BEYOND SPECIAL MEASURES: CHALLENGING TRADITIONAL CONSTRUCTIONS OF COMPETENCE AND CROSS-EXAMINATION FOR VULNERABLE WITNESSES IN IRELAND

Abstract: Since 1992, Ireland's adversarial criminal process has recognised a series of statutory special measures which, when invoked, operate to shield vulnerable witnesses from an accused in court while at the same time continuing to subject them to live adversarial examination. The enduring subscription by Irish policymakers to these courtroom accommodations was recently confirmed in the reforms visited upon Ireland's criminal trial by the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017; both of which wrought significant revisions to the contours of Ireland's special measures framework. In the context of these recent legislative interventions, this paper considers the limitations of this modest reformative approach. By demonstrating, in particular, the outstanding exclusionary impact which traditional constructions of witness competency and cross-examination can have on vulnerable court users, the paper presents the recent legislative interventions not only as a missed opportunity to challenge ingrained procedural practices, but also to look beyond the formal parameters of Ireland adversarial trial, for more imaginative solutions to address the invisible status of victims of crime with intellectual disabilities within the Irish criminal process.

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Introduction

The contours of Ireland's criminal justice system have undergone significant revision in recent decades in order to demonstrate an increased sensitivity to the needs and concerns of victims of crime. The promulgation, for instance, of the non-statutory Victims' Charter,[1] the recognition of a victim's limited right to separate legal representation,[2] and the introduction of Victim Impact Statements at sentencing,[3] are all emblematic of a concerted political and legal effort, not only to foster greater support for crime victims at all stages of proceedings, but also to actively accommodate their increased participation in the criminal process itself. This emergent momentum towards securing the increased juridification of victims' rights in Ireland arguably reached its high-water mark in January 2019 with the commencement of the Domestic Violence Act 2018; a development which, of itself, took place in the shadow of the implementation in May 2018 of two further victim-focused legislative interventions, namely the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017. In cherishing a triangulated vision of a fair trial – which, at once, recognises the interests of the crime victim, the accused and the State in the criminal dispute – these recent legislative developments are highly significant in the sense of revealing a rare willingness by Irish policymakers to reappraise some of the mainstream procedural formalities which lie at the heart of Ireland's adversarial criminal justice tradition.

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

[2] S 4A of the Criminal Law (Rape) Act 1981, as inserted by s 34 of the Sex Offenders Act 2001, as amended by s 3 of the Criminal Law (Sexual Offences) (Amendment) Act 2007, and by s 6(2) the Criminal Law (Sexual Offences) Act 2006.

[3] S 5 of the Criminal Justice Act 1993, as amended by s 4 of the Criminal Procedure Act 2010.

At the frontier of this 'victim revolution' has been Ireland's special measures framework.[4] At the time of their statutory advent in 1992, the recognition of special measures on a statutory basis represented a significant departure from established trial practice in Ireland.[5] The genesis for this departure was, in effect, attributable to two landmark reports published by the Law Reform Commission in 1990 which explicitly drew political and legal attention to the heightened barriers that traditional adversarial courtroom procedures posed for vulnerable witnesses in Ireland.[6] The resulting suite of special testimonial accommodations ushered in by Part III of the Criminal Evidence Act 1992 was therefore of significant reformative importance at the time, not only in the symbolic sense of addressing the structural and cultural invisibility of members of this marginalised victim constituency, but also in the forensic sense of facilitating access to their best evidence in Irish courtrooms for the first time.[7]

And yet, notwithstanding the patent advantages associated with this liberal legislative exercise in 1992, the statutory introduction of special measures was proceeded by a period of distinct legislative dormancy as successive governments resisted calls to revise and update the suite of testimonial accommodations available to vulnerable witnesses within Ireland's criminal justice system.[8] This period of political inertia, however, came to an abrupt end in 2017, when Irish policymakers, motivated by developments at a European Union level, introduced two landmark legislative instruments, namely the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017. Each of these instruments wrought significant revisions to the contours of Ireland's special measures landscape serving at once to both augment the armoury of available testimonial supports and expand the caste of witnesses eligible to benefit from these measures within Irish courtrooms.

Against the backdrop of such recent concentrated legislative activism in this area, this paper assesses the true extent to which victims of crime with intellectual disabilities can be said, through these recent reforms, to have enjoyed an equal share in the benefits of the wider victims' movement which has taken hold in Ireland in recent years.[9] By interrogating, in particular, the reforms visited upon Ireland's special measures landscape since 2017, the

[4] Leslie Sebba, 'Will the 'Victim Revolution' Trigger a Reorientation of the Criminal Justice System?' (1997) Israel Law Review (1) 379.

[5] For a detailed review of Ireland's special measures architecture, see Alan Cusack, 'Addressing Vulnerability in Ireland's Criminal Justice System: A Survey of Recent Statutory Developments' (2020) 24(3) International Journal of Evidence and Proof 280.

[6] See Law Reform Commission, *Report on Sexual Offences Against the Mentally Handicapped* (LRC 33-1990) 587. See also, Law Reform Commission, *Report on Child Sexual Abuse* (LRC 32-1990).

[7] For an account of the 'highly significant' implications of the evolution of special measures, see Ray Byrne and William Binchy, *Annual Review of Irish Law* (Round Hall 1992) 263.

[8] On this trend see, Alan Cusack, 'Victims of Crime with Intellectual Disabilities and Ireland's Adversarial Trial: Some Ontological, Procedural and Attitudinal Concerns' (2017) 68(4) Northern Ireland Legal Quarterly 433; Miriam Delahunt, Issues in Respect of Support Measures for Witnesses with an Intellectual Disability in the Irish Criminal Justice System (2015) 5(1) Irish Journal of Legal Studies; and Shane Kilcommins, Clare Edwards and Tina O'Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (Irish Council for Civil Liberties 2013).

[9] On the rise of the victim in Ireland, generally, see Shane Kilcommins, Susan Leahy, Kathleen Moore Walsh and Eimear Spain, *The Victim in the Irish Criminal Process* (Manchester University Press 2018); Liz Campbell, Shane Kilcommins, Catherine O'Sullivan and Alan Cusack, *Criminal Law in Ireland* (2nd edn, Clarus Press 2020); Shane Kilcommins and Luke Moffett, 'The Inclusion and Juridification of Victims on the Island of Ireland' in Deirdre Healy, Claire Hamilton, Yvonne Daly, and Michelle Butler (eds), *Routledge Handbook of Irish Criminology* (Routledge 2015) 379; Rebecca Coen, 'The Rise of the Victim- A Path to Punitiveness?' (2006) 3 Irish Criminal Law Journal 10.

article considers whether, and to what extent, the embedded ontological, procedural and attitudinal biases which have traditionally operated to prejudice efforts aimed at securing the best evidence of persons with intellectual disabilities in court, have been meaningfully addressed by these recent developments.[10] Drawing upon a substantial international literature, the paper opens with an overview of the cognitive dimensions of intellectual disability before offering an account of the contours of Ireland's revised special measures landscape. By exposing, in this account, the mainstream assumptions which continue to underpin orthodox constructions of cross-examination and witness competency in Irish courtroom proceedings, the paper makes a case for embracing a more ambitious reimagining of the procedural and cultural formalities which shape contemporary criminal procedure in Ireland with a view, ultimately, to ensuring that the interests of all crime victims are equally met within the modern Irish criminal trial.

Understanding Intellectual Disability

Persons with an intellectual disability, it is important to note, do not form a homogenous group. The types of impairment which exist, the level of their severity and the degree to which they inhibit normal social functioning can vary significantly between people falling within this classification.[11] Moreover, the intellectual disability label masks the reality that many people who share this condition exhibit important individual differences in how they respond to the forensic inquiries which dominate the pre-trial and trial formalities of archetypal adversarial procedure.[12] Thus, just as the heterogeneity of this constituency must not be forgotten, so too must we not overlook the social dimension to the construction of intellectual impairment as a disability within the criminal justice context.[13] There is, as Gudjonsson points out, no empirical basis for treating as unreliable the evidence of a witness simply because its author presents it with a number of psychological vulnerabilities: 'Persons with moderate learning disability may well be able to give reliable evidence pertaining to basic facts, even when they are generally highly suggestible and prone to confabulation'.[14]

At the outset then of any exposition of the ontological or cognitive dimensions of intellectual impairment, it is important to emphasise that there is no cause for automatically discrediting a witness on account of having an intellectual disability. Neither the psychological vulnerabilities of such witnesses, nor any related limitations in social functioning, present

[10] Cusack (n 8) 433.

[11] Mark R. Kebbell and Christopher Hatton, 'People with Mental Retardation as Witnesses in Court: A Review' (1999) 37(3) Mental Retardation 179; Gisli H Gudjonsson and Lucy Henry, 'Child and Adult Witnesses with Intellectual Disability: The Importance of Suggestibility' (2003) 8 Legal and Criminological Psychology 241.

[12] Alan Cusack, 'The Pre-Trial Position of Vulnerable Victims of Crime in Ireland' in Penny Cooper, and Linda Hunting (eds) *Access to Justice for Vulnerable People* (Wildy, Simmonds and Hill Publishing 2018) 185; Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions* (Wiley 2003).

[13] There is, for instance, an established corpus of literature within the field of disability studies which is directed towards identifying the direct and indirect manner by which abelist social and environmental structures contribute to the exclusion of persons with disabilities. For a classic overview of this 'social model of disability' theory see, Mike Oliver, 'Defining Impairment and Disability: Issues at Stake' in Colin Barnes and Geof Mercer (eds), *Exploring the Divide: Illness and Disability* (The Disability Press 1996) 29. See also, Vic Finkelstein, *Attitudes and Disabled People: Issues for Discussion* (World Rehabilitation Fund 1980) 33; Shelia McLean and Laura Williamson, *Impairment and Disability: Law and Ethics at the Beginning and End of Life* (Routledge-Cavendish 2007) 21.

[14] Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions* (Wiley 2003) 334. Marguerite Ternes and John C. Yuille, 'Eyewitness Memory and Eyewitness Identification Performance in Adults with Intellectual Disabilities' (2008) 21 Journal of Applied Research in Intellectual Disabilities 519.

evidentiary challenges that are insurmountable within the criminal process. However, for best evidence to prevail, the forensic design of proceedings is key. The type of questions asked, the status of the person asking them, and the formality of the arena in which this interrogation takes place, have all been found to play a fundamental role in shaping the factual accuracy of the testimony delivered by a witness with an intellectual disability in court.[15]

It is now widely recognised, for instance, that persons with intellectual disabilities provide their most accurate answers to open, free recall questions (eg 'Describe him?').[16] However, while such persons often respond to these questions with accuracy rates broadly similar to those of the general population, studies suggest that these responses are often less complete in terms of their factual detail.[17] By contrast, more directive, closed questions (eg 'Was the shirt he was wearing blue?') have been found to yield a more detailed response which is less factually precise.[18] In seeking to understand this polarisation in narrative accuracy, a significant volume of research has been devoted in recent years to exploring the issues of interrogative suggestibility (ie the extent to which people come to accept ideas communicated during formal questioning), acquiescence (ie the tendency to answer questions affirmatively, regardless of their content), naysaying (ie the tendency to respond negatively to questions, regardless of their content) and confabulation (ie the tendency to reply gaps in memory with distorted or fabricated material) amongst witnesses with intellectual disabilities.[19] These studies have found that individuals falling within this classification are comparatively more suggestible,[20] more acquiescent,[21] more likely to confabulate,[22] and more likely to engage in naysaying than their counterparts within the general population.[23]

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[15] Rebecca Milne and Ray Bull, 'Interviewing Witnesses with Learning Disabilities for Legal Purposes' (2001) 29(3) British Journal of Learning Disabilities 93; Mark R. Kebbell, Chris Hatton, Shane D. Johnson and Caitriona M.E. O'Kelly, 'People with Learning Disabilities as Witnesses in Court: What Questions Should Lawyers Ask?' (2001) 29 British Journal of Learning Disabilities 98.

[16] Kebbell and Hatton (n 11), Nitza B. Perlman, Kristine I. Ericson, Vctoria M. Esses and Barry J. Isaacs, 'The Developmentally Handicapped Witness: Competency as a Function of Question Format' (1994) 18 Law and Human Behaviour 171; Helen R. Dent, 'An Experimental Study of the Effectiveness of Different Techniques of Interviewing Mentally Handicapped Child Witnesses' (1986) 25 British Journal of Clinical Psychology 13.

[17] Dent (n 16); Perlman, Ericson, Esses and Isaacs (n 16); Mark R. Kebbell, Christopher Hatton and Shane D. Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions are Asked and What Influence do They Have?' (2004) 9 Legal and Criminological Psychology 23.

[18] This phenomenon, for instance, was recognised by Perlman and others, who arrived at the following conclusion following their empirical research in this area: 'In contrast to the more open-ended recall formats, it appears that less accurate reports are obtained with more focused recall questions for both groups, but particularly for the developmentally handicapped group'. See Perlman, Ericson, Esses and Isaacs (n 16) 181. See also Rebecca Milne, Isabel C.H. Clare and Ray Bull, 'Interrogative Suggestibility Among Witnesses with Mild Intellectual Disabilities: The Use of an Adaption of the GSS' (2002) 15 Journal of Applied Research in Intellectual Disabilities 8; L.W. Heal and Carol K. Sigelman, 'Response Biases in Interviews of Individuals with Limited Mental Ability' (1995) 39(4) Journal of Intellectual Disability Research 331.

[19] Isabel C.H. Clare and Gisli H. Gudjonsson 'Interrogative Suggestibility, Confabulation and Acquiescence in People with Mild Learning Disabilities (Mental Handicap): Implications for Liability in Police Interrogations' (1993) 32 British Journal of Clinical Psychology 295; Gisli H. Gudjonsson and Noel K. Clark, 'Suggestibility in Police Interrogation: A Social Psychological Model' (1986) 1(2), Social Behaviour 83–104; Gudjonsson and Henry (n 11); Milne, Clare and Bull (n 18); Heal and Sigelman (n 18).

[20] Ternes and Yuille (n 14).

[21]Ternes and Yuille (n 14); Kristine I. Ericsson and Nitza B. Perlman, 'Knowledge of Legal Terminology and Court Proceedings in Adults with Developmental Disabilities' (2001) 25(5) Law and Human Behaviour 529.

[22] Ternes and Yuille (n 14).

[23] Heal and Sigelman (n 18).

There is also evidence to suggest that such witnesses are at an increased risk of obfuscating generic details about an alleged incident such as names, times and dates,[24] that they will entertain a final option bias in response to closed-multiple choice questions,[25] that their knowledge of the legal process is often quite poor and that they struggle to comprehend legal terminology.[26] Moreover, research indicates that each of these psychological vulnerabilities can be significantly exacerbated by a range of environmental factors associated with the setting in which a witness's narrative is elicited.[27] It is particularly apparent from the research which exists in this area, for instance, that a witness's responses will be biased by both the status of the interviewing actor and the formality of the venue in which the exchange is taking place.[28]

Rather than recognising and responding appropriately, however, to these cognitive vulnerabilities, Ireland's adversarial criminal trial – through its subscription to a hostile 'contest morphology'– arguably exploits them.[29] In particular, the system's enduring reliance upon the delivery of live, viva voce testimony can, and should, be viewed as incorporating a pervasive mainstream bias which operates to the disadvantage of comparatively weak and unsophisticated language users.[30] As will become apparent, the extent to which this embedded procedural bias has been meaningfully addressed by the recent statutory interventions is far from certain.

Accommodating Intellectual Impairment: Ireland's Special Measures Landscape

Part III of the Criminal Evidence Act 1992 introduced into Ireland's adversarial trial a series of special measures which were designed specifically to mitigate the hostile excesses, and personal trauma, associated with the traditional formalities of Irish courtroom proceedings.[31] Indeed, having been the focus of no fewer than eight legislative revisions over the course of past quarter of a century,[32] the special measures framework ushered in by the Criminal Evidence Act 1992 has emerged in recent years to become the outstanding vehicle for securing the increased accommodation of vulnerable witnesses, and in particular vulnerable victims of crime, within the Irish criminal justice system.[33] Perhaps unsurprisingly however,

[24] Kebbell, Hatton, Johnson and O'Kelly (n 15); Nigel Beail, 'Interrogative Suggestibility, Memory and Intellectual Disability' (2002) 15 Journal of Applied Research in Intellectual Disabilities 129.
[25] Heal and Sigelman (n 18).
[26] Ericson and Perlman (n 21).
[27] Rosie McLeod, Cassie Philpin, Anna Sweeting, Lucy Joyce and Roger Evans, *Court Experience of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity. Report 3: At Court* (Ministry of Justice 2010).
[28] Gisli H. Gudjonsson, Glynis H. Murphy and Isabel C.H. Clare, 'Assessing the Capacity of People with Intellectual Disabilities to be Witnesses in Court' (2000) 30 Psychological Medicine 307; Gisli H. Gudjonsson and John Gunn, 'The Competence and Reliability of a Witness in a Criminal Court: A Case Report' (1982) 141 British Journal of Psychiatry 624.
[29] Mirjan Damaska, *The Faces of Justice and State Authority* (Yale University Press, 1986) 88.
[30] Louise Ellison, 'The Mosaic Art?: Cross-Examination and the Vulnerable Witness' (2001) 21(3) Legal Studies 353, 355.
[31] See Senate Debates, 12 July 1992.
[32] Child Trafficking and Pornography Act 1998; Criminal Justice Act 1999; Children Act 2001; Criminal Law (Human Trafficking) Act 2008; Criminal Law (Human Trafficking) (Amendment) Act 2013; Criminal Law (Sexual Offences) Act 2017; Criminal Justice (Victims of Crime) Act 2017 and Domestic Violence Act 2018.
[33] Commenting on the growing popularity of television link testimony, Delahunt, for instance, has remarked: 'The giving of evidence via videolink under s 13 of the Criminal Evidence Act 1992 is now... so common a measure as to be almost automatic'. See Delahunt (n 8) 65.

this unprincipled approach at a policy level to addressing the needs of this victim constituency within Ireland's criminal process has resulted in the creation of a legislative bricolage that is both confused and confusing.[34]

As a consequence, individuals within An Garda Síochána and prosecutors within the Office of the DPP are effectively required to negotiate a "legal labyrinth" in every case involving a vulnerable victim in order to determine whether, and to what extent, he or she may be eligible to apply for the support of a special measure in court.[35] This confusion not only poses the obvious risk that convictions secured through the use of these supports will be appealed in the future,[36] but it also poses a material risk of prejudicing the very consumers of the criminal justice system which the revised special measures were designed to serve.[37]

In brief, under the legislative pastiche which currently governs the delivery of evidence in Irish courts, child witnesses and witnesses with a 'mental disorder', as well as victims with 'specific protection needs', can variously expect to benefit from at least some of the following special measures: (i) an opportunity to deliver evidence via a live television link; (ii) the removal of wigs and gowns by counsel and the judiciary in court; (iii) the delivery of evidence via an intermediary; and (iv) the admission of video-recorded evidence and sworn depositions in court and (v) the use of screens.[38]

Live Television Link

Section 13 of the Criminal Evidence Act 1992 provides that victims, amongst other witnesses (with the exception of the accused), can give evidence in criminal proceedings via a live television link.[39] In the case of a child witness under eighteen years of age who is called to give evidence in connection with an alleged sexual or violent offence (ie a 'relevant offence'),[40] there is a statutory presumption in favour of giving evidence via a live television link.[41] In all other cases, leave of the court is required. For victims of crime specifically, as opposed to witnesses more generally, eligibility to invoke this special measure is no longer governed by an offence gateway following a significant amendment introduced by the Criminal Justice (Victims of Crime) Act 2017.[42] Consequently, under section 13(1A) of the

[34] Cusack (n 5).
[35] Liz Heffernan, *Recent Adjustments to the Adversarial Law of Evidence* (Sixth Annual Irish Criminal Justice Agencies Conference, Dublin, Ireland, 4 June 2019).
[36] ibid.
[37] For a detailed analysis of the procedural shortcomings of Ireland's revised special measures regime, see Cusack (n 5).
[38] The Criminal Justice (Victims of Crime) Act 2017 introduced a series of additional procedural accommodations which operate in conjunction with special measures to ameliorate the testimonial experience of vulnerable witnesses in Ireland. These ancillary supports include: (i) the exclusion of the public from court during the proceedings; and (ii) the imposition of restrictions on the level of questioning which can be introduced during cross-examination with respect to the private life of a victim.
[39] S 13 of the Criminal Evidence Act 1992, as amended.
[40] Pursuant to s 12 of the Criminal Evidence Act 1992, as amended by s 30(a) of the Criminal Justice (Victims of Crime) Act 2017 and s 44(b) of the Domestic Violence Act 2018, 'relevant offence' means a sexual or violent offence, or an offence involving human trafficking or domestic violence.
[41] S 13(1)(a) of the Criminal Evidence Act 1992.
[42] Traditionally, access to this special measure could only be secured through a strict offence gateway whereby tv link testimony was denied to victims and witnesses in cases which did not involve a violent or sexual offence. Prior to the recent reforms, under s 12 of the Criminal Evidence Act 1992, as substituted by s 12(b) of the Criminal Law (Human Trafficking) Act 2008, special measures only applied to: (a) a sexual offence; (b) an offence involving violence or the threat of violence to a person; (c) an offence under s 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998; (d) an offence under ss 2, 4 or 7 of the Criminal Law (Human

Criminal Evidence Act 1992, a victim of any alleged offence, including those of a non-violent or non-sexual nature, may apply, for this first time under Irish law, to give evidence through a live television link.[43] The Criminal Justice (Victims of Crime) Act 2017 was also significant in terms of widening the category of witnesses eligible for this special measure by enshrining a right for victims of crime with 'specific protection needs' to apply for this accommodation.[44] In keeping with the non-presumptive approach which governs the application of the measure to victims drawn from the mainstream population under the Criminal Evidence Act 1992, television link testimony will only be extended to victims with 'specific protection needs' at the discretion of the court.

Removal of Wigs and Gowns

Section 14B of the Criminal Evidence Act 1992 provides that where a child witness under eighteen years of age, or an adult witness with a 'mental disorder',[45] is giving evidence in relation to a sexual or violent offence (ie a 'relevant offence'),[46] neither the judge nor the barrister or solicitor involved in the examination of the witness shall wear a wig or gown.[47] In addition, section 14B(b) of the Criminal Evidence Act 1992 extends this mandatory prohibition against the wearing of formal legal regalia in criminal proceedings in all cases that involve testimony from a child victim or an adult victim with a 'mental disorder' regardless of the nature of the alleged offence.

Evidence Through an Intermediary

Under section 14(1) of the Criminal Evidence Act 1992, witnesses under eighteen years of age and adult witnesses with a 'mental disorder' who are delivering, or about to deliver, testimony through a live television link in respect other sexual and violent offence (ie a 'relevant offence') may be permitted to give their evidence via an intermediary. The relevant offence gateway, it should be noted, does not apply where the witness in respect of whom the special measures application is being made, is the victim of the alleged offence and is a child or an adult with a 'mental disorder'. Under section 14(A) of the Criminal Evidence Act 1992, any child victim under 18 years of age or any adult victim with a 'mental disorder' may apply for this special measure regardless of the nature of the alleged offence.[48] In each case the court has jurisdiction to grant an application for an intermediary if it is satisfied that such an accommodation is in the 'interests of justice'.[49]

Trafficking) Act 2008 or (e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of one of the aforementioned offences.

[43] S 13(1A) of the Criminal Evidence Act 1992 as inserted by s 30(b)(ii) of the Criminal Justice (Victims of Crime) Act 2017.

[44] S 19(2)(c) of the Criminal Justice (Victims of Crime) Act 2017.

[45] It should be noted that, for the purposes of Part III of the Criminal Evidence Act 1992, the term 'mental disorder' is defined as follows: "mental disorder" includes a mental illness, mental disability, dementia or any disease of the mind'. See s 5 of the Criminal Justice Act 1993, as substituted by s 4 of the Criminal Procedure Act 2010.

[46] S 12 of the Criminal Evidence Act 1992, as amended by s 30(a) of the Criminal Justice (Victims of Crime) Act 2017 and s 44(b) of the Domestic Violence Act 2018.

[47] S 14B of the Criminal Evidence Act 1992 as inserted by s 30(f) of the Criminal Justice (Victims of Crime) Act 2017.

[48] Moreover, pursuant to s 19(2)(c) of the Criminal Justice (Victims of Crime) Act 2017, the intermediary facility is open, at the discretion of the court, to all victims who are adjudged to have a 'specific protection need' regardless of the nature of the offence that has allegedly been committed against them.

[49] S 14(1A) of the Criminal Evidence Act 1992 as inserted by s 30(c)(ii) of the Criminal Justice (Victims of Crime) Act 2017.

Regrettably, the 1992 Act fails to provide any ethical guidance on the qualifications that must be possessed by an individual prior to assuming the role of an intermediary, and an Irish court is authorised by statute to appoint as an intermediary any person that it considers competent to act as such.[50] Once appointed, the intermediary's role is to convey questions to the witness in either the words used by the questioner or so as to convey to the witness, in a way which is appropriate to his age and mental condition, the meaning of the questions being asked.[51] Under this arrangement, as O'Malley points out, 'The intermediary is, in effect, an interpreter. The substance of the questions asked is still a matter for counsel to decide'.[52]

Pre-Recorded Evidence-in-Chief

Under section 16(1)(a) of the Criminal Evidence Act, as amended, a video recording of any evidence given by a person under eighteen years of age, or a person with a 'mental disorder', though a live television link at the preliminary examination in the District Court of a sexual or violent offence (ie a 'relevant offence') is admissible at trial as evidence of any fact stated therein.[53] Moreover, under section 16(1)(b) of the Criminal Evidence Act 1992, as amended, a video recording of any statement made by a victim who is under eighteen years of age, or is an adult with a 'mental disorder', during an interview with a member of An Garda Síochána is admissible at trial as evidence of any fact stated therein of which direct oral evidence by that person would be admissible. Children under eighteen years of age and persons with a 'mental disorder' (other than the accused), who are not the victims of a crime, are similarly entitled to apply for this special measure in cases where they are called as a witness to an alleged sexual offence; or an alleged child trafficking or child pornography offence or a human trafficking offence.[54] This latter facility, as prescribed by section 16(1)(b) of the Criminal Evidence Act 1992, however, is subject to the proviso that the person who made the video recorded statement to An Garda Síochána is available at trial for cross-examination.[55] Moreover, the court will not accede to the application to admit video-recorded testimony where it is of the opinion that it is not in the interests of justice to do so.[56]

Screens

The Criminal Justice (Victims of Crime) Act 2017 introduced a statutory mechanism to facilitate the delivery of evidence behind a screen in Irish courtrooms for the first time. Under section 14A of the Criminal Evidence Act 1992, screening facilities can now be made available, not only to child witnesses under eighteen years of age in all cases where they are testifying as witnesses to an alleged sexual or violent offence (ie a 'relevant offence'),[57] but

[50] S 14(3) of the Criminal Evidence Act 1992.
[51] S 14(2) of the Criminal Evidence Act 1992
[52] Tom O'Malley, *Sexual Offences* (Round Hall 2013), para 17-52.
[53] S 16(1)(a) of the Criminal Evidence Act 1992 as substituted by s 257(3) of the Children Act 2001 and s 30(i) of the Criminal Justice (Victims of Crime) Act 2017.
[54] S 16(i)(b)(ii) of the Criminal Evidence Act 1992 as substituted by s 37 of the Criminal Law (Sexual Offences) act 2017.
[55] S 16(1)(b) as substituted by s 20(a) of the Criminal Justice Act 1999.
[56] S 16(2)(a) of the Criminal Evidence Act 1992.
[57] S 14A(1) of the Criminal Evidence Act 1992 as inserted by s 30(d) of the Criminal Justice (Victims of Crime) Act 2017. It should be noted that, outside of cases where they represent the alleged victim of a relevant offence, adult witnesses with an 'mental disorder' are not entitled to apply for this relief. For a criticism of this lopsided legislative approach see Cusack (n 5).

also to all victims of crime regardless of the nature of the alleged act of victimisation provided the trial court in question is satisfied that the 'interests of justice' require recourse to the accommodation in a given case.[58] In addition, for victims of crime who are deemed to have a 'specific protection need', they have a supplementary right to apply for this special measure under the parallel terms of section 19(2)(b) of the Criminal Justice (Victims of Crime) Act 2017, which permits, at the court's discretion, the extension of the facility to members of this victim constituency regardless of the nature of the alleged offence.

Beyond Special Measures

That the special measures introduced into the Irish criminal process in recent years have gone some way to addressing the systemic barriers which Ireland's adversarial trial traditionally posed for victims of crime with an intellectual disability cannot be gainsaid. In a study of nearly identical measures in England and Wales, Burton and others note that, 'All [criminal justice] agencies, to a greater or lesser extent, feel that the reforms have helped significantly'.[59] Moreover, and perhaps more significantly, this enthusiasm for special measures appears to be shared by court users themselves. In MacLeod and others study, for instance, it was noted that 'several court users reported that knowing they could avoid contact with the defendants through the use of video links convinced them to continue with their case, which they would otherwise have found too stressful'.[60]

Notwithstanding these positive testimonials which have emerged from England and Wales in recent years, it would be misleading to view the special accommodations introduced in Ireland by the Criminal Evidence Act 1992, and more recently, by the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017 as a panacea for all of the procedural shortcomings of the Irish adversarial trial. Indeed, there is disconcerting evidence that victims of crime with intellectual disabilities continue to occupy an invisible status within Ireland's criminal justice process owing to the system's subscription to an ostensibly mainstream vision of adversarial legalism which overlooks the heterogeneity of the victim constituency.[61] Significantly, elements of this mainstream bias can be detected, not only in the structural and epistemological values which continue to underpin the predominantly oral design of modern Irish courtroom proceedings, but also, arguably, in how Irish criminal justice professionals – the gatekeepers the nation's special measures repository – construct victim identities in the aftermath of an allegation of criminal wrongdoing.

Challenging Traditional Constructions of Cross-Examination

Lord Devlin once famously remarked, 'the centrepiece of the adversary system is the oral trial'.[62] It is, indeed, a truism of orthodox adversarial epistemology that witnesses are expected to substantiate their accounts by delivering oral evidence live during the criminal

[58] S 14A(2) of the Criminal Evidence Act 1992 as inserted by s 30(d) of the Criminal Justice (Victims of Crime) Act 2017.
[59] Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (Home Office 2006) 63.
[60] McLeod, Philpin, Sweeting, Joyce and Evans (n 27) 30.
[61] See Cusack (n 8); Clare Edwards 'Pathologising the Victim: Law and the Construction of People with Disabilities as Victims of Crime in Ireland' (2014) 29(5) Disability and Society 685-698; Kilcommins, Edwards and O'Sullivan (n 8).
[62] P. Devlin, *The Judge* (Oxford University Press 1979).

trial. From an Irish perspective, the supremacy of this form of testimony was expressly confirmed by Hamilton CJ in *In Re Article 26 and The Employment Equality Bill 1996,*[63] when he declared: 'Historically trials, whether in summary form or on indictment, have proceeded *viva voce* although documentary evidence and inferences therefrom may be part and parcel of the trial. It is a fundamental principle of our system that, in general, criminal trials are conducted on viva voce evidence'.[64] This centrality of oral evidence within Ireland's adversarial trial is attributable, in the main, to its perceived evidential richness in terms of providing the jury, not only with a sworn narrative of events, but also with a valuable opportunity to judge the authenticity of this sworn narrative in light of a witness's demeanour in court.[65] As Burton and others explain, '[the principle of orality] rests on the belief that juries are best able to assess the honesty of defendants and witnesses if they give direct oral evidence in person in court'.[66]

Consistency of account and credibility of recount are therefore crucial to achieving testimonial success within the adversarial trial. Any factual inaccuracy in a witness's version of events, or any behavioural anxiety which he or she may exhibit in the witness stand, can cast fatal doubt on the perceived reliability of the resulting testimony. For prosecution witnesses, the pressure to deliver a high-quality performance is particularly acute. The accused in the adversarial trial, it must be remembered, does not need to be believed to be successful. If the trier of fact merely has a reasonable doubt about the prosecution case, an acquittal is mandated. It is at this frontier that the ableist epistemic assumptions of Ireland's paradigmatic adversarial trial are arguably most acutely apparent.[67] Not only are witnesses with intellectual disabilities faced with the very real prospect of having their impairment unduly invoked by zealous opposing advocates to discredit them, but they must also engage with a hostile interrogative procedure which, as Sanders and others have pointed out, is blind to the ontological realities of impairment: 'The law fails to recognise that learning-disabled witnesses... are caused particular problems by adversarial examination'.[68]

In epistemic terms, the root for such inequality of treatment can be traced to a uniquely mainstream normative assumption which has long sustained the 'morphology of combat and contest' at the heart of Ireland's adversarial legal tradition, namely the belief that 'all honest witnesses are equally capable of holding their own against [cross-examination]'.[69] However, this assumption fundamentally discounts the fact that witnesses are not uniformly articulate, confident and cognitively developed.[70] When constructed in this light, the Irish adversarial trial's procedural construction around viva voce testimony – and, in particular, its enduring subscription to live, oral cross-examination- can be seen to invite an inherent bias

[63] [1997] 2 IR 321
[64] [1997] 2 IR 321, 379
[65] This subtle practice of behavioural evaluation was famously encouraged by L'Heureux-Dubé J in *Laurentide Motels v Beauport (City)* [1989] 1 SCR 705, where the learned judge instructed the jury in no uncertain terms that they were entitled to 'consider the movement, glances, hesitations, trembling, blushing, surprise or bravado' of witnesses as evidence of veracity. See generally, Olin Guy Wellborn, 'Demeanour' (1991) 76 Cornell Law Review 1104.
[66] Mandy Burton, Roger Evans and Andrew Sanders, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11 The International Journal of Evidence and Proof 1, 16.
[67] See generally, Alan Cusack, 'Reforming Ireland's Adversarial Trial for Victims of Crime with Intellectual Disabilities' in: O Lynch, J Windle and Y Ahmed (eds) *Giving Voice to Diversity in Criminological Research* (Bristol: Bristol University Press 2020).
[68] Andrew Sanders, Jane Creaton, Sophia Bird and Leanne Weber, *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (University of Oxford Centre for Criminological Research 1997) 75.
[69] Jenny McEwan, *Evidence and the Adversarial Process* (Hart Publications 1998) 15.
[70] ibid 15.

against those who 'lack shared cognitive routines for presenting evidence in story-coded forms'.[71] Indeed, even for the most assiduous and indefatigable of witnesses, the process of cross-examination can be intimidating.[72] The adoption of advanced vocabulary and complex syntax,[73] the engagement in a coercive line of questioning,[74] the assumption of an aggressive, interrogative demeanour, [75] and the embarkment upon personal character attacks of witnesses,[76] are all techniques routinely employed by advocates (and, in particular, defence advocates) [77] during cross-examination in order to confuse, contradict, intimidate and discredit opposing witnesses.[78] As Ellison writes,

> Tone of voice, speech rate, emphasis, physical proximity, eye contact, physical gesture and facial expression are all devices which can be used to unsettle or unnerve a witness. In addition, an array of conversational ploys are used to intimidate and thereby undermine [an] opposing witness.[79]

For victims of crime with intellectual disabilities, the ordeal of cross-examination is particularly acute. Indeed, given the ontological challenges which these witnesses face in constructing a coherent, consistent and credible narrative, the insidious interrogative practices which constitute modern adversarial cross-examination pose a very significant risk of testimonial distortion:

> The questioning styles used by barristers, particularly when the victim is under cross-examination, can have a profound, and often detrimental, impact on the evidence provided by the witness if the legal professional is not aware of the accommodations necessary for effective communication with persons with learning, developmental or intellectual disabilities.[80]

Notwithstanding, however, the heightened risk of narrative bias which accompanies the cross-examination of a witness with an intellectual disability, empirical research suggests that advocates do not adapt their interrogative strategy when confronted with such witnesses in court.[81] Thus, in much the same way as they seek to control the narrative of mainstream

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[71] W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom* (Sweet & Maxwell 1981) 171.
[72] For commentaries on the distress caused by oral cross-examination, see Sue Lees, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton 1996); Zsuzsanna. Adler, *Rape on Trial* (Routledge and Kegan Paul 1987); and Jennifer Temkin, *Rape and the Legal Process* (Sweet & Maxwell 1987).
[73] Mark R. Kebbell and Shane D. Johnson, 'Lawyers' Questioning: The Effects of Confusing Questions on Witness Confidence and Accuracy' (2000) 24(6) *Law and Human Behaviour* 629.
[74] *Parkin v Moon* (1836) 7 C & P 408; *McLure v Mitchell* (1974) 6 ALR 471.
[75] Ellison (n 30) 360. See also John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol. 5 (Little Brown 1940) 29.
[76] *Hobbs v Tinling & Co. Ltd* [1929] 1 KB 1, 51.
[77] Unlike their counterparts in the Office of the DPP, defence advocates in Ireland are relatively unconstrained by a wider ethical duty to impartially present all evidence to the tribunal of fact that is at their disposal. See, in this regard, the dicta of O'Flaherty J. in *Paul Ward v Special Criminal Court* [1998] 2 ILRM 493, 505.
[78] A defence barrister interviewed by Temkin gave unequivocal voice to the combative sensibilities which underpin the archetypal adversarial advocate's duty in the following terms: 'When I'm defending it's no holds barred in that anything that properly I can use to help secure my client's acquittal I will'. See Jennifer Temkin, Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) Journal of Law and Society, 219-248, 230.
[79] Ellison (n 30) 360.
[80] Claire Edwards, Gillian Harold and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) 81.
[81] Kebbell, Hatton, Johnson and O'Kelly (n 15); Kebbell and Hatton (n 11). For studies on child witnesses see, Anne G. Walker, 'Questioning Young Children in Court: A Linguistic Case Study' (1993) 17 Law and Human

witnesses through a range of techniques, so too do lawyers, in cases involving vulnerable witnesses, invoke 'constraining and coercive questioning strategies which have a particularly negative impact on the testimony of witnesses with [learning disabilities]'.[82]

One particularly insidious technique which research suggests is routinely employed during the cross-examination of witnesses with an intellectual disability is for counsel to construct a case predominantly through the use of close-ended leading questions.[83] Interrogations of this nature, as we have seen, can have a significant distortive impact on the accuracy of testimony provided by such witnesses.[84] Kebbell and others, for instance, concluded, following their research in this area, that:

> witnesses with intellectual disabilities were significantly more likely than general population witnesses to agree with the force of a leading question, less likely to disagree with the force of the question, and less likely to provide additional information, particularly in cross examination.[85]

Numerous theories have been proposed with a view to explaining the heightened suggestibility of persons with intellectual disabilities to leading questions. One such theory is that such witnesses may have an impaired memory capacity which renders them more susceptible to suggestion and less resistant to the implied directive contained in the leading question. This view is supported by Gudjonsson's research which has found a directly inverse relationship to exist between an individual's level of suggestibility and the completeness of his or her recall capacity.[86] Another suggestion is that such witnesses are less able to cope with the uncertainty and expectations of questioning. Support for this proposition can be found in Perske's research which has shown that people with intellectual disabilities have difficulty responding to unfamiliar and stressful situations.[87] Given the overt formality of the adversarial courtroom this finding, it is submitted, is particularly concerning. Indeed, from McLeod's research in England and Wales, it would seem that there are few climates less conducive to accurate recall than the hostile arena of the adversarial courtroom. As one respondent in that study explained:

> We went into the courtroom and it was bigger and a bit more full than I was expecting. I don't really like busy places. I started to get a headache and I felt all stressed and shaky. I got asked a question and told I had to explain things in my own words. I had to stop for a minute and calm down.[88]

Behaviour 59; V.K. Kranat and H.L. Westcott, 'Under Fire: Lawyers Questioning Children in Criminal Courts' (1994) 3 Expert Evidence 16.

[82] Kebbell, Hatton, Johnson and O'Kelly (n 15) 98.

[83] A study by Kebbell and others, for instance, discovered that during cross-examination, the most frequent types of questions were yes-no questions (84% of all questions), leading questions (30% of all questions) and questions involving negatives (18% of all questions). See Kebbell, Hatton, Johnson and O'Kelly (n 15) 99.

[84] Charles Antaki and Mar Rapley, 'Questions and Answers to Psychological Assessment Schedules: Hidden Troubles in 'Quality of Life' Interviews' (1996) 40 Journal of Intellectual Disability Research 421; Isabel C.H. Clare and Gisli H. Gudjonsson, 'The Vulnerability of Suspects with Intellectual Disabilities during Police Interviews: A Review and Experimental Study of Decision-Making' (1995) 8 Mental Handicap Research 8, 110; Heal and Sigelman (n 18); Perlman, Ericson, Esses and Isaacs (n 16).

[85] Kebbell, Hatton and Johnson (n 17) 32.

[86] Gudjonsson (n 14).

[87] Robert Perske, 'Thoughts on the Police Interrogation of Individuals with Mental Retardation' (1994) 32 Mental Retardation 377.

[88] McLeod, Philpin, Sweeting, Joyce and Evans (n 27) 7.

These insights bear testimony once more to the ostensibly mainstream epistemology underpinning the design of the paradigmatic adversarial trial whereby the paucity of restraints on cross-examination allows litigating parties to readily exploit the heightened vulnerability of victims with an intellectual disability. Indeed, the reality of this procedural bias was brought into sharp focus in the research of Sanders and others which revealed that such witnesses often experience particular distress and anxiety from questioning strategies which otherwise appear legitimate for members of the mainstream population: 'We have seen that in many of our cases the witnesses did feel themselves to be bullied and pressured, in ways that they themselves recognised, led them to give poorer testimony than they would otherwise have done'.[89] It is little wonder then that studies by both the Home Office and by Hamlyn and others in England and Wales have identified the form and structure of adversarial cross-examination as the greatest impediment to securing meaningful participation by victims of crime with intellectual disabilities in the trial process.[90]

Challenging Traditional Constructions of Witness Competency

If the condition of intellectual impairment presents intrinsic ontological challenges for victims of crime with intellectual disabilities, and if the combative, oral design of the Irish criminal trial poses additional procedural hurdles for these witnesses, it is the attitude of Ireland's legal professionals which arguably represents the final frontier of marginalisation. Indeed, changing to the rules of evidence in order to better respond to the ontological dimensions of intellectual disability and dilute the mainstream processes by which evidence is delivered in court will be of little effect if criminal justice agencies entertain a presumptively dismissive attitude towards victims of crime with intellectual disabilities. As Diane Birch reminds us: 'Vulnerable witnesses may be the victims of negative ideologies ad unhelpful societal assumptions, so that an effective strategy involves challenging the culture as well as the law'.[91]

And yet, notwithstanding the uniquely formative role which criminal justice professionals play in shaping the trajectory of a criminal complaint, empirical evidence suggests that many cases involving victims with an intellectual disability fail to proceed because such witnesses are deemed to be incompetent either by police officers or prosecutors at the preliminary stage of proceedings or by members of the judiciary when the case formally comes on for hearing.[92] Commenting in the context of England and Wales, for instance, McLeod and others noted that there was:

> a widely held view, in particular among the judiciary, that people with mental health conditions, learning disabilities or a limited mental capacity would not be regarded as reliable witnesses, making it highly unlikely that a case involving them would even get to court.[93]

[89] Sanders, Creaton, Bird and Weber (n 68) 78.
[90] Burton, Evans and Sanders (n 59); Becky Hamlyn, Andrew Phelps, Jenny Turtle and Ghazala Sattar, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office 2004).
[91] Diane Birch. 'A Better Deal for Vulnerable Witnesses?' (2000) Criminal Law Review 223, 224.
[92] Sanders, Creaton, Bird and Weber (n 68); Christopher Williams, *Invisible Victims: Crime and Abuse against People with Learning Disabilities* (Jessica Kingsley Publishers 1995). For discussion of the experience of persons with mental health difficulties, see Mencap, *Living in Fear: The Need to Combat Bullying of People with a Learning Disability* (Mencap 1999).
[93] McLeod, Philpin, Sweeting, Joyce and Evans (n 27) 24.

In Ireland meanwhile, evidence pointing to the existence of a similar dismissive attitude within the legal profession was unearthed in a study by Hanly and others of rape files compiled by the DPP between the period of 2000 to 2004.[94] Of the 78 cases studied by the researchers which involved a complainant with a history of mental illness, only two were ultimately prosecuted. Similar results were found in a separate study by Hamilton who, in reviewing rape allegations made to the office of the DPP between 2005 and 2007, discovered that out of 11 cases involving a complainant with a history of mental illness, none resulted in a formal prosecution.[95] Although, it is important to recognise that other evidential and legal concerns may ultimately have contributed to the high attrition rates excavated in these two studies, these remarkably low prosecution figures nevertheless paint a worrying picture, not only about the accessibility of Ireland's modern criminal justice process, but also about the narrow, mainstream construction of victimhood which is entertained by the legal community surrounding it.[96] Indeed, in a qualitative study conducted by Edwards and others, one social care worker gave voice to frustration which surrounds this seemingly pre-emptively dismissive culture:

> 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.[97]

It is important to note that the task of overcoming this initial credibility hurdle is often heightened by the lengthy delay which currently takes places between the date of the alleged crime and the date of a witness' competency assessment.[98] Studies have shown that, for victims of crime with intellectual disabilities, recall accuracy is inversely related to the length of time which elapses between the criminal incident and the date upon which a witness is examined in court.[99] Accordingly, a witness's capacity to satisfy the competency test,[100] may be significantly compromised by the procedural delay which, as Rape Crisis Network Ireland recently noted, is now an engrained feature of modern Irish criminal litigation:

> The current trial system in Ireland results in long delays for victims and other witnesses between the conduct complained of and giving evidence. Many trials do not take place for over two years following the initial complaint. This hinders victims' ability to heal and move on with their lives, and is stressful in

[94] Conor Hanly, Deirdre Healy and Stacey Scriver, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009).
[95] James Hamilton, 'Sexual Offences and Capacity to Consent: A Prosecution Perspective' (Annual Conference of the Law Reform Commission, Dublin, 7 November 2011).
[96] Cusack (n 8) 443.
[97] Edwards, Harold and Kilcommins (n 80).
[98] Although earlier dates are stated to be made available for trials involving children and vulnerable witnesses, figures recently released by the Courts Service in Ireland recorded the average waiting time for murder and rape trials in the Central Criminal Court in 2018 as eleven months. See Courts Service, *Annual Report* (2018) 111.
[99] According to Heal and Sigelman, the capacity of persons with intellectual disabilities to give a consistent account over even a short period (one week) was 'substandard'. See Heal and Sigelman (n 18) 331.
[100] The statutory test for competency in Ireland is set down in s 27(3) of the Criminal Evidence Act 1992 which provides that a person with a 'mental handicap' may deliver evidence otherwise than on oath or on affirmation if the court is satisfied that the person can give an intelligible account of events which is relevant to the proceedings.

> itself. Prolonged delay makes it extremely difficult for vulnerable victims, and other witnesses, to give a coherent oral account of what happened. [101]

Additionally, awkward questions need to be addressed concerning the appropriateness of the legal test for competency adopted by Irish courts in the context of vulnerable witnesses. Under section 27(3) of the Criminal Evidence Act 1992 a witness with a 'mental handicap' is entitled to deliver evidence otherwise than on oath or on affirmation if the court is satisfied that he or she can give an intelligible account of events which is relevant to the proceedings.[102] Although expert medical opinion evidence may be adduced to assist the court in assessing the capacity of a witness to give an intelligible account, the final determination of this issue rests with the trial judge.[103] In this regard, the formative impact which a judge's questioning strategy can have on the outcome of this decision cannot be overemphasized.[104] By way of example of the undermining effect which improper inquiries can have on a victim with an intellectual disability, Sanders and others recount a case in England and Wales wherein the presiding judge had recourse to developmentally inappropriate language as well as complex sentence structures during the course of his assessment of the competency of a complainant with an intellectual disability. [105] Although the complainant was subsequently deemed competent and permitted to testify at trial, the ambiguity created by her difficulty in responding to the judge's competency questions, coupled with her difficulty in responding to questions raised during cross-examination, encouraged the prosecution to withdraw her case.[106]

Closer to home, meanwhile, the dangers associated with adopting a psychologically-unsound forensic approach in determining the competency of a vulnerable witnesses were starkly illustrated in the *Laura Kelly* case. The complainant in this case was a young woman with Down's Syndrome who was allegedly sexually assaulted at a 21st birthday party. At the trial, however, the complainant, who was described by the Central Criminal Court as having 'a mental age of four', was deemed incompetent to testify and the case was dismissed. Following this determination, the complainant's mother expressed her deep sense of dissatisfaction with the competency standard applied by the court:

> [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 the 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.[107]

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[101] Rape Crisis Network Ireland, *Hearing Every Voice - Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings* (Rape Crisis Network Ireland, 2018) 31.

[102] There is no mandatory corroboration requirement in Irish law for the unsworn or uncorroborated evidence of adults with 'mental handicap'. Corroboration warnings are issued on a discretionary basis by Irish courts. See, for instance, *People (DPP) v MJM* (Unreported, Court of Criminal Appeal 28 July 1995).

[103] *People (AG) v Kehoe* [1951] IR 70, 71.

[104] Smith and Hudson, for instance, discovered that the types of questions asked by a judge have a direct impact on the resulting competency verdict. The research found that an understanding of the terms 'court strategy', 'plead', 'testify', 'jury', 'guilty', 'trial' and 'prosecutor' are maximally predictive of whether an individual might require further screening to determine competency. Significantly, 44% of respondents deemed not competent did not know these terms. See Stuart A. Smith and Robert L. Hudson, 'A Quick Screening Test of Competency to Stand Trial for Defendants with Mental Retardation' (1995) 76 Psychological Reports 91.

[105] Sanders, Creaton, Bird and Weber (n 68) 58.

[106] ibid 58.

[107] Juno McEnroe, 'Family Want 'Archaic' Law Overhauled' *Irish Examiner* (Cork, 30 March 2010).

This statement, it is submitted, is illustrative of a flawed, mainstream understanding of the 'intelligible account' standard. Indeed if, as psychological studies have shown,[108] persons with intellectual disabilities have an increased recollective capacity for salient life experiences, then the trial judge's exclusive focus in the Laura Kelly case on impersonal, generic information was psychologically unsound. Worse still, his approach was rooted in a disabling, overly pathological understanding of disability. Instead of adopting a functional approach to capacity as mandated by section 3 of the Assisted Decision-Making (Capacity) Act 2015, and instead of considering whether the complainant had the capacity to impart information relevant to the matter at hand (ie give an intelligible account of the alleged crime), the test employed by the trial judge focused entirely on irrelevant details. Not only is such an approach to witness competency discredited within mainstream evidential scholarship, but it has also been discredited in wider areas of mental capacity law.[109]

It is submitted that, in the circumstances, the issue of the complainant's competence should have been properly considered in the context of her disability and, in particular, her consequentially limited level of semantic memory. The adoption by the court of such an inclusionary, subjective approach to the application of section 27 of the 1992 Act would not only have brought Irish law in line with the functional approach to capacity mandated by the UNCRPD and applied in other areas of Irish decision-making,[110] but would also have brought Irish policy in line with the terms of the Victims Directive; Article 10 of which expressly obliges all Member States to ensure that 'victims may be heard during criminal proceedings and may provide evidence'.[111] Accordingly, it enjoins upon all members of Ireland's judiciary to recognise that inaccuracies in relation to peripheral information are not necessarily indicative of a witness's recollective capacity for central details. In this regard, the court's narrow focus in the *Laura Kelly* case on such details arguably, and its adherence to mainstream constructions of intelligibility and competence, did a disservice to the accuracy and reliability of the complainant's testimony. As Benedet and Grant have observed:

> It is not unusual in cases involving complainants with mental disabilities to see inconsistencies in, or a certain amount of confusion regarding, some details of their testimony...in cases involving complainants with mental disabilities, trial judges should carefully examine the real significance of those inconsistencies to the legal issues at stake, with a view to understanding the essence of the complainant's testimony...Trial judges must be cautious not to dismiss too easily all of the complainant's testimony because some of the details may be unreliable.[112]

Conclusion

[108] Gudjonsson and Gunn (n 28).
[109] Birch (n 91); Edwards, Harold and Kilcommins (n 80); Ray Byrne, 'Sexual Offences and Capacity to Consent: Key Issues' (2015) 5(1) Irish Journal of Legal Studies 22.
[110] See, for instance, Assisted Decision-Making (Capacity) Act 2015, s 3(1).
[111] European Parliament and Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA 2001/220/JHA [2012] OJL 315.
[112] Janine Benedet and Isabel Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (2007) 52(3) McGill Law Journal 515.

While there is much to applaud in the reforms visited upon Ireland's special measures framework by the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017, the ameliorative impact of these legislative interventions would have been further enriched by the adoption of a more ambitious line of procedural reform. In particular, the failure of Ireland's legislature to make statutory provision in either of the two 2017 Acts for a scheme of pre-trial cross-examination, in the style which currently exists in England and Wales, is uniquely regretful.[113] So too, it must be said, is the failure by both instruments to statutorily prescribe preliminary pre-trial hearings between members of the judiciary, counsel and intermediaries for the purpose of securing consensus around the acceptable parameters of questioning in cases that involve a vulnerable witness.[114] In the context of these shortcomings, it would seem that the adopted response of Ireland's legislature to the plight of these vulnerable consumers of the criminal process has been, in effect, to shield them from direct confrontation while at the same time continuing to subject them to live, largely unrestricted cross-examination. In other words, solutions have been sought and developed within the limited structural and epistemological confines of Ireland established trial framework rather than challenging any of its underlying assumptions. The effectiveness of this accommodation approach, in terms of meaningfully addressing the embedded ontological, procedural and attitudinal barriers which victims of crime with intellectual disabilities face in the direction of delivering their best evidence in court is, as this article has shown, anything but certain.[115]

In the wake of such conservative law-making, the measured and sensitive approach of the Irish judiciary – particularly in the context of determining the capacity, and overseeing the cross-examination, of vulnerable witnesses – remains a uniquely important safeguard in ensuring equal access to justice for all members of Ireland's victim constituency. Indeed, the important protective role which the courts can assume in vindicating the rights of vulnerable witnesses was recently illustrated in *DPP v FE* and *DPP v NR and RN* where, in the absence of dedicated rules prescribing preliminary pre-trial hearings, the court in each case invoked its inherent jurisdiction to hold a ground rules hearing for the purposes of strategically delineating an agreed questioning strategy for vulnerable witnesses.[116] Whether the Irish judiciary will go further in following the example of their colleagues in England and Wales – where the court's inherent jurisdiction has been invoked to justify the recognition of bench-led restrictions on cross-examination,[117] and to extend special measures to vulnerable defendants,[118] – remains to be seen. While such developments would unquestionably represent a significant departure from established trial practice in Ireland, it would be wrong to dismiss them simply as a matter of principle. It should not be forgotten that with the ratification of the UN Convention on the Rights of Persons with Disabilities in March 2018, Ireland assumed a legal obligation not only to furnish persons with a disability with effective access to justice on an equal basis with others, but also to provide them with appropriate

[113] See Alan Cusack, 'Making the Case for Introducing Pre-Trial Cross-Examination' *The Irish Examiner* (Cork, 28 September 2016); Cusack (n 5); Cusack (n 67).
[114] See Cusack (n 5); Cusack (n 67); Rape Crisis Network Ireland (n 101).
[115] Ellison (n 30) 360.
[116] *DPP v FE* [2015] unreported, (Hunt J.) (Bill No.84/2013 Central Criminal Court); and *DPP v NR and RN* [2016] IECCC 2 (Central Criminal Court) respectively.
[117] *R v Barker* [2010] EWCA Crim 4, *R v W and M* [2010] EWCA Crim 1926; *R v Edwards* [2011] EWCA Crim 3028 and *R v Wills* [2011] EWCA Crim 1938.
[118] *R v Cox* [2012] EWCA Crim 549. See generally, Samantha Fairclough, 'It Doesn't Happen... And I've Never Thought it was Necessary for it to Happen': Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2016) The International Journal of Evidence and Proof 1.

special facilities, where necessary, to allow them to realise this right.[119] In addition, under the directly effective terms of the Victims Directive, Ireland is required to ensure that measures exist within the criminal justice system to protect victims from secondary and repeat victimisation and to safeguard 'the dignity of victims during questioning and when testifying'.[120] There are, therefore, clear legal, as well as urgent and unequivocal moral imperatives, for reappraising some of the deeply embedded assumptions of Ireland adversarial trial in light of the experience of victims of crime with intellectual disabilities.

[119] Convention on the Rights of Persons with Disabilities 2006 [A/RES/61/106], Article 13.
[120] Directive (n 11), Article 18.