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The centrality of the outsider status of victims with disabilities in Ireland: 'rights' and wrongs

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A. Introduction

The Victim in Criminal Justice Systems

- Non-entity
- 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).



Article 16 - Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to **protect** persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including the gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender and age-sensitive assistance and **support** for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.
(review)

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological **recovery**, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are **identified**, investigated and, where appropriate, prosecuted.



The Possibilities of Law

The People (DPP) v JT (1988)

- 20 year old Downs Syndrome witness
- Mother – spousal incompetence
- The invocation of the family – Article 41
- The juridification of a new form of inclusion?



The possibilities of law

- live television links in the courtroom (1992)
- the admission of video-recordings, depositions and out of court statements (1992 and 2006)
- eye witness identification (1992)
- competency of witnesses to testify at trial (1977)
- Changes in corroboration rules (1990)
- doctrine of recent complaint (2009)
- the absence of resistance by a victim in a rape case does not equate with consent (1990)
- tighter restrictions that offer victims better protection against unnecessary and distressing information being raised about their sexual histories;
- separate legal representation for sexual offence complainants where an application is made to admit previous sexual history (2001)
- the abolition of the marital exemption in relation to rape (1990)
- court accompaniment in sexual offence cases;

The possibilities of law

- greater protection of the identity of victims and witnesses in criminal cases (1981);
- the introduction of measures to restrict unjustified imputations at trial against the character of a deceased or incapacitated victim or witness (2010);
- the creation of a statutory offence of intimidation of witnesses or their families (1999);
- the ability of the DPP to appeal unduly lenient sentences (1993);
- the right to return of property to be used as evidence;
- and provisions for the payment of compensation to victims through a statutory scheme introduced under section 6 of the Criminal Justice (1993)

- Victim impact statements (1993)
- Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the Victims Directive).
- ECHR
- Criminal Justice (Victims of Crime) Bill 2015
- Criminal Law (Sexual Offences) Act 2017



The flow of law in to the civil sphere.

- M.N. v. S.M. [2005] 4 I.R. 461 at 472
- Statute of Limitations
- Walsh v Byrne [2015] IEHC 414 – a new tort (negligence)



B. But what about victims with disabilities.

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).

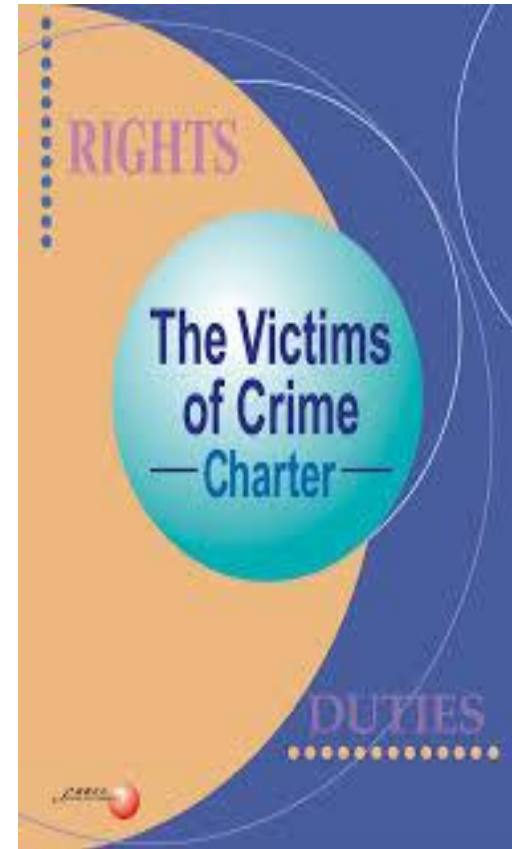
A recent study undertaken on victims of crime with disabilities found, for example, that people with disabilities *'are not being strategically identified as a victim group, either by victim support organisations, or those engaged at a central government policy level in dealing with victims' issues'* (Edwards et al 2012: 100).

Where – lack of data gathering, renders them invisible within the broader victim constituency.



Pre-trial

- 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**
 - ...(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.
- 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.



- The Law Reform Commission also noted in a Consultation Paper on Capacity that “a regrettable effect of section 5 of the 1993 Act 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”.
- The Commission went on to note that this may in fact **breach Article 8** of the European Convention on Human Rights in relation to respect for private life.
- There is also an evident gap in the provision in that it covers **buggery, intercourse and acts of gross indecency between males, but not unwanted sexual contact more generally.** Such an obvious hole 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.



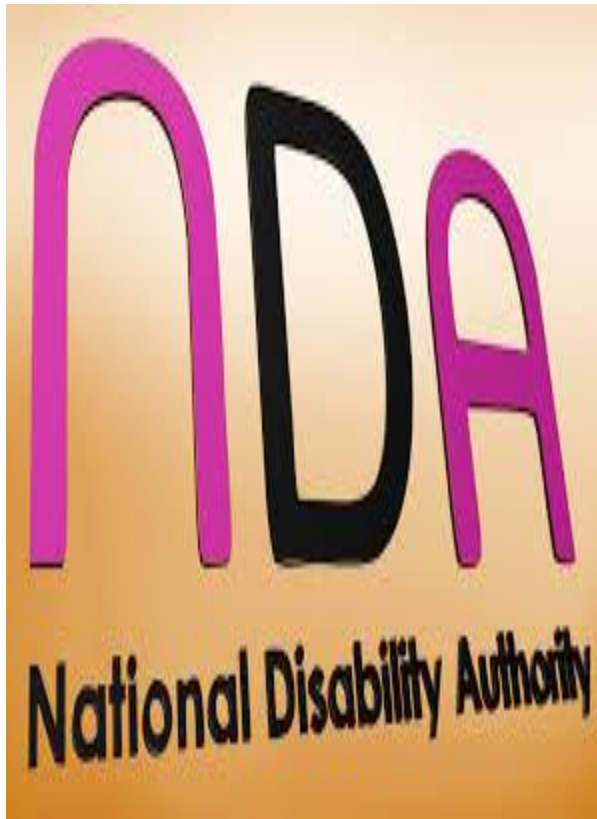
- The People (DPP) v XY, the accused was charged with section 4 of the Criminal Law (Rape) (Amendment) Act 1990 after it was alleged that he forced a woman with an intellectual disability into performing the act of oral sex with him. Such a sexual act did not come within the scope of section 5 of the 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.





- A recent study undertaken on victims of crime with disabilities in Ireland also found that people with disabilities *'are not being strategically identified as a victim group, either by victim support organisations, or those engaged at a central government policy level in dealing with victims' issues*'. Edwards et al, p. 100.

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



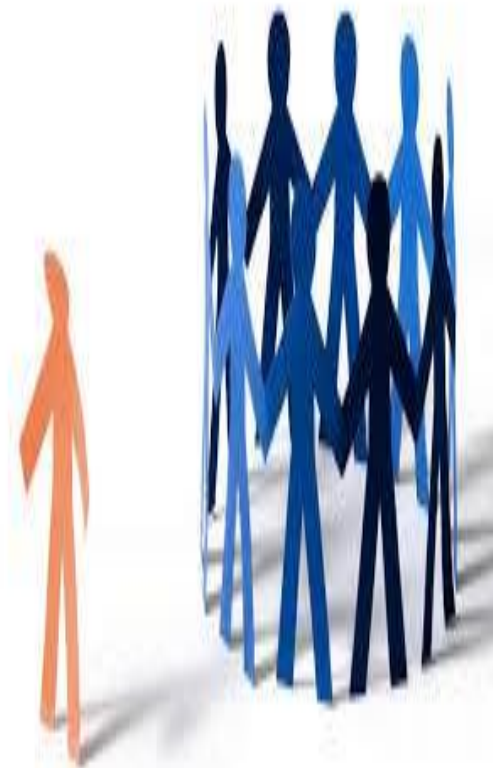
- The adversarial process can be a significant discriminatory barrier, particularly for those, for example, who have difficulty:
 - (i) Long term memory recall
 - (ii) With communicating information, and with cognitive overload
 - (iii) And with questioning that invites suggestibility, acquiescence and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



But we have come along way!

- In *DPP v JS* for example, a complainant with a moderate mental 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. (Unreported, Circuit Court, 1983).

- 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



An example of a case

- *D.O'D v Director of Public Prosecutions and Judge Patricia Ryan*, the applicant had been charged with having sexual relations with two 'mentally impaired' persons. He sought leave to quash the order of the trial judge directing the use of video link facilities pursuant to section 13(1)(b) of the Criminal Evidence Act of 1992 (a general provision which permits a witness 'with leave of the court' to give evidence via a link). The applicant contended that the giving of evidence by video link by the two complainants would create a real risk that he would not get a fair trial because the giving of evidence by them by way of live video could or would convey to the jury that they were persons with 'mental impairment', a matter which he disputed as part of his defence. [2010] 2 I.R. 605.



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

- It is difficult to understand why the complainants were not permitted to give their evidence via television link under 13(1)(a) of the Criminal Evidence Act 1992, which specifically relates to children and persons with a 'mental handicap', where there is a **presumption operating in their favour**. The complainants were channelled into the more general provision of section 13(1)(b) (where a presumption in their favour does not operate) on the basis that a finding of 'mental impairment' would be unfair to the accused and would compromise his defence.
- It is **unclear how a finding that the complainants were 'mentally impaired'** for the purposes of giving evidence via a television link under section 13(1)(a) would 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'.
- **Such a debate and determination would take place in the absence of a jury**, and at the end of the **trial a direction** could be given by the trial judge informing jury members that nothing was to be taken from the fact of persons giving evidence via a television link (the jury would not know that the application was made under section 13(1)(a)).
- It should also be borne in **mind that the range of section 13 is very limited; it is confined to offences involving physical or sexual violence**. When sexual offences are perpetrated against persons with a mental disability under section 5 of the Criminal Law (Sexual Offences) Act 1993 (the only offence governing sexual relations with 'mentally impaired' persons), the specific defence open to an accused party is to argue that he did not know that the complainant had a mental disability. According to DO'D, such a defence prevents the complainant from relying on the presumption of giving evidence under 13(1)(a), and requires the strongest of proof under section 13(1)(b). This reasoning denies — or, at best, greatly reduces — the possibility for such complainants in such sexual offence cases to give their evidence via television link, something which is completely at odds with the spirit underpinning section 13. It imposes on the provisions a straight-jacket that is anathema to the accommodation they were designed to facilitate.

- 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.

- **Ground Rule Hearings** (Lubemba [2014] EWCA 2014)
- Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge or magistrates, advocates and intermediary **before the witness gives evidence.**
- Discussion of ground rules is good practice, **even if no intermediary is used**
- Discussion before the day of trial is preferable to give advocates **time to adapt their questions** to the witness's needs.
- All **witnesses,, should be enabled to give** the best evidence they can. I
- This may mean departing radically from **traditional cross-examination.**
-

The court may dispense with the normal practice and **impose restrictions on the advocate 'putting his case'** where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions.



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

The Advocate's Gateway (TAG) provides free access to practical, evidence-based guidance on vulnerable witnesses and defendants. TAG is hosted by the The Inns of Court College of Advocacy,



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
- Identification as a vulnerable group
- Ground rule hearings

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 the ECHR, the new victims directive (Articles 21 and 22), and the Convention for the Protection of Persons with Disabilities (when it becomes law).