that the policy requirements outlined above are not offended, our courts should recognize the efficacy of foreign legal systems in creating interests in local land. The search for the sources of such interests in implied contractual relations is, however, somewhat clumsy, and, as observed above, technically suspect, and it may be that a more scientific solution would be found in a recognition of equitable rights.

To sum up, although the Privy Council expressed doubt as to whether, if we had found it necessary to decide the substantive issue raised in *Callwood* v. *Callwood,* it could have looked beyond *Welch* v. *Tennent,*[31] it is submitted that there would have been no logical necessity to apply that decision, and its application would have gone far beyond the requirements of public policy and created an unfortunate precedent.

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UNCONTROLLABLE IMPULSE AS EVIDENCE OF INSANITY

ATTORNEY-GENERAL v. *BROWN*

Attorney-General for South Australia v. *Brown*[1] is a case in which the factor which assumed outstanding importance in both the High Court and Privy Council appeals was one which counsel for the accused had most strenuously tried to keep out of the trial. The importance assumed by the issue of uncontrollable impulse in all three appeals is remarkable, considering that counsel for the accused did not raise the issue at the trial, nor was any evidence given on behalf of the accused that uncontrollable impulse played any part in the crime. Uncontrollable or irresistible impulse was first mentioned by the trial judge in his direction to the jury and it is his comments on this issue that caused the rare difference of opinion between a unanimous High Court and the Privy Council. Despite the strange way the issue entered the case, *Attorney-General* v. *Brown* will no doubt always be cited as one of the leading cases on the relationship between legal insanity within the M'Naghten Rules and uncontrollable or irresistible impulse.

It is now well settled that the fact that the accused, at the time of the commission of the crime, could not resist the impulse to commit the crime does not by itself constitute a defence to the charge of murder.[2] Although medical evidence may be to the effect that the accused was "insane" he is not considered legally insane unless he either did not know the nature and quality of his act or he did not know that what he was doing was wrong. This is the test of criminal responsibility laid down in the so-called M'Naghten Rules. In the circumstances it is not surprising that counsel for the accused in *Brown's Case* did not rely on any contention that the accused was acting under an uncontrollable impulse.

To understand the issues in *Brown's Case* it is necessary to go into the facts fully. John Whelan Brown, the accused, was charged and convicted of the murder of Neville Montgomery Lord on an outback sheep station in South Australia. There was no apparent motive for the crime. Brown had been employed as a station-hand on Lord's property for three days when the shooting occurred and there was no evidence of any quarrel between them. The rifle Brown used to shoot Lord had belonged to another station-hand on the property who, at the time of the shooting, was away from the property. The rifle had been left in his room in a position where it was visible from the door. According to a statement

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[31] (1891) A.C. 639.
[1] (1960) A.C. 432; (1960) 34 A.L.J.R. 18.
[2] *R.* v. *Kopsch* (1925) 19 Cr. App. R. 50; *R.* v. *Flavell* (1926) 19 Cr. App. R. 141.

made by Brown to the police soon after his arrest he had woken up during the night, taken the rifle and shot Lord while the latter slept. Lord's wife was in another room and Brown had run out of the house when she appeared. Brown then took the rifle and set off into the bush. He was arrested some five days later twenty-five miles away. As he gave himself up he said "Is he dead?".

In the statement made to the police Brown admitted that he had done the shooting. He said that neither Lord nor any other person had given him any reason to bear malice. Then he was asked certain questions and the following rather improbable dialogue ensued:

Q. Is there any reason you wish to offer for your conduct?
A. Even though I do recall everything and I did it, I don't think I was responsible for my actions.
Q. You knew that the rifle was loaded? A. Yes.
Q. You knew that when you pulled the trigger it would discharge a missile? A. Yes.
Q. And that if the missile hit anyone it would at least maim them and probably kill them? A. Yes.
Q. Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them? A. Yes, but I could not help myself.

At the trial, before Abbott, J., the defence pleaded insanity. In support of this plea the defence called Dr. Forgan, a psychiatrist. Dr. Forgan stated that he believed that at the time Brown killed Lord he had lapsed into a temporary state of simple schizophrenia. Dr. Forgan deposed that Brown was quite obviously a schizoid personality but he admitted that as far as he knew Brown had not suffered from the disease schizophrenia either prior to or since the killing. Dr. Forgan stated that in his opinion Brown did not know at the time of the shooting that what he was doing was wrong, because he was in this state of schizophrenia. He considered that Brown had run away after the shooting because of panic and that the statement to the police that "he couldn't help himself" was merely a "reconstruction" by Brown of his state of mind at the time of the shooting. As the psychiatrist said, it was easy enough for him to give an account of his physical actions but not as easy to give an account of his feelings.

Dr. Shea, another psychiatrist, was called on behalf of the prosecution. Dr. Shea agreed that Brown was a schizoid personality but he denied that simple schizophrenia could have a sudden onset and disappear in the manner described by Dr. Forgan. He considered that Brown was not suffering from schizophrenia and that at the time of the shooting he did not know that what he was doing was wrong.

Both psychiatrists were therefore agreed that at the time of the shooting Brown knew the nature and quality of this act but they were in disagreement as to whether he knew that what he was doing was wrong.

At the trial, Abbott, J. dealt briefly with the fact that the crime was motiveless.

"Gentlemen," he said, "throughout the centuries of civilization crimes have repeatedly been committed without any apparent or discoverable motive. . . You may, perhaps, remember the words of Shakespeare — 'How oft the sight of means to do ill deeds make ill deeds done'."

His Honour continued:

> You may, perhaps, think that on November 23, the accused, when he shot Neville Lord was acting on an uncontrollable impulse — a dreadful impulse which arose suddenly and which he was unable to control. If that view should commend itself to you, it is my duty to direct you that that is no defence in law. The defence of uncontrollable impulse is unknown to our law and if that, in your considered view, is the only explanation of the death caused by the accused on 23rd November it is your duty to bring in a

verdict of guilty of murder . . .

His Honour later returned to this question of uncontrollable impulse. He referred to Brown's statement ". . . but I could not help myself". His Honour said:

> These words, gentlemen, may suggest to you that the accused was thereby setting up the defence of "uncontrollable impulse" which you may think is the true explanation of what he did, but, as you will remember, gentlemen, I have directed you, if that be the true explanation of what the accused did, that is no defence, and he is guilty in law of the crime charged.[3]

These parts of His Honour's direction appear to have been the first mention of uncontrollable impulse in the trial.

The accused was found guilty and sentenced to death. After an unsuccessful appeal to the South Australian Court of Criminal Appeal, Brown applied for special leave to appeal to the High Court, where the application was heard by Dixon, C.J. and McTiernan, Fullagar, Kitto and Taylor, JJ. who delivered a unanimous judgment.[4]

The High Court took exception to both passages from the learned trial judge's direction quoted above. In the opinion of Their Honours:

> Whatever the learned Judge may have had in mind in using the word "only" when he first gave the direction about uncontrollable impulse the second statement says in plain terms that because the killing was done under uncontrollable impulse, if that were the jury's opinion, therefore it amounted to murder and they must convict the prisoner. It may be true enough that although a prisoner has acted in the commission of the acts with which he is charged under uncontrollable impulse a jury may nevertheless think that he knew the nature and quality of his act and that it was wrong and therefore convict him. But to treat his domination by an uncontrollable impulse as reason for a conclusion against his defence of insanity is quite erroneous. On the contrary it may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. The law has nothing to say against the view that mind is indivisible and that such a symptom of derangement as action under uncontrollable impulse may be inconsistent with an adequate capacity at the time to comprehend the wrongness of the act . . .
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> *For that reason, even if no more had been said than that that uncontrollable impulse does not amount to a defence, the fact that the subject was mentioned would make it necessary to put before the jury the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree . . . .*[5]

The High Court consequently gave special leave to appeal, allowed the appeal and ordered a new trial. The Crown then appealed to the Privy Council where the appeal was heard by a Board consisting of Viscount Simonds and Lords Radcliffe, Tucker, Jenkins and Morris.[6] Their Lordships allowed the appeal, setting aside the High Court's order for a new trial. In the opinion of their Lordships, delivered by Lord Tucker, "the law will not recognise uncontrollable impulse as a symptom from which the jury may without evidence infer sanity within the M'Naghten Rules".

Their Lordships considered that the statement of the High Court printed in italics above:—

> would naturally be read by the Judge who presides over the new trial and by all Judges in similar cases in States where the English common law

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[3] (1960) A.C. 432 at 442.
[4] (1959) 33 A.L.J.R. 89 *Sub. nom. Brown* v. *The Queen.*
[5] *Id.* at 93 (italics supplied).
[6] Special leave to appeal had been given previously by the Privy Council.

> prevails as requiring them to tell the jury *as a matter of law* and in the absence of any medical evidence to that effect that irresistible impulse is a symptom of some disease or disorder of the mind which, although not preventing the patient from knowing the nature and quality of his Act, yet does prevent him from knowing that it is wrong.
> . . . Their Lordships can find no support for the view that this accurately represents the criminal law.[7]

The Privy Council thus directed their main attack on the paragraph of the High Court's judgment quoted in italics above. In order to discover Their Lordships' precise reason for reversing the High Court it is necessary to examine their consideration of Brown's second ground of appeal. This, it is submitted, was the real ground on which the High Court had allowed the appeal. This ground was . . .

> That the Judge's references to irresistible impulse were so worded that the jury would or might infer that even if they were satisfied that the respondent did not know that what he was doing was wrong they must nevertheless find him guilty of murder if they thought he was acting under irresistible impulse.[8]

The High Court had considered that the effect of the direction to the jury was that if they came to the conclusion that the cause of the shooting was uncontrollable impulse, then they must reject the plea of insanity.

The Privy Council rejected this interpretation, saying that the direction must be read as a whole. In the view of their Lordships, if this is done, it would be unreasonable to conclude that the language used by the trial Judge would lead the jury to believe that: "even if satisfied that the respondent (Brown) did not know that what he was doing was wrong they must find him guilty of murder if they thought that he was acting under an irresistible impulse".

The area of actual disagreement between the High Court and the Privy Council, on the facts of this case, is therefore very small. It rested on a question of interpretation and the Privy Council did not, as might seem at first glance, disapprove the view of the High Court that uncontrollable impulse could be a symptom of M'Naghten insanity. Indeed, their Lordships expressly approved the statement of Latham, C.J. in *Sodeman* v. *The King*;[9]

> The law recognizes that mental disease manifested in, for example, what is called "uncontrollable impulse" may also be manifested in lack of knowledge, or incapacity to have knowledge, of the nature and quality of an act of its character as a wrong act. Such an impulse may be evidence of this very lack of capacity.[10]

The Privy Council pointed out, however, that in *Sodeman's Case*[9] there was evidence of the relationship between uncontrollable impulse and M'Naghten insanity which was absent in *Brown's Case*. It is this point which, it is suggested, is the real difference of opinion between the High Court and Privy Council, though the High Court was able to proceed on a broader principle because of its interpretation of the trial judge's direction.

The High Court definitely seems to have taken the view that, in a case of this kind, the trial judge should point out to the jury that the manifestation of an uncontrollable impulse may be very strong evidence that the accused did not know that what he was doing was wrong, even though no medical evidence has been given in the case that this is so. This view seems to be an extension of the statement by Dixon, J. (as he then was) in *Sodeman's Case;*

> It is one thing . . . to say that, if he is able to understand the motive of his

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[7] (1960) A.C. 432 at 448.
[8] *Id.* at 455.
[9] (1936) 55 C.L.R. 192.
[10] *Id.* at 205.

> act and to know that the act is wrong, an incapacity through disease of the mind to control his actions affords no excuse and leaves the prisoner criminally responsible. It is another thing to suppose that inability through disease of the mind to control conduct is in opposition to an incapacity to understand the quality of an act and its moral character. Indeed, while negativing the rule contended for, it is important to bear steadily in mind that if through disorder of the faculties a prisoner is incapable of controlling his relevant acts, this may afford the strongest reason for supposing that he is incapable of forming a judgment that they are wrong and in some cases even of understanding their nature.
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> . . . In general it may correctly be said that, if the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented from knowing that what he is doing is wrong.[11]

The view of Sir Owen Dixon seems to be that uncontrollable impulse may be such strong evidence of M'Naghten insanity that in certain cases, it may be unnecessary for medical evidence to be adduced to establish the relationship between the two. It is this proposition which is rejected by the Privy Council in *Brown's Case*.

On the authorities the view of the Privy Council appears to be correct. There appears to be no situation where the Court has a duty to put to the jury a proposition of fact, especially of a medical nature, on which evidence has not been given. Nevertheless, one reaches the rather unfortunate conclusion in this case that if counsel for the accused had asked Dr. Forgan whether the manifestation of an uncontrollable impulse in Brown aided him in coming to the conclusion that Brown did not know that what he was doing was wrong then on the authority of *Sodeman's Case*, the trial judge would have had to direct the jury on "the true operation of uncontrollable impulse as a possible symptom of insanity". But then, as the Privy Council pointed out, the distinction between what the law presumes and what the law will listen to is of the first importance.

The views expressed in *Brown's Case* do not represent a simple isolated case of difference in judicial opinion. The view taken by the High Court in this case is a further example of the liberal interpretation which the High Court, notably influenced by Sir Owen Dixon, has given to the M'Naghten Rules. Although this interpretation has not been expressly rejected by the English Courts, it does seem to be contrary to the construction put on the M'Naghten Rules by the English Courts. The general attitude of the High Court to the M'Naghten Rules, which is reflected in the cases of *R* v. *Porter*,[12] *Sodeman* v. *The King*[13] and *Stapleton* v. *The King*[14] is examined by Professor Norval Morris in an essay entitled *The Defence of Insanity in Australia*.[15] The furthest the High Court has gone hitherto in its original interpretation of the M'Naghten Rules was in *Stapleton's Case*, in which it declined to follow the English Court of Criminal Appeal decision in *R v. Windle*.[16] In that case the High Court held that "wrong" in the M'Naghten Rules meant "morally wrong" and not "wrong according to law" as the Court of Criminal Appeal had held.

The doctrine evolved by the High Court in the *Porter*, *Sodeman* and *Stapleton* cases has done much to temper the inflexibility of the M'Naghten

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[11] *Id.* at 214.

[12] (1936) 55 C.L.R. 182: This was a case tried by Dixon J. at first instance when the High Court had original jurisdiction in the Australian Capital Territory before the *Seat of Government Supreme Court Act* 1933.

[13] (1936) 55 C.L.R. 192.

[14] (1952) 86 C.L.R. 358.

[15] Published in *Essays in Criminal Science* (1960-Sweet and Maxwell).

[16] (1952) Cr. App. R. 85 (1952) 2 K.B. 826.

Rules and would, if allowed to develop as the High Court wishes it, probably make statutory amendment of the law of insanity in Australia unnecessary. It seems, for example, that under the M'Naghten Rules as interpretated by the High Court there is no need for the introduction of such a defence as "diminished responsibility" as was created in England by the *Homicide Act*, 1957.[17] Indeed, in *Sodeman's Case* Evatt, J. was inclined to reject the English authorities and allow uncontrollable impulse as a distinct defence within the M'Naghten Rules.[18] Dixon, J. seems to have achieved almost the same result by holding that the manifestation of an uncontrollable impulse "may afford the strongest reason for supposing that (the accused) is incapable of forming a judgment (that his relevant acts) were wrong".[19]

It is worth noting that the Royal Commission on Capital Punishment in England 1949-1953 recommended that the defence of insanity should be available to one who was "incapable of preventing himself from committing the crime".[20] As Professor Morris has pointed out in the essay cited above the interpretation of the M'Naghten Rules adopted by the High Court goes a long way towards achieving the same result in many, if not in all cases.

It must be admitted however, that the Privy Council in *Brown's Case* scrupulously refrained from commenting on the *Stapleton-Windle* controversy. Therefore the doctrine of the High Court developed in *Porter, Sodeman* and *Stapleton* has not been directly disapproved by the Privy Council or the House of Lords in any case. One must assume that the apparent difference of opinion between the High Court and the English courts did receive their Lordships' attention in considering *Brown's Case* but that they decided not to attempt to lay down any broad principles. The present writer considers this to be a very fortunate decision. Because of its custom of readily granting special leave to appeal in criminal cases if it considers that the appeal should be allowed, the High Court is able to exercise a strong influence on the criminal law of Australia which the learned Law Lords, sitting either as the House of Lords or the Privy Council, cannot have.[21] It would be dangerous for the Privy Council to attempt to clarify such a complicated area of the law in one case and of course, criminal appeals to the Privy Council from Australia are rare.[22]

Although it must be agreed, as the Judicial Committee said in *Sodeman's Case*,[23] that it would be undesirable to establish different standards of law in

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[17] Sec. 2 (1) of the *Homicide Act* 1957 (Eng.) provides "where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing".

Sec. 2 (3) provides that a person who, but for the section would have been convicted of murder, will instead be convicted of manslaughter.

[18] (1936) 55 C.L.R. 192 at 227.

[19] (1936) 55 C.L.R. 192 at 215.

[20] Cmd. 8932 p. 276. The Commission came to the general conclusion on the question of criminal responsibility "that a preferable amendment of the law would be to abrogate the M'Naghten Rules and leave the jury to determine whether at the time of the act the accused was suffering from a disease of the mind or mental deficiency to such a degree that he ought not to be held responsible".

[21] Appeal to the House of Lords in criminal cases in England is only possible with the *fiat* of the Attorney General and this *fiat* is rarely given. The Court of Criminal Appeal is therefore, for all practical purposes, the final court of Appeal in criminal matters in England. The High Court does not consider itself bound to follow decisions of the Court of Criminal Appeal: *R.* v. *Windle, op. cit.* Consequently English decisions do not have such a great influence on the Australian criminal law as they do in other areas of the law.

[22] *Attorney-General* v. *Brown* seems to be the first case since 1901 in which the Crown has appealed to the Privy Council in a criminal case from an Australian Court. *Sodeman* v. *The King, op. cit.* which was an application for special leave to appeal, appears to be the only other reported case of a criminal appeal to the Privy Council from Australia in the last thirty years.

[23] (1936) 55 C.L.R. 192.

England and the Dominions, it is pointed out that in this particular area, the law of England is in fact different owing to the introduction of the concept of diminished responsibility by the *Homicide Act* 1957.

In this connection it is interesting to note the apparent approval by the Privy Council of the statement made in the South Australian Full Court that "there is ground for surmising that the appellant may have suffered from such abnormality of mind as might, under the recent amendment of the law in England, be held to diminish his responsibility".[24] In an article entitled *Diminished Responsibility: A Layman's View*,[25] Lady Wootton of Abinger has analyzed the cases which have come before the English Court of Criminal Appeal in which this concept of diminished responsibility has been an issue. It appears from this article that the Court is reluctant to admit this defence unless there is a definite history of some mental disorder in the accused. It will be remembered that the fact which told most against Brown's plea of insanity in *Attorney-General* v. *Brown*[26] was that neither of the psychiatrists who examined him could find any evidence of mental disease, either before or after the shooting. It is doubted, therefore, whether this would have been a case for the application of the doctrine of diminished responsibility as that concept is at present interpreted. Possibly the comment made by their Lordships in *Brown's Case* is indicative of the attitude which the House of Lords will take when and if they are called upon to consider the concept in relation to the concept of uncontrollable impulse.

Generally then, although the judgment of the Privy Council in *Attorney-General* v. *Brown*[26] does reflect the difference in the views of the High Court and the English courts, that decision has done little to destroy the more liberal doctrine developed by the High Court on the question of insanity as a defence to the charge of murder. It is perhaps unfortunate that the Privy Council thought it necessary, in this particular case, to reverse the High Court. In view of the last minute intrusion and somewhat cursory dismissal of the issue of uncontrollable impulse at the trial — when it was not raised by the defence, it would seem that the award of a new trial would have been justified. This is not to say, however, that there are any grounds for the view that on the facts and in the present state of the law any injustice was done to the accused.

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[24] (1960) A.C. 432 at 458.
[25] 76 L.Q.R. 224.
[26] (1960) A.C. 432.