

# Disability in the Courtroom: the centrality of the outsider status of victims with disabilities.

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# A. Introduction

- How do I present this – follow sequentially
- Non-entity/ state-accused dyad
- Re-entered criminal justice discourse.
- ‘The victim is now a much more **representative** character, whose experience is taken to be collective, rather than individual and atypical’.
- ‘Ideal Victims’ at **labelling** stage (perceived vulnerability, perceived weakness)
- **Institutional** phase – rules, rights, principles
- ‘those who have long term physical physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’ (Art. 1 CRPD).

# The possibilities of law

- *The People (DPP) v JT* (1988) 3 Frewen 141
- 20 year old Downs Syndrome witness
- Mother – spousal incompetence
- The invocation of the family – Article 41
- The juridification of a new form of inclusion?

## B. Pre-Trial Stage

- **A politics/culture of neglect?**
- The **Ryan Report**, established to inquire into child abuse in institutions of the State from 1936 onwards, for example, noted in 2009 that *'[c]hildren with a learning disability, physical and sensory impairments and children who had no known family contact were especially vulnerable in institutional settings. They described being powerless against adults who abused them, especially when those adults were in positions of authority and trust. Impaired mobility and communication deficits made it impossible to inform others of their abuse or to resist it. Children who were unable to hear, see, speak, move or adequately express themselves were at a complete disadvantage in environments that did not recognise or facilitate their right to be heard'* (2009).
- A recent study undertaken on victims of crime with disabilities found, for example, 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).
- Where – lack of data gathering, renders them invisible within the broader victim constituency.

- **The Victims Charter:** In the Garda section, a commitment is made as follows: 'if you have any form of disability we will take your special needs or requirements into account' (Department of Justice and Law Reform, 2010: 17) (compare with England and Wales)
- **Statement of General Guidelines for Prosecutors** (2010, para4.14 ), for example, the Office of the Director of Public Prosecutions sets out a non-exhaustive list of factors which a prosecutor must consider in evaluating the strength of evidence in determining whether or not to prosecute a case. They specifically include the following:
  - *...(g) Could the reliability of evidence be affected by physical or mental illness or infirmity?*
  - *(n) In relation to mentally handicapped witnesses, are they capable of giving an intelligible account of events which are relevant to the proceedings so as to enable their evidence to be given pursuant to section 27 of the Criminal Evidence Act, 1992?*
  - Why is this possibly discriminatory? Links without qualification the reliability and intelligibility of evidence to physical or mental illness
  - Should be couched in gender neutral language.

- **Bartlett and Mears (2011)**, for example, recently analysed Rape Crisis Network Ireland data on incidents of sexual abuse, disclosed by people with disabilities between 2008 and 2010. They also conducted an online survey of people with disabilities. They identified a **number of problems including dissatisfaction with professional services** such as the Gardaí and difficulties of accessing general services
- **(underreporting)** 66% of persons with disabilities who suffered sexual violence and attended Rape Crisis Centres between 2008 and 2010 did not report the abuse to a formal authority.
- **(Attrition rates)** What limited research exists in this area in Ireland in relation to mental illness and intellectual disability relates to sexual offences. **Hanly et al (2009)**, in a study of rape files received by the DPP between 2000 and 2004, found that 13.1% (78) of the sample involved a complainant with a history of mental illness. Of these 78 specific cases, only two were prosecuted. Research has also been undertaken by the **Prosecution Policy Unit of the DPP's Office** in relation to cases labelled as 'rape' in the period between 2005 and 2007. The analysis found that 3.7% of cases (11) involved complainants with a history of mental illness, none of which were prosecuted (Hamilton 2011). It also found that in the 5.8% (17) of cases involving someone with a learning disability, only four were prosecuted whilst another one was withdrawn (ibid).

- **Under and over criminalisation**

**Section 5** of the Criminal Law (Sexual Offences) Act 1993 which provides that it is an offence to have sexual intercourse or commit an act of buggery with a person who is 'mentally impaired' (other than a person to whom s/he is married or to whom s/he believes with reasonable cause s/he is married), or to attempt such offences. Section 5(2) goes on to state it is also an offence for a male person to commit or attempt to commit an act of gross indecency with another male person who is mentally impaired.

A more recently introduced measure is **section 3 of the Criminal Justice (Withholding Information on Offences Against Children and Vulnerable Persons) Act 2012** also provides that it is an offence for a person to withhold information on certain offences against vulnerable persons. This offence was introduced partly in response to the content of published reports such as the Ryan Report, the Murphy Report and the Cloyne Report which detailed serious sexual abuse of children and vulnerable persons.

- Initially it can be said that it is not appropriate to use the **term** ‘mentally impaired’ to describe persons with disabilities (Law Reform Commission 2006)
- **‘outside a marriage context**, a sexual relationship between two “mentally impaired” persons may constitute a criminal offence because there is no provision for consent as a defence in respect of a relationship between adults who were both capable of giving a real consent to sexual intercourse’ (fair labelling)
- it covers buggery, intercourse and acts of gross indecency between males, **but not unwanted sexual contact more generally**. Such an obvious gap in the criminal law calendar jeopardizes the sexual autonomy of persons with disabilities and falls short of establishing a process that punishes all forms of serious sexual abuse against such persons.



- The **People (DPP) v XY**, 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. Such a sexual act did not come within the scope of section 5 of the 1993 Act. On this issue, White J in the case noted that “[i]t seems to me that the Oireachtas when they introduced the 1993 Act did not fully appreciate the range of offences needed to give protection to the vulnerable” (as quoted in Law Reform Commission 2011: 191). Given the lack of evidence of an assault or hostile act on the part of the accused, the trial judge directed the jury to acquit the defendant, stating that that the judiciary could not fill a ‘lacuna in the law’
- *MC v Bulgaria* – 14 year old – resistance, Art 3 (bodily integrity)

# Incitement to Hatred Act 1989

- provides that it is an offence to incite hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, or membership of the travelling community or sexual orientation.
- Significantly no mention is made of disability as an actionable ground in this piece of legislation, ensuring that incitement of this kind cannot result in criminalisation.
- On October 22nd, 2000, for example, Mary Ellen Synon, a journalist with the Sunday Independent, wrote the following offensive remarks about persons with disabilities who participated in the Paralympics:
- *It is time to suggest that these so-called Paralympics . . . are - well, one hesitates to say 'grotesque'. One will only say 'perverse'...Surely physical competition is about finding the best - the fastest, strongest, highest, all that. It is not about finding someone who can wobble his way around a track in a wheelchair, or who can swim from one end of a pool to the other by Braille...Yet we are supposed to imagine that there is some kind of equivalence in value between what the cripples do and what the truly fastest, strongest, highest do. There isn't.*
- She advised the disabled and blind to 'play to your competitive advantage' and added: 'In other words, Stephen Hawking shows his wisdom by staying out of the three-legged race'.
- Despite widespread outrage, and awareness about the limitations of the legislation, no change has occurred that would criminalise incitement of this kind

- In England and Wales: ...In July 2007 **Christine Lakinski**, a disabled woman, collapsed in a doorway on her way home. As she lay dying a man threw a bucket of water over her, covered her in shaving foam and urinated on her. One of his friends filmed the incident on a mobile phone...In May 2006 **Raymond Atherton**, a 40 year old man with learning difficulties, was severely beaten had bleach poured over him and was thrown in the River Mersey, where his body was later found by the police. His attackers were people he considered his friends...In April 2007 **Colin Greenwood**, a blind father with young children was kicked to death by two teenagers. Before his murder Mr Greenwood had stopped using his white stick in public for fear of being targeted...
- There are no specific offences prohibiting crimes involving hostility based on disability in the 1998 Act. **However, section 146 of the Criminal Justice Act 2003**, which is a sentencing provision, has added hostility based on disability to the list of statutory aggravating factors for sentencing. Technically any crime therefore in England and Wales can be a disability hate crime – including assault, financial exploitation, threats and intimidation – once it is perceived by the victim to be motivated by hostility or prejudice based on a person's disability or perceived disability. A recent publication by the Home Office on hate crimes reported that there were a total of 43,748 hate crimes reported by the police in 2011/2012 (Home Office, 2012).
- Part 3 of the **Public Order (Northern Ireland) Order 1987** prohibits acts intended or likely to stir up hatred or arouse fear by reference to a religious belief, colour, race, nationality or ethnic or national origins. These hate crime offences were extended by the Criminal Justice (No.2) (Northern Ireland) Order 2004 to include sexual orientation and disability

# C. The Trial Process

- 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
- A morphology of contest and combat
- Rarely articulated determinants of truthfulness and credibility:
  - *Consistency of account*
  - *Clear and rational recollection*
  - *Accuracy as to detail*
  - *Appearance and deportment*
  - *Poised expressions and body language*

- The adversarial process can be a significant discriminatory barrier, particularly for those, for example, who have difficulty:
  - (i) Long term memory recall
  - (ii) With communicating information, and with cognitive overload
  - (iii) And with questioning that invites suggestibility, acquiescence and compliance

- The intellectual disability organisation, Inclusion Ireland, has argued that many cases involving people with intellectual disabilities are failing to proceed because the victims are deemed **incompetent** either before, or when they reach, court (Inclusion Ireland, 2011).
- In the recent **Laura Kelly case**, the complainant, who has Down 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 that the man was naked from the waist down. However, at trial, Ms Kelly, who was described by the Court as having '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"*
  - Nature of an oath, and capability of giving an intelligent account

# Unsworn evidence

- In the past, if a witness with a disability was not able or permitted to give sworn evidence, there was no means by which **unsworn evidence** could be given (remember this was possible for children since 1908).
- In *DPP v JS* (Unreported, Circuit Court, 1983), for example, a complainant with a moderate intellectual disability 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 complainant with a moderate intellectual disability 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.
- 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). ('child like' – the witness with a disability in a sexual offence case), but note the LRC 1990

- In England and Wales , a person with a disability is not competent to give evidence in criminal proceedings if it appears to the court that he or she is a person who is unable to understand questions put to him or her as a witness and give answers to them which can be understood. This is a generous, inclusionary approach that establishes the threshold test as one requiring a witness to be capable of imparting relevant information to a fact finder. It is designed to maximise access to justice (Youth Justice and Criminal Evidence Act, 1999).
- In **DPP v R** ([2007] EWHC Crim 1842) a 13-year-old complainant with a severe mental disability who alleged that she had been sexually assaulted. Her initial police interview about the incident was video-recorded and was considered to be coherent. This was tendered at trial as her examination-in-chief (under a special measures direction). However, when it came to cross-examination, the girl was unable to recall anything about the incident. The Divisional Court concluded that the lack of independent recollection of the incident that had brought her to court did not render her incompetent. The girl satisfied the test set out in the YJCE Act in that she could understand and answer questions coherently, even if her answer was limited to saying that she did not remember anything. This case is therefore authority of the fact that recollection is quite different to competence, demonstrating a less stringent approach to the competency test.



- In Ireland, Delahunt (2010) suggests that we continue to “endure a situation where our adversarial system risks imposing a secondary trauma on the complainant”. She goes on to note:
- *We have legislation here which is 20 years out of date [referring to the Criminal Evidence Act 1992], which is limited in respect of the offences to which it applies, which contains archaic, undefined terms, which does not provide statutory guidelines for Gardaí or courts to work within, and which does little to safeguard the interests of either the complainant or defendant.*
- The lack of recognition of vulnerable witnesses in Ireland has also been identified in Report on Services and Legislation Providing Support for Victims of Crime (**Bacik et al** 2007: 10-11). The Report recommended that (2007: 10-11) that “[s]pecific provision should be made...for vulnerable and intimidated victims.” To date, however, this has not occurred.

*D.O'D v Director of Public Prosecutions and Judge Patricia Ryan*, [2010] 2IR 605

s. 13 (1) (a) – presumption in favour of giving evidence via live tv link

s. 13 (1) (b) – general category

‘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’.

- How, for example, does a **finding that the complainants were ‘mentally impaired’** for the purposes of giving evidence via a television link — which would take place in the absence of a jury — compromise the accused’s defence, namely that he (subjectively) did not know and had no reason to suspect that the complainants with whom he had sexual relations were mentally impaired?
- What was the real **risk of unfairness** to the accused in this case in permitting the complainants to give their evidence via television link?
- **Using a complainant’s disability to deny him or her the right to give evidence via television link because of the nature of an accused’s defence is insufficiently specific and is hard to justify on objective grounds.** No explanation is forthcoming in the case regarding the precise nature of the injustice; nor is a normative justification provided for the decision having regard to all the legal principles and rules at play in the case.
- It is a decision which **reifies the default position** — the principle of orality and legal adversarialism — which it reverts to with unceasing obedience at the first sign of a defence objection. It speaks of a system unwilling to adjust its practices to accommodate the different circumstances of some witnesses and the distress and trauma that giving evidence in court may cause them.
- **legal profession.** In 1996, the **Report of the Commission on the Status of People with Disabilities** recommended that there needed to be a ‘general raising awareness amongst the legal professions towards disability issues’ and proposed that it should be part of their legal training (1996: para 15.2; 15.15).
- **Advocacy Training Council** in England and Wales – modular programme, toolkits

# In addition to more general problems

- Provision of information
- The lack of private areas in courts,
- Delays in the system
- Inadequate support services

# D. Recommendations

## Recommendations

### General

- Data collection
- Appropriate language
- Working assumption are entitled to the same rights of access as other victims and witnesses
- Structured and continuous enhanced service mechanism
- Training

### Pre-Trial

- Broader range of criminal offences
- Specialised victim support group

### Trial

- Special measures package
- Not limited to sexual offences or offences involving violence
- Use of screening
- Test of competency
- Employ video identification by electronic means

# Conclusion

- There should be an onus on all criminal justice agencies to strategically identify victims with disabilities as a category of the broader victim constituency, and to develop a professional rubric which seeks their needs, as befits an equitable, accessible justice system anxious to promote rights inherent in our Constitution, the ECHR, the new victims directive (Articles 21 and 22), and the Convention for the Protection of Persons with Disabilities (when it becomes law).