

sideration of the jury, the court shall leave to the sole determination of the jury the question as to the incapacitating effect if any of such mental condition, whether there has been opinion testimony regarding its incapacitating effect or not.

COMMITTEE ON CRIMINAL RESPONSIBILITY SUMMARY OF REPORT

The test of criminal responsibility known as the Durham rule is not satisfactory and should be changed by statute. Legislation to effectuate the new test is also needed.

The Durham rule provides that a person is not responsible for a criminal act if the act was the product of a mental disease or mental defect.

There is no clear definition of mental disease or mental defect. Hence its meaning depends on psychiatric opinion. Psychiatrists do not agree on what the term means nor on its application in particular cases, and their opinion is subject to change overnight, as has actually occurred.

The causality or "product" part of the rule is also confusing. Although the Court of Appeals has reversed convictions because the instructions of the trial judges on causality were inaccurate or inadequate, it has not suggested an instruction as a guide for future cases, and the trial judges are left without a guide even on re-trials of the reversed cases.

An accused person may raise the issue of insanity by producing a minimal showing of mental disease without evidence as to whether the act was the product thereof. The government must then prove sanity beyond a reasonable doubt, or prove that the act was not the product of the disease. Psychiatrists are unwilling to give an opinion on this latter point, and the United States Attorney has lost prosecutions and abandoned prosecutions on that account.

The basic difficulty in the Durham rule is that it attempts to make the legal test of criminal insanity the same as the medical test of mental disease. The requirement of a fixed standard for a legal test, and the inevitable changes in psychiatric discovery and concepts, make any such attempt futile.