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CASE NOTES

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CRIMINAL LAW — Insanity as a Defense — Tests for Determining. — Appellant raped a nine year old girl. He neither denied commission of the act, nor that he knew his act was wrong. Rather, he sought to excuse his action by showing that he suffered from a mental illness which rendered him incapable of overcoming the urge to touch and molest young girls. The trial court found him guilty and sentenced him to death. On appeal, HELD: Affirmed. The court was not convinced that the *M'Naghten* rule is not the best available test for measuring the mental condition of an individual in terms of accountability for his criminal acts. *Piccott v. State,* 116 So. 2d 626 (Fla. 1960).

It is a well established principle of Anglo-American law that insanity negates criminal intent, and is, therefore, a defense to crimes which require criminal intent as an essential element. One of the earliest tests of legal insanity was the "wild beast" theory whereby the accused was not held responsible if he did not know what he was doing anymore than a wild beast. *Rex v. Arnold,* 16 How. St. Tr. 695 (1724). This was superceded by the "right-wrong" test. *Earl Ferrer's Case,* 19 How. St. Tr. 886 (1760). The "right-wrong" test is that the accused will not be held responsible, if at the time of committing the act, he was suffering from a disease of the mind so as not to know the nature of what he was doing, or, if he did know, he did not know it was wrong, received its classic formation in *M'Naghten's Case,* 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). It appears that the irresistible impulse test, whereby the accused will not be held accountable if he was suffering from a mental disease or defect which produced an irresistible impulse to commit an act, first received legal recognition in Massachusetts. *Commonwealth v. Rogers,* 7 Metc. 500 (Mass. 1844). Basically, the irresistible test today has two forms. One, the accused will not be held responsible when he is so diseased in mind that he cannot distinguish between right and wrong, or, if he is able to do so, he does not possess power sufficient to suppress an irresistible impulse to do an act. *Parsons v. State,* 81 Ala. 577, 2 So. 854 (1887); *Ryan v. People,* 60 Colo. 425, 153 Pac. 756 (1915); *Thompson v. Commonwealth,* 193 Va. 704, 70 S. E. 2d 284 (1952). Two, the accused will not be held responsible when

he is unable to resist an irresistible impulse growing out of a mental disease. *Flowers v. State,* 236 Ind. 151, 139 N. E. 2d 185 (1956); *State v. Blair,* 118 Vt. 81, 99 A. 2d 677 (1953). Another rule, followed by Georgia provides that although one may have the ability to distinguish between right and wrong, yet, if in consequence of a delusion arising from a diseased mind he is impelled to do an act, he will be excused. *Roberts v. State,* 3 Ga. 310 (1847); *McKethan v. State,* 201 Ga. 23, 39 S. E. 2d 15 (1946). At an early date New Hampshire adopted a rule which has remained exclusively its own. If the act was the offspring or product of mental illness in the defendant, he is not guilty by reason of insanity. *State v. Pike,* 49 N. H. 399 (1870); *State v. Jones,* 50 N. H. 369 (1871). The famous *Durham* case laid down the rule that the accused will not be held criminally responsible if his unlawful act was the product of mental disease or mental defect. *Durham v. United States,* 214 F. 2d 862 (D. C. Cir. 1954). The *M'Naghten* rule was widely adopted and is now the sole test of legal insanity in most common law jurisdictions. *People v. Berry,* 282 P. 2d 861 (Cal. 1955); *State v. Auld,* 2 N. J. 426, 67 A. 2d 175 (1949); *People v. Horton,* 308 N. Y. 1, 123 N. E. 2d 609 (1954); 45 A. L. R. 2d 1447 (1954). Moreover, tests other than *M'Naghten's* rule have been expressly disapproved in some jurisdictions. *State v. Gatlin,* 208 S. C. 414, 38 S. E. 2d 238 (1946); *State v. Odell,* 227 P. 2d 710 (Wash. 1951).

The *M'Naghten* rule has been under attack for some time, the fundamental objection being that criminal responsibility is made to rest upon one symptom, the accused's ability to distinguish between right and wrong. This, it is said, ties the jury down and precludes its considering other possible causes of the commission of the unlawful act. If this be a valid objection, does the irresistible impulse or *Durham* rule remedy it? The irresistible impulse test postulates that a person of normal intelligence, who understands what he is doing, and knows that he is committing a grossly immoral act, may be excused by pleading that he had an irresistible impulse to commit that act. In other words, a rational being may be insane. The adoption of this test of criminal responsibility would allow psychiatrists, as expert witnesses, who claim to be unable to testify under the *M'Naghten* rule, to testify in almost any way they please and in support of any conceivable theory concerning the defendant's mental condition. Then the jury

will have to plough their way through a mass of scientific terminology and conflicting theories. The *Durham* rule does offer a slight bit of guidance by giving some direction to the jury in its search for the facts relevant to the accused's responsibility. However, it must make determinations about degrees of impairment or disease which puzzle the experts themselves. The jury is called upon to decide causation, but here they can do no more than speculate. The main trouble with this rule is that it ignores a question which is crucial from the perspective of the law, that is, whether the accused was competent to make the relevant moral decision. Under the *M'Naghten* rule not only is causation no such separate problem, but also no question arises concerning the determination of degrees of impairment or disease. Although *M'Naghten's* rule is phrased in terms of cognition, it generally is interpreted broadly by the courts with the result that all psychiatric evidence relevant to the defendant's mental condition is admitted. *M'Naghten's* rule is functioning very well in practice, and no better substitute has been found.

SAMUEL BROOKS MENDENHALL

TORTS — Independent Contractor — Liability after Completion of the Work and Acceptance by the Contractee. — Plaintiff brought a wrongful death action against two defendants who allegedly had created an attractive nuisance resulting in the death of the plaintiff's eight year old son. One of the defendants, an independent construction contractor, had moved a large display counter, placing it upon an incline in such a way as to be unstable and thereby constitute an attractive nuisance upon the premises of the other defendant, a business establishment. Thirteen days after completion of the work and three days before a formal acceptance, plaintiff's intestate was found crushed to death under the display counter. There were no witnesses to the accident. At the time of the accident the premises were in the sole possession of the owner-defendant, but the contractor had remained on the premises for a period of eight days after the creation of the attractive nuisance before the practical acceptance of the work took place. At the trial the jury awarded actual damages against both defendants to be apportioned between them equally. Only the defendant contractor ap-

pealed, contending, *inter alia*, that its liability was terminated upon the completion and acceptance of the work by the other defendant. HELD: Reversed. A contractor's liability to third persons receiving injury as a result of the contractor's negligent conduct is discharged by a practical acceptance of the completed work by the contractee. *Clyde v. Sumerel*, 233 S. C. 228, 104 S. E. 2d 392 (1958).

Under the general rule, an independent contractor is not liable to third persons for damages or injuries resulting from the condition of the work after the work has been turned over to the contractee or owner of the land. *Ford v. Sturgis*, 14 F. 2d 253, 52 A. L. R. 619 (D. C. Cir. 1926), *expressly overruled by Hanna v. Fletcher*, 231 F. 2d 469, 58 A. L. R. 2d 847 (D. C. Cir. 1956), *cert. denied, Gichner Iron Works, Inc. v. Hanna*, 351 U. S. 989 (1956); 2 HARPER AND JAMES, TORTS § 18.5 (1956). A formal acceptance of the work is not necessary, and the liability of the contractor will cease upon the contractee's practical acceptance of the work. *Wilson v. North Central Gas Co.*, 163 Neb. 664, 80 N. W. 2d 685 (1957); *Nichols v. Craven*, 224 S. C. 244, 78 S. E. 2d 376 (1953). The exceptions to the general rule are almost as numerous as the factual situations to which it is applied. *Slavin v. McCann Plumbing Co.*, 73 So. 2d 902 (Fla. 1954); Annotation, 58 A. L. R. 870 (1958). Thus, the contractor remains liable after the work has been turned over to the contractee where the work is so negligently done as to be imminently dangerous to third persons, provided the contractor knows or should know of the dangerous situation created by him and the owner does not know of the dangerous condition and would not discover it by a reasonable inspection. *Kuhr Bros., Inc. v. Spahos*, 89 Ga. App. 885, 81 S. E. 2d 491 (1954); *Price v. Johnson Cotton Co.*, 226 N. C. 758, 40 S. E. 2d 344 (1946); *Rouse v. Johnson*, 136 W. Va. 607, 80 S. E. 2d 857 (1954). However, in some cases the exception to the general rule of non-liability does not include imminence of danger as a requisite, the requirement is that the thing be reasonably certain to place life and limb in peril when negligently made. *Freeman v. Mazzera*, 150 Cal. App. 61, 309 P. 2d 510 (1957); *Hale v. Depaoli*, 33 Cal. 2d 228, 201 P. 2d 1 (1948). But the owner's maintenance of the work after acceptance of it in a dangerous condition which is obvious to him, constitutes negligence and operates as the intervention of an independent cause which will, under certain circumstances, destroy the casual connection

of the contractor's original negligence. *Greenwood v. Lyles and Buckner, Inc.*, 329 P. 2d 1063 (Okla. 1958); *Hale v. Depaoli, supra.* By taking possession the owner is presumed to have made a reasonable inspection and to know of the defects and he accepts the defects and the negligence that caused them as his own, unless the dangerous condition is one which is not discoverable by a reasonable inspection. *Slavin v. Kay,* 108 So. 2d 462 (Fla. 1959); *First Presby. Congregation v. Smith,* 163 Pa. St. 561, 30 Atl. 279 (1894). However, if the contractor could have reasonably anticipated that the contractee would not correct the defect, the chain of causation is not broken by the new and efficient negligence of the contractee. *Greenwood v. Lyles and Buckner, supra.* The passage of time and intervening occupancy may limit application of the exception to the general rule of non-liability after acceptance by the owner, but such incidents present questions of fact and not of law. *Greenwood v. Lyles and Buckner, supra; Hale v. Depaoli, supra.* According to the modern trend, building contractors are placed on the same footing as sellers of goods and are held to the same general standard of reasonable care for the protection of anyone who may foreseeably be endangered by the negligence, even after acceptance of the work. *Hanna v. Fletcher, supra; Hale v. Depaoli, supra.* The contractee's failure to inspect will make him liable, but will not relieve the contractor whose negligence created the dangerous situation in the first place. *Foley v. Pittsburgh-Des Moines Steel Co.*, 363 Pa. 1, 68 A. 2d 517 (1949); RESTATEMENT, TORTS § 396 (1934). The rule that a general contractor is not liable for injuries to third persons resulting from his negligence in construction of the work after the work is completed and accepted by the contractee, because of lack of privity of contract, has been held to be no longer the law. *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P. 2d 736 (1958).

The attractive nuisance doctrine can be invoked not only against the possessor of land for constructing or maintaining conditions dangerous to children, but also against a contractor. *Woods v. City and County of San Francisco,* 148 Cal. App. 956, 307 P. 2d 698 (1957); *Carter v. Livesay Window Co., Inc.*, 73 So. 2d 411 (Fla. 1954). Although there is a premise that buildings in process of construction are attractive to children, it must be shown further that the contractor created an instrumentality inherently dangerous to children because it is in the nature of a trap. *Miller v. Guernsey Const. Co.*, 112

So. 2d 55 (Fla. 1959); *Carter v. Livesay Window Co., Inc., supra.* Inherently dangerous means unusually hazardous or that in the end there is danger. *Vale v. Bonnett,* 191 F. 2d 334 (D. C. Cir. 1951); *Miller v. Struck Const. Co.,* 251 S. W. 2d 457 (Ky. 1952). Each case must be judged on its particular facts according to the requirements that have to be met for the attractive nuisance to apply. *Woods v. City and County of San Francisco, supra; Carter v. Livesay Window Co., Inc., supra.* According to the weight of authority in this country, a building under construction is not per se an attractive nuisance. *Miller v. Guernsey Const. Co., supra;* Annotation, 44 A. L. R. 2d 1253 (1955). The modern trend is to hold building contractors to the same general standard of reasonable care for the protection of anyone who may foreseeably be endangered by his negligence, even after acceptance of the work. *Tomchik v. Julian,* 340 P. 2d 72 (Cal. 1959); *Hanna v. Fletcher, supra;* 27 AM. JUR. *Independent Contractors* § 55 (Supp. 1959).

Under the modern view, the rule of the nonliability of a contractor to third persons for injuries suffered after practical acceptance of the work by the contractee or owner has undergone a complete change in recent years. According to the reasoning in many of these later cases, the *MacPherson* doctrine has been applied in the area of structures, recognizing the fact that there is no sufficient differentiation between the liability of a manufacturer of chattels and a building contractor. This is not to say that the contractor is absolutely liable for any defects in his work, or that he will become an insurer for any injuries to third persons resulting from conditions that he has created. On the contrary, the discarding of the general rule will only result in the elimination of an anachronistic legal principle which has created a pocket of immunity for the contractor to hide his negligence in, and will substitute ordinary negligence principles as a foundation for liability. The holding in the present case seems contrary to the modern trend in this country in view of the numerous exceptions which have rendered sterile the general rule of nonliability of contractors after practical acceptance of the work by the contractee. There has been only one other case in South Carolina on this point, *Nichols v. Craven,* 224 S. C. 244, 78 S. E. 2d 376 (1953). Because of the distinguishing feature of affirmative conduct on the part of the contractee, that case seems to have been correctly decided on the

facts, in line with the modern authority. It would seem desirable in the future to hold the contractor liable for his negligence if it were the proximate cause of the injury to a third person, despite acceptance of the work by the contractee.

HERBERT L. MOODY, JR.