Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

An Irish Journey Towards a More Victim-Centred Criminal Justice System

Delivered by Ms. Justice Aileen Donnelly to the Tanzanian High-Level Symposium on Victim-Centred Criminal Justice on 1 February 2025[1]

1. Honourable Chief Justice Juma, former Chief Justice Othman, fellow judges, magistrates and other professionals working within the criminal justice community, I am honoured and delighted to be able to address you virtually this morning and take part in this continuing dialogue between the Irish and Tanzanian judiciary. By way of introduction, I am a judge of the Supreme Court of Ireland, which is the apex constitutional court and court of final appeal for all criminal, civil and administrative cases. We hear appeals on matters of general public importance.

2. Any one of us can be a victim of crime. Examples include crimes of theft/fraud, crimes of physical violence and crimes of sexual violence. It is a fair observation that it is usually in crimes of physical violence, but especially sexual violence, that the person alleging the crime may be cross-examined in ways which suggest that no actual crime was committed e.g. the alleged perpetrator says that they acted in self-defence or with consent. From the perspective of the person who alleges that an offence has been committed against them, this can appear as if the entire trial has turned into a trial of their actions, motivations and/or belief. For those who say they are (and ultimately are found to have been) victims of sexual violence, this can feel like an attack on their very personhood and may amount to re-traumatisation in respect of the offence. For that reason, I shall comment

[1] I am grateful for the work of my Judicial Assistant Eoin Ryan in preparation for this presentation.

mainly on persons who come to court claiming to be victims of sexual offences.

3. Sexual violence is a global problem. No region and no country is exempt. There are international agreements and regional agreements which seek to address these matters.[2] Sexual violence particularly affects women and children. In Ireland we took a long time to understand the prevalence of violence (both physical and sexual) against women and children. Our former Chief Justice (Murray CJ.) said in a case from 2006[3] that: "The wave of prosecutions relating to child sexual abuse which arrived at the courts in the 1990s was a new phenomenon".[4] In terms of child sexual abuse, it was not until this period that Ireland began to confront issues of institutional abuse against those children who had been left in the care of the State usually through residences in religiously run institutions or abuse caused to pupils in all types of schools. This is not the place to go through the history of how those abuses began to reveal themselves and resulted in such a stream of allegations that a 'Commission to Inquire into Child Abuse'[5] was established in 2000 to investigate what turned out to be a torrent of neglect, emotional and physical abuse as well as sexual abuse against the most vulnerable of children who had been placed in residential care. Simultaneously more and more cases of horrific physical and sexual abuse within families were coming to light. Some of those cases involved situations where social workers had previously either ignored this abuse or perhaps more often, were not listened to when they tried to report it to investigating authorities. Even when these types of offences were investigated, the prosecuting authority on many occasions did not prosecute.

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[2] The UN Convention on the Elimination of All Forms of Discrimination against Women, 1979; the UN Declaration on the Elimination of Violence Against Women, 1993; the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003; and, the Istanbul Convention on preventing and combating violence against women and domestic violence, 2001.
[3] *SH v DPP* [2006] IESC 55, [2006] 3 IR 575.
[4] ibid [29].
[5] See the website of the *Commission to Inquire into Child Abuse* to access the five volumes of its Report published on 20 May 2009, <https://childabusecommission.ie/?page_id=241>.

4. I cannot cover all the issues concerning the pathway which Ireland has taken towards a more victim-centred justice system. Recognising that there is an issue with sexual violence is only the beginning of that pathway. Recent statistics from our Central Statistics Office showed that 52% of women and 28% of men reported experiences of sexual violence in their lifetime.[6] In relation to child sexual violence, only 12% of adults who disclosed their abuse to another person, having experienced sexual abuse as a child, reported the abuse to the police.[7] As regards adult sexual violence, 5% of adults who told somebody else about their abuse reported it to the police.[8] Between 2012 and 2022, sexual violence incidents reported to the police increased by 87%.[9] In general, between 2017 and 2021, just over 20% of reported incidents led to a prosecution.[10] I do not have the statistics of how many of those prosecutions lead to a conviction of some type. I do not believe there is any doubt that there is a fall off. The attrition rate between even reported offences and final convictions is huge.

5. The recognition by Irish society since the 1990s that we had a problem with sexual violence led to plenty of reforms. These reforms are a work in progress. The criminal justice system is still learning lessons and over the years amending Acts have been amended further still.

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[6] Central Statistics Office (CSO), Main Results (*Sexual Violence Survey*, 2022) <https://www.cso.ie/en/releasesandpublications/ep/p-svsmr/sexualviolencesurvey2022mainresults/>.

[7] Central Statistics Office (CSO), Disclosure of Experiences – Child Experiences Disclosure (*Sexual Violence Survey*, 2022) <https://www.cso.ie/en/releasesandpublications/ep/p-svsde/sexualviolencesurvey2022disclosureofexperiences/childhoodexperiencesdisclosure-police/>.

[8] Central Statistics Office (CSO), Disclosure of Experiences – Adult Experiences Disclosure (*Sexual Violence Survey*, 2022) <https://www.cso.ie/en/releasesandpublications/ep/p-svsde/sexualviolencesurvey2022disclosureofexperiences/adultexperiencesdisclosure-police/>.

[9] As reported at the University of Limerick Conference, 'Words Matter: Promoting Best Practice in Media and Cultural Representations of Gender-Based Violence, 25 October 2024; see Ralph Riegel, 'Number of sex crimes reported almost doubled over past decade' *The Hearld* (Dublin, 28 October 2024), <https://www.pressreader.com/ireland/the-herald-1253/20241028/281586656088955>.

[10] Central Statistics Office (CSO), Crimes Leading to Charge or Summons (*Recorded Crime Detection*, 2023) <https://www.cso.ie/en/releasesandpublications/ep/p-rcd/recordedcrimedetection2023/crimesleadingtochargeorsummons/>.

6. The reforms affect all the key institutions of the criminal justice system. Some of the reforms were brought about by legislation e.g. the right of victims to give a Victim Impact Report for the purposes of sentences,[11] the right of children to give evidence by way of 'live TV link' i.e. 'video evidence',[12] and subsequently the right to have their initial statements of evidence to the police be recorded and played as their evidence-in-chief at trial. The witnesses are then subject to being cross-examined over the video link.[13] Intermediaries may be used to assist in the communication process between lawyers and especially vulnerable witnesses at trial.[14] Provision was also made for vulnerable adult victims to give evidence over video link,[15] greater extension to the prohibition on cross-examination about previous sexual experience (even with the accused) without leave of the judge and the right to be represented in that application,[16] the abolition of the requirement for a mandatory corroboration warning,[17] greater protection as regards counselling notes[18] and other privacy protections.[19] Some of these, but by no means the majority, were encouraged by protections now required under European Union law.[20] This was not all a linear progression. Even though we passed the Criminal Evidence Act in 1992 it was almost 20 years later before a video recorded statement made its first appearance at trial[21] and almost 30 years later before an intermediary appeared.[22]

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[11] Criminal Justice Act 1993, s. 5 as substituted by the Criminal Procedure Act 2010, s. 4 and amended by the Criminal Justice (Victims of Crime) Act 2017, s. 31.
[12] Criminal Evidence Act 1992, s. 13(1)(a).
[13] Criminal Evidence Act 1992, s. 16(1)(b).
[14] Criminal Evidence Act 1992, s.14 as amended by Criminal Justice (Victims of Crime) Act 2017, s. 30(c)(ii), (iii).
[15] Criminal Evidence Act 1992, s. 13(1)(b) and s. 13(1A) as inserted by the Criminal Justice (Victims of Crime) Act 2017, s. 30(b).
[16] Criminal Law (Rape) Act 1981, s. 3(1) as amended by the Criminal Law (Rape) (Amendment) Act 1990, s. 13.
[17] Criminal Evidence Act 1992, s. 28 (for the unsworn evidence of a child) and Criminal Law (Rape) Amendment Act 1990, s. 7 (for the evidence of a victim in sexual offence proceedings).
[18] Criminal Evidence Act 1992, s. 19A as inserted by Criminal Law (Sexual Offences) Act 2017, s. 39.
[19] Criminal Evidence Act 1992, s. 14C as inserted by the Criminal Law (Sexual Offences) Act 2017, s. 36 and the Criminal Justice (Victims of Crime) Act 2017, s. 21.
[20] The Victim's Rights Directive 2012/29/EU.
[21] Miriam Delahunt, 'Video Evidence and s 16(1)(b) of the Criminal Evidence Act 1992' (2011) 16(1) Bar Review 2.
[22] Miriam Delahunt, *Vulnerable Witnesses and Defendants in Criminal Proceedings* (Clarus Press 2023) [17-64]: The first reported case involving an intermediary appears to be *The People (DPP) v NR* [2021] IECA 122. However, *The People (DPP) v NR* involved an English

7. Some of the change was institutional; there was a greater focus by the police[23] and prosecuting authorities on the investigation and prosecution of offences of sexual violence. There was a greater understanding of the difficulties for victims to reveal their abuse (to anyone but especially to those in authority) and then commit to the matter being prosecuted through the court system. Significant changes were made to the way in which persons who complained of sexual violence could make a report to the police. More training for the police on understanding the impact of sexual violence and domestic violence was also delivered.

8. Many other reforms were brought about by the judiciary in exercise of common law powers to control trials or by way of giving a workable interpretation to legislation which had as its purpose the protection of victims' rights. At all times however the judiciary have been mindful and protective of an accused person's right to a fair trial as guaranteed under Article 38.1 of our Constitution, and of course in the international agreements to which we are a party e.g. The European Convention on Human Rights. Rights of accused persons within the system have also developed over this time period, for example through legislative intervention interviews with suspects in custody are now all videotaped[24] and the Supreme Court has held that there is a constitutional right of access to legal advice. Although it has not been recognised as a constitutional right to have a lawyer present during questioning, in practice the presence of lawyers is facilitated through a police Code of Practice and the payment of legal aid for such attendance.[25] The focus of the criminal trial remains the issue of the guilt or innocence of the

intermediary assisting the court from the Old Bailey in the United Kingdom. The trial of *The People (DPP) v VE* [2021] IECA 122 appears to be the first reported case of the use of a trained intermediary on Irish soil in an Irish Court.

[23] In Ireland the police are called 'An Garda Síochána' (Guardians of the Peace) and an individual police officer is a 'Garda'.

[24] Criminal Justice Act 1984, s. 27 as initially implemented by Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, SI 1997/74 and as amended by Criminal Justice Act 1984 (Electronic Recording of Interviews) (Amendment) Regulations 2009, SI 2009/168 and the Criminal Justice Act 1984 (Electronic Recording of Interviews) (Amendment) Regulations 2010, SI 2010/560.

[25] *The People (DPP) v Gormley & White* [2014] IESC 17, [2014] 2 IR 591; *The People (DPP) v Barry Doyle* [2017] IESC 1, [2018] 1 IR 1.

accused, with the onus on the prosecution to prove guilt beyond reasonable doubt. Within the boundaries of ensuring the constitutional rights of the accused are safeguarded, the rights of victims are to be protected.

9. The deepened understanding by the judiciary of the impact of sexual abuse on victims has led to changes in approach. The aforementioned 2006 case of *SH v DPP*, was an appeal of a judicial review application by the accused person to prevent their trial proceedings on the basis of the delay in their charge. For many years, the Irish courts required expert evidence that the complainant could not report the abuse because of some kind of psychological disorder before the prosecution would be allowed proceed despite the delay. Eventually the Supreme Court said that: "The court approaches such cases with knowledge incrementally assimilated over the last decade in some of which different views were expressed as to how these issues should be approached."[26] Murray CJ. went on to say: "The court's judicial knowledge of these issues has been further expanded in the period since that particular case. Consequently, there is judicial knowledge of this aspect of offending. Reasons for such delay are well established…".[27] In assessing whether there could be a fair trial the Court needs to look at the consequences of the delay for the accused and not the reasons for the delay (usually the consequences of the abuse on the person making the complaint).

10. Witness evidence is often the lynchpin on which the prosecution's case will turn. Forensic evidence may be unavailable in cases of historic sexual violence. Moreover, its presence or absence often cannot confirm or contradict whether the sexual act was consensual or non-consensual. Thus, oral evidence, and in particular cross-examination, is vital to the hope of success for either party. The rest of this speech will focus on those issues which are inherently amenable to judicial control; the control of the trial process and the protection of the victim/witness from oppressive cross-examination.

[26] *SH v DPP* (n 3) [44].
[27] ibid [46]

11. I propose to provide a broad overview of how the Irish courts have addressed cross-examination limits where necessary and appropriate to ensure the fairness of the trial. I will also look at some of the special measures afforded to victims of crime in Irish law.

Cross-Examination

12. The American jurist John Henry Wigmore famously commented that cross-examination was "the greatest legal engine ever invented for the discovery of truth".[28] The role of cross-examination in the adversarial trial tradition is fundamental to how the criminal process operates in common law jurisdictions across the world. However, this quote from Wigmore conceals the fact that the confrontational engagements which can often occur in the course of cross-examination can be counterproductive to the ability of vulnerable witnesses and victims to give a true and accurate recollection when they testify. Cross-examination may cause a vulnerable victim undue stress and upset which can undermine their capacity to testify and provide their 'best evidence'. Wigmore himself recognised that an "intimidating" approach to questioning "may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject".[29] Fellow of Trinity College Dublin, Dr. Liz Heffernan notes that victims may be inhibited from providing a free-flowing narrative through the medium of examination-in-chief and cross-examination. As stated by Dr. Heffernan, "[t]he posing of questions by counsel is inherently directive and at times confrontational."[30] Witnesses are often required to provide direct and specific answers to a variety of complex questions and sub-questions.

13. It is important when in engaging in any analysis of cross-examination with regard to the rights of victims to emphasise that cross-examination is not some dusty holdover concept based on an archaic legal principle. The opportunity to cross-examine witnesses is a fundamental bulwark for the

[28] John Henry Wigmore, *Evidence In Trials At Common Law* (Vol. 5, Chadbourn Edition 1974) 32.
[29] John Henry Wigmore, *Evidence In Trials At Common Law* (Vol. 3, Chadbourn Edition 1970) 173.
[30] Liz Heffernan, *Evidence in Criminal Trials* (2nd edn, Bloomsbury Professional 2020) [6.03].

protection of the rights of the accused. The right of an accused to a fair trial is protected by numerous human rights instruments.[31] Inherent in this right to a fair trial is the right of the accused to cross-examine. In the Supreme Court decision of *Maguire v Ardagh*, the late Mr. Justice Adrian Hardiman stated that cross-examination is "an essential, constitutionally guaranteed, right which has been the means of the vindication of innocent people."[32] Protecting the accused's right to defend him or herself is a vital task for the judge but equally the victim has a right to be heard, to be respected and not to be bludgeoned into enforced submission.

14. Undergoing the full of rigours of a lengthy and complex cross-examination by an experienced practitioner can be a difficult experience for any individual. Thus, it is only correct that the law recognises the particular vulnerability of victims who open themselves up to potential re-traumatisation by testifying. Developing a victim-centred approach to criminal justice necessitates a broader understanding of vulnerability where all victims are recognised as needing support. Vulnerability is not a personal condition present in only certain socially constructed groups rather it is "a universal, inevitable, [and] enduring aspect of the human condition …".[33]

Restrictions on the Right of Cross Examination

15. The scope of cross-examination is governed by common law rules, protocols of practice, and some statutory provisions (which are specific to each jurisdiction). Judges are required to prohibit any questions they determine to be vexatious, unnecessary, improper or oppressive. In considering the various ways in which a judge can ensure that a victim-conscious approach is taken towards cross-examination, a useful starting point may be the basic principle that any evidence adduced at trial must be relevant to the proceedings at hand. This rule of evidence applies in the same manner to any invited testimony that a defence counsel may seek during the course of

[31] Article 38.1 of the Constitution; Articles 47 and 48 of the Charter of Fundamental Rights of the EU; Article 6 of the European Convention of Human Rights; and, Article 10 of the Universal Declaration of Human Rights.
[32] [2002] IESC 21, [2002] 1 IR 385, 707.
[33] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law and Feminism 1, 8.

cross-examination. A judge is perfectly entitled to intervene if he or she feels that the questions being put to a victim are irrelevant to the case at issue. To allow such behaviour could potentially lead to confusion and distress for the victim and in extreme cases may result in an unfair trial.

16. The Irish Supreme Court decision in *The People (DPP) v DO* considered the limits on the rights to cross-examination.[34] While this case concerned the prejudicial questioning of the accused and the duty of the prosecution not to obtain a conviction at all costs, there are some helpful points to be taken from the general consideration of the appropriateness of certain lines of questioning. Murray CJ. stated that "[i]f counsel departs from accepted standards of conduct the trial judge must immediately exert his authority to require that they be observed."[35]

17. In reaching a determination that the prosecution had overstepped the mark, Murray CJ. had regard to the fact that elements of the cross-examination were "intimidating, disparaging, and, if not personally vilifying, demeaning."[36] As will often occur with such oppressive lines of cross-examination, the Court found that the impugned questions were irrelevant to the issues which the jury had to decide. This underscores the fact that often the simplest principle such as relevance can constitute an adequate tool and basis for dealing with vexatious questioning. Murray CJ. notes in his discussion of the particular questioning that arose in the case that "[t]he offending part of the cross-examination was replete with impermissible innuendos as to the accused's profile or disposition." Such questions could only serve to prejudice the jury.

18. Where the cross-examining questions are focused on questions of fact which are directly relevant to the case, a wide latitude must be afforded to counsel. However, when a cross-examination is focused on the general credibility of the witness, as can sometimes occur in sexual offences cases, and the matters raised are not directly relevant, a trial judge "is entitled to exercise

[34] [2006] IESC 12, [2006] 2 ILRM 61.
[35] ibid [7].
[36] ibid [11].

a greater degree of control over the extent to which such issues can be pursued."[37]

19. In order to protect the rights and dignity of victims during cross-examination, a judge may be required to interrupt or intervene. However, as previously noted the judge must perform a balancing exercise as the accused must be allowed to adequately present their case. Excessive or inappropriate intervention may render the trial unfair.[38] However, a cautious approach to interruption during cross-examination should not become an enemy to any interruption at all. Useful guidance on judicial intervention was provided by Kennedy J. in *The People (DPP) v AH*, who held that "[a] judge may question or intervene in a wider range of circumstances than mere clarification; take for example, where the question asked is unfair, where it is asked on a false or inaccurate premise, or where the question seeks to elicit inadmissible evidence".[39] The judgment of the Court of Appeal also stated that a trial judge *should* intervene if a cross-examination has become "unduly lengthy or repetitive."[40]

Facilitating 'Best Evidence'

20. In addition to the common law rules which require a trial judge to monitor the scope of cross-examination in order to ensure the fairness of the trial and the rights of the victim, Irish law makes provision for a number of special measures that may be afforded to victims for the purposes of giving evidence.[41] Special measures may be utilised in order to protect the individual "from secondary and repeat victimisation, intimidation or retaliation."[42] One special measure which I wish to draw attention to is the provision for the use of intermediaries in circumstances where the victim is a child or an adult with certain intellectual disabilities.[43]

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[37] *The People (DPP) v Piotrowski* [2014] IECCA 17 [8.3].
[38] *The People (DPP) v McGuinness* [1978] IR 189.
[39] [2022] IECA 156 [24].
[40] ibid [25].
[41] Criminal Evidence Act 1993, as amended by the Criminal Justice (Victims of Crime) Act 2017.
[42] Criminal Justice (Victims of Crime) Act 2017, s. 30(e).
[43] Criminal Evidence Act 1992, s. 14(1A) as inserted by the Criminal Justice (Victims of Crime) Act 2017, s. 30(c).

21. The function of an intermediary is to enable the victim to give their 'best evidence'. The intermediary supports the victim in this endeavour by setting out, during a ground rules hearing, a report with recommendations on the manner and propriety of questioning that counsel may put to a vulnerable witness. In her book on vulnerable witnesses in criminal proceedings, Dr. Miriam Delahunt BL identifies a number of areas and recommendations that an intermediary may include in their report which can assist a victim to give their 'best evidence'.[44] Regardless, of whether an intermediary is present or if the victim is a child or an adult with an intellectual disability, it seems to me that some of the suggestions raised by Dr. Delahunt are of potential broad application and may be of assistance to any particularly vulnerable victim who is giving evidence. I will now discuss some of Dr. Delahunt's recommendations.

22. Whether counsel are questioning vulnerable witnesses in the context of examination-in-chief or cross-examination they should be cognisant of ensuring that their questions take into account the age and maturity of the victim. Similarly, the linguistic ability, cognitive development and educational proficiency of a victim can all have an impact on a victim's ability to give their 'best evidence'. In a 2009 study of the experiences of child witnesses in the UK criminal justice system, it was reported that 58% of young witnesses surveyed said that "the defence lawyer tried to make them say something they did not mean or put words in their mouth."[45]

23. Thomas O'Malley SC highlights the use of 'tag questions', which are often used by counsel, as particularly problematic due to the danger of acquiescence. A tag question involves a statement followed by an 'interrogative', such as: 'you went to the park, didn't you?' Such questions may cause a child to agree, even if this is not the truth, for fear of contradicting an adult.[46] Dr. Delahunt also emphasises that in cases where

[44] Delahunt (n 22) [17.70-17.102].
[45] Joyce Plotnikoff and Richard Woolfson, *Executive Summary of Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (National Society for the Prevention of Cruelty to Children 2009) 8.
[46] Thomas O'Malley, *Sexual Offences* (2nd edn, Round Hall 2013) [17.39].

there are multiple defendants, repetitive questioning by respective counsel should be avoided.[47] Clearly being asked about a possibly traumatic event repeatedly could serve to only exacerbate the mental injury to the victim. Given the age, vulnerability, and possible 'secondary trauma' caused by testifying, victims may 'fatigue' more quickly due to high stress levels which can lead to emotional dysregulation. Consideration should be given to facilitating breaks and the pacing of questioning for vulnerable witnesses.

24. Verbose, lengthy, multi-part and complex questions as well as double negatives should also all be strongly discouraged when questioning a vulnerable victim. Any phrase where there is ambiguity or complexity in understanding the exact meaning can obstruct the victim from providing their 'best evidence'. Questions should be short and simple.[48] Similarly, legal jargon, complex vocabulary, idioms and metaphors are all best avoided as they can obscure the victim's understating of a question. Finally, and perhaps most importantly, all victims should be given the appropriate time and space they require when answering particularly difficult or traumatic questions. That is very much a whistlestop tour of the variety of ways in which a judge can facilitate a victim to give their 'best evidence', but the main approach is that of simplicity.

Some Tanzanian Provisions

25. When I had the privilege of co-facilitating a 'Training the Trainers' course based upon the theme of 'Avoiding Re-traumatisation of Victims' at the Institute of Judicial Administration in Lushoto, Tanzania, I was introduced to the Tanzanian law on the area of cross-examination in the form of the decision of the Court of Appeal in *Pantaleo Teresphory v The Republic*.[49]

26. Much of what I say here is already apparent in your system. The Law of The Child (Juvenile Court Procedure) Rules, 2016, GN. No. 182 provides for controls on the conduct of cross-examination of a child witness. In *Pantaleo*,

[47] Delahunt (n 22) [17.75]-[17.77].
[48] *The People (DPP) v MB* [2023] IECA 156 [42].
[49] [2023] TZCA 47.

the Court said for good measure that there is no reason why this should not apply just to juvenile courts but also to the evidence of children in ordinary courts. Perhaps the need for simple and understandable questions, can apply to all witnesses in accordance with their ability to understand? I will turn to look at how the Irish judiciary have dealt with this in the absence of any specific rules on the cross-examination of children.

The People (DPP) v VE

27. A relatively recent case from the Irish courts is the judgment of Ní Raifeartaigh J. in *The People (DPP) v VE*.[50] This case concerned a conviction of rape and sexual assault. The victim in this case was a child with a learning disability. At the beginning of the trial, a 'ground rules hearing' was held where the court heard from an intermediary, a qualified speech and language therapist, who made a number of recommendations on eliciting evidence from the victim. The trial judge adopted these recommendations.

28. The primary ground of appeal in *The People (DPP) v VE* concerned the decision of the trial judge not to give a corroboration warning to the jury which the accused argued was necessitated, *inter alia*, by the fact that the victim's evidence was not fully tested in cross-examination as a result of the constraints imposed by the 'ground rules hearing'. In rejecting the appeal, the Court first considered the previous jurisprudence of the Irish courts which recognised the accused's right to cross-examination. The Court also noted the *dicta* of O'Higgins CJ. in *State (Healy) v Donoghue* who stated that "[t]he general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed".[51] The view expressed by the former Chief Justice in his judgment remains prescient and insightful nearly fifty years later.

29. Ní Raifeartaigh J. considered the competing rights of the victim, such as the right to bodily autonomy, and stated that "adaptations may need to be made

[50] [2021] IECA 122.
[51] [1976] IR 325.

[to] the form, content, pace and length of questions to a complainant in order to ensure that she gives the best evidence she is capable of giving. The trial judge has the difficult task of trying to hold the delicate balance between enabling this to happen while ensuring that the ability of the accused to present his case is still protected…".[52] Adhering to the traditional and regular approach to cross-examination would unfairly favour the defence as "the complainant may be more susceptible to the subtle pressures exerted during cross-examination by means of questioning techniques such as the posing of complex or loaded questions."[53]

30. Ní Raifeartaigh J. set out a number of principles which accord with what I have advocated for in my address today. Firstly, "[t]he trial judge has a responsibility to ensure that communication is developmentally appropriate, which includes questioning which is tailored not only to the complainant's age but also her cognitive capacities (in the case of a learning disability)."[54] The styles of questioning often employed by advocates requiring 'advanced forms of psychological reasoning' for comprehension have no place in the cross-examination of a vulnerable witness. Secondly, the judgment states that a fair trial must not permit a situation where a victim gives evidence without a proper understanding of the questions they are being asked or simply provides an answer because of acquiescence due to pressure.[55]

31. Drawing from the approach of our neighbouring jurisdiction of England and Wales, the decision in *The People* (*DPP) v VE* goes on to advocate for increased general and specialised training programmes for both judges and lawyers on how to deal with vulnerable witnesses.[56] The English and Welsh Court of Appeal judgment in *R v Lubemba, R v JP* ("*Lubemba*")[57] was cited with approval by Ní Raifeartaigh J. The first principle to extract from the decision in *Lubemba* is the responsibility of the trial judge to control questioning and ensure that "vulnerable witnesses and defendants are

[52] *The People (DPP) v VE* (n 50) [69].
[53] ibid.
[54] ibid [71].
[55] ibid.
[56] ibid [75].
[57] [2014] EWCA Crim 2064.

enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocates questioning is confusing or inappropriate."[58] Secondly, it was once again emphasised that in regard to vulnerable witness there needs to be a move away from traditional styles of questioning: "Advocates must adapt to the witness, not the other way around."[59]

Ground Rule Hearings

32. Before I conclude, I wish to make a brief comment about the practice of 'ground rule hearings' which I have previously mentioned. Ground rule hearings are a relatively recent addition to the Irish criminal justice process and are to be commended. The first use of such hearings in Ireland can be identified in the 2015 unreported case of *The People* (*DPP) v FE* where the court relied on its inherent jurisdiction to take such an action.[60] The law in Ireland has since been reformed and there are now statutory measures which provide a foundation for trial judges to convene 'preliminary trial hearings'.[61] The court may make "such orders or rulings as it considers appropriate and in the interests of justice and to ensure the just, expeditious, and efficient conduct of the trial".[62]

33. Ground rule hearings are an effective mechanism to ensure the full and fair participation of victims and other vulnerable witnesses at trial. The court can use the opportunity of such hearings to consider how counsel and the trial judge will engage with the victim in order to facilitate their 'best evidence'. A ground rules hearing will undoubtedly benefit from the specialist knowledge and evidence of an expert or an intermediary, but this is not a requirement.[63] Dr. Heffernan states that a trial judge may issue directions at a ground rule hearing on "the conduct of questioning of vulnerable witnesses including the

[58] ibid [44].
[59] ibid [45].
[60] Unreported (HC, November 2015); Caroline Biggs and Miriam Delahunt, 'Prosecutorial Challenges – Vulnerable Witnesses' (2017) 22(1) Bar Review, 24.
[61] Part II of the Criminal Procedure Act 2021.
[62] ibid s. 6(7).
[63] Delahunt (n 22) [15.05].

manner and duration of questioning and, if necessary, the questions may or may not be asked."[64]

34. In *The People* (*DPP) v VE*, the Court of Appeal stated that the use of ground rules hearings at the beginning of a trial provides "a useful mechanism at which issues relating to the questioning of the particular complainant(s) in the trial can be aired, with the assistance of expert advice from a suitably qualified person, and where decisions can be made about how the particular complainant(s) is to be questioned in the trial."[65]

35. In *Lubemba*, the Court outlined that "it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness."[66] Highlighting the importance and usefulness of ground rules hearings, Lady Justice Hallett VP. stated that "[w]e would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances."[67] The decision in *Lubemba* set out a number of issues that could be covered in a ground rules hearing:

> "In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties…. The ground rules hearing should cover, amongst other matters, the general care of the witness, if ,when and where the witness is to be shown their video interview, when, where and how the parties and the judge if identified intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. …"[68]

<u>Conclusion</u>

36. Ireland woke up to the reality of the widespread nature of child sexual abuse in the 1990s and what follows was the "wave of cases", as described by the

[64] Heffernan (n 30) [2.90].
[65] *The People (DPP) v VE* (n 50) [74].
[66] *Lubemba* (n 57) [42].
[67] ibid.
[68] ibid [43].

former Chief Justice, coming before the courts. These began as historic cases of abuse, but it soon became apparent that child sexual abuse was widespread. It occurs in families, in communities, in schools and in sports facilities. As more and more victims were exposed to the criminal justice system, that system was found wanting. With a better understanding of the prevalence of abuse and its impact, legislative change began and institutional change followed.

37. Criminal trials are about establishing whether "the accused is guilty or not guilty of the offence (*or* the several offences) charged in the indictment against him (*or* her *or* them) and a true verdict give according to the evidence".[69] A fair trial to the accused is guaranteed. Within those boundaries, justice requires that a witness has the opportunity to give the 'best evidence' they can and not to be intimidated or confused by deliberately antagonistic or opaque questioning. The trial arena is the place where the judge can control the proceedings in a firm and fair way that will allow the real issue of guilt or innocence to be examined. Judges need to be aware of and prepared to use their powers to ensure a fair trial that will take appropriate account of the needs of those who give evidence before it. Judicial training that takes account of the complexities in ensuring a fair trial is highly recommended.

38. I will end by quoting from my former colleague at the Court of Appeal, Úna Ní Raifeartaigh, who is now a Judge of the European Court of Human Rights. I could not improve on what she said in *The People (DPP) v VE*, as follows:

> "However, the fairness of a trial is not equivalent to what might suit the defence or what defence counsel are traditionally used to doing. Rather, it is a concept of much greater depth, complexity and objective content. To ensure fairness to a child complainant with a learning disability, adaptations may need to be made to the form, content, pace and length of questions to a complainant in order to ensure that she gives the best evidence she is capable of giving. The trial judge has the difficult task of trying to hold the delicate balance

[69] Taken from the juror's oath as provided for in the Juries Act 1976, s. 19(1).

between enabling this to happen while ensuring that the ability of the accused to present his case is still protected in such a way that the trial complies with the requirements of Article 38.1 of the Constitution."[70]

[70] *The People (DPP) v VE* (n 50) [69].