# TOWARDS A PRESUMPTION OF VICTIMHOOD: POSSIBILITIES FOR RE-BALANCING THE CRIMINAL PROCESS

*Abstract: This article explores what changes might be possible to better accommodate victims within criminal trials. While the transplantation of foreign victim-oriented procedures is often posited, this requires a wider understanding of their intricacies. What may be possible? We here consider the advance preparation of victims by counsel, greater control of cross-examination at trial, ticketing of advocates, closer communication with victims, the assertion of rights to privacy, and reform to the admission of self-serving statements from the accused. A presumption of victimhood, that all those who come into court asserting a wrong to have been done against them should be treated as such, is explored.*

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## Introduction

Retiring as Director of Public Prosecutions of England and Wales in November 2013, Keir Starmer was despondent that the victims of sexual and other violent crimes would ever be given a fair hearing through the adversarial criminal trial system; a common law approach fundamental also to this jurisdiction.[2] Labelling new arrangements for the training of police and prosecutors, and a general code of practice for victims of crime, as 'bolt-ons to existing arrangements', he called for radical change.[3] In the system of which he wrote, victim impact statements upon conviction have been a feature of sentencing procedures over decades.[4] For Starmer, victims having a voice at sentencing was important, but that was not the only issue since 'the debate obscures something much more fundamental: most victims have so little faith in our criminal justice system that they do not access it at all. And the issue that deters them is simply the way in which they are likely to be treated if they come forward.'[5] The British Government's recent publication of an end-to-end rape review gives further weight to Starmer's argument that the current system may be less than ideal.[6] In the foreword, there is the admission that 'victims of rape are being failed' by a system which sees only 20% of rapes reported, where one in two rape victims withdraws from investigations, and where only

[1] The authors are grateful to Professor Laura Hoyano, Wadham College, Oxford, and Red Lion Chambers, for reading this article and for very helpful suggestions made by her; noting that what is written here is not to be ascribed to her. The authors also thank the Office of the Director of Public Prosecutions for detailed and helpful responses to queries raised in correspondence.

[2] In this article, 'victim' is preferred, even in sexual violence cases, to 'complainant' as being more consistent with our overall approach. Keir Starmer, 'Britain's criminal justice system fails the vulnerable: we need a Victims' Law' *The Guardian* (3 February 2014) <https://www.theguardian.com/commentisfree/2014/feb/03/britain-criminal-justice-system-victims-law-public-prosecutions> accessed 1 June 2021.

[3] Criminal Procedure Rules for England and Wales 2013, CrimPR2013.

[4] Originally introduced in Ireland through a decision of Budd J sitting in the Central Criminal Court, these have since gained a statutory basis through s 5 of the Criminal Justice Act 1993, as amended by s 31 of the Criminal Justice (Victims of Crime) Act 2017. See also McGrath, 'Is anybody listening, and why do they hear? The use of victim impact statements in Ireland' (2008) 30 DULJ 71.

[5] Keir Starmer, 'A voice for victims of crime' *The Guardian (6 April 2014)* <https://www.theguardian.com/commentisfree/2014/apr/06/victims-law-criminal-justice-labour-plan> accessed 1 June 2021.

[6] Ministry of Justice, 'The end-to-end rape review report on findings and actions', 18 June 2021.

1.6% of reports of rape lead to someone being charged.[7] In Ireland, the Minister for Justice and Equality has explored reform in this area and promised to 'create a system centred around' victims.[8]

Not all agree that the system as we currently operate criminal trials is flawed. Even if imperfect, many argue that constitutional considerations, derived from the right of an accused to a trial 'in due course of law' under Article 38.1 of the Constitution, enshrine a balance that necessarily favours those at risk of losing their liberty, rather than victims. Others, placing themselves on the side of those who have suffered from crime, may cast around to jurisdictions such as Belgium and see there the full representation of the victim as a party entitled to compensation from the accused and envision some radical innovation of that kind.[9] Alternatively some may, perhaps only partly understanding other legal systems, make the claim that, as in Norway, a police officer interviewing the victim at an early stage constitutes a sufficient testing of her or his evidence and that examination in court is unnecessary.[10] In that context, Starmer's initial suggestion was 'to blend the adversarial and inquisitorial systems' asking, in particular, whether 'judges should be given the task of questioning young and vulnerable witnesses?'[11] With this jurisdiction opting into the Victims Directive,[12] and with the consequent passing of the Criminal Justice (Victims of Crime) Act 2017, a contrary view also emerges: that enough has already been done.

The purpose of this article is simply to add to that debate an analysis of what may be possible. It considers how criminal justice processes might better support victims of crime; truly presuming them to be victims, irrespective of the outcome. Its suggestions apply to victims generally, rather than being exclusively directed to those deemed 'vulnerable', although how the law has been reformed to accommodate specific vulnerabilities, and the issues still present within the system for doing so, remain relevant. The focus here is not solely on sexual violence offences but, because these may involve difficult court experiences for victims, the treatment of such charges are especially relevant to this discussion.[13] The nature of rape

[7] ibid, see Foreword by Emily Hunt. In Ireland in 2020, the number of suspects facing prosecution for rape rose by 35% according to reports from the Director of Public Prosecutions. But the Chief Executive of the Dublin Rape Crisis Centre, Noeline Blackwell, believes 90% of rape victims do not report in the first place: Ellen O'Riordan, 'Number of suspects facing prosecution for rape rose by 35% in 2020' *The Irish Times* (3 February 2021) <https://www.irishtimes.com/news/ireland/irish-news/number-of-suspects-facing-prosecution-for-rape-rose-by-35-in-2020-1.4475388> accessed 2 July 2021. While statistical reliability may be at times insecure in some of these surveys, that there is a serious problem of sexual violence is clear; see Jennifer O'Connell, '"He raped me. And I told no one." Stories of sexual assault' *The Irish Times* (17 July 2021) <https://www.irishtimes.com/life-and-style/people/he-raped-me-and-i-told-no-one-stories-of-sexual-assault-1.4621618>, accessed 18 July 2021. It should be noted that while the accuracy of statistics tend to vary with sampling, these surveys do help to indicate trends and attitudes.

[8] Department of Justice and Equality, 'Supporting a Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases', December 2020.

[9] The process is described in Sabine Dardenne, *I Choose to Live* (London, Virago 2006).

[10] For more information see Trond Myklebust, 'The Position in Norway' in John R. Spencer and Michael E. Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Oxford: Bloomsbury Publishing 2012), Ch 8.

[11] Starmer (n 5).

[12] Directive 2012/29/EU of the European Parliament and of the Council 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.

[13] See, for example, Sarah Grace's description of her experience, Una Mullally, '"He strangled me to the point where I couldn't breathe, I couldn't scream"' *The Irish Times* (6 March 2021) <https://www.irishtimes.com/life-and-style/people/he-strangled-me-to-the-point-where-i-couldn-t-breathe-i-couldn-t-scream-1.4501041> Accessed 2 July 2021. See also Julian Molina and Sarah Poppleton, *Rape Survivors and the Criminal Justice System* (Victims Commissioner, October 2020), p 60.

means that most trials centre around two conflicting versions of events. In order for the crime to be prosecuted, it is essential that a victim of rape participates in the trial by giving evidence and answering questions under cross-examination. This is necessary to ensure a fair trial, but it is becoming increasingly apparent that most rape victims do not engage with the justice process.[14] Some analyses that have essayed this issue speak to the uncomfortable place of the casualties of crime in our system, particularly in the context of sexual violence, and suggest that the adversarial process requires reappraisal.[15] But, in what respect? And, more importantly, what is possible within our constitutional framework?

In explicit terms, the preamble to the Victims Directive states that the status of a victim does not depend on 'whether an offender is identified, apprehended, prosecuted or convicted.'[16] Rather, a person complaining of a crime is legally to be taken at face value. The 2017 Act makes clear that the application of the rights included within it is not 'dependent on the commission of an offence having to be established'.[17] Hence, even in sexual violence cases where the allegation of rape and kindred offences is not an offence absent consent, and where victims are usually named 'complainant' because of the possibility of false allegations and the presumption of innocence,[18] it is clear that all who go into a courtroom alleging that an offence has been committed against them are, as a matter of law, a victim.[19] Would this innovation be capable of altering attitudes, particularly in sexual violence cases, and where a victim is vulnerable, or is this legal declaration merely rhetorical? What practical measures might further this legally enshrined principle?

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[14] Elaine Mears, *RCNI Rape Crisis Statistics 2019* (Rape Crisis Network Ireland December 2020) 22 reports that 39% of incidents of sexual violence perpetrated against adults were reported to a formal authority. This was even lower if the sexual violence was at the hands of a partner or ex-partner (28%). Victims Commissioner (n 13) 51: only 14% of survivors of rape and sexual offences in England and Wales agreed that rape survivors can get justice by reporting incidents to police, 9% thought rape and sexual violence survivors were fully supported by the court. This is of course simply a perception study, reflecting what people think of how the criminal justice system treats victims of sexual offences. A statistical analysis is also provided in Peter Charleton and Stephen Byrne, 'Sexual Violence: Witness and Suspects, A Debating Document' (2010) 1 IJLS 1, 69; see also Sarah Bryan O'Sullivan, 'Sexual Experience Evidence – The Continued Search for a Balance Approach' (2018) 28(1) ICLJ 2, 5.

[15] Tonna-Barthet and Hunter Blair, 'Exploring Rape Conviction Rates: Consent, False Allegations and Legal Obstacles' (2020) 2 IJSJ, 198.

[16] Recital 19.

[17] Section 4(2).

[18] Statistics indicate that instances of false allegations are relatively uncommon with 4% of cases reported in the United Kingdom being found, or suspected to be, false. See David Lisak, Lori Gardinier, Sarah C Nicks and Ashley M Cote, 'False allegation of sexual assault: an analysis of 10 years of reported cases' (2010) 16(12) Violence Against Women; Lisa Lazard, 'Here's the truth about false accusations of sexual violence' *Irish Examine*r (28th September 2018); and Tonna-Barthet and Hunter Blair (n 15). Aside from the possibility of false allegations, an accused person in a sexual offence trial may be found 'not guilty' on the basis that they did not have the requisite *mens rea*, that is that they had a reasonable belief in consent. This is in a context where the Supreme Court in *The People (DPP) v C O'R* [2016] IESC 64 has emphasised that sexual relations constitute communication and that it may be recklessness to fail to resolve a doubt as to consent by asking an appropriate question.

[19] This does not mean that, as a matter of law, the accused person is guilty of the offence or that the jury must accept the victim's account. Legally, though in practice unlikely in the extreme, there may be two versions of events: one where a victim of a sexual offence legitimately considers themselves to have been sexually assaulted, and one where the accused person had a reasonable belief in consent. If a jury believes both versions, they must acquit. Presuming victimhood simply ensures that anyone coming to court making such an allegation is treated in a sensitive manner, appropriate to the difficult and sometimes traumatising experience they have had. It recognises that a victim may have been subjected to a violating encounter, even if the accused is not guilty of rape.

## Can victims have constitutional rights?

Shane Kilcommins has traced the role of the victim at common law from the prosecutor having complete control of proceedings up to the mid-18th century, to becoming a side-lined party, effectively without rights, upon the development of a centralised policing and prosecuting authority systems.[20] Article 30.3 of the Constitution, in providing that, apart from in courts of summary jurisdiction, all 'crimes and offences prosecuted … shall be prosecuted in the name of the People and at the suit of' what is now the Director of Public Prosecutions, has arguably set the victim on the periphery.[21] Whatever partial repossession may be possible in victims' rights, a definite limit is set. What was, centuries ago, a private process, is now public with all cases filtered through decisions by the DPP as to what wrongs will be prosecuted, though with an entitlement to victims and potential accused persons to make representations.[22]

Since *The State (Healy) v Donoghue*,[23] there have been a multiplicity of judicial pronouncements on the rights of the accused.[24] The paucity of statements on possible constitutional rights of victims is, on the other hand, sometimes pointed to as an indication of their peripheral role in the criminal process. That is not completely accurate. The lesser number of judicial pronouncements on victims' rights may be explained, not by indifference, but by the simple fact that victims are not parties to the criminal process, unlike in France and in Belgium.[25] Victims, further, do not tend to take judicial reviews of decisions not to prosecute or seek prohibition on grounds of delay, the disappearance of evidence or supposedly damaging media interest; examples of commonplace judicial review litigation by accused persons in our system. [26] Even still, there are strong pronouncements from the Bench that victims are not

[20] Shane Kilcommins, 'The victim in the Irish criminal process: a journey from dispossession towards partial repossession' (2017) NILQ 505.

[21] See the comments of Charleton J in *DPP v Cash* [2007] IEHC 108; the prosecuting authority was the Attorney General but is now the DPP under the Prosecution of Offences Act 1974 s 3(1).

[22] Prosecution of Offences Act 1974, s 6 which provides that 'it shall not be lawful to communicate the Director … for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings [save] … (i) communications made by a person who is a defendant or a complainant in criminal proceedings or believes that he is likely to be a defendant in criminal proceedings, or (ii) communications made by a person involved in the matter either personally or as legal or medical adviser to a person involved in the matter or as a social worker or a member of the family of a person involved in the matter'. Gardaí have discretion to prosecute in the name of the DPP on a range of offences. Any person (any 'common informer' as they are called) may commence a case in the district court but on return for trial by the judge, Article 38.2 of the Constitution stipulates that where the offence is indictable and not minor, the authority reverts to the DPP and the victim loses carriage of the proceedings. See *The State (Ennis) v Farrell* [1996] IR 107.

[23] [1976] IR 325.

[24] See Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2017), Ch 6.5.

[25] Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) Journal of Law and Society 32(2) 308: victims can join as a *partie civile* to the process; in France and Belgium a victim can set the prosecution process in motion where the *ministère publique* has declined to do so, through issuing a summons for the accused to appear in court. Once this occurs, the public prosecutor must take over. See also Ivana Bacik, Catherine Maunsell, Susan Grogan, *The Legal Process and Victims of Rape: a comparative analysis of the laws and legal procedures relating to rape, and their impact upon victims of rape, in the fifteen member states of the European Union*, (Dublin Rape Crisis Centre and the School of Law, Trinity College Dublin September 1998) 13, as a *partie civile,* the victim is no longer a witness and does not give evidence at trial. The pre-trial statement to the investigating judge is contained in the *dossier* and relied upon by the prosecution.

[26] This does happen in England and Wales, albeit less commonly since the Victims' Right of Review was introduced. See CPS guidance, 'Appeals: Judicial Review of CPS Prosecuting Decisions' (27 September 2019) <https://www.cps.gov.uk/legal-guidance/appeals-judicial-review-cps-prosecuting-decisions>, accessed on 6th October 2021. See also *R(FNM) v DPP* [2020] EWHC 870 (Admin), where the High Court granted a judicial

to be forgotten; that they have rights. In lost evidence cases, where arguments are posited by accused persons as to the importance of what was asserted not to have been gathered during an investigation, the tendency towards prohibiting trials from proceeding has been held back by the judicial invocation of the rights of the community to be protected from crime. Thus, the High Court test for prohibiting a criminal trial has evolved to become whether, on a fair assessment, the contended rights of the accused are so infringed by the wrong asserted that a trial in due course of law has become impossible notwithstanding appropriate directions and warnings to the jury by the trial judge. Without the community as beneficiaries of 'true social order' under the Preamble to the Constitution, and in whose name prosecutions are taken under Article 30.3, with the victim being part of that equation, the tendency for formulating the ultimate test may have moved towards an exclusive focus on the accused having rights. Instead, judicial pronouncements have asserted victims' rights. Denham J in *The People (DPP) v Gilligan* stated that in protecting the 'rights of an accused the court will also have regard to the right of the People that offences be prosecuted' and that this 'may require the court to balance competing rights.'[27] Hence:

> On a hierarchy of constitutional rights, the applicant's right to a fair trial is superior to the community's right to have the matter prosecuted: *Z v. D.P.P.* [1994] 2 I.R. 476. In balancing competing positions the test is whether there is a real or serious risk of an unfair trial for the accused: *D. v. D.P.P.* [1994] 2 I.R. 465. The right of the People is also part of the equation. This incorporates the right to have an accused prosecuted; the right to have a fair trial system in the community; and to guard against unfair trials which may lead to miscarriages of justice. The position of victims (and their families) should not be excluded from this equation either.[28]

Other statements assert the centrality of the person wronged by crime. In relation to delay,[29] as to illegally obtained evidence,[30] and, though not explicitly, as to the missing evidence argument.[31] But what matters more than rhetoric is practical effect. Humphreys J in *KD v DPP* saw the test for prohibiting a pending trial in a manner that incorporated victims' rights:

> A trial judge can only stop a trial if an irremediable injustice would be caused to a defendant of such gravity that it would be fundamentally unjust to allow the matter to go to a jury. Of necessity, this is an exceptionally high test, and one that will only rarely be met, if for no other reason than that the State is under important legal obligations to victims of crime, pursuant to the Constitution, EU law and the ECHR, including the "obligation to conduct

review where the CPS Appeals and Review Unit had upheld a decision not to prosecute an allegation of rape without accepting representations from the victim.

[27] [2006] 1 IR 107, 137.

[28] ibid [8.2].

[29] *KD v DPP* [2016] IEHC 21, Humphreys J.

[30] *The State (Walsh) v Cash* [2005] 1 ILRM 443, Charleton J and see *DPP v JC (No 1)* [2015] IESC 31, where the theme of community rights runs through the majority judgments revising the rule of exclusion on a mere mistake is overturned. The judgments of Clarke J (268-269) and MacMenamin J (308), refer explicitly to the rights and interests of victims to have crimes committed against them be prosecuted. Notable in the judgment overturned, *The People (DPP) v Kenny* [1990] 2 IR 110, is the exclusive focus on using criminal courts to discipline the police; this made the community and victims a non-consideration, some might suggest.

[31] *Scully v DPP* [2005] 1 IR 242, [2005] IESC 11. See also *B v DPP* [1997] 3 IR. *Z v DPP* [1994] 2 IR 476. *D v DPP* [1994] 2 IR 476.

> an effective prosecution" (*Söderman v. Sweden*, Application No. 5786/08 (European Court of Human Rights, 12th November, 2013) para. 88).[32]

Notable also is how the European Court of Human Rights feels no prohibition in invoking individual victims' rights against a lack of logic in the fair disposal of offences where flaws in national criminal procedure are challenged. Not just the community, but the person wronged, is in the balance, as seen both in *Söderman v Sweden* and in *X and Y v The Netherlands*,[33] the cases cited in *The State (Walsh) v Cash*,[34] where Dutch law required every victim of sexual violence to give a statement prior to the commencement of any prosecution. Since, in that case, the victim had severe disabilities, this proved impossible. The illogical nature of this rule as undermining respect for private and family life, under Article 8 of the Convention, was held incompatible with the obligations of the Netherlands towards human rights. Strasbourg has similarly recognised that vindication of the Article 2 right to life entails a positive obligation on behalf of the State to conduct a proper investigation into the taking of life.[35] In a number of cases, Strasbourg has found that a state has failed to protect the right to life, guaranteed by Article 2, where the investigative process was inadequate or marred by errors.[36] In *EB v Romania*,[37] it was held that there had been a violation of Articles 3 and 8 where an accusation of rape had not been properly investigated.[38] Since the Supreme Court decision in *Fox v Minister for Justice*,[39] it seems that the duty on behalf of the State to investigate a murder is probably a feature of Irish law. Clarke CJ did not rule out the possibility that the right to life enshrined in Article 40.3 of the Constitution encompassed a duty to victims to investigate deaths in certain circumstances.[40] The Court, however, asserted that the right to life did not extend to an 'investigation into an investigation' where the applicant had sought an investigation into the State's handling of the murder investigation of his uncle's shooting.[41]

Some support for the existence of constitutional rights for victims comes from the decision of the Court of Criminal Appeal in *The People (DPP) v JT*,[42] which condemned as unconstitutional the rule whereby a wife was prevented at common law from giving evidence against her husband. The accused had been charged with incest, the victim being his daughter who had a mental disability. Paternity is one of the elements of the offence of incest and the prosecution called his wife to prove that the girl was the accused's daughter. Walsh J was explicit in invoking the harm done to the victim and why the common law rule could not stand in the way:

> Insofar as the justification sought for the existence of the rule is the prevention of family dissension, it can quite clearly have no validity in a situation where the application of the rule is so far from preventing dissension, is assisting in concealing in effect, and thus permitting to go

[32] [8-9], citing *MS v Director of Public Prosecutions* [2015] IECA 309 (Hogan J).
[33] (Application no 8978/80), (1986) 8 EHRR 235.
[34] [39-42].
[35] *McCann and others v UK* (Application 18984/91) [1995] ECHR 31 is but one example.
[36] *Jordan v UK* Application 24746/94, (2003) 37 EHRR 52; *Kelly v UK* Application 30054/96, (4 May 2001, unreported); *McKerr v UK* Application 28883/95, (2002) 34 EHRR 553; *Menson v UK* Application 47916/99, (2003) 37 EHRR CE 220; *Jelic v Croatid* (2015) 61 EHRR 43.
[37] Application no. 49089/10, [2019] ECHR 222.
[38] See also *MC v Bulgaria* [2005] 40 EHRR 20, [153]; *Y v Bulgaria* Application no. 41990/18, [2020] ECHR 163; *JL v Italie* (Application no 5671/16) [27 May 2021] [117].
[39] [2021] IESC 61
[40] [12.8]
[41] [12.16]
[42] (1988) 3 Frewen 141.

> unpunished, a serious offence committed upon members of the family by other members of the family, particularly sexual offences by a father upon his own daughter. In view of the sense of obligation placed upon this Court to assist insofar as it can in the protection of the family the Court must take the view that the maintenance of the common law rule relied on in this case would be a failure to comply with the obligations imposed by the Constitution. This is all the more so in cases of assault upon the children of the family by the parents.[43]

Charleton J in *The People (DPP) v Cash* considered that the judgment in *JT* was an indication 'that the victim, being the subject of crime, can have interests which should be weighed in the balance as well as those of the accused'. [44] This concept is put on a statutory footing in the Criminal Procedure Act 2010 which notes that, when deciding whether or not to order a re-trial, appellate courts shall have regard to the interests of any victim of the offence.[45] In *The People (DPP) v VE*,[46] Ní Raifeartaigh J, delivering the judgment of the Court of Appeal, strongly asserted the constitutional rights of victims of crime:

> However, it is necessary also to consider the rights of complainants in criminal trials. Even if Article 38.1 does not apply to complainants, the rights of victims of crime are protected by Article 40.3 of the Constitution, while Article 42A(1) of the Constitution now refers to the natural and imprescriptible rights of the child and guarantees to protect and vindicate those rights as far as practicable. The constitutional right to bodily integrity is of primary relevance here; rape being considered as one of the most serious violations of bodily integrity in the criminal calendar. Indeed the European Court of Human Rights has repeatedly held that rape and other crimes of sexual violence violate the right to be free from torture and inhuman and degrading treatment under Article 3 of the Convention and the right to privacy under Article 8, and that States are under a positive obligation to have systems in place to effectively investigate and prosecute such offences. Article 13 of the Convention on the Rights of Person with Disabilities requires that persons with disabilities have effective access to justice and that appropriate accommodations be made available to facilitate their participation.[47]

Consequently, we are, perhaps, moving towards a place where constitutional rights of victims are recognised and where what constitutes a fair trial is no longer exclusively defined by reference to what is fair, or favourable, to the accused.[48] Even so, we are some way from recognising any presumption equivalent to that in favour of accused persons in *DPP v Woolmington* whereby all charged with a crime are legally innocent until proven guilty, as to rights underpinning the status of victims.[49] But, what is to be done? Rather than awaiting a storm blown up by some public controversy that may lead to a crystallisation of the rights of

[43] 160.
[44] At [50].
[45] Criminal Procedure Act 2010, s 10(3).
[46] [2021] IECA 122.
[47] ibid [67].
[48] *The People (DPP) v VE* [68]-[69].
[49] Note s 4(2) of 2017 Act follows the Victims Directive in stating that the application of the Act is not dependent on the commission of an offence having been established.

victims, should not the criminal justice system be continually analysed to discover where fairness and balance lie and to scrutinise how imbalances may be redressed?

## Is information enough?

Information - knowing what is going on, why decisions are being made, when a case is to be heard, having a designated liaison person - these are rights which cannot possibly undermine either the accused's rights nor the constitutional exclusivity of the DPP as designated prosecutor. The recital to the Victims Directive designates information as key to any further entitlement to participation in the criminal process.[50] Thus, knowing about relevant procedures, why decisions are made, enables a possible review or protest by a victim of a decision not to prosecute, or to prosecute for a lesser included offence, or a right of complaint where entitlements are ignored, and if there is a trial and conviction, to follow any appeal process. This must, at least, lessen any unease that arises where victims are excluded.[51] Knowing about medical or psychological support and potential compensation for criminal injury become practical measures tending towards restorative justice. This is reflected in sections 7 to 10 of the 2017 Act, with the only exceptions relevant being in relation to safety, impeding an investigation and undermining a potential prosecution.[52]

How far has this come? In 1983, the first author, as a junior barrister, prosecuted a case of dangerous driving causing death. A young woman working abroad had returned home to see her parents, visited a friend by bicycle and on returning in the early hours was struck by a stolen car which timings indicated had to be travelling through a Dublin suburb at well over 160kmh.[53] While the primary victim had died, her parents were not included in discussions immediately prior to the trial as to dropping what was initially a manslaughter charge. In addition, senior counsel at first declined to meet the parents on a traditional basis of thereby losing the appearance of objectivity but later relented when they were ushered into the State solicitor's room in Chancery Place. Experience from the time, however, indicates that the natural humanity of those investigating ensured a much wider appreciation of the need to know than this anecdote indicates. Even still, we have already come far; and necessarily. Victims now have entitlements enshrined in law,[54] in a code of practice,[55] in standardised leaflets from agencies,[56] and by providing a designated and unchanging person of contact.[57] This movement at least enables the possibility of those who suffer from crime to give a point

[50] Recital 1(26) and Article 4.
[51] Article 1 has information as central to the purposes of the Directive.
[52] S 11 provides that information may be refused, including on grounds of State security, by a Garda of superintendent rank, or equivalent designated person for other agencies.
[53] Thus, 200m would be covered in 4 seconds, giving no time for a cyclist to evade.
[54] See Maria McDonald, 'Guide for Lawyers to the Victims Directive & the Criminal Justice (Victims of Crime) Act 2017', Irish Council for Civil Liberties (2020).
[55] Gardai Code of Ethics 2017: 'I will give timely and truthful information as long as this is in accordance with the law and does not compromise an ongoing investigation. Examples of this includes updating victims and witnesses about investigations; I will make sure that victims of crime are made aware of their rights as soon as possible'.
[56] An Garda Síochána, Victim Information available at www.garda.ie. See also Victims and Witnesses section of www.dppireland.ie.
[57] As per Garda policy, personnel in the Garda Victim Service Office are the main point of contact for the majority of victims. PULSE letters updating victims on investigations will indicate for them to contact GVSO for updates. In more serious cases, the investigating member maintains in-person contact with the victim to provide updates. In some cases, such as a murder, a Family Liaison Officer is appointed and they are in regular contact with the victim/victim's family.

of view and to seek a reappraisal of such central decisions as any marked reduction in charge. Information is important.

## Preparation for court

Prior to the actual trial, does a witness, who may happen to be a victim also, deserve a discussion with prosecution counsel about the evidence to be given? Even positing that question may suggest that the answer is straightforward; after all no plaintiff or defendant in a civil case would imagine a negative answer. There is, however, a caginess among advocates in approaching and discussing in depth the facts of a criminal prosecution with the main witness. Especially so in sexual violence cases because, most often, unless it is a case of attack by a stranger, which is rare, the line between a serious crime and a lawful action is consent and that issue is tried as between the strength of assertion and denial. Experience suggests that such reluctance arises because of fear of dialogue distorting the prosecution narrative. Some jurisdictions draw a bright line between the investigation, a police process, and the actual trial proceedings; the investigation ending when the court process begins, usually when a charge is proffered. Where there has been a pre-trial meeting with the victim (who is usually the main prosecution witness), there can be defence questioning, even if such a consultation has taken place prior to trial. The danger is of this shading into, hinting at, if not explicitly alleging, coaching. In this respect, the 1988 Law Reform Commission's consultation paper on rape was ground-breaking. It suggested that all prosecution witnesses, whether the allegation was of theft or violence, should be treated equally; the opinion expressed being that what was involved in prosecution-victim pre-trial consultations was no more than what the preparation of any serious civil case would involve. In such circumstances, it is suggested that the Bar Council should consider making it clear that, provided the rule against coaching is strictly observed, there is no objection whatever to counsel for the prosecution having a proper consultation with the complainant and any other witnesses in sufficient time for the hearing, and that this indeed is normally desirable. At such a consultation, the complainant could be made fully aware of the nature of the trial and of the questions to which she might be subjected. [58]

While experience shows that such an approach to access was tried in the aftermath of the 1988 report,[59] problems arose as a consequence of such consultation in the form of a later statement correcting facts or amplifying important descriptions which could lead to defence questions, quite legitimately, and, less so, to the suspicion of coaching. After that early experiment, pre-trial discussions between prosecution counsel and victims or other witnesses have not been pursued. However, there have been two positive developments. Firstly, a practice has developed, as a matter of police work, of a first statement not sufficing (as these tend to be generated in stressful circumstances), and a second statement of re-checking and amplification as to fact being necessary for the book of evidence. This is a matter of fundamental fairness to a victim because first reactions to new information do not enable them to give their best evidence by way of reply if they have not had a chance to give matters thought; a process inimical to emotional shock. Secondly, victims in sexual violence cases meet the prosecution barrister,[60] but only on a get-to-know-you basis, are taken on a tour of

[58] Law Reform Commission, 'Rape and Allied Offences' LRC 24-1988, p 15.
[59] Here the first author draws on his own experience.
[60] See 'Victims of Crime' (*Office of the Director of Public Prosecutions*) <https://www.dppireland.ie/criminal-justice-system/victims-of-crime/> accessed 21 October 2021.

the courts,[61] are informed what to expect as to how the trial may run and are invariably treated with kindness appropriate to the difficulty of any court experience.

But, should there be more? The courtroom is an institution alien to all but those working within the system. Yet, it is stressful even for professionals. In order for victims to communicate effectively within this environment it is basic to preparing any case that key witnesses require some form of familiarisation with the rules and processes governing courtroom interactions.[62] Rather than a mere friendly meeting with prosecution lawyers, is it appropriate that a key witness on whom a case depends should be prepared in a meaningful way; talked through her or his evidence in chief, asked non-suggestive but gently probing questions, and have an entitlement to a discussion with counsel for the prosecution as to the general outline of what the defence may be?[63] That is not coaching, but staying on the right side of the line requires real skill, especially as it is appropriate to note such an interview.[64] That being so, another reason for reluctance arises where counsel advise a new statement be taken; that of crowding the field with potentially differing statements. Hence, a clear line needs to be drawn and to be abided by.

Coaching witnesses turns a trial into theatre: a fiction and not an exploration of where truth lies. But presenting evidence so that its essence is understood prior to court and is thus capable of being put across by a witness so that it emerges as a coherent narrative that a jury hearing it for the first time may understand is not coaching. That process, instead, is laying the groundwork towards a fair but truthful presentation. Coaching, conversely, is suggesting deceit, either explicitly through suggestion, as to what evidence not already in the narrative of facts in the witnesses' statement might suit better, or hints that particular events be downplayed, exaggerated, or dropped; in which case a court case becomes a drama production. Barristers, whether defence or prosecution, are bound by a code of ethics which prohibits coaching a witness.[65] Defence counsel always meet with the accused and always discuss both the evidence against him or her and what might be said should the accused exercise the option of giving evidence. There clearly is an imbalance; but with what result? What has perhaps resulted from our current minimalist involvement of prosecution counsel involvement is that victim support groups have fulfilled the role of preparing victims for

[61] For more information see 'Pre-trial visit to the court' (*Victim Support at Court)* <https://www.vsac.ie/what-we-offer/pre-trial-visit-to-the-court/> accessed 21 October 2021; for discussion see Working Group appointed by the Minister for Justice and Equality, headed by Tom O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* ('O'Malley Report') July 2020, para 7.23.

[62] Amanda Konradi, 'Too Little, Too Late: Prosecutor's Pre-Court Preparation of Rape Survivors' (1997) 22 Law and Social Inquiry, 4; See Louise Ellison and Jacqueline Wheatcroft, "'Can you ask me that in a different way please?" Exploring the impact of courtroom questioning and witness familiarisation on adult witness accuracy' (2010) Crim LR 823: this study found that prepared mock witnesses were significantly more likely than unprepared witnesses to provide factually correct responses to cross-examination and were more likely to seek clarification.

[63] Office of the Director of Public Prosecutions, *Guidelines for Prosecutors* (4th edn, 2016), p 25 <https://www.dppireland.ie/app/uploads/2019/03/Guidelines_for_Prosecutors_4th_Edition_-_October_2016.pdf> accessed on 16 July 2021, para 12.21 e) states 'generally, the prosecutor is not permitted to discuss evidence with witnesses or victims in advance of the hearing of a case'. In England and Wales pre-trial meetings between prosecution and victims have been introduced; these can discuss procedure, how to ask for clarification of questions, the basic defence to be advanced, and can inform the victim of any successful application for bad character or previous sexual behaviour evidence to be adduced. See CPS Guidance, 'Speaking to Witnesses at Court' (February 2018) p 14. For discussion, see also Elisabeth McDonald, 'The Views of Complainants and the Provision of Information, Support and Legal Advice: How Much Should a Prosecutor Do?' (2011) 17 Canterbury Law Review 66-87.

[64] Since this is in furtherance of litigation, even though a victim or other witness is not the client of prosecution counsel, the DPP is, privilege applies.

[65] Konradi (n 62) 71.

their court appearances and probably quite well. Is there a medium way? Would it perhaps be possible for prosecution counsel to conduct such preparation, the benefit being that they are members of a professional body, have strong court knowledge, and are therefore bound by professional standards?

What is to be considered? One argument against greater victim-prosecution counsel involvement is that it breaches the line whereby investigation is done by the police and trials proceed with no involvement by counsel in that process.[66] As against that, are victims not better as witnesses for having some appreciation of the issues? In a civil case, that would be inescapable trial preparation. Perhaps a median solution might be an early meeting with counsel as to likely issues at trial with the victim being encouraged to focus. Discussion of the potential defence and of how to put a coherent narrative would require little in the way of comment from the victim. That would not breach the investigation-trial barrier, which in any event has not been declared an aspect of best practice in this jurisdiction. Even if something new was revealed, resulting in a notice of additional evidence, if such a meeting was early and that statement was properly taken by Garda officers, surely that would be an advantage? Closer familiarity between prosecution counsel and the victim may also undermine any arguments for going further on victim representation separately with the adoption of procedures from civil jurisdictions, the fit for which in our procedures might be questioned.

## Can victims and accused be kept apart?

Section 2(1) of the 2017 Act defines a victim as being a person 'who has suffered harm … which was directly caused by an offence.' In designing the Criminal Courts of Justice, the State's central criminal court, innovation put the entrance and circulation of judges away from the public.[67] However, as in any county venue, those accused of crime, their lawyers, and the victims of crime must share the same public spaces and, ultimately, be present with each other on opposite corners of a courtroom.[68] This, in all practical terms, may be unavoidable save through engaging remote technology. We have seen significant statutory reforms which aim to keep separate accused persons and victims. With the passing of the innovative Criminal Evidence Act 1992, putting children and those with disabilities in the same space as the accused was avoided.[69] The 1992 Act coincided with a sudden expansion of prosecutions in relation to the young and enables a person under 18 years of age to give evidence by television link.[70] That worked well from the time of introduction. A trained court officer stayed with the child, informed him or her of procedures and was a comforting presence during the proceedings, which were remote from the victim (thus lessening stress), with the judge controlling who could participate through a monitor. Judges allowed victims to be put at their ease with a few initial minutes of general, and essentially irrelevant, questioning by the prosecution. Such victims never had to see the accused and never had to come to an actual court setting, unless, as the legislation states, there was 'good reason to the contrary.'[71] This has now legally become almost a general measure, extending from sexual to all other kinds of violence or threats thereof; essentially to everything apart from economic

[66] (n 63) p 25.
[67] O'Malley Report (n 61) para 2.44.
[68] While there is a Victim Suite in the CCJ, victims must enter the building and the courtroom through the public entrances. The same entrances are used by accused persons on bail.
[69] Criminal Evidence Act 1992, Part III.
[70] Criminal Evidence Act 1992 s 13 as amended by the Criminal Justice (Victims of Crime) Act 2017 s 30(b)(ii).
[71] Criminal Evidence Act 1992 s 13(1)(a)

offences.[72] In amending the legislation to conform with the spirit of the Victims Directive, general measures enabled anyone to have the same protections 'with leave of the court.'[73] In so deciding, the court is to 'have regard to the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation' while considering '(i) the nature and circumstances of the case, and (ii) the personal characteristics of the victim' but should not so permit if the interests of justice require otherwise.[74] Note: at least the first criterion assumes victimhood, even prior to conviction. In that respect, the presumption of the victim being a victim is given some life. The measure supplements s 39 of the Criminal Justice Act 1999 which permits video-link where a court is satisfied that a witness is being intimidated (an offence in itself).

Intermediaries may also be used to put questions to the victim in the words used by the defence barrister or in language better suited to a child or person with a disability, but only where the witness is within those categories. In this jurisdiction, that is very rare. There is no training specified for intermediaries.[75] Instead, the court is to be satisfied that a person may so act. For sexual offence cases, or those involving violence or the threat of violence, screens may be erected to shut off sight of the accused; but the reality is that both sides would already have caught sight of each other. In England and Wales, a practical measure is to have the victim behind a screen before the accused person, and the public, are brought into the courtroom. Section 14C of the 1992 Act limits an accused person's right to self-represent during cross-examination of an alleged victim where the witness is under 18 years of age,[76] or where the person is accused of having committed a sexual offence.[77] Self-representation is not a constitutional right and personal identifications in court may be avoided in such cases.[78] Children's statements videotaped from an earlier stage of investigation may be used in place of examination by the prosecution. This is of some use but a correctly handled examination in chief puts the vulnerable into a calmer mood, easing them into the ordeal of having their testimony challenged by the accused. A sudden jump to cross-examination is hard to envision as a good idea. With an early meeting, a connection is surely also established with the prosecution barrister.

[72] The relevant offence is defined in s 13 as a) a sexual offence; (b) an offence involving violence or the threat of violence to a person; (c) an offence under section 3 , 4 , 5 or 6 of the Child Trafficking and Pornography Act 1998 ; (d) an offence under section 2 , 4 or 7 of the Criminal Law (Human Trafficking) Act 2008 ; (da) an offence under section 33 , 38 or 39 of the Domestic Violence Act 2018; (e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a) (b) (c) or (da).

[73] Section 13(1)(b) of the 1992 Act.

[74] Criminal Evidence Act 1992 s 14AA, as inserted by s 30 of the Criminal Justice (Victims of Crime) Act 2017.

[75] Unlike in England and Wales where intermediaries are governed by a Code of Practice and a detailed Practice Manual, and must be designated as a Registered Intermediary for prosecution witnesses. In Ireland, use is made of registered, trained intermediaries from the UK and Northern Ireland. For a discussion of intermediaries in Ireland see O'Malley Report (n 61) ch 8. Correspondence with the Office of the DPP indicates that it is participating in the Department of Justice sub-group to implement the recommendation, made in the O'Malley Report, that appropriately qualified intermediaries should be recruited and registered in this jurisdiction. The Department of Justice has issued a tender inviting expressions of interest from third level institutions to provide an appropriate training and accreditation programme for relevant professionals to be recognised as intermediaries.

[76] Criminal Evidence Act 1992, s 14C(1).

[77] Criminal Evidence Act 1992, s 14C(2).

[78] Criminal Evidence Act 1992, s 18. In *The People (DPP) v Sheehan* [2021] IESC 49, the Supreme Court noted that insisting in self-representation for an improper purpose, such as an oppressive examination of a witness, is not constitutionally required, per O'Malley J [89].

All of this is progress; doing what can be done.[79] The legislation, coming from various amendments is, however, overly complex, with perhaps unnecessary distinctions as between various categories when a simple section setting out the law and adding a judicial discretion as to extending protections beyond an ordinary court hearing required. [80] The uncodified legislation, consisting of piecemeal amendments, inescapably typical of Irish criminal law and procedure, generates a real chance of error.[81] In the light of general measures introduced against the Covid-19 pandemic by the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, enabling general measures of video and online attendance, remote provisions seem obvious ways of facilitating testimony. A physical courtroom confrontation is not part of the rights of the accused.[82] What is important, whether on a screen, through a video-link, or across a courtroom, is: how a witness is treated and whether he or she is identified as a victim or not by those who challenge his or her testimony, by the trial judge and by the prosecution. Thus, separate representation, apparently someone for the victim, and control of the court by the judge, come into focus.

## Does separate representation advance victims' rights?

Article 10 of the Victims Directive bestows on victims the right 'to be heard during criminal proceedings and … provide evidence.'[83] Since the common law system requires *viva voce* evidence of a crime, more than the review of a file by the trial judge that can constitute a civil jurisdiction case, clearly victims, particularly in sexual violence cases, are heard. However, in the Irish system, a victim can only act as a witness and not as a party.[84] Section 31 of the 2017 Act provides only for victim impact, post-conviction evidence and submissions, and s 8 enables evidence on 'interference or attempted interference' on a bail application. In addition, s 34 of the Sex Offenders Act 2001 enables separate legal representation by a sexual violence victim where it is proposed to attempt the introduction of any evidence or pose any question to her or him as to any prior sexual experience.[85] Section 3 of the Criminal Law (Rape) Act, as amended,[86] prevents the introduction of any such issue unless it is especially relevant, thus

[79] A good guide is Liz Heffernan, *Evidence in Criminal Trials* (2nd end, Bloomsbury Professional 2020) ch 6.

[80] Alan Cusack, 'Addressing Vulnerability in Ireland's Criminal Justice System: A survey of recent statutory developments', (2020) 24(3) International Journal of Evidence and Procedure 280–306, 282: 'multiple overlapping and discordant provisions … has, in effect, created a 'legal labyrinth'.'

[81] See the forward to Peter Charleton and others, *Charleton & McDermott's Criminal Law and Evidence* (2nd edn, Bloomsbury Professional 2020).

[82] *Donnelly v Ireland* [1998] 1 IR 321, 336. See also *The People (DPP) v Sheehan*.

[83] The Directive provides at Article 10.2: 'The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.'

[84] Increasingly, the civil law systems have become less reliant on the *dossier* and more on live witnesses due to the influence of the ECHR; for a discussion see John D. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment', (2005) 68(5) The Modern Law Review, where it is noted that the influence of the ECtHR has been to direct contracting states towards a participatory trial system.

[85] Inserting s 4A into the Criminal Law (Rape) Act 1981.

[86] By s 13 of the Criminal Law (Rape)(Amendment) Act 1990. This provides: '(1) If at a trial any person is for the time being charged with a sexual assault offence to which he pleads not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience (other than that to which the charge relates) of a complainant with any person… (2) (a) The judge shall not give leave in pursuance of *subsection* (*1*) for any evidence or question except on an application made to him, in the absence of the jury, by or on behalf of an accused person. b) The judge shall give leave if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied. (3) If, notwithstanding that the judge has

cutting back the very wide definition of relevance that prevails ordinarily at common law.[87] This reduction of the concept of relevance is possible for good reason and if the interests of justice are not undermined. On a reasonable level, according to the statutory test, prior sexual history, whether with the accused or any other person, becomes relevant only where, reasonably considered, it may lead to a jury having a reasonable doubt as to the truth of the allegations.[88]

As a limited exception to the bi-partite nature of the adversarial system, a victim alleging sexual violence is separately represented and her or his counsel addresses the court if the defence proposes introducing sexual history.[89] That happens in the absence of the jury, since the issue is whether the jury should hear the question being asked of the victim, or if evidence is proposed, to hear defence evidence addressing an argument that consent was more likely because of prior sexual history. Since the jury is the tribunal of fact in criminal cases, this does not breach the prosecution-defence fortress: the jury are not there, they do not hear two advocates for the prosecution, and so all is merely preparatory. Is this helpful? Experience, however, suggests that the system operates at least as a caution against traducing character without leave; needing permission means that the limits to cross-examination as to credit extend into relevance and an application must at least be thought-through.

Issues faced by an extension of the system to making a victim a co-prosecutor derive essentially from a consideration of what that would mean. Instead of an ostensibly balanced system, *State v Accused*, it could be argued that what would emerge would be two against one, an undermining of the adversarial system,[90] and, arguably, the upturning of the principle of equality of arms.[91] Such a proposal has been made,[92] and repeated.[93] As of yet this radical proposal has not gained traction. While it is certainly the case that barristers on behalf of the DPP represent the prosecution, experience shows that the interests of victims are central to putting forward the best case. The prosecution act as ministers for justice to both sides and strive towards fairness. On the topic of disclosure, prosecution and victim may come into conflict as the rights which an accused may have can clash with a victim's point of view. But there is, in reality, very little in respect of which a conflict might arise or whereby a victim, for instance of sexual violence, would not have complete access during the trial process in

given leave in accordance with this section for any evidence to be adduced or question to be asked in cross-examination, it appears to the judge that any question asked or proposed to be asked (whether in the course of so adducing evidence or of cross-examination) in reliance on the leave which he has given is not or may not be such as may properly be asked in accordance with that leave, he may direct that the question shall not be asked or, if asked, that it shall not be answered except in accordance with his leave given on a fresh application under this section.'

[87] *The People (DPP) v Almasi* [2020] IESC 34, [24]; *The People (DPP) v EH* [2019] IECA 30: '[t]he statutory threshold [under s3(2)(b) of the 1981 Act] is … a high one, though we hasten to add not an impossible or unattainable one.' For discussion see O'Malley Report (n 61) para 6.3-6.8.

[88] Further, see *Charleton & McDermott* (n 81) para 11.136-139 and the Scottish cases there cited; *CJM* [2013] ACCR 214, *Begg* [2015] HCJAC 69, *Dongan* [2019] HCJAC 10, *McDonald* [2020] HCJAC 21.

[89] O'Malley Report (n 61) para 6.15 recommends that, if the judge grants leave to cross-examine a witness on issues relating to previous sexual experience, counsel appointed by the legal aid board to represent the victim should be allowed to remain during the cross-examination and perhaps be allowed to object to certain questions or indicate to the judge that they are outside of the grant of leave.

[90] Right Honourable Lord Justice Auld, 'A Review of the Criminal Courts of England and Wales, (Ministry of Justice, 2001) at 545.

[91] For discussion see O'Malley Report (n 61) para 6.16

[92] Bacik, Maunsell and Grogan (n 25) para 2.1-3, 2.7, 3.12.

[93] Perhaps most recently, and surprisingly in view of legal analysis, by the Law Society Submission to the Joint Oireachtas Committee on Justice, 'Law Society Submission, Victims Testimony in Cases of Rape and Sexual Assault', February 2021, Recommendation II.

order to make a suggestion on any point that arises.[94] That would be particularly so where there is a designated police liaison person always in court with access to the State solicitor.

Confusion may ensue from adding another legal team into the trial process – what would their role be, how would this role interact with that of the DPP, and would it add anything beyond the services already provided by non-legal professionals through victim support services? Secondly, as Laura Hoyano has argued,[95] the transplantation of procedures from other jurisdictions fails to consider the limitations by public prosecutors in early stages of investigations, how the various elements of a system interact and the embeddedness of balance in those systems. In other European trial systems, the judge may be able, unlike in the common law system, to ask the accused to answer as to what defence is in fact being adduced,[96] and so control, direct and sift the evidence in a way which our prosecution-prove-everything system precludes.

The possibility of multiple representation could be cast into doubt by the decision of the Supreme Court in *The People (DPP) v Shaughnessy*.[97] There, the main issue was the competence of the accused's legal representation in a rape case. In dealing with the appeal, however, the Court of Appeal had enabled representation not only of the prosecution and defence but also the former lawyers for the accused who were accused of incompetence. Presumably, this was in aid of the vindication of the right to their good name.[98] That was not permissible since:

> Nowhere does the Constitution contemplate that any party other than the prosecution and the defence should enter into criminal proceedings in contesting whether the prosecution have discharged the burden of proving the commission of a crime beyond reasonable doubt.[99]

While *obiter*, the remark evokes caution. Victim-prosecution representation at trial seems less possible. What, however, does remain possible is representation, pre-trial and in the absence of the jury, in the context of prior sexual history, or it would seem generally as to credit questioning, or as to disclosure prior to trial. These are all areas where privacy rights may enable some limited scope.[100] This is referenced in the tentative suggestions below.

It seems, nonetheless, that separate legal representation remains a key proposal for groups advocating greater participation of victims in the criminal trial process; but whether it would actually improve outcomes in the trial process is less certain. Such advocacy, in the past, has led to meaningful reform in the areas of adducing evidence of previous sexual experience and disclosure of counselling records in sexual offence trials, but a general introduction of separate legal representation seems unlikely to fit within the adversarial system. Further, it may not be what victims need.[101] The key issue for victims must be how well the trial process works; how their dignity is upheld in court notwithstanding that it is inescapable that the

[94] See O'Malley Report (n 61) para 6.17.
[95] Laura Hoyano, 'Reforming the adversarial trial for vulnerable witnesses and defendants' (2015) 2 Crim LR 107, 117-119.
[96] Van Kessel, 'European perspectives on the accused as a source of testimonial evidence' (1997-1998) 100 W Va L Rev 833-835: in France, the judge and other participants expect the accused to speak. Although there technically exists a right to remain silent it is rarely invoked as silence may lead the judge to draw negative inferences.
[97] [2021] IESC 18.
[98] *Re Haughey* [1971] IR 217.
[99] *The People (DPP) v Shaughnessy* (n 97) Charleton J, [34-35].
[100] See, from the Supreme Court of Canada, *R v Mills* [1999] 3 SCR 553.
[101] O'Malley Report (n 61) considered this proposal but ultimately rejected it at para 6.16.

accused will have a different account of events and that reliving the trauma through recounting that experience to strangers is bound to be difficult. But can that burden be lessened? Elisabeth McDonald suggests that separate legal representation confined to intervention in cross-examination of the complainant could achieve a lot in vindicating victims' rights and improving their experience of the trial process.[102] However, rather than upsetting the delicate balance of the adversarial system perhaps an already established participant in the justice process should be encouraged to intervene in cross-examination to ensure it is fair to both victim and accused – ought that not be the role of the trial judge?

## Can a judge control a court towards a fair (to everyone) hearing?

Starmer suggested judges take the place of defence barristers in sexual violence, and other especially difficult cases involving the vulnerable asking the questions, effectively as an intermediary, and transposing the adversarial system into an enquiry. There are, however, limits to what is possible in what would involve a complete transformation of our system. What, most obviously, may not be possible is requiring prior authorisation from the judge for every defence question. If that, why not all prosecution questions? What cannot be done is to put the police officer taking the initial statement from a victim, even a child or person with a disability, into the role of both prosecution and defence counsel.[103] In our system, if a witness refuses to back up his or her statement, turns hostile as it is known, the initial statement may be put in evidence by the prosecution.[104] If the statement so treated is that of the victim, that undermines the prosecution case. In the case of a child or vulnerable person, a video recording of an interview may serve as a full or partial prosecution testimony. But, here our consideration is on removing 'razzle dazzle',[105] or at least moving cross-examination of victims away from the use of rhetorical devices and of properly confining less objective aspects of advocacy to a closing speech. Generally, also, the point of cross-examination of a victim is to put the accused's case.[106] The practice, and the law, is geared in our system for the trial judge to observe, not to participate. The trial judge is not even supposed to interpose questions into a defence cross-examination, save as necessary for clarification.[107] This poses difficult questions: should the trial judge take a view and direct cross-examination of victims only to what is relevant and impose time and concision directions?[108] The difficulty in striking a balance is exemplified by *Y v Slovenia*,[109] where the protections guaranteeing respect for private life in Article 8 of the European Convention on Human Rights were held infringed by intrusive questions of a sexual violence victim. Dissenting, however, Judge Yudkivska focused on fair trial rights under Article 6. She contrasted the consequences of conviction

[102] Elisabeth McDonald, 'The Views of Complainants and the Provision of Information, Support and Legal Advice: How Much Should a Prosecutor Do?' (2010) p 86.
[103] As in the Norwegian system;. For discussion, see Hoyano, (n 95) at 118.
[104] Section 16, Criminal Justice Act 2006. This is especially likely in abusive relationship cases, where controlling behaviour may make a victim dependent on his or her abuser. In one such case in England and Wales, a victim was taken into custody to ensure she would testify against an abusive partner. For a discussion see Laura Hoyano and John Riley, 'Prosecution Strategies in AR Cases (1) & (2)', Counsel Magazine, September 2020. Available at <https://www.counselmagazine.co.uk/articles/prosecution-strategies-in-ar-cases-(1)> accessed 6th October 2021.
[105] Referring to the song from the 1975 musical 'Chicago'.
[106] *McDonagh v Sunday Newspapers* [2018] 2 IR 79; Laura Hoyano, 'Putting the Case in Every Case' (Counsel Magazine November 2018) 18 < https://www.counselmagazine.co.uk/articles/putting-the-case-every-case> accessed 21 October 2021.
[107] *The People (DPP) v McGuinness* [1978] IR 189 and see *Charleton & McDermott* (n 81) para 6.06-07.
[108] This is what happens in the Commercial Court, and other High Court hearings; see Order 63A of the Rules of the Superior Courts.
[109] 41107/10 28 May 2015 ECHR.

for the accused to the necessity to probe what the accused asserts is a false allegation with ultimately dire consequences for him. She said:

> In the present case, "offensive insinuations" such as the comments that "the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him or that she had confided in him her desire to dominate men" are mostly value judgments and cannot be compared to a false, as X believed, accusation of sexual abuse. The degree of interference in one's private life represented by those quoted remarks and by the accusation of having committed a grave crime is incommensurable. Thus, I cannot agree that X's questions overstepped the admissible limits of defence, given that what was at stake for him was his honour and liberty.[110]

Latitude has always been permitted in cross-examination, particularly to the defence. Should that latitude extend to exercises in confusion and the repetition of prior statements by witnesses as to tiny differences? Finding where the balance lies in permitting questions but confining cross-examination to a search for truth requires real experience on the part of the trial judge. He or she is supposedly the party in control of the trial; but with what authority?

Trials are a lengthy process, some may argue unnecessarily,[111] and victims can be subjected to days long cross-examination.[112] It may be questioned as to whether this is right or is even necessary. This is especially so where there are multiple defendants and the victim may be cross-examined by several different barristers. In England and Wales, where there are multiple accused in respect of one victim, judges have jurisdiction to require defence counsel to appoint a 'lead' cross-examiner to canvass all common issues in cross-examination with the others allowed only to put questions relevant to their client's case.[113] This sensible approach could be adopted here. Is cross-examination the putting of the accused's case, as it must at least be according to the Supreme Court's ruling in *McDonagh v Sunday Newspapers*, or is there a danger of trials becoming less exercises in determining if the prosecution have produced enough evidence to prove a case beyond a reasonable doubt, but rather a process which results in the confusion or distortion of witness testimony? If that danger looms in a trial, is it consistent with concepts of justice? Trials can take on a life of their own. Cases can run and run because side avenues are opened that seem important. Barristers are not to be criticised for enthusiasm. But, whether the limit is as strict as in civil cases,[114] surely there

[110] Page 36 of the Court's judgment.

[111] Prior to the reconstruction of the jurisdiction of the Central Criminal Court by the introduction of rape and serious sexual violence cases, those were tried in the Circuit Criminal Court. Experience indicates that the time taken has at least doubled.

[112] In the Belfast rape case, the young woman making the allegations was cross-examined by four barristers over a period of eight days, see Conor Gallagher, 'Inside Court 12: the complete story of the Belfast rape trial' *The Irish Times* (28 March 2018) <https://www.irishtimes.com/news/crime-and-law/inside-court-12-the-complete-story-of-the-belfast-rape-trial-1.3443620> accessed on 2 July 2021. In *DPP v NR* [2021] IECA 121, Birmingham P indicated that at trial the 12-year-old complainant had been cross-examined for six days. A government minister, surrounded by protesters, where the issue was false imprisonment, was cross-examined for four days, see Pat Murphy, 'Joan Burton's cross-examination continues today' *Tipp FM* <https://tippfm.com/news/joans-burtons-cross-examination-continues-today/> accessed 20 July 2021.

[113] This will usually be done at a Ground Rules Hearing, see CPS Legal Guidance, Special Measures <https://www.cps.gov.uk/legal-guidance/special-measures>, accessed on 13 October 2021. Repetitive questioning should be avoided, particularly in multi-defendant cases. Practice Direction 3AA – Vulnerable Persons: Participation in Proceedings and Giving Evidence, 5.5: at a ground rules hearing the court should consider whether 'a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court'.

[114] *Talbot v Hermitage Golf Club* [2014] IESC 57.

have to be boundaries as to how much time is taken in cross-examination and how many times the same, or similar, questions may be put, or reiterated, by multiple accused to the same victim? Experience indicates that cross-examinations have lengthened where the accused does not propose to take to the witness stand to defend the case. Part of the problem, and why real experience is demanded of trial judges, is that while the prosecution disclose their hand, through a book of evidence, and through general disclosure outside that formal document, the defence in our system have to disclose nothing.[115] Hence, judges do not know, outside of educated intuition, what is coming next and may find it hard to set limits.

But is there legal authority to control cross-examination? While often it is posited that cross-examination by the accused is at large, that may not be so. Questions as to credit, meaning general reputation or behaviour, are final and the reiteration of questions as to credit, directed as to the character of a witness, background and unrelated conduct, and not as to the accuracy of the testimony, can be limited both as to range and as to relevance by the trial judge.[116] Why not cross-examination on the issue? Many are sceptical of cross-examination, but hostility to what can be legitimate challenge may, perhaps, be a better description. There are a range of views from the polarities of 'a procedure for manufacturing false evidence',[117] to Wigmore declaiming cross-examination 'beyond doubt the greatest legal engine invented for the discovery of the truth.'[118] There is also an illuminating exchange in Earle Stanley Gardner's novel *The Case of the Queenly Contestant*, where Perry Mason and Duncan Lovett, a lawyer colleague, discuss the purpose of the ancient art:

> "The purpose of cross-examination is to find out whether a witness is telling the truth." Lovett laughed sarcastically. "That's the line they try to teach you in the law books and in the colleges. Actually, when you come right down to it, you know and I know, Mason, that the object of cross-examination is to first find out to your own satisfaction if a witness is telling the truth, then you go on to the next step – which is to try and confuse the witness so that any testimony the witness has given is open to doubt.[119]

What, however, can be misdescribed as abuses, or forensic trickery, may be simply enthusiasm or subjectivity overcoming the role of counsel, which is supposed to be an objective and professional representation of the instructions of the client.[120] The style of questioning favoured by some defence advocates of asking leading or tagged questions,[121]

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[115] In contrast, in England and Wales, the defence must file a Defence Statement after primary disclosure before they are entitled to Secondary Disclosure under the Criminal Procedure and Investigation Act 1996, see Part 1.
[116] The rule is explained in the Third Report of the Disclosures Tribunal (October 2018, REF) 23.
[117] Annie Cossins, 'Cross-examining the child complainant: rights, innovations and unfounded fears in the Australian context' in Spencer and Lamb (eds) (n 10) p 102.
[118] John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown 1961), para 1367. An example of its success is the cross-examination of Richard Pigott by Sir Charles Russell before the Parnell Commission; see Brian Creegan, *Parnell: A Novel* (The History Press Ltd 2013).
[119] ibid, p 61.
[120] See Evan Whitton, *Trial by Voodoo* (Random House 1994), Evan Whitton, *The Cartel: Lawyers and Their Nine Magic Tricks* (Herwick 1998), Evan Whitton, *Serial Liars: How Lawyers Get the Money and Get the Criminals Off* (Lulu 2005); all criticisms of the adversarial system. Whitton sees a pattern of evasion. It includes delaying the proceedings by multiple applications, like ones of a judicial review kind; causing the concealment of evidence (through exploitation of exclusionary rules); confusing the issues; confusing witnesses to make them look like liars; and, only finally, the defences of innocence or excuse.
[121] For discussion see Kirsten Hanna and Emily Henderson, '"[Expletive], that was confusing wasn't it?" Defence lawyers' and intermediaries' assessment of the language used to question a child witness' (2018) 22(4) E&P 411-427.

has been shown to confuse even robust adult witnesses.[122] Perhaps the intention is not to confuse, but to test the witness's memory of events so stringently that we get closer to the truth as a result? It is, however, important to remember that cross-examination is about just that: getting closer to the truth.[123]

A series of cases from England and Wales suggest there are definite controls possible in aid of a fair focus to a trial, essentially, but perhaps especially, where the victim, as witness, is vulnerable.[124] From this there may be a spill over to other cases where the victim is not young or does not have a disability. In that jurisdiction, the Youth Justice and Criminal Evidence Act 1999 puts in place special measures for children under eighteen and those with mental or physical disabilities, as well as witnesses in fear and distress in connection with testifying.[125] Section 28 of the Act provides for cross-examination to be recorded in advance of a trial where a witness is identified as being under the age of eighteen, or having a physical or mental disability.[126] The Criminal Practice Direction includes detailed information on how this should be prepared for and carried out. For example, there must be a Ground Rules Hearing before any s 28 hearing, with a registered intermediary present. Even in non s 28 hearings, but where a victim is still deemed vulnerable, the trial judge has extensive authority to control cross examination. The trial judge can set ground rules, including timings,[127] for how and if intermediaries are to be used, dispensing with or modifying leading questions where these may be misunderstood by a witness, and enabling the defence case not to be put, or put it in modified form, if that may cause upset,[128] as well as prioritising cases where the victim is, in addition to the statutory categories, vulnerable because of intimidation or trauma. Are these approaches more generally valid? The Advocacy Training Council of the Bar of England and Wales responded with a report recommending training and ticketing of advocates; that only those who had undergone a course should undertake cases with vulnerable witnesses.[129] The

[122] Emily Henderson, '"Did you see the broken headlight?" Questioning the cross-examination of robust adult witnesses' (2014) 10 Arch Rev 4-6, refers to study by Professors Louise Ellison and Jacqueline Wheatcroft which found that 100% of ordinary adults studied, when asked a question containing two pieces of information, simply answered 'yes' or 'no' without indicating which part they accepted or denied. At p 5 'There is considerable research showing that competent, innocent adults make false confessions at an alarming rate when subjected to an interviewer who insists on their guilt, not, generally, because they become deluded but simply to escape further pressure … The likelihood is that witnesses falsely retract evidence in much the same way as suspects make false confessions.'

[123] For discussion see Emily Henderson, 'Best evidence or best interests? What does the case law say about the function of criminal cross-examination?' 2016 20(3) E&P 183-199.

[124] *R v Barker* [2010]; *R v E* [2011] EWCA Crim 3028; *R v W* [2010] EWCA Crim 1926; *R v Wills (Alan Paul)* [2011] EWCA Crim 1938; *R v Lubemba* (Cokesix), [2015] 1 WLR 1579 (2014).

[125] Sections 16 and 17 of the 1999 Act.

[126] That is, a s 16 witness; CPD V Evidence 18E.1. This does not extend to witnesses identified under s 17 except in three Crown Courts where a pilot is running. For more information, see Laura Hoyano and John Riley, 'Making s 28 more flexible and effective' (Counsel Magazine, June 2021).

[127] For instance, in *Lubemba*, a limit of 45 minutes to cross examine a child victim was set.

[128] An example is *R v E* [2011] where the child victim was a teenager, punched violently in the stomach by her stepfather. The ground rules set by the trial judge included not explicitly putting the accused's case that he never assaulted her. Rafferty LJ stating, 'the real complaint here, in our view, is that the defence was deprived of the opportunity to confront C in what we might venture to call "the traditional way". It is common, in the trial of an adult, to hear, once the nursery slopes of cross-examination have been skied, the assertion: "You were never punched, hit, kicked as you have suggested, were you?" It was precisely this that the judge was anxious to avoid and, in our view, rightly. It would have risked confusion in the mind of the witness whose evidence was bound to take centre stage, and it is difficult to see how it could have been helpful. Putting the same thing a different way, we struggle to understand how the defendant's right to a fair trial was in any way compromised simply because Mr Whitehead was not allowed to ask: "S did not punch you in the tummy, did he?"'

[129] The Inns of Court College of Advocacy, 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court'. Available at <https://www.icca.ac.uk/wp-content/uploads/2019/07/Raising-the-

emphasis being a cooperation towards witnesses being enabled to give their best in court while preserving a fair trial.[130] Is that not a good principle and one which might extend to sexual violence cases? As Lord Judge CJ stated in *R v B*:

> the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished. [131]

Could these restrictions in support of the vulnerable influence judicial control of the cross-examination of sexual violence victims and of the victims of other crimes? What has been reined in, through the necessity to facilitate the evidence of the vulnerable, is the interspersion of comment by counsel into the questioning of witnesses, with the reaffirmation of the traditional rule that comment is restricted to a closing speech and is not to be sandwiched into questioning to discommode or make rhetorical gesture.[132] More generally, these authorities emphasise cross-examination as an exchange of, and testing of, competing facts, thereby emphasising the limits to that dialogue set by what the client's instructions actually are. Emily Henderson trenchantly comments:

> When a defendant has a potential murder weapon re-tested by an alternative expert, or has an alternative expert critique the Crown expert's conclusions, the defence expert can suggest alternative hypotheses, point to holes in the Crown's methodology or search for evidence previously overlooked, but it is never permissible to manufacture or to deliberately destroy the evidence. One cannot surreptitiously wipe the gun clean or spatter additional blood around the murder scene. No more should a cross-examiner be entitled to manipulate a witness into making or retracting statements via confusing or suggestive examination. Just as expert evidence is not admissible unless the methodology is sound, the threshold standard for any question, or method of testing oral evidence, is its reliability.[133]

In apparent competition, if not conflict, in the potential control of defence cross-examination by the trial judge are: first, the constitutional principle guaranteed by Article 38.1 that all accused receive a trial 'in due course of law'; secondly, that courts, nonetheless, be places where, as the Preamble states, 'the dignity and freedom of the individual may be assured'; but, thirdly, enabling to an accused the right to present his or her case in accordance with the constitutional guarantees and Article 6 of the European Convention on Human Rights; while, fourthly, removing unnecessary blockages to the use of court procedures as an aid to pursuing the truth. So, where do we stand?

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Bar.pdf> accessed on 27th June 2021. This 'ticketing' and mandatory training for publicly funded advocates has not been implemented. The Bar of Ireland did not express any view when asked by us.

[130] In this way, the old best evidence rule, has made a surprise reappearance, but, to enable a witness to give of their best.

[131] [2010] EWCA Crim 4 [41].

[132] *Hardy's Trial* (1794) 24 How St Trials 745, Eyre CJ: 'questions ought not to be accompanied with … comments: They are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of facts, to probe a witness as closely as you can, but it is not the object of a cross-examination to introduce that sort of periphrasis.'

[133] Emily Henderson, 'All the proper protections: The Court of Appeal re-writes the rules for cross-examination of vulnerable witnesses' (2014) Crim LR 93, and Emily Henderson (n 123).

This article has highlighted issues on the transplantation of procedures from civil systems without thought as to how these might fit within our own processes. Encouraging trial judges to be proactive in controlling hearings would still bring us closer to how those systems operate. This can be done in a way which respects our own constitution and procedural principles. Since the common law system is adversarial, and effectively bi-cameral, judge and jury, ruler on law and decider of fact, the procedures developed in England and Wales of discussion with counsel in the absence of the jury, so as not to have the trial judge unnecessarily interrupting cross-examination when the jury, as triers of fact, are present, the setting of time limits, the restriction of comment and emphasis on the necessity to focus on essential elements of the defence case may be enabled to come to the fore. While these controls arose out of the movement towards the right of the court to have the evidence of every person, the entitlement of the judicial arm of government, [134] judicial control points up the utility of refocusing trial procedures toward what is essential: finding the truth. That possibly demonstrates that conflicts as between the assurance of dignity to witnesses and the necessity that the accused be enabled to properly put forward a defence case are not insurmountable.

## What about privacy?

And then there is the issue of history; the personal story of a victim – how much of that can be legitimately explored in court? In *The People (DPP) v Almasi*,[135] the Supreme Court set out the definition of relevancy, noting that 'evidence is relevant if that evidence renders more probable or more improbable any fact in issue at trial'. But that is perhaps not the final answer; provided justice is served. Statutory reform cut down that which is deemed relevant concerning prior sexual conduct of a victim, as noted above. Since 2018, where defence counsel seeks disclosure of counselling records, if the victim objects, there will be a hearing as to whether or not it should be admitted and the victim has a right to be legally represented.[136] But what should be recognised, and this not only in the field of sexual violence but also accounts for the endless reiteration of email and document traffic that extends the time taken for cases generally, is that much of cross-examination is as to what are presented as prior inconsistent statements. Hence, not taking a second, or third, statement from a victim is dangerous, since something may be left out, but taking such a statement brings up the line of questioning as to the why and what of any apparent contradiction as between statements. Police training is key. There are few steps more important in the criminal process than taking a statement. Going back and rechecking is inescapable. Prior to 1865, any prior statement was hearsay, but s 4 of the Criminal Procedure Act of that year enabled prior statements to be put to a witness if these were 'inconsistent with his present testimony'. Section 5 enables the proof of prior statements 'to contradict such witnesses by the writing' and requires attention to be drawn to such a passage by the cross-examiner.

But, is it that all too often what is involved is not contradiction or inconsistency but mere nuance or difference in perception? Possibly such a problem might be solved by a gentle comment from the trial judge to the jury to use their own experience to consider whether, if asked to write a narrative of an event, they would get all the details correct the first or second time or if, on the other hand, the circumstances of these statements raise a risk of unreliability. But, a central focus, certainly in sexual violence cases, is prior email and text

134 *The People (DPP) v Gilligan* 162.
135 [2020] IESC 35.
136 Section 19A Criminal Evidence Act 1992, inserted by s 39 Criminal Law (Sexual Offences) Act 2017; for discussion see O'Malley Report (n 61) para 6.33-6.40.

traffic. That has to be disclosed, but surely only that which is relevant to the case; rarely would this include communications with third parties,[137] and surely in a context which demonstrates focus on the central narrative? It is relevant what the victim said about her or his supposed assailant to a friend in the aftermath of what is said to be a sexually violating encounter,[138] but do not rights of privacy of the victim prevail as to any wider enquiry?[139] May not a privilege for psychotherapy be there asserted; and in any event what may usefully be made of the runes that constitute a therapist's notes.[140]

At least, in consequence of the Directive, a counterbalancing argument presents to unfocused disclosure on a person's life, simply because they are the subject of a crime that must be proven in court. In Canada, the separate representation principle applies to pre-trial disclosure applications, resulting in what Hoyano describes as a 'rigorous statutory regime governing applications for third party disclosure in sexual assault cases'.[141] This, at the least, directs attention to the trial issues extending beyond the accused's rights and points up that other interests may be legitimately involved.

## Should self-serving statements be the subject of a judicial warning?

Disquiet may be apparent from the observation of what is the current situation at trial: where the accused depends for an answer to the charge on a self-serving statement, drafted by a solicitor while being questioned in custody, and emphasising the, perhaps entirely fictional, aspects of consent while remaining silent in court, never giving evidence and thus not being subject to cross-examination. It has been suggested that this infringes the principle of equality of arms; one side being put on proof with the other merely offering an untested and unsworn statement. In effect, the victim must testify and be cross-examined, while the accused is entitled to go into evidence but may decide not to in the knowledge that the jury will retire with his or her self-serving statement as an exhibit. Hence, the jury have an *aide memoire* of the defence case but may struggle to recall the victim's account. In England and Wales, where a recorded interview with a victim may be used at trial,[142] the transcripts from this cannot become an exhibit.

The genesis of the rule, that admission to sexual intercourse involves a partial admission of crime, may be doubted since that is an entirely lawful activity.[143] At a minimum, does the effective reintroduction of an unsworn, untested defence narrative not call for a judicial

[137] An example of a relevant third party communication might be the boasting of a sexual encounter while later asserting a lack of consent.
[138] Tonna-Barthet and Hunter Blair (n 15) 196: 'if a woman … had made early 'hue and cry', claiming forthwith rather than keeping the matter private, she might be more trusted.'
[139] At 6.49 of the O'Malley Report (n 61), it is recommended that digital records should be reviewed only as part of a definite line of inquiry, and that the test of relevance should be strictly applied.
[140] Simon O'Leary, A Privilege for psychotherapy (2007) 12(1) and 12(2) Bar Review 33.
[141] Hoyano, (n 95) 125. Note judgments of the SCC which developed the criteria of disclosure of third party records; *R v O'Connor* [1995] 4 SCR 411 held that for disclosure of third party counselling records, the accused must satisfy the judge that the information is likely to be relevant. Upon production to the court, the judge should examine them and determine whether they should be produced. The procedure developed in *R v Mills* applies to certain sexual offences and is more protective of victims' records.
[142] Known as the Achieving Best Evidence interview.
[143] *McCormack v The People (DPP)* [2008] 1 ILRM 49.

warning;[144] or perhaps statutory reform?[145] The current judicial warning is that such a self-serving statement is evidence but is not in the same category as a witness who testifies under oath and who has been tested by cross-examination. But is that enough if there is a fundamental unfairness?

## So many issues but are only tentative suggestions possible?

The Victims Directive and the 2017 Act have moved the dialogue towards a situation where, accepting the inescapable principle of proving a case beyond reasonable doubt, the status of a complaint that proceeds to court involves consideration of the entitlements of the victim; named as such whether conviction results or not. While a presumption of victimhood might go further, reform has been necessarily tentative. It might only be suggested that certain further steps may be possible to enhance the usability of the courts system while carefully preserving the standards inherent in the constitutional disposal of an allegation of crime through fair procedures.

First, mere information is not enough: a victim is required to be treated as such under the legislation, as a presumed victim, with a single point of contact, priority of information and, where there is any especial trauma, as to trial listing. That ties in to rights to a private life, to possibly separate representation where pre-trial disclosure is sought and the protection of legitimate rights to privacy in therapy; putting in place a higher hurdle than the common law suggests as to relevance and unrestricted entitlements to defence cross-examination.

Secondly, while separate legal representation of victims remains a goal for many advocacy groups, a complete reconfiguration of the criminal trial process, and possibly a constitutional amendment, may be necessary for what may not be an urgent reform. As an improvement in the system, what might be advocated is that victims, even of sexual violence, become entitled to a closer encounter with prosecution counsel. Is it possible to move to an early meeting involving perhaps only the open and non-suggestive discussion of the victim's account; of any need for a further statement; and of the possible lines of defence? Would that not mirror standard preparation in major civil cases; and one might wonder why criminal cases ought to be different? Such a tentative suggestion goes only part of the way towards what in a civil case is regarded as essential. Since separate representation is often promulgated as the gold standard, the question might be asked as to where there might be harm in thereby establishing a closer communication as between the victim and prosecution counsel. Situations in which a conflict of interest might arise in that relationship, given that prosecution counsel are representing the DPP, are rare. In any event, the DPP retains control, but perhaps the feeling of knowing the person running the case and having confidence through having earlier engaged with him or her might alleviate the feeling of some victims that they are on the periphery?

Thirdly, perhaps there is a need to engage in training by professional bodies and perhaps State parties engaging counsel and solicitors might so insist? Ticketing of only those trained appropriately in relation to the vulnerable, meaning those young or with a disability or

[144] Tonna-Barthet and Hunter Blair (n 15) 207: 'It is submitted then that the admission of such statements should be reconsidered or that if admitted, these statements should always be accompanied by a warning that the evidence was not given under oath or on a solemn occasion, and that the evidence was not subject to cross examination.'

[145] Peter Charleton and Ciara Herlihy, 'Truth to be told: understanding truth in the age of post truth politics' (2019) IJSJ 1.

traumatised, while not in any way conceding the difficult necessity of making the defence case unhindered, save by good manners and concision and sensitivity, might be considered.[146] Notably absent in this jurisdiction is any parallel to the Advocates Gateway as exists in England and Wales, with its detailed toolkits on questioning vulnerable witnesses and up-to-date resources. Ground rules hearings could be placed on a legislative basis and intermediaries might be present throughout to guide barristers as to the appropriate approach to questioning. It might also be questioned if ticketing should be required for both judges and prosecution and defence barristers in sexual violence cases? A practitioner might be ticketed on the basis of undergoing a course of training. Involving the views of victims groups in that process opens up the provision of information from that viewpoint.

Fourthly, while training of barristers in respect of questioning vulnerable witnesses may be a reform, does that suffice? Perhaps that should include education before anyone can defend or prosecute in sexual violence cases? Does cross-examination now sometimes carry, in addition to a truth finding exercise, the burden of being diffuse, repetitive and unfocused? What matters also is how current approaches to cross-examination can trip up even robust adult victims. Alan Cusack has explored a lack of enthusiasm for Ireland's statutory special measures framework among practitioners.[147] Does this perhaps indicate that if true change is to be brought about as to how cross-examination is directed and conducted, such direction must that come from the Bench? Empowering and encouraging trial judges to insist on genuine relevance to identified issues, to eschew unnecessary repetition, to encourage reasonable concision, and to channel questioning towards the necessary, rather than the rhetorical, might that bring cross-examination back into focus? Multiple accused need not mean a much longer experience for the victim in the witness stand. Would that be one way of improving the experience of victims whilst also preserving the equality of arms?

Fifthly, self-serving statements by accused persons who do not give evidence, and so open their evidence to cross-examination by the prosecution, deserve to be approached dubiously.[148] There is no oath. There is no testing by cross-examination. Such evidence may admit sexual contact in a sexual violence case but build an often detailed claim of consent. Why are such statements evidence in the first place? Is statutory intervention possible here? The victim is tested on allegations of abuse or sexual violence but the self-serving statement simply comes in as a piece of paper that is evidence of what it says. And, it goes to the jury as an exhibit while the victim's statement does not. Is that equality of arms? Such statements should invariably be accompanied by a warning from the trial judge that such evidence, while carrying such weight as the jury consider appropriate in the light of the evidence as a whole, are not sworn and have not been tested in the same way as that of prosecution witnesses by cross-examination. Possible statutory reform might address this possible anomaly to the equality of arms principle and put such statements on the same footing as an unsworn statement from the dock. These were abolished in 1984: and in their place comes this.

Lastly, it must be remembered that intrusive questioning as to prior sexual history, once a feature of sexual violence cross-examinations on behalf of the accused, has been reformed

[146] *R v Grant-Murray & Henry* [2017] EWCA Crim 1228 at [226]; *R v Rashid* [2017] EWCA Crim 2 at [80], advocates warned that it might be professional misconduct to take on a case involving vulnerable witnesses without doing the specialised training.

[147] Alan Cusack, 'Victims of crime with intellectual disabilities and Ireland's adversarial trial', (2017) 69 N Ir Legal Q 433, 446.

[148] In England and Wales, this is likely to be the subject of judicial comment and also the jury can be told they are entitled to draw an adverse inference under the Criminal Justice and Public Order Act 1994, s 35 where no evidence is given on behalf of the accused.

by statute. It is possible to modify common law relevancy rules and the cross-examination as to credit limitations by statutory intervention? One might wonder why a victim coming to court has to have every aspect of their life traversed by disclosure? Perhaps a closer focus on what might aid the interests of justice, if not outright statutory intervention, might assist? The reform of prior sexual history by statutory intervention has put that issue into focus. Would a similar reform in aid of privacy focus minds on the victim also having rights?

## Final comment

Discourse in the context of criminal trials has long focused on defendants. This is in part due to the fact that he or she is at risk of a loss of liberty, and therefore has more to lose in the trial process than any other party. Further, as it is the State prosecuting, the defendant is the weaker party and must be endowed with certain rights to avoid an inequality of arms. This article does not propose diminishing defendants' rights or upsetting the presumption of innocence; rather, it encourages a reappraisal of how victims are treated within a system in which they have been on the periphery for so long. Specific rights for victims of crime is a concept novel to the common law, even if now enshrined in the 2017 Act. This article has considered what might still be done to provide real protection for victims and their rights. Reforms continually advocated, such as separate legal representation for rape victims, run the risk of upsetting the balance by turning the trial into a two against one contest. These proposals often overlook smaller scale reforms which have the potential to make a meaningful impact without upsetting constitutionally enshrined principles.

This article has sought to examine how the criminal trial process could be reformed to bring greater balance as between defendant and victim. Reform proposals have been posited which would potentially lead to more positive court experiences for victims, whilst still protecting a defendant's rights. What is sought here is some balance: victims are not, and it seems cannot be, parties to criminal proceedings, but, as is clear from the 2017 Act and recent rulings, they do have rights. Using such rights as have been judicially declared, applying them to concrete situations and using them to encourage greater consideration for victims has been advocated for here. Awaiting some controversy concerning the treatment of victims during criminal trials may lead to a knee-jerk response whereby reforms are hastily passed without true thought to their effect on both defendants and victims. This article proposes avoiding this outcome by assessing, and re-assessing, the balance in the system and how fairness can be achieved.