

Chapter 3: Developments in Victims Rights in Ireland

Shane Kilcommins, Susan Leahy and Eimear Spain.

3.1 Introduction

This chapter documents some of the legislative and policy developments relating to victims' rights in Ireland. Internationally, there has been growing recognition of the interests and needs of victims in the criminal justice system over the past few decades, where previous emphasis had been predominantly on the rights of the *offender* (Christie, 1977; O'Hara, 2005). The result, in Ireland and in other jurisdictions, has been a series of developments which seek to enhance the support provided to victims, particularly in terms of their role as witnesses in court.

3.2 Legal Developments

The Irish courts and legislature are beginning to take more account of the interests of victims of crime and there has been an expansion in service (welfare) and procedural (participatory) rights. This 'mainstreaming of victim-centred justice' (Goodey, 2005: 35) in Ireland is evident in the introduction of a series of provisions designed to accommodate victims. To begin with, one can refer to the introduction of **live television links** in the courtroom. Ordinarily, the adversarial nature of the Irish criminal process requires that witnesses are examined *viva voce* in open court. In recognition, however, of the trauma that this may impose on victims of specified sexual or violent offences (LRC 1989, 120-121) the legislature enacted section 13 of the Criminal Evidence Act 1992 which provides that victims, among other witnesses, can give evidence in such cases *via* a live television link. In the case of victims of such offences who are under the age of 18¹ or are persons suffering from a 'mental handicap'(s 19), there is a presumption in favour of giving evidence via television link (s. 13(1)(a)). In all other cases, leave of the court is required (s. 13(1)(b)). More recently, section 39 of the Criminal Justice Act 1999 provides that where a witness is in fear or subject to intimidation in any proceedings on indictment for an offence, that person may, with leave of the court, give evidence through a live

¹ The Criminal Evidence Act 1992 originally set this age at 'under 17', but this was amended by section 257(3) of the Children Act 2001.

television link. Section 29(1) of the Criminal Evidence Act 1992, as substituted by section 24 of the Extradition (European Union Conventions) Act 2001, attempts to accommodate witnesses who are outside the State from having to attend to give evidence at trial. It provides that in any criminal proceedings, a witness other than the accused may, with leave of the court, give evidence through a live television link.² The use of such a provision was contested in the Irish courts in the cases of both *Donnelly v Ireland* [1998] 1 IR 321 and *White v Ireland* [1995] 1 IR 268 on the grounds that it constituted an unlawful interference with an accused person's right to fairness of procedures. In neither case was the challenge successful.

More recently, in *D.O'D v Director of Public Prosecutions and Judge Patricia Ryan* (Unreported, High Court, 17th December, 2009), the applicant had been charged with having sexual relations with two mentally impaired persons. He sought leave to quash the order of the trial judge directing the use of video link facilities pursuant to section 13(1)(b) of the Criminal Evidence Act of 1992. The applicant contended that the giving of evidence by video link by the two complainants would create a real risk that he would not get a fair trial because the giving of evidence by them by way of live video could or would convey to the jury that they were persons with mental impairment a matter which he disputed as part of his defence. The High Court upheld his claim, holding that evidence by video link in the circumstances carried with it a real risk of unfairness to the accused which probably could not be remedied by directions from the trial judge or statements from the prosecution. In the case, the prosecution applied for evidence to be given in this way under s. 13(1)(b) of the Act of 1992. Had the application been made under s. 13(1)(a) of the Act of 1992, it would have involved a finding that both of the complainants suffered from a 'mental handicap'. The only material put before the trial judge which expressly considered the ability of either complainant to give evidence were the statements of psychologists.

² Since 2001, it also applies to extraditions proceedings and in particular to persons whose extradition is being sought. See also section 67 of the *Criminal Justice (Mutual Assistance) Act* 2008 which provides that a witness can give live television link evidence from another designated state.

The defence objected on the grounds that it would create an inference that the complainants were vulnerable persons and persons who suffered from a mental impairment, if permitted to give evidence by way of video link. In essence, the defence argued that the issue of their mental impairment would be pre-determined and would impinge on his client's right to a fair trial. The trial judge directed that the evidence should be given by video link under 13(1)(b) of the CEA 1992. On appeal to the High Court, O'Neill J over turned this decision. He stated:

In my judgment, it is clear that evidence by video link in the circumstances of this case does carry with it a real risk of unfairness to the accused person which probably cannot be remedied by directions from the trial judge or statements from the prosecution. Manifestly, s.13 of the Act of 1992 provides for the giving evidence by video link for offences such as the ones the applicant is charged with. The discretion which the Court has under s.13(1)(b) to order evidence to be given in this way or to direct otherwise raises the difficult question as to how the Court is to achieve a correct balance between the accused's right to a fair trial and the prosecution's right in an appropriate case to have evidence given by video link. It is clear that what is required is a test that achieves the correct balance between these two competing rights.

He went on to note:

Where the Court reaches the conclusion that the giving of evidence in this way carries with it a serious risk of unfairness to the accused which could not be corrected by an appropriate statement from the prosecution or direction from the trial judge, it should only permit the giving of evidence by video link where it was satisfied by evidence that a serious injustice would be done, in the sense of a significant impairment to the prosecution's case if evidence had to be given in the normal way, *viva voce*, thus necessitating evidence by video link in order to vindicate the right of the public to prosecute offences of this kind. The fact that the giving of evidence *viva voce* would be very unpleasant for the witness or coming to court to give evidence very inconvenient, would not be relevant factors.

Having established the test, the judge went on to hold that the trial judge did not achieve ‘the correct balance in this case between the right of the applicant to a fair trial and the right of the first named respondent to prosecute the offences in question on behalf of the public’.

Under section 14 (1) of the *Criminal Evidence Act 1992*, witnesses may, on application by the prosecution or the defence, also be permitted to give evidence in court **through an intermediary** in circumstances where they are using the live television link and are under 18 years of age or are persons with a ‘mental handicap’ who have reached that age in relation to a sexual offence or an offence involving violence. The trial judge can grant such an application if he or she believes that the interests of justice require that any questions to be put to the witness be put through an intermediary. Questions put to a witness in this manner shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his or her age and mental condition the meaning of the questions being asked. While evidence is being given through a live television link pursuant to section 13(1) of the *Criminal Evidence Act 1992*, (except through an intermediary) neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear **a wig or gown**. Moreover if a child or a person with a mental disorder is giving evidence *via* a television link in respect of a victim impact statement, the same rule applies (s 5 *Criminal Procedure Act 2010*).

Given the emphasis placed by our adversarial system on the orality of the proceedings, pre-trial statements are not generally permitted in the criminal process. The rationale underpinning the exclusion of such statements is that they constitute hearsay and ordinarily are excluded because the court is deprived of the normal methods of testing the credibility of the witness. A pre-trial statement for example is not given on oath; the demeanour of the witness making the statement cannot be observed by the trier of fact; and the defence has no opportunity to cross-examine the witness. The absence of this latter safeguard is of particular importance. More recently, however, it has been recognised that an overly rigid application of the hearsay rule can lead to injustice. Provision has accordingly been made for the **admission of videorecordings, depositions**

and out of court statements in certain circumstances. Under section 16(1) of the *Criminal Evidence Act 1992*, for example, it provides that a videorecording of any evidence given by a person under 18 years of age or a person with a mental handicap through a live television link at the preliminary examination of a sexual offence or an offence involving violence shall be admissible at trial. It also renders admissible at trial a videorecording of any statement made by a person under 14 years of age or a person with a mental handicap (being a person in respect of whom such a sexual offence or an offence involving violence is alleged to have been committed) during an interview with a member of the Garda Síochána or any other person who is competent for the purpose, provided the witness is available at trial for cross examination. This provision is, as Delahunt notes, ‘undoubtedly a practical step towards making the testimony of child witnesses and witnesses with an intellectual disability more easily heard within the criminal justice system’. (Delahunt 2011, 6). Section 4(b) of the Criminal Law (Human Trafficking) (Amendment) Act 2013 amended section 16(1)(b) and extended this provision to persons under the age of 18 (other than the accused) in relation to offences related to human trafficking,³ child trafficking and pornography⁴. In these cases the videorecording shall not be admitted in evidence if the court is of opinion that it is not in the interests of justice to do so. In *The People (DPP) v XY*, for example, the accused was charged with section 4 of the Criminal Law (Rape) (Amendment) Act 1990 after it was alleged that he forced a woman with an intellectual disability into performing the act of oral sex with him. In the case, the trial judge admitted as evidence a DVD recording of an interview with the complainant. This pre-trial recording was admitted as examination-in-chief testimony. (LRC 2011, pp. 191-192; Delahunt 2010)

More general provision for the admission of depositions (and video recordings) at the pre-trial stage are now made under section 4G of the Criminal Procedure Act 1967, as amended. It provides that a deposition by a witness may be admitted in evidence at the trial of the accused if it is proved that—

³ Committed under section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008

⁴ Committed under section 3(1), (2) or (3) of the Child Trafficking and Pornography Act 1998

- (a) the witness is dead, is unable to attend to give evidence at the trial, is prevented from so attending, or does not give evidence at the trial through fear or intimidation.
- (b) the accused was present at the taking of the evidence, and
- (c) an opportunity was given to cross-examine and re-examine the witness.

The trial court retains a discretion to exclude such evidence if it is of the opinion that it is necessary in the interests of justice.

Moreover, under section 255 of the Children Act 2001, a judge of the District Court, when satisfied on the evidence of a registered medical practitioner that the attendance before a court of any child would involve serious danger to the safety, health or wellbeing of the child, may take the evidence of the child concerned by way of sworn deposition or through a live television link in any case where the evidence is to be given through such a link. This relates to certain specified offences including cruelty against children, causing or procuring a child to engage in begging, allowing a child to be in a brothel, and causing or encouraging a sexual offence on a child, the murder or manslaughter of a child, any offence involving bodily injury to a child, and most sexual offences (Walsh 2005, 21).⁵

Part 3 of the Criminal Justice Act, 2006 makes provision for the admission of a statement made by a witness in any criminal proceedings relating to an arrestable offence. It can be invoked either by the prosecution or the defence. It can occur in circumstances where the witness, although available for cross examination, refuses to give evidence, denies making the statement, or gives evidence which is materially consistent with it. The statement can then be admitted if it is proved that the witness made it, it is reliable, was made voluntarily, and direct oral evidence of the fact concerned would be admissible. The statement must be given on oath or affirmation or contain a declaration by the

⁵ The rules set out in section 4F(3) of the *Criminal Procedure Act 1967* apply to the taking of evidence under section 255 of the *Children Act 2001*. These rules provide as follows: a) when the evidence is being taken, both the accused and a judge of the District Court shall be present; (b) before it is taken, the judge shall inform the accused of the circumstances in which it may be admitted in evidence at the accused's trial; c) the witness may be cross-examined and re-examined; d) where the evidence is taken by way of sworn deposition, the deposition and any cross-examination and re-examination of the deponent shall be recorded, read to the deponent and signed by the deponent and the judge.

witness that the statement is true to the best of his knowledge or belief, or, the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth. In determining whether the statement is reliable, the court will have regard to whether or not it was given on oath or affirmation or was videorecorded, if there is other evidence to support its reliability, and the explanations of the witness, if any, in refusing to give evidence. The court must also be satisfied that the admission of the statement would not be contrary to the interests of justice

In some instances eye witness **identification** of the perpetrators of crime will be required at the pre-trial and trial stages of criminal process. This can be very traumatic for witnesses, particularly those who are the alleged victims. There are no one-way mirror identification systems in Garda stations, and very often the victim may find himself or herself in the same room as the accused. Moreover, at a pre-trial identification parade, the witness will according to the Garda Síochána *Criminal Investigation Manual* generally be asked to 'place his/her hand on the identified person's shoulder' though fortunately it is now that case that this practice has been relaxed and the witness can, if he or she requests, make the identification by pointing and describing the person in question (Walsh 2002, para 6.55). Making an identification in court can also be difficult for a witness. More recently efforts have been made to alleviate this trauma. Persons giving evidence via television link under section 13 of CEA 1992 and section 39 of the Criminal Justice Act 1999, as referred to above, shall not now be required to identify the accused at the trial of the offence if the accused is known to them (unless the court in the interests of justice directs otherwise). Moreover evidence by a person other than the witness that the witness identified the accused at an identification parade as being the offender shall be admissible as evidence that the accused was so identified.

The reduction of victim alienation has also occurred through the use of **victim impact statements**. Section 5 of the Criminal Justice Act 1993 made provision for the court to receive evidence or submissions concerning any effect of specified offences on the person in respect of whom an offence was committed. These offences relate to most sexual offences, offences involving violence or the threat of violence to a person and

female genital mutilation. Section 5 initially presupposed that the victims of these offences were capable themselves of giving evidence of the impact that the crime had on them (O'Malley 2009, 885). To combat the narrowness of this presumption, the Irish courts began as a practice to admit the evidence of family members of homicide victims (see *DPP v O'Donoghue* [2007] 2 IR 336). As a result of the introduction of section 4 of the *Criminal Procedure Act* 2010, a 'person in respect of whom the offence was committed' now includes a family member of that person when that person has died, is ill or is otherwise incapacitated as a result of the commission of the offence. A family member may also give evidence under section 5(3)(b)(ii) of the Criminal Justice Act 1993, as amended, where the victim of the specified offence suffers from a mental disorder (not related to the commission of the offence). Under section 5A of the Act, a child or a person with a mental disorder may give evidence of the impact of the crime through a live television link unless the court sees good reason to the contrary.⁶ Moreover, where a child or a person with a mental disorder is giving evidence through a live television link pursuant to section 5A, the court may, on the application of the prosecution or the accused, direct that any questions be put to the witness through an intermediary (provided it is in the interests of justice to do so) (s 5B Criminal Justice Act 1993, as inserted by section of the Criminal Procedure Act 2010).

The only purpose for which a victim impact statement can be received at sentencing stage is to describe the impact of the offence on the victim (or on the family members if the victim has died as a result of the offence). It cannot be used to adduce further evidence, to suggest the evidence that should be imposed, or to make fresh allegations. The prosecution bears the responsibility of ensuring that the statement restricts itself in this regard. The prosecution and defence may also examine the victim on any evidence given in respect of the impact of the crime (*People (DPP) v C(M)* (Unreported, Central Criminal Court, 16 June 1995).

⁶ Provision is also made for any other witness, with leave of the court, to give victim impact evidence via a television link

The Irish criminal process works off the assumption that all witnesses are **competent** to testify in court. If a dispute arises as to the competence of a particular witness, the party calling that witness bears the legal burden of proving that he or she is in fact competent. At common law, a witness demonstrates competence by showing that he or she understands the nature of an oath and is capable of giving an intelligent account.⁷ Testimony in civil and criminal proceedings normally requires that the evidence has to be given on oath or affirmation. As was noted in *Mapp v Gilhooly* [1991] IR 253, ‘the broad purpose of the rule is to ensure as far as possible that such *viva voce* evidence shall be true by the provision of a moral or religious and legal sanction against deliberate untruth’.

Issues of competence primarily arise in respect of witnesses who are children or are persons with a mental disability. The law relating to both categories has become more accommodating in recent years. Traditionally, for example, a child could only give sworn evidence.⁸ Such evidence could only be given if, in addition to satisfying the intelligibility criterion, the child also could demonstrate that he or she understood ‘both the nature and consequences of an oath’ (*R v Brasier* (1779) 1 Leach 199). A more secular common law approach however began to emerge in the 1970s in relation to sworn evidence; the determining factor was ‘whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct’ (*R v Hayes* [1977] 2 All ER 288). More recently, section 27 of the *Criminal Evidence Act* 1992 was enacted which provides that in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he or she is capable of giving an intelligible account of events which are relevant to those proceedings.⁹ In a recent Court

⁷ The determination as to whether a child understands the nature and consequences of an oath is one for the trial judge. See *AG v. O’Sullivan* [1930] IR 553.

⁸ If a child was capable of giving an intelligible account, but did not understand the importance of telling the truth under oath, it was still possible for him or her to give unsworn testimony under section 30 of the 1908 Children’s Act, as amended by section 28(2) of Criminal Justice Act of 1914. Such testimony however needed to be corroborated.

⁹ See also section 255 of the Children Act 2001 which provides that the evidence of a child under 14 years

of Appeal decision in *People (DPP) v P.P.* [2015] IECA 152, Sheehan J. held that while it is preferable that an inquiry be made into the capacity of the person under 14 to give an intelligible account of relevant proceedings prior to placing the evidence before the jury, a failure to carry out a formal inquiry in advance does not render a trial unsatisfactory. The court in this case was influenced by the fact that the absence of a formal inquiry did not result in unfairness to the appellant and that it was clear from cross examination that the child was not only capable of giving an intelligible account but did in fact provide one. Significantly, and as we shall see later, section 28(1) abolishes the mandatory requirement that the unsworn evidence of a child be corroborated; a trial judge now has a discretion whether a jury should be given a warning about the dangers of convicting on the unsworn evidence of a child.

Persons suffering from a mental impairment were traditionally excluded from giving evidence at trial. The common law, however, then altered, and permitted such a witness to testify provided he or she was capable of understanding the nature and consequences of an oath, was capable of giving an intelligible account, and the mental disorder did not impede his or her ability to give evidence at trial (*R v Hill* (1851) 2 Den 254). If a witness has communicative difficulties, an interpreter may be provided to aid with the giving of evidence. In *People (DPP) v Gillane* (Unreported, Court of Criminal Appeal, 14 December, 1998), for example, it was held that it was permissible for a witness to give identification evidence for the prosecution in a case despite the fact that he believed that staff at the Mater Hospital had inserted a microchip into his head. As the court noted, though the witness ‘had very strange ideas about what was done to him when he had an operation on his head some twenty years before in the Mater Hospital, [this] does not mean that he was incapable of giving evidence’.

If, however, a mentally impaired person was not able or permitted to give sworn evidence, there was no means by which unsworn evidence could be given. In *DPP v JS* (Unreported, Circuit Court, 1983), for example, a moderately mentally impaired

of age may be taken or received otherwise than on oath or affirmation if the court is satisfied that the child is capable of giving an intelligible account of events which are relevant to those proceedings. It relates to certain specified offences mentioned in part 12 and schedule 1 of the Act.

complainant could not answer questions as to the nature of the oath or the nature of a lie at trial. She made no response when asked by the judge what the moral and legal consequences of telling a lie were. In the result, she could not be sworn and, as there was no independent evidence in the case, a *nolle prosequi* was entered (LRC 1990, 10). Similarly, *DPP v MW* (Unreported, Circuit Court, 1983) a moderately impaired complainant alleged that she was raped in a car. The accused was charged with two counts, rape and unlawful carnal knowledge of a mentally impaired person. At the rape trial, the trial judge ruled that she was competent to take the oath. Her testimony at trial, however, was held to be contradictory and the judge directed an acquittal. Subsequently the accused was tried with the second count, unlawful carnal knowledge of a mentally impaired person. On this occasion, however, her preliminary answers on questions pertaining to the nature of an oath were less satisfactory, and the trial judge declined to have her sworn. As there was no independent evidence in the case, the prosecution was compelled to enter a *nolle prosequi*. (LRC 1990, 10)

Fortunately section 27(3) of the Criminal Evidence Act 1992 now provides that the evidence of a person with a 'mental handicap' may be received otherwise than on oath or affirmation if the court is satisfied that the person is capable of giving an intelligible account of events which are relevant to the proceedings. In *O'Sullivan v Hamill* [1999] 3 IR 9, O'Higgins CJ noted

Unsworn evidence is provided for from a person with a mental handicap 'if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings'. In my view, before that section comes into play there are two requirements on which the court has to be satisfied - (1) that the person has a mental handicap, and (2) that he is capable of giving an intelligible account of events which are relevant to the proceedings. Clearly there must be an inquiry.

Determining the answers to these questions in that inquiry at trial may require expert medical opinion evidence. A corroborative warning may need to be given to the jury in respect of the testimony of a witness suffering from a mental disability (*People (DPP) v Molloy* Unreported, Court of Criminal Appeal, July 28, 1995).

Determining the capacity of a witness to give an intelligible account has can rise to difficulties. In the recent *Laura Kelly* case, the complainant, who has Downs Syndrome, alleged that she was sexually assaulted at a 21st birthday party. The family claimed that shortly after Ms Kelly was put to bed, a family member entered the bedroom and saw a man in bed with her. It was alleged that Ms Kelly had most of her clothes removed and the man was naked from the waist down. However, at trial, Ms Kelly, who had ‘a mental age of four’, was deemed incompetent to testify and the case was dismissed. Ms Kelly’s mother stated:

She [Laura] was brought into this room in the Central Criminal Court and asked questions about numbers and colours and days of the week which had no relevance in Laura’s mind. She knew that she had to go into a courtroom and tell a story so the bad man would be taken away. "It was ridiculous. There is no one trained in Ireland to deal with someone similar to Laura, from the gardaí up to the top judge in Ireland and the barristers and solicitors. (Irish Examiner, 30 March, 2010)

Traditionally, too, the **spouse of an accused** was not competent to give evidence for the prosecution in a case, except in the case of rape or violence perpetrated on that spouse (*R v. Lapworth* [1931] 1 KB 117).¹⁰ This was justified on the basis of marital unity (the law made no distinction between the accused and the spouse) and the importance of preserving marital harmony. The constitutionality of this rule was challenged in *People DPP v JT* (1998) 3 Frewen 141. The complainant was a 20 year old woman who had Downs Syndrome who alleged that she had been sexually abused by her father. At trial the spouse of the accused and the complainant’s mother gave evidence that at the end of a television programme concerning child sexual abuse, her daughter expressed delight that the wrongdoer in the programme was eventually brought to justice. As a result of questioning her daughter on the issue, it emerged that the complainant’s father had allegedly perpetrated similar abuses as those illustrated on the programme. The accused

¹⁰ There were also some other specific statutory exceptions.

was convicted but appealed on the basis, inter alia, that his spouse was incompetent to testify for the prosecution. In upholding the conviction, Walsh J examined the common law rule and declared that its application on the facts of the cases would be in violation of Article 41 of the Constitution which protected family rights.

Section 21 of the Criminal Evidence Act 1992, as amended by section 257(3) of the Children Act 2001 now provides that in any criminal proceedings a spouse of the accused is competent to give evidence for the prosecution. Such a spouse, however, is only **compellable** to give evidence at the instance of the prosecution in the case of an offence which involves violence or the threat of violence to the spouse, a child of the spouse or of the accused, or any person who was at the material time under the age of 18 years, or is a sexual offence alleged to have been committed in relation to a child of the spouse or the accused, or any person who was at the material time under the age of 18 years (Jackson 1993 202). More extensive compellability requirements for the prosecution exist for former spouses under section 22(2) of the same Act.

In more recent years the system has also witnessed a greater awareness of the reasons why a complainant may not have made a complaint of a sexual offence at first reasonable opportunity but still avail of the **doctrine of recent complaint**¹¹ (see, for example, *People (DPP) v DR* [1998] 2 IR 106); a relaxation of the exclusionary rule on **opinion evidence** in certain circumstances;¹² the introduction of a provision which makes it clear that the **absence of resistance** by a victim in a rape case does not equate with consent (section 9 of the Criminal Law (Rape) (Amendment) Act 1990); tighter restrictions that offer victims better protection against unnecessary and distressing information being raised about their **sexual histories**;¹³ **separate legal representation** for sexual offence

¹¹ In a case involving a sexual offence, a voluntary complaint made at the first reasonable opportunity after the commission of the alleged offence is admissible to demonstrate consistency and credibility on the part of the complainant.

¹² Section 3(4)(b) of the *Domestic Violence Act 1996*, for example, permits an applicant for a barring order to provide opinion evidence that he or she has a legal or beneficial interest in the place of residence that is not less than that of the respondent.

¹³ Section 3 of the *Criminal Law (Rape) Act 1981*, as amended by section 13 of the *Criminal Law (Rape) (Amendment) Act 1990* now provides that, except with leave of the court, no questions shall be asked in cross examination about the sexual experience of a complainant. Previously in a rape case where the defence was one of consent, the trial judge was obliged 'to allow unpleasant charges to be made against the

complainants where an application is made to admit previous sexual history (section 34, Sex Offenders Act, 2001); greater protection of the **identity of victims¹⁴ and witnesses¹⁵** in criminal cases; the introduction of measures to restrict **unjustified imputations at trial against the character of a deceased or incapacitated victim or witness** (s. 33 Criminal Procedure Act 2010); the introduction of an exception to the **rule against double jeopardy** when new and compelling evidence becomes available (Part 3, Criminal Procedure Act 2010); the introduction of **bail conditions** requiring a bail applicant to refrain from going to specific locations or to meet specified persons; the creation of a statutory offence of intimidation of witnesses or their families (s 41 of Criminal Justice Act 1999); the ability of the DPP to appeal **unduly lenient sentences** (s 2 of the Criminal Justice Act 1993, as amended by section 23 of the Criminal Justice Act 2006); and provisions for the **payment of compensation** to victims through a non-statutory scheme introduced in 1974, and a statutory scheme introduced under section 6 of the Criminal Justice Act 1993. Kilcommins et al., 2004: 150-153; Rogan, 2006a: 202-208; Fennell 2010:250-260; Vaughan and Kilcommins 2010)

Over the years the common law also devised particular **corroboration rules** in respect of certain categories of ‘suspect’ witnesses such as sexual complainants, children, accomplices and so on. Ordinarily, an accused person in a criminal trial can be convicted on the testimony of one witness alone. However, for suspect witnesses such as those cited above, a warning of the dangers of convicting on such evidence in the absence of corroboration had had to be given to the jury. The previously fossilised exclusionary assumptions underpinning the perception of some victims/witnesses in the Irish criminal justice system is evident, for example, in the law on the corroboration of sexual complaints. In the past the evidence of a complainant in a sexual offences case required a mandatory warning to the jury on the dangers of acting on such evidence alone. This rule was justified ‘by the fear that complaints of sexual offences may sometimes be the product of spite, jealousy, psychological denial of having consented, or a reaction to

complainant in connection with her past; he should not indicate to the jury that he disapproves of this being done’. *People (DPP) v McGuinness* [1978] IR 189

¹⁴ See, for example, section 7 of the Criminal Law (Rape) Act 1991, as amended; section 11 of the Criminal Law (Human Trafficking) Act 2008; and section 252 of the Children Act 2001.

¹⁵ See section 181 of the Criminal Justice Act 2006.

having been jolted; that women with nothing to lose might seek to subject a man of high social standing to blackmail; and that the accusation of rape is easily made, but difficult to defend' (Healy, 2004: 157). More recently, however, these essentialised notions about the traits and motives of sexual complainants have largely been abandoned and the trial judge now has discretion whether or not to give such a warning to the jury (s 7 *Criminal Law (Rape) (Amendment) Act* 1990).

In respect of the unsworn testimony of child witnesses, corroboration by some other material evidence was also required to obtain a conviction against an accused party. This could not be the unsworn evidence of another child. In *Attorney General (Kelly) v Kearns* (1946) 80 ILTR 45, for example, the defendant was charged with attempted carnal knowledge of a girl aged 9 (RB), indecent assault of the same girl, and indecent assault of two other girls also aged 9 (AH and MC respectively). Two of the girls gave evidence that they were in the defendant's house together and that each saw the unpleasant acts being perpetrated against the other (RB and AH). The other girl (MC) gave evidence that on a different date she was also in the defendant's house and that he also indecently assaulted her. Playmates of the three complainants also gave unsworn testimony that the three complainants went into the defendant's house.

Molony J held:

Corroboration is a statutory requirement in the case of the unsworn testimony of a child of tender years. Sec. 30 of the Children Act, 1908, has the proviso "(a) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused." ...[I]t is quite clear from the vast number of authorities that, to quote from the headnote in *Rex. v. Coyle* [1926] N. I. 208, 'the unsworn testimony of a child of tender years admitted by virtue of section 30 of the Children Act, 1908, could not be corroborated within the meaning of proviso (a) to that section, by the unsworn testimony, similarly admitted, of any number of such children.' ...It will be remembered that the children R. B. and A. H. both said they were together in [the defendant's] room, and each witnessed the assault upon the other. I am clear that R. B.'s story does not, in law, corroborate A. H.'s story, nor does A. H.'s story corroborate R. B.'s

story—nor do any of the little girls, other than those alleged to be injured afford corroboration—simply because, in my opinion, they are incapable of giving corroboration. The same remarks apply in respect to the charge in connection with M. C.

Since there was no other evidence in the case, the prosecution failed, demonstrating the harshness of the rules on corroboration. For the sworn evidence of children, a mandatory warning had to be given of the dangers of convicting on such evidence in the absence of corroboration. More recently, the legislature has moved away from the operating assumption that the evidence of children was inherently flawed or unreliable. Section 28(1) of the Criminal Evidence Act 1992 abolished the requirement that the unsworn evidence of children had to be corroborated and s 28 (2)(a) abolished the mandatory warning about the dangers of convicting on the sworn evidence of children in the absence of corroboration. Section 28(3) of the same Act also provides that the unsworn evidence of a child may corroborate unsworn evidence given by any other person,¹⁶ ensuring that the decision in *Kearns* will not reoccur.

In respect of witnesses with a mental disability, there is no statutory law requiring corroboration or that a corroboration warning be given. However, there is some case law support for the view that in the case of such witnesses, a warning should be given of the dangers of convicting on the testimony of such witnesses in the absence of corroborative evidence (see, for example, the Australian case of *Bromley v R* (1986) 161 CLR 315). In Ireland, in *The People (Director of Public Prosecutions) v. M.J.M.* (Unreported, Court of Criminal Appeal, 28th July, 1995), in a sexual offence cases, a trial judge invoked his discretion to give a warning under section 7 of the Criminal Law (Rape) (Amendment) Act 1990 in a sexual offences cases in part based on the mental status of the complainant, and in particular the fact that she had a childlike mind. It should be noted however that the Law Reform Commission in Ireland suggested in 1990 that there should be no corroboration requirement in respect of persons suffering from a mental disability (1990, p. 24).

¹⁶ The unsworn evidence of a child could always be corroborated by sworn evidence.

It is also open to a victim of crime to take a **civil action** against the perpetrator. In *M.N. v. S.M.* [2005] 4 I.R. 461 at 472, for example, the court considered the appropriate level of damages to order in civil proceedings for a continuum of sexual abuse over five years which culminated in the rape of a teenager. The law is also constantly evolving in this field. The Statute of Limitations Act 1957 was amended in 2000, for example, to take account of acts of sexual abuse which may result in tort actions, and in particular the capacity of some victims of this abuse to bring actions within the relevant time period. The courts too are developing jurisprudence on civil wrongs. In a recent case of *Walsh v Byrne* [2015] IEHC 414, the plaintiff took an action for personal injuries, loss, damage, inconvenience and expense including aggravated damages for sexual assault and battery and trespass to the person. He also sought a declaration that the entire relationship created by the defendant with the plaintiff constituted a continuum of oppression, and argued that the court should develop the law by recognising the practice of grooming for the purposes of sexual abuse as either a new tort or the development of existing tort law. White J accepted this reasoning and recognised the ‘continuum of sexual abuse’ as a new tort:

[T]he mental trauma suffered by the plaintiff, is not just confined to the acts of assault and battery, but arises also as a result of the consequences of the breach of trust of the defendant who had played such an important role in the plaintiff’s life. The court’s objective consideration of the purpose of the defendant’s kindness, concern and considerable investment of time, to the period when the abuse stopped was for the insidious purpose of satisfying his own sexual desire. For those reasons, it is appropriate to extend the law of tort, to cover what is now a well recognised and established pattern of wrongdoing, where a child is befriended, where trust is established and where that friendship and trust is used to perpetrate sexual abuse.

2.3 Policy Developments

In Ireland, the **Victim’s Charter** marked an important policy development for crime victims (McGovern 2002, 393; Rogan 2006, 153). This Charter was produced by the

Department of Justice, Equality and Law Reform in September 1999, reflecting the ‘commitment to giving victims of crime a central place in the criminal justice. As such it amalgamates for the first time ‘all the elements of the criminal justice system from the victim’s perspective’ (1999: 3). In 2005, a review of the entire Charter was undertaken by the Commission for the Support of Victims of Crime. A revised *Victim’s Charter and Guide to the Criminal Justice System* was produced in 2010 and attempts to increase the information available to victims of crime from the Crime Victims Helpline, the Garda Síochána, the Courts Service, the Director of Public Prosecutions, the Prison Service, the Probation Service, the Legal Aid Board, the Coroner’s Service and the Criminal Injuries Compensation Tribunal. It sets out the entitlements a victim has from these various services, but it does not confer legal rights.

The needs of crime victims in Ireland are also addressed by a wide variety of **victims’ organisations**. These operate both at the national and local level. In Ireland, these groups include, *inter alia*, Advic, Amen, The Commission for the Support of Court Support Services, National Crime Victims’ Helpline, Rape Crisis Centres, Support after Homicide, Irish Centre for Parentally Abducted Children, Irish Tourist Assistance Service, One in Four, Sexual Violence Centre Cork, Survivors of Child Abuse and so on. Whilst a significant proportion are specialised in nature dealing with specific types of victim or services, there are also some key national groups. Similarly, Victim Support at Court provides support to witnesses and victims both before and during court proceedings, including pre-trial visits and court accompaniment during proceedings. The Victims’ Rights Alliance, which was launched in November 2013, is an amalgam of victims’ support and human rights organisations with the purpose of ensuring that the new Victims’ Rights Directive is implemented within the proposed time frame (by November 2015). SAFE Ireland is an organisation established to raise awareness about the prevalence of domestic violence and to advocate on behalf of its victims. Other associations and groups include the Irish Road Victims Association (established in 2012) and the PARC road safety group (established in 2006), which offer support to road traffic victims and their families.

For example, the national Crime Victims Helpline, which represents a proactive initiative to support crime victims, was launched in 2005. It is funded by the Commission for the Support of Victims of Crime and offers support to victims of crime in Ireland. Similarly the Court Support Service provides support to witnesses and victims both before and during court proceedings, including pre-trial visits and court accompaniment during proceedings. It has stated in its strategic plan for 2011-2014 that it hopes to promote its service among groups who may be 'isolated, vulnerable and/or disadvantaged' and includes people with disabilities within this cohort.

Furthermore, as far back as 1974, a **Criminal Injuries Compensation Tribunal** was established by the then Government to administer a scheme designed to alleviate some of the financial difficulties experienced by victims of violent crime and their families. The purpose of this scheme was to compensate individuals for losses arising from personal injuries as a result of violent crime or acquired while assisting another individual in preventing a crime or saving a human life. Individuals eligible to apply for compensation under this scheme include the injured person(s), the immediate family of the injured person(s) if the victim has died as a result of the crime, or those responsible for looking after the injured party.

The **Office of the Director of Public Prosecutions** has also been active in respect of victims needs and concerns. It has, for example, published a number of documents which have implications for victims' experiences of criminal justice organisations: *The Role of the D.P.P; Attending Court as a Witness; Statement of General Guidelines for Prosecutors*; and, *Prosecution Policy on the Giving of Reasons for Decisions*. A *Reasons for Decisions* pilot project also commenced in Ireland in October 2008. Ordinarily the DPP is under no obligation to give reasons in respect of a decision not to prosecute, as established in cases such as *The State (McCormack) v Curran* [1987] ILRM 225 and *Eviston v DPP* (Unreported, 31 July, 2002). The project, however, reverses this rule as it relates to homicide offences such as murder, manslaughter, infanticide, fatalities in the workplace, and vehicular manslaughter. In such cases reasons for decisions not to

prosecute, or to discontinue a prosecution, were given by the Office of the Director of Public Prosecutions on request to parties closely connected with the deceased, such as members of the deceased's family or household, their legal or medical advisers, or social workers acting on their behalf. Such reasons however would only be given where it was possible to do so without creating an injustice.

The **Courts Service** has also issued a number of publications including *Going to Court* and *Explaining the Courts*. The Committee for Judicial Studies also recently published a guide for the Irish judiciary, entitled *The Equal Treatment of Persons in Court: guidance for the judiciary* (2011). Measures that have been taken to improve access to the courts include the use of induction loops for persons with a hearing impairment in the courtrooms of refurbished buildings; signage and contact details for court offices are in Braille; wheelchair ramps are provided in many courthouses; and wheelchair users can give evidence in many courthouses at the front of the court beside the witness box. The **Gardaí** have also given a number of commitments to victims of crime including an assurance regarding the provision of information on the progress of a case and on the prosecution process, as set out in its Charter for Victims of Crime. The Garda Victim Liaison Office, for example, is responsible for developing Garda Policy on victims of crime, and for ensuring the implementation of the Garda aspect of the Victims' Charter. Garda Family Liaison Officers have been introduced to provide support to victims of crime affected by traumatic crimes such as homicide, kidnap, false imprisonment, hostage siege situations and other serious crimes where this is deemed appropriate by the local Superintendent. The role of the Family Liaison Officer is to keep the victim informed on all matters relating to the crime and to provide practical information and support. Referrals can be made by the Garda Family Liaison Office, with the consent of the victim, to ensure appropriate emotional and psychological support. Garda Ethnic Liaison Officers are trained to provide specific support and advice to victims of racist incidents and the Gardaí also provide a Liaison scheme for the LGBT Community. Officers are trained to provide support to victims from this community and encourage reporting of homophobic crime where appropriate.

Along with these policy developments in Ireland, a number of **administrative moves** — as part of a *Justice for Victims Initiative* — to increase the level of support to victims of crime have also been implemented. For example, a new executive office has been established in the Department of Justice to support crime victims (established September, 2008). The core mandate of this Victims of Crime Office is to improve the continuity and quality of services to victims of crime, by state agencies and non-governmental organisations throughout the country. It works to support the development of competent, caring and efficient services to victims of crime. A reconstituted Commission for the Support of Victims of Crime occurred in September, 2008. Working with an annual budget from the Department of Justice and Equality, the Commission provides funding for services and supports to victims of crime. The Commission also works to improve cohesion and consistency of service and information available to victims of crime. A Victims of Crime Consultative Forum held its first meeting in January 2009. It provides a forum for victim support organisations to put forward the views of victims with a view to shaping strategy and policy initiatives.

A **Victims' Rights Bill** was initiated in 2008 the purpose of which was to make provision for the treatment of and rights of victims of criminal offences. More recently, the first commitment in the Justice and Law Reform section of the Programme for Government, 2011-2016 indicated a requirement for legislation to strengthen the rights of victims of crime and their families, including greater use of victim impact statements and statutory rights to information.

Two new Bills have recently been introduced. The General Scheme of the **Criminal Justice (Victims of Crime) Bill 2015** was introduced in July 2015 as part of the process of implementing the Victims' Rights Directive, a task which must be completed by 16th November 2015. The Bill provides some important new measures to strengthen victims' rights. One of the significant developments in this proposed legislation is the increased level of information which will be provided to victims. The Bill provides that an individual contacting the Gardaí to inform them that s/he has been the victim of a criminal offence must be provided with certain information. For example, s/he should be informed about: procedures for making a complaint alleging an offence; services which

provide support for victims of crime; the role of the victim in the criminal justice process; available protection measures; legal aid and entitlement to interpretation and/or translation assistance. Victims are also entitled to request certain additional information about their cases and Gardaí are obliged to provide that information ‘as soon as is practicable’. For example, under this provision, a victim can request information about significant developments in the investigation of the offence or information relating to the trial of an alleged offender. Other significant developments in the Bill include the requirement that the Gardaí or the DPP to provide victims with reasons for decisions not to prosecute a crime and the introduction of a process for formally reviewing a decision not to prosecute.

A notable feature of the Bill is the introduction of ‘victim personal statements’ which apply to offences other than those where a victim impact statement may be given. A ‘victim personal statement’ should ‘set out how the victim has been affected by the offence including, as the case may be, physically, emotionally, financially or in any other way but shall not include any prejudicial comment on the offender or comment on the appropriate sentence be imposed on the offender’. This statement is provided to the Gardaí who will forward it to the DPP, as appropriate. These statements are submitted by the prosecutor to the trial court and served on the defence prior to sentencing and must be taken into account when determining the sentence to be imposed. Further protections for victims during investigation and whilst testifying are provided for in Parts 5 of the Bill. For example, on the application of the prosecution, special measures such as the testifying via video-link or from behind a screen may be made available to a victim where the court is satisfied that this is necessary to protect him/her. This is a significant extension of the availability of the special measures which are available in the Criminal Evidence Act 1992, which were previously only available to victims of a limited number of offences.

The **Criminal Law (Sexual Offences) Bill 2015** increases protection for victims of sexual offences in a number of significant ways. Perhaps most notably, the Bill introduces a procedure for regulating the disclosure of counselling records in sexual offence trials. Previously, under Irish law there was no procedure for regulation

disclosure of counselling records which were held by third parties such as counsellors or social workers. Section 33 of the Bill fills this lacuna, creating formal application process for the introduction of this evidence which is similar to the process which regulates the disclosure of sexual experience evidence. If the defence seeks disclosure of counselling records, a written application to court must be made. A hearing will then take place to determine whether disclosure should be ordered. The complainant (who is entitled to legal representation) and the record-holder are entitled to be heard at this hearing and the judge must provide reasons for his/her decision regarding disclosure. The section provides useful guidelines to structure judicial discretion in deciding whether to order disclosure. These guidelines, along with the possibility of imposing conditions upon disclosure orders , are designed to ensure that disclosure of records goes no further than is necessary, maximising protection of victims' privacy rights.

The Bill also amends the special measures for testifying provided for in the Criminal Evidence Act 1992. Importantly, the definition of 'sexual offence' in section 2 of the 1992 Act is extended to ensure that the special measures contained therein are available for the new offences created by the 2015 Bill. The Bill repeals section 13 of the 1992 Act which provides that wigs and gowns should not be worn by judges or legal professionals where a child is giving evidence via video-link. Instead, judges and legal professionals concerned in the examination of witnesses are prohibited from wearing wigs and gowns in all circumstances where evidence is given by a child under eighteen years in a sexual offence case to which the 1992 Act applies. The Bill introduces the possibility for those under the age of eighteen to give evidence from behind a screen to prevent the witness from seeing the defendant. Defendants are also prohibited from personally cross-examining witnesses who are under fourteen years of age. Unfortunately, this provision has not been extended to adult complainants. The 2015 Bill amends section 16 of the 1992 Act, increasing the age limit for out-of-court video-recording of complainants' evidence from fourteen to eighteen years of age. A final important development in the 2015 Bill is the introduction of harassment orders which may be imposed upon convicted sex offenders when passing sentence or at any time before their release from prison. Such orders may prohibit the respondent from

communicating with the victim and order the respondent to stay within a specified distance of the victim's home, workplace or any other place frequented by the victim. Harassment orders shall cease to have effect on the date of the respondent's release from prison or an earlier date specified by the court or the court may impose the order for a period of up to twelve months from the date of the respondent's release. Contravention of a harassment order is an offence.

2.4. EU/ECHR Developments

A number of key developments in Europe have also promoted recognition of the needs of victims within criminal justice systems. Internationally, the General Assembly of the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985. Recognising 'that the victims of crime and the victims of abuse of power, and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders', the Declaration set forth a number of rights which included: the right to be treated with respect and recognition; the right to be referred to adequate support services; the right to receive information about the progress of the case; the right to be present and give input to the decision-making; the right to counsel; the right to protection of physical safety and privacy; and the right of compensation, from both the offender and the State. The document is not legally binding but does set out the minimum standards for the treatment of victims of crime. Among other things, it recommends that police and the judiciary should be provided with proper training, with special emphasis given to those with special needs (Article 17). It has been described as providing "a benchmark for victim-friendly legislation and policies." (Van Dijk 2005: 202).

The Council of Europe also recognised that it 'is essential to put victims and witnesses at the very heart of the justice system. Victims should and need to be treated with the respect and dignity they deserve when coming into contact with justice, in particular so that they are safe from secondary victimisation'¹⁷ Recommendation (2006)8, for

¹⁷ Available at <http://www.coe.int/t/DGHL/StandardSetting/Victims/>

example, provides that ‘States should ensure the effective recognition of, and respect for, the rights of victims with regard to their human rights; they should, in particular, respect the security, dignity, private and family life of victims and recognise the negative effects of crime on victims’ (Article 2.1). Article 3.4, in particular, points out that ‘States should ensure that victims who are particularly vulnerable, either through their personal characteristics or through the circumstances of the crime, can benefit from special measures best suited to their situation’.¹⁸

The European Union has also more recently begun to focus on the area of criminal justice area, particularly following the introduction of the Maastricht Treaty in 1993, which among other things promoted greater judicial cooperation in criminal matters. Cooperation was intensified after the Tampere summit in Finland in 1999, the first European Council meeting explicitly dedicated to justice and home affairs. In 1999, the European Commission adopted a communication entitled *Crime Victims in the European Union – standards and actions*. In March 2001, the Council adopted a *Framework Decision on the Standing of Victims in Criminal Proceedings*, which provides for minimum rights (including the right to be heard and furnish evidence, access to relevant information, the opportunity to participate, and the right to compensation) to be ensured in all the territories of the EU. This was replaced in 2012 with an important directive on victims’ rights, *Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime* (the *Victims Directive*). Under the *Victims Directive*, victims should be “recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or competent authorities operating within the context of criminal proceedings.”¹⁹ The Directive builds on existing rights for victims and contains more tangible and comprehensive rights for victims than existed previously. The Directive also places clearer obligations on Member States including an obligation to conduct individual assessments of victims to identify vulnerability and special protection

¹⁸ See also Council of Europe, *Non-Criminal Remedies for Crime Victims* (Strasbourg, Council of Europe, 2009), p.25.

¹⁹ Article 1

measures.²⁰ Communication with victims must now also be accessible, with an emphasis on child sensitive communication.²¹ Interestingly, family members of deceased victims are now defined as victims and bestowed with all the rights afforded to victims in the directive.²² Other rights include a right to access victim support services under Article 8, a right to be heard under Article 10 and a right to be informed about a decision not to prosecute the offender and a right to have such decision reviewed under Article 11. The Directive forms part of a package of measures including measures aimed at victims of specific crimes including the Directive on Trafficking in Human Beings²³ and the Directive on Child Sexual Exploitation²⁴.

The European Commission also issued a proposal for a *Council Directive on Compensation to Crime Victims* to reduce the disparities in the compensation schemes of various member States. The Council adopted this Directive on the 29th of April, 2004. The Directive ensures that compensation is easily accessible in practice regardless of where in the EU a person becomes the victim of a crime. Similarly the Committee of Ministers of the Council of Europe adopted Recommendation Rec (2006)8 on assistance to victims of crime on the 14th June, 2006. It sets out various provisions and recommends that member states be guided by them in their domestic legislation. These provisions relate to the role of public services and victim support services, the provision of information to victims, the right to effective access to other remedies, state compensation, insurance, protection of physical and psychological integrity, confidentiality, and training. There are also other pieces of EU law facilitating the provision of compensation to crime victims from the offender. The Regulation on *Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters*, for example, provides that the victim may sue the offender for damages in the same court that deals with the criminal proceedings, if this is possible under national law. The same Regulation also lays down how a crime victim can enforce a judgment for damages against the offender in another member State.

²⁰ Article 22

²¹ Article 3

²² Article 2.

²³ Directive 2011/36/EU

²⁴ Directive 2011/92/EU

The *Victims Directive* also establishes a right to a decision on compensation from the offender in the course of criminal proceedings under Article 16.

The European Convention on Human Rights, which Ireland incorporated at a sub-constitutional level in 2003, has also been interpreted in ways that began to afford rights to victims of crime. Though the Convention does not explicitly refer to victims of crime, the jurisprudence of the Court has placed obligations on member states to criminalise wrongdoing, 'to take preventive operational measures', to investigate and give reasons, and to adequately protect victims and witnesses at various stages in the criminal process. These obligations arise under Articles 2 (right to life), 3 (degrading treatment), 6 (fair trial) and 8 (private life) and have been analysed in cases such as *Osman v The United Kingdom* [1998] EHRLR 228, *X and Y v The Netherlands* [1985] 8 EHRR 2350, *MC v Bulgaria* [2003] ECHR 3927/98), *A v UK* [1999] 27 EHRR 611, and *KU v Finland* [2008] 48 EHRR 1237. In 1996, for example, the court in *Doorson v The Netherlands* [1996] 22 EHRR 330 expanded its interpretation of Article 6, primarily concerned with the rights of defendants in criminal proceedings, to take account of the rights of vulnerable witnesses and defendants. It noted:

It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 [right to a private life]. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (our emphasis).

Recently in *Y v Slovenia* (41107/10) 28 August, 2015 at para 106), it was held that since 'direct confrontation between the defendants charged with criminal offences of sexual

violence and their alleged victims involves a risk of further traumatising on the latter's part, in the Court's opinion personal cross-examination by the defendant should be subject to a most careful assessment by the national courts, all the more so the more intimate the questions are'. In the instant case, it was held that manner in which the criminal proceedings were conducted failed to afford the victim the necessary protection so as to strike an appropriate balance between her rights and interests protected by Article 8 and the defence rights protected by Article 6 of the Convention. ECHR jurisprudence has been referred to in the Irish Courts. For example, Charleton J. in examining the exclusionary rule in *People (DPP) v Cash* [2007] IEHC 108 noted: 'the entire focus is on the accused and his rights; the rights of the community to live safely has receded out of view'. He drew attention to European Convention on Human Rights, and particularly the decision of *X and Y v The Netherlands* ((1986) 8 E.H.R.R. 235), which suggests that rules which hinder a fair prosecution may be incompatible with the Convention. He then emphasised the following principle:

"Criminal trials are about the rights and obligations of the entire community; of which the accused and the victim are members...The cases of J.T. [discussed below] and...X. and Y. make it clear that the victim, being the subject of a crime, can have interests which should be weighed in the balance as well of those of the accused."

The European Commission has also identified as a strategic priority the protection of victims of crimes and the establishment of minimum standards. In May 2011, it put forward a proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime. It includes provisions on information rights for victims including those with disabilities, right of access to victim support services, right of victims to have their complaints acknowledged, the right of victims to be heard, the rights of victims in the event of a decision not to prosecute, the right to reimbursement of expenses, the identification of vulnerable victims (children and persons with disabilities are at a particular risk of harm due to their personal characteristics, and therefore are in need of special measures), right to avoidance of contact between victim and offender, the protection of vulnerable victims during criminal proceedings, and the training of

practitioners who have contact with victims. This draft Directive has been adopted and Member states are given until 2015 to transpose it into law.

2.5 Continuing Problems

Notwithstanding the increased recognition of victims in the criminal process, it remains the case, however, that many of the needs of victims continue to be unmet. A lack of knowledge among criminal justice agencies and actors about the needs of victims of crime remains a central issue. For example, a study by McGrath showed that 51% of members of the legal profession were unfamiliar with the provisions of the Victims Charter (2009). There are also many reported difficulties with the provision of information to victims. The European Commission suggested in 2004 that the provision of information was not secured by 'simply issuing information booklets or setting up websites, without the authorities actively providing individual victims with information' (2004: 5). The Irish Council for Civil Liberties (2008: 21) takes a similar position noting the 'lack of initiation on the part of the State actors in their role as information-providers' to victims of crime. Similarly the SAVI (Sexual Abuse and Violence in Ireland) Report (2002) identified barriers for accessing law enforcement, medical and therapeutic services for those abused and their families. Lack of information from the Gardaí and medical personnel was the main source of dissatisfaction with the services provided. Specifically, the Gardaí were seen to provide inadequate explanations of procedures being undertaken, and medical personnel were seen as needing to provide more information regarding other available services and options. In relation to counselling services, time waiting to get an appointment was the major source of dissatisfaction.

There also remains a problem with the under-reporting of crime. O'Connell and Whelan, for example, in a study in Dublin in the early 1990s noted that 19% of those surveyed did not report the crime (1994: 85). In a follow-up study a few years later, the figure was reported at 20% (Kirwan and O'Connell 2001: 10). The Quarterly National Household Survey in 2010, which asked 39,000 households about the experiences of crime among those over 18 years of age in the previous 12 months, found that 25 per cent of burglaries,

36 per cent of violent thefts, 45 per cent of assaults and 45 per cent of acts of vandalism were not reported (Central Statistics Office, 2010). The SAVI Report into sexual abuse and violence in Ireland noted in 2002, after carrying out a study involving 3,120 participants, that disclosure rates to the Gardaí were very low (McGee et al, 2002: 128-132). Regarding experiences of adult sexual assault, only 1% of men and 8% of women had reported their experiences to the Gardaí (6% overall). Only 8% of adults reported previous experiences of child sexual abuse to the Gardaí (ibid: xxxvii).

Other issues that cause concern to victims include fear of crime (Butler and Cunningham 2010: 429-460); intimidation by the process (Kelleher et al 1999); attrition rates (Leane et al 2001; Hanly et al 2009; O'Mahony 2009; Leahy 2014; Bartlett and Mears 2011; Hamilton 2011); a lack of empathy and understanding in reporting a crime (Kilcommins et al 2010: 57-64); the lack of private areas in courts; difficulties with procedural rules and legal definitions and directions (e.g. consent in rape cases) (Bacik et al 1998; Cooper 2008; Leahy 2013); delays in the system (Hanly et al 2009); the lack of protection and security offered by the criminal justice system (Kilcommins et al 2010: 64-66), the lack of opportunity to participate fully in the criminal process; the lack of information on the progress of criminal prosecutions (Watson 2000); an over emphasis in some instances on adversarialism and its morphology of combat and contest (Kilcommins and Donnelly 2014); under and over criminalisation; overcrowded courtrooms and an inability to hear the proceedings (Kilcommins et al 2010: 168); low levels of awareness of the Crime Victims Helpline; a lack of information on claiming witness expenses (Kilcommins et al 2010: 164-166); and inadequate support services (Bacik et al 2007; Mulkerrins 2003; Deane 2007; Irish Council for Civil Liberties 2008, Cooper 2008; Spain et al 2014).

The lack of recognition of vulnerable witnesses in Ireland has also been identified (Bacik 2007, 10-11). Victims of crime with disabilities, for example, remain largely invisible, not least because of the difficulties they pose in relation to information gathering and fact finding for an adversarial justice system which for the most part refuses to engage with the ontological dimensions of disability (Kilcommins et al 2014). A recent study undertaken on victims of crime with disabilities found that people with disabilities 'are

not being strategically identified as a victim group, either by victim support organisations, or those engaged at a central government policy level in dealing with victims' issues' (Edwards et al 2012: 100). The Irish court process also remains epistemically rooted in mainstream accounts of victims' needs and concerns. Such victims fit more easily within an adversarial paradigm of justice that emphasises orality, lawyer-led questioning, observation of the demeanour of a witness, the curtailment of free-flowing witness narrative, confrontation and robust cross-examination (Kilcommins and Donnelly 2014).

Conclusion

The last few decades have clearly witnessed a shift in terms of victims' rights in Ireland, as legislative and policy measures which seek to promote and support victims in the criminal justice system have come into operation. At the same time, the emergence of a network of support organisations outside the statutory criminal justice agencies is providing assistance to victims in many different forms. The new EU Directive will aid change in this area by demanding that stakeholders re-examine the nature of their engagements with victims of crime. Though Ireland will continue to encounter difficulties in recognising the needs and concerns of victims, it is clear that over the past 40 years it has moved significantly in the direction of creating a more communicative criminal process which better embraces their experiences and voices.

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