

# ULRR

## Victims of crime with disabilities: hidden casualites in the 'vision of victim as everyman'

Item Type	Article
Authors	Kilcommins, Shane;Donnelly, Mary
Citation	International Review of Victimology;2014, June
Publisher	SAGE Publications Ltd.
Download date	2026-03-09 15:41:50
Item License	<a href="https://creativecommons.org/licenses/by-nc-sa/1.0/">https://creativecommons.org/licenses/by-nc-sa/1.0/</a>
Link to Item	<a href="https://hdl.handle.net/10344/3888">https://hdl.handle.net/10344/3888</a>

*Victims of Crime with Disabilities in Ireland: hidden casualties in the 'vision of victim as Everyman'\**

**Introduction**

Eighteenth century justice emphasised at every turn the importance of the victim. Crime conflicts remained very much the property of the parties personally affected, with 'negotiation and informal sanction (rather than formal prosecution) the norm' (King 2000: 22). When formal justice was invoked, it relied heavily on the victim who monopolised investigative and prosecutorial functions. In contrast, the story of criminal justice for much of the nineteenth and twentieth centuries might best be told as the rise of institutionalised justice whereby the State gradually colonised ownership of the wrongfulness of criminal wrongdoing. This entailed the steady development of an 'equality of arms' framework, designed to offset the power vested in an increasingly Leviathan State and offer some protections and safeguards to those accused of crime. Justice increasingly became an institutionalised, rule-bound reality, and decreasingly dependent on the victim's energy, needs, experiences or perspective as regards the alleged crime. This new institutional pattern quickly transcended the victim's interaction with the crime conflict and re-shaped how it was presented, addressed, legitimated and concluded. As a consequence, the victim was displaced, confined to the peripheral status of reporting crime and providing testimonial evidence in court, if needed (Rock 2004: 331-354).

In the last four decades, however, victims are again returning to centre stage in western jurisdictions. Justice systems are partially being reconstructed as they demonstrate an increased sensitivity to the needs and concerns of victims of crime. As Garland has noted: 'The victim is

no longer an unfortunate citizen who has been on the receiving end of a criminal harm, and whose concerns are subsumed within the public interest...The victim is now...a much more representative character, whose experience is taken to be collective, rather than individual and atypical' (2001:11).<sup>1</sup> This 'vision of the victim as Everyman' is part of a 'new cultural theme', a 'new collective meaning of victimhood' (2001: 12) that is increasingly represented in social, political and media circles. The pattern of the representation of the victim is broadly accurate as it relates to Ireland. Victims of crime have moved to the centre of the Irish criminal process from the periphery, and are now re-emerging again as important stakeholders.

Nevertheless this 'Everyman' account of the ways in which the justice system currently depicts and signifies the victim is not without its problems, in particular its tendency to engage in a form of essentialism that oversimplifies the complexities involved. The general constituency of victimhood as 'Everyman' as constructed under this account often reveals itself as a narrow caste of individuals — heterosexual, white, mainly urban, often female — that focuses on a relatively restricted band of offences such as domestic violence, sexual offences and homicide (Kilcommins *et al* 2010: v; Hoyle 2012: 398). These generalising tendencies conceal the multiplicity of experiences of victimhood and the multiplicity of interactions with the criminal justice process. The result is that certain categories of victim are rendered invisible and unable to share in the benefits of the more inclusive approach. One such category is victims with disabilities. Though such individuals are very likely to be conferred with 'the complete and legitimate status' of being 'ideal victims' in Irish social, media and political networks given their perceived vulnerability and blamelessness (Christie 1986: 18), this status does not readily transpose itself into the more limiting structural framework of the Irish justice system. The

values that facilitate the construction of an ‘ideal victim’ at the initial (and very broad discretionary) labelling stage following the commission of a crime — such as perceived vulnerability and weakness in relation to the offender — can work in the opposite direction as one moves further into formalised, institutionalised justice network governed by rules (evidence and criminal procedure), rights (the right to cross-examine, for example) and principles (such as the principle of orality).

The purpose of this article is to highlight the digression that can occur between the *labelling* and *institutional* phases of the Irish criminal process for victims with disabilities and to demonstrate the variety of ways in which such victims do not always fit more orthodox conceptions of victimisation. There is considerable practical need for this kind of analysis. Across the common law world, persons with disabilities are over-represented as victims of crime (French 2007; Equality and Human Rights Commission 2011). An important sub-category within this general over-representation is that of victims of sexual offences with intellectual disabilities (French 2007). It is reasonable to assume that the pattern is similar in Ireland. However, the position cannot be stated definitively because, unfortunately, neither of the two main crime surveys provides a breakdown based on disability (Edwards 2012). Although studies have found that victims with disabilities are disadvantaged across the common law world (French 2007), we argue here that victims with disabilities within the Irish system are especially disadvantaged, which we attribute in part at least to an ongoing politics of neglect.

The article will begin by tracing the contours of the re-emergence of the victim of crime as a key stakeholder in the criminal process, before outlining the numerous ways in which the outsider

status of victims of crime with disabilities continues to be maintained in areas such as policy, the adversarial process, the language employed by the criminal law, and service provision. For the purposes of the analysis in this article, we adopt the definition used in the Convention on the Rights of Persons with Disabilities (2006) (CRPD)<sup>2</sup> which defines persons with disabilities as ‘those who have long-term 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). Thus, we recognise that disability is a result of the interaction between a person’s impairments and his or her physical and social environment (Shakespeare, 2006). The category of ‘disabled’ persons is broad and multifarious and the ways in which the law can respond to the specific needs of victims are equally varied. However, especially difficult challenges arise in relation to victims with intellectual disabilities who present the most significant challenges to formalised, institutionalised justice as it currently operates. Accordingly, although this article addresses issues across the range of disabilities, particular attention is paid to victims with intellectual disabilities. This also reflects the weight of literature in the area (French 2007).

### **The Rise to prominence of State-Accused relations**

The ‘paradigm of prosecution’ in the eighteenth century common law world rested on victims of crime (Hay 1983: 167). They were the principal investigators of crime and the key decision-makers in the prosecution process (King 1984: 27). Victims could elect not to invoke the law and let the criminal act go unpunished; they could engage in a personal settlement or private retribution; or, they could prosecute but shape the severity of any criminal charge (capital or non-capital) through their interpretation of the facts. Conflicts remained therefore the property of the

parties personally affected and this often involved recourse to informal dispute settlement (Christie 1977: 1-15; King 2000: 22-23). If victims did proceed with a prosecution, it was their energy, for the most part, that carried the case through the various prosecution stages. Victims engaged in fact-finding, gathered witnesses, prepared cases, presented evidence in court as examiners-in-chief, and bore the costs involved (Beattie 1986: 35). The trials themselves were personal altercations involving face to face confrontation between the alleged victims and those accused of crime (May 2003), the latter not generally being entitled to have arguments made for them by counsel in felony cases (Beattie 1991: 221-267). Few restrictions existed on what could be admitted in evidence. Moreover, in ‘accused speaks’ trials, as they were referred to, the onus was always on the accused to engage in self-exculpation (Langbein 1994: 1047). He or she was viewed as a vital testimonial resource.

In contrast, the story of criminal justice and criminal law for much of the 19th and 20th centuries might best be told as the rise of institutionalized justice whereby the State gradually monopolized investigative and prosecutorial functions and colonised “ownership” of the wrongfulness of criminal wrongdoing (Vaughan and Kilcommis 2010: 65-68). Gradually the criminal complex was redrawn as a new statist administrative machinery emerged for investigating, prosecuting and punishing crime. Subjects increasingly ceded ‘their authorisations to use coercion to a legal authority that monopolises the means of legitimate coercion and if necessary employs these means on their behalf’ (Habermas, 2008 repr: 124). The penal field increasingly dissociated itself from the local, personal and arbitrary confrontations that governed criminal relations in the eighteenth century and became a more depersonalised, rule-governed affair with the State at the centre. Private disputes and vendettas were thus gradually monopolised by the State apparatus

and rerouted into the courtroom. A society in which ‘the law operates more and more as the norm’ (Foucault 1979: 144) slowly emerged—reflecting the ‘public interest’ and the ‘will of the people’—in which the temptation to commit crime would no longer be countered by a sovereign will to command and a display of terror (McGowen, 1986: 313-317). When this process was completed, ‘sovereign power was transformed into a public power’ (Garland, 2001: 30). Within such a society, executive arbitrariness and discretionary power abuses were constrained, egalitarianism advocated, and procedural justice increasingly promoted in addition to substantive justice.

In distilling the criminal process into a more monopolised State-accused event, an ‘equality of arms’ framework was created as part of a broader Rule of Law value system. This addressed the problem of the previously ‘bad economy of power’ which vested too much...on the side of the prosecution... while the accused opposed it virtually unarmed’ (Foucault, 1979: 79). Redistributing this economy of power meant an expansion in the exclusionary rules of evidence that could be employed by the defence against the prosecution case, clearer and greater obligations imposed on the State to prove its case against the accused, better opportunities afforded to the defence to prepare its case and test the prosecution case, and the removal of any obligation of self-exculpation on the accused. Even when the case was proved against the accused, he or she was subjected to a new power to punish in which ‘an economy of continuity and permanence ...replace[d] that of expenditure and excess’ (Foucault, 1979: 87).

This new institutional pattern quickly transcended the victim’s interaction with the crime conflict and re-shaped how it was presented, addressed, legitimated and concluded. Within such a

depersonalized, bureaucratized system, the victim was displaced, confined largely to the bit-part role of reporting crime and of adducing evidence in court as a witness, if needed. The victim's space for negotiation and participation in pursuing his or her own interests was thus dismantled by an increasingly State/accused centred logic of action. From being a cornerstone in the regulation of relations concerning the conflict, victims increasingly found their individual experiences (such a vital currency in the pursuit of justice in the pre-modern era) assimilated into general group will – the public interest. The latter was validated through the institutional architecture of a criminal justice system whereas the former was increasingly viewed as invalid knowledge given its partiality, subjectivity, emotiveness and unconstrained dimensions, all of which were filtered out by the operations of a justice system. In the course of the 19th century, the individual victim's experience was increasingly rendered as part of the collective public interest and packaged and presented in institutional terms. This marked the shift from victim-mediated justice to bureaucratized State/accused mediated justice.

Following independence in 1922, the political inclination in Ireland was to maintain the inherited social, economic and legal structures subsisting on the demise of the colonial state. This meant that the “ordinary” adversarial criminal trial—involving ‘a contest morphology’ that included oral presentation of evidence, cross examination by counsel, relative ‘judicial passivity’ during the guilt determining phase of the trial, and informational sources secured by both the prosecution and defence—became deeply ingrained throughout the twentieth century as the appropriate means of resolving criminal disputes (Damaska 1986: 88). More importantly, the common law and statutory rules that were introduced to safeguard those accused of crime also increasingly became fused with constitutional jurisprudence and more recently, with human

rights jurisprudence. Active judicial review, especially since the 1960s, has permitted the development of a great corpus of jurisprudence— constructing a 'meta-Constitution'—on the constitutional role in protecting the rights of the accused and on restricting State power. Logical consistency regarding rules (rule formalism or a “rulebook” conception of the Rule of Law) was now further buttressed by rights and principles— implemented through a constitutional structure— which commands that 'rules in the rule book capture and enforce moral rights' ('a rights-based' conception of the Rule of Law) (Dworkin 1985: 11-12).

In contrast to the eighteenth century which was centred upon a sovereign model of justice that placed the victim at the centre of the conflict, the nineteenth and twentieth centuries have witnessed the emergence of an all encompassing state-accused network of justice. This state-accused network was heavily lawyerised and institutionalised, and driven by a logic that emphasised the rights of the accused at every turn in the criminal process. The adversarial process that emerged placed — and continues to place — a heavy emphasis on orality of the proceedings, and on consistency and credibility of witness accounts. The observation of direct, unmediated responses to questions is often crucial in this regard. Consistency of account, clear and rational recollection, accuracy as to detail, appearance and deportment, and poised expressions and body language are all important indicators of a witness's truthfulness and credibility in relation to determinations of fact. A failure along any or all of these lines either at reporting or trial stages may cast fatal doubt on the truthfulness of a witness's account, which ultimately will impact on decisions to prosecute and determinations of guilt. This foundational commitment to the reception and observation of unmediated *viva voce* testimony is grounded in the need to uphold the integrity of the adjudicative process and minimise the risk of misdecision.

Under this adversarial model, the criminal system came to resemble an ‘obstacle course’ where ‘each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process’ (Packer, 1968: 163). Victims were thus written out of the State-accused justice system, their absentee status quickly acquiring a relative permanence, ‘fixity’ and immovability. The issue of vulnerability, accordingly, was rooted exclusively through this ‘equality of arms’ epistemic framework, ensuring that it was interpreted and understood around an axis that focused on the accused and his or her safeguards. The voices of vulnerable witnesses, including victims with disabilities, were not heard, and were not capable of being understood, given the commitments, value choices and governing principles of this institutional arrangement (Stone 2009: 71).

### **The Re-emergence of the Victim as a stakeholder in the Irish criminal process**

The State/accused model of justice that has been built up incrementally over the last two hundred years is now beginning to creak and strain, however, as newly ‘discovered’ competing narratives emerged. These narratives are increasingly undermining the fixity of criminal law and its tendency to organise justice around the central axis of the State and the accused/offender (O’Hara 2005: 229-247). Justice is thus partially being reconstructed in Ireland as it demonstrates, among other things, an increased sensitivity to the influx of new issues and value orientations and a willingness to accommodate a range of standpoints rather than engage in debilitating stereotyping— what Habermas refers to as ‘the juridification of new forms of inclusion’ (2008: 506).

For victims of crime in Ireland these new forms of inclusion include, for example, a Victim's Charter which sets out a series of (non-binding) commitments from a variety of criminal justice agencies.<sup>3</sup> A growing number of victims' rights advocacy/support groups and victim surveys have also increasingly made victims more visible again and highlighted the ways in which they are marginalised or further scarred by the process. 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 Director of Public Prosecutions (DPP) has given undertakings to have regard to the views expressed by victims of crime when making decisions in specific cases whether or not to prosecute and to facilitate pre-trial meetings to explain the trial process (Office of the Director of Public Prosecutions, 2006: para 2.12; Rogan, 2006b: 151-155). The Irish police (Gardaí) too have given a number of commitments to victims of crime including the provision of information on the progress of a case and the prosecution process. These changes have been augmented by developments in the European Union. In March 2001, for example, the Council adopted a Framework Decision (2001/220/JHA) on the Standing of Victims in Criminal Proceedings which provides minimum rights for those victimised by crime. More recently, a new Directive (2012/29/EU), which will amend and expand the provisions of the Framework Decision, makes specific reference to the identification (Article 22) and protection (Article 23) of vulnerable victims (including persons with disabilities) during criminal proceedings.<sup>4</sup>

The Irish Courts, legislature and politicians are also beginning to take more account of the interests of victims of crime and there has been an expansion in evidential<sup>5</sup> and procedural<sup>6</sup> rights. For victims of crime with disabilities, this increased accommodation includes, for

example, a presumption in favour of giving evidence via a television link in certain specified cases (Law Reform Commission 1989: 120-121),<sup>7</sup> the use of intermediaries,<sup>8</sup> the removal of wigs and gowns,<sup>9</sup> the use of video-recordings of statements as evidence in relation to certain offences,<sup>10</sup> greater flexibility in the giving of victim impact statements,<sup>11</sup> more relaxed identification practices,<sup>12</sup> a less exclusionary approach regarding the competence of mentally impaired persons to give evidence at trial,<sup>13</sup> and provision for the reception of unsworn evidence.<sup>14</sup>

Notwithstanding the increased recognition of victims in the Irish criminal process, it remains the case that some 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 is a key issue.<sup>15</sup> There are also many reported difficulties with the provision of information to victims.<sup>16</sup> Other issues that cause concern include underreporting;<sup>17</sup> intimidation by the process (Kelleher and O'Connor, 1999); attrition rates (Hanly, 2009; O'Mahony, 2009); the lack of private areas in courts (Kilcommins *et al*, 2010); difficulties with procedural rules and legal definitions (e.g. consent in rape cases) (Bacik, 1998); delays in the system (Hanly, 2009); the lack of opportunity to participate fully in the criminal process; and inadequate support services.

Yet even despite these shortcomings, it remains the case that in the last three decades the status of the crime victim in Ireland has gradually altered from being perceived as a 'nonentity' or 'hidden casualty' to a stakeholder whose interests and opinions matter (Christie, 1977: 1-15). Driven largely by an inclusionary logic—flowing from many streams—the Irish criminal process is increasingly accommodating the previously excluded voices of victims of crime. Crime

victims are being anchored once again as key constituents in the criminal justice landscape and criminal justice agencies are having to rework their relationships with them.

### **The More Marginal Status of Victims of Crime with Disabilities**

Victims of crime with disabilities have derived some benefits from the broader inclusionary momentum in relation to victims in the legal field. In addition, there have been some benefits from legislation specifically targeted at persons with disabilities. The requirements on public service providers imposed by the Disability Act 2005, for example, have led to improved physical access to courthouses and Garda stations, for example, through wheelchair ramps, and to the provision of information in an accessible format, for example, through the introduction of induction loop systems. This has enhanced the accessibility of the criminal justice system for victims with physical and sensory disabilities. Victims with intellectual disabilities have also benefitted from some of the measures introduced to ameliorate the impact of the requirements of the formal evidence process introduced by the Criminal Evidence Act 1992. However, victims of crime with disabilities also experience the more general problems of under reporting, lack of information provision, lack of private areas in courtrooms, and delays in progressing complaints which apply in relation to all victims in Ireland. Indeed, very often, the centrality of their outsider status is more pronounced. This derives from a failure to engage with the specific needs of victims with disabilities beyond the immediate needs addressed by the Disability Act 2005. This lack of engagement is especially evident in relation to victims with intellectual disabilities or other conditions which impede mental capacity because accommodation of the needs of these victims poses real challenges for the fundamental premises of the criminal justice system. The effect is that these victims do not have equal access to the benefits of the broader

inclusionary momentum and are doubly disadvantaged, first as victims and secondly, as persons with disabilities. This double disadvantage is evident in a number of areas in the criminal process including a lack of policy emphasis, the continued over reification of the adversarial process, and both the under and over-criminalisation of conduct which involves persons with disabilities. In the following section we will highlight the variety of ways in which victims of crime with disabilities continue to be discriminated against and excluded by the Irish criminal process. While some of these are especially relevant to victims with intellectual disabilities, many are more applicable across the spectrum of all persons with disabilities.

(i) *A politics of neglect at a policy level.*

The ongoing absence of victims of crime with disabilities at a policy level in Ireland is striking. 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). This is evident across most, if not all, of the Irish criminal justice agencies. To begin with, the lack of data collection on people with disabilities as victims of crime is striking. Unlike other jurisdictions, statistical data on crime prevalence rates experienced by people with disabilities, based on crime type or impairment type, simply does not exist. Irish national crime surveys do not include people with disabilities as a sub-group. It is also not apparent that agencies involved in the criminal justice system are monitoring or keeping records of people with disabilities. As Edwards *et al* recently pointed out (2012: 123), ‘[t]hese data absences need to be acknowledged as serious gaps which undermine our knowledge of

people with disabilities' experiences, and render them invisible as a group within the broader victim constituency'.

There is also very little reference to people with disabilities as victims of crime in criminal justice policy literature. The Victims Charter, which marked such an important policy development for crime victims in Ireland, embodies only one insipid reference to victims with disabilities. 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).<sup>18</sup> The position taken in the Charter is in notable contrast with the much more detailed engagement with 'vulnerable' victims in the Code of Practice for Victims of Crime (2006) in England and Wales. The absence of a reference to victims with disabilities from any of the other criminal justice agencies in the non-binding Charter is significant, demonstrating their invisible status at a policy level. The Committee for Judicial Studies has recently published a guide for the Irish judiciary, entitled *The Equal Treatment of Persons in Court: guidance for the judiciary* (2011). It includes a brief section entitled 'Guidance on appropriate treatment of persons with disabilities' (pp. 124-125). Aside from this guidance, it is notable that no specific commitments are made within the literature of the DPP and Courts Service to facilitating people with disabilities as victims of crime. No structured and continuous enhanced service mechanism is provided to such victims — whose quality of evidence may be reduced because of the disability — as they pass through investigative, prosecutorial and trial stages of the process.

In addition to being effectively written out of criminal justice policy through what might be described as a politics of neglect, there is also some evidence of more overtly discriminatory

practices. In its recently revised *Statement of General Guidelines for Prosecutors* (2010, para.4.14), 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?

Aside from difficulties with some of the phraseology used, such statements are objectionable on the basis that they give the impression that the evidence of mentally or physically impaired persons carry less weight — and are less likely to be believed — than other witnesses. They certainly do little to encourage such witnesses to come forward and report crime. In particular, the statements link — without qualification — the reliability or intelligibility of evidence to the physical or mental illness of a witness. Any assumption that supposes that a person suffering from a physical or mental disability is any less reliable or intelligible than any other category of witness is discriminatory. As such, it is contrary to the CRPD (and arguably also to the European Convention on Human Rights and to the Constitution of Ireland). To the extent that reliability of evidence is a valid criterion for determining whether a prosecution case should proceed, it should be couched in a disability-neutral manner and within a framework that seeks as far as possible to accommodate such witnesses as part of their right of equal access to justice, whilst

also ensuring fairness of procedures. That balance is not reflected in the aforementioned statements.

Though empirical data is sparse in the area, the failure of the legal profession in Ireland to understand the difficulties posed by the criminal justice system for victims with disabilities has also been noted.<sup>19</sup> 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). There is no evidence that training programmes have been introduced for solicitors or barristers in Ireland on advising, examining, and cross examining witnesses with disabilities in the intervening period. This provides further support for the view that the politics of neglect is deeply embedded in Irish legal culture. In England and Wales, the Advocacy Training Council recently noted that the manner ‘in which the vulnerable are treated in our court system is a mark of how civilised a society we are’. In noting ‘the paucity of understanding’ of some advocates as regards the conditions and needs of vulnerable people, and the inconsistencies in approach to questioning such witnesses, it recommended, *inter alia*, that a ‘comprehensive modular programme of training in handling vulnerable witnesses, victims and defendants should be put in place for all criminal and family practitioners, both new and experienced’, and the provision of ‘Toolkits’ for advocates setting out common problems and solutions.<sup>20</sup> These kinds of mechanisms are not available to Irish legal professionals and, more significantly, at present, there would seem to be no momentum in developing such mechanisms.

The marginality of victims of crime at a policy level is of concern given that the interaction between criminal justice agencies and such witnesses can also reinforce traditional constructions of subordination and inferiority. 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. Some of the comments were as follows (2011, 68-69):

*“The police let me down in some regards by not investigating more fully and the saddest thing is rape, mutilation and attempted murder is not exactly a grey area. There was a lack of information from the police and constant worry of being murdered.”...*

*“I was sexually abused for seven years of my life. I did go to the Gardaí but they handled it very, very badly and I had to go to the papers so that they would take the situation I was in seriously. The Gardaí eventually put me in touch with the rape crisis centre in my area. They said I didn't have a case and I wasn't raped so they said they weren't the people to help me because they were dealing with people who had it worse than me...”*

*“I went to the Rape Crisis Centre and they knew all about rape, but they did not understand about the disability element of the situation.”*

These vignettes allude to intermediate or advanced stages in the reporting process. 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).

There is an onus on all criminal justice agencies in Ireland to strategically identify victims with disabilities as a category of the broader victim constituency, and to develop a professional, integrated rubric which seeks to meet their needs as befits an equitable, accessible justice process.<sup>21</sup> However, at present, there is little indication of any real commitment on the part of agencies to address the specific needs of this category of victim.

(ii) *An over emphasis on adversarialism and its morphology of combat and contest.*

To the extent that it accommodates victims of crime, the Irish criminal justice process 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. Victims of crime with disabilities 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. For victims with sensory disabilities, difficulties may arise in respect of providing evidence. Clearly, the capacity of a person with visual or aural impairments to provide visual or aural evidence will be impeded. A person with a speech impairment may have difficulties in providing oral evidence, perhaps creating an impression of hesitancy or uncertainty and raising doubts among judges or jury members about the accuracy or verity of the evidence provided.<sup>22</sup>

However, the most significant difficulties are encountered by victims with some form of intellectual disability. For such victims, the adversarial process can be a significant discriminatory barrier, particularly for those, for example, who have difficulty with long term memory recall, with communicating information, and with cognitive overload, or are vulnerable to questioning that invites suggestibility, acquiescence and compliance (Ellison, 2001; Kebbell *et al* 2004; Sanders 1996; Quinn 2003; Burton *et al* 2007).

To begin with, determining the competency of a witness to give an intelligible account has given rise to significant difficulties in Ireland. 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 21<sup>st</sup> 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" (McEnroe, 30 March, 2010).

This statement shows clear deficiencies in the approach of the Irish courts to competence to testify. Instead of adopting a functional approach and determining whether the person has the capacity to perform the task in question, in other words to provide evidence in respect of the events at issue, the test employed focused on irrelevancies. This kind of approach is discredited in other areas of mental capacity law and is clearly incompatible with the CRPD (Dhanda, 2006). The absence of even basic understanding of the issues and the lack of training among any of the relevant professionals is also apparent.

As part of the study by Edwards *et al* (2012: 110) into victims of crime with disabilities in Ireland, an interview was conducted with representatives from a health and social care service

provider organisation. Concerns were raised in relation to the legal process's construction of a 'competent witness' and the consequences of failing to attain this status. As one of the representatives noted:

“We do have occasions where people we bring along and try to get them to report things, it's stopped on that basis, that they're not going to be credible so there's no point to bring it any further, or they encroach on other things like it's not enough evidence or it's usually not as blatant as they're not able to make a statement it's usually something else”.

Other representatives from the same organisation noted the issue more specifically in relation to people with intellectual disabilities:

*Point 1:* there are four significant levels of intellectual disability - mild, moderate, severe and profound - so we're talking about the people who have mild, maybe low mild, they're the people who there's a chance that can bring it to the court or to the Gardaí. But it's the people, I can name out, I can count out a number of people who have been pregnant through family abuse with a moderate intellectual disability. That will never go anywhere.

*Point 2:* And people with severe profound disability who have been assaulted by family members or others – because they're not a credible witness it stops. [...] Even though somebody might have witnessed it, the person themselves being the victim won't be

able to stand up in court and say this person did this, this and this to me, and the Gardaí say look there's no point in taking this to the DPP so it just stops again.(ibid).”

These statements suggest that flawed conceptions of competence to testify serve to limit access to justice for victims with disabilities not just in those cases in which competence is raised as an issue at trial but throughout all stage of the criminal justice process, beginning from the decision to prosecute and the charging strategies employed.<sup>23</sup> Thus, it may well be the case that only the strongest cases reach trial stage.

Those victims who successfully negotiate the competence hurdle are then confronted with a myriad of difficulties within the trial process. Elsewhere it has been noted that the greatest impediment to accommodating complainants with mental disabilities ‘lies in our assumptions about what is necessary to ensure a fair trial for an accused’(Benedet and Grant 2007: 547). In Ireland, as in other common law jurisdictions, the assumption is that fairness to the accused can be delivered only through the adversarial process, delivered in the main through oral evidence with cross-examination. Insofar as measures have been taken to accommodate victims with disabilities, they have for the most part attempted to facilitate victims in engaging in the adversarial process rather than challenging any of the foundational premises of the process. Yet, as Ellison argues, ‘the paradigmatic adversarial process offers limited scope for the improved treatment of vulnerable and intimidated witnesses’ (2001: 160). In Ireland, Delahunt (2010) makes a similar point, suggesting 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.

A blindingly narrow emphasis on adversarial legalism—rooted stubbornly in a State-accused way of knowing — is also evident in Irish case law in respect of the Criminal Evidence Act 1992. For example, in a very recent case, *D.O'D v Director of Public Prosecutions and Judge Patricia Ryan*,<sup>24</sup> 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 on the basis that it would create a real risk that he would not get a fair trial. In particular, the defence argued that the giving of evidence by the complainants by way of live video link would infer that the complainants were vulnerable persons and persons who suffered from a 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.<sup>25</sup> The complainants accordingly were required to give their evidence *viva voce* in the case.

This decision imposes a strait jacket on the use of video link provisions that is anathema to the accommodation that they were designed to facilitate. The reasoning in the judgment also raises a number of questions. 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.

Other aspects of the trial process also serve to undermine the evidence provided by victims with disabilities, in particular intellectual disabilities. It still remains common to refer to victims according to a 'mental age' (in the *Laura Kelly* case discussed above, the complainant was

described as having a ‘mental age of four’). As Benedet and Grant argue, ‘the analogy to children can set in motion a whole chain of assumptions that can undermine a complainant’s credibility’. (2007: 522). As well as raising doubts about the veracity of the evidence, in the context of sexual offences, the equation with children suggests that any form of sexual activity/desire on the part of the complainant is wrong or inappropriate. Any evidence of prior sexual activity by the complainant (to any degree) can then be used to undermine a complainant’s argument that she did not consent in the case in question.

(iii) *Under and Over Protection*

In recent years the Irish legislature has been ‘hyperactive’ in its approach to criminalising and combating serious criminal wrongdoing particularly in the area of organised crime (Kilcommins *et al*, 2004). Surprisingly, however, there has been limited intervention in relation to offences concerning persons with disabilities. One such measure is 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. For both offences, a defence is provided for an accused if he or she can show that at the time of the alleged commission of the offence s/he did not know and had no reason to suspect that the person in respect of whom s/he is charged was 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. The offences which require disclosure include false imprisonment, rape, serious assault, incest and trafficking of persons.<sup>26</sup>

There are a number of difficulties with the offences provided for under section 5 of the Criminal Law (Sexual Offences) Act 1993. 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).<sup>27</sup> In addition, the definition of ‘mentally impaired’ is overly broad. ‘Mentally impaired’ is defined as ‘suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation’. These factors are irrelevant to the fundamental question of whether or not the person with disabilities can consent/has consented to the sexual activity. The effect, as described by the Law Reform Commission, is that ‘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’ (2005: 141). This criminalization of consensual sexual activity fails to recognise the sexual autonomy of people with intellectual disabilities or mental illnesses who fall within the statutory definition. The position is clearly in breach of the CRPD which, in Art. 23, expressly requires States Parties to take “appropriate measures” to eliminate discrimination against persons with disabilities in all matters relating to “marriage, family, parenthood, and relationships.” In addition, the provision

may breach Article 8 of the European Convention on Human Rights in relation to respect for private life (LRC, 2005: 143).

At the same time, section 5 under protects some people with disabilities in that 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.<sup>28</sup> In a recent case, *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’ (ibid: 192).

There are also notable absences of the protection of people with disabilities in other relevant pieces of legislation. For example, under the Prohibition to Incitement to Hatred Act 1989, 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 22<sup>nd</sup>, 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.

## **Conclusion**

The past decade has seen significant shifts, both in the way we think about victims and in the way we think about people with disabilities. The process of returning victims to the criminal justice process is now advanced, although in Ireland there is still some considerable distance to travel in giving practical meaning to the rhetoric of inclusion. At the same time, the introduction of the CRPD provides a comprehensive framework for the protection of human rights of persons with disabilities and begins the paradigm shift needed in order to render visible people with disabilities across a range of public and private contexts. (Lawson, 2006-07; Kayess and French,

2008). This article has shown that, as yet in Ireland, there has been little real attempt to engage with the issues raised by victims with disabilities. The system is not designed in contemplation of victims with disabilities. While some surface measures, such as the installation of ramps or induction loop systems, have been taken, there has been little effort to address the fundamental challenge which the right of victims with disabilities to have access to justice poses for the foundational premises of the criminal justice system.

The marginality of victims of crime with disabilities reveals itself in many areas of the Irish criminal process. At a policy level victims of crime with disabilities are not strategically identified as a specific victim group with particular needs and concerns among criminal justice agencies and victim support organisations. In terms of criminal justice agency commitments, no structured and continuous enhanced service mechanism is provided to such victims — whose quality of evidence may be reduced because of the disability — as they pass through investigative, prosecutorial and trial stages of the process. The fact that there is no evidence of a targeted approach that treats such victims with sensitivity, dignity and respect raises serious concerns about the extent to which their right of access to justice is fairly accommodated. In addition, some of the procedural and substantive rules are also inadequate having regard to the social and medical realities of such victims' lives. Commitment to reform is often hampered by a misconceived fidelity to the conventional way of doing things and a reluctance to overly disturb familiar and reified patterns. This is evident in the static, somewhat fixed, approach to competency to testify determinations, an over insistence on adversarialism in some instances, the absence of fair criminal labelling, and a lack of suitable protections in the criminal law calendar.

The CRPD requires that ‘States Parties must recognise that all persons are equal before and under the law and are entitled without discrimination to the equal protection and equal benefit of the law’ (Art. 5(1)). In Ireland, this is clearly not the case for victims with disabilities. Although our primary concern in this article has been to recognise and enumerate the ways in which victims with disabilities are excluded from the Irish criminal justice process, a number of preliminary recommendations may be made regarding the necessary next steps towards the inclusion of victims with disabilities. First, and as a matter of urgency, better data is needed. It is essential that the current method of presenting Irish crime statistics is amended so that a clear picture of the extent, and the nature, of crime experienced by victims with disabilities is accurately recorded. In addition, the perspectives of the range of victims with disabilities must be collated and recognised. Secondly, it is necessary to undertake a review of the current legal framework for inclusion contained in the Disability Act 2005 and the Criminal Evidence Act 1992. We have raised questions about the effectiveness of these measures in delivering meaningful inclusion for persons with disabilities. However, a targeted empirical investigation of how these measures operate in practice is required as part of any evaluation. Thirdly, the policy of neglect must be addressed. We have identified an almost complete absence of victims with disabilities in Irish victim support measures. A review of policy from an inclusionary perspective must therefore be a priority. Recognising the specific needs of victims with disabilities is an issue of equality, inclusion and fairness, Until these needs are addressed, any progress towards the recognition of victims of crime in Ireland is inevitably incomplete.

---

## Notes

\*We would like to thank the journal reviewers for their helpful comments.

---

<sup>1</sup>He also noted (2001: 179): “In the penal-welfare framework, the offending individual was centre-stage: the primary focus of criminological concern...In vivid contrast, the individual victim featured hardly at all. For the most part, he or she remained a silent abstraction: a background figure whose individuality hardly registered, whose personal wishes and concerns had no place in the process. In contemporary penalty this situation is reversed. The process of individualisation now increasingly centres upon the victim. Individual victims are to be kept informed, to be offered the support that they need, to be consulted prior to decision-making, to be involved in the judicial process from complaint through to conviction and beyond.”

<sup>2</sup> The CRPD entered into force on 3 May 2008, on receipt of its twentieth ratification. At the time of writing, the CRPD has been signed by 155 States and ratified by 130 (including Australia, Canada, New Zealand and the United Kingdom). The CRPD has been signed by Ireland but not ratified although there is a political commitment to ratify the CRPD once capacity legislation has been enacted. This is likely to take place in 2014-15.

<sup>3</sup> This Charter was produced by the Department of Justice, Equality and Law Reform in September 1999 (and updated in 2010), reflecting the ‘commitment to giving victims of crime a central place in the criminal justice system.’

<sup>4</sup>The Directive was adopted in October 2012 and entered into force on 15<sup>th</sup> November 2012, giving EU member states three years to implement the provisions.

<sup>5</sup> This ‘mainstreaming of victim-centred justice’ (Goodey, 2005: 35) is evident in Ireland through the following: the employment of intermediaries, live television links and video testimony for witnesses and victims of crime; the abolition of the mandatory requirement on judges to warn juries of the dangers of convicting on the basis of uncorroborated or unsworn victim/witness testimony; the removal of wigs and gowns when conducting an examination in

---

chief or cross-examination of a child witnesses; restrictions on the admissibility of the prior sexual history of victims; the protection of the identity of victims in sexual offence cases; separate legal representation for rape victims where an application is made to admit previous sexual history; greater protection for the identity of victims and witnesses in criminal cases; the introduction of measures to restrict unjustified imputations at trial against the character of a deceased or incapacitated victim or witness; the reduction of victim alienation through the use of victim impact statements; the ability of the DPP to appeal unduly lenient sentences; the creation of a statutory offence of intimidation of witnesses or their families; and provisions for the payment of compensation to victims in respect of any personal injury or loss caused by a crime.

<sup>6</sup> In more recent years the system has also witnessed a far less rigid approach to the circumstances in which the spouse of an accused is competent to testify for the prosecution in criminal proceedings; tighter restrictions that offer victims better protection against unnecessary and distressing information being raised about their sexual histories; 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; a relaxation of the exclusionary rules on opinion evidence in certain circumstances; the introduction of a provision which make it clear that the absence of resistance by a victim in a rape case does not equate with consent; and a less prejudiced approach to the determination of certain witnesses' competence to testify at the trial of an accused. (Kilcommins et al., 2004: 150-153; Rogan, 2006a: 202-208).

<sup>7</sup> Section 13 of the Criminal Evidence Act 1992 provides that victims, among other witnesses, can give evidence in cases involving violence or an alleged sexual offence *via* a live television link. In the case of victims of such offences who are under the age of 18 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)).

<sup>8</sup> Under section 14 (1) of the Criminal Evidence Act 1992, witnesses may, on application by the prosecution or the defence, 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.

<sup>9</sup> 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).

<sup>10</sup> Under section 16(1) of the Criminal Evidence Act 1992, for example, it provides that a video recording 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 video recording 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 (2011: 6) 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'.

<sup>11</sup> 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 and to offences involving violence or the threat of violence to a person. Section 5 initially presupposed that the victims of these offences were capable themselves of giving evidence in open court of the impact that the crime had on them (O'Malley 2009). Under section 5A of the Criminal Procedure Act 2010, a child or a person with a mental disorder may now give evidence of the impact of the crime through a live television link unless the court sees good reason to the contrary.

<sup>12</sup> Persons giving evidence via television link under section 13 of the Criminal Evidence Act 1992, for example, are not 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 as being the offender at an identification parade, shall be admissible as evidence.

<sup>13</sup> Persons deemed to have 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.

This was 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.’

<sup>14</sup> Section 27(3) of the Criminal Evidence Act 1992 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. See also *O’Sullivan v Hamill* [1999] 3 IR 9.

<sup>15</sup> For example, a study by McGrath (2009) showed that 51% of members of the legal profession were unfamiliar with the provisions of the Victims Charter

<sup>16</sup> The European Commission suggested in 2004, for example, 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 (McGee et al, 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, 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.

---

<sup>17</sup>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 2006, which asked 39,000 households about the experiences of crime among those over 18 years of age in the previous 12 months, found that 30% of burglaries (up from 23% in 1998), 39% of violent thefts (roughly the same as in 1998), 47% of assaults (up from 43% in 1998), and 57% of acts of vandalism (down from 60% in 1998) were not reported (CSO 2007). 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).

<sup>18</sup> In contrast, the *Code of Practice for Victims of Crime* in England and Wales, which has lawful authority, specifically provides an enhanced service for vulnerable victims by all relevant criminal justice agencies. A vulnerable victim includes a “person suffering from a mental disorder or otherwise has a significant impairment of intelligence and social functioning, or has a physical disability or is suffering from a physical disorder” (Office for Criminal Justice Reform, 2005: 4).

<sup>19</sup> See Edwards *et al* (2012: 111-112)

<sup>20</sup> Available at <http://www.advocacytrainingcouncil.org/images/word/raising%20the%20bar.pdf>

<sup>21</sup> This failure to put in place mechanisms to identify victims of crime with disabilities will in all likelihood ensure that the Irish state is in breach of Article 22 of the new EU Directive (2012/29/EU) establishing minimum standards on the rights, support and protection of victims

---

of crime (though it should be noted that there is currently a window of three years before compliance is required). It provides that Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings. More generally, see de Than (2003: 165-182).

<sup>22</sup> See the decision of the Supreme Court of Tasmania in *Coombe v Bessell* [1994] TASSC 66 where the Supreme Court overturned a magistrate's conviction of a man with a speech impediment of which the magistrate had been unaware.

<sup>23</sup> See Saunders (2010) on the impact of disabilities on charging strategies in the Crown Prosecution Service.

<sup>24</sup> [2010] 2 I.R. 605.

<sup>25</sup> The material put before the trial judge which expressly considered the ability of either complainant to give evidence were the statements of two psychologists who noted that the level of intellectual disability of the complainants fell within the low to mild range and that the use of video link testimony would be 'advantageous in the circumstances.'

<sup>26</sup> A vulnerable person is defined as a person: (a) Who is suffering from a disorder of the mind, whether as a result of mental illness or dementia, or has an intellectual disability, which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person, or (b) Who is suffering from an enduring physical impairment or injury which is of such a nature or degree as to severely restrict the capacity of the person to guard himself or herself against serious exploitation or abuse, whether physical or sexual, by another person or to report such exploitation or abuse to the Garda Síochána, or both.

---

<sup>27</sup> By the same reasoning, the use of the phrase ‘mental handicap’ in the Criminal Evidence Act 1992 is also inappropriate.

<sup>28</sup>See *MC v Bulgaria* (2005) 40 EHRR 20.

## References

Bacik I, Heffernan L, Brazil P and Woods M (2007) *Report on Services and Legislation Providing Support for Victims of Crime*. Dublin: Commission for the Support of Victims of Crime.

Bacik I, Maunsell C and Gogan S (1998) *The Legal Process and Victims of Rape*. Dublin: Dublin Rape Crisis Centre.

Bartlett H and Mears E (2011) *Sexual violence against people with disabilities: data collection and barriers to disclosure*. Dublin: Rape Crisis Network Ireland.

Beattie J (1986) *Crime and the Courts in England, 1660-1800*. Princeton, Princeton University Press.

Beattie J (1991) Scales of Justice: Defence Counsel and the English Trial in the Eighteenth and Nineteenth Centuries *Law and History Review* 9(2): 221-167.

Benedet J and Grant I (2007) Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues, *McGill Law Journal* 52: 515-552.

Burton M, Evans, R and Sanders A (2007) Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales *International Journal of Evidence and Proof* 11(1): 1-23

Central Statistics Office (2007) *Quarterly National Household Survey 2006: Crime Victimization* Central Statistics Office: Cork and Dublin.

---

Christie N (1977) Conflicts as Property *British Journal of Criminology* 17: 1-15.

Christie N (1986) The Ideal Victim. In Fattah, E (ed) *From Crime Policy to Victim Policy*  
Basingstoke, MacMillan.

Convention on the Rights of Persons with Disabilities, (2006) General Assembly Resolution  
61/106.

Courts Service (2010) *Explaining the Courts: An Information Booklet*. Dublin: Courts Service of  
Ireland.

Courts Service (undated) *Going to Court: A DVD and Booklet for Young Witnesses*. Dublin:  
Courts Service of Ireland.

Crown Prosecution Service (2006) *Code of Practice for Victims of Crime*. London: Crown  
Prosecution Service.

Crown Prosecution Service (2007) *Policy for Prosecuting Cases of Disability Hate Crime*.  
London: Crown Prosecution Service.

Damaska M (1986) *The Faces of Justice and State Authority*. Yale University Press, New Haven.

Delahunt M (2010) Improved measures needed for vulnerable witnesses in court, *The Irish  
Times*, 7 December, p. 24.

Delahunt M (2011) Video evidence and s. 16(1)(b) of the Criminal Evidence Act 1992', *The Bar  
Review*, 16, February 2011.

Department of Justice and Law Reform (2010) *Victims Charter and Guide to the Criminal  
Justice System*. Dublin: Victims of Crime Office, Department of Justice and Law Reform.

De Than, C (2003) Positive Obligations under the European Convention on Human Rights:  
towards the human rights of victims and vulnerable witnesses *Journal of Criminal Law* 67: 165-

182

---

Dhanda A (2007) Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future? *Syracuse Journal of International Law and Commerce* 34, 429-458

Director of Public Prosecutions (2010) *Guidelines for Prosecutors* (Revised November 2010). Dublin: Office of the Director of Public Prosecutions.

Dworkin R (1977) *Taking Rights Seriously* Harvard University Press, Cambridge.

Dworkin R (1985) *A Matter of Principle* Harvard University Press, Cambridge.

Dworkin R (1998 repr) *Law's Empire* Hart Publishing, Oxford.

Edwards C, Harold G and Kilcommins, S (2012) *Access to Justice for People with Disabilities as Victims of Crime in Ireland* UCC, Cork.

Ellison,L (2001) *The Adversarial Process and the Vulnerable Witness* Oxford: Oxford University Press.

European Commission (2004) *Report from the Commission on the basis of Article 18 of the Council framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.*[SEC 2004, 102].

Foucault M (1979) *Discipline and Punish: the birth of the prison* Harmondsworth: Penguin

French P (2007) *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland* Brisbane: Queensland Advocacy Incorporated.

Garland D (2001) *The Culture of Control: Crime and Social Order in Contemporary Society* Oxford: Oxford University Press

Goodey J (2005) *Victims and Victimology: Research, Policy and Practice*. London: Pearson Education Limited.

Habermas J (2008 repr) *Between Facts and Norms* Cambridge: Polity Press.

---

Hamilton J (2011) Sexual Offences and Capacity to Consent: a prosecution perspective Presentation given at *Annual Conference of the Law Reform Commission*, 7<sup>th</sup> November, Dublin, 2011.

Hanly C et al (2009) *Rape and Justice in Ireland: a national study of survivor, prosecutor and court responses to rape*. Dublin: The Liffey Press.

Hay D (1977) Property, Authority and the Criminal Law. In Hay, D *et al* (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* London: Allen and Unwin, pp. 17-63.

Healy J (2004) *Irish Laws of Evidence*. Dublin: Thomson Round Hall

Hoong Sin C, Hedges A, Cook C, Mguni N and Comber N. (2009) *Disabled People's Experiences of Targeted Violence and Hostility*. Research Report 21, Manchester: Equality and Human Rights Commission.

Hoyle C (2012) Victims, the Criminal Process, and Restorative Justice. In Maguire, M *et al* (eds), *The Oxford Handbook of Criminology* Oxford, Oxford University Press, (5<sup>th</sup>ed), pp. 398-425.

Inclusion Ireland(2011) Access to justice for People with a Disability hampered by antiquatedlaw'. Available at

<http://www.inclusionireland.ie/ACCESSTOJUSTICEFORPEOPLEWITHADISABILITYHAMPEREDBYANTIQUATEDLAW.htm>

Irish Council for Civil Liberties (2008) *A Better Deal: the human rights of victims in the criminal justice system*. Dublin: Irish Council for Civil Liberties.

Judicial Studies Board (2010) *Equal Treatment Bench Book* (London: Judicial Studies Board).

Kayess R and French P (2008) Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities *Human Rights Law Review* 8(1): 1-34.

---

KebellIM *et al*, (2004) Witnesses with Intellectual Disabilities in Court: What questions are asked and what influence do they have? *Legal and Criminal Psychology* 9: 23-35.

Kelleher P and O'Connor M. (1999) *Safety and Sanctions: Domestic Violence and the Enforcement of the Law in Ireland* (Women's Aid, 1999).

Kilcommins S *et al* (2004), *Crime, Punishment and the Search for Order in Ireland* (Dublin, IPA)

Kilcommins S, Leane M, Donson F and Fennell C (2010) *The Needs and Concerns of Victims of Crime in Ireland* (Dublin: Commission for the Support of Victims of Crime).

King P (1984) Decision Makers and Decision-Making in the English Criminal Law, 1750-1800 *Historical Journal* 27(1): 25-58.

King P (2000) *Crime, Justice, and Discretion in England, 1740-1820* Oxford: Oxford University Press.

Kirwan G and O'Connell M (2001) Crime Victimization in Dublin Revisited *Irish Criminal Law Journal* 11(2): 10-13

Langbein JH (1994) The Historical Origins of the Privilege Against Self-Incrimination at Common Law *Michigan Law Review* 92(5): 1047-1085.

Law Reform Commission (1989) *Consultation Paper on Child Sexual Abuse*. Dublin: Law Reform Commission.

Law Reform Commission (2005) *Consultation Paper on Vulnerable Adults and the Law: Capacity*. Dublin: Law Reform Commission.

Law Reform Commission (2006) *Vulnerable Adults and the Law*. (LRC 83-2006). Dublin: Law Reform Commission.

---

Law Reform Commission (2011) *Sexual Offences and Capacity to Consent: Consultation Paper*. (LRC CP 63 – 2011). Dublin: Law Reform Commission.

Lawson A (2006-7) The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn *Syracuse Journal of International Law and Commerce* 34(2): 563-619.

May A (2003) *The Bar and the Old Bailey, 1750-1850* (London: University of North Carolina Press).

McEnroe J (2010) Family want ‘archaic’ law overhauled *Irish Examiner*, March 30<sup>th</sup>.

McGee H, Garavna R, de Barra M Byrne J and Conroy R. (2002) *The SAVI Report: Sexual Abuse and Violence in Ireland*. (Dublin: Liffey Press).

McGowen R (1986) A Powerful Sympathy: Terror, the Prison and Humanitarian Reform in the Early Nineteenth Century *Journal of British Studies* 25: 312-334.

McGrath, A. (2009) *The Living Victims of Homicide: analysing the needs and concerns of the co-victims of homicide within the Irish criminal justice system*. (Unpublished PhD thesis, University College Cork).

McGrath D (2008) The Constitutionalisation of the Law of Evidence. In Carolan E and Doyle O, (eds), *The Irish Constitution* Thomson, Round Hall, Dublin, pp. 293-306.

Nocon A, Iganski, P, Lagou, S (2011) *Disabled People’s Experiences and Concerns about Crime: Analysis of the British Crime Survey 2007-8, 2008-9, 2009-10* Manchester: Equality and Human Rights Commission.

O’Connell M and Whelan A (1994) ‘Crime Victimization in Dublin’ *Irish Criminal Law Journal* 4(1): 85-112.

---

Office for Criminal Justice Reform (2005) *The Code of Practice for Victims of Crime*. London: Office for Criminal Justice Reform. Accessed at: [http://www.cps.gov.uk/victims\\_witnesses/victims\\_code.pdf](http://www.cps.gov.uk/victims_witnesses/victims_code.pdf)

Office of the Director of Public Prosecutions (2006) *Guidelines for Prosecutors* Dublin: Office of the DPP.

O'Hara E (2005) Victim Participation in the Criminal Process, *Journal of Law and Policy*, 13: 229-247.

O'Mahony P. (2009) Ireland. In Lovett J and Kelly L (eds). *Different Systems, similar outcomes? Tracking attrition in reported rape cases in eleven European countries* London: Child and Woman Abuse Unit.

O'Malley T (2009) *The Irish Criminal Process* Dublin: Thomson Round Hall.

Packer H (1968) *The Limits of the Criminal Sanction* California: Stanford University Press.

*Report of the Commission on the Status of People with Disabilities* (1996) Dublin.

Quinn, K (2003) Justice for Vulnerable and Intimidated Witnesses in Adversarial Proceedings *Modern Law Review* 66(1): 139-155.

Rock P (2004) Victims, Prosecutors and the State in Nineteenth Century England and Wales *Criminal Justice* 4(4): 331-354.

Rogan M (2006a) The Role of Victims in Sentencing – the case of compensation orders *Irish Law Times* 13: 202-208.

Rogan M (2006b) Victims Rights: Theory and Practice Part II *Irish Law Times* 10: 151-155.

Sanders A et al (1996) *Victims with Learning Disabilities: negotiating the criminal justice system* (findings no 44) London, HMSO.

- 
- Saunders C (2010) Making it Count: Sexual Offences, Evidential Sufficiency and the Mentally Disordered Complainant *Liverpool Law Review* 31: 177-206
- Shakespeare, T (2006) *Disability Rights and Wrongs* Abingdon: Routledge.
- Sherry M (2000) Hate crimes against disabled people *Social Alternatives*, 19 (4): 22-30.
- Stone, K (2009) Criminal Justice and Vulnerable Adults: who does what? In J Pritchard (ed) *Good Practice in the Law in Safeguarding Adults: criminal justice and adult protection*, London: Jessica Kingsley Publishers.
- Thomas P (2011) Mate crime: ridicule, hostility and targeted attacks against people with disabilities *Disability and Society*, 26 (1): 107-111.
- Vaughan, B and Kilcommins S (2010) 'The Governance of Crime and the Negotiation of Justice' 2010 *Criminology and Criminal Justice* 10: 59-68.
- Walsh D (2002) *Criminal Procedure* Dublin, Thomson Round Hall.