

far greater than mere dicta. A panel of the court heard argument, and rehearing *en banc* was ordered *sua sponte*. So far as the points under discussion here are concerned, the new rules were unanimously supported by the full court.

1. The court pointed out in *McDonald* that, contrary to the Government's contention, sufficient evidence of mental disease was present to require a jury instruction on criminal responsibility. The issue is raised by "some evidence" which must be "more than a scintilla, yet, of course, the amount need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal."¹⁶ After *Clark v. United States*,¹⁷ this statement would appear to tighten the standard of "some evidence" considerably.

2. Possibly the most significant portion of the court's opinion in *McDonald* dealt with the standards for directed verdict. The court firmly knocked on the head the notion that affirmative government evidence of responsibility is necessary to avoid a directed verdict. The court said:

"It does not follow, however, that whenever there is any testimony which may be said to constitute 'some evidence' of mental disorder, the Government must present affirmative rebuttal evidence or suffer a directed verdict. A directed verdict requires not merely 'some evidence,' but proof sufficient to compel a reasonable juror to entertain a reasonable doubt concerning the accused's responsibility. * * * Whether uncontradicted evidence, including expert opinion evidence, which is sufficient to raise a jury question on the mental issue is also sufficient to require a directed verdict depends upon its weight and credibility. * * * *Davis v. United States*, 160 U.S. 469, clearly supports this position. There the Supreme Court said that the jury, in considering an insanity plea, must weigh all the evidence, including the presumption of sanity. *Id.* at 488. Whether uncontradicted expert testimony overcomes the presumption depends upon its weight and credibility, and weight and credibility ordinarily are for the jury."¹⁸

As a practical matter this amounts to saying that every issue of criminal responsibility must go to the jury, a very great improvement in the law from a prosecutor's point of view and a rule that does neither side an injustice. Subsequent to *McDonald*, decisions of the court of appeals have made it clear that the court will not revert to an evidence-weighting process in passing upon appellants' claims that a verdict should have been directed. They have adhered to the approach expressed in *McDonald*.¹⁹

3. Perhaps the most significant part of the *McDonald* opinion is the court's handling of the causal connection problem. The court changed the standard of responsibility, in effect, from a two-step finding of (1) mental disease and (2) causal connection to a one-step analysis. This was done by a definition of "mental disease" in the following terms:

"[A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation, and functioning of these processes and controls."²⁰

By this standard a mental condition must have behavioral consequences to qualify as "mental disease" for legal purposes. Thus, the psychiatrists' terminology does not control the question of "mental disease," but rather the consequences of the mental condition control it. "What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility."²¹ The recognition of this dichotomy of the medical and legal standard is long overdue and the candid handling of it in *McDonald* should bring much clarity to the confusion wrought by medical witnesses' testimony. It may be, though the court has not yet so ruled, that it will be improper to put the question to a medical witness: "Doctor, on the basis of your examination of the defendant and his medical record, was he, on January 2, 1963, in your opinion, suffering from a mental disease?" Under the old *Durham* rules, this question was a common one, and an affirmative answer could wrap up the ball game.

While *McDonald* does not formally abolish the "product" element, it does reduce its significance. It is apparent that a finding of "mental disease," with the consequences required under *McDonald*, much reduces the significance of

¹⁶ *Id.* at 3-4.

¹⁷ 104 U.S. App. D.C. 27, 259 F. 2d 184 (1958).

¹⁸ No. 16,304, D.C. Cir., Oct. 8, 1962, at 5-6.

¹⁹ E.g., *Hawkins v. United States*, 112 U.S. App. D.C. 257, 310 F. 2d 849 (1962).

²⁰ No. 16,304, D.C. Cir., Oct. 18, 1962, at 7.

²¹ *Ibid.*