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**THE CULTURE OF DECISION-MAKING:
A CASE FOR JUDICIAL DEFIANCE
THROUGH EVIDENCE AND FACT-FINDING**

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A task recently identified by Professor Andrew Ashworth in the context of the criminal law was that of the

search of features for a model of criminal laws that is more principled, conceptually more coherent, and constitutionally and politically more appropriate.¹

The rules of evidence traditionally receive their strictest application in the criminal context, being more easily waived or set aside by the parties in the civil context and tribunals. Some of the rules have been given a constitutional home in this jurisdiction, however, and so are not, ostensibly, so easily departed from. A core of the rules is seen to correlate to fairness, and may be seen to be wedded domestically to a constitutional, and indeed transnationally to a Convention concept of 'fair trial'. Although the European Court of Human Rights, for instance, allows countries latitude with regard to their domestic rules of evidence ("The admissibility of evidence is primarily a matter for regulation by national law"²), certain basic principles such as the presumption of innocence, and the right to silence, are guaranteed under Article 6. Hence the legal burden of proof

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¹ Ashworth, "Is the criminal law a lost cause?" (2000) 116 L.Q.R. 255 at 255.

² *Windisch v. Austria* (1990) 13 E.H.R.R. 281.

cannot normally be placed on the accused, nor silence criminalised.³

Certain rules of evidence reveal themselves on examination to be self-evidently ‘political’ or policy driven - the rules on admissibility of real or confession evidence in the aftermath of police breach of pre-trial process for example. High water marks here would be the Irish courts’ decisions in *Kenny*⁴ and *Ward*.⁵ Other rules may be viewed simply as ‘adjectival law’, so remaining hidden in terms of influence, or regarded as a matter of ‘common-sense’. That unquestioning acceptance of certain rules regarding fact finding and credibility, in particular, merits exploration in terms of its relationship to popular culture and sentiment in the world around us. In searching for a model of evidence that is principled and coherent, it may prove useful to square the application of rules in certain contexts with a central unifying concept of fair trial. How that concept evolves over both context and time, as revealed through our treatment of evidence may raise questions - and provide tentative answers-to what might ground our evidentiary rules.

I. (RE)CONSTRUCTING THE ‘LAW STORY’: THE ROLE OF POPULAR CULTURE

The symbolic trial is viewed as a signifier within the dominant legal culture: it is a forum that projects authoritative messages through language and legal form about identity and social relationships in a struggle between the

³ *R v. Lambert* [2001] 3 W.L.R. 206; *Heaney & McGuinness v. Ireland* Jgt. 21 Dec. 2000 [2001] *Crim LR* 481; *Quinn v. Ireland* jgt. Dec 21 2000

⁴ *D.P.P. v. Kenny* [1990] 2 I.R. 110; [1990] I.L.R.M. 569.

⁵ *D.P.P. v. Ward* (Special Criminal Court, unreported, Barr J., 27 November 1998).

antagonistic world views of the defence and the prosecution.⁶

Cultural nuances dictate how we assess information. Less well appreciated may be the fact that as such nuances change over time, rules relating to relevance, fact determination or credibility, when fossilised in law, can be found to contain the vestiges of another age, ill-suited to the current climate. This distillation of assumptions regarding veracity into law, and subsequent application to assessments of credibility and fact-finding at trial, prove powerful determinants of guilt or innocence. Solidified as evidentiary rules, these assumptions become part of legal culture, and may prove themselves difficult to uproot, even in face of legislative reform. Several jurisdictions, for example, have attempted to reform corroboration rules, both as to the need for a warning at all (Canada and the United Kingdom⁷ in the case of accomplices); or its mandatory application in certain cases (Ireland⁸ in relation to sexual offence victims and children).⁹ Similarly, rape shield rules were introduced in

⁶ Bumiller, "Fallen Angels: The Representation of Violence Against Women in Legal Culture" (1990) 18 *International Journal of the Sociology of Law* 125, 126.

⁷ Section 31(2) of the Criminal Justice and Public Order Act, 1994 abolished the corroboration warnings where a person is an accomplice or the offence a sexual offence. See further Birch, "Corroboration: Goodbye to All That" [1995] Crim. L.R. 524. In Canada the Supreme Court abandoned the corroboration requirement in relation to accomplices in *Vetrovec v. R.* [1982] 136 D.L.R. (3d) 89.

⁸ Section 27 of the Criminal Justice (Evidence) Act, 1992; section 7 of the Criminal Law (Rape) Amendment Act, 1990.

⁹ At the time the changes were introduced in relation to sexual offences, they were unsurprising, given originating rationale(s) such as Wigmore's suggestion that every sexual offence complainant should be subjected to psychiatric examination before being allowed to testify, general assumptions regarding the veracity of women in rape cases, or the supposed hierarchy of trustworthiness between different types of sex offence victims. See further Fennell, "Differential Treatment of Sexual Complainants by the Law of Evidence: A Case for Reform" (1987) 22 Ir.

many jurisdictions, including England and Ireland, to exclude previously admissible evidence of past sexual history.¹⁰

It has been demonstrated that, initially at least, the judiciary may not fully implement the effect of these changes, particularly where their discretion remains.¹¹ This may particularly be the case where the rules were creatures of their own development. The manner in which legal culture develops, absorbs and discards these rules, whether they are the momentary products of the vagaries of popular and hence legislative or judicial sentiment, or a reaction against them, reveals how evidentiary rules develop and fact finding operates. It may be self-evident that legal adjudication within the criminal process carries elements of individual or situational bias, inequity of bargaining power, inevitable error due to human fallibility and forensic inaccuracy. However locating the rules of evidence in the context of their application may help ascertain if fact-finding and fairness are a product of current prejudice and norm.

There is more to evidence and adjudication¹² than the pursuit of accuracy. Adjudicative decisions are not only about ‘what happened’ as Nicolson¹³ points out, in that they also

Jur. (n.s.) 228.

¹⁰ In England s. 2 of the Sexual Offences (Amendment) Act, 1976 provided a shield with regard to past sexual history with third parties. In Ireland section 3 of the Criminal Law (Rape) Act, 1981 provided a shield in relation to past sexual history with third parties, while s. 13 of the Criminal Law (Rape) (Amendment) Act, 1990 extended that shield to also cover past sexual history with the accused.

¹¹ Adler, “The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation” [1985] *Crim.L.R.* 769.

¹² Jonakait, “Making the Law of Factual Determinations Matter More” [1992] 25(3) *Loyola of Los Angeles Law Review* 673, 688: “Evidence law is only a small part of the much larger fact-determination system... We need to be scholars of the fact-determination, not just of evidence. The accurate determination of facts is crucial to justice, and we need to explore all the possibilities that can affect that accuracy.”

¹³ Nicolson, “Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse” [1994] *M.L.R.* 726.

communicate a number of truths of a more overtly moral and political nature. It is that communication between trial and culture which lies at the heart of this exploration of evidentiary rules.

Changing societal needs, such as an upswing in the number of sexual abuse/offence cases can lead to a greater belief in such witnesses. Similarly an upsurge in organised crime, and use of a State Witness Protection programme, has implications for the acceptability of accomplice evidence.¹⁴ In contrast revelations of miscarriages of justice can lead to a corresponding suspicious attitude to confession evidence. In that sense, the system is demonstrably vulnerable to prevailing shifts in public opinion as to the manner in which we do 'justice'. But fact-finding itself is also more immediately and inevitably influenced by the popular cultural view of the 'tale' being reconstructed in the courtroom.

This is seen in the way lawyers may use stories to organise their presentation of evidence, and in that sense the popular tale with contemporary currency may find its way into the reconstruction which is the trial. The jury is also an obvious conduit for such transference.¹⁵ Indeed trial by a jury of one's peers in situations where tempers are running high in a small locale, can give new and harsh meaning to the concept of 'community' justice.¹⁶ On a broader canvass,

¹⁴ In the Ward Case, for example, rejection and disbelief of the police and confession here combined with belief of the accomplice and refusal to 'upgrade' that doubt regarding accomplices in the case of WPP participants - hence strengthening the credibility of 'ordinary' accomplices.

¹⁵ Jackson and Doran, "Judge and Jury: Towards a New Division of Labour in Criminal Trials" [1997] M.L.R. 759, at 763: "It is commonly suggested that lawyers use stories to organise evidence, but the actual presentation of evidence in trials does not conform easily to a coherent normative structure. Juries too will construct stories from the evidence and will test the plausibility of such stories by reference to common sense generalisations."

¹⁶ "Out of the Frying Pan or into the Fire? Race and Choice of Venue After Rodney King" (1993) 106 Harv. L. Rev. 705, 722. Garcia advises

society at large may mark as particularly reprehensible at any time a particular type of crime, rendering trial of those individuals more visible and marked. In support of this is the finding by Jackson and Doran of a prevalent view among counsel that sexual cases are particularly difficult to defend before juries.¹⁷ Of course, one of the reasons for juries is precisely this ability to channel 'community values' into the decision making process.¹⁸ But that has implications in terms of their role in the criminal justice system. Jackson and Doran suggest that judges may have the edge in emotionally charged cases such as sexual offences, where the legal scales on the eyes of lawyers help stop the high beam of politics and media discourse.¹⁹ The media is then a significant player here.

Those who are involved in decision making in the criminal process, most particularly the jury, are interpreting the tales told to them in accordance with a background and criteria imbued with popular images and the interpretations of the media. Farrel Corcoran makes the point that all media are (sic) about the making of public meanings:

close scrutiny of jury composition: "The rules of evidence are a child of the jury system, yet we seldom focus on the issues of jury composition and jury selection in evidence courses. We should. We can. Selection strategies depend heavily on the particulars of a specific case, such as the nature of the charge, what the evidence shows, who the witnesses are, who the defendant is, who the lawyers are, and who else is in the jury pool. It is not enough to read about empirical studies in the abstract. We should think about these issues in the context of a particular case." Garcia, "Rape, Lies and Videotape", 25(3) *Loyola of Los Angeles Law Review* 711, 736-737.

¹⁷ Jackson and Doran, "Judge and Jury: Towards a New Division of Labour in Criminal Trials" (1997) 60 *Modern Law Review* 759.

¹⁸ Jackson and Doran (1997) 60 *Modern Law Review* 759, 764 and 766.

¹⁹ Hence defence lawyers in these cases might well like the option of a non-jury trial. Jackson & Doran argue for roles for both judge and jury in fact finding: "In the absence of any perfect line of communication to 'how it happened', triers of fact must play a part in bringing their own experiences, their own 'evidence', to bear on the case." (1997) 60 *Modern Law Review* 759, 778.

The media intimately affect our thoughts and actions because they have the power to decide what is important in the public sphere, to set the agenda, to light up certain events and keep others in darkness. They have the power to define the world in a particular way, to establish a partial (maybe even a bespoke) point of view as universal common sense, not to be questioned.

The influence of the subtext of the crime debate here is what is operating here. Very often procedural changes with regard to evidentiary rules comprise legislative initiatives introduced in response to 'public pressure' on a particular issue. These changes may initially experience limitations in terms of their effect. Althouse,²⁰ for example, points out in relation to the rape shield rules that²¹ initial generous interpretation of exceptions to the rape shield rules can substantially influence the impact of the rule.²² However, ultimately “[t]he way people think about the evidence they hear is more important than any rule”,²³ and accordingly, Althouse sees the rape shield rules importance as lying in its value as a “cultural phenomenon”. It matters in her view as a film or a famous rape case matters, as “...a cultural

²⁰ Althouse, “Thelma and Louise and the Law: Do Rape Shield Rules Matter?” (1992) *Loyola of Los Angeles Law Review* 757.

²¹ Althouse points out that at the level of interpretation and application a rule’s purpose can be skewed. “One cannot simply rely on the promise of the rule because a judge or jury that does not share the goals and beliefs embodied in the rule can drastically undercut its effect.” (1992) *Loyola of Los Angeles Law Review* 757, 764.

²² “Thus, if the judge thinks the evidence of past sexual behaviour has strong probative value, it becomes more likely that the right to confront the witness or the process right to present evidence will require its admission.” (1992) *Loyola of Los Angeles Law Review* 757, 765.

²³ (1992) *Loyola of Los Angeles Law Review* 757, 768.

phenomenon that shapes the minds of the judges and juries who decide the outcomes of trials.”²⁴

In similar fashion the media’s presentation of criminal events, or identification of a perpetrator of a particular crime, fashions amongst its audience a knee-jerk response to that class. Consider the difficulty of establishing a case for the defence that has cultural meaning or significance in relation to battered women who kill, where, as Edwards remarks “the nagging husband does not have the same cultural meaning”,²⁵ yet “when building up the case for the defence the scene constructed must be one capable of convincing a jury of the congruence between social and legal accounts”.²⁶

The very manner in which the law, lawyers and courts operate invokes orthodoxy and exclusion as “...law restricts, confines and places into hierarchy those who may speak the discourse, the texts of the discourse and the settings where legal discourse takes place.”²⁷ There are other constraints that may not be so apparent. Prior to the trial itself, the investigative process is circumscribed, as the police have impacted upon what is presented to (and further (mis)interpreted by) the courts. As Zuckerman points out:

The police case does not contain just raw objective facts. The police construct and present an entire picture of reality which is interlaced with evaluative conclusions (such as the description of the conduct to fit a particular legal definition), with evidence created by the police in their interaction with the suspect (the confession), and is shaped by

²⁴ (1992) *Loyola of Los Angeles Law Review* 757, 772.

²⁵ Edwards, *Sex and Gender in the Legal Process*, p. 399.

²⁶ Edwards, p. 400.

²⁷ Green, Lim and Roche, “The Indeterminate Province: Storytelling in Legal Theory and Legal Education” (1994) 28(2) *The Law Teacher* 128, 132

numerous decisions, mostly unrecorded and sometimes even unconscious, to pursue certain leads or hypotheses and drop others, to ask certain questions rather than others, and to look in some places but not in others.²⁸

The overall structure of the criminal process may itself be affected by the number of sequential decisions in relation to the same event, each determined in accordance with various rules. In Ireland pre-trial applications for prohibition orders on the basis of delay have met with differing views as between judges on the application in that context of the presumption of innocence, to say nothing of its implications for the subsequent trial. In *P. O'C. v D.P.P.*,²⁹ for example, Denham J. expressed the view that she "... would not apply the presumption of innocence in this type of application",³⁰ whereas Murray J. was of the view that it was

... inconsistent with the fundamental rights of a citizen... that such proceedings should proceed on the assumption, however contingent, that the allegations of criminal guilt made by the prosecuting authority against the individual citizen are true.³¹

The implications of altering the decision making process in any manner to attend to the micro concerns in different contexts, without an eye on the composite whole, has been described by Patton as

... individual body parts waiting to be transplanted. Independently each appears normal, but when combined they create a

²⁸ Zuckerman, "Reducing Miscarriage of Justice" (1993) 44 N.I.L.Q. 3, 4.

²⁹ [2000] 3 I.R. 87.

³⁰ [2000] 3 I.R. 87 at 102.

³¹ [2000] 3 I.R. 87 at 103-104.

horrible Frankensteinian creature. The resulting body of law does not at all resemble anything remotely similar to traditional notions of fairness.³²

An examination of recent constructions of fairness in context by Irish and English courts might reveal whether difficulties now exist for the defence of certain accused - those involving charges of sexual offences for example? Can we literally 'recognise' the concept of the innocent paedophile priest, or fairness to the date rapist?

In that sense is fact-finding and assessment of credibility in (certain) context(s) inimical to guaranteeing traditional fairness (to the accused)?

II. CONSTRUCTIONS OF 'FAIRNESS': THE CONTEXT OF SEXUAL OFFENCES

The cultural and legal context with regard to sexual offences in both the Irish and English jurisdictions, has undergone somewhat of a sea change in recent times. This has resulted in legislative activity introducing changes in criminal procedure, which in England led to the Youth Justice and Criminal Evidence Act 1999, which aimed to be more cognisant of the special needs of child and vulnerable adult witnesses.³³ In Ireland, facilitation of live television link and video testimony by witnesses, had been introduced by the Criminal Evidence Act 1992,³⁴ which Act also weakened the

³² Patton, "Evolution in Child Abuse Litigation: The Theoretical Void Where Evidentiary and Procedural Worlds Collide" (1992) 25(3) *Loyola of Los Angeles Law Review* 1009, 1019.

³³ See Hoyano, "Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses" [2000] *Crim. L.R.* 250, 273.

³⁴ This facility was provided for children in the context of civil cases in the Children Act, 1997, and was recently extended to intimidated or vulnerable witnesses intimidation by the Criminal Justice Act, 1999. Separate legal representation for rape victims is also provided for under the Sex Offenders Act, 2001. This relates to the issue of cross-examination on past sexual history where the accused will now face

corroboration rule in relation to sexual offences, giving the judiciary discretion as to whether to give such a warning to the jury.³⁵ Each of these changes emanates from what might be categorised as ‘pro-victim’ approach - introducing changes to facilitate prosecution and ease the giving of testimony by witnesses - other than the accused.

In sexual offences, issues such as credibility (of the victim) and relevance (of sexual history evidence), are obviously core to determination of the ultimate issue at trial. When these are in turn constructed in accordance with judicial views of what is ‘fair’, it can be seen whether the motivation to do justice for women and children victims clashes with that of fair trial rights of the accused. Irish ‘rights’ adjudication in the context of (historical) sex abuse cases, and the English House of Lords decision regarding rape shield rules and fair trial rights in *A*,³⁶ both operate in a climate of public opinion emotionally charged in relation to sexual offenders, particularly child sexual abuse. Whether fact-finding itself, and judicial construction of fairness, is then influenced by this sway from accused to victim, or whether it results in a judicial mandate to pull against the tides of current wisdom is worked out in relevant case law. The latter could not offer a better occasion to test the mettle of guarantees of fairness, or estimate the variable nature of rules of evidence in face of policy considerations.

III. IRELAND: RIGHTS ADJUDICATION IN HISTORIC SEX ABUSE CASES

two sets of counsel.

³⁵ The application of the said corroboration rule in relation to accomplices remains at full strength, but would seem to be somewhat cosmetic in effect as evidenced by the recent *Holland* and *Ward* cases. Moreover the application of the rules of evidence in the Special Criminal Court suffers from the artificiality of judges instructing themselves, to be cautious of accomplice evidence, for example, or to ignore evidence as in the case of excluded confessions (e.g. *Ward*).

³⁶ *R. v. A.* [2001] 2 W.L.R. 1546

In Ireland, the constitutional guarantee of fair procedure includes that of a right to expeditious trial. In the *D.P.P. v Byrne*,³⁷ Denham J. commented that "...whereas there is no specific constitutional right to a speedy trial, there is an implied right to reasonable expedition under the due process clause. An accused is entitled to have a trial free of abuse of process."³⁸ Chief Justice Finlay in that same case quoted O'Higgins C.J. in *The State (Healy) v. Donoghue*³⁹ to the effect that "...the importance of the protection of the right to a trial with reasonable expedition is not in any way lessened by the fact that the constitutional origins of it in our law arose from the general provision for a trial in due course of law rather than from a separate express provision of a right to a speedy trial."⁴⁰

Recent resolution of the concepts of fairness and delay in the context of prosecution of historic sex abuse in Ireland, reveals competing tensions, both in the judicial prioritisation and identification of the standpoints within the criminal justice system (that of victim, accused, community, and state); and in the treatment of historic sex abuse allegations within the confines of the general principles of criminal justice, particularly that of expeditious trial.

*G. v. D.P.P.*⁴¹ concerned 27 charges related to the period 1967-1981 involving offences against young women. In 1993 the accused was charged and sought leave to apply for judicial review on grounds of lapse of time. In relation to delay in sexual offences against young children, Chief Justice Finlay's comments mark the beginnings of a recognition on

³⁷ *D.P.P. v Byrne* [1994] 2 I.R. 236. The Supreme Court in a three-two decision in relation to a drunk driving charge rejected an application to prohibit the trial of the offence. There had been a ten-month delay which had led to a dismissal in the District Court.

³⁸ [1994] 2 I.R. 236 at 260.

³⁹ [1976] I.R. 325 at 375.

⁴⁰ [1994] 2 I.R. 236 at 244.

⁴¹ [1994] 1 I.R. 374. He was successful on grounds of delay.

the part of the Irish courts, that because of the feature of dominion, in particular, an exception to the general requirement of expeditious justice is created in these cases:

In cases in general of sexual harassment or interference with young children, the perpetrator may, if he or she is related to or has a particular relationship of domination with the child concerned, by that domination or by threats or intimidation, prevent the child from reporting the offence. The court asked to prohibit the trial of a person on such offences, even after a very long time, might well be satisfied and justified in reaching a conclusion that the extent to which the applicant had contributed to the delay in the revealing of the offences and their subsequent reporting to the prosecution authorities meant that as a matter of justice he should not be entitled to the order.⁴²

Denham J., in that same case, however, does caution victims as to what they might seek:

A trial in a court of law is not an exercise in vengeance but is a trial in due course of law in the pursuit of justice on behalf of the community...When women and children come to the legal system it would be a disservice to them if it were perceived that they sought vengeance rather than the rule of law and justice. Insofar as there are new developments and knowledge in our society on issues that relate to the charges laid in this case then these matters must be dealt with in a fair and just way by the courts.⁴³

⁴² [1994] 1 I.R. 374 at 380.

⁴³ [1994] 1 I.R. 374 at 381.

It is clear here that the accused's interest in fairness is tempered by the role he may have had in causing the delay. There also is recognition of the 'community's' pursuit of justice in a trial, and acceptance of the direct input and influence of specialist (and popular) knowledge into the process. Identification of the 'community' with victims' rights emerges in *E. O'R. v. D.P.P.*,⁴⁴ which concerned charges made against the accused in March 1993, in relation to sexual offences against three young women alleged to have occurred between 1978-1986 (one in the period 1982-1986). A challenge on grounds of delay was initially successful in the High Court, where Keane J. stated that "[w]hat is beyond doubt is that where that community right conflicts with due process, it is the latter right which must prevail."⁴⁵

Keane J. notes that jurisprudence has developed to the effect that in the case of charges of sexual abuse of children, special considerations apply. These include the reluctance of young children to accuse persons in authority,⁴⁶ which reluctance may be exacerbated by threats; and the fact that the accused may be responsible for delay.⁴⁷ In application of the general principles identified to the facts of the case at hand, including that of the relationship between applicant and complainants, however, Keane J. pointed out that this must be seen in the context of their respective ages (here the difference being 4-11 years), and that the possibility of a relationship of domination is markedly lessened, as the

⁴⁴ [1996] 2 I.L.R.M. 128.

⁴⁵ [1996] 2 I.L.R.M. 128 at 136.

⁴⁶ In *Hogan v. President of Circuit Court* [1994] 2 I.R. 513 Finlay C.J. had identified these.

⁴⁷ Keane J. notes that in the English case of *L.P.B.* (1990) 91 Cr. App. R. 359 Judge J. had stated that it would be difficult to envisage any circumstances where delay in a complaint of child abuse would lead to abuse of the Court process. Keane J. does not however, agree and comments that such would be at variance with the need to have regard to particular circumstances and the paramount nature of due process guarantees: [1996] 2 I.L.R.M. 128 at 139.

applicant and the complainants were not living in the same house. Hence Keane J. concluded therefore that the interests of the accused must prevail here, although his identification of the victim's interests with those of the public is clear:

Whatever decision a court arrives at in a case such as this, there is the possibility of injustice; *injustice to the complainants and the public* whom the court must protect if the proceedings are stayed where the accused was indeed guilty of the offences, and injustice to the accused if he is exposed to the dangerous ordeal of an unavoidably unfair trial. I am satisfied that ... there is a real and serious risk of an unfair trial that cannot be avoided by any rulings or directions that may be given by the trial judge.⁴⁸ (Emphasis added.)

This identification of community or public interest with those of the victim, to the detriment of the accused, reaches its apotheosis in *B. v. D.P.P.*⁴⁹ where the defendant was charged in 1993 in relation to offences allegedly perpetrated against his daughter between 1963 and 1973.⁵⁰ An order of prohibition on grounds of delay was refused.

⁴⁸ [1996] 2 I.L.R.M. 128 at 141-142. On appeal to the Supreme Court (unreported judgment given on 18 March 1997), however, O'Flaherty J. interpreted Keane J.'s decision as being one that the accused was going to find it difficult to defend the case. O'Flaherty J. comments that this is so in every case of this kind, even if there is no significant delay, and therefore holds this not to be a case where the Court is entitled to prohibit the continuation of proceedings. The effect is to prefer the continuation of proceedings over fairness to the accused.

⁴⁹ *B. v. D.P.P.* [1997] 2 I.L.R.M. 118.

⁵⁰ On appeal, Denham J. identified the particular factors to be considered in this case: the relationships in question, the matter of dominion, the question of who delayed, the nature of the offence, namely alleged abuse in the home, a possible alibi, the witnesses and the question of an admission of guilt. In looking at each of those latter factors, dominion received much, if not most, attention. Denham J. commented: "This

In reaching the decision as to whether this particular delay between 20 to 30 years, acknowledged as “an inordinate length of time”,⁵¹ would prejudice the fair trial of the defendant, Denham J. places heavy emphasis on dominion:

The events in this case are governed by what the learned trial judge described as B’s: ‘violent, dominant and menacing personality’. This dominance is the kernel reason for the delay and the factor carrying most weight.⁵²

Denham J places the community rights in opposition to those of the accused:

In weighing up the community’s right to proceed with this prosecution as against the other factors ... it is clear that B has not discharged the onus of establishing that arising out of the delay there is a real risk that he would not obtain a fair trial, that the trial would be unfair as a consequence of the delay between the dates of the alleged events and the postponed trial.⁵³

dominion places this (and similar cases) in a special category as by the said control the accused’s actions prevented the complainant’s taking steps so that the prosecution could proceed within a more usual timeframe. B is barred from arguing that the delay is unreasonable while such dominion existed. Any delay that continued during this time of dominion is reasonable. Consequently any prosecution commenced within that time or within a reasonable time thereafter, is commenced with reasonable expedition.” [1997] 2 I.L.R.M. 118 at 133. In this case the facts were that in 1982 his wife had obtained a barring order against the defendant, and in 1991 she had died.

⁵¹ [1997] 2 I.L.R.M. 118 at 132.

⁵² Denham J. relies here on the evidence of the psychologist in this case. The psychologist was not, however, cross-examined on his affidavit. [1997] 2 I.L.R.M. 118 at 128-129.

⁵³ [1997] 2 I.L.R.M. 118 at 133-134.

These decisions of the Irish courts reveal acceptance of the role and input of the victim into the criminal trial. Occasional vindication of the priority of the accused's rights is only of occasional and limited effect (*G*,⁵⁴ *E. O'R.*⁵⁵). The overarching theme is accommodation of prosecution and pursuit of victims' interests, seen to be in the public/community interest, with presumptions of dominion prevailing over innocence rights. The popular context - one increasingly intolerant of sexual offences particularly those perpetrated against young children - is directly influential in supporting the admissibility of psychological expert evidence to explain delay and analyse victim response. Quite literally the expert evidence is admissible because of the status of that specialty in our community.⁵⁶ Community deference ensures judicial acceptance of that expertise to justify delay, while credibility and fact-finding issues are similarly transposed with assumption of the truth of the allegation overshadowing the judicial review.⁵⁷

IV. COUNTERBALANCING CERTAINTY: THE 'RE-CLAIMING' OF CORROBORATION

If assumptions of veracity have reached an orthodoxy, it may be inevitable that in order to express caution, the judiciary may bring about the rehabilitation of rules relating to suspicion of credibility and veracity in those contexts. In the context of sexual offences, the re-emergence of rules of

⁵⁴ [1994] 1 I.R. 374.

⁵⁵ Unreported, High Court, Keane J., 21 December 1995.

⁵⁶ Zuckerman, *The Principles of Criminal Evidence*, p.67: "If the community has come to defer to professional standards on the matters in question, the courts will normally follow suit. Medical evidence is admissible on matters of health because we accept the authority of the medical profession in this regard."

⁵⁷ See for example the judgment of Keane C.J. in *P. O'C. v. D.P.P.* [2000] 3 I.R. 87 at 94: "...the inquiry conducted by the court which is asked to halt the trial necessarily involves an assumption by the court that the allegation of the victim is true."

evidence encapsulating scepticism and caution with regards to the credibility or veracity of complaints or the justification for their delayed reception, may seem unjustifiable or indeed unwelcome. This may be particularly so where their origins may be dubious, or the rumours of their demise have been greatly exaggerated.⁵⁸ Their re-emergence can in turn be interpreted as typical of judicial fondness for rules of their own creation. It should in fact be taken more seriously in terms of the dynamics of evidentiary rules and popular contexts or beliefs. It may in fact say more about the role and rationale of rules of evidence than we at first appreciate.

The beginning of the suggestion that an assumption of credibility of victims in cases of historic sex abuse had hardened to an orthodoxy in Ireland is found in *P.C. v. D.P.P.*⁵⁹ The facts concerned the arrest of the defendant in 1995 in relation to allegations of sexual offences perpetrated between 1982-83 and 1983-4 against a young woman. The defendant had been the coach driver who transported schoolgirls to a pool. His relationship with the victim had been ended by her, when he commented that it would be legal when she was 16, causing her to then appreciate the illegality.

⁵⁸ *D.P.P. v. Finnerty* [1999] 4 I.R. 364 is a case in point. The factual scenario was that of a sexual offence: the alleged rape of a student after a disco. A corroboration warning was given by the trial judge. On appeal it was commented that “[n]o criticism has been, or could be, made of those aspects of his charge.” (per Keane J. at 372-373). *Finnerty* illustrates how a once crystallised perspective on credibility prevails even through legislative change because of judicial adherence to its original precepts. cf. Birch, “Corroboration: Goodbye to All That?” [1995] *Crim L.R.* 524. In earlier consideration of reform of the corroboration requirement by s. 32(1) of the Criminal Justice and Public Order Act, 1994, Birch had expressed an appreciation of the value of *Beck* [1982] 1 W.L.R. 461; [1982] 1 All E.R. 807 which creates a witness-specific obligation, arising only if material to suggest a particular witness's evidence may be tainted by improper motive. Those changes which have extended the accommodation of vulnerable witnesses so that it is a concept now beyond that of women and children do not avoid those particular criticisms of inflexibility and complexity.

⁵⁹ [1999] 2 I.R. 25.

There were two periods of delay here - 1980-88 and 1988-95. The victim had meantime gone to university and obtained a masters degree. McGuinness J. does not find evidence here of the type of 'dominion' dealt with in B's case, and although the experts,⁶⁰ Mr. Carroll and Ms. Fitzmaurice, did describe a type of 'kindly' dominion, she suggests "their views contain an element of rationalisation by hindsight".⁶¹ In terms of the relationship between assumptions of dominion and the presumption of innocence, McGuinness J. comments that "[t]his court cannot accept that a situation of domination exists automatically in all cases where a person is accused of sexual offences. The presumption of innocence has to play a part in the Court's considerations and the court must base its decision on the actual evidence before it."⁶²

In a neat juxtaposition McGuinness J. links the current orthodoxy with that of the past:

⁶⁰ By contrast with Denham J.'s reliance on the expert's testimony in *B*, McGuinness J. is critical of the experts testifying in the case. At pages 34-35, she comments that Ms. Fitzpatrick "... had great difficulty in elaborating with any degree of logic or scientific method what lay behind (theories on the effect of child abuse). She was vague about the nature of the organisation from which she had obtained her qualifications and also about the process whereby she treated those whom she counselled... I had difficulty in accepting that she was sufficiently qualified to be an expert witness as to what lay behind AM's delay in making her complaint to the gardai in this particular case."

The affidavit of Mr. Alex Carroll, Senior Clinical Psychologist employed by the Midlands Health Board, she find "extremely close both in content and actual wording" (at 35) to the affidavit sworn by him in *D. O'R. v. D.P.P.* (Unreported, High Court, Kelly J., 27 February 1997) although the facts of the case were very different. The fact that he relied on a statement provided by the Gardai for the victim's history rather than going through it with her himself, does not strike McGuinness J. "as the most desirable way of carrying out an in-depth psychological assessment in a matter of such crucial importance to both the complainant and the accused." (At 36.)

⁶¹ [1999] 2 I.R. 25 at 40.

⁶² [1999] 2 I.R. 25 at 40.

...I consider that there may be a danger that *B v. D.P.P.* and the unreported cases to which I have also been referred might be taken as authority for the proposition that in all cases where an accused is charged with sexual abuse of a child or young person which took place some years ago, any claimed prejudice on account of delay can be negated by a claim that the accused exercised 'dominion' over the complainant.⁶³

She then relates this directly to the equally abhorrent automatic disbelief which pertained in relation to all sexual offence complainants:

In years gone by, accusations of rape or any kind of sexual assault were treated with considerable suspicion. The orthodox view was that accusations of rape and sexual assault by women against men were "easy to make and hard to disprove" and Judges were required to give stern warnings in their charge to the jury of the need for corroboration and the dangers attached to convicting on the evidence of the complainant alone.

No one to-day would support the orthodoxy of the past and there has been a great increase in the psychological understanding of sexual offences generally. Nevertheless it would be unfortunate if the discredited orthodoxy of the past were to be replaced with an equally rigid orthodox view that in all cases of delay in making complaints of sexual abuse the delay can automatically be negated by dominion.⁶⁴

⁶³ [1999] 2 I.R. 25 at 43.

⁶⁴ At 43.

The applicant was held to have established his claim and the order of prohibition granted.⁶⁵ This was however reversed on appeal by the Supreme Court. There Denham J. identified the “fundamental principles” involved which had to be “weighed and *balanced* by the court”⁶⁶ (emphasis added) as:

...the community's right to legal issues being determined in the courts; to have criminal charges processed through the courts; the right and duty of the prosecutor to bring to the courts for adjudication allegations of serious child sexual abuse alleged to have taken place; the community's right to have its society protected, especially its most vulnerable - children. Also at the core of this case is the rule of law; the right of the applicant to a fair trial; the right of the community to the rule of law for all, including the applicant.⁶⁷

In terms of identification of standpoints within the criminal justice system, the community's identification with vindication of the interests of the victim, is in contrast to the failure to identify the interest of the community in the accused's right to a fair trial - the only indication of a commonality between accused and community being in the rule of law, which could, after all, cut both ways. Denham J. differs from the trial judge also with regard to the presence of dominance, and interpretation of the expert evidence,

⁶⁵ A number of cases where the exception was applied and so prohibition on grounds of delay refused include *D. O'R. v. D.P.P.* (Unreported, High Court, Kelly J., 27 February 1997); *P.D. v. D.P.P.* (Unreported, High Court, Kelly J., 19 March 1997); *D.C. v. D.P.P. & O'Leary* (Unreported, High Court, Geoghegan J., 31 October 1997). In others, it was nonetheless granted - *P.W. v. D.P.P.* (Unreported, High Court, Flood J., 27 November 1997); *Fitzpatrick v. D.P.P.* (Unreported, High Court, McCracken J., 5 December 1997).

⁶⁶ *P.C. v. D.P.P.* [1999] 2 I.R. 25 at 61.

⁶⁷ [1999] 2 I.R. 25 at 61.

deciding the applicant ‘may not profit from alleged illegal actions’.⁶⁸ It is regarding the question of whether the simple efflux of time had prejudiced the applicant's chance of a fair trial, however, that her comments are most revealing: “A trial of charges of this type, in the circumstances described, is in fact a trial of the *credibility* of the witnesses.”⁶⁹ (Emphasis added.)

Denham J. holds that the applicant had not “distinguished his case from the growing body of case law which has permitted delayed prosecutions for child sexual abuse to proceed. No factor takes his case out of the *norm* of this common law, or establishes that a constitutional right will be breached.”⁷⁰ (Emphasis added.)

The crucial point being missed here is that credibility issues do change over time, as do cultural and societal norms. While the latter is acknowledged, and hence legitimate to that degree, the former may remain hidden and unappreciated in its effect. It is precisely relevant that if the individual here had been tried at the time of the alleged offences, he would have had not only no temporal obstacles to overcome, but avoided current cultural obstacles. The victim might also have faced additional hurdles at that time, equally illegitimate perhaps, but again adding to the advantages held by an accused. If it is not right to place credibility barriers to certain victims (as then), is it not similarly unacceptable to place them at the door of certain accused now? Supporting the centrality of credibility here, Keane C.J. with regard to the issue of fair trial finds that “[h]ad this case been tried ten years ago, the issue for the jury would essentially have been one as to the *credibility* of the complainant and, if he gave evidence, of the applicant.”⁷¹ (Emphasis added.)

⁶⁸ [1999] 2 I.R. 25 at 63.

⁶⁹ [1999] 2 I.R. 25 at 63.

⁷⁰ [1999] 2 I.R. 25 at 65.

⁷¹ [1999] 2 I.R. 25 at 70.

The issue of credibility and norms regarding these cases begs the very question of how different the temporal and popular cultural climate is now than it might have been ten years ago? The legal and cultural context of belief regarding these kinds of cases has greatly changed. The prosecution task regarding such offences has been eased by the availability - and admissibility - of expert testimony, the removal of the corroboration requirement, and the facilitating of witness testimony through live television link and video provision. Moreover the public's, and hence jury's, view of such cases has quite simply transformed.

Popular wisdom, which would have leaned in the past in the opposite direction, now leans towards pro-prosecution and hence accommodation of the victim's voice, at the expense of the defendant's claim to absence of a fair trial. Within the confines of sexual offences, there is a current consistency of opposition between state and individual accused, community versus accused, victim versus accused.

The particular nature of judicial reflection, occurring where partial sightedness may tolerate departure from traditional norms, facilitates a judicial role which may continue to pledge allegiance formally and visibly to such concepts as fairness (thereby ensuring the appearance of their continuity), despite the reality of changes on the ground. What does this mean for the fair trial of the accused? Ultimately is there a schism created, however, a fertile breeding ground for future and further divergence, and ultimate paradigm collapse?

To the extent that it goes against the grain of popular sentiment, McGuinness J.'s decision in *P. C. v D.P.P.*⁷² serves as a litmus test for the meaning of justice as fairness in context. Ironically (in face of its comparatively recent legislative reform), it is this disenchantment with 'received wisdom' and assumptions of verity on the part of the victim which has manifested in a renewed argument for the

⁷² [1999] 2 I.R. 25.

re-introduction of corroboration. In *P. O'C. v. D.P.P.*,⁷³ the applicant was charged with five counts of indecently assaulting PK at dates unknown from 1st January 1982 to 31st December 1983. The applicant was a violin teacher, and the incidents allegedly took place in a music room, a significant factor being the existence of a facility to lock same, something that was difficult for the applicant to obtain evidence of after the delay. In the High Court McGuinness J. granted the order of prohibition holding that the risk of an unfair trial here was not one which could be avoided by trial judge direction. An appeal to the Supreme Court by the respondent was dismissed. Denham J., agreeing that the applicant had established prejudice as a result of delay, sees this significantly as “an exception to the general rule”⁷⁴ demonstrating the degree to which the relationship between fairness and the right to an expeditious trial has been inverted. She also invokes the language of ‘balance’: “The court must achieve a balance in protecting the constitutional rights of the accused yet weighing in the balance also the rights of the community and the victim.”⁷⁵

Of specific interest, in terms of rules of evidence, and the impact or influence of popular culture, is the judgment of Hardiman J. He refers to the fact that corroboration requirement in sexual cases was abolished by s. 7 of the Criminal Law (Rape) (Amendment) Act, 1990 and s. 27 of the Criminal Evidence Act, 1992 and comments:

It may well be that these pieces of legislation were enacted before the prosecution of very old offences became routine as it now is. Cases which will be tried more than ten years after the offences are alleged to have been committed are very common, and a twenty to twenty five year interval is by no means

⁷³ [2000] 3 I.R. 87.

⁷⁴ [2000] 3 I.R. 87 at 102.

⁷⁵ [2000] 3 I.R. 87 at 101.

uncommon. My personal experience extends to a case proposed to be prosecuted more than 46 years after the alleged offences and one has heard of an interval of more than 52 years. These, even the shorter periods, are remarkable lengths of time. They appear to me of themselves, and independently of the respondent's reliance on possible unspecified "directions" of a trial judge, to require serious consideration of what can or should be said to a jury in these cases. At present, one cannot be sure that any direction or warning will be given.⁷⁶

Given the effectiveness of the corroboration reform then in relation to sexual offences, and in particular the changing popular context in which such claims are manifest and litigated, Hardiman J. sees a need for the mitigation of more recent certainties regarding such claims by an evidentiary rule of caution in favour of the accused:

A plausible and sympathetic witness is not necessarily telling the truth, nor a furtive and cowed one lying. The very pressures of litigation of this sort, so deeply personal and perhaps central to a complainant's self worth on the one hand and so threatening of prolonged imprisonment, life long stigmatisation and financial and familial catastrophe on the other, in themselves have the potential drastically to alter the witnesses' presentation and effect. To permit such prosecutions, in the absence of any scope for corroboration or contradiction after one, two or more decades is, to say the least, to venture into uncharted territory where the normal forensic safeguards are gravely attenuated.

⁷⁶[2000] 3 I.R. 87 at 120.

The process of the trial itself may be a life altering event for one or both parties and their families, and rarely for the better. In these circumstances it appears to me that there is in each case a point at which a trial in those circumstances “puts justice to the hazard” so that the issue of guilt or innocence is “beyond the risk of fair litigation.”⁷⁷

Another case in which corroboration is discussed is *J. O’C. v D.P.P.*⁷⁸ The applicant was a retired guard of 69 years of age who was charged with 16 counts of indecent assault

⁷⁷ [2000] 3 I.R. 87 at 120-121. Vindication of that case for the ‘re-claiming’ of corroboration in this context is given in *J.L. v. D.P.P.* [2000] 3 I.R. 122 by McGuinness J. who says at 134 that his experiences accord with her own in the Central Criminal Court. There is also in that case confirmation of the applicability of the presumption of innocence: Keane C.J. concludes: “Given the presumption of innocence to which, at this stage of the inquiry, the applicant is entitled, I am satisfied that he has discharged the onus...that there is a real and serious risk of an unfair trial.” (At 126-127.) McGuinness J. also states at 137-138:

I do not accept, however, that the presumption of innocence plays no part in the decision which must be made by the court in this case... While for the purposes of looking at the reasons for a complainant's delay in reporting a sexual assault to the gardai an assumption as to the truth of her allegations may be made, when the court subsequently considers whether there is a real risk of an unfair trial it is a trial based on the presumption of innocence that is in question.

By this approach the court will hold the balance between a situation in which it would be impossible to try any accused of sexual offences against children where delay in reporting had occurred, and the equally undesirable situation where all persons accused of sexual offences against children would have to face trial no matter how long the time was which had elapsed since the alleged offence and no matter how great was the danger of an unfair trial.

⁷⁸ [2000] 3 I.R. 478.

between 1974 and 1978, when the complainant C. O'S. was between 10 and 13 years of age. Her father was a retired Sergeant, and the families were next door neighbours at the time of the alleged offences. The applicant's wife had died in 1993 and so was unavailable to give valuable evidence regarding frequency of visits etc. The applicant suffered from ill health and medical evidence suggested he would have great difficulty in coping with the stress of a trial. A consultant psychologist gave evidence that the delay of C. O'S. was 'reasonable'. The President of the High Court had accepted that a number of factors here militated against a fair trial.

On appeal, Keane C.J. in the Supreme Court pointed out that the court must decide whether as a matter of probability, assuming the complaint to be truthful, the delay in making it was referable to the accused's (sic) own actions. Given the respective ages, and the fact that the accused was not only considerably older, but a person in authority, he states that this was classically a case where the child might not be willing to make a complaint.⁷⁹ With regard to the hierarchy of interests here, Keane C.J. points out that "[e]ven in cases where, assuming, as one must do for the purpose of the application, that the complaints are true, the court finds that the delay is essentially due to the applicant's own conduct, there remains the paramount necessity to ensure that the applicant receives a trial in due course of law."⁸⁰ He finds the President of the High Court, however, was not correct in drawing inferences that the degree of prejudice here was such as would lead to a real and serious risk of an unfair trial. With regard to the court's approach to proceedings such as these, Keane C.J. is clear that "...the court must proceed on the assumption that the allegations are well founded and, to that

⁷⁹ [2000] 3 I.R. 478 at 485.

⁸⁰ [2000] 3 I.R. 478 at 485.

extent only and solely in the context of these specific proceedings, the presumption of innocence does not apply.”⁸¹

Murphy J. stated that, in the absence of delay on the part of the state or prosecution, the onus was on the applicant to prove that a fair trial is impossible. This was not done here, and so he also dismissed the application. Hardiman J., in a dissenting judgment, points that the inability to test evidence in sex abuse cases due to lapse of time is compounded by two factors: no general requirement of corroboration, and the practical pressure on the defendant to answer questions. With regard to the special category status of such cases, Hardiman J. endorses this for another reason, that of “...the chilling and destructive effect which a long lapse of time may have on the ability even of an innocent person to defend himself...”⁸² It is with regard to the presumption of innocence, however, that his disagreement with the jurisprudence to date is most profound:

I cannot subscribe to the proposition that the presumption of innocence applies only in the actual trial of criminal proceeding or is capable of suspension for any purpose relating to the trial, such as the disposal of injunctive proceedings like as the present ones.

...[T]here is...no basis whatever for assuming the truth of the allegations against the accused, prior to conviction, for any purpose or in any proceedings. This assumption, even for a limited purpose, is a much greater step than merely not applying the presumption, great as that is in itself. It involves assuming the contrary.⁸³

⁸¹ [2000] 3 I.R. 478 at 486.

⁸² [2000] 3 I.R. 478 at 514 per Hardiman J.

⁸³ [2000] 3 I.R. 478 at 517.

Hardiman J. reiterates that the real issue is whether there is a real risk that the applicant will not receive a fair trial. In that he is *ad idem* with the others, but begs to differ in so far as he does not see it necessary "...to assume for any purpose that the allegations of the complainant are true."⁸⁴ Unlike the rest of the court, he would grant the order of prohibition. Criticism of the expert witness testimony, which is so much a feature of these cases, also emerges, with Hardiman J. finding the nature of the examination by the psychologist here to have been 'gravely inadequate'.⁸⁵ Expert witnesses here in both the presentation of evidence and recognition of their area of research or expertise, meet with sharp differences in judicial views of their testimony (see for example the contrasting views of McGuinness J. and Denham J. in *P.C. v D.P.P.*⁸⁶ *infra*). In *N.C. v D.P.P.*⁸⁷ this was manifest in the actual unavailability of the hypnotist, under whose ministrations the complainant revived her memory of the events forming the basis of the complaint (this also triggering the other complaints made by her sister). The trial would have taken place 40 years and 10 months after the first alleged assault. Hardiman J., granting the application to restrain prosecution, pointed out that there was therefore no effective test or control of the mechanism of alleged recovery, rendering this a situation "fraught with the risk of unfairness".

In these instances of judicial review of Irish historic sexual abuse cases there is a clear clash of interests: justice, in terms of fair trial, versus criminal prosecution, seen now in terms of victims' rights. On each occasion, almost without exception, the victim trumps the accused. Exceptional

⁸⁴ [2000] 3 I.R. 478 at 521.

⁸⁵ [2000] 3 I.R. 478 at 527.

⁸⁶ [1999] 2 IR 25.

⁸⁷ *N.C. v. D.P.P.* (Supreme Court, unreported, Hardiman J., 5 July 2001) at page 18. See also "Risk of unfairness if therapist unavailable in recovered memory case", *Irish Times*, 3 September 2001.

provision in sexual offence cases on grounds of delay arguably comes close to prejudicing the presumption of innocence of the accused, as the applicability of the latter is the subject of judicial dispute. From this accommodation of exceptional provision in light of victim need comes the identification of the said victim with the community and state, and its opposition to the individual now accused. The triumphing of victims' rights on almost every occasion, transposes the previous position of non-belief of victims to absolute and automatic belief. There is a related replacement or juxtaposition of the accused's presumption of innocence, with a presumption of guilt. On each such occasion the choice is facilitated by the lack of appeal of the accuseds - respectively the 'folk devils' of their day. Occasional vindication of their rights serves only to illustrate the overall vulnerable nature of the fairness guarantee.

In terms of historic sex abuse cases however, there is evidence that the Irish courts may have begun to turn full circle: the exception carved out to the principle of expeditious justice, invoking assumptions of credibility and proof to the detriment of the accused's fair trial rights, and the presumption of innocence, has turned to judicial rejection of received wisdom manifest in renewed grounds for corroboration and greater scrutiny of expert testimony.

V. ENGLAND: THE RAPE SHIELD RULE AND FAIR TRIAL RIGHTS

A parallel development which is interesting for comparative purposes here is the impact of the Human Rights Act's fairness requirements on rape-shield rules in England.

The tenor of changes introduced by the Youth Justice and Criminal Evidence Act, 1999 is one which makes particularised provision for vulnerable witnesses. Not all witnesses qualify for such consideration however. As Di Birch points out⁸⁸ the accused is excluded from taking

⁸⁸ Birch, "A Better Deal for Vulnerable Witnesses?" [2000] *Crim. L.R.* 223, 224: "Vulnerable witnesses may be the victims of ideologies and unhelpful societal assumptions, so that an effective strategy involves

advantage of any of the 'special measures', as "[t]his is an Act which leaves us in no doubt where its sympathies lie."⁸⁹

In manifesting an overwhelming concern with witnesses aside from the accused, the provisions of that Act re-enforce the notion that it is only they who are worthy of (extra) consideration or help.

Despite occasional popular manifestations of concern for those accused or suspected of sexual offences,⁹⁰ the general tenor remains one cognisant of victims' needs in sexual offences, and their accommodation through the medium of the criminal justice system. In *R. v A.*,⁹¹ the House of Lords had an opportunity to directly assess this issue of victim or witness accommodation in the context of fair trial rights of the accused mandated by the Human Rights Act. The central concern here was the accommodation of the rape shield provisions under the Youth Justice and Criminal

challenging the culture as well as the law".

⁸⁹ Birch, [2000] Crim. L.R. 223, 226.

⁹⁰ Within popular culture, cases such as that of Roy Shuttleworth and David Jones which have recently raised the issue of miscarriage of justice in situations particularly where rules of adjudication and investigation have been adapted for particular circumstances. Here the practice of police 'trawling' (multiplying the number of complaints against an individual and facilitating their subsequent admission) in the context of child sex abuse charges was found complicit. See "Betrayal of the carers", *The Observer*, 10 December 2000: former care worker David Jones was cleared of child sex charges after police trawling. See also Rose and Horne, "Abuse Witch-Hunt Traps", *The Observer*, 26 November 2000, at p.18 (regarding Roy Shuttleworth).

Jenny McEwan states that this ignores the possibility that the plight of a learning disabled or otherwise vulnerable defendant may have to be addressed: "The European Commission and Court on Human Rights have already expressed the view in *Thompson* that the traditional English criminal court is not a forum where a juvenile can be given a fair trial. It may only be a matter of time before it is found that the same applies also to vulnerable defendants who are intimidated or bewildered by adversarial criminal proceedings." McEwan, "In Defence of Vulnerable Witnesses: The Youth and Criminal Evidence Act 1999" [2000] 4(1) *International Journal of Evidence & Proof* 1, 30.

⁹¹ Unreported, House of Lords, 17 May 2001.

Evidence Act, 1999 with the concept of fair trial guaranteed to the accused under the ECHR.

Section 41 of the 1999 Act prohibited the giving of evidence and cross examination about any sexual behaviour of the complainant except with leave of the court. Leave could be given in very limited circumstance: where the sexual behaviour is alleged to have taken place ‘at about the same time’ as that before the court (s. 41(3)(b)) and where it is ‘so similar’ to that before the court that it cannot be explained as coincidence. (s. 41(3)(c)). Neither of these would avail the defendant in this case.⁹² The legislative objective in introducing the rape shield provisions was identified as that of eliminating the ‘twin myths’, i.e. that if the complainant had had sexual intercourse with third parties she would be more likely to have consented to intercourse with the defendant; and that such a complainant would be less worthy of belief than a woman of unblemished chastity. In terms of the result (aside from the implications of the court’s avoidance of a declaration of incompatibility), superficially, it might appear that the fair trial considerations - and in particular fairness to the accused - won out, as the decision of the majority of the court in A was that evidence of the complainant’s past sexual history with the accused should not be excluded if it is “so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the convention.”⁹³

At first glance this appears to resemble the occasions of the Irish courts’ skepticism of pro-victim accommodation or prosecution orientated changes. A closer examination of the language of the House of Lords judgments, however, indicates that the court was generally comfortable with the notion of ‘balancing’ the accused’s interests with those of the interests of the victim and society.

Lord Steyn, for instance, in his judgment determines:

⁹² The same issue was arising in 13 other criminal cases.

⁹³ Per Lord Steyn at para. 46

It is well established that the guarantee of a fair trial under article 6 is absolute...The only balancing permitted is in respect of what a concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play.⁹⁴

In similar vein, Lord Hutton identifies the principal objectives of a criminal trial, invoking a third in the context of rape:

One is that a defendant should not be convicted of the crime with which he is charged when he has not committed it. The other is that a defendant who is guilty of the crime with which he is charged should be convicted. But where the crime charged is that of rape, the law must have a third objective which is also of great importance: it is to ensure that the woman who complains that she has been raped is treated with dignity in court and is given protection against cross-examination and evidence which invades her privacy unnecessarily and which subjects her to humiliating questioning and accusations which are irrelevant to the charge against the defendant.⁹⁵

Later on he equates the position of defendant and victim in a criminal trial where he refers to "...the need to achieve both the objective of protecting an innocent

⁹⁴ Per Lord Steyn at para. 38.

⁹⁵ Per Lord Hutton at para 142.

defendant and the objective of protecting a woman complainant.”⁹⁶

There is evident recognition then of the role of the victim in the criminal trial and acceptance of their standpoint and interest. While this may be unproblematic in itself, evidence of the ‘public interest’ influence on judicial construction of fairness is more disquieting. This is found where the role of the legislature is invoked to give credence to the goal of accommodating victims’ interests. Lord Hutton in particular refers to the earlier decision of *Brown v. Stott*,⁹⁷ where consideration was given to the qualification of a right under Article 6, by considerations of the public interest in the need to address the high incidence of injury and deaths on the road through misuse of motor vehicles: “Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for.”⁹⁸

Lord Hutton, although underlining the pre-eminence of the accused’s rights, and the limitations on the public interest here, nonetheless acknowledges the latter’s role concluding that “...the right of a defendant to call relevant evidence, where the absence of such evidence may give rise to an unjust conviction, is an absolute right which cannot be qualified by considerations of public interest, no matter how well-founded that public interest may be.”⁹⁹

Although vindicated on this occasion in *A.*, therefore, a fissure in the pre-eminence of the rights of the accused is identifiable in so far as the public interest - closely identified with legislative action - is concerned. The future potential of such reasoning is evident from the judgment of Lord Hope,

⁹⁶ Per Lord Hutton at para 143.

⁹⁷ [2001] 2 W.L.R. 817.

⁹⁸ [2001] 2 W.L.R. 817 per Lord Bingham at 836.

⁹⁹ Per Lord Hutton at para 161.

where he finds the legislation compatible with Article 6.¹⁰⁰ Lord Hope constructs a 'balance' "...between the right of the defendant to a fair trial and the right of the complainant not to be subjected to unnecessary humiliation and distress when giving evidence."¹⁰¹ He invokes the terrorism precedent of *Ex parte Kelibene*¹⁰² to assert that "...it is appropriate in some circumstances for the judiciary to defer, on democratic grounds, to the considered opinion of the elected body as to where the balance is to be struck between the rights of the individual and the needs of society."¹⁰³

There could not be greater proof of the power of the public mood than in this use of a terrorism precedent: it represents another context where the public feelings invoked deem rights diminution acceptable. The point is, however, that once the fissure is extant, the question of what is found to justify derogation depends then precisely on the public mood. The fact that one may feel comfortable with the group identified to benefit from the public interest in victims' rights, as in the case of rape victims perhaps, should not hide the broader truth that the loss is that of all defendants, and the corresponding strength of the legislature not confined to areas of which we might approve. In fact the unattractiveness of the defendant may be a sure sign of his merit in attracting all the safeguards we might give. Ultimately the English courts have demonstrated an appreciation of fair trial rights in *A.*, but it is one loaded with the potential for exception. Despite the outcome in *A.*, one could well predict a series of decisions in which the English courts will now balance rights to the effect of accommodating victims' rights, while simultaneously

¹⁰⁰ Lord Hope effects this without having recourse to the strained interpretations availed of under section 3 of the Human Rights Act 1998, by the other Law Lords.

¹⁰¹ Per Lord Hope at para 51.

¹⁰² [2000] 2 A.C. 326.

¹⁰³ Per Lord Hope at para 58 referring to *R v. D.P.P. Ex parte Kelibene* [2000] 2 A.C. 326.

diminishing those of the accused. The overt use of the concepts of legitimate aim and proportionality¹⁰⁴ to justify interference with the Article 6 (implied) right is evident in a number of these judgments.¹⁰⁵ Lord Hope's in *Brown v. Stott* is particularly noteworthy in its invocation of a Canadian concept that a right is not absolute but "contextually sensitive".¹⁰⁶ This Lord Hope equates as similar to the European Court's examination of issues as to legitimate aim and proportionality. He refers to other jurisdictions in Europe with similar provisions and concludes, "...the restriction is regarded as having a legitimate aim and as striking the right balance between the general interest of the community and the fundamental rights of the individual".¹⁰⁷

Constructions of 'public interest', balancing exercises, and determinations of credibility and hence fact finding are demonstrably affected by the public winds of change. Judicial statements of principle and rights however conceal that dimension to justice. This facilitates a process of change which imperceptibly, but crucially, changes the nature of

¹⁰⁴ [2001] 2 W.L.R. 817 at 856.

¹⁰⁵ In *R. v. Forbes* [2001] 3 W.L.R. 428; [2001] 4 All E.R. 97 the failure to hold an identification parade was held not to be a breach of Article 6, when assessed in the context of the whole history of the proceedings. Furthermore in *R v. D.P.P. Ex parte Kelibene* [2000] 2 A.C. 326 reverse onus provisions have been held to be compatible with Article 6. *Brown v. Stott* [2001] 2 W.L.R. 817 provides overt evidence of the changing nature of the accused's procedural rights where the 'public interest' in combating RTAs was held to justify interference with the privilege against self-incrimination. More recently in its classification of the burden imposed on the accused under the Misuse of Drugs Act 1971 (s. 28(3)) as 'evidential' not persuasive thus 'saving' it, (in the drugs context), the House of Lords in *R. v. Lambert* [2001] 3 W.L.R. 206 demonstrates the malleable nature of Article 6 rights.

¹⁰⁶ Per Iacobucci J. in *R. v. White* [1999] 2 S.C.R. 417 at 427, regarding the principle of self-incrimination, which was held to be a principle of fundamental justice under section 7 of the Charter.

¹⁰⁷ Lord Hope in *Brown v. Stott* [2001] 2 W.L.R. 817 at 856.

‘fairness’ or ‘due process’ in a context where all-pervasive is the assumption that these remain the same.

Ashworth¹⁰⁸ has made evident his dislike of the practice of ‘balancing’ rights in the context of such proceedings:

The scourge of many debates about criminal justice policy is the concept of ‘balance’... The principled approach to criminal justice... is explicitly normative. It sets out various rights and principles that ought to be safeguarded... One consequence of the Human Rights Bill 1998 will be to bring rights into a central position.

With regard to assessments of Article 6 fair trial rights and the particular ‘balancing’ exercises beloved of members of the judiciary, Ashworth reminds us that Article 6 is a strong right - unlike say Articles 8-11 which are qualified rights. Hence his warning with regard to this kind of reasoning in that context:¹⁰⁹

Any argument to the effect that a right implied into Article 6 should be restricted out of deference to the “public interest” should be required to be at least as strong, and probably stronger, than a similar argument for justifying interference with one of the qualified rights under Articles 8-11. The right to a fair trial and its constituent elements should surely be given a greater weight, in such calculations...[T]he Strasbourg decisions refer frequently to one doctrine ...that no restriction should be such as to “destroy the very essence of the right”. This doctrine places distinct

¹⁰⁸ Ashworth, *The Criminal Process* (2nd. ed., 1998), p. 307.

¹⁰⁹ Ashworth, “Criminal Proceedings after the Human Rights Act: The First Year” [2001] *Crim. L. R.* 855, 856.

limits on “public interest” balancing of the kind that some British judges have found attractive.

Ashworth makes the point that to accept that these rights are not absolute is “not to concede that they may be ‘balanced away’ by being compared with a general public interest and put in second place.”¹¹⁰

Although the development in *A.* appears to endorse traditional pre-accused’s rights (such as untrammelled cross-examination), closer examination reveals the potential for ‘public interest’ (as legislatively construed) incursions. ‘Fair trial’ rights prove vulnerable and protection of the accused is diminished, in the context of fact finding particularly where media pressure and popular wisdom influence and indeed overwhelm assessments of credibility and hence guilt.

VI. COUNTER-CULTURE: COUNTER-BALANCING POPULAR WISDOM WITH A PRO-DEFENCE BIAS.

Within the Irish and English contexts, there is some evidence of judicial scepticism regarding recent changes to criminal procedure to accommodate witnesses, other than the accused, in terms of implications for fair trial rights. On the other hand, prosecutorial bias is evident in the legislature's and popular view regarding certain offences - now including those of sexual offences and historic sex abuse claims.¹¹¹

In Ireland, Hardiman J. has counseled caution in face of historic sex abuse claims, and McGuinness J. identified a parallel response equally reprehensible to that previously applicable to sex abuse victims - now affecting the accused. The construction of fairness in sexual offences may have

¹¹⁰ [2001] Crim. L. R. 855, 866-867.

¹¹¹ Regarding the recovered memory/false memory debate, see generally Nachson, “Truthfulness, Deception and Self-Deception in Recovering True and False memories of Child Sexual Abuse” (2001) 8 *International Review of Victimology* 1.

resulted in the accused's presumption of innocence being usurped by a presumption of guilt. A possible solution emerges in *P. O'C.*¹¹² which revives a rule of evidence cautious of credibility (corroboration), in a context where a judicially carved exception to expeditiousness in cases of historic sex abuse was predicated on victims' needs. 'Fairness' in the House of Lords decision in *A.*¹¹³ operated to include evidence previously excluded under legislation with a victims' rights mandate. Yet in *A.* the House of Lords also invoked the triple danger of opposition of the accused and victims' rights in the criminal justice system; deferring to popular legislative sentiment; and raised the specter of future 'contextual sensitivity' in rights evaluation.

From one perspective, both Irish and English case-law reveal change being stymied by fairness arguments. From another, fairness is revealed, as a moveable feast dependent on legislative desire and popular wisdom, even to the extent of influencing judicial construction of fair trial needs in context. What is common to judicial reasoning in both jurisdictions, is ultimate rejection of popular sentiment - although one might query how strongly in *A.* Certainly one might question whether the mechanism for implementation used - judicial mandates regarding fairness - provide an adequate vindication of an accused's fair trial rights.

While the decision in *A.* in England might be taken as a positive reflection on the position of the accused's fair trial rights, the European precedents invoked in *Forbes*,¹¹⁴ *Brown v. Stott*,¹¹⁵ and *Kebilene*,¹¹⁶ where *Murray*¹¹⁷ is consistently

¹¹² [2000] 3 I.R. 87.

¹¹³ [2001] 1 W.L.R. 789.

¹¹⁴ *R. v. Forbes* [2001] 2 W.L.R. 1; [2001] 4 All E.R. 97.

¹¹⁵ *Brown v. Stott* [2001] 2 W.L.R. 817.

¹¹⁶ *R. v. D.P.P., ex parte Kebilene* [2000] 2 A.C. 326.

¹¹⁷ *Murray v. United Kingdom* (1996) 22 E.H.R.R. 29.

preferred to *Saunders*,¹¹⁸ indicate that those decisions vindicating fair trial rights are purely symbolic. Article 6 may not offer any protection for those who are seen as abhorrent - the victims of current witch-hunts and collective wisdom. There has certainly been ample evidence in both jurisdictions of accommodation of victims' rights, at the expense of those of the accused. This is perhaps understandable. It is human nature to want to be on the side of the angels, but there must be a recognition amongst those of us concerned with criminal law, that that is a moveable feast, and that for criminal lawyers it is with the devils we ride. The solution here may not lie however in rights discourse, and the dictates of fair trial, but in our approach to fact finding itself. The solution may indeed lie in the direction of judgments like Hardiman J.'s, re-invigorating corroboration arguments to drown the rush of certainty and belief. Taking the current popular culture and context into account, one can certainly argue for a pro-accused approach in interpreting the 'story' of a criminal trial. This is particularly so in relation to any crime that is currently the subject of a perceived 'crisis' or 'witch-hunt', where perpetrators are thereby distanced from all fact finders: jury, judge, legislator, and public. These cases arguably require an adjustment in terms of credibility issues, as at a fundamental level we cannot recognise their 'story' - it literally makes no sense in equal measure as the opposing tale does. To make such an assumption may undoubtedly be uncomfortable for us as a society collectively and individually - as we do not like these people and are not 'like' them. On the other hand, not to do so, and to risk using the criminal process to draw that distinction is not just wrong - it is a travesty and a perversion of justice. It is surely to those whom we regard as perverse that we owe most, or we pervert not only the course of justice, but by definition, ourselves.

The rules of evidence are often criticised as being of another climate or time. It may be, however, that it is precisely when they reject the certainties or tenor of our own

¹¹⁸ *Saunders v. United Kingdom* (1996) 23 E.H.R.R. 313.

culture and values, that they are necessary to counter-balance our prejudices as fact-finders.

To leave matters subject to the exercise of judicial discretion on an individual basis (as reform of the corroboration rules has done), or subject to community feeling, manifest through the jury on the occasion when they feel so moved, will most likely result in the issue being determined by non-identification with the (victim or) accused: prostitute, drug dealer, paedophile, rapist - those currently furthest from us and so 'other'. Avoidance of such 'scape goating' and arbitrary justice, requires rooting the rules of evidence and fact-determination in a pro-accused, pro-defence rights bias, which may be the only guarantee of justice in the aftermath of media witch hunts. Reliance on judicial watchfulness alone - even with an increased rights mandate - does not prove a sufficient or, despite the evidence of the English and Irish courts' periodic breaks with legislative and public consensus, constant guarantee.

The inevitable constraints of fact determination and application of evidentiary rules - not least the adjudication of fairness - require more than is promised by a general judicial mandate of fair trial. An overarching remit, applicable in all contexts, but most particularly those of current 'popular' concern, to vindicate the accused's rights, through application of the rules of evidence and directing finders of fact to err on the side of the accused, may indeed be a pre-condition to justice.