O'NEILL *v.* THE QUEEN

1976. Court of Criminal Appeal: Green C.J., Neasey and Nettlefold JJ.

March 5, 8-10, May 28, 1976.

Criminal Law—Criminal liability and capacity—Insanity—Tests of criminal responsibility—Irresistible impulse—Deprivation in substance of any power to resist impulse—Whether total or partial deprivation—Direction to jury—Criminal Code, s. 16(1)(*b*)*.

Words, Phrases, and Maxims—"Impulse"—"In substance".

The *Criminal Code*, by s. 16(1), provides that a "person is not criminally responsible for an act done . . . by him . . . (*b*) where such act . . . was done . . . under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist".

Held, that —

(*a*) for a defence based on par. (*b*) to succeed it must appear that the accused was in substance deprived of all power to resist the impulse, and not just that his power to resist was lessened or weakened;

(*b*) "in substance" is meant to exclude the insubstantial or inessential, and does not mean partially, to a substantial or material degree or in the main;

(*c*) to paraphrase "in substance" by "substantially" can be misleading, and (per Nettlefold J.) should not be done; and

(*d*) "impulse" is not a word that has to be explained to a jury.

Hitchens v. *The Queen*, [1962] Tas S.R. 35, explained.

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION.

James Ryan O'Neill was convicted at the Hobart Criminal Sittings before Chambers J. on 13th November, 1975, of murder for that he at Taranna on or about 4th February, 1975, murdered a schoolboy, Ricky John Smith. He had pleaded not guilty and his principal defence was that he was not criminally responsible for the killing because it was done under an impulse which by reason of mental disease he was in substance deprived of any power to resist.

---

* *Criminal Code*, s. 16-(1) A person is not criminally responsible for an act done or an omission made by him —

(*a*) when afflicted with mental disease to such an extent as to render him incapable of —

(i) understanding the physical character of such act or omission; or

(ii) knowing that such act or omission was one which he ought not to do or make; or

(*b*) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.

(2) The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.

It appeared that he had made a statement to the police admitting that he had taken the boy into the bush and killed him by many blows on the head with a stone and that he had lead the police to where he had hidden the body. He denied the truth of the statement, saying that he could not remember what he had done. He also said he only took the police to various places he used to visit when out shooting. Evidence was given of his past life and of his mental condition.

He sought leave to appeal against his conviction on grounds which as amended were:

"1. The learned trial judge erred in law in his summing-up in that

(a) he failed to put or alternatively failed properly to put to the jury the meaning of the words "in substance deprived" in Section 16(1)(*b*) of the Criminal Code, and in that

(b) he gave to the jury a paraphrase of those words defined only by contrast with a partial deprivation in a minor degree, and in that

(c) he directed the jury that a lessening or diminishing of the accused's power to resist was not sufficient to make out the defence.

"2. The learned trial judge failed in the context of Section 16(1)(*b*) of the Criminal Code, to put to the jury adequately the evidence relative to the extent of the lessening of the power of the accused to resist an impulse and failed to give sufficient weight to essential aspects of such evidence.

"3. The learned trial judge failed to direct the jury adequately or at all, as to what could constitute an impulse within Section 16(1)(*b*) of the Criminal Code, and failed to put fully enough to the jury the evidence from which the jury if it found that the accused killed the deceased boy, could have reached the view that he did so under an impulse.

"4. The verdict of the jury on the issue of insanity
a) was unreasonable;
b) cannot be supported having regard to the evidence; and
c) was against the evidence and the weight of evidence."

The relevant parts of the judge's charge to the jury appear in the reasons for judgment.

M. G. Everett Q.C. and *P. J. A. Wright* for the applicant.

Henry Cosgrove Q.C., Crown Advocate, and *D. J. Bugg* for the Crown.

The following cases were referred to in argument:

Hitchens v. *The Queen*(1);
Sodeman v. *The King*(2);
Stapleton v. *The Queen*(3);
Reg. v. *Weise*(4);
Phillips v. *The Queen*(5);
Reg. v. *Fleeton*(6).

Cur. adv. vult.

MAY 28.

GREEN C.J. referred to the trial, the notice of appeal, and the *Criminal Code*, s. 16, and continued:

The directions complained of in ground 1 are contained in the following passages from the learned trial judge's summing-up:

"If, however, the defence have failed to satisfy you that the accused was rendered incapable by mental disease from understanding the physical character of his act, or alternatively, of understanding that his act was wrong, then there is one final matter for your consideration. Again, if you look at s. 16 which is before you, you will see what that is. It is sometimes loosely referred to as 'irresistible impulse'. It would be a defence calling for a special verdict if you were satisfied that his act of killing the boy was done under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist. 'In substance' means substantially. Deprived in substance means substantially deprived of any power to resist. Any in that context must mean all. Deprived of all power to resist. Any power to resist. So that substantially or in substance is opposed to being partially deprived in a minor degree. It is not a case of his power to resist being lessened or being diminished. In the words of the section, what the defence need to prove is that by reason of mental disease he was, in substance, deprived of any power to resist an impulse to kill the boy, if he had that impulse. This again, as you will see, right throughout s. 16 is linked with mental disease. In other words if he killed through strong emotions that by itself would be not enough but of course if that was produced, if that condition was produced by mental disease then that would be sufficient. Providing, of course, always that the mental disease in substance deprived him of any power to resist. This is a separate matter, of course, from the earlier part of the section. To some extent at least they do overlap, this question of by reason of mental disease not knowing right from wrong may overlap to some

(1) [1962] Tas. S.R. 35
(2) (1936) 55 C.L.R. 192.
(3) (1952) 86 C.L.R. 358.
(4) [1969] V.R. 953.
(5) [1971] Tas. S.R.
(6) (1964) 64 S.R. (N.S.W.) 72, at p. 86.

> extent with an incapacity by reason of mental disease to resist an impulse. It really depends on the evidence in the case and as I go through the evidence I will draw your attention to parts that relate particularly to those matters."

Counsel for the appellant submitted that the phrase "in substance" used in s. 16(1)(*b*) meant substantially in the sense of largely or in the main. He submitted that in order to avail himself of the defence it is not necessary for an accused person to show that by reason of mental disease he was totally deprived of all power to resist, but that it is sufficient if he can demonstrate that his power to resist was diminished to such a degree that a jury could conclude that he was in substance deprived of the power to resist.

The *Criminal Code* is, of course, the sole source of the law in this State relating to the defence of insanity and we are therefore only concerned with construing its provisions. But where the provisions of the *Code* under consideration are ambiguous, or use expressions or deal with matters which formed part of the common law, it is permissible to look at their historical antecedents and at the common law position: see generally *Vallance* v. *The Queen*(7), and *Kaporonowski* v. *The Queen*(8) and, in particular, see *Hitchens* v. *The Queen*(9) (which I shall hereafter refer to as *Hitchens No. 1*) and *Hitchens* v. *The Queen*(10) (which I shall hereafter refer to as *Hitchens No. 2*) in which this court recognized that it is appropriate to have regard to such materials when construing s. 16.

The defence of what has come to be called irresistible impulse arising from mental disease is not new. In *Reg.* v. *Oxford*(11) Denman C.J. instructed the jury in these terms:

> "Then the very important question comes, whether the prisoner was of unsound mind at the time when the act was done? Persons *prima facie* must be taken to be of sound mind till the contrary is shewn. But a person may commit a criminal act, and yet not be responsible. If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible."

Three years later the acquittal of McNaghten of a charge of murder on the ground of insanity led to a debate in the House of Lords and it was resolved that five questions be posed to the Judges in order to elicit their opinion upon the "question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort". Although the evidence

(7) (1961) 108 C.L.R. 56, at p. 75.
(8) [1973] 1 A.L.R. 296, at p. 313, 47 A.L.J.R. 472, at p. 482.
(9) [1959] Tas. S.R. 209.
(10) [1962] Tas. S.R. 35.
(11) (1840) 9 Cav. & P. 525, at p. 546.

given at the trial appeared to suggest that, in addition to insane delusions, McNaghten was also subject to a disease of the mind of "irresistible intensity" which deprived him of control over acts which were connected with certain delusions he had (12), it is important to note that the questions put by their Lordships were confined to the issue of the state of the law in the case of crimes committed by persons "afflicted with insane delusions" and that in delivering the opinion of the Judges, Tindal L.C.J. expressly restricted himself to answering the questions put and did not go outside their scope. It is thus difficult to see how the view arose that the judges' answers represented a statement of the whole of the law relating to the defence of insanity and, in particular, it is difficult to see why their answers have been regarded as excluding the defence of irresistible impulse: see the doubts expressed extra judicially by Sir Owen Dixon as to why the judges' advice has "been treated as a sacred text behind which you must not go" and that in conjunction with other factors, the result has "been to imprison the common law in a formula, a formula which has been misunderstood at more than one point and has deprived the common law not only of its capacity for development, but even of its accustomed flexibility of application". ("A legacy of Hadfield, McNaghten and Maclean", 31 A.L.J. 255, 257 and 261.)

Stephen thought that the *McNaghten Rules* had been applied too narrowly and that they did not preclude the defence of irresistible impulse, but in the alternative he expressed his view of what he thought the law ought to be if his opinion of the scope of the *McNaghten Rules* were wrong. At pp. 168, 175 and 182 of Vol. II of his *History of the Criminal Law of England* he said:

> "The proposition, then, which I have to maintain and explain is that, if it is not, it ought to be the law of England that no act is a crime if the person who does it is at the time when it is done prevented either by defective mental power or by any disease affecting his mind from controlling his own conduct, unless the absence of the power of control has been produced by his own default."
>
> . . .
>
> "The practical inference from this seems to me to be that the law ought to recognize these various effects of madness. It ought, where madness is proved, to allow the jury to return any one of three verdicts: Guilty; Guilty, but his power of self-control was diminished by insanity; Not guilty on the ground of insanity."
>
> . . .
>
> "As to the verdict of not guilty on the ground of insanity, the foregoing observations show in what cases it ought in

(12) (1843) 10 Cl. & Fin. 200, at pp. 201, 202.

> my opinion to be returned; that is to say, in those cases in which it is proved that the power of self-control in respect of the particular act is so much weakened that it may be regarded as practically destroyed, either by general weakening of the mental powers, or by morbid excitements, or by delusions which throw the whole mind into disorder, or which are evidence that it has been thrown into disorder by diseases of which they are symptoms, or by impulses which really are irresistible and not merely unresisted."

These passages show that Stephen drew a clear distinction between cases in which there was a diminution as opposed to a complete deprivation of the power of self-control and that he considered that the verdict of not guilty on the ground of insanity should only be available in the latter case.

Stephen's view that *McNaghten's Case*(13) did not exhaustively state the law relating to the defence of insanity was reflected in a number of trials in the 19th century and in the earlier part of this century in which juries were instructed that an incapacity to control one's actions as a result of mental disease would justify a verdict of insanity. See for example *R.* v. *Hay*(14) and *Reg.* v. *Fryer*(15) and see also *Reg.* v. *Davis*(16) in which it is arguable that Stephen J., whilst ostensibly adhering to the "great test" laid down in *McNaghten's Case*(*supra*), was in fact indicating to the jury that irresistible impulse arising out of a mental disease would be a defence. But in *R.* v. *True*(17) the Court of Criminal Appeal held that *McNaghten's Case* laid down a rule which was "sufficient and salutory" and that there existed no third category of defence arising out of an inability to control one's actions as a result of a disease of the mind. No doubt influenced by a hint given in the reasons for judgment in *R.* v. *True*, the Home Secretary reprieved True. As an indirect result of the public disapproval excited by this exercise of the prerogative of mercy, the Government appointed what has become known as the Atkin Committee which was required to recommend changes to the criminal law relating to insanity. The first two paragraphs of the summary of the Committee's recommendations read as follows:

> "1. It should be recognized that a person charged criminally with an offence is irresponsible for his act when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist. It may require legislation to bring this rule into effect.

---

(13) (1843) 10 Cl. & Fin. 200.
(14) (1911) 22 Cox C.C. 268, at p. 269.
(15) (1915) 24 Cox C.C. 403, at p. 405.
(16) (1881) 14 Cox C.C. 563, at p. 564.
(17) (1922) 16 Cr. App. R. 164.

2. Save as above, the rules in *McNaghten's Case* should be maintained."

In the body of the report the Committee said at p. 8:

> "The question which we have mentioned as not covered expressly by the *McNaghten Rules* is the difficult question of loss of control caused by unsoundness of mind. The report of the British Medical Association, par. II (c), recommends that a person should be held to be irresponsible if prevented by mental disease, from controlling his own conduct unless the absence of control is the direct and immediate consequence of his own default'.
>
> "The witnesses called in support of this recommendation did not propose that a weakening of control by mental disease should be sufficient. They mean control so impaired by disease as in substance to amount to complete loss of control."

Such is the similarity that par. (1) of the conclusions expressed in the Atkin Committee report bears to the language used in s. 16(1)(*b*) that there seems little doubt that regard was had to those recommendations in the drafting of the Bill which was to become the *Code*. During argument some doubt was raised as to whether the Atkin report could have reached Tasmania in time to have had any influence upon the drafting of the *Code*, but although the Committee's report is sometimes shown to have been made in 1924, in fact it was published in 1923 well in time for it to have reached this State before the passage of the *Criminal Code Act* 1924(18).

Thus it may be seen that in none of the judicial, academic or other historical antecedents of the defence of irresistible impulse to which I have referred has a diminution as opposed to a total deprivation of the capacity to control one's actions been regarded as sufficient to provide a defence.

In *Hitchens No. 2*(19) this Court made some observations which are relevant to the question of the proper construction of s. 16(1)(*b*). According to the transcript of the summing-up appearing in the appeal book in that case, the learned trial judge directed the jury in the following terms:

> "Well, now I then turn to the question of irresistible impulse and I think it is pretty well self-explanatory in the terms of par. b. He's excused if the act that was done under an impulse, an impulse is simply something that impels him, some stimulus coming from his mind not necessarily his conscious mind, his sub-conscious, or perhaps an emotion, something stirring him so that his volition makes him lift the

(18) 14 Geo. V No. 69. (19) [1962] Tas. S.R. 35.

gun to the required position and pull the trigger. That is an impulse and he is impelled to do that and it is an excuse for crime if by reason of mental disease, in this case schizophrenia, he was in substance, which I suppose means substantially, deprived of any power to resist. As I have said to you it simply doesn't mean that he is deprived of power to resist by anger or some ordinary human emotion, it must be by reason of his mental disease that his emotions which do various things which would enable him to use his will power to resist are gone."

. . .

"Mr. Foreman: 'I still don't understand in substance'.

"His Honour: Well, I think there has been no judicial interpretation of it that I know. I think it just simply means substantially — in substance deprived, I suppose it means totally, or almost totally whatever you would regard as substantially, in substance."

Later in his summing-up his Honour said:

"One thing which I think I have said wrongly to you is when you asked me Mr. Foreman what 'in substance' meant. I think I said totally, or almost totally. Mr. Wright has said that is too strong a meaning. I think it is. It is very hard to find another word for in substance — substantially. I suppose if you say what is substantial, when a thing is substantial, it is not slight, it has got body in it, it has got substance in it. Not just a little one, it has got body, substance in it, but it wouldn't have to be as far as total or almost total. He has got to be substantially deprived of it. You see, I am afraid I can't assist you very much more. It is a defence for him if he can prove on the probabilities the act was done when such was done under an impulse, something which he felt, which by reason of mental disease, he was in substance, or substantially deprived of any power to resist, a substantial matter not a slight matter. I don't think I can help you any further than that."

One of the grounds of appeal in *Hitchens No. 2*(20) was that the trial judge gave inadequate or erroneous directions as to the meaning of s. 16(1)(*b*) and this ground was further particularized in part as follows:

"(c) by using the expression 'irresistible' in relation to impulse without a clear direction as to what 'in substance' meant;"

At p. 71 the court said of this ground:

"Ground 6(d)-(c) complains of an inadequate direction as to the meaning of the phrase 'in substance' occurring in s. 16(1) of the *Code*. His Honour in a supplementary direction

(20) [1962] Tas. S.R. 35.

conceded that he had originally overstated the meaning of 'in substance' by defining it as 'totally or almost totally' and he explained it afresh in a way to which no objection can be taken."

To say that 'no objection' can be taken to a direction is not equivalent to saying that that direction accurately or completely states the law. In *Hitchens No. 2* (*supra*) the court was considering a complaint by a convicted appellant as to a direction in the summing-up and the court was only required to say whether that complaint was well founded. It was not necessary for the court to decide whether the direction had been expressed in terms which were too favourable to the accused. Leaving aside the question of whether this court is bound by its own decisions, I do not think that the above passage from the judgment in *Hitchens No. 2* (*supra*) should be regarded as an authoritative pronouncement upon the meaning of the phrase "in substance".

In my view, as a matter of language and bearing in mind its historical background, s. 16(1)(*b*) should be construed as applying only to a person who by reason of mental disease is wholly deprived of any power to resist the impulse under which the crime was done. In my opinion, it is not logically possible to qualify or cut down the expression "deprived of any power to resist" in a quantitative way. If "any" is synonymous with "all" (and I cannot see how it could be otherwise in this context) then I cannot see how it is possible to construe the expression so that it applies to a person who is only partially deprived of the power to resist: a person is either deprived of *all* power or he is not; it is not possible for a person to be deprived of *all* power to a limited degree.

An additional consideration which leads to the same conclusion arises from the fact that an accused person may only avail himself of the other limbs of the defence of insanity provided in s. 16(1)(*a*) if he can show that he had a total incapacity to appreciate the nature or moral implications of his act. As there is no room for a defence under s. 16(1)(*a*) based upon a partial incapacity to make such an appreciation it would seem anomalous if the defence provided by s. 16(1)(*b*) should be available to an accused person who was only partially deprived of his capacity to control his actions.

What then do the words "in substance" mean? If the defence if only available when there has been a total deprivation of the power to resist why has the phrase been used in s. 16(1)(*b*) at all?

As the defence under s. 16(1)(*b*) is independent of the defences provided for in s. 16(1)(*a*), s. 16(1)(*b*) should be construed so as to permit the defence to succeed in cases in which the conditions necessary to satisfy s. 16(1)(*a*) are not present. In other words, the defence under s. 16(1)(*b*) must be available to an accused

notwithstanding that he is aware that his act is wrong and may therefore be subject to some competing impulse deterring him from committing the crime. In my view, the words "in substance" were inserted to allow for the possibility that in some cases a person may be ambivalent in his attitude towards the crime which he feels impelled to commit. He may have a very strong impulse to commit the crime, but he may also be subject to some other countervailing impulses which tend to impel him not to commit the crime. If the mental disease from which the accused is suffering causes the impulse to commit the crime to prevail so that the accused is wholly incapable of resisting that impulse, he is, in my view, in substance deprived of any power to resist notwithstanding that at some stage prior to the commission of that crime a countervailing impulse was present. If it is necessary to use a synonym in explaining the meaning of the words "in substance" to a jury then I think that the word "effectively" proposed by the learned Crown Advocate during the course of his submissions to this court most nearly expresses the meaning of the phrase. But by adopting that word I do not mean to import any notion of degree into the section. I am simply intending to indicate my view that the section is concerned with the overall effect or end result of the accused's mental disease. If the overall effect of the mental disease is to wholly deprive the accused of all power to resist the particular impulse to commit the crime with which he is charged the requirements of the section are satisfied, notwithstanding the existence of some other impulses in the mind of the accused.

In my view, the learned trial judge properly directed the jury as to the meaning of s. 16(1)(*b*). It is true that he said that "'in substance' means substantially", but any doubts that that direction may have raised would have been dispelled by his subsequent direction that "It is not a case of his power to resist being lessened or diminished". In addition, in the following passage in his summing-up in which his Honour was referring to the evidence given by a psychologist, the learned trial judge made it perfectly clear that a distinction had to be drawn between a lessening and a total deprivation of the power to resist:

> "So there he is saying that in his opinion there was a markedly less awareness and less control than would normally have been the case. Lessened control over his impulses. He does not seem to be saying there, or going to the extent of saying that he was deprived in substance of any power to resist, but he certainly says that probably there was a markedly lessened control."

Upon the view of the meaning of s. 16(1)(*b*) which I have formed, the basis of the complaint in ground 2 disappears. However, counsel for the appellant argued in the alternative that the trial was conducted on the basis that a partial deprivation of the

power to resist impulses was sufficient to establish the defence of insanity and that if the meaning I have given to the section be correct then everyone who took part in the trial was acting under a misconception and the trial miscarried so that the verdict should not be permitted to stand. I do not accept that alternative submission. The Crown Advocate drew our attention to the fact that on many occasions both he and counsel for the accused during their examination of witnesses and during their addresses to the jury asked questions or made comments directed to the issue of whether the accused had "any ability" or an "incapacity" or was "deprived of all power" or had "no power, in substance" to resist his impulses. It is true that during the trial many references were made to the question of the lessening of the power of the accused to control his impulses, but this question was subordinate to the main issue and it could not be said that the trial was conducted under the misapprehension that it was the primary question to be decided.

It is appropriate to add that I have considered the summing-up broadly and without confining myself to the precise terms of ground 2. In my view, the learned trial judge fairly summarized the evidence given by the medical witnesses and properly related that evidence to the issues the jury had to determine when considering the defence raised under s. 16(1)(*b*).

In support of the first part of ground 3, counsel for the appellant argued that the word 'impulse' was used on scores of occasions throughout the trial and that the trial judge should have specifically directed the jury as to the meaning of the word. He submitted that the effect of the way the Crown had conducted its case would have been to mislead the jury into thinking that for the purposes of s. 16(1)(*b*) an impulse had to be the product of ungovernable rage or passion and that it was therefore necessary for the trial judge to correct that impression by an appropriate direction. I agree that to restrict the meaning of the word "impulse" to those cases in which a person is subject to some violent emotion would amount to a misdirection. But I do not think that either the witnesses in the course of their evidence or the trial judge in the course of his summing-up did so restrict their use of the word. It is true that the trial judge did refer to some passages in the evidence in which the question of whether the accused had been subject to uncontrollable rages was explored, but I do not think that it could possibly be said that those references could have misled the jury into thinking that it was only impulses of that kind which were capable of coming within s. 16(1)(*b*). Looking at the summing-up overall I do not think that any reasonable juror would have concluded that the learned trial judge was using the word otherwise than in the widest sense of any stimulus, emotional or otherwise, which impels human action. The word

"impulse" is a commonly used word and it was used by the trial judge in its accepted sense and no specific direction as to its meaning was called for.

I do not think that there is any substance in the second part of ground 3. If the general meaning of the word "impulse" which I have referred to is adopted, it does not seem to me to be appropriate or desirable for a trial judge to relate the evidence to the isolated question of the nature of the appellant's impulse. What is necessary is to relate the evidence to the whole defence of whether whatever act the jury find the accused did was done under an impulse which by reason of mental disease he was in substance deprived of any power to resist. This whole issue may be conveniently broken down into three questions:

(a) what was the accused's act?

(b) was that act done under an impulse which the accused was in substance deprived of any power to resist? and

(c) was he so deprived by reason of mental disease?

In the circumstances of this case, I do not think that it was necessary to break down those issues any further. I do not think that the learned trial judge fell into any error in not dealing with the evidence relating to the question of the nature of the appellant's impulse as a separate or isolated issue.

Ground 4

Ground 4 essentially amounts to a complaint that upon the evidence before them it was not reasonably open to the jury to conclude that they were not satisfied that the killing of the deceased was done under an impulse which by reason of mental disease the appellant was deprived of any power to resist. Apart from the psychiatric evidence which went directly to the issue of the appellant's mental capacity, there was evidence from a number of witnesses as to the appellant's background. Evidence was also given by two neuro-surgeons who described damage to the appellant's brain which had been caused by a bullet wound sustained by the appellant in 1969 and who expressed their opinions about the possible effects on the appellant's behaviour that such damage might have had. In addition, the jury would have been entitled to draw some general inferences about the appellant's mental state from his unsworn statement and from the confessional evidence. However, and I think that this was implicitly conceded by counsel during his submissions in support of this ground, this evidence would not by itself have been sufficient to persuade a jury that the appellant was not responsible at the material time. To establish that defence it was necessary to rely upon the psychiatric evidence.

Three psychiatrists and one psychologist were called by the defence. The psychiatrists expressed the opinion that under certain circumstances the appellant would have been acting under an impulse which by reason of mental disease he would have been deprived of any power to resist. The psychologist was not prepared to go further than expressing the opinion that the accused was "not fully responsible" for his actions and that certain impulses would have been "almost irresistible". All these witnesses based their opinions upon information they had received as to the appellant's previous behaviour and his medical history and upon assumptions they made as to the circumstances surrounding the killing. Not all of these witnesses made the same assumptions but they all assumed the existence of one or more of several factors such as that at the time he killed the deceased the appellant was subject to stress because of his domestic situation, that the appellant had homosexual paedophilic tendencies and that immediately before he killed the boy the accused was subjected to some kind of immediate stress brought on by panic or resistance on the part of the boy. Both the psychiatrists called by the Crown expressed the view that the accused was suffering from a mental disorder, but neither was prepared to express the view that he was suffering from a mental disease which brought him within s. 16(1)(*b*).

Two general observations may be made about this evidence. First, as the learned trial judge correctly reminded the jury, they were not entitled to surrender their function to the expert witnesses and the final responsibility for assessing the opinion evidence was theirs. Secondly, it could not be said that the evidence was such that it would have been unreasonable for the jury not to have found established some or all of the assumptions or inferences relied upon by the expert witnesses in the formation of their opinions.

After considering the evidence I have referred to and the other evidence presented at the trial, I am quite unable to say that the jury's conclusion that the evidence did not persuade them that the requirements of s. 16(1)(*b*) had been satisfied was a conclusion which could not be supported having regard to the evidence, or was against the evidence or the weight of the evidence, or was a conclusion which was not reasonably open to them. I think ground 4 fails.

In my view, none of the grounds of appeal has been made out. I do not think that there was any error of law made in the conduct of the trial, nor do I think that on any ground whatsoever was there a miscarriage of justice.

Insofar as this appeal amounts to an application for leave to appeal I would grant leave. I would dismiss the appeal.

NEASEY J. referred to the evidence and continued:

Complicity by the appellant in the child's death was therefore not conceded at the trial, though an adverse finding in this regard by the jury must have been regarded as virtually inevitable. The principal defence put forward was insanity, under the ground in s. 16(1)(*b*) of the *Criminal Code* generally referred to as "irresistible impulse" Indeed for the present purpose that may be regarded as the sole defence. The appellant, having been convicted, now appeals on four grounds, of which the first three complain of alleged defects in the summing-up by the learned trial judge concerning the defence under s. 16(1)(*b*). The fourth ground claims that the verdict of the jury, having regard to the evidence of insanity, was unreasonable and cannot be supported.

The first ground of appeal is that the trial judge erred in law in that he failed or failed properly to put to the jury the meaning of the words "in substance deprived" in s. 16(1)(*b*) of the *Code.* This ground further complains that the trial judge erred in law in that he gave to the jury a paraphrase of the words "in substance deprived" defined only by contrast with a partial deprivation in a minor degree, and in that "he directed the jury that a lessening or diminishing of the accused's power to resist was not sufficient to make out the defence". The second ground complains that the trial judge failed in the context of s. 16(1)(*b*) to put to the jury adequately the evidence relating to "the extent of the lessening of the power of the accused to resist an impulse", and failed to give sufficient weight to essential aspects of that evidence.

Basic to the appellant's case, therefore, was a submission of law which may be put in this way — that an accused person may bring himself within the application of the defence provided by s. 16(1)(*b*) if he can show on the balance of probabilities that at the relevant time his act or omission was done or made under an impulse concerning which he was partially deprived by mental disease of the power to resist, provided that such deprivation was of sufficient degree to be properly described by the jury as "substantial". Rephrased in short form, the submission was that partial deprivation of the power to resist, brought about by mental disease, is sufficient provided it amounts to substantial deprivation.

I have no doubt that this submision is not well founded. [His Honour set forth s. 16(1) and continued:] A Court of Criminal Appeal in *Hitchens* v. *The Queen* (*No. 2*)(21), consisting of Burbury C.J., Crisp and Cox JJ., said that s. 16 of the Tasmanian *Criminal Code* puts in statutory form the legal criteria of responsibility expressed in the *McNaghten Rules,* and adds to them what has come to be generally known as the defence of "irresistible impulse." Then their Honours said:

---

(21) [1962] Tas. S.R. 35, at p. 49.

> "This defence was no doubt introduced into the Tasmanian *Criminal Code* enacted in 1924 as a result of the recommendations of the Atkin Committee on Insanity and Crime in the same year (Cmd. 2005)."

They then cited a passage from that Report in which the Atkin Committee said:

> ". . and we think that it should be made clear that the law does recognize irresponsibility on the ground of insanity where the act was committed under an impulse which the prisoner was, by mental disease, in substance deprived of any power to resist."

Indeed the inference drawn by the Court that the Tasmanian Parliament in 1924 drew directly upon the Atkin Report (which is dated 1st November, 1923) when framing s. 16(1)(*b*) is almost certainly correct. The *Criminal Code* was not drafted in a legal vacuum. I venture to refer to what I said on that subject in *Phillips* v. *The Queen* (*No. 1*)(22). As a matter of historical perspective it would be doing much less than justice to the draftsman of the *Code* and to the legislature to think that they were not in this particular case paying special attention to the recommendations of a committee so inherently authoritative by reason of its composition as the Atkin Committee; particularly as in the operative part of s. 16(1)(*b*) they have reproduced precisely the words of the Committee. It is a reasonable inference also that the words in s. 16(1)(*b*), ". . in substance deprived of any power to resist", were intended to have the same meaning in the *Code* as they bore in the relevant part of the Atkin Report; and there is no doubt whatever what the Committee's intended meaning was, as the following passage clearly shows. It is a passage which includes that cited by the Court of Criminal Appeal in *Hitchens* v. *The Queen*(23); and it reads as follows (at pp. 8 and 9 of the Report):

> "The question which we have mentioned as not covered expressly by the *McNaghten Rules* is the difficult question of loss of control caused by unsoundness of mind. The report of the British Medical Association, par. II(c), recommends that a person should be held to be irresponsible if prevented by mental disease 'from controlling his own conduct unless the absence of control is the direct and immediate consequence of his own default'.
>
> "*The witnesses called in support of this recommendation did not propose that a weakening of control by mental disease should be sufficient. They mean control so impaired by disease as in substance to amount to complete loss of control.* (My emphasis)

(22) [1971] Tas. S.R. (23) [1962] Tas. S.R. 35, at pp. 49, 50.

"On the other hand, if such a loss of control exists, caused by mental disease, there seems no good reason for inserting the exception as the direct consequence of his own default. The only case suggested to us which would come within the exception was intentional taking of drink or drugs as an incentive to the act, which would presumably in any case show that the loss of control was not caused by mental disease.

"It was established to our satisfaction that there are cases of mental disorder where the impulse to do a criminal act recurs with increasing force until it is, in fact, uncontrollable. Thus cases of mothers who have been seized with the impulse to cut the throat of or otherwise destroy their children to whom they are normally devoted are not uncommon. In practice, in such cases the accused is found to be guilty but insane. In fact, the accused knows the nature of the act and that it is wrong; and the *McNaghten* formula is not logically sufficient. It may be that the true view is that under such circumstances the act, owing to mental disease, is not a voluntary act. We think it would be right that such cases should be brought expressly within the law by decision or statute. We appreciate the difficulty of distinguishing some of such cases from cases where there is no mental disease, such as criminal acts of violence or sexual offences where the impulse at the time is actually not merely uncontrolled, but uncontrollable. The suggested rule, however, postulates mental disease; and we think that it should be made clear that the law does recognise irresponsibility on the ground of insanity where the act was committed under an impulse which the prisoner was, by mental disease, in substance deprived of any power to resist.

"This recommendation gives effect to a view of the law which is accepted by Mr. Justice Stephen, though with doubt, as being the existing law (Digest of Criminal Law, Article 28) and is in accordance with the Criminal Code of Queensland 1899, s. 27, and with the law of South Africa as laid down by the late Lord *de Villiers* in *R.* v. *Hay* 16 Cape of Good Hope Rep. (Sup. Ct.) 290. We think, however, that the question to be determined should be, not whether the accused could control his conduct generally, but could control it in reference to the particular act or acts charged. No doubt general lack of control would be relevant to the question whether the lack of control in the particular case was due to mental disorder or to a mere vicious propensity.

"We have already stated that, in our opinion, such cases as would be covered by the formula we have suggested, would, in fact, fall within the existing law, as suggested by

> Mr. Justice Stephen; and no doubt some judges have charged juries to that effect. On the other hand, there seem to be definite decisions of the Court of Criminal Appeal the other way. It seems to us that if this legal doubt should continue, it would be advisable to make the law clear by an express statutory provision. We have no doubt that if this matter were settled most of the criticisms from the medical point of view would disappear."

The relevant phrases from Stephen's Digest and from the *Criminal Code of Queensland* (they are set out in Appendix B to the Atkin Report) were ". . from controlling his own conduct, unless the absence of the power of control has been produced by his own default"; and ". . in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing or of capacity to control his actions . . ."; respectively.

Of course, as is well known, this recommendation of the Atkin Committee concerning irresistible impulse has never been accepted in England (nor in any of the non-Code States in Australia) for reasons expressed in numerous writings upon the subject since 1923; amongst which may be mentioned the following:-

> "Irresistible Impulse in English Law", an article in volume XVII, The Canadian Bar Review (March 1939) pp. 147-165, by Professor D. Seaborne Davies;
>
> "Psychiatry and Criminal Responsibility", 65 Yale L.J. (May 1956) pp. 761-785, by Professor Jerome Hall;
>
> Professor Hall's work, *General Principles of Criminal Law*, 2nd edn., at pp. 486-500;
>
> Report of the Royal Commission on Capital Punishment 1949-1953 (Cmd. 8932), pars. 310-320 in particular;
>
> "Criminal Responsibility and Punishment; functions of Judge and Jury" by Sir Patrick Devlin (as he then was), (1954) Crim. Law Rev. pp. 661-686.

The Royal Commission on Capital Punishment said (in par. 313) that the concept of "irresistible impulse has been largely discredited not only because of past controversy 'but because it is inherently inadequate and unsatisfactory' ". The Commission said this because, as explained in par. 314, it thought that "the real objection to the term 'irresistible impulse' is that it is too narrow, and carries an unfortunate and misleading implication that, where a crime is committed as a result of emotional disorder due to insanity, it must have been suddenly and impulsively committed after a sharp internal conflict;" but as Professor Hall has pointed out, the Commission itself proposed an addition to the *McNaghten Rules* which scarcely improved upon the concept of irresistible impulse — 65 Yale L.J., at pp. 776-7. The Commission proposed exculpating the accused if he "was incapable of preventing himself from committing (the act)".

However, notwithstanding the continued non-acceptance of the irresistible impulse concept in England and elsewhere, (though it is said to be the law in South Africa — Atkin Committee Report, passage cited; in a number of the States of the United States, although that proposition should be much qualified, per Professor Hall, *General Principles*, pp. 491 *et seqq.*; and in certain European countries — 10 A.L.J. 130.) and the denial of it as an existing defence within the *McNaghten Rules* in English law, it is well established that evidence of uncontrollable conduct as a symptom of mental disease is relevant to the question whether the accused understood the nature and quality of his act, and whether he knew it was wrong — *Sodeman* v. *The King*(24); *Attorney-General for South Australia* v. *Brown*(25). Indeed in *Sodeman's Case* Evatt J. said, in effect, that the question whether the defence of "irresistible impulse" might be found to be within the *McNaghten Rules,* as was Stephen's view, was still an open question in the High Court of Australia, although unacceptable in the Court of Criminal Appeal in England; but the views of the majority of the justices in *Sodeman's Case,* and the advice of the Judicial Committee in that case and in *Brown's Case,* ruled out irresistible impulse as a separate ground of insanity in non-Code States in Australia.

Thus irresistible impulse remains very much alive in its evidentiary aspect in the criminal law of England relating to insanity, and its adoption as a specific legal concept in the *Criminal Codes* of Queensland, Western Australia and Tasmania has been said to have accorded general satisfaction — Morris & Howard *Studies in Criminal Law* (1964), p. 56. It might be added also that it has had at least one vigorous proponent in a non-Code State, in the late Sir John Barry — see 10 A.L.J. at pp. 3 and 176.

Even when enacted in this State in 1924 the concept had, of course, the support not only of the Atkin Committee Report but of the immense authority of Sir James Fitzjames Stephen, and almost a quarter century of successful operation under the Queensland and Western Australian Criminal Codes.

The point of this brief consideration of the history of the matter is not to debate the desirability or otherwise of having this provision in the *Code* — it is there, but to emphasize a proposition which but for the issues raised in this appeal I should have thought would never have been called in question; namely that in 1924 the Parliament of this State sought to enact into law a legal concept which had been thoroughly discussed from time to time over some three-quarters of a century, and never in any other context except that of the test being complete as distinct

(24) (1936) 55 C.L.R. 192. (25) [1960] A.C. 432.

from partial inability by reason of mental disease to control conduct. The idea of partial inability to control conduct being a ground of insanity resulting in irresponsibility at law for an act which would otherwise have been criminal was, then and since, simply outside the realm of discourse on the subject. Medical witnesses who gave evidence to the Capital Punishment Commission of 1866 insisted upon the distinction between "controllable" and "uncontrollable" impulses — see Seaborne Davies, *op. cit.*, at p. 152. The first draft of the *Homicide Amendment Bill* 1872 which was principally the work of Stephen, provided —

> "homicide is not criminal, if the person by whom it is committed is, at the time when he commits it, prevented by disease affecting his mind —
>
> (*a*) from knowing the nature of the act done by him;
> (*b*) from knowing that it is forbidden by law; and
> (*c*) from knowing that it is morally wrong; or
> (*d*) from controlling his own conduct."

Stephen in giving evidence before a Select Committee to which the Bill had been referred said "subsection (*b*) applies to a man prevented by disease affecting his mind 'from controlling his own conduct' ", and in the same evidence he used on several occasions the term "irresistible impulse" — see generally the discussion in Seaborne-Davies, *op. cit,* at pp. 154 *et seqq.* And again, the whole of the discussion by Stephen in his *History of the Criminal Law,* Vol. II, pp. 170 *et seqq.* proceeds upon the basis that irresistible impulse, uncontrollable conduct, brought about by or appearing as a manifestation of mental disease ought to be, and on a proper interpretation of the *McNaghten Rules* was, a ground of irresponsibility at law. So the discussion went then and so it has continued.

This issue, whether s. 16(1)(*b*) contemplates partial as distinct from complete deprivation of power to control conduct, arose in the present case because of some expressions used in the two cases of *Hitchens* v. *The Queen*(26). Hitchens had killed by shooting the parents of a girl with whom he had been keeping company. He was tried twice, and convicted of murder on both occasions; but his conviction at the first trial was set aside by the Court of Criminal Appeal on the basis that the trial judge had not properly instructed the jury in relation to the law of insanity, particularly in respect of his having declined to direct them in terms of the well known passage from the summing-up of Dixon J. in *R.* v. *Porter*(27). The principal defence maintained by the accused at both trials was insanity, principally on the basis of the provisions of s. 16(1)(*a*) which embodies the substance of the

(26) [1959] Tas. S.R. 209, [1962] Tas. S.R. 35.

(27) (1933) 55 C.L.R. 182.

McNaghten Rules, but as a secondary line the irresistible impulse defence under s. 16(1)(*b*). The mental disease from which Hitchens was said to have suffered at the relevant time was schizophrenia, and there was ample medical evidence from witnesses called by both the prosecution and the defence to support that contention. The judge who presided at the first trial, Burbury C.J. in the nub of his directions to the jury on irresistible impulse said this:

> "In my understanding of what the doctors tell us, in the case of a man suffering from schizophrenia in what is called a 'florid episode', his emotions — his impulses, which would normally be controlled by his intellect or his brain, whatever one calls it — that that control is gone — he is deprived in substance, in reality, of any power to resist an impulse because of mental disease . . . But on the question of the state of mind of the accused at the time — whether he was able to distinguish between good and evil in relation to these dreadful deeds or whether he was acting under an impulse which in fact he couldn't control — his will was so much in the throes of a mental disease that he was unable to control this impulse — those are questions of fact —."

After conviction at the second trial there was a further appeal, and as appears from the report one of the grounds of appeal complained of misdirection in law as to the meaning of the phrase "in substance" in s. 16(1)(*b*). The Court of Criminal Appeal considered the weight of the expert evidence in relation to the irresistible impulse defence, indicating that it was very strong in favour of the appellant, but then said:

> "Having regard to the whole of the medical evidence and the other evidence in the case we are unable to say as a court of appeal that the jury with the advantage that they had were not entitled reasonably to conclude that the evidence fell short of persuading them that the homicides were committed by the appellant under an impulse which by reason of mental disease he was substantially deprived of any power to resist." (28)

A little later this appears:

> "It may be said there was a strong probability that the appellant's mind was so disordered as a result of schizophrenia that he was incapable of knowing that his acts were wrong and substantially incapable of controlling his impulses." (29)

But the Court said that nevertheless it could not find that the jury could not reasonably fail to be satisfied of the affirmative of the issue. Then the Court turned to specific parts of the actual directions of the trial judge, Crawford J., relating to irresistible impulse. His Honour had said to the jury:

(28) [1962] Tas. S.R. 35, at p. 57. (29) [1962] Tas. S.R. 35, at p. 57.

". . I turn to the question of irresistible impulse . . . He's excused if the act that was done under an impulse, an impulse is simply something that impels him, some stimulus coming from his mind not necessarily his conscious mind, his subconscious, or perhaps an emotion, something stirring him so that his volition makes him lift the gun to the required position and pull the trigger. That is an impulse and he is impelled to do that and it is an excuse for crime if by reason of mental disease, in this case schizophrenia, he was in substance, which I suppose means substantially, deprived of any power to resist . . . I think it just simply means substantially — in substance deprived, I suppose it means totally or almost totally, whatever you would regard as substantially, in substance. There might be one tiny glimmer . . . There might be such a slight feeling that it doesn't really come into the conscious mind fully at all, it might just be a slightly uneasy feeling which the person gets. If it was so slight, you see it would in substance still deprive him of any power to resist as I understand it."

At a later stage of his summing-up however, the learned judge said this:

"One thing which I think I have said wrongly to you is when you asked me, Mr. Foreman, what 'in substance' meant. I think I said totally, or almost totally. Mr. Wright has said this is too strong a meaning. I think it is. It is very hard to find another word for in substance — substantially. I suppose if you say what is substantial, when a thing is substantial, it is not slight, it has got body in it, it has got substance in it. Not just a little one, it has got body, substance in it, but it wouldn't have to be as far as total or almost total. He has got to be substantially deprived of it. You see, I am afraid I can't assist you very much more. It is a defence for him if he can prove on the probabilities the act was done when such was done under an impulse, something which he felt, which by reason of mental disease, he was in substance, or substantially, deprived of any power to resist, a substantial matter not a slight matter."

At the end of its consideration of the summing-up on this point, the Court of Criminal Appeal in respect of the ground which had complained of inadequate direction as to the meaning of the phrase "in substance", said only this:

"His Honour in a supplementary direction conceded that he had originally overstated the meaning of 'in substance' by defining it as 'totally or almost totally' and he explained it afresh in a way to which no objection can be taken." (30)

(30) [1962] Tas. S.R. 35, at p. 71.

The argument in the present case arises directly out of that short passage in the Court's judgment in *Hitchens* v. *The Queen (No. 2)*. Virtually the whole of the appellant's argument has been based upon the proposition that the Court of Criminal Appeal there positively approved the amended meaning of "in substance" in which the learned judge had explained it to the jury as contemplating a partial deprivation of the power to resist so long as the degree of deprivation could be described as substantial. (It will be noted that the Court itself in its judgment on the appeal twice used the word "substantially" as a synonym for "in substance").

There are two questions of importance arising out of this part of the judgment in *Hitchens* v. *The Queen*(31). The first is whether the Court must be taken to have held positively, as a matter of law, that the words "in substance deprived" in s. 16(1)(*b*) means "substantially deprived", in the sense of "to a substantial extent but not necessarily wholly deprived"; and if the Court did so hold, whether this Court should regard itself as bound thereby. The second question, which partly overlaps the first, is whether if the Court did so hold it was right. I think it is convenient to deal with the second question first.

As indicated above, it would seem to me to be totally extraordinary in the light of the long history of discussion of the irresistible impulse defence if the words "in substance deprived" mean deprived to a substantial degree but not necessarily wholly deprived. So to interpret them would be in effect to substitute a diminished responsibility test for irresistible impulse. Nevertheless if that be the clear meaning of those words we should be obliged to give effect to it; but I have no doubt it is not. The *O. E. D.*, Vol. IX, Pt. 2, p. 54, gives the following meanings for the phrase "in substance":

"(a) in reality;
"(b) in general, generally speaking;
"(c) in the main, for the most part;
"(d) in essentials, substantially;
"(e) in effect, virtually;
"(f) in a pure or unmixed state, in the natural state;
"(g) real, substantial."

However, in determining the meaning of s. 16(1)(*b*) the words "in substance" must be considered not in isolation but within the framework of the whole sub-paragraph; and indeed I think it is unwise to try to explain to the jury the meaning of "in substance" or "in substance deprived" apart from the context as a whole. In order to come within the defence the accused must have been in substance deprived by mental disease of *any* power to resist. "Any" in that sentence must, as the learned trial judge told the

jury, mean "all". I do not think the meaning of s. 16(1)(*b*) can be better explained than by employing words similar to those which the Atkin Committee used in the passage above cited. What the jury has to consider, if they are satisfied the relevant act or omission was done or made under an impulse, is whether the accused's power to resist that impulse at the time he did the act or made the omission was so impaired that he was in substance, meaning in effect, in reality, deprived completely of any power to resist it. Out of that formulation one may take the words "in substance" and say they mean "in effect" or "in reality", but in my opinion it is much more satisfactory to explain to the jury the meaning of the sub-paragraph as a whole.

Amongst the meanings of "substantially" given by the *O.E.D.* (at the same page) are:

> "in substance, in its substantial nature or existence;
> essentially, intrinsically;
> actually, really;
> in all essential characters or features, in regard
> to everything material, in essentials, to all
> intents and purposes, in the main."

It is not, therefore, incorrect to say that "in substance" in s. 16(1)(*b*) means substantially; but it is inadequate to say that and no more, and it can be misleading if "substantially" is taken to mean "in the main" — that is, largely but not necessarily wholly. Its potential to mislead is I think shown by the first and second explanations given by the learned trial judge in Hitchen's second trial (*supra*).

In my opinion, in ordinary modern usage the word "substantially" is generally taken to mean something less than wholly or completely. This is illustrated by the interpretation given to that word in the English and Queensland provisions relating to diminished responsibility, in which each speak of substantial impairment of mental responsibility or capacity. In *Reg.* v. *Lloyd*(32) the trial judge told the jury that "Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence; was the mental responsibility impaired, and, if so, was it substantially impaired?" The Court of Criminal Appeal held that this direction was correct in law. In the Queensland case, *Reg.* v. *Biess*(33), Hart J. and Matthews J. said that in their opinion this direction in *Reg.* v. *Lloyd* (*supra*) was the most satisfactory that had so far appeared as to the

(31) [1962] Tas. S.R. 35, at p. 71.
(32) (1965) 50 Cr. App. R. 61.
(33) [1967] Qd.R. 470.

meaning of the word substantial and that "substantially" is a word of degree.

Thus it will be plain that if the Court of Criminal Appeal in *Hitchens* v. *The Queen* (*No. 2*)(34) held that the words "in substance deprived" mean substantially deprived, in the sense that partial deprivation might come within the defence, it was in my respectful opinion wrong. But if the Court did so hold, the question would arise whether this Court should regard itself as bound by that ruling — compare *Reg.* v. *Scott-Hogarth*(35); *Reg.* v. *Waring* (*No. 2*)(36); *Reg.* v. *Gould*(37); *Reg.* v. *Newsome*(38). However, I do not think we are faced with that question. I am uncertain whether the Court in *Hitchens* v. *The Queen* (*No. 2*) (*supra*) intended to approve positively the amended direction by the trial judge, or whether it meant that since the amended version was more favourable to the appellant than the original, no valid objection could be taken by the appellant. *Prima facie* the short passage from the Court's judgment tends to indicate positive approval, but in the context of the whole of the judgment concerning irresistible impulse, and having regard particularly to the Court's citation of the passage from the Atkin Committee Report, with which their Honours obviously had familiarized themselves, I cannot think that they intended to approve in positive terms the trial judge's amended direction. Consequently in my opinion there is no clear ruling on the point by which this Court should in any event regard itself as bound.

I turn then to the actual direction of the learned trial judge in the present case on the point at issue, and a consideration of ground 1 in relation to it. The relevant direction is contained in two passages from the summing-up. The learned trial judge said:

> " . . . Then there is one final matter for your consideration. Again, if you look at s. 16 which is before you, you will see what it is. It is sometimes loosely referred to as 'irresistible impulse'. It would be a defence calling for a special verdict if you were satisfied that his act of killing the boy was done under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist. 'In substance' means substantially. 'Deprived in substance' means substantially deprived of any power to resist. 'Any' in that context must mean 'all'. Deprived of all power to resist. Any power to resist. So that substantially or in substance is opposed to being partially deprived in a minor degree. It is not a case of his power to resist being lessened or being diminished. In the words of the section, what the defence

(34) [1962] Tas. S.R. 35.
(35) 1965 Q.W.N. 17.
(36) [1972] Qd.R. 263, at pp. 264-266.
(37) [1968] 2 Q.B. 65, 52 Cr. App. R. 152.
(38) [1970] 2 Q.B. 711, 54 Cr. App. R. 485.

> need to prove is that by reason of mental disease he was, in substance, deprived of any power to resist an impulse to kill the boy, if he had that impulse. This, again, as you will see, right throughout s. 16 is linked with mental disease. In other words if he killed through strong emotions that by itself would not be enough but of course if that was produced, if that condition was produced by mental disease then that would be sufficient. Providing, of course, always that the mental disease in substance deprived him of any power to resist. This is a separate matter, of course, from the earlier part of the section. To some extent at least they do overlap, this question of by reason of mental disease not knowing right from wrong may overlap to some extent with an incapacity by reason of mental disease to resist an impulse. It really depends on the evidence in the case and as I go through the evidence I will draw your attention to parts that relate particularly to those matters."

Then after reviewing some of the evidence his Honour said, referring to the evidence of Dr. Conway:

> "He said that his conclusion was that he felt that due to a combination of previous mental aberration, or sexual aberration and brain injury, the accused had been, in his view, at the time of the crime most probably in a state of markedly lessened awareness and control. So there he is saying that in his opinion there was a markedly less awareness and less control than would normally have been the case. Lessened control over his impulses. He does not seem to be saying there, or going to the extent of saying that he was deprived in substance of any power to resist, but he certainly says that probably there was a markedly lessened control."

Ground 1 complains that these passages embody a direction erroneous in law in that the trial judge directed the jury that a lessening or diminishing of the accused's power to resist was not sufficient to make out the defence. It is also said in ground 1 that the judge failed to put properly to the jury the meaning of the words in s. 16(1)(*b*), "in substance deprived" and that he erred by giving to the jury a paraphrase of those words defined only by contrast with a partial deprivation in a minor degree. I have already indicated that I regard the first of those arguments as being unsound. The learned judge was quite correct in directing the jury that a lessening or diminution of power to resist was insufficient, if he did so direct them, but ground 1 as a whole requires us to consider whether the direction on irresistible impulse was correct and adequate overall.

It was submitted by counsel for the appellant that the direction as well as being erroneous would have been confusing to the jury; but I do not think that criticism is made out. The learned judge did introduce the word "substantially" as a synonym for "in substance", having ample persuasive guidance from *Hitchens* v. *The Queen*(39) for doing so. I have already said that use of "substantially" in this context may tend to mislead, but I think that in the present case the learned trial judge made clear to the jury the sense in which he was using the word. The direction must be looked at as a whole. He told them that "deprived in substance" meant substantially deprived of any power to resist, and that "any" in that context meant "all"; and he repeated, "deprived of all power to resist. Any power to resist". Then in the earlier passage cited he twice again used the phrase "deprived of any power to resist". It is true that his Honour said "So that substantially or in substance is opposed to being partially deprived in a minor degree", from which it might have been open to the jury to infer that he was telling them that being partially deprived in a major degree would be sufficient. But to regard that statement as misleading would be to give too much weight to one sentence considered alone; especially as his Honour followed it immediately by, "It is not a case of his power to resist being lessened or being diminished". In my opinion the first passage cited above considered as a whole conveyed to the jury clearly enough the proposition that in order to come within the defence the accused must at the relevant time as a matter of overall effect and reality have been completely deprived by mental disease of all power to resist the impulse to kill. The second passage from the direction confirms that view and would have emphasized it to the jury. His Honour was there inviting them to consider the conclusion of the witness as to the accused having markedly lessened control over his impulses, and how that conclusion did not seem to go as far as the defence would require, namely a deprivation in substance of all power to resist. It is not to be overlooked also that his Honour had introduced his direction on the point by saying that the defence is "sometimes loosely referred to as 'irresistible impulse' ". The phrase "irresistible impulse" was scattered throughout the evidence of the medical witnesses, and is repeated a number of times in the trial judge's recapitulation of their evidence during his summing-up. The word "irresistible" is a plain enough word; and the ordinary meaning of irresistible impulse would not admit the concept of an impulse which was partially resistible. I think the average juryman would understand that without the necessity of explanation.

---

(39) [1962] Tas. S.R. 35.

In my opinion, therefore, the learned judge's direction to the jury on the defence under s. 16(1)(*b*) was correct in law and the meaning was adequately and satisfactorily explained to the jury.

The second ground of appeal alleges that the trial judge failed in the context of s. 16(1)(*b*) to put to the jury adequately the evidence relative to the extent of the lessening of the power of the accused to resist an impulse and failed to give sufficient weight to essential aspects of such evidence. It will be seen that this ground of appeal is based directly upon the erroneous view of the law put forward by ground 1; which consideration virtually wholly robs the appellant's submissions under ground 2 of force and relevance. When this point was put to learned senior counsel for the appellant during argument, his reply was that if the defence under s. 16(1)(*b*) requires complete deprivation of ability to resist the impulse, rather than as the appellant submitted a partial deprivation being sufficient, then not only did the learned trial judge fail to explain the law properly to the jury but counsel on both sides and all the medical witnesses misunderstood the law. In that event, counsel said, the trial could not be regarded as satisfactory but would plainly have miscarried.

If all concerned had so misunderstood the law, it would be a matter requiring careful examination whether the trial had miscarried on that account. However, I have already given reasons for regarding the trial judge's direction on the point as being correct and satisfactory, and in addition I am of opinion that the transcript does not show that either counsel misunderstood the law. We have had the advantage of having a transcript of the final addresses of both counsel at the trial before us, and I think it is quite plain that both were basing their submissions upon a correct view of the law. Both counsel on a number of occasions asked the jury to consider whether the evidence of witnesses amounted to an opinion that the accused had, in effect, lost all power to resist, and they asked the jury to consider the same question in the light of the evidence as a whole. So far as the medical evidence is concerned, it is not a matter of importance whether the expert witnesses properly understood the law or not, so long as their minds were directed to relevant medical questions concerning the accused's state of mind at material times. Having studied the transcript closely I have no doubt that the minds of the medical witnesses were constantly directed to relevant medical issues, and indeed an extensive mass of evidence highly relevant to the central issue under s. 16(1)(*b*) was in result produced. In any event, of course, it was for the appellant to make out the defence.

In the light of his correct explanation to the jury of s. 16(1)(*b*), I think that the learned trial judge's observations to them upon the evidence which bore upon the central issue whether

a defence under that provision had been made out (*vide Criminal Code* s. 371(*j*)) were entirely adequate.

In *McNaghten's Case*(40), Tyndal C.J. emphasized that the statement of the rules should be "accompanied with such observations and explanations as the circumstances of each particular case may require"; and *Sodeman* v. *The Queen*(41), and *Hitchens* v. *The Queen*(42), for example, show that where the full ambit of the application of the *McNaghten Rules* is required to be considered by the jury a substantial amount of explanation is required from the trial judge. However, where irresistible impulse is the aspect of insanity relied upon by the defence the issue is a good deal less complex as a jury question. Consequently a less elaborate explanation of the bearing or possible bearing of various parts of the evidence upon the issue before the jury may be quite sufficient. The learned trial judge here, having explained the central issue to the jury, said that he would go through the evidence and draw their attention to parts that related particularly to that issue. This he did in a way which to my mind was entirely adequate. He summarized the evidence of the medical witnesses, paying particular attention to those parts which related to the issue whether in the opinion of the particular witness the accused at the relevant time was likely to have a diminished ability to control his conduct, and the extent of such diminution. In addition to that, his Honour drew the jury's attention in detail to evidence of the accused's background in respect of past conduct which may have been relevant to ability to control his behaviour, and other evidence concerning his conduct and behaviour on the day in question. "All these things", his Honour said, "have to be taken into account in deciding and considering what his mental state was at the crucial time when the boy was killed. You must take account of all the evidence, all the circumstances which have been proved."

The third ground of appeal is that the trial judge failed to direct the jury adequately or at all as to what would constitute an impulse within s. 16(1)(*b*), and failed to put fully enough to the jury the evidence from which the jury, if it found that the accused killed the deceased, could have reached the view that he did so under an impulse. As I understand the argument the substance of it is that the judge did not sufficiently direct the jury's mind to antecedent conduct of the appellant which showed inability on his part in the past to resist impulses to engage in irrational and illegal conduct. It is true that his Honour did not explain to the jury directly what an impulse is, but he instructed them to take into account all relevant evidence of past conduct in deciding what the accused's mental state at the crucial time was, and he

(40) (1843) 4 State Tr. N.S. 847.
(41) (1936) 55 C.L.R. 192.
(42) [1962] Tas. S.R. 35.

reminded them in considerable detail of what that evidence of past conduct consisted. I do not regard his Honour's omission to give the jury a synonym for or explanation of the word or notion of impulse as a matter of importance. Of the many meanings of "impulse" given in the *O.E.D.*, the most appropriate in the present context is "incitement or stimulus to action arising from some state or mind or feeling"; and whilst in my opinion it would probably have been advisable to tell the jury of this meaning, I do not think they would have failed to understand it in this sense in the absence of such explanation. The word in the context of s. 16(1)(*b*) is not an esoteric or technical one and would in my view have been understood by the jury without an explanation.

The final ground is that the verdict of the jury on the issue of insanity was unreasonable and cannot be supported having regard to the evidence. This ground depended heavily in the appellant's case upon the detailed submissions made in support of the other grounds, and I need say no more than that in my view there is no substance in it. The medical evidence and the evidence as a whole left it as an open question for the jury to decide whether or not the defence of insanity had been made out, and there was ample basis for their declining to find that it had. The opinions of the medical witnesses were substantially qualified in almost every case, and there was ample room for argument based both upon the medical and the non-medical evidence that on the whole it tended against a finding that the appellant had discharged the onus of proving insanity at the relevant time.

In my opinion it has not been shown that in any respect the appellant had other than a fair trial according to law. I would grant leave to appeal so far as leave is necessary, but would dismiss the appeal.

NETTLEFOLD J. set out the first ground of appeal and continued:

This ground of appeal and the argument submitted in support of it raises the question of the true meaning of s. 16(1)(*b*) of the *Criminal Code*. In order to deal adequately with the specific points raised, it is necessary to make some general observations about this provision.

In construing it, the first step should be to interpret the language of the provision and ask what is its natural meaning without any presumption as to the probable intention of Parliament derived from legal history (*Bank of England* v. *Vagliano Bros.*(43)). And the words used must be construed in their context and in relation to the subject matter to which they apply. What is that subject matter? It is important to keep in mind that it is the

(43) [1891] A.C. 107, at pp. 144, 145.

subject of criminal responsibility and not "insanity". The word "insanity" is not used in the section; the term which the section uses is "mental disease" and that term has quite a wide meaning (see Howard: *Australian Criminal Law,* 2nd edn., p. 329; *R.* v. *Porter*(44); *Reg.* v. *Connolly*(45); *Reg.* v. *Foy*(46) per Philp J., particularly at p. 243 and Wanstall J.; "A Legacy of Hadfield McNaghten & Maclean" by Sir Owen Dixon 31 A.L.J. 255, particularly at p. 260.)

When a judge directing a jury explains the meaning of the term "mental disease" he is explaining one element of a legal test of criminal responsibility; he is talking law and not medicine. Whether the accused at the relevant time was suffering from mental disease is a question of fact for the jury and, in deciding that question, they will usually have the assistance of medical men. But the criminal law does not attempt to define "insanity"; it merely states what degree of mental disease negatives criminality.

Mental disease of sufficient severity to fall within the provisions of s. 16 has, by the force of the section, the effect of negativing all criminal responsibility. That is clear from the introductory words of the section and from s. 381(1).

Naturally, there is a strong contrast between a provision having such an effect and a provision like s. 2 of the English *Homicide Act* 1957(47) which has the limited effect, when the evidence brings the accused within its provisions, of reducing a homicide, which in the absence of the section would amount to murder, to manslaughter.

Paragraph (*a*) of s. 16(1) applies only in cases where the mental disease, at the time the relevant act was done or omission made, was such as to render the accused incapable of understanding the physical character of his act or omission or knowing that such act or omission was one which he ought not to do or make. Thus, what is contemplated by that paragraph is a lack of capacity either to understand a simple thing, i.e. in effect, the nature of the conduct, or to know that that conduct is wrong according to the ordinary standards of reasonable people. Thus, for par. (*a*) to operate as a privative of criminal responsibility, a very high degree of mental disease must be shown to exist; indeed, the degree contemplated is quite inconsistent with any real culpability.

The foregoing describes the context in which par. (*b*) appears. And that context is not a section dealing with diminished responsibility but one defining circumstances in which criminal responsibility is lacking.

---

(44) (1933) 55 C.L.R. 182.
(45) (1959) 76 W.N. (N.S.W.) 184, at p. 185.
(46) 1960 Qd. R. 225.
(47) 5 & 6 Eliz. 2, c. 11.

The high water mark of the submissions for the appellant was reached when it was submitted that par. (*b*) operates where the act or omission was done or made under an impulse and the circumstances at the time were such that, by reason of mental disease, the accused was in such a condition that it could be said that there was "a substantial deprivation of the power to resist". If, as appears to be the case, the word "deprivation" in this submission is used as synonymous with "loss" and if counsel gives to the word "substantial" its natural meaning in this context which would include a loss which is something more than trivial or minimal (compare *Reg.* v. *Lloyd*(48)), then the submission must be rejected. For such a construction would be in stark contrast with the context and, in my opinion, in conflict with the text. Implicit in the paragraph is the notion that a state or condition, namely, "deprived of any power to resist" is related back to a cause, namely, mental disease. The paragraph operates only if the specified state or condition is the effect of mental disease. As there is this causative factor implicit in the provision, it is not surprising that the words "in substance" appear.

There are two situations which go to explain the presence of the words "in substance" and they are —

(a) there may have been some slight power of self-control in the relevant circumstances and at the relevant time but when the matter is looked at "in substance", it is so slight that a practical tribunal, looking at the essence or "substance" of the matter, should ignore it;

(b) the cause, mental disease, is not the sole cause of the alleged state of the accused; there is another concurrent cause but when the essence or "substance" of the matter is looked at that factor may be safely ignored.

In my opinion the word "substance" in the paragraph means "essence". The words "in substance" perform the function of directing any court applying the provision to ignore what is inessential. The court must look at the essence of the problem and determine whether the mental disease produced the result, in effect, that the accused was deprived of all power to resist.

It follows that I reject the suggestion that the words "in substance" are to be read as synonymous with the word "substantially". I do so because, in my opinion, the words "in substance" have their primary meaning which is, "in essence" and that meaning reconciles with the context and structure of the provision. To read the words "in substance" as meaning "substantially" would be inappropriate. The decision in *Reg* v. *Lloyd*(49) indicates the kind of difficulty which could arise if that view were taken.

(48) (1965) 50 Cr. App. R. 61. (49) (1965) 50 Cr. App. R. 61.

It has long been recognized that there may be great difficulty in distinguishing the type of case which the paragraph is designed to accommodate from cases such as crimes of violence or sexual crimes committed in circumstances where there is loss of self-control through terrible anger or very intense passion. And a person whose mind may not have been normal prior to the relevant time may get himself into such a state perhaps more easily than others. In such a situation the jury has a problem which has two aspects, namely, whether at the time the crime was committed he was capable of resisting the impulse to commit the crime and, if not, whether that condition was by reason of mental disease.

If one assumes for the moment that the paragraph is of doubtful import, it is then legitimate to turn to history and other legal literature. There is no doubt Sir James Stephen had great influence on the development of ideas in this area of the law. In his digest he stated the relevant law as follows with points he thought doubtful in brackets:

> "No act is a crime if the person who does it is at the time when it is done prevented [either by defective mental power or] by any disease affecting his mind
>
> (*a*) from knowing the nature and quality of his act; or
> (*b*) from knowing that the act is wrong [or
> (*c*) from controlling his own conduct unless the absence of the power of control has been produced by his own default].
>
> "But an act may be a crime although the mind of the person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act." (50)

He gave two illustrations which are relevant and they are:

> "A suddenly stabs B under the influence of an impulse caused by disease and of such a nature that nothing short of the mechanical restraint of A's hand would have prevented the stab. A's act is a crime if (*c*) is not law. It is not a crime if (*c*) is law.
>
> "A suddenly stabs B under the influence of an impulse caused by disease and of such a nature that a strong motive, as for instance the fear of his own immediate death, would have prevented the act. A's act is a crime whether (*c*) is or is not law."

In his *History of the Criminal Law of England*, Vol. II, p. 172, he said:

---

(50) Dig. Crim. Law, art. 27 (4th edn.).

> "I should be sorry to countenance the notion that the mere fact that an insane impulse is not resisted is to be taken as proof that it is *irresistible*. In fact such impulses are continually felt and resisted, and I do not think that they ought to be any greater excuse for crime than the existence of other motives, so long as the power of control or choice, which consists in comparing together different motives near and remote, special and general, remains."
>
> (The emphasis is mine).

It is clear that that learned author held the opinion that mental disease affecting capacity for self-control, but falling outside the *McNaghten Rules*, should only be a defence when the disease has, in effect, destroyed all power to resist the relevant impulse.

There are a number of references where this subject is discussed generally which I have considered (see Can. Bar Review (1929), Vol. 7, pp. 291-292; Can. Bar Review (March 1939), Vol. 17, p. 147; Can. Bar Review (1943), Vol. 21, p. 427; Columbia Law Review (1945), Vol. 45, an article commencing at p. 677, particularly at pp. 702-704; and, of course, the report of the Atkin Committee on Insanity and Crime (1923)).

Generally speaking, what emerges from that literature for present purposes, is that where the criminal law is administered in accordance with what may be broadly described as the English tradition, this defence has been construed as confined to circumstances indicated by the legal shorthand "irresistible impulse". And the reason for that is not hard to find and it may be stated as follows.

Where the mental disease operates to produce an impairment of the capacity for self-control which, for example, is sufficient to qualify as a "substantial" impairment, but barely so, you have a situation where, although there is substantial impairment, there is coexisting a degree of culpability which may, in a given case, be quite considerable. In such a situation the view is held that to allow the impairment of the power of self-control to operate to negative criminal responsibility is to frustrate an elementary purpose of the criminal law. And the justification for that view is found in the ancient maxim "*salus populi suprema lex*". There should not be freedom from criminal responsibility where there is a significant degree of culpability.

The result is that, in my opinion, the words "in substance" do no more than direct attention to the "essence" or "substance" of the matter and direct the tribunal of fact to ignore factors which it regards as inessential. These words do not qualify the concluding words "deprived of any power to resist" beyond the degree which I have indicated earlier. A man either has the power to resist an impulse or he has not. If he has that power and fails to use it, this

paragraph will not operate to free him from criminal responsibility. The paragraph does not free him from criminal responsibility if all that can be proved is that, by reason of mental disease, his ability to resist the impulse was merely impaired. If the jury rejects the proposition that by reason of mental disease he was deprived of power to resist the impulse, it will avail him nothing to point to impairment even if the impairment is substantial. But, of course, at the end of the day, the jury will apply the legal criterion in a common sense way. It should not be overlooked that the question of what verdict is appropriate or required by an application of the legal criterion to the facts proved is the ultimate question of fact for them.

There is nothing in the decision in *Hitchens* v. *The Queen*(51) which is inconsistent with what I have written. It is true that at p. 71 of the report the court said that the learned trial judge explained the words "in substance" "in a way to which no objection can be taken". It is also true that one of the words the learned trial judge used to explain those words was the word "substantially". But, of course, the applicant Hitchens could not take any valid objection to that; treating "in substance" as synonymous with "substantially" could not have operated to his disadvantage.

It follows that, in my opinion, the attack made on the summing-up in ground one of the notice of appeal must fail. With great respect, for the reasons I have given, I do not agree with the learned trial judge's statement to the jury "in substance means substantially". But that error could not have operated to the disadvantage of the accused. Looking at the summing-up as a whole, and in substance, his Honour gave the jury the correct legal criterion.

Ground 2.

Several times in the course of his submissions the learned senior counsel for the appellant said, in effect, that the jury could only have been concerned with the defence of insanity which, for all practical purposes, reduced itself to the question whether the accused had a defence under s. 16(1)(*b*). Having carefully considered all the evidence I am satisfied that that concession was a proper one and I propose, hereafter, to consider the case on that basis.

It is convenient at this stage to turn to the Crown evidence called in rebuttal. An examination of that evidence will show that there was a certain amount of common ground shared by the expert witnesses on both sides. Dr. Dick expressed the opinion that the accused was suffering from a mental disorder. He said he thought

(51) [1962] Tas. S.R. 35.

that, from his early days, the accused had a personality disorder of considerable magnitude. He described the brain damage which the accused suffered in 1969 and referred to the fact that, later, he suffered meningitis. He described the physical consequences of the accused's injuries. He referred to significant facts from the accused's life prior to the gunshot wound in 1969.

Dr. Dick expressed the view that there was no evidence that the accused's personality had changed after the gunshot wound. It should be remembered that Dr. Dick had heard almost all the evidence in the case. He was asked the following questions and gave the following answers (these are extracted from various parts of the transcript — it is not one continuous extract):

Q. "Is it your opinion that the accused was so afflicted by mental disease as to be substantially deprived of any power to resist an impulse to kill?"
A. "I do not think that he was deprived of any power in the sense of all power to resist."
Q. "Had there been anybody present do you think that this child would have died?"
A. "I'm certain not."
Q. "Does that indicate to you that his capacity to resist impulses was not gone?"
A. "Yes".
Q. "Not substantially gone?"
A. "Yes".

In cross-examination he said in effect that he thought it likely that, at the time, the accused was deprived of some power to resist and then he was asked:

Q. "Do you agree that he had lost a very large measure of control?"
A. "I have no way of measuring that so I can't answer that question."
Q. "You can't measure its magnitude or its smallness?"
A. "I'm afraid I can't, Sir."
Q. "Well I put to you that he has largely lost the ability to control his impulses."
A. "I can't answer that. I don't know whether he has."
Q. "So you're left in a state of just not knowing, is that the situation?"
A. "I'm left in the state of not knowing accurately."
Q. "And you would not dispute would you that damage of that nature (counsel was referring to the physical brain damage) could very largely destroy a man's control of his impulses?"
A. "I'm sorry Sir, I have no way of measuring that. I can't honestly answer that question. It would certainly affect it

but how much or how little I'm unable to answer, I'm sorry."

Q. "I put it to you that in those circumstances and, knowing those circumstances, O'Neill had no power, in substance, by virtue of mental disease of resisting the impulse to kill that he had?"

A. "I would think that he had the power but he did not use it, Sir."

Dr. Boland examined the accused on one occasion only for one hour and was present when certain narcoanalysis tests were done by Dr. Burges-Watson.

He said he found no evidence of emotional incompetence in the accused and he appeared very well controlled when he saw him.

But he agreed that the accused was suffering from a mental disorder of long-standing, probably starting off in adolescence. He said that brain damage can cause personality change but the evidence of the witnesses did not persuade him that there had been any material change in the accused's personality since the head injury.

He said he had no evidence "on clinical examination" which suggested he was "substantially deprived" of any power to resist an impulse to commit the crime in question.

Under cross-examination he said he could not accept the hypothesis that in all probability the accused would not have the capacity to resist the impulse because he had no proof of it. And he added, in effect, that he had no proof that he was incapable, basing himself on the clinical examination.

The appellant called a number of witnesses to prove his personal, social and medical history. I do not include in this category the psychologist and psychiatrists. An examination of the transcript will show that, generally speaking, the Crown did not challenge their veracity. In the case of each of these witnesses the cross-examination was directed to clarifying points which were thought not to be clear, obtaining additional information where possible and, generally, putting questions to the witnesses directed to aiding the jury in assessing the significance of the witness' evidence in relation to the relevant legal criterion. But the defence was left with the objective facts which the witnesses came to establish; the Crown did not seek to say that these assertions were untrue.

What I have sought to emphasise is that there were these objective facts unchallenged in cross-examination, and that the expert witnesses shared a certain amount of common ground. What remained as the real area of dispute was whether the defence had proved, on the balance of probabilities, that, bearing in mind this

personal, social and medical history, the circumstances of the crime so far as they were known, the accused's behaviour before and after the crime, the police evidence, the unsworn statement and the expert opinions, this brain-damaged accused, with an admitted personality disorder, had killed in circumstances where, by reason of mental disease, he was unable to resist the impulse to kill.

There was one further point which was, in effect, common ground and that was that the accused is a liar, the defence case on that being that he was a pathological liar. But he is the only person still alive who was at the scene of the crime. And the defence was that he cannot remember what occurred.

The defence was faced with a difficulty which was adverted to by Lord Parker C.J. when giving his decision in *Reg.* v. *Byrne*(52) (a decision dealing with s. 2 of the *Homicide Act,* 1957). His Lordship said:

> "Furthermore, in a case where the abnormality of mind is one which affects the accused's self-control the step between 'he did not resist his impulse' and 'he could not resist his impulse' is, as the evidence in this case shows, one which is incapable of scientific proof. *A fortiori* there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses. These problems which in the present state of medical knowledge are scientifically insoluble, the jury can only approach in a broad, common-sense way."(53)

I hasten to add that I am well aware that his Lordship's observation is on a question of fact and, that being so, it is not an authoritative statement. I cite it only because I find it a convenient statement of the principal difficulty I feel about this case; here the appellant had a good deal of opinion evidence of a scientific kind but little by way of objective fact on which to base those opinions.

Dr. Burges-Watson's evidence shows that he was aware of the difficulty which the defence faced. In effect, he said there were the following difficulties:

1. No weight could be given to what the appellant said when trying to determine his motivation and behaviour.
2. Although there was clear evidence of brain damage, in fact extensive brain damage, the precise extent of it could not be determined.
3. ". . . the information provided by O'Neill's parents, relatives, and mostly his mother, cannot all be questioned and accepted. Precise details of his behaviour and emotional state, prior to

---

(52) [1960] 2 Q.B. 396. (53) [1960] 2 Q.B. 396, at p. 404.

the shooting accident in 1969, cannot therefore be said to be completely available. However, amongst all the information that one does get from various relatives and friends and other people a reliable consensus which indicates that he obviously did have a very disturbed personality."

And it should not be overlooked that Dr. Burges-Watson said that the appellant had told him "quite frequently" that all the things said about him as a child and the disturbances in childhood were a lot of "elaboration" and lies by his "parents" trying to defend him. In that context, I do not overlook that some of the defence witnesses said that he was a pathological liar.

I now turn to summarize very briefly the essential points made by the appellant's counsel in his final address. In essence this is what he put to the jury as to the facts of the case:

1. He outlined the evidence concerning the appellant's conduct before the head injury.

2. He referred to the brain damage and its significance.

3. He said that the fact that there was not more evidence of ungovernable rages or ungovernable behaviour in the five or six years after the shooting incident did not mean that there was not such a loss of control. There was simply a lack of evidence on that point but the sort of situation which led to the impulse which the defence said he could not resist "may not hitherto have arisen".

4. He referred to the evidence which suggested that brain damage of the kind suffered by the appellant may make worse pre-existing psychiatric tendencies.

5. He submitted that stresses can cause an increase "in the risk factor of a psychotic person" who suffers "this type of brain damage". In support of his assertion that the appellant was subject to stress at the relevant time he referred to facts which do not appear to have been disputed.

6. He pointed out that what happened in the bush on the day the killing occurred there was not known.

7. He reminded the jury of the opinions expressed by the expert witnesses for the defence and urged the jury to prefer those opinions to those given by the Crown experts.

What emerges from a consideration of that speech which, in my opinion, put the defence adequately, is that there was a serious weakness in the defence case and that was that there was a paucity of objective facts to ground the opinion evidence. To turn back to Lord Parker's observation on a factual point, the defence in this case was trying to stretch science beyond its present limitations. Anyone who thinks that that is an overstatement of the position,

would do well to read Lady Wootton's penetrating observations in a lecture she gave at Cambridge in 1960 reported 76 L.Q.R. p. 224 under the title "A layman's view of Diminished Responsibility".

In this case the learned Crown Advocate was entitled to reply. I have outlined what he had to meet. He met it by traversing the same ground which learned counsel for the accused had traversed but, of course, suggesting a different inference on the ultimate issue.

So that was the case which the learned trial judge had to sum up. It should not be overlooked that, unless something important has been overlooked by counsel — in which event the better practice is to mention it and give counsel an opportunity to deal with it before the summing-up begins — generally speaking, a judge summing-up should not go off "on a frolic of his own"; by that I mean that he should not raise fresh arguments. The reason for that is that the final decision of the jury should be based, as far as possible, on tested evidence and tested arguments. The real question here was in the realm of inference. If his Honour had suggested to the jury that inferences, favourable to the accused, were open which were not mentioned by counsel for the accused, the learned Crown Advocate would not have had an opportunity to answer or "test" that.

His Honour gave the jury a correct direction on the law. He put the defence and referred to the important parts of the evidence. In the circumstances, I do not think that there was any need to go further than that. In the end the case depended on whether the jury drew, or declined to draw, a particular inference on a quite narrow point. The jury could not have been in doubt as to what that point was. I should add that his Honour asked counsel for the appellant whether they wanted any further direction. They asked for a further direction on one point of law and he gave that direction.

Ground 3.

Dr. Burges-Watson said this: "Well, there must have been an impulse. There is an impulse involved with all forms of behaviour. That is what produces behaviour". I do not think that the jury would have had any difficulty in understanding that.

The word "impulse" is an ordinary word which has its ordinary meaning in this section. I do not think that the jury needed any specific direction on that point. The accused's difficulty was not to prove that he experienced an impulse to act as he did; he must have had that experience; that is clear from what he did. His problem was to satisfy the jury that that impulse was one which, by reason of mental disease, he could not resist.

Ground 4.

It will be clear from what I have written already that I reject this ground of appeal. The jury was entitled to accept the evidence of Dr. Dick and Dr. Boland. And, of course, in addition, they were entitled to reject the expert evidence called by the defence. It is clear that the jury was entitled to reject that evidence on the ground that the opinions lacked an adequate factual foundation and that the reasoning disclosed in them was essentially circular and unconvincing.

For these reasons, I am of the opinion that in so far as the notice of appeal seeks leave to appeal, leave should be granted. The appeal should be dismissed.

Leave to appeal granted.
Appeal dismissed.

Attorneys for the applicant: *Crisp, Wright & Brown.*

F.D.C-S.