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Evidence - Criminal Insanity - Psychologist's Diagnosis Regarding Mental Disease or Defect Admissible on Issue of Insanity

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cases, reveals compelling reasons, justifying the action of the court. Public welfare must be put before private liberties. This is not to say that a small danger to public welfare will justify an irreparable blow to an individual's liberties, but some balance must be struck. Each case must be weighed individually. If in the instant case, there had been two methods of treatment available, or if the operation required had not been a simple transfusion, but a more difficult operation which itself constituted a threat to the child's life, perhaps the case would be decided differently. However, in the present case a simple and safe operation was all that was required to save the child from imminent death. It cannot be legally, logically, or morally argued that the action taken was incorrect.[22]

Joseph F. Doyle

EVIDENCE—CRIMINAL INSANITY—PSYCHOLOGIST'S DIAGNOSIS REGARDING MENTAL DISEASE OR DEFECT ADMISSIBLE ON ISSUE OF INSANITY.

Jenkins v. United States (D.C. Cir. 1962).

Appellant was indicted for housebreaking with intent to commit an assault; he pleaded insanity as his defense. Two examining psychiatrists at District General Hospital reported that appellant was "suffering from an organic brain defect resulting in mental deficiency and impaired judgment."[1] Thereupon, the district court adjudged appellant incompetent to stand trial and committed him to St. Elizabeth's Hospital pursuant to a local statute.[2] There, appellant underwent an extensive battery of tests and was personally examined by a number of staff psychologists, two of whom concluded that at the time of the alleged crime appellant was suffering from schizophrenia. Some months later, a hearing was ordered to reconsider appellant's competency to stand trial. The two psychiatrists who had originally examined appellant requested Dr. Bernard I. Levy, Chief Psychologist at District General Hospital, to re-test the appellant. After reviewing all of the data, Dr. Levy, previously unable to make a diagnosis, concluded appellant was "psychotic and schizophrenic."[3] Considering these reports and those of St. Elizabeth's, the psychiatrists revised their former diagnoses, one concluding that appellant was schizophrenic and the other that he was suffering from undifferentiated psychosis. The trial

22. The United States Supreme Court has denied certiorari, 31 U.S.L. WEEK 3152 (U.S. Nov. 6, 1962).

1. 307 F.2d 637 at 639 (D.C. Cir. 1962).
2. D.C. Code Ann. tit. 24 § 301 (1951), as amended 1955.
3. 307 F.2d 637 at 640 (D.C. Cir. 1962).

court excluded the psychiatrists' revised diagnoses and instructed the jury to disregard the testimony of the three defense psychologists on the ground that a "psychologist is not competent to give a medical opinion as to a mental disease or defect."[4] The circuit court of appeals, with four judges concurring in two separate opinions and two dissenting, reversed, *holding* that a psychologist's diagnosis of mental disease is admissible in a criminal proceeding. *Jenkins v. United States,* 307 F.2d 637 (D.C. Cir. 1962).

Before the support of the expert witness can be enlisted two elements are required: the subject of the inference to be drawn must be so distinctively related to some science, profession or occupation as to be beyond the ken of the average layman, and the witness must possess such skill, knowledge or experience in that field as to make it probable that his opinion will aid the trier in his search.[5] Applying these standards, it would initially appear that a psychologist holding one or more graduate degrees and having devoted all of his professional efforts to one or more areas of mental disorders would qualify as an expert on insanity. Nevertheless, there has been considerable judicial reluctance to receive the testimony of a psychologist on the issue of mental competency[6] although it has been received on other matters.[7] The source of the difficulty has been the identification of "insanity" with "mental disease," thus bringing it within the realm of medical science — the study and treatment of disease.[8] The effect is virtually to restrict expert testimony on insanity to the psychiatrist and the physician.[9] The resulting overemphasis on the importance of a medical degree to the exclusion of the testimony of the

4. *Id.* at 643.

5. MCCORMICK, EVIDENCE § 13 (1954).

6. Dobbs v. State, 191 Ark. 236, 85 S.W.2d 694 (1935) (dictum), (psychologist not qualified to testify in murder trial when defense was insanity); People v. Spigno, 156 Cal. App. 2d 279, 319 P.2d 458 (1957) (in a prosecution for commission of lewd act upon a child psychologist's testimony that the defendant lacked necessary lustful intent was held inadmissible). See also, State v. Gibson, 15 N.J. 384, 105 A.2d 1 (1954), *overruled on other grounds sub nom.,* Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Abbott v. State, 113 Neb. 517, 204 N.W. 74 (1925), *rev'd on other grounds,* 113 Neb. 517, 206 N.W. 153 (1925).

7. It should be noted that the psychologist is not a newcomer to the field of qualified experts. The importance of his tests and resulting interpretations has been judicially recognized in areas other than the diagnosis of mental disease or defect. *E.g.,* Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942) (particularly concurring opinion), permitting a psychologist to render his expert opinion as to whether X-ray given mother during pregnancy resulted in child being microcephalic idiot; *In Re* Masters, 216 Minn. 553, 13 N.W.2d 487 (1944), psychologist permitted to testify on feeble-mindedness of petitioner where this condition was determined by I.Q. tests administered and interpreted by the witness; People v. Horton, 308 N.Y. 1, 123 N.E.2d 609 (1944), clinical psychologist testified defendant was "narcissistic" on the basis of psychometric test administered by him where defendant's sanity in a criminal case was in issue.

8. However, this view is rarely stated in psychiatry today. See Scheflen, *The Psychologist as a Witness,* 32 PA. B.A.Q. 329 (1961).

9. "The psychologist is not necessarily a physician but, instead, probably holds a Ph.D. degree. He has done four years of undergraduate work in psychology, plus probably another four years of graduate study, followed by the service of an internship." Gaines, *The Clinical Psychologist as an Expert Witness in a Personal Injury Case,* 39 MARQ. L. REV. 239 (1956).

highly trained and skilled non-medic ignores the educational and practical qualifications of the psychologist. Such a rule forces the courts into the anomalous position of qualifying as an expert the general practitioner who has had no special training in mental disease[10] while rejecting the skilled psychologist.[11]

There has been a small but significant trend to cases indicating an adjustment of the old rule to reflect more accurately the achievements and abilities of the psychologist. One of the earliest cases to express disapproval of the exclusion of a qualified psychologist was *People v. Hawthorne*.[12] Judge Butzel, in a concurring opinion in which he was joined by four other members of the court, declared that merely the inclusion of insanity within the realm of medical science did not of itself pre-empt from the field of qualified experts anyone not holding a medical degree. In discussing the trial court's rejection of a learned psychologist as a witness[13] on the issue of the defendant's sanity, he stated that the law does not require a rule so formal and that the cause of justice is not furthered by insisting that only a medical man may competently advise on the subject of mental condition. However, the trial court was cautioned to investigate the qualifications of such an "expert" with greater care than would be necessary in the case of a medical school graduate. Judge Butzel's prudent counsels were given practical effect several years later in *Hidden v. Mutual Life Ins. Co.*[14] Plaintiff brought a civil action based on the permanent disability clause of two life insurance policies; he claimed he had been afflicted with a disabling nervous condition which had forced his retirement. Two physicians, skilled in psychiatry and neurology, and a psychologist, were offered as experts. The latter's testimony was excluded on the ground that a psychologist was not qualified to testify on such matters. In addition to his impressive credentials,[15] the psychologist was the only one of the witnesses who had examined the insured at the time of his original disability application. On appeal, the circuit court held that the psychologist qualified as an expert by reason of his academic training and experience; further, it was pointed out that one of the psychiatrists had based his opinion on the objective tests administered by the psychologist.

10. Holland v. State, 80 Tex. Crim. 637, 192 S.W. 1070 (1917); Crocker v. Crocker, 156 Ark. 309, 246 S.W. 6 (1922); Baldridge v. Zigler, 103 Okla. 219, 229 Pac. 831 (1924) *(semble);* Commonwealth v. Cavalier, 284 Pa. 311, 131 Atl. 229 (1925).

11. *Supra* note 6.

12. 293 Mich. 15, 291 N.W. 205 (1940).

13. The proposed witness's qualifications included: attendance at Wesleyan University, Yale University and the Harvard Foundation; he held the degrees of Bachelor of Arts, Master of Arts, Bachelor of Divinity and Doctor of Philosophy in Psychology; as a graduate student he attended the University of California, Columbia University, Boston University, Harvard University Medical School and the Boston Psychopathic Hospital; he was a full professor at two colleges and two universities and had given courses in normal and abnormal, experimental, educational psychology and criminology; insanity and diseases of the brain were his special study.

14. 217 F.2d 818 (4th Cir. 1954).

15. The witness held a Ph.D. in clinical psychology, had had experience in army hospitals and at the time of trial was the Chief Psychologist in a state mental institution.

In *Watson v. State*,[16] a Texas court gave additional vitality to the *Hawthorne* dictum in applying it in a criminal proceeding. A psychologist[17] was asked to answer a hypothetical question based on a condensation of the 128 page testimony of the defendant in which she recounted her life's history. It was held that the lower court's exclusion of the psychologist deprived the defendant of admissible evidence. The court noted that, although medical men, preferably psychiatrists, had traditionally been called upon to testify regarding the question of insanity, a practicing psychologist, with considerable training and experience in analyzing motivation, was qualified to give testimony superior to a layman's and should be classified as an expert. Although the *Hidden* and *Watson* cases do not deal with the precise problem posed by the instant case, namely a full pre-trial diagnosis of a mental disease or defect after an extended period of observation and testing, they do crystallize the *Hawthorne* directive into a workable body of precedent. In so doing they provide the necessary intermediate step that precedes most significant advances in judicial thinking.[18]

It is not without significance that the present decision accords skills to the clinical psychologist in the courtroom which are not ordinarily recognized as within his competence in a hospital. Traditionally, hospitals have not considered the diagnosis of a psychologist as qualified. However, there is an important distinction to be drawn between the hospital and the courtroom diagnosis. In the former setting a diagnosis is made the basis of the patient's treatment and subsequent rehabilitation. Since the afflicted patient's condition may be founded on an organic disorder or some complication resulting therefrom, and since the psychologist would probably lack the necessary background to isolate the precise cause of such a deviation, he would be unable to prescribe the proper treatment. The courtroom diagnosis, on the other hand, does not insist on these precise determinations. The test of insanity as propounded in the *Durham* case[19] requires the

16. 161 Tex. Crim. 5, 273 S.W.2d 879 (1954).

17. Here the witness had trained in psychology for five years at Harvard and two years at the University of Texas before engaging in psychological counseling in a penal institution for ten years.

18. The court in *Jenkins* also supported its decision with a line of cases which permitted persons lacking medical training to testify as to the effects of certain foreign substances or reactions on the body. Vessels v. Kansas City Light & Power Co., 219 S.W. 80 (Mo. 1920) and Blakeney v. Alabama Power Co., 222 Ala. 394, 133 So. 16 (1931), witnesses who have had experience in electrical work may testify to the effects of electrical shock upon the human body; Jackson v. Waller, 126 Conn. 294, 10 A.2d 763 (1940), optometrist may testify to the presence of cataract discovered in fitting of glasses; Black Starr Coal Corp. v. Reeder, 278 Ky. 532, 128 S.W.2d 905 (1939), optometrist may testify to the effect of scar upon vision; Reynolds v. Davis, 55 R.I. 206, 179 Atl. 613 (1935), toxicologist permitted to testify to the effect of oxalic acid, a poison, upon the human eye. An attempt was made by the court to analogize these non-medical witnesses with the psychologist, the implication being that to qualify as an expert with respect to the human body one need not be a physician. The analogy is defective for it must be remembered that the issue is not whether a psychologist may give some expert testimony on the question of insanity but whether he may render a diagnosis of a mental disease or defect — a task which heretofore required a medical opinion.

19. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

expert to answer only whether the defendant was suffering from a mental disease or defect and, if so, whether the criminal act was a product of such abnormality.[20] The first question solicits an opinion based on the psychologist's test analysis, interpretation, personal observations and whatever other factors his training and experience indicate may be relevant. This same training and experience should similarly qualify him to express an opinion on the causal nexus between the act and the disorder. Thus, the *Durham* rule, by eliminating the factors which are of such crucial importance in the hospital diagnosis, serves to qualify the psychologist as an expert in the courtroom. It may be argued that if a mental disease or defect is discovered, it must be properly identified before the question of causality can be adequately considered. It must be recognized that the clinical psychologist is certainly competent to identify non-organic deviations; it is suggested that regarding organic disorders, the expert's general designation of the malfunction as such should suffice without further categorization. If, however, the present decision is followed in a jurisdiction employing the *M'Naghten* test,[21] a more serious question arises as to whether a psychologist should be on an equal footing with the physician or psychiatrist. At least one authority suggests that this exceeds the competence of the psychologist who is expected to state his opinion only "concerning the mental states, the diagnosis, the personality and intellectual organization of the defendant based on the information derived from the psychological tests and any other sources."[22]

The majority in *Jenkins* appears to follow what has been characterized the "modern common sense" approach to expert testimony.[23] The determinative test is "whether the opinion offered will be likely to aid the trier in the search for truth." While it would seem that the expertise of the highly trained and experienced psychologist complies with this simple formula, the mandate is not without problems in its practical application by the trial judge. As to whether a particular psychologist qualifies as an expert, the court reposes the initial determination in the traditional discretion of the trial court subject to appellate review. Regarding what credentials a psychologist must present to a trial judge, a variety of possibilities present themselves. Licensing statutes may be of assistance in some jurisdictions,[24] although several states have not adopted such legislation,[25]

20. *Id.* at 875.

21. M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843). The test of criminal insanity under this case turned on the inability of the defendant to know the nature or moral quality of his act.

22. MCDONALD, PSYCHIATRY AND THE CRIMINAL 171 (1958).

23. Louisell, *The Psychologist in Today's Legal World*, 39 MINN. L. REV. 235, 243, discussing the approach used in Bratt v. Western Air Lines, 155 F.2d 850 (10th Cir. 1946).

24. Note, 33 CHI.-KENT L. REV. 230 (1955), in which the author, who holds a Ph.D. degree in psychology and is the Director of the Clinical Training Program at the University of Houston, approves of licensing statutes as a criterion.

25. There are no such statutes in Pennsylvania, New Mexico or the District of Columbia. *But see*, CONN. GEN. STAT. ANN. §§ 20-188-91 (1960); MD. ANN. CODE art. 43, §§ 618-20, 629-36 (1957); MICH. REV. STAT. ANN. vol. 10, § 14.677 (Supp. 1961); MINN. STAT. ANN. vol. 11, § 148.81 (Supp. 1962).

and, where adopted, the requirements have not been uniform.[26] At the other extreme, it has been suggested that the proposed witness hold the diploma of the American Board of Examiners in Professional Psychology.[27] One court settled on what might be termed a compromise between these two standards.[28] While approving generally the proposition that a psychologist is competent to testify on the issue of insanity it rejected the opinion of a psychologist who did not possess a Ph.D. degree, who lacked post-graduate training in clinical psychology, and who had not done one year's internship at a mental hospital approved by the American Psychological Association.[29] At the same time, the court indicated that certain psychologists who had wide practical experience, but who did not fulfill the aforementioned requirements, might also qualify. The majority in *Jenkins* stated that a Ph.D. in Clinical Psychology might suffice. The problem, however, is still a difficult one for the trial judge since the attainment of such a degree does not inform him of the particular witness's experience in diagnosing mental disease or in determining criminal responsibility under the *Durham* rule. This type of uncertainty might well engender a prolonged preliminary qualifying hearing, perhaps conducted in adversary fashion, in which each proposed witness would be questioned regarding his degrees, experience, coursework and learning. To avoid such a dilatory scheme, some objective criterion and direction should be found.[30] Whatever criterion is ultimately adopted, it seems evident that the present court's holding, without further qualification, should create a greater number of "expert" witnesses who will be available to the criminally accused (and, perhaps, financially embarrassed) defendant, to assist him in his insanity plea.[31]

C. Clark Hodgson, Jr.

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26. *Compare* Minnesota statute requiring as the minimum education requirement for licensing a master's degree *with* Michigan requiring a doctoral degree or its equivalent.

27. This requires applicant to have four years professional post-doctoral experience, present credentials, which include a sample of his work, and letters of recommendation, plus complete oral and written examinations. Kelley, Sanford & Clark, *The Meaning of the ABEPP Diploma,* 16 AM. PSYCHOL. 132 (1961).

28. State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959).

29. These qualifications were selected by the court from MCDONALD, *supra* note 19 at 162; *Medical Trial Technique Quarterly,* 1957 Annual 9-18.

30. Burger, J., in his concurring opinion indicated that a rigorous exploratory hearing should be conducted on remand to determine, *inter alia,* the scope, nature and extent of the education of a Ph.D. in Psychology and in Clinical Psychology, the clinical psychologist's clinical education in physiological and medical subjects, particularly in comparison with that of a psychiatrist, the independent diagnostic practices of the clinical psychologist and the correlation between mental disease and biological, physical or physiological data.

31. One further problem suggests itself in the trial of cases under this rule. It might be rhetorically asked what significance will the jury attach to the defense psychologist's testimony when confronted with the conflicting testimony of the state's psychiatrist? Will recitation to the jury of the psychiatrist's qualifications, which will include a medical degree, have any prejudicial effect on the defendant who produces a psychologist?