

An Chúirt Uachtarach**The Supreme Court**

Dunne J
Charleton J
O'Malley J
Woulfe J
Murray J

Supreme Court appeal number: S:AP:IE:2021:000115
[2022] IESC NN
Court of Appeal record number: A:AP:IE:2020:000202
[2021] IECA 237
Central Criminal Court bill number: CCDP 87/2002
[2020] IEHC 434

Between

**The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Appellant**

- and -

**Yusif Ali Abdi
Accused/Respondents**

Judgment of Mr Justice Peter Charleton delivered on Monday 30 May 2022

1. Where a person is accused of the murder of his infant son, pleads insanity as a defence, is convicted by a jury which rejects that defence, spends a decade in custody which mostly involves treatment in the Central Mental Hospital, making the reality of the accused's mental illness increasingly apparent so that the State forensic psychiatrist, who testified at trial in contradiction of two other forensic psychiatrists' views that the accused was a paranoid schizophrenic, changes his mind, leading to an order of retrial due to a newly-discovered fact and that trial jury acquitting the accused on the grounds of insanity, do these unprecedented and extraordinary facts give rise to an entitlement to a declaration that the conviction was a miscarriage of justice under s 9 of the Criminal Procedure Act 1993?

Core issues

2. On behalf of the accused it is argued that he was clearly acquitted by a jury at the retrial ordered upon the acceptance by the Court of Appeal that the change in diagnosis was a newly-discovered fact; the prosecution disagree and claim that because there is no contest over the fact that the accused killed his son, a finding of not guilty by reason of insanity is not an acquittal. That a forensic psychiatrist changes his mind, in consequence of treatment reports and a fresh review of clinical materials and the commissioning by the prosecution of a further expert report from outside the State system, is argued on behalf of the accused to amount to a miscarriage of justice; the prosecution replying that what has occurred has been “a carriage of justice” on the basis that no contest has been raised that all of the prosecution witnesses acted in good faith and that this is no more than the system correcting errors in the ordinary way.

Determination

3. By a determination of 14 January 2022, [2022] IESCDET 5, this Court decided that there were legal issues of general public importance enabling an appeal under Article 34.4.4° of the Constitution, stating:

The Court is satisfied that the applicant has raised an issue of general public importance as to the meaning of “acquittal” in the context of section 9 of the 1993 Act and further, as to the meaning of “miscarriage of justice” as set out in section 9 and whether such meaning encompasses the type of situation that has occurred in this case, involving a changed medical diagnosis which arose many years after the conviction of the person seeking a section 9 certificate.

Background facts

4. On the night of 17 April 2001, the accused entered the bedroom of his estranged wife, took his infant son, who was sleeping in her bed and who was not yet 2 years old, brought him into another room, locking the door behind him, and hit the boy so severely that he died. By the time the victim’s mother was able to respond, the child was already dead and the accused was offering prayers. There had been an immediate background whereby the accused had recently obtained refugee status, had assaulted his wife, had exhibited paranoid delusional behaviour, had assaulted a Garda, had insisted on a smoke alarm being checked for a hidden spy camera and had concerns over whether in the imminent separation of the couple he would have access to the child and over the religion in which the child might be raised. Their family doctor had expressed the view in the light of these events that, more than likely, the accused would have to be involuntarily committed to a mental hospital.

5. On being charged with murder, and cautioned that he was not obliged to make any response, the accused said “I don’t know. Nothing to say. I don’t remember anything. I am not in good stead. I am so upset my son is dead. I am sorry it happened. That’s all”. The defence consulted a forensic psychiatrist for the first trial, Dr Brian McCaffrey. There were five interviews with Dr McCaffrey. It is posited by the prosecution that at the consultation in January, before the first trial, the accused first mentioned external voices commanding him to kill his son. The State was not in a position to have Dr Damien Mohan, of the Central Mental Hospital, their forensic psychiatrist interview the accused until literally the day before the matter came on for trial on 19 January 2003. This was

not a satisfactory situation. The first trial began on 20 January 2003 with Dr McCaffrey expressing the view that at the time of the killing the accused was insane and Dr Mohan opposing that view, being sceptical as to the self-reporting of the accused, the factual circumstance of the door to the room where the child was killed being purposively locked and the late reporting to Dr McCaffrey as to voices. At that trial, the jury disagreed and so no verdict was possible.

6. A retrial was held shortly afterwards on 14 May 2003. By that stage, the defence had also engaged Dr Aggrey Washington Burke and, together with evidence from Dr McCaffrey, sought to persuade the jury that a diagnosis of paranoid schizophrenia operative at the time of the killing, and responsible for the accused's actions, was the correct verdict, with Dr Mohan taking an opposite viewpoint. The accused was convicted by majority verdict, 10:2, of murder two weeks later on 28 May 2003, the jury rejecting the defence of insanity. Consequently, the accused was sentenced to life imprisonment. An appeal to the Court of Criminal Appeal was unsuccessful; [2004] IECCA 47.

7. Following his arrest, the accused had been transferred on 5 November 2001 to the Central Mental Hospital for treatment. After his conviction, the accused was admitted again to that facility between June and September 2005. There was another admission as between May and September 2009 and a fourth from May to October 2013 and on discharge the diagnosis was of paranoid schizophrenia and antisocial personality disorder. In the light of this, the accused claimed a newly-discovered fact, within the meaning given by s 2(4) of the 1993 Act, the portion relevant here, "a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings". Given the possibility of mental illness impinging on ability to analyse, the inclusion of advisors may be noted. Here, the new fact was the diagnosis upon treatment over many months and observation in the Central Mental Hospital.

8. Upon that application being issued by the accused, there was an interview with Dr Alex Quinn in March 2018 who issued a report on 12 June 2018. He had been commissioned by the prosecution in order to meet with the application on a more considered basis than had been the position earlier.

9. The application to the Court of Appeal resulted in an order for retrial, judgment being given on 13 February 2019, [2019] IECA 38. The analysis of Edwards J should be quoted as to the conclusion:

94. Returning to the real life circumstances of this case, we are satisfied that the material being relied upon as being newly discovered facts, would, if it had been before the jury at the original trial, have had at least the potential to influence the outcome. The case might have been either prosecuted or defended materially differently. Moreover, the new evidence, if the jury had known of it, might have significantly influenced the jury's view of the reliability of the expert evidence adduced before them, and the weight to be afforded to the different views being advanced. It is entirely possible that it could have led to a radical recalibration by the jury as to how they should view the evidence. We are in no doubt but that it could potentially have precipitated a different verdict, although clearly we cannot go so far as to say that it would necessarily have done so.

95. How the applicant would actually fare in the future in terms of his mental health was not capable of being known at the time of the trial. As it would have involved foresight of the future, it was not something capable of being discerned with reasonable diligence. At best the most that could have been offered was a forecast, that might or might not prove to be reliable. However, the newly-discovered material at issue here is at this point largely historical with much of it now a matter of record. It is a matter of record that the applicant remained mentally unwell. It is a matter of record that he continued to experience paranoia and other symptoms associated with psychosis. It is a matter of record that he was hospitalised in the Central Mental hospital on multiple occasions since his trial. It is a matter of record that in 2013 the doctors treating him in the Central Mental Hospital changed his diagnosis, and diagnosed him as suffering from paranoid schizophrenia. It is a matter of record that his mental ill-health is of long standing. There has been no suggestion that he has only lately developed or acquired the psychotic condition from which he presently suffers.

96. There is a cogency to all of this additional evidence, particularly when it is viewed together with the evidence given at the actual trial, and to the respective opinions of Dr. Washington-Burke and Dr. Quinn concerning it. The material, including the expert opinions relied upon, appears to us to be credible, although it may not be incontrovertible. However, there is no requirement that it being controvertible. It is clearly substantial in its potential import and not in any sense trivial.

10. In addition, the defence also commissioned Dr Keith Rix who reported on 21 September, with a further report delivered on 7 December 2019. This latter report included an updated chronology which sought to demonstrate a consistent thread of conduct supporting the diagnosis as between the period of time prior to the killing of the child and later treatment. This was for the purpose of the retrial where the accused was again put to the proof of his insanity at the time of the killing. Prior to that, Dr Mohan issued a supplementary report in which the diagnosis was that there was “good evidence to support the defence view that the Defendant’s mental state had started to deteriorate some months prior to April 2001.” He also said that he was persuaded by Dr Rix in analysing the reasons “as to why Mr Abdi would not readily make an admission of a psychotic state at the material time, namely his post-traumatic stress disorder and his perceived risk to his asylum status.” Consequently, he was “satisfied, that it is more likely than not, that he was suffering from a mental disorder at the material time which impaired his capacity to form an intent.”

The High Court

11. On the retrial on 10 December 2019, these were the parameters of the evidence and on 13 December 2019 a special verdict of not guilty by reason of insanity was returned by the jury, the trial judge being Owens J, as to the events of 17 April 2001.

12. By judgment dated 2 September 2020, Owens J declared that there had been a miscarriage of justice; [2020] IEHC 434. Owens J disposed of the argument by the prosecution that the accused had never been acquitted, as such, since in reality it was he who had carried out the killing and thus bore responsibility:

10. Two issues were raised in submissions. Was there an acquittal in the re-trial? Has it been demonstrated to my satisfaction that any newly-discovered facts show that there has been a miscarriage of justice?

11. I will deal with the issue of acquittal first. During the oral presentation counsel for the respondent accepted that the verdict amounted in law to an acquittal and that had a special verdict been entered in 2003, this would have amounted to an acquittal, but he suggested that the nature of the activity which the applicant was proved to have engaged in showed that the applicant was not “acquitted” within the sense of that term as used in s.9.

12. I do not agree with this submission and would not have accepted this proposition even if this matter had come up for determination prior to the commencement of the Criminal Law (Insanity) Act 2006. There are only two outcomes in any completed criminal trial where a jury has not disagreed. The first outcome is a conviction. The second outcome is an acquittal. Section 9(1) of the 1993 Act does not give any special meaning to the term “acquittal” which departs from the ordinary meaning as understood by lawyers.

13. As to whether this circumstance amounted to a miscarriage of justice, Owens J, on a review of the authorities, analysed the applicable test thus:

26. In my view, the meaning of the term “miscarriage of justice” in s.9 is the popular meaning which connotes “a failure of the judicial system to attain the ends of justice”. This formulation is quoted in the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Hannon* [2009] 4 I.R. 147 at 156 [25]. The words “miscarriage of justice” in s.9(1) are used to convey that something has gone seriously wrong in relation to the original trial process which has led to a conviction and not merely that there are misgivings about the result.

27. “Miscarriage of justice” is used in a different sense in ss.2 and 3. These sections deal with criteria which must be met by either an applicant who relies on s.2 or an appellant under s.3 in order to succeed in an appeal against conviction. It is not necessary to show the matters specified in s.9 in order to succeed in an application under s.2.

28. In this case a directed acquittal was not available and the Court of Appeal had no option but to remit the case against the applicant for a re-trial. A different option was formerly available under s.35 of the Courts of Justice Act 1924. This allowed the Court of Criminal Appeal to find that an appellant was insane and substitute the special verdict for the conviction. Section 35 of the 1924 Act was repealed by s.25 of the Criminal Law (Insanity) Act 2006. On the material put before the Court of Appeal this would not have been a suitable case for a substituted special verdict, even if that option had been available.

29. I have considered the authorities cited in relation s.9(1) of the 1993 Act. In each case where a certificate was granted it was clear that the original verdict could not stand because of prosecutorial irregularities or perjured evidence or other material which demonstrated to the courts in a real way that there was a miscarriage of justice in the sense that the conviction was wrong in a

fundamental aspect. These convictions were not merely wrong in law because of judicial misdirection or introduction of inadmissible evidence.

30. This type of serious defect in criminal proceedings which leads to a miscarriage of justice may occur for a number of reasons. The new material may demonstrate the innocence of the accused or that a fundamental element of the evidence which led to a conviction has been undermined. It may demonstrate an irregularity which shows that a substantial failure of due process led to the conviction. The phrase “newly-discovered fact” is not confined to new evidence having a bearing on proof of guilt of the accused. It may relate to other matters which undermine confidence in the process or result of the original trial.

31. This is not a case where the newly-discovered facts relied on are outside the evidence in the re-trial. I am in a somewhat different position to the Court of Criminal Appeal as I have presided over the re-trial. I have the transcript and I can see the effect of any new material which the jury did not have the benefit of in 2003. I can look at how any evidential material which was not put before the original tribunal impacted on the evidence at the re-trial and examine whether this shows that something went seriously wrong at the time of the original trial and resulted in a wrongful conviction. Section 9(1) does not require that the finger of blame must be pointed at any person or thing. Was the result of the process in 2003 a “miscarriage of justice” in the sense that there was a conviction when there ought to have been an acquittal because of something fundamental which is disclosed by the new material relied on by the applicant?

Court of Appeal

14. The Court of Appeal upheld the reasoning of the High Court, fully concurring in the test applied by Owens J as to the meaning of an acquittal and following his reasoning as to the meaning of a miscarriage of justice for the purpose of a certificate under the 1993 Act. Birmingham P stated:

21. Clearly, in the present case, there is no question of prosecutorial irregularity or of perjured evidence. The question for consideration is whether there is material which has demonstrated in a real way that there was a miscarriage of justice, in the sense that the conviction was wrong in a fundamental aspect. The High Court judge commented, correctly, in my view, that he did not regard himself as bound by the views expressed by the Court of Appeal on the s. 2 application as to what may or may not be newly-discovered facts. Things had moved on since the decision of the Court of Appeal. The decisive factor in the retrial was agreement by all psychiatric experts who gave evidence that the respondent was suffering from schizophrenia when he killed his son. As the High Court judge had commented at an earlier stage of his judgment, “diagnosis changed gradually”. By the time of the retrial, what had started as a disputed medical opinion that the respondent suffered from schizophrenia, which was the situation at the time of the first trial, had become accepted fact.

22. I have to confess that when I first heard of the application for a certificate, my immediate reaction was not one of sympathy. Indeed, when I first read the papers for the purpose of this appeal, I felt that there was substance in the complaint on behalf of the Director that the High Court judge was too quick to

form the view that a certificate should follow in circumstances where there had been a changed diagnosis and there had been insufficient consideration of all the surrounding circumstances. However, on further consideration, it seems to me that sometimes matters are actually more straightforward than they may first appear. Nobody now is in any doubt about the fact that the respondent killed his infant son while suffering from schizophrenia and that the extent of the mental illness that he suffered from in 2003 was such that he was not legally sane at the time that he killed. That being so, he should never have been convicted. That a conviction for murder was recorded when it should not have been meant, to use the language of the High Court judge, that “the conviction was wrong in a fundamental aspect”.

15. These two issues continued into the appeal to this Court. At the hearing, however, a possible analysis was put to the parties by the Court that the nature of insanity was such that all culpability in the person committing the external element of the act was dissolved due to the mind not acting purposely and that, consequently, a finding by a jury of a special verdict of not guilty by reason of insanity was more than an acquittal but, rather, was a positive finding on the balance of probabilities that the accused was innocent. The prosecution disagreed with this. Were this to be correct, on any consideration of miscarriage of justice in circumstances specific to insanity, and there only, a finding of a special verdict would be a declaration of innocence and fit within a category where a certificate should issue. A consideration of the defence of insanity is thus necessary to pursue the possible validity of this analysis.

Insanity

16. Since 1800, those who have persuaded a jury that at the time of the offence they were insane, and thus not criminally responsible, have been confined to a hospital; Criminal Lunatics Act 1800 s 1, Lunacy (Ireland) Act 1821 ss 16-18, Central Criminal Lunatic Asylum (Ireland) Act 1845 s 8. At common law, insanity meant a complete, and not merely partial, absence of understanding of the nature and quality of the action charged, or comprehension that that action was morally and legally wrong; *Archbold's Criminal Pleading, Evidence and Practice in Criminal Cases* (26th edition, London, 1922) at pp 13-18. Sir James Stephen, *A History of English Criminal Law Volume II* (Cambridge, 2014) at p186, also admitted within the defence “an act when he is deprived by disease of the power of controlling his conduct, unless the absence of control has been caused by his own default.” That definition, from an earlier edition, was accepted in *The People (Attorney General) v Hayes* (Unreported, Central Criminal Court, 13 November 1967) and approved in *Doyle v Wicklow County Council* [1974] IR 55. Section 5 of the Criminal Law (Insanity) Act 2006 provides a statutory definition that supplants the common law as explained in *R v M'Naghten* 8 ER 718 and later developed. This provides in simple terms:

(1) Where an accused person is tried for an offence and, in the case of the District Court or Special Criminal Court, the court or, in any other case, the jury finds that the accused person committed the act alleged against him or her and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, finds that—

(a) the accused person was suffering at the time from a mental disorder,
and

(b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she—

- (i) did not know the nature and quality of the act, or
- (ii) did not know that what he or she was doing was wrong, or
- (iii) was unable to refrain from committing the act,

the court or the jury, as the case may be, shall return a special verdict to the effect that the accused person is not guilty by reason of insanity.

(2) If the court, having considered any report submitted to it in accordance with subsection (3) and such other evidence as may be adduced before it, is satisfied that an accused person found not guilty by reason of insanity pursuant to subsection (1) is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, the court shall commit that person to a specified designated centre until an order is made under section 13.

17. Owens J helpfully provided a history of the special verdict, as it is called, whereby on a modern issue paper, a jury will be asked if the accused is guilty or not guilty by reason of insanity. On issue papers, prior to the 2006 Act, the latter question was guilty but insane; a misnomer but one relied on by the prosecution.

13. It is necessary to say something about the history of the defence of insanity and of the special verdict where a defence based on insanity is made out. The origin of special verdicts in insanity trials goes back to the trial of James Hadfield reported in (1800) 27 State Trials 1281. He was charged with treason following an attempt to kill George III with a pistol at the Drury Lane Theatre on 15th May 1800. At that time the correct course was for the jury to find the prisoner who was adjudged to be insane not guilty but as the law then stood this might result in his immediate release. The common law on that was unclear.

14. Everybody was in agreement that Hadfield should be kept in confinement as he posed a danger to others. At the time of his trial legislation was contemplated to cover the potential difficulty as to what was to be done after the verdict if Hadfield was found not to be so under the guidance of reason as to be answerable for his act. At the suggestion of the prosecution the jury returned a verdict “We find the prisoner is not guilty; he being under the influence of insanity at the time the act was committed.”

15. This brought Hadfield within the scope of the Bill which Parliament was about to consider and which became the Criminal Lunatics Act 1800. The effect of the Act was that a person found not guilty on the grounds of insanity was no longer entitled to a general acquittal which would permit release. Insanity became a special verdict with automatic confinement for an indefinite period of time. The Act required the jury to find specially whether the person charged with the offence was insane and made it lawful for a court as a consequence of such a finding to order the detention of that person at the pleasure of the Sovereign.

16. The form of the special verdict was altered by s.2(1) of the Trial of Lunatics Act 1883 which provided as follows:

“Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.”

17. The expression “guilty but insane” is not an accurate description of the legal effect of the verdict. The legislation was introduced at the behest of the reigning Sovereign in the hope that a change in the manner in which the verdict was expressed would dissuade mentally deranged persons from making attempts on her life. This provision was procedural and did not affect the substance of the verdict. The verdict remained a verdict of acquittal which carried special consequences. The wording of the verdict did not connote that the person was convicted of the offence charged and the “guilt” proved was nothing more than that the person did or made the act or omission which, if committed by a sane person, would constitute an offence.

18. This section was repealed by the Criminal Law (Insanity) Act 2006 which specifies in s.5(1) that where the court or jury makes a finding that the accused was suffering from a mental disorder at the time of the offence charged and fulfils one or more of the criteria set out in s.5(1)(b) that court or jury “shall return a special verdict to the effect that the accused person is not guilty by reason of insanity.”

19. The special verdict was not regarded as a conviction for the purposes of an appeal to the Court of Criminal Appeal under the Courts of Justice Act 1924 and was not appealable. It was regarded as an acquittal for procedural purposes. The 2006 Act has now altered the law by giving a right of appeal. The reason for the alteration is that the prosecution may now make the case that a person accused of committing a criminal offence was insane at the time.

18. Under ss 8-9 of the 2006 Act, notwithstanding a verdict of not guilty by reason of insanity, an accused may appeal on the ground that “it was not proved that he or she had committed the act in question” or was not “suffering from any mental disorder”, or that the accused was in fact “unfit to be tried.” These provisions illustrate that the burden of proof of the commission of the facts constituting the offence remains on the prosecution, though the accused may formally admit facts including causing the death of the victim under s 22 of the Criminal Procedure Act 1984.

Consequence of insanity

19. For a criminal offence to be committed, the accused must bring about the external element or elements of the offence and in so doing must also act with the relevant culpable mental state. Without that coinciding of external and mental element, the accused does not commit a crime. Thus, a person attacked and stung by a swarm of

hornets who reflexively lashes out to ward off the infliction of pain and accidentally hits a companion does not commit an assault; the mind is completely absent from the action, the elements of an assault requiring the accused to intentionally or recklessly strike another. While the external elements of an offence are infinitely variable, and serve to describe the action which is to be made criminal, ranging from unauthorised access to a computer to burning down a premises to remaining in occupation of a building when directed by the authorities to leave, mental elements are designated by common law or legislation based on knowledge or intention or recklessness or criminal negligence (manslaughter); leaving aside for these purposes absolute and strict liability offences, which are of a regulatory kind, such as parking or minor environmental prohibitions. Ordinarily, the accused brings about the deed which fits within the definition of the offence through a deliberate, as opposed to genuinely accidental, action. Hence, in murder, under s 4 of the Criminal Justice Act 1964, where the accused who kills another “unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.” A person accused is presumed to “have intended the natural and probable consequences of” that person’s conduct, though this inference of general application may be rebutted; the burden being on the prosecution to demonstrate that it has not been rebutted.

20. Hence, in a murder case, the prosecution will set about proving that the accused did whatever the action is that caused the victim’s death; for example, the accused put strychnine into the bedtime drink of the victim. Since ordinarily people do things purposely, and not while sleep walking, ordinary sense applies. Hence, unless there is evidence suggesting on a reasonable basis that the victim put the poison into the drink in order to die by suicide, or that somehow the poison arrived by some mishap, it can be taken that people mean to do as they actually do. For murder, a crime of specific, or additional, intent, the addition of that poison must be proven to be that the accused’s purpose in that deliberate action was to kill the victim or to cause him or her serious injury. Actions demonstrating control and planning, such as securing deadly poison, preparation of a potion, concealing its nature so that it may be unwittingly drunk, are untypical of circumstances in which a defence of insanity may be raised. But, those circumstances are important and are rightly the subject of consideration by the jury and any expert assisting their deliberations as to soundness of mind.

21. Dealing with persons of unsound mind, the 1922 edition of *Archbold* at p 13 states: “But if there is an incapacity, or defect of the understanding, as there can be no consent of the will, the act is not punishable as a crime.” Later, quoting *R v Hadfield* (1800) 27 St Tr 1281, the nature of an action committed under an absence of mental capacity is described as not being a crime, since:

the test accepted was, that if a man is completely deranged so that he knows not what he does, if he is lost to all sense so that he cannot distinguish good from evil, and cannot judge of the consequences of his actions, then he cannot be guilty of crime because the will, which to a certain extent is the essence of every crime, is wanting.

22. A scheme of compensation may be expressly dependent upon on the commission of a crime, as in *Doyle v Wicklow County Council*. The occurrence of the crime will be absent where an element of an offence is absent. Then, a crime is not committed. A crime is not committed if it is brought about by an insane mind. In *Doyle*, the argument concerned malicious damage, for which local authorities were once statutorily liable, and while that

case admitted that a person captured by an irresistible impulse could be insane, there to burn an abattoir to stop the slaughter of animals, this Court carefully expressed the view that there was insufficient convincing evidence. If there had been, there would have been no liability for a malicious action because there had been no crime. Malicious damage, under the legislation, may be forgotten to have required an act of malice; which is an old concept for a guilty mind. Older books dealing with murder refer to malice aforethought, which is now outmoded since defined in the criminal justice Act 1964, s 4, in terms of intention. A guilty mind as an integral definitional part of criminal liability continues; though now expressed in modern legislation as a specific mental element. Even though actions seem deliberate, unless there is a guilty mind there is no crime committed. For example, taking the wrong bicycle from a university bicycle stand is an action inconsistent with the rights of the owner and is an interference with such property rights, but it is not a crime if on reasonable grounds that unlocked bicycle is mistaken for the that of the person innocently taking it. People would not call that a theft and neither legally is it a theft once the element of an absence of intent to do an action inconsistent with ownership rights is missing. Griffin J, in detailing the history of the development of the law on insanity, comments in *Doyle* at p 66: “While insanity has always exempted from criminal responsibility a person doing an act which would otherwise be a crime, the approach of the courts and writers to the question of insanity has become less rigid with the passage of time, as might be expected.” An insane person who does not know the nature and quality of the action prohibited under penal sanction, does not commit an offence. While a wrong is committed as against the victim and that victim’s family, in terms of definition that wrong is not attributable to the person bringing about whatever the external elements of the crime are defined as, since the essential mental element of the crime is absent due to a complete absence of reason.

Burden of proof

23. In ordinary circumstances a jury acquits where there is a doubt as to the proof of the necessary elements of the offence. In insanity, the burden of proof rests on the defence; Archbold (1922) at pp 18-19. That burden is discharged on the balance of probabilities, whether the defence is one of insanity or the less circumscribed defence of diminished responsibility under s 6 of the 2006 Act. Insanity or diminished responsibility must be demonstrated clearly in negating the mental element of the offence; *The People (DPP) v Heffernan* [2017] 1 IR 82. Previously, in *AG v Boylan* [1937] I.R. 449 the Court of Criminal Appeal had ruled against liability due to insanity being absent where the accused had merely raised sufficient evidence whereby the jury might have a doubt as to his sanity. Rather, a presumption of sanity, reiterated in *M’Naghten’s Case* continues until “the contrary is proved to the satisfaction of the jury, and clearly proved.”

24. As was remarked by Lamer CJ in *R v Chaulk* [1990] 3 SCR 1303, a definitive analysis whereby insanity was to be properly regarded as a defence to liability or as an absence of liability was difficult to find. The judges in *Doyle v Wicklow County Council* seemed to act on the basis that by acting through insanity an accused did not commit a crime. In *Court*, two teenage boys had invaded a dwelling, ransacked it and killed the sole occupant. They claimed a disease of the mind whereby the victim was regarded by them as unworthy of life while they considered themselves as beyond morality. Some criminal codes, and the Canadian code in particular, may define infancy as an absence of capacity to commit a crime. At common law, children below 7 years of age were by incontrovertible presumption of law lacking criminal capacity; 1 Hale 27-18, 4 Bl Com.

25. That was abolished by s 52(3) of the Children Act 2001 but provides, with the exception of homicide and rape offences, that “a child under 12 years of age shall not be charged with an offence.” Were insanity to be classified as incapacity to commit a crime, what would occur would be that to all intents and purposes an abattoir might be burned down through the actions of the accused, or a person might lose his life in a violent incident, but despite the self-advocacy of such incidents proclaiming the commission of an offence, no crime would have been committed. Lamer CJ preferred the analysis whereby absence of capacity defined not an offence but its commission as being outside the sphere of criminal liability. He started his analysis with a comparison with infancy:

In other words, the nature of the insanity defence is revealed if one views the changing presumptions regarding criminal capacity as a continuum. At common law, this continuum began with an irrebuttable presumption that a child under the age of seven could not have the capacity for criminal intent. Our current Code s. 13 provides for an irrebuttable presumption that a child under the age of twelve has no criminal capacity. At common law, the continuum provided for a rebuttable presumption of incapacity for children between the ages of seven and fourteen. Perkins and Boyce state “[t]his presumption is extremely strong at the age of seven and diminishes gradually until it disappears entirely at the age of fourteen” (p. 936). The current Criminal Code cuts off the presumption at age twelve; after a person reaches the age of twelve the presumption of sanity in s. 16(4) comes into play. Thus, at this end of the continuum, individuals are presumed to have criminal capacity until such presumption is rebutted on a balance of probabilities (of course, the Young Offenders Act, R.S.C., 1985, c. Y-1, which incorporates a concept of diminished responsibility, applies to young people between the ages of twelve and eighteen).

While the state of insanity and the state of childhood cannot be equated, the connection between these two situations for the purpose of criminal law is apparent. What these two situations have in common is that they both indicate that the individual in question does not accord with some basic assumptions of our criminal law model: that the accused is a rational autonomous being who is capable of appreciating the nature and quality of an act and of knowing right from wrong. With respect to the state of childhood, these basic assumptions are brought into question because of the immaturity of the individual -- he or she has not yet developed the basic capacity which justice and fairness require be present in a person who is being measured against the standards of criminal law. With the state of insanity, these basic assumptions are brought into question because the accused is suffering from some disease of the mind or from some delusions which cause him or her to have a frame of reference which is significantly different than that which most people share. This mental condition means that the accused is largely incapable of criminal intent and should not, therefore, generally be subject to criminal liability in the same way that sane people are. (I note here that s. 16 does not exempt all people with a disease of the mind from criminal liability. The insanity defence is defined in a particular way and only if an accused meets those criteria will his or her mental condition preclude a finding of guilt.)

26. Where there was incapacity to commit a crime, no liability could arise in the accused, to be answered by such defences as necessity, duress or self-defence in excuse of conduct, since the absence of capacity negated the fundamental definitional element of

the crime. Without a mind acting to bring about the external elements of an offence, no offence would be committed. Lamer CJ continued:

The foregoing discussion indicates, in my view, that the insanity provisions operate, at the most fundamental level, as an exemption from criminal liability which is predicated on an incapacity for criminal intent. However, in particular cases, this basic incapacity may manifest itself in a number of different ways depending on the claims put forward by the accused. A claim of insanity, with its underlying claim of criminal incapacity, could give rise to a denial of the *actus reus* or of the *mens rea* in a particular case. For example, an accused could claim that his or her mental condition is such that when the alleged crime took place, he or she was not acting consciously. This is akin to a claim of insane automatism which denies the essential element of voluntary *actus reus* on the basis of an internal cause - the accused's disease of the mind (*Rabey v. The Queen*, [1980] 2 S.C.R. 513). An accused could also raise the argument that his or her mental condition was such that while he or she was acting consciously and voluntarily, he or she did not have the requisite *mens rea*. For example, a person charged with murder could claim that while he consciously and voluntarily did the act of chopping, he thought that he was chopping a loaf of bread in half, when, in fact, he was chopping off the victim's head (see *Kenny's Outlines of Criminal Law* (19th ed. 1966), at p. 83, n. 1). In such a case, the insanity claim is manifested as a denial of *mens rea*. The accused had no intention to bring about the consequence of death. In yet another case, an accused, charged with murder, could argue that while she consciously and voluntarily did the act of killing and while she desired to bring about the death of the victim, she did so because her mental condition was such that she honestly believed that the victim was evil incarnate and would destroy the earth if the accused did not kill him. In such a case, the insanity claim is manifested not as a denial of *actus reus* or *mens rea*, but rather as a defence in the nature of an excuse or a justification based on the fact that the accused's mental condition rendered her incapable of knowing that the act was wrong. Professor Eric Colvin makes reference to the different roles played by the insanity defence in "Exculpatory Defences in Criminal Law" (1990), 10 Oxford J. Legal Stud. 381. He states (at pp. 394 and 401):

The traditional approach to the insanity defence has been to conceive of it as negating all culpability. Insanity can, of course, operate either as a special way of denying a mental element of the offence or as an exculpatory defence. . . .

. . .

Deficient mental capacity may provide the basis for defences of several different kinds. Impairment may be used to deny definitional elements of an offence, or to claim an exculpatory defence which is specifically geared to the problem of impairment, or to make a special claim to one of the exculpatory defences which are based on contextual permission.

All three types of defence can be illustrated by the M'Naghten Rules on insanity at common law. The central proposition in the M'Naghten Rules was that the defence would be available to someone who, because of a 'defect of reason' resulting from 'disease of the mind', did not 'know the nature and quality of the act he was doing; or if he did know it, . . . he did

not know he was doing what was wrong'. The first alternative deals with the situation where insanity negatives mental elements in the definitions of offences. The second alternative establishes a special exculpatory defence which is based on lack of capacity for normative understanding. There is, in effect, an exception to the general rule that 'ignorance of the law is no excuse'. The third way in which insanity could be relevant to criminal culpability is through a cognitive breakdown leading to a mistaken belief in a matter of contextual permission. This situation was covered in the M'Naghten Rules by a ruling that responsibility would be determined as if the facts were as they were believed to be. [Citations omitted.]

The foregoing examples illustrate that the insanity defence can be raised in a number of different ways, depending on the mental condition of the accused. All of these examples have one thing in common however. Each is based on an underlying claim that the accused has no capacity for criminal intent because his or her mental condition has brought about a skewed frame of reference. When a person claims insanity, he or she may well be denying the existence of *mens rea* in the particular case or putting forward an excuse which would preclude criminal liability in the particular case; but he is also making a more basic claim which goes beyond *mens rea* or *actus reus* in the particular case - he is claiming that he does not fit within the normal assumptions of our criminal law model because he does not have the capacity for criminal intent. Such a claim may or may not be successful. If the incapacity is such that it fits into the defence of insanity encompassed in s. 16, it will preclude a conviction.

27. Lamer CJ, consequently, in an analysis which echoes the underlying basis for the decision in *Doyle v Wicklow County Council*, viewed insanity "as an exemption to criminal liability which is based on an incapacity for criminal intent." It is usual, in circumstances where a reversed burden of proof is constitutionally possible, for that burden not to be that the accused must prove his innocence on the element required to be established in defence, such as on the prosecution proving possession of a packet of drugs that the substance was a controlled drug that he or she had no knowledge or suspicion, but rather a persuasive burden; that of demonstrating a reasonable doubt. A persuasive burden is greater than an evidential burden, such that merely enables a defence to be considered by a jury; *The People (Director of Public Prosecutions) v Smyth & Smyth* [2010] 3 IR 688. To be clear, an evidential burden means that the accused can demonstrate some evidence, either on the entire of the prosecution case or on defence evidence (if given) that enables a jury to consider a defence; such as self-defence or provocation or mistake. A persuasive burden, as where the prosecution prove the possession by the accused of drugs, requires the accused to demonstrate that there is a reasonable doubt that the accused neither knew or suspected that the item was or contained controlled drugs. In insanity and in diminished responsibility, the accused bears the persuasive burden of proving mental incapacity and that must be demonstrated as a probability. Both O'Malley J in *Heffernan* and Lamer CJ in *Chaulk* analyse the difficulties with the mental incapacity defence, or as is the case with diminished responsibility a substantially reduced capacity due to mental illness. Diminished responsibility disregards the consequences of substance abuse. Both insanity and diminished responsibility place the burden of proof of that mental state on the defence. While intention, recklessness and criminal negligence may be inferred from external actions, and regularly are so inferred by juries, irresistible impulses, lack of capacity to know the nature of an action and complete absence of moral sensibility may

be occasionally be demonstrated to a degree by external action, but these mental states remain the hidden workings of a mind which the accused must clearly demonstrate to the jury in defence.

Role of the psychiatrist

28. Many persons suffering from a major mental illness such as schizophrenia or manic depression, whether burdened additionally by paranoid delusions beyond the address of reason or demonstration, are the gentlest of people. As a sad reflection of the state of not only organised criminal gang rivalry but the capacity of leaders to initiate and pursue war, on a basis indistinguishable from the teenage minds in *Chaulke*, killing is a normal activity. The fact that someone kills another person is not of itself evidence of derangement. Furthermore, an incorrect psychiatric diagnosis can have the effect of committal to the Central Mental Hospital where a period of observation, or a periodic review under mental health legislation, may demonstrate that the person who has killed has done so deliberately. In other words, that they are not sick at all.

29. Insanity in itself is not enough, furthermore, unless the insanity operated at the time of the deadly attack. Many of those suffering from a major mental illness are gentle people whose affliction does not drive them to kill. Incapacity must be proven in relation to event that is the charge proffered. The role of forensic psychiatrist is to analyse the circumstances, interview the accused, obtain background information, including medical reports, seek psychological evaluation if necessary, consider history and to form an opinion, giving evidence as to same in such a way as to enable the jury to apply the discipline; thereby equipped to evaluate the soundness of the view expressed. Psychiatric evidence is admissible only in relation to mental illness and not to supplement the jury's deliberations with a mere point of view outside of mental infirmity cases; *The People (DPP) v Kehoe* [1992] ILRM 481.

30. It is not in any way a criticism to describe psychiatry as an arcane discipline. In a legal context, all this means is that the science of the mind is outside the experience of everyday life, even though the probability remains that, in a jury of 12 women and men, many will have encountered mental illness. But, the diagnosis of a major psychiatric illness, one whereby the accused at the time of the killing did not know what he was doing (the nature and quality of the actions causing death), was unaware that such actions were wrong or was acting under an impulse which by reason of insanity was uncontrollable, requires specialist training and experience.

31. Experience indicates that psychiatry is not a science which unwaveringly yields precise and unassailable diagnoses. Diagnoses depend on what is reported by witnesses as to the circumstances of the commission of the action, on winning trust, on what family and others say as to the conduct of the accused, on mental health history, on medical history, on objective psychological testing, on alcohol consumption or substance abuse, on what is reported by the accused at interview, on an analysis of consistency with objective fact, on gaining insight over time and on a fair analysis in matching or rejecting a diagnosis based on the application of clinical judgment.

32. Just as there is built into the law a presumption of the innocence of the accused, which is rebuttable by proof beyond reasonable doubt, people are also presumed to be sane until the contrary is clearly demonstrated on the balance of probabilities. Approaching a diagnosis on a basis which starts with the presumption of sanity but

which fairly takes into account all relevant factors in order to see if there may be evidence of insanity, at the time of the commission of the acts charged, cannot be wrong. Experience demonstrates that experts may disagree and that those asserted, on defence evidence, to be insane at the time of the actions charged, where State psychiatric evidence has differed, may turn out on committal to the Central Mental Hospital not to be mentally ill. Perhaps this might be explicable due to the treating experience of diagnosticians over months in that institution. But, it is right to affirm that scepticism is built into the approach to criminal responsibility and the defence of ostensibly criminal actions on an asserted basis of insanity.

33. For the resolution of the difficult issue of insanity as the cause of an ostensible crime, the assistance of expert psychiatric evidence is required. In general, an expert called on behalf of either side as to any arcane discipline is called because he or she is considered to have something to say of benefit to the side presenting that evidence. The expert's duty is nonetheless to the court, to assist the determination of a particular issue objectively and through the application of knowledge and experience. As a natural human tendency there may for every expert in every field be a natural pull towards team loyalty which experts need to guard against. That does not arise in this case. Unthinking criticism as to either defence evidence or State evidence might undermine the complete objectivity and professionalism which forensic psychiatry brings to the difficult issue of an expert assisting the jury's and the court's deliberations as to sanity. All are agreed as to the professionalism and good faith of those involved. Furthermore, while at common law an inference may be drawn where an accused person who has a defence diagnosis of insanity refuses to be seen by State forensic psychiatrists and to submit to testing and in-depth interviews, that obvious principle speaks to the necessity of time and of cooperation. In reality, here, as the chronology indicates, the State side was deprived of time, no doubt through no one's fault, and it was over time and experience that the diagnosis on the State side changed.

1993 Act and contentions

34. Section 9 of the Criminal Procedure Act 1993 provides:

(1) Where a person has been convicted of an offence and either—

(a) (i) his conviction has been quashed by the Court on an application under section 2 or on appeal, or he has been acquitted in any re-trial, and

(ii) the Court or the court of re-trial, as the case may be, has certified that a newly-discovered fact shows that there has been a miscarriage of justice,

or

(b) (i) he has been pardoned as a result of a petition under section 7, and

(ii) the Minister for Justice is of opinion that a newly-discovered fact shows that there has been a miscarriage of justice,

the Minister shall, subject to subsections (2) and (3), pay compensation to the convicted person or, if he is dead, to his legal personal representatives unless the

non-disclosure of the fact in time is wholly or partly attributable to the convicted person.

(2) A person to whom subsection (1) relates shall have the option of applying for compensation or of instituting an action for damages arising out of the conviction.

(3) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Minister for Justice.

(4) The compensation shall be of such amount as may be determined by the Minister for Justice.

(5) Any person who is dissatisfied with the amount of compensation determined by the Minister may apply to the High Court to determine the amount which the Minister shall pay under this section and the award of the High Court shall be final.

(6) In subsection (1) “newly-discovered fact” means—

(a) where a conviction was quashed by the Court on an application under section 2 or a convicted person was pardoned as a result of a petition under section 7, or has been acquitted in any re-trial, a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings, and

(b) where a conviction was quashed by that Court on appeal, a fact which was discovered by the convicted person or came to his notice after the conviction to which the appeal relates or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial.

35. Here, a retrial was ordered on the basis of a newly-discovered fact and, on that retrial, there was unanimity in the defence and State evidence that at the time of killing his son, the accused suffered from paranoid schizophrenia; on the jury’s verdict on that retrial it was accepted as a probability that this mental illness was causative of the death.

36. For the prosecution, it is contended: that the events in this case amount decisively to the system working, to the “carriage of justice”; that nothing in the approach of the prosecution to the proceedings was anything other than honest and balanced; that for there to be a miscarriage of justice either the accused must be actually innocent or that the conduct of the State actors must amount to an affront to the administration of justice; that since the accused carried out the physical actions of killing his son, he cannot be accounted as having been acquitted in the retrial, even on the basis of psychiatric unanimity; and that for the courts to take a perfectionist view of the operation of the 1993 Act would ignore and undermine the self-correcting nature of the criminal trial system which incorporates appeals, allows appeals on the basis of error and may order retrials where an accused may be either acquitted or convicted but without any basis for legal liability being established.

37. For the accused, on the 1993 Act, in the written process supplemented by a short oral argument: it is contended that the circumstances were an affront to the administration of justice; that the circumstances are not disputed and as such amount to a miscarriage of justice; that actual innocence does not have to be established to meet the statutory test; but, rather, that for the system to go badly wrong resulting in a newly-discovered fact and an acquittal on retrial suffices for the grant of a certificate.

Acquittal

38. The acquittal point may be disposed of immediately. It is not correct that by reason of the accused having done, either on his own admission or by independent proof, the actions upon which a criminal charge is brought, that despite acquittal, he remains somehow guilty. In the ordinary course of the disposal of criminal business by the courts, an acquittal does not involve a finding of innocence, it is instead a statement that the presumption of innocence has not been displaced beyond reasonable doubt. There could, for instance, still take place a defamation case where if the accused sues a newspaper which pleads justification for asserting his involvement, the probabilities as found may speak otherwise. But, there are cases of, for instance, accidental poisoning, where a doctor administers the wrong medicine while exhausted but exercising care despite his or her burdens (and thus not meeting the standard of criminal negligence) or an accidental shooting where, certainly, the accused has done the actions causing the harm to the victim but where, nonetheless, the acquittal could not be questioned as a finding.

39. In that respect, the analysis of Owens J quoted above at paragraph 12 is correct and is not in need of elaboration. The accused was acquitted and thus meets the test in s 9(a)(i) of the 1993 Act. The issue remains as to whether there has been a miscarriage of justice, a concept not subject to a statutory definition and which derives in part from international obligations. But these are in respect of a positive finding of innocence. The issue of what is a miscarriage of justice requires to be briefly revisited, as was commented in this Court's decision in *The People (DPP) v Buck* [2020] IESC 16 at paragraph 41:

The appellate court is exercising all of the powers of an ordinary criminal appeal. Hence, the legislation contemplates that even though the accused may demonstrate that a conviction is unsafe or unsatisfactory, there may be sufficient evidence whereby a retrial may be justified. A finding of a miscarriage of justice under s 2 on the basis of a new fact does not amount to a finding that the person tried and convicted was innocent. That requires an additional level of proof. Hence the test for obtaining a certificate from the court under s 9 differs from that under s 2. The s 9 procedure requires more than the quashing of a conviction or, on a retrial ordered under a miscarriage of justice application, the acquittal of the accused. A finding is required that a miscarriage of justice has occurred. This is a civil procedure where factual innocence is to be established or a finding is made that the prosecution should never have been brought because there was never any credible evidence implicating the accused; the relevant cases are set out in *Walsh on Criminal Procedure* 26-475 – 26-471 and are not in contest on this appeal.

International obligations

40. It was in effect agreed by the parties over the course of their submissions that the international treaties to which Ireland is a signatory do not assist in the interpretation of s 9 of the 1993 Act. Referring to Article 6(2) of the European Convention on Human Rights, it was submitted that the UK Supreme Court held in *R (Hallam and Nealon) v Secretary of State for Justice* [2019] UKSC 2 that the narrow definition of miscarriage of justice under s 133 of the Criminal Justice Act 1988 (as amended by s 175 of the Anti-social Behaviour, Crime and Policing Act 2014), limiting it to cases of factual innocence, was compliant with Article 6(2) of the ECHR. Both parties also referred to Article 3 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1984, ratified in this jurisdiction by the introduction of the European Convention on Human Rights Act 2003:

When a person has been a final decision convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

41. A similar argument arose in *DPP v Hannon* [2009] 4 IR 147, in which counsel referred to the requirement that domestic statutory provisions be interpreted in a manner compatible with the State's obligations under the ECHR provisions, per s 2(1) of the European Convention on Human Rights Act 2003. In finding that the court would have interpreted s 9 of the 1993 Act in the same way even in the absence of the relevant international instruments, Hardiman J held that the requirement on the State was to allow for compensation in circumstances where an innocent person had been convicted, thereby giving rise to a miscarriage of justice:

The wording of the International Instruments which bind Ireland appear, at a minimum, to require compensation of a person who is “*reconnu innocent*”, and that phrase is of course helpful in the construction of those Articles. The Instruments do not contain the additional requirement that the State or its agents must be in some way culpable. For the State or the Court to add this requirement would appear to prevent s 9 from complying with the State's international obligation in full.

Miscarriage of justice

42. An international obligation establishes a minimum standard. It is entirely possible for a signatory state to go further and to expand the definition whereby an accused who is imprisoned following conviction but who discovers a new fact and is in a position to secure an acquittal on that basis on retrial may not have to bear the burden of proving innocence. Under the legislation, as interpreted by the case decisions, actual innocence being established suffices for the grant of a certificate. However, the relief is not limited to the proof of actual innocence.

43. Fault on the part of the prosecution is not a requirement under s 9 of the 1993 Act, but serious fault may be a component of an applicant meeting the test whereby more

than a mere acquittal following a retrial, but an actual miscarriage of justice is required. In *The People (DPP) v Hannon* [2009] 4 IR 147, a young lady who had testified against a neighbour and thereby secured a conviction for sexual assault, went abroad but returned to withdraw her allegation having reflected as to the morality of what she had alleged, in the context of a land dispute between neighbours. The prosecution had argued that because the Director of Public Prosecutions had acted in good faith, not having any reason to doubt the account, with the police similarly proceeding properly: while “unfortunate and disturbing” this was claimed, [16], not to be a miscarriage of justice without there “being fault on the part of the prosecutor or of the garda investigators or other State agents.” The Court of Criminal Appeal rejected this, describing a miscarriage of justice, [25], as “a failure of the judicial system to attain the ends of justice”. While this might seem broad, possibly requiring no more than an acquittal, which is not the case, on the facts the test was met, [47], as the applicant was “a person whose accuser has, almost a decade after the event, confessed that her allegation was wholly false and contrived.” This was, on any analysis, a significant change from the trial position due to the revelation of a new fact: that the offences had never taken place in the first instance. Often, however, what is claimed to be a newly-discovered fact is an over-emphasised error or minor defect properly to be dealt with on appeal. As this Court stated in *Buck*, [44], to undermine a conviction after an appeal has upheld the jury’s verdict as safe and satisfactory, the accused must demonstrate an error that goes beyond nuance and, furthermore, for a miscarriage of justice to be demonstrated if the accused is acquitted on retrial, requires a fundamental defect in the administration of justice amounting to an affront;

What is not contemplated in the legislation is a complete rerunning of the original appeal which upheld the conviction of the accused. Rather, the focus of any such application is on the new fact or newly-discovered fact and the relationship of that to the central building blocks of the prosecution case, or of the defence case if one has been presented in evidence, and how that “shows that there has been a miscarriage of justice in relation to the conviction”; to use the wording of s 2(1)(a). While the focus of both civil and criminal trials is the identification and analysis of facts in issue, many peripheral facts are presented by way of background or as an aid to the demonstration of the narrative. These will rightly be seen at trial as insignificant but if left out of disclosure to the accused in the pre-trial process and later discovered may at first sight assume a larger status than reality demands.

44. More, therefore, than the ordinary carriage of justice, involving as it does correction and the availability of an appeal, is required to demonstrate a miscarriage of justice. In the *Buck* case, a submission for the applicant that since the Court of Appeal continued in the ordinary powers formerly vested in the Court of Criminal Appeal, for the accused, on whom the burden of proof rests, to establish a miscarriage of justice, it was sufficient to demonstrate that a point on which a jury might have decided a case differently had been established. That is not the test.

45. In *The People (DPP) v Wall* [2005] IECCA 140 a witness, whom the Director of Public Prosecutions had directed should not be called at trial, had, due to a breakdown in communications as between gardaí, the State solicitor and counsel, been unwittingly called to corroborate an allegation of rape and indecent assault. Four months later, the prosecution “fully and ungrudgingly” accepted on appeal that the accused was entitled to be presumed innocent. Keane J, citing the earlier cases of *The People (DPP) v Pringle (No 2)*

[1997] 2 IR 225 and *The People (DPP) v Meleady & Grogan (No 3)* [2001] 4 IR 16 and *The People (DPP) v Shortt (No 2)* [2002] 2 IR 696 and as had been concluded in *The People (DPP) v Meleady* [1995] 2 IR 517 at 541, while it is unnecessary to demonstrate under s 2 of the 1993 Act that a miscarriage of justice has occurred in the sense of the conviction of the innocent, the point established must be a substantial and fundamental failure in the trial process and one which undermines in a significant way the prosecution case as accepted by the jury. According to the earlier analysis of Keane J in *Meleady*, the purpose of the 1993 Act went beyond providing redress where the newly-discovered fact “conclusively demonstrated the innocence of the accused”: rather, the legislation also enables redress “hitherto not available, in cases where facts came to light for the first time after the appeal to this Court which showed that there might have been a miscarriage of justice.” But that miscarriage must be established by the accused as an applicant for a certificate; see also the *Shortt (No 2)* case.

46. A miscarriage of justice can arise due to prosecution fault, as in the concealment, or material non-disclosure, of witness statements focused on a central issue in the prosecution case which tend to support an actual defence for the accused; *The People (DPP) v Conmey* [2010] IECCA 105. This amounts not just to the justice system correcting itself but to the substantial failure of the system to administer justice in the first place. In that case, witnesses placed the accused in a car enabling opportunity for the homicide of the victim at a precise time. In fact, there were earlier witness statements indicating that no car, never mind one ascribed to the accused, had passed at the crucial time. These were neither disclosed to the accused nor produced at the trial. This was, according to the judgment of the Court of Criminal Appeal, rejecting a prosecution submission that the statements were less than significant, a grave defect in the administration of justice. The statements were, consequently, of central significance and their non-disclosure an affront to the administration of justice; thereby establishing a miscarriage of justice without necessarily demonstrating the innocence of an applicant for a certificate under s 9 of the 1993 Act.

47. It is relevant to what a miscarriage of justice is that, on appeal, what an appellate court is analysing on an application for a retrial is whether there is on “objective evaluation of the newly-discovered fact with a view to determining in the light of it, whether the applicant's conviction was unsafe and unsatisfactory. The Court cannot have regard solely to the course taken by the defence at the trial”; *The People (DPP) v Gannon* [1997] 1 IR 40 at 48. In accordance with the earlier decisions dismissing what is merely of tangential relevance, the issue must be central under s 2(1)(a), and for an acquittal to result on a retrial, a miscarriage of justice is only demonstrated as certifiable by the trial judge where the accused proves a substantial and fundamental failure in the trial process and one which undermines in a significant way the prosecution case as accepted by the jury.

48. Cases will depend on their own facts. But, if innocence is not demonstrated in consequence of an acquittal following on the discovery of a new fact, then for a certificate of a miscarriage of justice to issue, what is required is that the accused demonstrate such bad faith on the part of the State authorities (as in *Wall* or *Conmey*) that undermines the justice system, or such a failure in the administration of justice (as in *Meleady* or *Hannon*) due to error that the prosecution is fundamentally undermined. This goes beyond the system correcting itself and is not established merely by the acquittal of the accused. The matter is a civil application requiring the accused applying for a certificate to bear the burden of establishing a miscarriage of justice. Where the accused

can demonstrate innocence, that case is made out (as in *Hannon*) despite the prosecuting authorities not being in any way at fault in terms of concealment or other grave wrong.

49. No further analysis of the test for an appeal court under s 2 of the 1993 Act as to a newly-discovered fact and the approach thereto is necessary or comment beyond those established as to the meaning of a miscarriage of justice remains necessary since the decision of this Court in *Buck* addressed those issues and has been reiterated herein.

This case

50. The common law demonstrates insanity as in a category of its own as regards the commission of a crime. To use older terminology, an insane person lacks malice. He or she is the instrument of the commission of the crime but since criminal liability is constructed on the basis of an external element coupled with a mental element, as in the old maxim in Latin *actus reus non facit reum nisi mens sit rea*, meaning that the act is not culpable unless the mind is guilty. As is commented by Bishop from an American perspective, *Criminal Law* (9th edition, Chicago, 1930): “There can be no crime, large or small, without an evil mind. It is therefore a principle of our legal system, as it probably is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist.”

51. An error whereby with greater experience of the symptomology of an accused and reports on actual treatment within a hospital setting causes a forensic psychiatrist to revise a diagnosis does not amount to an affront to the justice system so as to demonstrate a fundamental failure in the administration of justice. That may occur through bad faith on the part of the State authorities or such a failure in the administration of justice due to error that the prosecution is fundamentally undermined. That is not this case. But, insanity has always been regarded on a better view of the relevant authorities as a fundamental negation of criminal responsibility. That is demonstrated in this jurisdiction not only in *Doyle v Wicklow County Council* but by the Canadian Supreme Court’s analysis in *Chaulk*. Unlike other defences in criminal law, which sometimes conflate an absence of a required external element or mental element as a defence, which is incorrect, if an element required by the definitional boundaries of an offence is missing, it is not a matter of defence but the failure by the prosecution to establish any case in the first instance. Basic to criminal liability is a guilty mind. In insanity that is completely absent. For murder, the position was once that malice aforethought was needed, which did not demand planning but only a guilty mind of intent to kill or cause serious harm at the moment of the fatal blow being administered, for example. In modern analysis, intent to do the action leading to death is required with the purpose of the accused in that action to kill or cause serious injury. Addressing only insanity, and not diminished responsibility, that intent to do an action and the specific purpose of death or serious injury is entirely absent.

52. Furthermore, since the mind of the accused and the disease overcoming it is totally within the experience of an accused and may confound the usual approach that a person intends what he or she does, unless the circumstances otherwise suggest, a person pleading insanity must call a consultant psychiatrist in addition to whatever other evidence supports a diagnosis of a mind not knowing the nature and quality of the action causing death, or that such action was wrong, or that an uncontrollable insane impulse drove the accused’s body through his or her mind, and thereby establish insanity as a probability.

53. That is what the accused in case has done, demonstrating to the jury on the retrial before Owens J that on the balance of probabilities that in killing his son in April 2001 he was acting in the grip of insanity. That is an acquittal, as the jury's verdict indicates. In an analysis particular to insanity and having regard to the burden and standard of proof, that verdict demonstrates innocence.

54. Hence, a certificate should issue.