It might be thought that the issue is unimportant, in that, "irresistible impulse" is not a psychologically meaningful term, and is not likely to be raised by either side at the trial (in view of the well-settled rule that irresistible impulse *per se* does not constitute insanity and is no defence to a criminal charge). Indeed, neither the High Court nor the Privy Council seem to have been convinced that the term need ever have been used by the trial judge at all. But such a view is probably too easy to be correct. The truth is that "irresistible impulse", as an ambiguous and discredited legal notion, is merely the cloak for something far more immediately intelligible and compelling—the inevitable tendency of a jury to ask, in any case where insanity has been discussed, "Could he help doing it?" The law must have some way of dealing with that question. The ordinary way has been to instruct the jury that they should put it out of their minds and answer a different set of questions. The High Court pointed out that the answer to the common-sense question might assist the jury in deciding the legally relevant questions defined in the M'Naughten Rules. The Privy Council have now ruled that (if the matter is raised) medical evidence must be given as to the connection between the conclusion, "He could not help doing it", and the (legally relevant) conclusions, "He did not know the nature and quality of his act" or "He did not know that he was doing wrong". To the tension between the common-sense question and the legal questions there has thus been added a tension between common-sense concepts, legal concepts and the concepts of contemporary psychology.

The present state of the law relating to criminal insanity cannot be said to be conducive to legal certainty, the professional integrity of witnesses, or the sound administration of justice by judge and jury.

CONTRACT

Implied Term in the Sale of Goods

A recent case involving the applicability of an implied term in a contract for work done and materials supplied is that of *Peters* v. *C. W. McFarling Floor Surfacing Ltd.*[1]

Peters had engaged the respondents to lay "Expanko" tiles on the floors of two rooms in his house. The manager of the company inspected the floor and the ventilation under it before commencing operations, and was satisfied that there was no undue dampness in the floor, and that the ventilation was sufficient. On completion of the work, the floor seemed entirely satisfactory. After 24 hours, however, the tiles began to buckle and lift, and the adhesive material had become quite ineffective. Tests of the flooring revealed that some of the wood contained twice the usual percentage of water, and this had caused the tiles to buckle. The excess moisture resulted from the floor being covered, and from insufficient ventilation under the floor. The appellant subsequently had additional ventilation installed, and the floor re-tiled by another company.

1. [1959] S.A.S.R. 261.

The respondents brought an action for the contract price which the appellant had refused to pay upon the ground that the work was valueless; the appellant counter-claimed for the additional expense incurred by having new tiles laid by another contractor. In the lower court it was found as a matter of fact that the excess moisture in the floor was unknown to both parties, and could not be detected by an examination of reasonable care, such as was made by the company's manager.[2]

On appeal before Reed J., the appellant claimed that the work was valueless, and that the implied term in the contract that the work should be done in a good and workmanlike manner had not been fulfilled.

But Reed J., applying the decision in *G. H. Myers* v. *Brent Cross Service Co.*[3] held that such an implied warranty in a contract for work done and materials used was analogous to a warranty of fitness implied in the sale of goods.[4] Thus, for the appellant to succeed on his claim, and for the implied term to arise, he had to prove that he had made known expressly or by implication the "particular purpose" for which the materials were required, so as to show that he relied on the contractors' skill and judgment.[5] This he had failed to do, as the particular purpose here was to cover a badly ventilated floor, and this had not been made known to the contracting company.

Obviously the particular purpose may be made known impliedly as well as expressly.[6]

Besides referring to *Myers* case[7] Reed J. relied strongly on two other cases—one relating to the sale of goods, and one relating to a contract for work and materials—where such particular purpose had not been made known to the seller or contractor, with the result that the plaintiff could not recover.

The first of these was *Griffiths* v. *Peter Conway Ltd.*[8] where the plaintiff bought a Harris Tweed coat which gave her dermatitis, and her action failed because she had not made known to the defendant the particular purpose for which it was required, namely, to clothe a person whose skin was allergic to Harris Tweed. At the time of buying the coat she did not know of her allergy,[9] and could hardly be said to be in a position to inform the defendants of this particular purpose. However, as was the case with Mr.

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2. "In my opinion", the Court said, "the plaintiff company has proved that its employees did their work with reasonable skill, and in a good and workmanlike manner . . . and that the failure of their work was due to circumstances for which they were not responsible". (Ibid, at 265.)
3. [1934] 1 K.B. 46.
4. See Sale of Goods Act 1895-1937, sec. 14.
5. Sale of Goods Act sec. 14(1).
6. Thus a carpet cleaner has been held liable to injury due to his leaving the end of an adjoining carpet loose—*Kimber* v. *Willett* [1947] 1 K.B. 570. Motor repairers have been held liable for faulty repair of brakes on a customer's car, even though part of the work was delegated to a sub-contractor—*Stewart* v. *Reavell's Garage* [1952] 2 K.B. 545.
7. Supra n. 3.
8. [1939] 1 All E.R. 685.
9. A note in 29 A.L.J. at p. 349 suggests that the plaintiff did know of her allergy. This, it is submitted, was not found by the trial judge, who went to great lengths in his judgment to establish by medical evidence that she was allergic at the time of buying the coat.

Peters, who did not know of the peculiarity of his floor, she could not recover because she did not make this particular purpose known.

The other case on which Reed J. relied was *Ingham* v. *Emes*.[10] In this case Mrs. Ingham had her hair dyed with Inecto which required a test to be carried out on the customer's skin before it could be safely applied. In this case, the hairdresser carried out in the proper manner the test required by the manufacturers, and the customer's skin showed no reaction to it. A week later she had her hair dyed, and within a few days she was found to be suffering from acute dermatitis, which was undoubtedly due to the "Inecto". She thereupon claimed damages in the county court for breach of contract and for negligence, and was allowed the claim for breach of contract on the ground of breach of an implied warranty. She was "of the rare type to whom the ordinary test will not apply, but who is allergic to a large dose". It was proved that the customer knew that she was allergic to Inecto, but had not disclosed this fact to the hairdresser. The defendant appealed on the claim for breach of contract, and the Court of Appeal reversed the decision of the county court.

Denning L.J. held that the case was analogous to the sale of goods, and that Mrs. Ingham could not rely on an implied term because she did not make known to the hairdresser the particular purpose for which the dye was required: namely, the dyeing of the hair of a person known to be allergic to Inecto.

However, it is submitted, with respect, that *Ingham* v. *Emes*[11] was wrongly decided, and it not a case of an implied term at all, but rather of a breach of an express term. There were, on the bottle, instructions for the use of the dye as follows:

> "The manufacturers draw attention to a simple and easy test which in the opinion of eminent skin specialists will disclose any pre-disposition to skin trouble from the use of the dye. The test must, as a matter of routine, be employed on each occasion prior to using the dye, regardless of the fact that it has been used with success on the same persons on a previous occasion".

Then followed in large letters:

> "It may be dangerous to use Inecto Rapid without this test".

The test was described and the instructions continued:

> "If no irritation has been experienced and there is no redness or inflammation then the skin is free from predisposition and the colouring may be used".

Mrs. Ingham herself read these instructions, and as Denning L.J. said[12]: "She was apparently a perfectly normal person, and the assistant said, or as good as said, to her: 'If you pass the test you may safely have Inecto'". There, it is submitted, was the express term on which Mrs. Ingham should have recovered. Despite this the learned Lord Justice then proceeded to hold this to be an implied term: "There would in those circumstances be an implied term that

10. [1955] 2 Q.B. 366.
11. Ibid.
12. Ibid, at 373.

Inecto was reasonably fit for the purpose of dyeing the hair of this particular person if she passed the test". Once this is called an implied term, the onus is of course on the plaintiff to prove that she made known the particular purpose for which the dye was required, and this Mrs. Ingham failed to do, and so the appeal was allowed.

"The way this result is reached in law is this", said Denning L.J.[13]: "in a contract for work and materials (such as the present) there is an implied term that the materials are reasonably fit for the purpose for which they are required: see *Myers* v. *Brent Cross Service Co.*[14] This term is analogous to the corresponding term in the sale of goods: See *Stewart* v. *Reavell's Garage.*[15] In order for the implied term to arise, however, the customer must make known to the contractor expressly or by implication the "particular purpose" for which the materials are required so as to show that he relies on the contractor's skill or judgment. The particular purpose in this case was to dye the hair, not of a normal person, but of a person allergic to Inecto. Mrs. Ingham did not make that particular purpose known to the assistant. She cannot therefore recover on the implied term". This was undoubtedly a correct statement of the law, but it is submitted that it was misapplied in *Ingham* v. *Emes* where there was an express term in the contract.

A further question arises in this branch of the law on implied terms in the sale of goods, namely to what extent must the particular purpose be made known to the vendor or contractor? From *Griffiths* v. *Peter Conway Ltd.*[16] it would appear that the particular purpose which should have been made known was to supply a coat not for a normal person, but for one who is allergic to Harris Tweed. In *Ingham* v. *Emes,* the particular purpose was to dye the hair, not of a normal person (i.e., a person who had passed the test), but of a person allergic to Inecto. The Court of Appeal, however, appear to have equated Mrs. Ingham's knowledge with the duty to disclose her idiosyncrasy. Romer L.J. said[17]: "In my opinion the decisive fact in this case which precludes Mrs. Ingham from succeeding is that when she had her hair dyed with Inecto in 1954 she knew, but the assistant did not know, that she had in 1947 suffered ill-effects from the application of this dye". It is submitted that an implied term in a contract cannot be made to depend on knowledge of a particular fact which, only if undisclosed, will bring the implied term into operation. Here, it is respectfully submitted, the Court of Appeal confused the claim in contract on the implied term with a claim of contributory negligence in tort. Be that as it may, the particular purpose is defined as being for a person allergic to Inecto, and not a normal person.

Similarly in *Peters* v. *McFarling,* the particular purpose was not to cover a normal floor, but to cover an insufficiently ventilated floor, and this purpose, for Mr. Peters to succeed, had to be made known to the plaintiff company even though both parties had every reason to believe that the floor was adequately ventilated.

13. Ibid, at 374
14. Supra n. 3.
15. Supra n. 6.
16. Supra n. 8.
17. [1955] Q.B. at 377.

Thus it is submitted that for a person to succeed on such an implied term in a contract for the sale of goods or for work done, he must either:

(a) Have knowledge of the peculiarity which will cause damage, and make that known to the seller, or

(b) he must make known to the seller every conceivable consequence which may arise, and which he has no reason to believe may exist—a seemingly impossible duty to perform.

POLICE OFFENCES ACT

Police Rights on Private Property

On the morning of Anzac Day, 1959, a plainclothes police constable out driving with his wife observed a man "slumped over the wheel" of a stationary utility. As he watched, the man staggered from the vehicle and, assisted by another, made his way into his house. The constable followed, but on disclosing his identity, was ordered aggressively to leave the premises, whereupon he arrested the man on charges of driving under the influence of liquor and using indecent language.

On appeal[1] from dismissal of a count of resisting a member of the police force in the execution of his duty, Napier C.J. was called upon to construe s.75 of the Police Offences Act, which reads,

> "(1) Any member of the police force, without any warrant other than this act, at any time of the day or night, may apprehend any person whom he finds committing or has reasonable cause to suspect of having committed, or being about to commit, any offence."

As a matter of strict literal interpretation, the answer to the question whether a constable can lawfully enter or remain on the premises of a suspected person when denied permission or requested to leave is obvious; but the result, when pronounced by a court, is nevertheless alarming. Napier C.J. held:

> "that the plain intention of the enactment is to give the constable such authority as would be given by a warrant for the apprehension of the suspected person. I am therefore, unable to accept the suggestion that this gives the member of the police force no right or authority to follow the suspected person onto private property for the purposes of effecting the arrest.
>
> I can see no reason why any such limitation should be placed upon the general words of the statute."[2]

The once prevailing common law rules provide an instructive comparison with this result.

1. A constable has a power—indeed a duty—to arrest without warrant where a felony is suspected. This power extends to private

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1. *Dinan* v. *Brereton* [1960] S.A.L.S. Judgt. Scheme, 172.
2. Ibid, p. 175.