

Anthony Donnelly, Plaintiff, v. Ireland, The Attorney General and The Director of Public Prosecutions, Defendants [1995 No. 1073 P; S.C. No. 11 of 1997]

High Court

3rd December, 1996

Supreme Court

22nd January, 1998

Constitution - Right to trial in due course of law - Plaintiff charged with sexual offence against child - Child witness testifying via live video link - Whether plaintiff entitled to physically confront child witness in open court - Criminal Evidence Act, 1992 (No. 12), ss. 12 and 13 - Constitution of Ireland, 1937, Articles 38.1, 40.1 and 40.3.

Evidence - Plaintiff charged with sexual offence against child - Child witness testifying via live video link - General presumption of trauma in favour of child witnesses - Mandatory procedure for live video evidence unless trial judge sees good reason to the contrary - Burden of proof - Interference with rights to fair trial - Criminal Evidence Act, 1992 (No. 12), ss. 12 and 13 - Constitution of Ireland, 1937, Articles 38.1, 40.1 and 40.3

Article 38.1 of the Constitution of Ireland, 1937, provides that: "No person shall be tried on any criminal charge save in due course of law".

Article 40.3.1 provides that: "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen".

Part III of the Criminal Evidence Act, 1992, provides for the reception of evidence in certain circumstances by means of a live video link.

Section 12 of the Act of 1992, which is contained in Part III, provides, *inter alia*, that live video evidence may be adduced at the trial of a sexual offence.

Section 13 of the Act of 1992, provides, *inter alia*, that in such proceedings, a person other than the accused may give evidence through a live video link; (a) if that person is under 17 years of age, unless the court sees good reason to the contrary, (b) in all other cases with the leave of the court.

The plaintiff was charged with a sexual offence against a young boy. Prior to his trial, he was informed by the Director of Public Prosecutions that it was intended to present the child's evidence at the trial by means of a live video link. The plaintiff objected to this proposal. However, his objections were overruled by the trial judge who allowed the child to testify via the live video link.

The plaintiff was convicted and sentenced to five years imprisonment.

The plaintiff instituted proceedings challenging the constitutionality of s. 13 of the Criminal Evidence Act, 1992, on the grounds that it interfered with his right to a fair trial. In particular, it was argued that the plaintiff had a constitutional right to physically confront his accuser in open court. It was also argued that the general presumption of trauma created by s. 13 for child witnesses testifying in such circumstances placed an unconstitutional and unfair burden of proof on an accused who would have to prove that the child was capable of testifying in open court.

Held by Costello P. in dismissing the plaintiff's claim 1, that the duty of the court in a criminal trial was to ensure a fair trial for the accused. This involved ensuring that the accused had an adequate opportunity to know and meet the case being made against him and to have the case tried in his presence before an independent court. The procedures applied throughout the trial process must be fair. However, the general view of what was fair and proper in relation to criminal trials was always the subject of change and development.

The State (Healy) v. Donoghue [1976] I.R. 325 applied.

2. That the constitutional right of an accused to a fair trial was a superior right. If s. 13 of the Criminal Evidence Act, 1992, breached the guarantee of fair procedures there could be no question of trying to balance the rights of the accused against those of the community.

3. That the right of an accused to physical confrontation with those testifying against him was not a constitutionally protected right.

White v. Ireland [1995] 2 I.R. 268 approved.

4. That the effectiveness of an accused's right to cross examine was not adversely affected merely because the witness was testifying from outside of the physical confines of the courtroom.

5. That, having established that there was no unfairness involved in allowing evidence to be given in the absence of physical confrontation, the legislature was free to choose the means by which such evidence was to be tendered.

The plaintiff appealed to the Supreme Court.

Held by the Supreme Court (Hamilton C.J., O'Flaherty, Denham, Barrington and Murphy JJ.) in dismissing the appeal and affirming the order of the High Court, 1, that it was well established that the right of an accused to a fair trial was a superior right in the hierarchy of constitutional rights, insofar as it is possible or desirable to construct one.

2. That the right of an accused to a fair trial did not include in all circumstances the right to physical confrontation with his accuser and consequently there was no such constitutional right. Therefore, the circumstances in which physical confrontation was denied an accused was a matter for the Oireachtas and did not require case-by-case determination.

Coy v. Iowa (1987) 487 U.S. 1012; *Maryland v. Craig* (1989) 497 U.S. 836 considered.

3. That fair procedures were satisfied by requiring that the witness give evidence on oath which was subject to cross-examination while the witness was under the scrutiny of the judge and jury.

In re Haughey [1971] I.R. 217; *The State (Healy) v. Donoghue* [1976] I.R. 325 approved.

Cases mentioned in this report:-

California v. Green (1970) 399 U.S. 149.

Coy v. Iowa (1987) 487 U.S. 1012.

D. v. Director of Public Prosecutions [1994] 2 I.R. 465; [1994] 1 I.L.R.M. 435.

Dowdell v. United States (1911) 221 U.S. 325.

In re Haughey [1971] I.R. 217.

Kentucky v. Stincer (1987) 482 U.S. 730.

Kirby v. United States (1899) 174 U.S. 47.

Maryland v. Craig (1989) 497 U.S. 836.

Mattox v. United States (1895) 156 U.S. 237.

Pennsylvania v. Ritchie (1987) 480 U.S. 39.

The State (Healy) v. Donoghue [1976] I.R. 325; (1976) 112 I.L.T.R. 37.

White v. Ireland [1995] 2 I.R. 268.

Plenary summons.

The facts have been summarised in the headnote and are fully set in the judgment of Costello P., *infra*.

By plenary summons dated the 13th February, 1995, the plaintiff sought, *inter alia*, the following reliefs:-

- (a) A declaration that ss. 12 and 13 of the Criminal Evidence Act, 1992, constitute an infringement of the plaintiff's right to a fair trial and in particular, the plaintiff's right to cross-examine and confront any witnesses testifying against him.
- (b) A declaration that the said sections infringe the plaintiff's constitutional right to equality before the law.
- (c) An order of *certiorari* quashing the plaintiff's conviction.

The case was heard by the High Court (Costello P.) on the 30th October, 1996.

Michael Feehan S.C. (with him *Andrew Kelly*) for the plaintiff.

Barry White S.C. (with him *Shane Murphy*) for the defendants.

Cur. adv. vult.

Costello P.

3rd December, 1996

Introduction

This is an application for declaratory relief and for an order of *certiorari* to quash an order made on the 18th March, 1994, in the Dublin Circuit Criminal Court convicting the applicant of an offence of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act,

1990. The application challenges the constitutional validity of certain provisions of the Criminal Evidence Act, 1992, which permit the reception of evidence in certain circumstances by means of a live television link. The relevant facts are as follows:-

The facts

- (1) After a seven day trial, the applicant was found guilty on the 17th February, 1994, of an offence under s. 2 of the Act of 1990. He was sentenced on the 18th March, 1994, to a term of five years imprisonment.
- (2) On the 22nd March, 1994, the plaintiff applied *ex parte* for leave to review judicially his conviction. Leave was refused by Flood J. and the plaintiff appealed to the Supreme Court. Pending this appeal the plaintiff also appealed against his conviction and sentence to the Court of Criminal Appeal. The appeal before that Court is still pending. On the 13th June, 1994, that Court released him on bail pending the hearing of that appeal.
- (3) The appeal against the refusal of leave to apply for judicial review was determined by the Supreme Court on the 1st February, 1995. The Supreme Court allowed the appeal and gave leave to apply for judicial review by way of plenary summons. Leave was given to apply for -
 - (i) A declaration that ss. 12, 13 (1) and (2) and 18 of Part III of the Criminal Evidence Act, 1992, are invalid insofar and to the extent that they are repugnant to the provisions of Bunreacht na hÉireann and in particular Articles 38.1 and 38.5 and Article 40.3 thereof.
 - (ii) A declaration that s. 13 (3) of the Criminal Evidence Act, 1992, is invalid insofar as the said provision is repugnant to the provisions of Bunreacht na hÉireann and in particular Articles 6, 34, 38.1 and Article 40.3 thereof.
 - (iii) An order of *certiorari* in respect of the plaintiff's conviction dated the 18th March, 1994, in the Dublin Circuit Criminal Court.
- (4) The plenary summons was issued on the 13th February, 1995, followed by a statement of claim on the 16th March, 1995, in which it was pleaded that (a) seven days before the trial of the plaintiff, his solicitor was informed by the Director of Public Prosecutions that the prosecution intended to rely on the provi-

sions of the Act of 1992, for the purpose of adducing evidence to the trial by means of a live video link; (b) at the trial an objection was taken by the plaintiff's counsel to this procedure, which was over-ruled, the trial judge concluding that he was satisfied that the trial was an appropriate one for the use of the video link as means by which the prosecutrix would give her evidence.

- (5) It was not considered necessary in the course of the hearing before me to give evidence as to the manner in which evidence under s. 13 was given at the plaintiff's trial. I was aware from my own experience how in practice the "live television link" referred to in the section is effected. It is explained very fully and in considerable detail by Kinlen J. in *White v. Ireland* [1995] 2 I.R. 268, and I have assumed that the link was effected in a similar way in this case. For the purpose of his application, it is important to note the following features of the system which was adopted; the witness is seen at all times by judge, jury and counsel on monitors; the witness has a monitor and when being questioned can see the questioner; the system is under the control of the trial judge and the witness need not see the accused; the witness can be cross-examined; the witness is not in the courtroom but in a specially furnished room nearby.

The Law

(a) Irish Law.

Section 12 of the Criminal Evidence Act, 1992, provides that Part III of the Act (headed "Evidence in Certain Proceedings") is to apply, *inter alia*, to a "sexual offence". Section 13 (the impugned section) provides;

"(1) In any proceedings for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link -

(a) if the person is under 17 years of age, unless the court sees good reason to the contrary,

(b) in any other case, with the leave of the court.

(2) Evidence given under subsection (1) shall be videorecorded."

It has been accepted that the reason for the enactment of s. 13 (1) (a) is that it is generally accepted that young persons under the age of 17 are likely to be traumatised by the experience of giving evidence in court and that its purpose is to minimise this trauma. It should be noted, because this forms part of the plaintiff's challenge to the section, that the section does

not require the trial judge to examine each young witness to see whether he or she would be traumatised - the trial judge is required to assume that this will be so and only if there is good reason to do so will permission to give evidence in the way permitted by the section be refused. It is also accepted that the initial decision to operate the section is that of the Director of Public Prosecutions, who informs the accused of his intention so to do. If the accused objects he must show the trial judge that there exist "good reasons" why the section should not be operated. The constitutional provisions referred in the submissions are as follows:-

Article 38.1

"No person shall be tried on any criminal charge save in due course of law."

Article 38.5

Having provided that save in the case of the trial of offences under ss. 2, 3 or 4 of the Article (which do not apply in this case):-

"no person shall be tried on any criminal charge without a jury."

Article 40.3

"The State guarantees in its law to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

Article 40.1

"All citizens shall, as human persons, be held equal before the law."

The constitutional validity of s. 13 has already been considered by the High Court. Kinlen J., in *White v. Ireland* [1995] 2 I.R. 268, having heard detailed evidence from an officer of the Department of Justice as to how the video link operated in practice, and having reviewed the relevant American authorities concluded that an accused enjoyed no constitutionally protected right to have witnesses physically present in court whilst giving evidence. The plaintiff in these proceedings submits that this conclusion was wrong and asked me not to follow it.

(b) United States Law.

The submissions in this case referred in some detail to the views of the American Supreme Court on the "right to confront" witnesses which is conferred on an accused person by American law. This is a right which, unlike the Irish Constitution, is expressly contained in the text of the Constitution and is not one which the courts have implied into it. The sixth amendment, which deals generally with the rights of an accused in a criminal trial, provides;

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.”

This clause has been subject to considerable judicial consideration. Its requirement that an accused is to enjoy “the right to be confronted with the witnesses against him” was firstly seen as a means of ensuring that oral, not written, testimony would be adduced at the trial. This was made clear in *Mattox v. United States* (1895) 156 U.S. 237 at pp. 242 and 243, where it was stated:-

“... the primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of personal examination and cross-examination of the witnesses in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”

It will be noted that this judgment refers to the amendment as conferring a right to compel a witness *to stand face to face with the jury* so that they could evaluate his evidence. Later however, it was construed as, in addition, conferring a right on an accused to have the witnesses give evidence in his presence. This aspect of the “confrontation clause” is a right which was considered in considerable depth in two recent decisions of the Supreme Court, which I must examine as they have featured prominently in counsel’s submissions before me.

Coy v. Iowa (1987) 487 U.S. 1012, was a case in which a statute of the State of Iowa allowed a court to confine a party behind a screen which permitted the party to see and hear the child during the child’s testimony but did not allow the child to see or hear the party. The accused was charged with sexually assaulting two 13 year-old girls and a large screen was placed between him and the witnesses during their evidence. Objection was taken to these proceedings on the ground that the confrontation clause gave him the right to face-to-face confrontation. This objection was over-ruled and the accused was convicted. The Supreme Court was called

on to decide whether the Iowa law was constitutional. The judgment of the majority confirmed that the sixth amendment guaranteed a face-to-face meeting with witnesses appearing before the trier of fact and for the criminal defendant, the right physically to face those who testify against him and the right to conduct cross-examination. Having concluded that the statute clearly violated the accused's right to a face-to-face encounter, the judgment of the majority then turned to the argument advanced on the part of the State, namely that the interests of the accused were outweighed by the necessity of protecting victims of sexual abuse. The judgment observed that the court would leave to another day the issue whether any exception exists which would permit the court to hold that the confrontation clause should give way to more important interests. It pointed out however, that the statute in suit created a "legislatively imposed presumption of trauma" and that the exception created by this statute could not be justified by any conceivable exception "Since there have been no individualised findings that these particular witnesses needed special protection". (p. 1021).

In *Maryland v. Craig* (1989) 497 U.S. 836, the court was considering a statute which provided that in a case of abuse of a child a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television, but before this could be done the judge was required to determine that the testimony by the child victim in the courtroom would result in the child suffering serious emotional distress such that the child could not reasonably communicate. The prosecution and defence counsel and the child were in the separate room where the child was examined and cross examined, the judge, jury and defendant remaining in the courtroom where the testimony was displayed. At the trial, this statute was unsuccessfully challenged by the accused who was then found guilty by the jury. Eventually, the Supreme Court was required to consider the statute's constitutional validity. It concluded that the sixth amendment did not confer on an accused a guarantee of an absolute right to a face-to-face meeting with the witnesses against him at the trial, that its central purpose was to ensure the reliability of the evidence against an accused, that this is ensured by the combined effects of the elements which make up the concept of confrontation, namely the physical presence of the witnesses, the giving by the witnesses of testimony under oath, the opportunity to cross-examine the witnesses and the observation of the demeanour of the witness by the trier of fact. Although face-to-face confrontation was the core of the confrontation clause values, it is not an indispensable element

of the confrontation right. The majority concluded that the right was not an absolute one. But it could not be easily dispensed with and the denial of the right could only be permitted where it is necessary to further an important public interest and where the reliability of the evidence can otherwise be assured. The State of Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case was sufficiently important to justify the denial of the right by the special procedure contained in the statute. But a case of necessity must be made in each individual case and the law which denies the right must provide that the court should hear evidence and determine in respect of each witness whether the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness and the trial court must find that the child would be traumatised not by the courtroom generally but by the presence of the accused. The court therefore held that the Maryland Court of Appeal was correct in deciding that (1989) 497 U.S. 836 at p. 857, "although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a 'case-specific finding of necessity'."

The plaintiff's submissions

- (1) The plaintiff submits that an accused person has the right to confront physically his accuser in open court. This right is part of the right referred to as the right of confrontation. It is claimed that this right is an essential part of the plaintiff's right to due process because it is the means by which an accused can effectively test the veracity of the evidence and the credibility of the character of his accuser. This, it is said, cannot effectively be achieved unless a witness who has made an accusation is physically in the presence of the person accused. This right is to be inferred as a distinct and separate constitutional right. Alternatively the right of an accused to be able effectively to cross-examine his accuser is a right guaranteed by the Constitution (*In re Haughey* [1971] I.R. 217) and the effectiveness of cross-examination requires the physical presence in court of an accuser and the physical confrontation between the accuser and accused, the right is part of the right to cross-examine.
- (2) Once it is accepted that the right to confrontation is constitutionally protected there can be no question of balancing this right with those of the prosecution or of the victim of a crime. In the

hierarchy of rights, the accused's right to fair procedures is superior to the community's rights to prosecute (*D. v. Director of Public Prosecutions* [1994] 2 I.R. 465).

- (3) Alternatively, if the exercise of the right can be restricted in any way it is submitted that this must be the minimum restriction necessary to achieve the objectives of the legislation. Section 12 goes beyond what is necessary to achieve the objectives of the Act of 1992. The law could provide (as legislation elsewhere provides) that a decision to use a television link should be made on a case by case basis in the light of the evidence adduced in each case and not on the basis of presumption that it should be used in every case where a witness is under the age of 17. Furthermore, the section's interference is not permissible because it places an onus on an accused to establish the competence of the witness to give evidence in court in the presence of the accused which is an unfair procedure.
- (4) Even if there is no constitutional right to the form of confrontation urged on the plaintiff's behalf s. 13 is unconstitutional because it interferes with the plaintiff's constitutional right to fair procedures in another way. The procedures are unfair in that they are based on a presumption that a witness under the age of 17 would be traumatised if required to give evidence in court in the presence of the accused and places an unfair onus on the accused to establish the contrary. Furthermore, the procedures are unfair as they do not require a case by case review by the trial judge of the effect of a physical confrontation in court on each witness whose evidence it is proposed to be given by television link.

The defendants' submission

- (1) It was submitted that the decision of the Supreme Court in *In Re Haughey* [1971] I.R. 217, stated that the basic requirements which were to be afforded to every person accused of a serious offence were (a) that the accused person be furnished with a copy of the evidence to be tendered against him, (b) that an accused person be allowed to cross-examine by counsel his accuser, (c) that the accused be allowed to give rebutting evidence and (d) the accused be permitted to address the court by counsel in his own defence. It was submitted that neither in that case nor in any other case did the Supreme Court suggest there was to be an implied

right to a face to face confrontation between an accuser and the accused by virtue of the Constitution, that such a confrontation is not an essential part of the plaintiff's right to due process. Furthermore, the use of live television does permit an effective cross-examination and an effective way of testing the veracity of an accuser's evidence and the credibility of an accuser's character. There is, therefore, no right to a "physical confrontation" between an accused and his or her accuser recognised by the Constitution.

- (2) The matter in issue in this case has been determined by Kinlen J. in *White v. Ireland* [1995] 2 I.R. 268. It was submitted that the Court should follow this decision.
- (3) The right now advanced on behalf of the plaintiff was not one recognised at common law and no case-law has been adduced on behalf of the plaintiff to support the right now claimed. The United States authorities must be considered in the light of the fact that the sixth amendment contains a confrontation clause. It was further submitted that the U.S. Supreme Court in *Maryland v. Craig* (1989) 497 U.S. 836, decided that the confrontation clause was not a guarantee of an absolute right to face to face confrontation and that its denial was permitted if it was necessary to further an important public policy where the reliability of the witnesses testimony was otherwise assured. The U.S. Supreme Court recognised that the constitutional provision did not prohibit a law which denied the right to physical confrontation in certain circumstances.
- (4) It was submitted that the procedures in the present case met the standards of constitutional justice required by the Constitution. These included (a) approximate physical presence, (b) oath, (c) cross examination, (d) notification of the case to be made against the accused and (e) observation of the demeanour of the witnesses by the triers of fact. These were elements referred to in *Maryland v. Craig* (1989) 497 U.S. 836 at p. 846, as elements of confrontation "ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings".
- (5) The Act of 1992 is a constitutional and proportionate response to the problems encountered by young persons in criminal trials. It does not create any special unfairness. The Constitution itself recognises that laws may have regard to differences of capacity

and social function and so the Constitution permits laws to be passed which would enable children to give evidence who may be traumatised by standard courtroom procedures and the physical presence of the accused person.

- (6) Section 13 does not impose an unconstitutional burden of proof upon an accused person. An accused person is entitled to make objections to the trial judge and may request the court to consider any allegation that medical or psychiatric evidence should be required to show that a child accuser should testify in open court. In fact, the words of s. 13(1)(a) envisage the exercise of a case-by-case consideration in circumstances where an accused may object to the adoption of the sections procedures and permits the trial judge to regulate the exercise of the powers conferred by the section in any way the trial judge considers proper.

Conclusions

There has been in recent years both in this country and elsewhere a growing concern for the victims of crime and a desire to minimise, insofar as it can be reasonably done, the trauma associated with the giving of evidence in a criminal trial. This concern is for all victims of crime but has been most particularly focused on the victims of sexual assault. This has led, in this country and elsewhere, to consideration as to how minimise the trauma which children who are victims of such crimes suffer from giving testimony in open court. The legal problems involved have been carefully researched and considered in this country by the Law Reform Commission, firstly in a Discussion Paper and then in a Report which directly led to the enactment of s. 13(1)(a), the section impugned in these proceedings.

When the validity of a statute enacted to assist victims of crime is challenged on constitutional grounds, this challenge can be formulated in different ways. For example, it may be suggested that the victims of crime have “rights” and that an accused has “rights” and that the court’s task is to balance these rights, and decide whether the rights of the accused have been unduly restricted by laws designed to uphold victims rights. It seems to me, however, that this is not the way to approach the task with which the Court is now confronted. There is a specific and explicit constitutional requirement [Article 38.1] relating to criminal trials and I think the Court should consider firstly what that requirement is. It has been authoritatively

explained by O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325. At p. 349 he stated as follows:-

“Article 38 deals specifically with a criminal trial and provides that no person should be tried on any criminal charge save in due course of law. This Article must be considered in conjunction with Article 34; with Article 40, s. 3, sub-s. 1, under which ‘the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’ and with sub-s. 2 of the same section under which ‘the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen’. Being so considered, it is clear that the words ‘due course of law’ in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.”

The judgment then went on to suggest what rights a person charged with a criminal offence was afforded by the Constitution. The Chief Justice quoted with approval the views of Gannon J. in this regard as follows at p. 349:-

“Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence.”

The Chief Justice, having commented on this quotation, added at p. 350:-

“The 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.”

If, therefore, the constitutional guarantee of fair procedures is breached then the court will declare a statute which does so to be unconstitutional. What the Court must do in this case is to see whether or not s. 13(1)(a) breaches that guarantee. If it does so then there can be no question of balancing conflicting rights - if the procedures are unfair this section must be condemned.

The plaintiff in this case had, in his trial in the Dublin Circuit Criminal Court the benefit of all the procedures which the Supreme Court identified as being necessary to constitute a fair trial. He had notice of the evidence which was to be given against him. He was represented by counsel. The witnesses were examined and cross-examined and were seen at all times by the jury (as well as the trial judge and counsel) by means of the television link. What has to be determined, therefore, is whether the trial was unfair because the children who accused him of the crime with which he was charged did not give evidence in his presence. The unfairness involved, it is submitted, was this; (a) it is well recognised that it is more difficult for a false accuser to lie successfully in the presence of the person wrongfully accused than in his or her absence and (b) if the safeguard which the physical presence of an accuser and the accused is withdrawn (as is done by the impugned section) the trial becomes unfair.

It is, of course, an undeniable fact that children may be manipulated by malevolent adults or, in some cases, by over-zealous social workers into making false accusations of sexual abuse and it is obvious that fair procedures require that there are proper means to assess the credibility of all the testimony in the prosecution case, including that of child witnesses. The question, therefore, is whether the existing procedures without a physical confrontation, are fair to the accused. I think they are. It may well have been considered necessary at the end of the 18th century when criminal procedures were very different to what they are today to require a face-to-face confrontation between the accused and his or her accuser. I do not think that in modern Ireland a criminal trial becomes unfair if there is not such confrontation. The jury in a trial in which the s. 13 procedures are adopted will see the witness at all times. It will be able to evaluate the manner in which the child gives his or her testimony and his or her reaction to any suggestion that he or she is lying or that he or she has been manipulated. It seems to me that the absence of a physical confrontation between the witness and the accused will have no significant effect on the ability of a false accuser to mislead a jury and I do not think that the jury's assessment of the credibility of a witness will be compromised by the fact that the witness does not see the accused when giving evidence. It

follows, therefore, that the procedures allowed by the section are not unfair.

I am strengthened in the conclusions which I have reached by a number of other considerations.

The Law Reform Commission published a consultation paper on "Child Sexual Abuse" in August, 1989. It considered the constitutional issue which has been raised in these proceedings (see p. 136 and following pages) and it concluded that:-

"There is, accordingly, no authority for the proposition that a constitutional right of physical confrontation, as distinct from a right to cross-examination, can be derived from the guarantee of fair procedures" (p.139).

The paper went on to consider what were the proper procedures to be adopted and in a criminal trial and, in particular, whether there should be an absolute right for the prosecution to use the non-confrontation procedure or whether certain matters should first have to be proved to the satisfaction of the court, *e.g.* a risk of serious psychological trauma to the child. It examined the law in the United States on this subject and concluded that the Irish courts in a criminal case would insist, with few exceptions, on a right to *cross-examine* but not on a right to physically *confront* State witnesses (p. 145).

The Law Reform Commission examined proposals by which a child could give evidence by means of closed circuit television. It referred to the fact that 24 American States had enacted legislation to permit child victims to testify by this means, that England, New South Wales and other countries had also enacted legislation to permit the use of closed circuit television, and that the Victorian Law Reform Commission and the Scottish Law Reform Commission had also recommended its use (p. 152). Its provisional recommendation was that the option of enabling the child to give evidence by means of closed circuit television should be adopted as the Law Reform Commission did not think that the use of close circuit television should be excluded on constitutional grounds or on the grounds of impracticality or expense (p. 179).

After consultation with interested parties the Law Reform Commission produced its report on "Child Sexual Abuse" in September, 1990. It pointed out (p. 68) that it had received no submissions dissenting from the conclusion expressed in the discussion paper that a right to confront one's accuser did not enjoy the same constitutional status as the right to cross-examine an accuser (p. 68). It went on to consider an objection to

the use of close circuit television to the effect that a camera did not capture the true "body language" of a witness and pointed out:-

"Given a properly positioned camera and a clear picture, we fail to see why not. This deficiency does not seem to have arisen in practice to date. It will always be preferable to conduct trials in the usual way, but if use of a live link enables more cases to be presented without distress for the complainant, while securing fair procedures for the accused, some lack of physical immediacy can be tolerated" (p. 71).

It reiterated that it had received no submissions opposed to the introduction of close circuit television and recommended (p. 72) that:-

"... use of closed circuit television (or, if unavailable, a screen) should be the rule where a witness in these cases is under 17 years of age unless the Court, for special reasons, decides otherwise."

This proposal was accepted by the Government and approved by the Oireachtas and was enacted in section 13 (1) (a).

The conclusion of the Law Reform Commission that its proposals were constitutionally valid was, of course, a legal opinion. What is relevant in the present context is that its conclusion must be regarded as an expression of a considered view on the moral issue involved and of an opinion that its proposals were not in any way unfair to accused persons. Similarly, the adoption in other jurisdictions with similar legal traditions as ours of legislation permitting evidence by close circuit television in criminal trials is relevant. The statutory means by which evidence is given by close circuit television is different in different jurisdictions and the circumstances in which the procedures may be permitted vary. But the legislation in other countries involves the absence of a physical confrontation between the accuser and the accused. The clear implication is that this was not regarded as unfair to the accused either by the Law Reform Commissions which recommended them or the legislatures which enacted them. Legislators in this country and elsewhere can, of course, err but it is of considerable significance in deciding a basic moral issue such as procedural fairness in a criminal trial to find that the absence of a physical confrontation between an accused and his or her accuser is not regarded in itself as unfair in other common law jurisdictions.

I am satisfied therefore that the section does not infringe the plaintiff's constitutional right to fair procedures. As a corollary to this it follows that the right to a physical confrontation by an accused of his or her accusers is not a constitutionally protected right. It also follows that the Court is not required to consider whether the section has impermissibly restricted the exercise of a protected right.

There are other consequences flowing from the conclusions I have reached which dispose of the other issues in the case:-

- (a) The constitutional right to fair procedures includes the right to cross-examine witnesses in a criminal trial. For reasons already explained, I do not think that the effectiveness of this right is adversely affected if it takes place when the witness is not in the physical presence of the accused. Accordingly, I cannot agree that the section is invalid because it interferes with an accused's right of cross-examination.
- (b) It will be recalled that it was urged that even if the accused had no constitutionally protected right to a physical confrontation the procedures adopted by s. 13 (1) (a) were unfair (and therefore unconstitutional) because (i) they did not require a case by case determination of the need to apply the new procedures and (ii) they place an unfair onus on an accused in that the accused is required to establish the witness' competence to undertake a face-to-face confrontation. However, once it is established that there is no unfairness involved in allowing evidence to be given in the absence of a physical confrontation then the Oireachtas is free to adopt the proposals of the Law Reform Commission as to the circumstances in which the procedures will be permitted or to enact legislation so as to require the trial judge to decide the point on evidence to be adduced in a case by case basis. The adoption of the Law Reform Commission's proposals was constitutionally permissible once it is established that there is no unfairness in permitting the absence of a face-to-face confrontation.

I agree, therefore, with the conclusions of Kinlen J. in *White v. Ireland* [1995] 2 I.R. 268. I am satisfied that the section is not invalid. Accordingly, I dismiss this application.

The plaintiff appealed to the Supreme Court by way of notice of appeal dated the 7th June, 1997.

The appeal was heard by the Supreme Court (Hamilton C.J., O'Flaherty, Denham, Barrington and Murphy JJ.) on the 9th December, 1997.

Blaise O'Carroll S.C. (with him *Michael Feehan S.C.* and *Andrew Kelly*) for the plaintiff: It is more difficult for a false accuser to lie in the

presence of the accused, and if that safeguard of physical confrontation is withdrawn, the trial becomes unfair: *Coy v. Iowa*; *Maryland v. Craig*. Even if such right does not exist, the impugned provisions are unfair in that they do not require a case-by-case determination of the need to apply the special procedures and they place an unfair onus on accused to require him to establish the competence of the witness to physically confront the accused.

Barry White S.C. (with him *Shane Murphy*) for the defendants: There is no right express or implied to physical confrontation. The United States authorities cited are of reduced utility in that they were founded on differently worded constitutional provisions.

Cur. adv. vult.

Pursuant to the provisions of Article 34.4.5 of the Constitution of Ireland, 1937, the decision of the Supreme Court was pronounced by a single member.

Hamilton C.J.

22nd January, 1998

This is an appeal brought by the above-named Anthony Donnelly (hereinafter called the plaintiff), against the judgment of the then President of the High Court (Costello P.) delivered on the 9th December, 1996 and the order made in pursuance thereof on that date whereby the plaintiff's claims for:-

- (1) a declaration that ss. 12, 13 (1) and (2) and 18 of Part III of the Criminal Evidence Act, 1992, are invalid insofar and to the extent that they are repugnant to the provisions of Bunreacht na hÉireann and in particular Articles 38.1, 38.5 and 40.3 thereof;
 - (2) a declaration that s. 13 (3) of the Criminal Evidence Act, 1992, is invalid insofar as the said provision is repugnant to the provisions of Bunreacht na hÉireann and in particular Articles 6, 34, 38.1 and 40.3 thereof;
 - (3) an order of *certiorari* in respect of the plaintiff's conviction by the Dublin Circuit Criminal Court on the 18th March, 1994
- were dismissed.

The Criminal Evidence Act, 1992, will hereinafter be referred to as the Act of 1992.

Impugned provisions

The provisions of the Act of 1992 sought to be impugned provide as follows:-

“12. This Part applies to -

- (a) a sexual offence,
- (b) an offence involving violence or the threat of violence to a person, or
- (c) an offence consisting of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a) or (b).

13. (1) In any proceedings for an offence to which this Part applies a person other than the accused may give evidence, whether from within or outside the State, through a live television link

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- (a) if the person is under 17 years of age, unless the court sees good reason to the contrary,
- (b) in any other case, with the leave of the court.

(2) Evidence given under subsection (1) shall be videorecorded.

(3) While evidence is being given through a live television link pursuant to subsection (1) (except through an intermediary pursuant to section 14 (1)), neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown.

14. (1) Where -

(a) a person is accused of an offence to which this Part applies, and

(b) a person under 17 years of age is giving, or is to give, evidence through a live television link, the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

- (3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.”

“18. Where -

- (a) a person is accused of an offence to which this Part applies, and
- (b) evidence is given by a person (in this section referred to as “the witness”) through a live television link pursuant to section 13 (1), then -
 - (i) in case evidence is given that the accused was known to the witness before the date on which the offence is alleged to have been committed, the witness shall not be required to identify the accused at the trial of the offence, unless the court in the interests of justice directs otherwise, and
 - (ii) in any other case, evidence by a person other than the witness that the witness identified the accused at an identification parade as being the offender shall be admissible as evidence that the accused was so identified.”

The effect of the foregoing provisions of the Act of 1992 is that in proceedings for an offence to which they relate, viz. sexual offences, offences involving violence or the threat of violence to a person or offences consisting of attempting or conspiring to commit or of aiding, abetting, counselling, procuring or inciting the commission of such offences, the persons therein designated, may give evidence, whether from within or outside the State, through a live television link.

The persons therein designated are:-

1. a person under 17 years of age, unless the court sees good reason to the contrary, and
2. any other person with the leave of the court.

An accused person may not give evidence in this manner.

Persons permitted to give evidence through a live television link are not physically present in the court where a judge is presiding, the jury is assembled and the accused is present and are not required to give evidence in the presence of the accused person.

The plaintiff challenged the constitutionality of the provisions of the Act of 1992 which permitted the giving of evidence in this manner on the grounds that

- (a) the giving of evidence in this manner constituted an infringement of his right through counsel to cross-examine

and/or confront the complainant and his accusers in the presence of the jury;

- (b) such provisions discriminated unjustly and invidiously against the plaintiff in the conduct of his defence in that the prosecution was empowered to adduce evidence in the manner provided by reason only of the nature of the offence with which he was charged and the age of the witnesses to be called.

In the statement of claim delivered on his behalf he claimed -

- (a) A declaration that ss. 12, 13 and 18 of Part III of the Criminal Evidence Act, 1992, and each of them constitute an infringement of the plaintiff's right to cross-examine and/or confront the complainant and his accusers in respect of the count in the indictment laid against him in the presence of the jury; and constitute a breach of the plaintiff's constitutional rights to trial in the course of law and/or natural justice and/or constitutional justice and fairness of procedures as guaranteed by Articles 38.1, 38.5 and 40.3 of Bunreacht na hÉireann.
- (b) A declaration that ss. 12, 13(1) and (2) and 18 of Part III of the Criminal Evidence Act, 1992, and each of them, constitute an infringement of the plaintiff's right as a human person to be held equal before the law guaranteed by Article 40.1 of Bunreacht na hÉireann and is an invidious discrimination and/or a breach of the plaintiff's constitutional right to trial in due course of law and/or natural justice and fairness of procedures as guaranteed by Articles 38.1, 38.5, and 40.3 of Bunreacht na hÉireann.
- (c) A declaration that ss. 12, 13(1) and (2) and 18 of Part III of the Criminal Evidence Act, 1992, and each of them, constitute an infringement of the plaintiff's right as a human person to be held equal before the law guaranteed by Article 40.1 of Bunreacht na hÉireann and is an invidious discrimination and/or a breach of the plaintiff's constitutional right to trial in due course of law and/or natural justice and/or constitutional justice and fairness of procedures as guaranteed by Articles 38.1 and 40.3 thereof insofar as the said provisions:
 - discriminate unjustly and unfairly against the plaintiff/accused in the conduct and prosecution of his defence by reason only of the nature of the offence with which the

plaintiff/accused was charged and the age of the witness to be called on behalf of the third defendant.

Relevant constitutional proceedings

The provisions of the Constitution upon which the plaintiff relies are:-
Article 38.1 which provides that:-

“No person shall be tried on any criminal charge save in due course of law.”

Article 38.5 which provides that:-

“Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.”

Article 40.1 which provides that:-

“All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

Article 40.3.1. which provides that:-

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

The facts

The facts relevant to the determination of the issues raised in this appeal may be stated briefly, as follows:-

1. The plaintiff was charged with an offence of sexual assault contrary to s. 2 of the Criminal Law (Rape Amendment) Act, 1990, and after a seven day trial was found guilty of the offence by a jury on the 17th February, 1994.
2. On the 18th March, 1994, he was sentenced to a term of five years imprisonment.
3. On the 3rd February, 1994, some seven days prior to the date of trial the Attorney General, on behalf of the Director of Public Prosecutions, informed the plaintiff's solicitors that the Director of Public Prosecutions intended to rely on the provisions of the Act of 1992 in the said prosecution for the purpose of adducing evidence by means of a live video link through which it was intended that the complainant would give evidence to the court pur-

suant to the provisions of Part III of the Act of 1992 and ss. 12, 13 and 18 thereof.

4. Submissions were made by counsel on behalf of the plaintiff to the trial judge protesting against the adoption of such procedure on the basis that such procedure constituted an interference with the plaintiff's constitutional right to a fair trial.
5. Counsel's objections were overruled by the trial judge who concluded that he was satisfied that the trial was an appropriate one for the use of the video link as a means by which the complainant would give her evidence.
6. The complainant, who was under seventeen years of age gave her evidence through a live television link. She was in fact fourteen years of age at the date of trial.
7. As appears from the judgment of the learned trial judge it was not considered necessary in the course of the hearing before him to give evidence as to the manner in which evidence under s. 13 was given at the trial. The learned trial judge was aware from his own experience how in practice 'the live television link' referred to in s. 13 is effected and assumed, without objection, that the live television link was operated in the manner set forth in detail by Kinlen J. in the course of his judgment in *White v. Ireland* [1995] 2 I.R. 268.
8. The learned trial judge, however, noted that:
 - (i) the witness was seen at all times by judge, jury and counsel on monitors;
 - (ii) the witness had a monitor and when being questioned could see the questioner;
 - (iii) the system was under the control of the trial judge;
 - (iv) the witness did not see the accused; and
 - (v) the witness could be and was cross-examined.
9. The plaintiff did not have the opportunity of confronting physically his accuser in open court.

Proceedings in the High Court

As appears from the judgment of the learned trial judge it was submitted on behalf of the plaintiff that:-

1. an accused person has the right to confront physically his accuser in open court;

2. this right is part of the right referred to as the right of confrontation;
3. this right is an essential part of the plaintiff's right to due process because it is the means by which an accused person can effectively test the veracity of the evidence and the credibility of the character of his accuser;
4. this can not be effectively achieved unless a witness who has made an accusation is physically in the presence of the person accused;
5. this right is to be inferred as a distinct and separate constitutional right;
6. alternatively, the right of an accused to be able effectively to cross-examine his accuser is a right guaranteed by the Constitution (*In Re Haughey* [1971] I.R. 217) and the effectiveness of cross-examination requires the physical presence in court of an accuser and the physical confrontation between the accuser and the accused;
7. once it is accepted that the right to confrontation is constitutionally protected there can be no question of balancing this right with those of the prosecution or of the victim of a crime because in the hierarchy of rights the accused's right to fair procedures is superior to the community's right to prosecute (*D. v. Director of Public Prosecutions* [1994] 2 I.R. 465).

Alternatively, it was submitted that:-

- (1) if the right can be restricted in any way, such restriction should be the minimum necessary to achieve the objectives of the legislation;
- (2) section 13 goes beyond what is necessary to achieve the objectives of the Act of 1992 in that the law could have provided that a decision to use a television link should be made on a case by case basis in the light of the evidence adduced in each case, and not on the basis of a presumption that it should be used in every case where a witness is under the age of 17;
- (3) these restrictions are not permissible because they place an onus on the accused person to establish the competence of the witness to give evidence in court in the presence of the accused.

It was further submitted on behalf of the plaintiff that even if there is no constitutional right to the form of confrontation urged on the plaintiff's behalf, s. 13 is unconstitutional because it interferes with the plaintiff's constitutional right to fair procedures in that they are based on a presump-

tion that a witness under the age of 17 would be traumatised if required to give evidence in court in the presence of the accused, that an unfair onus is placed on an accused to establish the contrary and that they do not require a case by case review by the trial judge of the effect of a physical confrontation in court on each witness whose evidence it is proposed to be given by television link.

The Court does not consider it necessary at this stage to set forth the submissions made on behalf of the defendants as these will be dealt with and referred to when the plaintiff's appeal to this Court is being considered.

Conclusions of the learned trial judge

It is clear from a consideration of the learned trial judge's judgment that he recognised the primacy of an accused person's right to fair procedures as guaranteed by the provisions of Article 38.1 of the Constitution as interpreted by the courts, in particular in *The State (Healy) v. Donoghue* [1976] I.R. 325.

Having quoted certain passages from the judgment of O'Higgins C.J. in that case he went on to say at p. 334:-

"If, therefore, the constitutional guarantee of fair procedures is breached then the court will declare a statute which does so to be unconstitutional. What the Court must do in this case is to see whether or not s. 13(1)(a) breaches that guarantee. If it does so then there can be no question of balancing conflicting rights - if the procedures are unfair this section must be condemned."

He then went on to consider the issue as to whether the procedures permitted by s. 13 of the Act of 1992 were unfair to the plaintiff and stated:-

"The plaintiff in this case had, in his trial in the Dublin Circuit Court the benefit of all the procedures which the Supreme Court identified as being necessary to constitute a fair trial. He had notice of the evidence which was to be given against him. He was represented by counsel. The witnesses were examined and cross-examined and were seen at all times by the jury (as well as the trial judge and counsel) by means of the television link. What has to be determined, therefore, is whether the trial was unfair because the children who accused him of the crime with which he was charged did not give evidence in his presence. The unfairness involved, it is submitted, was this; (a) it is well recognised that it is more difficult for a false accuser to lie

successfully in the presence of the person wrongfully accused than in his or her absence and (b) if the safeguard which the physical presence of an accuser and the accused is withdrawn (as is done by the impugned section) the trial becomes unfair.

It is, of course, an undeniable fact that children may be manipulated by malevolent adults or, in some cases, by over-zealous social workers into making false accusations of sexual abuse and it is obvious that fair procedures require that there are proper means to assess the credibility of all the testimony in the prosecution case, including that of child witnesses. The question, therefore, is whether the existing procedures without a physical confrontation, are fair to the accused. I think they are. It may well have been considered necessary at the end of the 18th century when criminal procedures were very different to what they are today to require a face-to-face confrontation between the accused and his or her accuser. I do not think that in modern Ireland a criminal trial becomes unfair if there is not such confrontation. The jury in a trial in which the s. 13 procedures are adopted will see the witness at all times. It will be able to evaluate the manner in which the child gives his or her testimony, and his or her reaction to any suggestion that he or she is lying or that he or she has been manipulated. It seems to me that the absence of a physical confrontation between the witness and the accused will have no significant effect on the ability of a false accuser to mislead a jury and I do not think that the jury's assessment of the credibility of a witness will be compromised by the fact that the witness does not see the accused when giving evidence. It follows, therefore, that the procedures allowed by the section are not unfair."

Having held that the section did not infringe the plaintiff's constitutional right to fair procedures he went on to say that:-

"As a corollary to this it follows that the right to a physical confrontation by an accused of his or her accusers is not a constitutionally protected right."

While acknowledging that the plaintiff's right to fair procedures included the right to cross-examine witnesses in a criminal trial he stated that the effectiveness of such right was not adversely affected if it took place when the witness was not in the physical presence of the accused and rejected the plaintiff's submission in that regard.

He also held that the procedures permitted by s. 13 of the Act of 1992 were not unfair because they did not require a case by case determination of the need to apply them or because they placed an onus on the plaintiff

to establish the witness's competence to undertake a face-to-face confrontation.

Grounds of appeal

The plaintiff has appealed to this Court against the said judgment and order on the grounds that:-

“the learned trial judge misdirected himself in law, having regard to the circumstances of the plaintiff in holding:-

- (a) that the right of physical face-to-face confrontation in a criminal trial can be restricted or limited in the manner in which s. 13 of the Criminal Evidence Act, 1992, purports to do;
- (b) that a jury's assessment of a witness's credibility would not be compromised by the fact that the witness does not see the accused;
- (c) that the procedures as set out in s. 13 of the Criminal Evidence Act, 1992, were fair to the accused and/or were not in breach of natural justice;
- (d) that there was no requirement of a “case by case” assessment;
- (e) that leave of the court was not necessary before the prosecution sought to give evidence (under s. 13(1)(a) of the Criminal Evidence Act, 1992,) by way of live television link;
- (f) that s. 13(1)(a) of Part III of the Criminal Evidence Act, 1992, did not breach the constitutional protection afforded to the plaintiff by Article 38.1 of Bunreacht na hÉireann the plaintiff having sought the protection of Article 38.1, Article 38.5 and Article 40.3 of Bunreacht na hÉireann respectively;
- (g) that the conclusions reached by Kinlen J. in *White v. Ireland* [1995] 2 I.R. 268, were conclusions with which he concurred.”

Appeal

The fundamental issues for determination by the Court prior to deciding whether the impugned sections of the Act of 1992 are invalid having regard to the provisions of the Constitution are:-

1. Whether the plaintiff or any person who is charged with an offence to which s. 12 of the Act of 1992 applies has a right, guaranteed by the Constitution, and in particular by Articles 38.1 and

40.3 thereof, to confront his/her accuser in open court, when he/she is giving evidence at his/her trial in respect of such offences, which alleged right is described as “the right of confrontation”,

2. Whether such right, if it exists, is a right which is separate and distinct from the admitted right of an accused person to cross-examine witnesses giving evidence for the prosecution at his/her trial, or
3. Whether such alleged right is an essential ingredient in the admitted and well-established right of cross-examination because, it is alleged the effectiveness of cross-examination requires a physical presence in court of an accuser and the physical confrontation between the accuser and the accused.

It is well established in our constitutional jurisprudence that an accused person’s right to a fair trial is one of the most fundamental constitutional rights accorded to persons and that in so far as it is possible or desirable to construct a hierarchy of constitutional rights it is a superior right.

The requirements necessary to vindicate this right have been set forth in a number of cases but it is only necessary for the purpose of this appeal to refer to two such cases.

In the course of his judgment in *In re Haughey* [1971] I.R. 217, Ó Dálaigh C.J. stated at p. 264 that:-

“Article 40, s.3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness and it is the duty of the Court to underline that the words of Article 40, s.3 are not political shibboleths but provide a positive protection for the citizen and his good name.”

In that case the Court agreed that the following were essential rights of a defendant at p. 263:

- “(a) that he should be furnished with a copy of the evidence which reflected on his good name;
- (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers;
- (c) that he should be allowed to give rebutting evidence, and
- (d) that he should be permitted to address, again by counsel, the Committee in his own defence.”

In the course of his judgment in *The State (Healy) v. Donoghue* [1976] I.R. 325 at pp. 335 and 336 of the report, Gannon J. stated as follows:-

“Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before the judgment be given. By mentioning these, I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence.”

This passage from the judgment of Gannon J. was quoted with approval by O’Higgins C.J. in the course of his judgment in the appeal from the order made by Gannon J. At p. 349 of the report O’Higgins C.J. stated:-

“Article 38 deals specifically with a criminal trial and provides that no person should be tried on any criminal charge save in due course of law. This Article must be considered in conjunction with Article 34; with Article 40, s. 3, sub-s. 1 under which ‘the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’ and with sub-s. 2 of the same section under which the ‘State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.’ Being so considered, it is clear that the words ‘due course of law’ in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.”

He then quoted the aforesaid passage from the judgment of Gannon J. and went on to say that:-

“It seems to me that this puts very clearly what one would expect to be the features of any trial which is regarded as fair.”

He further stated at page 350 that:-

“The 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.”

These judgments do not, and do not presume to, limit the specific rights of an accused which are necessary to ensure that his constitutional right to a fair trial is vindicated or to provide an exhaustive list of his rights in this regard.

What they do establish, if it was necessary to do so, is that the words “in due course of law” in Article 38.1 of the Constitution make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures shall be fair and that the person accused will be afforded every opportunity to defend himself.

An essential ingredient in the concept of fair procedures is that an accused person should have the opportunity to, in the words of Gannon J., ‘hear and test by examination the evidence offered by or on behalf of his accuser’.

It is claimed by the plaintiff in these proceedings and submitted on his behalf that this right to test by examination the evidence offered against him (the right to cross-examine), to be effective and to give him the opportunity to defend himself adequately, necessarily implies and requires that the witness should give evidence in his presence and that the witness, when giving evidence, should physically confront him.

The existence of such a right was not considered by the courts in this jurisdiction prior to the case of *White v. Ireland* [1995] 2 I.R. 268, which was tried in the High Court by Kinlen J., who gave judgment on the 21st December, 1993 and who held that the right “to eye-ball to eye-ball” did not exist.

In the light of subsequent developments the judgment of Kinlen J. was not appealed to this Court and the instant case is the first opportunity in which this Court has to decide whether the concept of fair procedures requires that a witness should be obliged to give evidence in the physical presence of an accused and that an accused person should have the right to such confrontation.

No Irish or other common law authorities which established such a requirement were opened to the Court in the course of submissions by counsel for the plaintiff and the defendants.

Indeed it is probable that no such case exists because in a passage from Wigmore on Evidence quoted by Blackmun J. in the course of his dissenting judgment in *Coy v. Iowa* (1987) 487 U.S. 1012, it is stated that “there never was at common law any recognised right to an indispensable thing called confrontation as distinguished from cross-examination.” (p. 1029)

The Court was, however, referred to the judgments in two cases decided by the Supreme Court of the United States of America viz. *Coy v. Iowa* (1987) 487 U.S. 1012 and *Maryland v. Craig* (1989) 497 U.S. 836.

The utility of these cases to this Court is reduced by the fact that they turned upon differently worded constitutional and statutory provisions to those under examination in the present case. Nevertheless, the judgments contain certain discussions of principle which this Court has found useful.

The sixth amendment to the American Constitution provides as follows:-

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him: to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.”

No such provision exists in the Irish Constitution and an accused person's rights are determined not by any specific provision of the Constitution but by the requirements of due process and fair procedures. All the rights, other than the right “to be confronted with the witnesses against him” set forth in the sixth amendment, have been established by this Court's constitutional jurisprudence as being necessary ingredients in and required by the concepts of “due process” and “fair procedures”.

Despite what was described by Scalia J., in the course of his dissenting opinion (p. 860), as the “unmistakable clarity” of the provisions of the sixth amendment, the majority of the American Supreme Court held in *Maryland v. Craig* (1989) 497 U.S. 836 that, the confrontation clause did not guarantee criminal defendants an absolute right to a face to face meeting with the witnesses against them at the trial.

The opinion of the court was delivered by O'Connor J. and though the decision was based on the provisions of the confrontation clause contained in the sixth amendment, and Maryland statutory procedure that permitted a judge to receive, by one-way closed circuit television, the testimony of a child witness who was alleged to be a victim of child abuse, certain statements made by her in the course of her judgment are of assistance to this Court because as stated by her at the beginning of her opinion:-

“This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a

child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television."

Though the Constitution of Ireland, 1937, contains no specific provision that "an accused person shall enjoy the right to be confronted with the witnesses against him" as is contained in the sixth amendment and the question of the existence or otherwise of such a right in this jurisdiction must be considered by this Court in the light of whether or not it is required by "fair procedures", the issue raised in *Maryland v. Craig* (1989) 497 U.S. 836, as outlined by O'Connor J. is substantially the same as the issue before this Court in the instant case.

It is clear from the opinions of the justices of the American Supreme Court as expressed in *Coy v. Iowa* (1987) 487 U.S. 1012, and *Maryland v. Craig* that in spite of the clarity of the provisions in the sixth amendment, there existed and exists a conflict of judicial opinion as to whether in certain circumstances a procedure which called for something other than face-to-face confrontation was permitted by such provision.

In the course of delivering the opinion of the court in *Coy v. Iowa*, Scalia J. made a number of observations at p. 1015:-

- "1. The Sixth Amendment gives a criminal defendant the right 'to be confronted with the witnesses against him',
2. We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. See *Kentucky v. Stincer* (1987) 482 U.S. 730, 748, 749-750, (Marshall J. dissenting). For example in *Kirby v. United States* (1899) 174 U.S. 47, 55, which concerned the admissibility of prior convictions of co-defendants to prove an element of the offence of receiving Government stolen property, we described the operation of the Clause as follows: 'A fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, when he is entitled to cross-examine, and whose testimony he may impeach in every mode authorised by the established rules governing the trial or conduct of criminal cases'. Similarly in *Dowdell v. United States* (1911) 221 U.S. 325, 330 we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment and proceeded to interpret it as intended 'to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as

meet him face-to-face at the trial . . .’ More recently, we have described the ‘literal right to confront’ the witness at the time of trial as forming ‘the core of the values furthered by the Confrontation Clause’ *California v. Green* 399 U.S. 149 at 157. Last Term, the plurality opinion in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51 stated that ‘the Confrontation Clause provides two types of protection for a criminal defendant, the right physically to face those who testify against him; and the right to conduct cross-examination’.

The Sixth Amendment’s guarantee of face-to-face encounter between witness and accused serves ends both to appearance and reality.”

In this case the majority of the court held that the appellant’s right to face-to-face confrontation was violated by the use of a screen which enabled the complaining witnesses to avoid viewing the accused person as they gave their testimony.

While O’Connor J. concurred in the decision of the court she had however the following to say at p. 1022:-

- “1. I agree with the Court that appellant’s rights under the Confrontation Clause were violated in this case. I write separately only to note my view that those rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices to shield a child witness from the trauma of courtroom testimony.
2. While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today’s decision necessarily dooms such efforts by state legislatures to protect child witnesses.”

Blackmun J., in the course of his dissent, stated at p. 1027:-

“The Court describes the appellant’s interest in ensuring that the girls could see him while they testified as ‘the irreducible literal meaning of the Clause’. Whatever may be the significance of this characterisation, in my view, it is not borne out by logic or precedent. While I agree with the concurrence that ‘there is nothing novel’ in the proposition that the Confrontation ‘reflects a preference’ for the witnesses to be able to see the defendant, I find it necessary to discuss my disagreement with the Court as to the place of this ‘preference’ in the constellation of rights provided by the Confrontation Clause for two reasons. First, the minimal extent of the infringement on the appellant’s Confrontation Clause interests is relevant in considering

whether competing public policies justify the procedures employed in this case. Second, I fear that the Court's apparent fascination with the witnesses' ability to see the defendant will lead the States that are attempting to adopt innovations to facilitate the testimony of child victims of sex abuse to sacrifice other, more central confrontation interests, such as the right to cross-examination or to have the trier of fact observe the testifying witness."

These statements illustrate the conflict of judicial opinion on the interpretation of the confrontation clause in the sixth amendment, despite the apparent clarity thereof.

The issue came up again for determination in *Maryland v. Craig* (1989) 497 U.S. 237, when the majority of the American Supreme Court decided that:-

1. the confrontation clause does not guarantee criminal defendants an absolute right to a face-to-face meeting with them at trial;
2. although face-to-face confrontation forms the core of the clause's values, it is not an indispensable element of the confrontation right;
3. the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured; and
4. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case.

In the course of delivering the majority opinion of the Supreme Court in that case, O'Connor J. made a number of statements and observations that are of assistance to this Court.

She stated that at p. 844:-

- "1. We observed in *Coy v. Iowa* that 'the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact'.
2. We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.
3. The central concern of the Confrontation Clause is to ensure the reliability of the evidence against the criminal defendant by subjecting it to rigorous testing in the context of an adversary pro-

ceeding before the trier of fact. The word 'confront' after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause;

'The primary object of the constitutional provision in question was to prevent depositions or ex-parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'

As this description indicates, the right guaranteed by the Confrontation Clause includes not only a 'personal examination' but also

- (1) Ensures that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
- (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth';
- (3) permits the jury that is to decide the defendant's fate to observe the demeanour of the witness in making his statement, thus aiding the jury in assessing his credibility.
- (4) Although face-to-face confrontation forms the 'core of the values furthered by the Confrontation Clause' we have nevertheless recognised that it is not the sine qua non of the confrontation right. The Confrontation Clause is generally satisfied when the defence is given a full and fair opportunity to probe and expose testimonial infirmities such as forgetfulness, confusion or evasion through cross-examination, thereby calling to the attention of the fact-finder the reasons for giving scant weight to the witness' testimony.
- (5) For this reason, we have never insisted on an actual face-to-face encounter at a trial in every instance in which testimony is admitted against the defendant.
- (6) In sum, our precedents established that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case.

- (7) That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy* our precedents confirmed that the defendant's right to confront accusatory witnesses may be satisfied, absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."

It is clear from the opinion of the majority of the court and in particular the said statements and observations, that though the confrontation clause is clear and specific, it does not give to criminal defendants the absolute right to a face-to-face meeting with witnesses against them, the central concern of the clause being to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.

Though the Constitution of Ireland, 1937, contains no specific right such as that guaranteed in the confrontation clause, the central concern of the requirements of due process and fair procedures is the same, that is to ensure the fairness of the trial of an accused person. This undoubtedly involves the rigorous testing by cross-examination of the evidence against him or her.

The impugned provisions of the Act of 1992 do not restrict in any way the rights of an accused person as established by the constitutional jurisprudence of this Court and in particular by *In re Haughey* [1971] I.R. 217 and *The State (Healy) v. Donoghue* [1976] I.R. 325.

What they do permit in the case of proceedings for the offences set forth in s. 12 of the Act of 1992 is the giving of evidence by persons under 17 years (unless the court sees good reason to the contrary) and by any other person, with the leave of the court, through a live television link.

It is accepted that the reason for the procedure permitted by s. 13 of the Act of 1992 was that it is generally accepted that young persons under the age of 17 are likely to be traumatised by the experience of giving evidence in court and that its purpose is to minimise such trauma.

Is the giving of evidence in accordance with such procedure unfair to the accused?

A witness, permitted to give evidence in such fashion, will be required to give evidence on oath in accordance with the statement of evidence previously made available to the accused person and be subject to cross-examination thereon by counsel on behalf of the accused person. His or her demeanour in the giving of such evidence and when subject to

such cross-examination by counsel on behalf of the accused will be clearly visible by way of monitors to the judge and jury trying the case, who will have ample opportunity to assess the reliability of such testimony.

It is submitted on behalf of the plaintiff in this case that it is well recognised that it is more difficult for a false accuser to lie successfully in the presence of the person wrongfully accused than in his or her absence, and that if the safeguard of the physical presence of the accuser is withdrawn, the trial becomes unfair.

The Court does not accept this submission.

The Court recognises, as did the learned trial judge, that it is an undeniable fact that children may be manipulated by malevolent adults, or in some cases, by over-zealous social workers into making false accusations of sexual abuse and that fair procedures require that there are proper means to assess the credibility of all the testimony in the prosecution case, including the testimony of child witnesses.

The Court is satisfied, however, that the assessment of such credibility does not require that the witness should be required to give evidence in the physical presence of the accused person and that the requirements of fair procedures are adequately fulfilled by requiring that the witness give evidence on oath and be subjected to cross-examination and that the judge and jury have ample opportunity to observe the demeanour of the witness while giving evidence and being subjected to cross-examination. In this way, an accused person's right to a fair trial is adequately protected and vindicated. Such right does not include the right in all circumstances to require that the evidence be given in his physical presence and consequently there is no such constitutional right.

The accused person's right to a fair trial is further protected by the fact that it is open to the court not to permit the giving of evidence by a young person through a live television link if the accused person establishes that 'there is good reason to the contrary' and that the leave of the court is required before any other person may give evidence in this manner. A judge considering either of these issues will be obliged to have regard to the accused person's right to a fair trial.

It was submitted on behalf of the plaintiff that, even if an accused person had no constitutionally protected right to a physical confrontation with his or her accuser the procedures permitted by s. 13 of the Act of 1992 and adopted during the course of his trial were unfair (and therefore unconstitutional) because (i) they did not require a case by case determination of the need to apply such procedures and (ii) they place an unfair

onus on an accused to require him to establish the witnesses' competence to undertake a face-to-face confrontation with the accused.

Once it is established that an accused person has no constitutional right to have a witness give evidence in his presence and in effect "confront" him, then the circumstances in which evidence is given other than in his presence is a matter for the Oireachtas.

The impugned sections of the Act of 1992, the procedures outlined therein and the circumstances in which they may be employed, enjoy the presumption of constitutionality and the onus is on the plaintiff to establish that they are repugnant to the Constitution and are not fair procedures. Such repugnancy must be clearly established.

Fair procedures do not require a case by case determination as to whether a person under the age of 17 years would be traumatised by giving evidence in court in the presence of the accused person and the Oireachtas was entitled to enact legislation permitting the giving of evidence by such persons through a live television link unless the court sees good reason to the contrary.

The Court is satisfied that the plaintiff has failed to discharge that onus and that the procedures complained of are not unfair and do not amount to an interference with an accused person's right to a fair trial and that his appeal should be dismissed and the order of the High Court affirmed.

Solicitors for the plaintiff: *Henry P. Kelly & Co.*

Solicitor for the defendants: *The Chief State Solicitor.*

Gordon Duffy, Barrister
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