‘The Evidence of Child Witnesses - Where Rules of Evidence and the Constitution Collide’
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The Evidence of Child Witnesses — Where Rules of Evidence and the Constitution Collide

A thesis submitted for the Degree of Doctor of Philosophy in Law by

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‘The Evidence of Child Witnesses – Where Rules of Evidence and the Constitution Collide’

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May 2007
DECLARATION

I, Rachel Casey, hereby declare that this thesis has not been submitted as an exercise for a degree at University of Dublin, Trinity College, or at any other University.

I further declare that this thesis is entirely my own work and, to the extent that it includes reference to the published work of others, such reference is duly acknowledged in the text wherever included.

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Rachel Casey

30 October 2006
SUMMARY

This thesis explores the development and reform of particular aspects of the law of evidence relating to child witnesses as informed by the changing orthodoxy advanced by psychologists – and adopted by the law – regarding, in particular, the capabilities and reliability of children as witnesses. Three principal areas of the law of evidence relating to children are scrutinised, namely: (i) the competence of children as witnesses; (ii) the corroboration requirements attaching to the evidence of children; and (iii) the examination of child witnesses and the statutory ‘special measures’ designed to facilitate the reception of evidence from such witnesses.

The primary focus of this thesis is whether an appropriate or permissible balance has been achieved between the often competing demands of, inter alia, the rights of the accused – both in the context of the Constitution of Ireland 1937 and the European Convention on Human Rights and Fundamental Freedoms – the protection of child witnesses from undue trauma or intimidation, the elicitation of the best evidence, the interest of the community in the prosecution of offences and the proper administration of justice. In particular, this thesis analyses the provisions of Part III of the Criminal Evidence Act 1992, as amended, in this jurisdiction and considers the desirability and permissibility of such statutory measures and the balance achieved therein. These measures are compared and contrasted with equivalent legislative provisions and their judicial interpretation in other common law jurisdictions, such as the United Kingdom, Scotland, Canada, Australia, New Zealand and the United States with a view to evaluating the approach adopted in the Irish provisions and to seeking the best solution to the unique difficulties posed by child witnesses for the law of evidence. This analysis encompasses both macro- and micro-criticisms of the current legislative reform in this jurisdiction.

The examination of these reforms of the law of evidence operates from a standpoint where, although it is accepted that – as propounded by modern psychological studies – child witnesses are capable of being as reliable as adult witnesses and, moreover, that the traditional restrictive approach of the law towards the evidence of children was founded upon common misperceptions regarding the capabilities of children and was not warranted, it is nonetheless submitted that children are not miniature adults, requiring identical treatment to adults; children are inherently different to adults and such difference must be recognised and accommodated by the law of evidence. It is further submitted that such different treatment is consistent with the principles of equality and may provide greater protection for the rights of the accused than an approach which requires that child witnesses be treated as adults.

The section examining the development and reform of the law of competence, analyses the many tests – both judicial and statutory – advanced to assess the competence of a child to act as a witness, from the restrictive ‘oath’ test and exclusionary rules traditionally employed at common law, through the ‘moral obligation’ and secularised tests for the reception of sworn evidence from child witnesses, to the modern legislative tests applied in each of the jurisdictions herein to determine the competence of children to give unsworn evidence in criminal proceedings. These tests are scrutinised with a view to determining: (i) which, if any, of the tests best assesses the child’s testimonial qualifications; and (ii) which, if any, achieves an appropriate balance between, inter alia, the ‘right to everyone’s evidence’, the reception of all relevant understandable evidence in the interests of the proper administration of justice, the protection of child witnesses and the right of the accused to a fair trial and fair procedures, in particular, his / her right to have the reliability of potentially unreliable and highly prejudicial
evidence tested prior to its admission into evidence against him/her. The section concludes in favour of the ‘intelligibility’ test of competence adopted in this jurisdiction in s. 27 of the Criminal Evidence Act 1992 as: (i) representing the best test of the psychological competence of a child; (ii) acknowledging and accommodating children’s ‘difference’ in terms of their linguistic and cognitive capabilities; and (iii) reflecting the most appropriate balance between the competing interests involved, in particular, by safeguarding the accused’s right to a fair trial and fair procedures and assisting in the proper administration of justice.

The following section examines the rationales and content of the traditional corroboration requirements in relation to the evidence of child witnesses both at common law and under statute, analysing their development and reform – both judicial and statutory – from rigid technical rules, requiring strict adherence in order to safeguard a conviction, to the abolition of the mandatory requirements of corroboration both as a matter of law and of practice. The focus of this analysis is on the impact of such reforms upon the right of the accused to a fair trial and fair procedures. It is submitted that the rules of evidence and the concept of ‘fairness’ as required in a fair trial or fair procedures is itself subject to change and that the modern approach embodied in s. 28 of the Criminal Evidence Act 1992 – which requires that the jury receive a judicial direction as to the need for caution when considering the evidence of an individual child witness only where there is an evidential basis for doubting the reliability of his/her evidence – provides adequate protection for the rights of the accused.

In the analysis of the ‘evidential revolution’ regarding the manner of presentation of the evidence of child witnesses – the judicial and statutory ‘special measures’ adopted to facilitate the reception of evidence from child witnesses and to improve the quality of evidence thereby received by minimising the trauma and distress associated with the witness experience – it is submitted that provided that the core elements of the right to a fair trial or fair procedures – the ‘purposes of confrontation’ – are preserved, it is not impermissible to alter the manner in which the trial is conducted or, by extension, the manner in which the rights of an accused person are protected. It is submitted that, subject to the necessary safeguards identified below, the provision of a one-way screen, the use of live television link or the presence of a support person do not contravene the accused’s right to a fair trial and fair procedures – or, alternatively, represent a permissible restriction thereof – notwithstanding the fact that these special measures dispense with the direct physical confrontation between accused and accuser characteristic of the traditional adversarial trial. Furthermore, by modifying or removing those aspects of adversarial trial procedure which were truth-defeating when applied to child witnesses, it is submitted that such reforms are also consistent with the rational ascertainment of facts and the proper administration of justice. However, it is concluded that the use of an intermediary pursuant to s. 14 of the Criminal Evidence Act 1992, as amended, dilutes the very essence of the accused’s right of cross-examination and negates the right to a fair trial and fair procedures.

Finally, it is concluded that the continued emphasis on the importance of the accused’s right to a fair trial and fair procedures, as reflected in the more conservative reforms of the law of evidence in relation to children adopted in this jurisdiction, combined with the change in the law’s discourse of ‘rights’ in the context of criminal proceedings attendant upon these reforms – expanding the concept of ‘fairness’ beyond the accused to encompass fairness to child witnesses and the proper administration of justice – results in an appropriate and superior balance of the competing interests involved than that achieved by many of the more ‘progressive’ statutory schemes enacted in the other common law jurisdictions examined herein.
I would like to express my sincere gratitude to my supervisor, Declan McGrath B.L., for his invaluable advice, guidance and understanding throughout the entire process of completing this thesis.

I would also like to convey my sincere appreciation to Dr. Hilary Delany, Head of the Law School, for her support and encouragement, particularly in the last few months.

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To Douglas and to my family, for their unfailing love and for always believing in me, I can only express my profound gratitude; this thesis simply would not have been possible without your tireless support.
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### SPECIAL MEASURES IN THE EXAMINATION OF CHILD WITNESSES IN CRIMINAL TRIALS

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INTRODUCTION

1.0.1 Child witnesses - and the reception of their evidence - pose unique and significant difficulties for the law of evidence. This thesis analyses the development and reform of key aspects of the law of evidence relating to child witnesses in light of the dramatic attitudinal changes in the law towards the capabilities of children as witnesses; these changes in the law’s perception of child witnesses were informed by the changing orthodoxy advanced by psychologists regarding, in particular, the reliability of children.

1.0.2 The areas of the law of evidence examined herein take the child from the courtroom door to the witness box; the development and reform of the law regarding the admissibility of his / her evidence (competence), the ‘value’ attached to such evidence (corroboration) and the manner in which such evidence may be given at the trial of the accused (‘special measures’) are scrutinised with a view to determining whether an appropriate or permissible balance has been struck between the often competing interests involved. These rival demands include, inter alia, the rights of the accused - both in the context of the guarantees provided by Articles 38.1 and 40.3 of the Constitution of Ireland, 1937 and Article 6 of the European Convention on Human Rights and Fundamental Freedoms – the protection of child witnesses from undue trauma or intimidation, the elicitation of the best evidence, the interest of the community in the prosecution of offences and the proper administration of justice.

1 See sections 2.0.0-2.17.18: Competence of Child Witnesses.
2 In this context, ‘value’ is not intended to refer to the weight to be attached to the evidence of the child witness since this is a matter for the jury to determine having regard to its assessment of the credibility of the individual child witness; rather it denotes the application of corroboration requirements to the evidence of the child witness and, in particular, whether the jury are entitled to convict an accused person on the strength of the uncorroborated evidence of a child witness and whether such evidence is mutually corroborative of the evidence – sworn or unsworn – of another child witness.
3 See sections 3.0.0-3.7.20: Corroboration of the Evidence of Child Witnesses.
4 See sections 4.0.0-4.18.28: Special Measures in the Examination of Child Witnesses in Criminal Trials.
5 The application of the metaphor of ‘balancing’ in the context of the protection of human rights under the European Convention on Human Rights – such as an accused’s right to a fair trial pursuant to
In particular, the provisions of Part III of the Criminal Evidence Act 1992, as amended, the judicial interpretation thereof and the comparable or distinct approaches adopted in other common law jurisdictions—such as England, Scotland, Canada, New Zealand, Australia and the United States—are examined with a view to determining the nature and extent of the difficulties inherent in the Irish provisions and to achieving the optimum balance between these competing interests.

Article 6 thereof—has been the subject of criticism by some academics, most notably, Andrew Ashworth. Ashworth adopts a tripartite categorisation of human rights as: (i) non-derogable rights, such as the right to life, which, while not absolute, “are not intended to give way to ‘public interest’ considerations” and to which the metaphor of ‘balancing’ should not be applied; (ii) qualified or prima facie rights, such as the right to respect for private life, which may be interfered with on certain express grounds, to the minimum extent possible, if it can be established that this is ‘necessary in a democratic society’; and (iii) ‘strong rights’, such as the right to a fair trial, which, although “less fundamental than the non-derogable rights, any argument for curtailting a strong right must at least be more powerful than the kind of ‘necessary in a democratic society’ argument that is needed to establish the acceptability of interference with a qualified right”. See: Ashworth, Andrew and Redmayne, Mike The Criminal Process (3rd ed., Oxford: Oxford University Press, 2005) at pp. 36-37; and Ashworth, Andrew Principles of Criminal Law (5th ed., Oxford: Oxford University Press, 2006) at p. 63. Ashworth is highly critical of what he terms the British courts’ “vague and unprincipled use of the concept of ‘balancing’ – one that fails to examine the interests involved, to give reasons for assigning them particular weight, and so forth”: Ashworth, Andrew and Redmayne, Mike The Criminal Process (3rd ed., Oxford: Oxford University Press, 2005) at pp. 42-43. However, Ashworth expressly rejects any suggestion that there is no place for the notion of ‘balance’ or ‘proportionality’; he simply asserts at pp. 42-43 that “the concept of ‘balance’ should be reserved for the conclusion of a lengthy and careful process, whereby rights and interests are identified, arguments for including some and excluding others are set out, appropriate weights or priorities are assigned to particular rights and interests, either generally or in specific contexts; and so forth” so that it represents a “properly researched, reasoned and principled course of argument, not simply the pronouncement of a conclusion”. He observes that the English approach is not merely doubtful under the Human Rights Act 1998 and erroneous as an application of the European Convention on Human Rights, but also unconvincing at the level of principle, since it fails to respect the nature of rights as protections for individuals against the will of the majority. He concludes that if the English courts are to continue to adopt the metaphor of ‘balancing’, they should adopt a more rigorous and structured approach such as that employed by the Strasbourg Court. Ashworth, Andrew Human Rights, Serious Crime and Criminal Procedure (London: Sweet & Maxwell, 2002) (The Hamlyn Lectures, 53rd Series) at p. 131: “The Strasbourg approach of Articles 5 and 6, in treating certain rights as fundamental, and in accepting that they can be curtailed only on certain strict conditions, is clearly superior...[T]his is a triangulated approach which takes account of the right itself, the public interest considerations, and compensating safeguards in the event of some restriction on the right... The strength of the Strasbourg approach is to specify procedures for determining the difficult issues, articulating the public interest considerations, identifying the essence of the right, and looking into the provision of safeguards.” It is submitted that the following analysis of the impact of the reforms of the rules of evidence as they apply to child witnesses employs an approach to the metaphor of ‘balancing’ akin to that adopted by the European Court of Human Rights. See, in particular, sections 2.17.0-2.17.17 (constitutionality and compatibility of the reforms of the law of competence), 3.7.0-3.7.20 (constitutionality and compatibility of the reforms of the law of corroboration), 4.9.0-4.9.6, 4.10.0-4.10.15, 4.11.0-4.11.37, 4.12.0-4.12.19 and 4.18.0-4.18.28 (constitutionality and compatibility of the use of special measures to facilitate the reception of evidence from child witnesses).
The principal impetus for these radical reforms – both judicial and statutory – of the law of evidence in relation to children was provided by the results of numerous modern psychological studies, which cast serious doubt on the legitimacy of the deep-seated suspicion with which the evidence of children was traditionally treated by the law, psychologists and society in general; children were regarded as unreliable witnesses by reason of, *inter alia*, their under-developed powers of observation, recollection and communication.

their suggestibility and malleability in the hands of authority figures or adults generally, their inability to distinguish fact from fiction and their tendency to exaggerate, to imagine or invent incidents of sexual abuse.7 In light of the outcome of this research, the attitude of the community of psychologists towards the capabilities of children experienced a fundamental volte face with far-reaching effects for the law of evidence; it is now understood that the evidence of children was traditionally unjustifiably undervalued and that children are no less reliable as witnesses than adults. More particularly, it is asserted that: (i) children’s intellectual and cognitive development is not linear and that, as a result, there are significant differences in capabilities, even within the same age group, making age an ineffective indicator of competence; (ii) even very young children are capable of demonstrating the necessary testimonial qualifications if

7 See: Goodman, Gail “Children’s Testimony in Historical Perspective” (1984) 40(2) Journal of Social Issues 9; Spencer J., Flin R., The Evidence of Children – The law and the Psychology (2nd ed., 1993) Chapter 11; Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) paras. 5.10-5.18 at pp. 87-91; Jones, David “The Evidence of a Three Year Old Child” [1987] Crim LR 677; Skolnick, A., “The limits of childhood: conceptions of child development and social context” (1975) Law and Contemporary Problems 38. See, in particular: Piaget’s 4 stages of cognitive development in children: sensory motor period, pre-operational period, the concrete operations period and the formal operations period in Inhelder, B. & Piaget, J. The Early Growth of Logic in the Child (1964) 90, analysed in Australian Law Reform Commission, Research Paper: Competence and Compellability of Witnesses (Research Paper No. 5, 1982) at pp. 14-23. These views are inherent in the advice given by O’Brien J. to the jury in relation to the evidence of a child witness in a murder trial in Attorney General v Joyce [1929] I.R. 526, at p. 542 to the effect that: “It is obvious that children are impressionable and imaginative sometimes and accordingly juries ought to exercise particular care in dealing with their evidence. I ask you to do so in this case.” In The State (Kenny) v O’Hadháigh [1979] IR 1, the High Court (Finlay P.) held at p. 5 that: “Many provisions of the law recognise the frailty of truth in relation to the evidence of young children, and afford protection for adults who may be penalised as a result of such evidence.” See also: People (Attorney General) v Casey (No. 2) [1963] IR 33, at p. 37, (S.C.) per Kingsmill Moore J. who refers to the “suggestibility and lack of responsibility of children of tender years” as the rationale underlying the strict corroboration requirements traditionally applied in respect of their evidence. See also: Hildreth v Key (1960) 341 S.W. 2d 601; People v Delaney, 52 Cal. App. 765, 199 P. 896, at p. 900; Cross v Commonwealth, 195 Va. 62, 77 S.E. 2d 447, at p. 452; and Hughes v Detroit, G.H. & M. Ry Co., 65 Mirch. 10, 31 N.W. 603, at p. 606. There were, however, some early advocates of the reliability of the evidence of children. See: Taylor, A Treatise on the Law of Evidence, (12th ed., 1931) Vol. I §55, at pp. 57-58: “In childhood, the faculties of observation and memory are usually more active than in after life, while the motives of falsehood are then less numerous and less powerful. The inexperience and artlessness which, in a great measure, must accompany tender years, render a child incapable of sustaining consistent perjury, while the same causes operate powerfully in preventing his true testimony from being shaken by the adroitness of counsel. Not comprehending the drift of the questions put to him in cross-examination, his only course is to answer them according to the fact. Thus, if he speak falsely, he is almost inevitably detected; but if he be the witness of truth, he avoids that imputation of dishonesty, which sometimes attaches to older witnesses, who, though substantially desiring to tell the truth, are apt to throw discredit on their testimony by a too anxious desire to reconcile every apparent inconsistency.”
questioned in a developmentally appropriate manner and that skilful questioning can also reduce the risk of suggestibility; (iii) egocentricity in children can lead to errors or inconsistencies in their evidence, however these are usually only in relation to peripheral matters;\(^8\) (iv) children do not generally fantasise about sexual abuse, rather their fantasies are characterised by their daily experience and personal knowledge; (v) children are no more likely to lie while testifying than adults and younger children in particular demonstrate an inability to *sustain* a fabrication upon cross-examination; and (vi) children are not inherently more suggestible than adults.\(^9\)


This research also indicated that many of the central characteristics of the adversarial criminal trial – such as the oath, formality of the courtroom and trial procedure, sophisticated techniques of cross-examination and direct physical confrontation between the accused and his / her accuser – which were intended to discourage false evidence or fabrications on the part of witnesses, and so to safeguard the court’s truth-seeking function in the interest both of the proper administration of justice and the protection of the rights of the accused, were truth-defeating when applied to child witnesses since the trauma which they occasioned in the child had an adverse effect on the quality of the evidence produced, in terms of its coherence, accuracy and completeness; indeed they could even result in the total loss of evidence from a child witness. These findings both demanded and inspired a radical redesign of the criminal justice system in order to better accommodate the special needs of child witnesses – thereby minimising the risk of loss or distortion of critical evidence – without endangering the rights of the accused.

The transformation effected in the law of competence as it applies to child witnesses resulting from this enlightened view of the capabilities of children led to the abandonment of the traditional ‘exclusionary rules’ in favour of a more inclusive approach; the challenge facing courts and legislatures alike was to craft a test or pre-conditions to competence for child witnesses which facilitated the reception of all relevant understandable evidence while maintaining adequate safeguards against the introduction into evidence of highly prejudicial evidence of no probative value, thereby preserving the rights of the accused. The first section of this thesis explores the development and reform of the law of competence from the historical...
insistence on the rejection of all evidence given otherwise than upon oath and the requirement that child witnesses satisfy the rigid test for the reception of sworn evidence – rooted in a traditional religious understanding of the nature and consequences of an oath – to the modern secularised test requiring an understanding of the obligation to tell the truth over and above that which is required in everyday social contact.\textsuperscript{10} This section further parses and evaluates the many different legislative tests employed to assess the competence of a child witness to give evidence unsworn,\textsuperscript{11} with particular emphasis on the ‘intelligibility’ test adopted in this jurisdiction and embodied in s. 27 of the Criminal Evidence Act 1992, as amended,\textsuperscript{12} compared and contrasted with the alternative models favoured in the other common law jurisdictions examined herein,\textsuperscript{13} with a view to determining: (i) which, if any, of the tests best assesses the child’s testimonial qualifications and establishes his / her psychological competence to act as a witness,\textsuperscript{14} and, the inter-related question, (ii) which, if any, of these tests establishes an appropriate and permissible balance between, \textit{inter alia}, the rights of the

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\textsuperscript{10} See sections 2.1.0-2.1.4: \textit{Sworn Evidence of Children} and the following sections, 2.2.0-2.2.3, 2.3.0-2.3.5, 2.4.0-2.4.5, 2.5.0-2.5.10, 2.6.0-2.6.7, 2.7.0-2.7.4 and 2.8.0-2.8.20 which analyse: the traditional understandings of the obligation of an oath; the \textit{Brasier} test of competence; the religious instruction of child witnesses; the adoption of the \textit{Brasier} test of competence in Ireland; criticisms of the \textit{Brasier} test of competence; the ‘moral obligation’ test of competence; and the modern \textit{Hayes} test of competence.

\textsuperscript{11} See: section 2.9.0-2.17.18 inclusive in relation to the \textit{Unsworn Evidence of Children}. See also: (1) Ireland: s. 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914 and, more recently, s. 27 of the Criminal Evidence Act 1992; (2) England: s. 38, Children and Young Persons Act 1933; repealed by s. 52 of the Criminal Justice Act, 1991, which also inserted ss. 33A(1), 33A(2) and 33A(3) into the Criminal Justice Act 1988; s. 33A(2A) was added by the Criminal Justice and Public Order Act, 1994 (Sch. 9, s. 33); and ss. 53 and 55 of the Youth Justice and Criminal Evidence Act 1999; (3) Canada: s. 16 and s. 16.1, Canada Evidence Act, R.S.C. 1985, c. C-5; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89, 2005, c. 32, ss. 26 and 27; (4) Australia: (Qld) s. 9(1), Evidence Act 1977; (Tas) s. 122C and s. 128(1), Evidence Act 1910; (WA) s. 106C, Evidence Act 1906; (NSW) ss. 32-35, Oaths Act 1900 and s. 23(1), Evidence Act 1958; (Vic) s. 23, Evidence Act 1958; (SA) ss. 12 and 93A, Evidence Act 1929; (NT) s. 25A, Oaths Act 1939 and (5) Scotland: s. 24 of Part III, Vulnerable Witnesses (Scotland) Act 2004.

\textsuperscript{12} See sections 2.15.0-2.15.16: \textit{Test Four: Intelligibility}.


\textsuperscript{14} In particular, the pre-occupation of the legislatures and courts in many of the common law jurisdictions examined herein with establishing, as a pre-condition to a finding of competence on the part of a child, that the child understands the meaning of ‘truth’, ‘falsehood’ and the obligation to speak the truth, is criticised as an unreliable indicator of psychological competence or incompetence on the part of the child. See, in particular: sections 2.12.8-2.12.16, 2.13.0-2.13.6, 2.15.5, 2.15.8-2.15.10 and 2.15.13-2.15.14.
accused, the admission of all relevant understandable evidence in the administration of justice and the interests of the child witness.¹⁵

1.0.7 The rigidity and technicality of the corroboration requirements at common law presented a further obstacle to the reception of evidence from child witnesses. The unsworn evidence of a child could not found a conviction in the absence of confirmatory evidence which complied with the narrow judicial definition of corroboration; equally, the sworn evidence of a child witness was subject to a mandatory ‘corroboration warning’ by the trial judge to the jury, wherein the court was obliged to emphasise the dangers involved in relying on the uncorroborated evidence of young child witnesses, to identify the evidence, if any, before the jury which was capable in law of amounting to corroboration, and to indicate that the jury were free to convict in the absence of corroboration if satisfied of the guilt of the accused. In the section regarding corroboration, the rationales and content of the traditional corroboration requirements in relation to child witnesses both at common law and under statute are analysed, from the rigid technical rules requiring strict adherence in order to safeguard a conviction, through judicial revision of the definition of corroboration, to the modern abandonment of all such requirements;¹⁶ that is, both the requirement of corroboration as a matter of law, and the mandatory obligation upon a trial judge to deliver a ‘full corroboration warning’ to the jury in respect of the evidence of a child witness.

1.0.8 These ameliorative measures, both judicial and statutory, were required in order to alleviate the restrictive effects of this complex body of rules, in light of the positive findings in relation to the capabilities of child witnesses; if a child is potentially as reliable as an adult witness, then it follows that the

¹⁵ See, in particular, sections 2.17.0-2.17.18: Impact upon the Accused of the Relaxation of Competence Requirements.

¹⁶ See, in particular: sections 3.1.0-3.1.4, 3.3.0-3.3.10, 3.4.0-3.4.3, 3.5.0-3.5.6 and 3.6.0-3.6.11 which examine: the traditional corroboration requirements for child witnesses; what amounted to corroboration for the purposes of these requirements; critiques of the traditional corroboration requirements; the ‘common sense’ approach to corroboration; and the legislative and judicial reform of the traditional corroboration requirements in relation to child witnesses.
protective measures developed at common law and contained in statute are no longer necessary in respect of every child witness, solely by virtue of his / her status as a child witness.\textsuperscript{17} Particular emphasis is laid on the impact of this dramatic reform of the law of evidence upon the rights of the accused, including the asserted right of an accused – as an aspect of the accused’s right to a fair trial – to have the reliability of potentially unreliable and highly prejudicial evidence supported prior to its acceptance as founding a conviction.\textsuperscript{18}

1.0.9 The following section analyses the ‘evidential revolution’ regarding the manner of presentation of the evidence of child witnesses and, in particular, the ‘special measures’ advocated and adopted to facilitate the reception of evidence from child witnesses and to minimise the trauma and distress associated with the witness experience; these measures gave effect to proposed changes in standard courtroom layout, design or procedure, or even in the law of evidence itself and removed or minimised those characteristics of the adversarial criminal trial which represented the principal sources of stress for child witnesses when giving evidence, such as direct physical confrontation with the accused. The term ‘special measures’ encompasses a broad spectrum of such measures, each involving reform on a greater or lesser scale of the conventional method of examination of


witnesses; while the most radical were introduced by the enactment of statutory schemes in each of the jurisdictions examined herein, many remain available at the discretion of the trial judge, in the exercise of the court’s inherent jurisdiction to arrange its procedures in a manner conducive to the proper administration of justice.\(^{19}\)

1.0.10 This thesis explores the four principal ‘special measures’ available in each of the common law jurisdictions examined herein – pursuant to either judicial or statutory authority – in order to facilitate the reception of evidence from child witnesses at the trial of the accused.\(^{20}\) The first two special measures – the provision of one-way screens and the use of the live television link facility – are designed to relieve the trauma induced by direct physical confrontation between the accused and the child witness while the child is giving evidence either by mechanical or technological means, thereby improving the quality of the resulting evidence received from the

\(^{19}\) See, in particular, sections: 4.1.0-4.1.5, 4.2.0-4.2.2, 4.3.0-4.3.8 and 4.4.0-4.4.12 analysing both the types of special measures available and the parameters of such special measures including the applicable offences and eligible witnesses in respect of whom such special measures are available. See also: (i) Ireland: Part III (ss. 12-14) of the Criminal Evidence Act 1992, as amended and Part III of the Children Act 1997, s. 29 of the Criminal Evidence Act 1992, as inserted by s. 24 of the Extradition (European Union Conventions) Act 2001, s. 39 of the Criminal Justice Act 1999 and Or. 63A, r. 23(1) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No. 2 of 2004); (ii) England: Part II (ss. 16-39) of the Youth Justice and Criminal Evidence Act 1999 and Part 8 of the Criminal Justice Act 2003; (iii) Scotland: ss. 271 and 271A-M of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 and ss. 288E and 288F of the of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 6 of the Vulnerable Witnesses (Scotland) Act 2004; (iv) Canada: s. 486.1(1)-(6), s. 486.2(1)-(8) and s. 486.3(1)-(5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15; and (v) New Zealand: s. 23C-1 of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.

\(^{20}\) Each of the special measures analysed herein involve the provision of assistance to the child witness giving evidence \textit{in person} at the trial of the accused in applicable criminal proceedings. While there are other special measures available which may facilitate the reception of the child’s evidence, these measures operate independently of the child witness, either by: (i) creating a more ‘child-friendly environment’ (e.g. the removal of wigs and gowns, clearing the court, restrictions on media reporting or publication of details of the witness/proceedings); or (ii) removing the necessity for the child to give his / her evidence-in-chief on the day of the trial, or even to attend at trial \textit{at all} by extension of the exceptions to the rules against hearsay (e.g. the introduction into evidence as evidence-in-chief of pre-trial video recordings of interviews with the child witness and even, in jurisdictions other than Ireland, of cross-examination of the child in relation to such evidence, or the use of ‘surrogate witnesses’ as in Israel). This thesis is concerned with the balance achieved by reforms of the law of evidence which \textit{directly involve} the child witness giving evidence \textit{in person} at the trial of the accused, such as, the rules relating to competence, the corroboration requirements and special measures aiding the examination of child witnesses at the trial and the receipt of their best evidence, that is, the provision of one-way screens, live television link, support persons and intermediaries.
child witness or even facilitating the reception of evidence which would otherwise be unavailable to the court.\textsuperscript{21} The child’s evidence remains subject to the conventional rules and practice regarding examination and cross-examination and although his / her view of the accused is obscured for the duration of his / her evidence, those present in court – including the judge, jury, legal representatives and the accused – are able to observe the demeanour of the child witness and assess his / her credibility at all times.

Given the identity of the rationale underlying these special measures and the similarity in their operation, they are analysed together for the purposes of assessing their impact upon the rights of the accused; in particular, the asserted right to face-to-face confrontation with his / her accusers and his / her right to a fair trial and fair procedures, having regard to the constitutional jurisprudence in this and other common law jurisdictions and the jurisprudence of the European Court of Human Rights.\textsuperscript{22}

1.0.11 This section also examines those special measures – both judicial and statutory in nature – which seek to facilitate the reception of evidence from child witnesses through the introduction of additional actors into the


criminal justice system, namely, support persons and intermediaries. While both actors are charged with this ‘facilitative function’, their exercise of this function is significantly different. The presence of a support person in close proximity to the child witness for the duration of his / her evidence is intended to elicit the best evidence from the child by reducing the trauma experienced by the child witness through the provision of emotional support, encouragement and even – where permissible – reassurance to the child witness. The intermediary is provided to a child witness to overcome the ‘language barrier’ presented to the court where a child witness is involved in criminal proceedings, in light of the realisation that the language utilised by the court may be incomprehensible, intimidating or confusing for the child witnesses and the sophisticated cross-examination techniques fashioned to disclose false testimony in adult witnesses may only confuse and distress child witnesses, regardless of the veracity of their account of events; in order to establish effective communication with the child witness, the intermediary is empowered to either repeat the questions posed by the legal representatives or to rephrase such questions so as to convey the meaning of the question originally formulated in a developmentally appropriate manner.

1.0.12 Such ‘special measures’, in re-imagining the adversarial trial as originally formulated, shift the balance traditionally achieved between, *inter alia*, the rights of the accused, the interest of the community in prosecuting serious offences against children, the protection of child witnesses from undue trauma, the elicitation of best evidence and the rational ascertainment of facts in order to do justice in any given case. The question posed in this

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23 See: (i) Scotland: s. 271L of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004; (ii) Canada: s. 486(1.2) and (1.3) of the Criminal Code, R.S.C., 1985, c. C-46, as amended; and (iii) New Zealand: s. 375A(2) of the Crimes Act 1961, as amended.


25 See: sections 4.13.0-4.18.28 inclusive which analyse the availability of support persons and intermediaries, the eligibility of persons to act as support persons or intermediaries, the function of a support person and an intermediary, and the impact upon the accused of the use of a support person or an intermediary.
section is whether, in the wake of such measures, the balance is now unevenly tipped in favour of the child witness and, accordingly, whether such measures are, in fact or in operation, unconstitutional or incompatible with the Convention, having regard to the rights of the accused. The parameters of such special measures and, in particular, the exclusion of the accused from eligibility to avail of such statutory measures to facilitate the reception of his / her evidence is also examined in the light of the accused’s right to a fair trial, including the right to ‘equality of arms’ and full and effective participation in his / her trial.\textsuperscript{26}

1.0.13 It is important to note that, notwithstanding the fact that the principal legislation in this jurisdiction governing the reception of evidence from child witnesses in criminal proceedings – Part III of the Criminal Evidence Act 1992 – is now more than fourteen years on the statute book, the debate regarding the balance to be achieved between accommodating the special needs of child witnesses – thereby obtaining their best evidence in the interests of the proper administration of justice – and ensuring that modifications of the traditional adversarial trial do not negate the rights of

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\item[(26)] See, in particular: sections 4.2.0-4.2.2, 4.3.0-4.3.8 and 4.4.0-4.4.12 analysing the parameters of special measures including the applicable offences and eligible witnesses in respect of whom such special measures are available; and sections 4.5.0-4.5.17: Availability of Special Measures – Exclusion of the Accused from Eligibility. See also: (i) Ireland: s. 13(1) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001 and – by necessary extension – s. 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001; (ii) England: ss. 16, 17, 21 and 22 of the Youth Justice and Criminal Evidence Act 1999; and (iii) New Zealand: s. 23C of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. See contra: s. 271 of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 in Scotland. See also: Donnelly v Ireland [1998] 1 IR 321 (H.C.), [1998] 1 IR 338 (S.C.); R(S) v Waltham Forest Youth Court [2004] 2 Cr App R 21 (Q.B. Div.); T and V v United Kingdom (2000) 30 EHRR 121 (E.Ct.H.R.); R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, [2005] 1 All ER 999, [2005] 2 Cr App R 1 (H.L.); O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005) [2005] IESC 9 (S.C.); J.F. v Director of Public Prosecutions [2005] 2 IR 174, at p. 187, per Hardiman J. (S.C.); Steel and Morris v United Kingdom (2005) 41 EHRR 22 (E.Ct.H.R.); and SC v United Kingdom (2005) 40 EHRR 10 (E.Ct.H.R.). See also: section 4.17.0 The Unrepresented Accused; The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141 (C.C.A.); R v Brown (Milton) [1998] 2 Cr App R 364 (C.A.); R v Smith (Brian George) [2004] EWCA Crim 2414 (C.A.); CG v United Kingdom (2002) 34 EHRR 31 (E.Ct.H.R.); Hillman v Richmond Magistrates’ Court [2003] EWHC 133 (Q.B. Div.); R v Goncalves (John) [2002] EWCA Crim 2896 (C.A.); Croissant v Germany (1992) 16 EHRR 135 (E.Cm.H.R.); ss. 34-39 of the Youth Justice and Criminal Evidence Act 1999 in England; s. 23F of the Evidence Act 1908, as inserted by the Evidence Amendment Act 1989 in New Zealand; s. 288E and s. 288F of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 6 of the Vulnerable Witnesses (Scotland) Act 2004; and s. 486.3(1)-(5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15 in Canada.
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the accused to a fair trial and fair procedures, has lapsed into silence for almost the entire duration of that period; the decisions in *White v Ireland*\(^{27}\) and *Donnelly v Ireland*\(^{28}\) dismissed in whispers the questions posed as to the propriety of the legislative balance struck, the Law Reform Commission has never revisited this thorny issue since the publication of its excellent consultation paper and report\(^{29}\) almost seventeen years ago and the Oireachtas has only altered the details of the principal legislation in this time.\(^{30}\)

1.0.14 The absence of a reasoned debate in relation to these issues is all the more surprising in light of the increased awareness of the incidence of child sexual abuse – both intra-familial and at the hands of figures of authority, such as members of religious orders and school teachers – since the

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\(^{27}\) *White v Ireland* [1995] 2 IR 268 (H.C.).

\(^{28}\) *Donnelly v Ireland* [1998] 1 IR 321 (H.C.), [1998] 1 IR 338 (S.C.). See also: *O'Sullivan v District Judge Hamill* [1999] 2 IR 9 (H.C.) which, while not involving questions of the constitutionality of the live television link facility, nonetheless raised questions involving the availability of live television link to a complainant of sexual offences with a mental handicap, the necessity for a *voir dire* to determine her eligibility to avail of this special measure and the relationship between s. 13(1)(a) and s. 13(1)(b) of the Criminal Evidence Act 1992, as amended.


\(^{30}\) The relevant amendments considered in this thesis are: (i) amendments to extend the list of applicable criminal offences in respect of which the ‘special measures’ outlined in Part III are available to child witnesses; (ii) amendments to increase the age limit for the definition of a ‘child witness’ from less than 17 years to less than 18 years; and (iii) amendments to incorporate the changes wrought by the new preliminary examination procedure in criminal proceedings. They include: (i) s. 12 of the Criminal Evidence Act 1992 (No. 12 of 1992), as amended by s. 10 of the Child Trafficking and Pornography Act 1998 (No. 22 of 1998); (ii) s. 13(1) and s. 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001 (No. of 2001); and (iii) s. 13(1) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 (No. 10 of 1999), s. 15 of the Criminal Evidence Act 1992, as amended by s. 19 of the Criminal Justice Act 1999 and s. 16 of the Criminal Evidence Act 1992, as amended by s. 20 of the Criminal Justice Act 1999. The Oireachtas has also enacted legislation extending the use of such or similar special measures to civil proceedings concerning the welfare of a child or “person not of full age” or a person, having attained full age, who has a mental disability to such an extent that it is “not reasonably possible for the person to live independently”: Part III of the Children Act 1997 (No. 40 of 1997). In addition, recent legislation has extended the use of live television link beyond the parameters – both as to applicable offences and eligible witnesses – set in the Criminal Evidence Act 1992: s. 29 of the Criminal Justice Act 1992, as inserted by s. 24 of the Extradition (European Union Conventions) Act 2001 (No. 49 of 2001); s. 39 of the Criminal Justice Act 1999 (No. 10 of 1999); and Or. 63A, s. 23(1) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No. 2 of 2004).
enactment of the principal legislation. Ireland is unique amongst the common law jurisdictions considered herein in neglecting – since the impetus for these reforms was first provided – to address the concerns raised either by revising its statutory scheme in order to provide a comprehensive and coherent response to the specific difficulties presented in obtaining the best evidence from child witnesses while preserving the rights of the accused, or by conducting research with regard to the optimum means of achieving such balance between the competing interests involved. The

31 See, in particular: Department of Justice, Equality and Law Reform, The Law on Sexual Offences: A Discussion Paper (Dublin: Stationery Office, 1998); Report on Child Sexual Abuse in Swimming (1998) (Chairperson, Mr. Justice Roderick Murphy); Commission to Inquire into Child Abuse, Interim Report (May, 2001)(Ms. Justice Laffoy, Chairperson); Commission to Inquire into Child Abuse, Second Interim Report (November, 2001) (Ms. Justice Laffoy, Chairperson); Commission to Inquire into Child Abuse Third Interim Report (December, 2003)(Ms. Justice Laffoy, Chairperson) referred to as ‘The Laffoy Report’; and Report on the Diocese of Ferns (2005) (Chairperson, Mr. Justice Francis D. Murphy)(referred to as the ‘Ferns Report’). See also: Commission to Inquire into Child Abuse Act, 2000 (No. 7 of 2000); and the Residential Institutions Redress Act, 2002 (No. 13 of 2002) establishing the Residential Institutions Redress Board to provide financial redress to persons abused while resident in industrial schools, reformatories and other institutions subject to state regulation or inspection. The Board is chaired by The Honorable Mr. Justice O'Leary (H.C.). More recently, on the 28th March 2006, the Minister for Justice, Equality and Law Reform announced that the Government had ordered the establishment of the Dublin Archdiocese Commission of Investigation, to be chaired by Judge Yvonne Murphy of the Circuit Court to investigate the handling of allegations or complaints of child sexual abuse made against members of the clergy operating under the aegis of the Catholic archdiocese of Dublin and the response to such cases; the Commission is to report to the Government within eighteen months with the results of its investigation.

32 See, in particular: Scotland: s. 271 and s. 271A-M of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3), and ss. 288E and 288F of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 6 of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3); England: Part II of the Youth Justice and Criminal Evidence Act 1999 (c. 23) and Part 8 of the Criminal Justice Act 2003 (ss. 51-56); and Canada: s. 486.1(1)-(6), s. 486.2(1)-(8), s. 486.3(1)-(5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.

within comparative analysis of the development and reform of the law of competence, corroboration and examination of child witnesses and the impact of the changes wrought by the enactment and interpretation of Part III of the Criminal Evidence Act 1992, as amended, upon the child witness, the rights of the accused and the administration of justice, has simply never been pursued in this jurisdiction.

1.0.15 However, the decision of the Supreme Court in C.C. v Ireland\textsuperscript{34} and the subsequent High Court and Supreme Court judgments in A v The Governor of Arbour Hill Prison\textsuperscript{35} all delivered within the last five months, have imbued the examination of the legislative measures and judicial practice regulating the reception of evidence from child witnesses in criminal proceedings with a new sense of urgency. The finding that s. 1(1) of the Criminal Law Amendment Act 1935\textsuperscript{36} – containing the strict liability offence of ‘statutory rape’ of a child aged less than fifteen years – is inconsistent with the Constitution and therefore unconstitutional opened up the possibility of requiring many child complainants of sexual offences – who had heretofore availed of the protection extended by s. 1(1) – to give evidence in criminal proceedings; the practice,\textsuperscript{37} encouraged by the courts,\textsuperscript{38}

\textsuperscript{34} C.C. v Ireland (Unreported, Supreme Court, 23\textsuperscript{rd} May, 2006), [2006] IESC 33 (H.C.).
\textsuperscript{35} A v The Governor of Arbour Hill Prison (Unreported, High Court, Laffoy J., 30\textsuperscript{th} May, 2006), [2006] IEHC 169 (H.C.).
\textsuperscript{36} Section 1(1) of the Criminal Law Amendment Act 1935, as amended by the First Schedule to the Criminal Law Act 1997, provides that: “Any person who unlawfully and carnally knows any girl under the age of fifteen years shall be guilty of a felony, and shall be liable on conviction thereof to imprisonment for life or for any term not less than three years or to imprisonment for any term not exceeding two years”.
had previously been to charge an accused with an offence contrary to s. 1(1), wherever there was a choice between charging the accused with such offence or a more serious sexual offence, since, unlike the former, the latter offence would require evidence as to the presence or absence of consent to the sexual intercourse on the part of the child and therefore could require that the child complainant himself/herself give evidence at the trial.39

Accordingly, following a long period of dormancy, the debate regarding the appropriateness and sufficiency of the measures adopted to regulate the reception of evidence from child witnesses—having regard to the rights of the accused, the protection of child witnesses and the proper administration of justice—is active once again.40

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38 See: O’B v District Judge Patwell [1994] 2 ILRM 465 (S.C.); KM v Director of Public Prosecutions [1994] 1 IR 514 (H.C.), referring with approval to The People (Director of Public Prosecutions) v Rock (Unreported, Supreme Court, 18th March, 1993); and State (Attorney General) v Coughlan (1968) 1 Frewen 325 (C.C.A.), analysed in section 2.10.8.

39 See also the Criminal Law (Sexual Offences) Act 2006 (No. 15 of 2006) enacted in the wake of these decisions to provide, in s. 2 thereof, that: "(1) Any person who engages in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment." While s. 2(2) sets out identical penalties on conviction for an attempt to engage a child aged less than 15 years in a sexual act, s. 2(3) provides that: "It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years." Subsection (4) further stipulates that: "Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant’s so believing and all other relevant circumstances”. Although s. 2(5) cautions that it shall not be a defence to proceedings in relation to an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted—and, accordingly, it will not be necessary under this new statutory provision to adduce evidence in relation to the presence or absence of consent—it may still be necessary to involve the child complainant in the proceedings to a greater extent than required under its statutory predecessor in light of the defence of ‘reasonable mistake’ in s. 2(3) of the new Act.

40 It should be noted that, by Resolutions of Dáil Éireann and Seanad Éireann on 6th July 2006, the Joint Oireachtas Committee on Child Protection was appointed. Its Orders of Reference state that it is appointed in order to: (i) review the substantive criminal law relating to sexual offences against children; (ii) examine the issues surrounding the age of consent in relation to sexual offences; (iii) examine criminal justice procedures relating to the evidence of children in abuse cases; (iv) consider the implications arising from and the consequences of the Supreme Court decision of the 23rd May 2006, in the C.C. case; (v) examine the desirability or otherwise of amending the Constitution to deal with the outcome of the C.C. case and/or to provide for a general right of protection for children; and (vi) make such other recommendations on the protection of children as shall to the committee seem appropriate. The Joint Committee (chaired by Peter Power T.D.) is to report back to both Houses of the Oireachtas with recommendations in a final report by 30th November 2006.
1.0.16 The following analysis of these statutory provisions and their interpretation by the courts operates from a standpoint where, although it is accepted that child witnesses are capable of being as reliable as adult witnesses and, moreover, that the traditional restrictive approach regarding the evidence of children was founded upon common misperceptions regarding the capabilities of children and was not warranted, it is nonetheless submitted that children are not ‘miniature adults’, requiring identical treatment to adults; children are inherently different to adults and such difference must be recognised and accommodated by the law of evidence. It is further submitted that such different treatment is consistent with the principle of equality and may provide greater protection for the rights of the accused than an approach which requires that child witnesses be treated, in every respect, as adults.

1.0.17 Equality does not require homogeneity, but rather requires that differences be recognized and accommodated. The popular understanding of equality is the prohibition against ‘direct discrimination’ which involves treating people differently when they are in a comparable situation and should be treated the same. However, the concept of equality also encompasses the prohibition against ‘indirect discrimination’ or affording the same treatment to persons who are different and ought to be treated differently.\(^{41}\) In relation to the evidence of children as witnesses, while the modern psychological research outlined above indicates that, contrary to the traditional understanding of their abilities, children are not inherently less reliable than adults, it should be noted that it does not logically follow from this finding that children should then be treated in exactly the same manner as adults. Although the evidence of a child witness may be equal in value to that of an adult witness, that does not mean that the child may not possess differences.

\(^{41}\) Report of the Constitution Review Group (Dublin: The Stationery Office, 1996), at p. 221: “It is determined by the differential impact of the same treatment on the members of one group of persons in comparison to the members of another. If such differential impact operates to the advantage or disadvantage of the members of one group rather than the other, then, unless such differential is capable of objective justification, the apparent equal treatment amounts to indirect discrimination.” As stated by the U.S. Supreme Court in *Jenness v Fortsom* 403 US 431 (1971): “sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike”.
which justify or even require different treatment; child sexual abuse occurs in part due to the inequalities between child and adult in terms of size, knowledge and power, accordingly, "the legal system should not perpetuate these same inequalities by failing to take such differences into account". 43

1.0.18 Thus, for example, as discussed below in the context of the law of competence, approaches which advocate the total abolition of all 'competence pre-conditions' to the reception of evidence from child witnesses — thereby extending to child witnesses the rebuttable presumption of competence currently enjoyed by adult witnesses — are problematic in that they fail to address or even recognize that important differences may exist between the two groups and that affording the same treatment to both may not represent sound law. In general, children do not

42 Law Reform Commission of Tasmania, Discussion Paper: Child Witnesses in Sexual Assault (Discussion Paper No. 1, 1987) (Kate Warner) at p. 116: "[I]n evaluating any reform proposals, it should be recognised that child sexual abuse occurs, at least partly, because of the inequalities between child and adult in size, knowledge and particularly, in power. In seeking to confront and prevent child sexual assault, unrealistic expectations should not be placed on the criminal justice system. But it is at least possible to ensure that the legal system takes these inequalities in power and knowledge into account. The criminal justice system should at least attempt to protect the most vulnerable and innocent, as well as the more powerful.

43 Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, A Private or Public Nightmare? (Wellington: October, 1988) (Geddis Report) at p. 3. The Report continued: "A criminal justice system fails if it does not protect its most vulnerable and innocent members at least as well as the more powerful". Although the Report ultimately concluded in favour of the abolition of all competency requirements for child witnesses, it is submitted that the reasoning underlying the rejection of competency requirements — namely, the accommodation of children's 'difference' — may equally be utilised in support of such requirements. See also: Law Reform Commission of Tasmania, Discussion Paper: Child Witnesses in Sexual Assault (Discussion Paper No. 1, October 1987) (Kate Warner) at p 116.

possess the same sophisticated linguistic and communicative skills present in the average adult,\textsuperscript{45} while children may be able to understand a concept, such as telling the truth, he or she may not yet possess the tools to explain such a concept to the satisfaction of an adult audience.\textsuperscript{46} It is for this reason – as outlined below – that it came to be understood that it was not the children who were failing the traditional competency tests but rather the competency tests which were failing the children.\textsuperscript{47} In this regard, legal feminists argue that children did not conform to the male patriarchal ideology underpinning the traditional discourse of the law and, as a result, the differences inherent in children were not accommodated by the law\textsuperscript{48}

\textsuperscript{45} Redmount, ‘Psychological Bases of Evidence’ (1958-59), 42 Minn.L.Rev. 559, at p. 577: “The child’s fund of general information and his use of language also acquires competence and reliability only with growth and experience. Symbolic processes reflect the opportunities of experience and education. Where these contacts are retarded reliable comprehension, explanation and communication are limited. Events depending for their correct identification and explanation on the use of words and upon thought processes may not be reflected with reasonable accuracy until a child completes his elementary education or its equivalent in experience. There is variation, of course, not only in terms of individual differences in skill but also dependent upon the complexity of the response expected of a child and upon the subtlety of the situation he is asked to recognize or interpret. Where simple perception under simple conditions is at stake, and the child need only offer recognition, he is obviously competent to do so at an earlier age than if he must offer extensive verbal interpretation of a fairly complex set of events.”

\textsuperscript{46} New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) at para. 28: “Research indicates that by the age of three or four most children do understand the difference between truth and lies, although they may have difficulty articulating a definition, as do many adults. Children of five or six may also consider they know the meaning of terms such as “truth”, “lie” and “promise”, but their definitions may be different from adults, which may influence assessments of children’s willingness or ability to tell the truth. For instance, very young children tend to define inaccurate statements as lies regardless of the intention of the person making the statement.”

\textsuperscript{47} See: Bala, “Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System” in Tarnopolsky, W.S., Whitman, J. and Ouellette, M. (eds.) Discrimination in the Law and the Administration of Justice (1993) at p. 233 wherein it was asserted that “[o]ur [Canadian] legal and social systems failed our children”.

\textsuperscript{48} See: \textit{R v L(D.O.)} [1993] 4 S.C.R. 419, 18 C.R.R. (2d) 257, per L’Heureux-Dubé J. (Gonthier J. concurring) (S.C.C.) in paras. 30-31 wherein it was stated that: “Another issue that must be kept at the forefront of this analysis is the innate power imbalance which exists between the abuser and the abused child...Another important concern in my view, one that, judging from their concurring opinions, some colleagues do not seem to share, is the power imbalance tied to the gender of the victim and perpetrator...The innate power imbalance between the numerous young women and girls who are
any more than the differences inherent in women;49 "if the witness [did] not conform to the standards of court behaviour then he or she [could] be excluded from giving evidence and the jury [did] not hear it and [could not] assess its relevance or weight".50

1.0.19 It is submitted that in the context of the law of competence and with regard to all aspects of the law of evidence as it relates to children, it is important to recognize that “children are not just short adults who have limited vocabularies”;51 they inhabit a world and employ a language and reasoning alien to adults.52 The following preliminary examination is extracted from victims of sexual abuse at the hands of almost exclusively male perpetrators cannot be underestimated when ‘truth’ is being sought before a male-defined criminal justice system...”

49 Young, Professor Alison Harvison, “Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues” 11 Can J. Fam. L. 11 (1992) at p. 21: “[A]s most perpetrators of abuse are male, the problem of child abuse – and society’s failure to wholeheartedly address it – is really one of male domination. This is reinforced by recent Canadian studies which indicate that one if four girls and one in ten boys will be victims of unwanted sexual acts before they are eighteen. The number of obstacles to victims of sexual abuse – who are mostly female – in pursuing their attackers in the legal process is thus seen as symptomatic of a patriarchal society which has systematized the oppression and devaluation of women. One cannot help but be struck by the parallel between the historical discrediting of children, and that of women who report sexual assaults....” See also: Clark, L. “Feminist Perspective on Violence Against Women and Children: Psychological, Social Services and Criminal Justice Concerns” (1987) 3 Can J.W.L. 420; Clark, L. “Boys Will Be Boys: Beyond the Badgley Report” (1986) 2 Can.J.W.L. 135; Lowman, J. “Child Saving, Legal Panaceas, and the Individualisation of Family Problems: Some Comments on the Findings of the Badgley Report” (1985) 4(4) Can.J.Fam.Law. 508; Ashe, Marie and Cahn, Naomi “Child Abuse: A Problem for Feminist Theory” (1993) 2 Texas Journal of Women and the Law 75; and Kelly, Liz “Remembering the Point: A Feminist Perspective on Children’s Evidence” in Westcott, Helen, Davies, Graham and Bull, Ray Children’s Testimony: A Handbook of Psychological Research and Forensic Practice (2002) at p. 361 et seq.


51 Bala, Nicholas “The Supreme Court Sends a Clear Message (Again): Children Are Not Adults” (1999) 27 C.R. (5th) 195, at p. 195: “Children can be reliable witnesses offering important information to the justice system, provided that their stage of development and capacities are respected. While the evidence of all witnesses must be carefully assessed, children are to be treated differently from adults, and their evidence should be assessed taking account of the capacities of children, not adults”.

52 In R v W.(R.) [1992] 2 S.C.R. 122, at p. 133 (S.C.C.), McLachlin J. observed that: “One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection.” See also: Saywitz, Karen, “Developmental Underpinnings of Children’s Testimony” in Westcott, Helen, Davies, Graham and Bull, Ray (eds.) Children’s Testimony: A Handbook of Psychological Research and Forensic Practice (2002) 1, at p. 6; and Bala, Nicholas “The Supreme Court Sends a Clear Message (Again): Children are not Adults” (1999) 27 C.R. (5th) 195.
the Canadian case, *R v Khan*[^53] and illustrates clearly the difficulties presented by child witnesses to the criminal justice system:

"Q. ...and do you know what it is to tell the truth? You're sort of shrugging your shoulders there and smiling. Do you know what it is to tell a lie?
A. U-hmm.
Q. What's a lie?
A. If you say you cleaned up the room and you didn't, and your mother and your father went to see it and it's messy, that's a lie.
Q. I see. What happens when you tell a lie?
A. The parent spank their bum.
Q. That's right. Is that what happens to you?
A. Yeah.
Q. Not often?
A. No.
Q. Do you ever tell a lie? Just a little one?
A. Some big and some little.
Q. Is that right? What's a big lie?
A. A big lie is if you have a big mess in your room, and you said "I cleaned up my room, Mom", and you went in the bedroom and the Grandma and the mother and Daddy were to see it's all a big mess. They would yell at them and spank the bum.
Q. What's a little lie?
A. If you have a little room.
Q. A little room?
A. Like a mouse's house...."

1.0.20 It is submitted that rather than assuming that, in lieu of the traditional treatment of the evidence of children as 'suspect' and inherently unreliable,

the same permissive treatment afforded to adult witnesses should be extended to child witnesses, the challenge for the legislature and the judiciary is to formulate laws in relation to the evidence of children which balance the need to recognize that child witnesses can be as reliable as adults, with the need to accommodate children’s difference:\(^{54}\)

“\[W\]e must assess witnesses of tender years for what they are, children, and not adults. We should not expect them as witnesses to perform in the same manner as adults. This does not mean, however, that we should subject the testimony of children to a lower level of scrutiny for reliability that we would do adults. My concern is that some trial judges may be inadvertently relaxing the proper level of scrutiny to which the evidence of children should be subjected. The changes to the evidentiary rules were intended to make child evidence more readily available to the court by removing the restraints on its use that existed previously but were never intended to encourage an undiscriminating acceptance of the evidence of children while holding adults to higher standards.”\(^{55}\)

1.0.21 It is submitted that a fair and balanced accommodation of the special needs of child witnesses ought not to endanger the rights of the accused to a fair trial and fair procedures but rather produce a criminal trial which is fair to all of its participants and, ultimately, consistent with the proper administration of justice;\(^{56}\) “\[i\]n our quest for the truth, if the defendant’s

\(^{54}\) As stated by the New Zealand Law Commission: “On the one hand, the differences between children’s and adults’ evidence are not sufficient to justify the traditional distrust of children’s evidence that is reflected in the requirement to test their competence. On the other hand, those difficulties do justify modifying some aspects of the trial procedures, particularly those relating to giving evidence, to enable children to give the best evidence they can.” New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 36, at p. 10.

\(^{55}\) \(R v S(W)\) (1994) 29 C.R. (4th) 143, at p. 151, per Justice Finlayson (Ont. C.A.) (accused was charged with sexual interference with a child, aged 15 years at the date of trial).

\(^{56}\) Law Reform Commission of Tasmania, Discussion Paper: Child Witnesses in Sexual Assault (Discussion Paper No. 1, October 1987) (Kate Warner) at p 116: “\[A\] balance of the rights of the suspect with the needs of the child must be struck. Concern for young victims of sexual abuse must not blind us to the serious implications for a person suspected of such abuse. At the same time objections to any such innovation, on the ground that it is contrary to basic principles of criminal justice, must be
rights must not be infringed, neither must the [child] complainant be further victimised". The following analysis considers whether such a balance has been struck by the reforms of the law of evidence in relation to children or whether, in our eagerness to atone for past exclusion, we have erred on the side of inclusion and replaced one form of imbalance with another.58

57 In R v L(D.O.) [1993] 4 S.C.R. 419, 18 C.R.R. (2d) 257, per L'Heureux-Dubé J. (Gonthier J. concurring) (S.C.C.) in para. 37 it was noted that: “Children require special treatment to facilitate the attainment of truth in a judicial proceeding in which they are involved. These special requirements stem not so much from any disability of the child witness, but from the fact that our criminal and courtroom procedures have been developed in a time when the participation of children in criminal justice proceedings was neither contemplated nor plausible.” L’Heureux-Dubé J. further noted, in para. 50 that “[c]hildren may have to be treated differently by the criminal justice system in order that it may provide them with the protections to which they are rightly entitled and which they deserve”.

58 A note of caution was sounded by Galligan J.A. in a decision of the Ontario Court of Appeal, in R v J(FE) (1990) 53 C.C.C. (3d) 64, at pp. 67-68 (Ont. C.A.) in relation to the balancing of the rights of the accused against the protection of children from sexual offences to the effect that: “While there is no scale upon which conflicting evils can be weighed, it should be remembered that revolting as child sexual abuse is, it would be horrible for an innocent person to be convicted of it. For that reason I think the courts must be vigilant to ensure that the zeal to punish child sexual abusers does not erode the rules which the courts have developed over the centuries to prevent the conviction of the innocent.”
2.0.0 COMPETENCE OF CHILD WITNESSES

2.0.1 Competence is easily understood as the capacity of a witness to offer admissible testimony relevant to the proceedings and compellability as the legal doctrine whereby a competent witness can be required as a matter of law to give evidence, upon pain of punishment for contempt of court for refusal to testify. At common law, the presumption that all witnesses were competent to give evidence in criminal proceedings was subject to a number of exceptions, excluding categories of witnesses—such as child witnesses—whose evidence was regarded as ‘suspect’ or unreliable.

2.0.2 While corroboration requirements governed—and continue in some respects to govern—the use which may be made of the evidence of a ‘suspect’ witness once admitted and the statutory reforms containing ‘special measures’ control the manner in which such evidence is to be given or received by the courts, the rules regarding competence operated at a far more fundamental level as a ‘gatekeeper’ in relation to the admission of evidence from such witnesses. With regard to child witnesses, the

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61 Together the rules regarding competence, the corroboration requirements and the obligation upon a child witness to give evidence in open court, face-to-face with the accused, in the same manner as an adult witness combined to form an almost impenetrable barrier to the reception of the evidence of child witnesses, particularly very young children.

62 It should be noted that this section is concerned with the operation of the rules of competence in relation to child witnesses and not with the admissibility of the testimony of adults who are giving evidence in relation to events—such as sexual abuse—which occurred when they were children. In this situation, the adult presumption of competence applies and, in direct contrast to the position
common law rules in relation to competence operated so strictly as to amount to ‘exclusionary’ rules.63

2.0.3 Wigmore64 advanced a sophisticated theory of competence which continues to find favour today. Wigmore asserted that there were three distinct elements or processes which together represented the testimonial qualifications necessary before a court could receive the testimony of a witness,65 namely: (i) observation (or knowledge);66 (ii) recollection;67 and (iii) communication (or narration). The concept of ‘observation’ is not limited to mere vision or hearing but rather includes interpretation and perception; it is the capacity to observe intelligently.68 Similarly, ‘recollection’ – essentially the storing and retrieval of mental ‘files’ – requires an understanding of that which was observed by the witness. The element of communication combines two aspects: (i) a minimum degree of cognitive development, or a “capacity mentally to understand the nature of

traditionally prevailing in relation to child witnesses, any inconsistencies or deficiencies in the evidence given affect the weight of the evidence and not its admissibility.

65 According to 2 Wigmore Evidence (3rd ed., 1940) § 483-485, at pp. 521-523, the time at which these qualifications are required to exist in order to render the witness competent is the time of “utterance of the testimony”. He notes that, although in theory the pre-existence of these testimonial qualifications is required – arguably at least the capacity of ‘observation’ is required at the time of the event witnessed – “it would be pedantic to require that their existence be expressly shown in every respect before the witness [would be] permitted to testify”. Thus, their existence is presumed in relation to some classes of witnesses, until the opposing party proves their absence, or presumed not to exist in relation to other classes, so that they must first be proved to exist by the party offering the witness. With regard to potential child witnesses, Wigmore stated that “lack of capacity by infancy must in theory be shown by [the opposing party] though the witness’ age and appearance usually serve to change the burden”. The incapacity of a witness could be revealed in any one or more of four ways: (i) by the behaviour of the witness in court during trial; (ii) through questioning during a preliminary examination or ‘voir dire’; (iii) through the evidence of other witness, given before the witness was sworn, but after he was called and presented as a witness; and/or (iv) the progress of the witness’ direct examination or cross-examination could reveal the incompetence of the witness, whose evidence up to that point would then be expunged.
66 ‘Observation’ ensures the “probability of a fairly accurate knowledge on the part of the witness” by requiring the witness to form an impression of the external event, corresponding to the fact or event as it existed in reality, which can be reproduced in court: 2 Wigmore, Evidence (3rd ed., 1940) § 478, at p. 519.
67 The rules in relation to ‘recollection’ ensure that such recollection reproduces the original knowledge or observation and, in common with the other two testimonial qualifications seek to preserve the accuracy of the witness’s testimony.
questions put and to form and communicate intelligent answers"; 69 and (ii) a sense of moral responsibility, 70 of the "duty to make the narration correspond to the recollection and knowledge" 71 or to convey accurately the objective reality of the occurrence. 72

2.0.4 Wigmore dealt with child witnesses under the heading, 'Organic Incapacity: Mental Immaturity (Infancy)', the term 'organic incapacity' referring to an incapacity affecting the inherent mental or moral powers of a potential witness; 73 children were regarded as "incapable of exercising the necessary powers of observation, recollection and communication". 74 As indicated

70 Phipson, S.L., Best on Evidence (12th ed., 1922) Vol. 2, asserted in § 151, at p. 138 that immaturity of intellect and a lack of moral development combined to make child witnesses "a source of embarrassment to tribunals" at common law; "while the intellect of a child may be sufficiently developed to enable him to give an intelligible account of what he has seen or heard, he may be ignorant, not only of the nature and obligation of an oath, but even of the obligation to speak the truth".
71 2 Wigmore, Evidence (3rd ed., 1940) § 495, at p. 587: "It would seem that the clear absence of such a sense would disqualify the witness." 2 Wigmore, Evidence (3rd ed., 1940) § 515, at p. 602: "A quality which affects only the element of Communication is Moral Depravity. One who is wholly capable of correct Observation and of accurate Recollection may still be so lacking in the sense of moral responsibility as to be likely to tell his story with entire indifference as to its correspondence with the facts observed and recollected by him. The question is whether any person should upon such grounds be deemed to lack the fundamental capacity of a witness."
72 Although it is difficult to distinguish the latter element from the obligation of an oath which formed the focus of much of the earlier caselaw across the jurisdictions – particularly in relation to potential child witnesses – Wigmore opined that an independent testimonial requirement exists, requiring a sense of moral responsibility to speak the truth. See: 2 Wigmore, Evidence (3rd ed., 1940) § 506, at p. 596.
73 2 Wigmore Evidence (3rd ed., 1940) § 478, at pp. 519-520. Other classes of witnesses in this category included the mentally deranged and the morally depraved. According to Wigmore, there were two other types of incapacity: Experiential and Emotional. 'Experiential incapacity' involved a lack of power to "judge rightly on particular subjects, arising from lack of experience or training"; while 'Emotional incapacity' arose from an "emotional relation to the controversy", such as a marital relationship, which was meant to involve an inability to give any credible testimony, i.e. it affected all three elements of testimonial qualifications alike. Thus, Organic incapacity was said to affect moral and mental functions or powers, Experiential incapacity, involved a lack of sufficient training or expertise, while Emotional incapacity involved the dominance of untrustworthy motives.
74 Delisle, R., Evidence: Principles and Problems (4th ed., 1996) at p. 273. There was a concern at common law that children, due to their limited development, would not perceive events correctly, articulate them accurately, or comprehend the event perceived or that the child would be unduly influenced by an adult (such as a parent) or by their imagination in relation to their perception of the event in question since children were believed to be highly suggestive and to experience difficulty distinguishing fact from fiction and fantasy from reality. Thus, competence attached, not to the quality of the evidence – as advocated by Wigmore's model above – but to the quality of the witness. Healy, John Irish Laws of Evidence (2004) asserts at p. 47 that "[t]he law's former suspicion of children's evidence was deeply rooted in cultural stereotype, and was certainly influenced by a collective memory of the Salem Witch Trials conducted in America towards the end of the seventeenth century – the first recorded legal proceedings there to receive the evidence of children".
above, this presumed unreliability of children as witnesses was founded upon a popular perception of adults and children as polar opposites, with adults at the logical and rational pole and children regarded as “autistic, irrational, emotional and lacking in perceptual and cognitive structures”; this negative view of the capabilities of children led to the exclusion of child witnesses and child complainants from criminal proceedings save in very limited circumstances – upon satisfaction of strict competence and / or corroboration requirements – in the interests of the protection of the rights of the accused and the rational ascertainment of facts.

2.0.5 The radical reappraisal – within the community of psychologists – of these underlying assumptions regarding the reliability of children had a dramatic and transformative effect on the law of evidence across the common law jurisdictions examined herein, including the relaxation – and even, in some instances, the abolition – of the rules regarding the competence of children as witnesses; the re-evaluation of the child as a witness brings into sharp focus the question of the appropriate balance to be achieved between, inter

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76 R v Osolin [1993] 4 S.C.R. 595, 86 C.C.C. (3d) 481, at p. 494, per L’Heureux-Dubé J. (S.C.C.): “The basic rule as to challenges to the competency of witnesses is as follows. All witnesses, with the exception of children under a specified age, are presumed competent to testify unless and until found otherwise due to some condition which renders it unsafe for the trier of fact to rely on the testimony....in order to disqualify a witness, the witness's condition must be such as to substantially negative the trustworthiness of the evidence on the specific subject.”
77 Child complainants of sexual offences were subject to a form of ‘double stereotyping’. The strongly held belief at common law, that a claim of rape was easily – and often maliciously – made and very difficult to defend or disprove, affected child complainants of sexual offences by adding a further layer of disbelief, in addition to the preconceptions outlined above, which a child had to penetrate before his or her evidence could be accepted by the courts. In this regard, Hale, Sir Matthew, The History of the Pleas of the Crown or Historia Placitorum Corone (1736) Vol. 1, famously stated at p. 635 that: “It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death: but it must be remembered, that it is an accusation easily to be made on hard to be proved, and harder to be defended by the party accused, tho never so innocent.” Having cited examples of such ‘false accusations, Hale concluded at p. 636 by stating that: “I only mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses.”
78 See sections 1.0.0-1.0.21: Introduction.
79 See sections 2.16.0-2.16.19: Test Five: Wigmore’s ‘Come What May’ Approach. See also: s. 24, Part III, Vulnerable Witnesses (Scotland) Act 2004 (c. 3).
alia, the admissibility of all relevant understandable evidence,\textsuperscript{80} the protection of the rights of the accused and the ascertainment of truth. It is this movement within the law of evidence, and the impact of these reforms upon the right of the accused to a fair trial and fair procedures and the proper administration of justice, which is analysed in this section.

\textsuperscript{80} Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, \textit{Speaking Up for Justice} (London: Home Office, June 1998) at para. 11.25: "If the basic principles of evidence are that relevant evidence is included and that it is for the tribunal of fact to weigh it, it could be argued that public policy should allow for its inclusion in all but the most exceptional of cases."
2.1.0 SWORN EVIDENCE OF CHILDREN

2.1.1 At common law, a witness was not permitted to give evidence in criminal proceedings unless considered legally competent to testify; since the only evidence which could be received by the courts was evidence given upon oath, a witness was only considered competent at common law where he / she could give sworn evidence, thus rendering himself / herself liable to prosecution for perjury if he / she should fail to give truthful testimony. As indicated above, child witnesses did not enjoy the presumption of competence attaching to adult witnesses based on a belief in the “inherent frailty” of the evidence of children. Accordingly, before the evidence of a child witness could be admitted in criminal proceedings, the court had to be

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81 Tapper, C., Cross and Tapper on Evidence (10th ed., 2004) at p. 241: “It is not much of an exaggeration to say that the old common law...was predominantly a law of witnesses, mainly concerned with their qualification to testify.”

82 Atwood v Welton, 7 Conn. 66, at p. 72 (1828): “A man of the most exalted virtue, though judges and jurors might place the most entire confidence in his declarations, cannot be heard in a court of justice without oath. This is a universal rule of the common law, sanctioned by the wisdom of ages, and obligatory upon every court of justice whose proceedings are according to the course of the common law”.

83 Taylor, A Treatise on the Law of Evidence (12th ed., 1931), Vol. 1, § 1378: “It is proper to observe that the law places no reliance on testimony not given on oath or affirmation. Consequently, in general, no person, what functions he may have to discharge in relation to the cause in question, or whatever be his rank, age, country or belief, can give testimony upon any trial, civil or criminal, until he have, in the form prescribed by law, given an outward pledge that he considers himself responsible for the truth of what he is about to narrate, and rendered himself liable to the temporal penalties of perjury in the event of his wilfully giving false testimony.” See also: R. v Powell (1775) 1 Leach 110, 168 E.R. 157 (Twelve Judges); R v Brasier (1779) 1 Leach 199, 168 E.R. 202 (Twelve Judges); Madan v Catanach (1861) 7 H. & N. 360, 158 E.R. 512 (Ex.); R v Souherr (1930) 22 Cr.App.R. 6 (C.C.A.); Bell v Bell (1899) 34 N.B.R. 615 (N.B.S.C. en banc); R v Antrobus (1949) 87 C.C.C. 118 (B.C.C.A.); and R v Pawlyn (1948) 91 C.C.C. 58 (Ont. C.A.).

84 Law Reform Commission of Ireland, Report on Oaths and Affirmations (LRC 34-1990) para. 2.2, at p. 3: “The principal practical consequence of the rule is that a person who asserts upon oath or affirmation the truth of some matter of fact material to the proceedings, which assertion he does not believe to be true when he makes it or of which he knows himself to be ignorant, may be prosecuted for the common law offence of perjury.”

85 Keane, A., The Modern Law of Evidence (5th ed., 2000) at pp. 105-106 notes the two general rules at common law - that all persons were competent witnesses and all competent witnesses were compellable - were subject to exceptions relating to the accused as a witness for the prosecution, children and persons of defective intellect. Murphy states that the rationale for these exceptions to the general rule of competence resulted from two fears: (i) the fear of manufactured evidence and perjury resulting from interest in the outcome of the case; and (ii) a fear based on personal characteristics of certain witnesses which suggested that they were not suitable or able to take the oath. While the evidence of children continues in modern times to be subject to special rules or considerations, Murphy argues that this special treatment is no longer based upon “any general theory of self-interest or intent to exclude entire classes of evidence” but merely for reasons of “practicality”: Murphy P., Murphy on Evidence (8th ed., 2003) at p. 515.

satisfied that the child was capable of giving his / her evidence *upon oath*; there was no facility at common law for the reception of evidence *unsworn* from a child witness.  

2.1.2 While legislation has been enacted in Ireland to stipulate the threshold which must be satisfied before a child may be admitted to give evidence unsworn in criminal proceedings, the modern law in this jurisdiction regarding the appropriate test to be applied before permitting a child to give evidence *upon oath* remains uncertain. Contrary to the position in other common law jurisdictions – most notably England and Canada – the issue of the eligibility of children to give sworn evidence as witnesses in our criminal courts and the test which must be satisfied before a child may be declared so competent has received scarcely any recent judicial and no legislative attention.

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87 In *R v Powell* (1775) 1 Leach 110, 168 E.R. 157 (Twelve Judges) the Court held, unequivocally, that an infant could not, under any circumstances, be admitted to give evidence except upon oath. The defendant had been charged with rape of a child aged between six and seven years; upon the presumption of law that a child under the age of seven years was incapable of understanding the nature of an oath, and was therefore incompetent to take it, she was admitted to give her evidence against the prisoner without being sworn. The Court held that no prisoner could be convicted except upon legal evidence and that, particularly in criminal cases, no evidence could be legal unless given upon oath; accordingly, the prisoner was acquitted. Similarly, in *Omychund v Barker* (1744) 1 Atkins 21, 26 E.R. 15, Lord Chief Justice Lee stated that it was determined at the Old Bailey, upon mature consideration, that a child could not be admitted as a witness except upon oath: (1776) 1 Leach 110n. Lord Chief Baron Parker agreed that this was the ruling of Lord Raymond in *R v Travers* (1726) 2 Strange 700, where, upon an indictment for rape he refused the evidence of a child without oath. See also: *R v Steward* (1704) 1 Strange 701; *R v White* (1786) 1 Leach 430, 168 E.R. 317; and *R v Brasier* (1779) 1 Leach 199, 168 E.R. 202 (Twelve Judges).

88 See: s. 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914; and, more recently, s. 27 of the Criminal Evidence Act 1992. See also: sections 2.12.0-2.12.16 *Test One: Intelligence and Moral Responsibility*; and sections 2.15.0-2.15.16 *Test Four: Intelligibility*.


It is submitted that the older caselaw – and the judicial approach evident therein – has continued relevance and importance in this jurisdiction, in particular due to: (i) the absence of judicial guidance in relation to the appropriate modern yardstick for the assessment of the competence of child witnesses to give sworn evidence; and (ii) in circumstances where the traditional Brasier test – having been expressly adopted – has not, more recently, been expressly rejected. It is fundamentally important in Ireland, more than in any of the other jurisdictions examined herein, to have regard to the development of the law from the traditional common law approach towards the competence of children to give sworn evidence and the deeply religious understanding of the obligation of an oath. Such examination of the development in the law is necessary in order to determine how far we have moved from the original test or pre-conditions to competence and/or how much remains of this highly restrictive approach. Moreover, since the express terms of the statutory provision authorizing the admission of the unsworn evidence of child witnesses exclude its application to children aged fourteen years or more who do not have a “mental handicap”, it is submitted that the only direct way in which the evidence of such children may be received by the Irish courts in criminal proceedings is by way of evidence upon oath.

92 The hints of a possible modification or refinement of the Brasier test of competence in Attorney General v O’Sullivan [1930] IR 552 (C.C.A.), People (Attorney General) v Rossiter (1951) 1 Frewen 118 (C.C.A.) People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141 (C.C.A.) and Mapp v Gilhooley [1991] 2 IR 253 (S.C.) are considered below in sections 2.5.0-2.5.9.

93 R v Brasier (1779) 1 Leach 199, 168 E.R. 202 (Twelve Judges).

94 See: Attorney General v O’Sullivan [1930] IR 552 (C.C.A.); People (Attorney General) v Rossiter (1951) 1 Frewen 118 (C.C.A.); People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141 (C.C.A.); and Mapp v Gilhooley [1991] 2 IR 253 (S.C.). See also sections 2.5.0-2.5.10: Adoption of Brasier Test of Competence in Ireland and section 2.4.0-2.4.5: Religious Instruction of Child Witnesses.


96 Section 27(1) of the Criminal Evidence Act 1992, read together with s. 27(3) of the Criminal Evidence Act 1992.

97 This thesis is not concerned with the indirect ways in which the evidence of a child witness may be admitted into evidence (i.e. without requiring the presence of the child at the trial of the accused to give evidence himself / herself) such as the admission into evidence of hearsay evidence, either simpliciter or in the form of pre-trial video recordings.
Accordingly, it is submitted that an examination and understanding of the older caselaw and the traditional approach of the law is essential both to determining the modern approach to be adopted and to assessing the balance thereby achieved between the often competing interests of the admission of all relevant evidence, the protection of the rights of the accused and the proper administration of justice.

**2.2.0 Traditional Understandings of the Obligation of an Oath:**

**2.2.1.** Historically, in order to give sworn evidence, the prospective child witness had to demonstrate to the court an understanding of the obligation of an oath as it was traditionally understood; a religious conditional self-curse. While it was initially believed that a witness who gave false testimony under oath would be subjected to swift and certain divine vengeance and that "false testimony was immediately decipherable by the immediate physical manifestation of divine retribution," it was later understood to operate by obtaining a 'hold' upon the conscience of the witness and "reminding the

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98 For a detailed history of the origins and history of the oath at common law, from the ancient concept of divine judgment — trial by ordeal, battle and computation — to the concept of an oath as a self-curse or an appeal to supernatural sanctions, see: The Law Reform Commission of Ireland, *Report on Oaths and Affirmations (LRC 34-1990)*, paras. 2.5-2.6, at pp. 4-5; and the Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with reference to the Multicultural Community (Melbourne: Government Printer, October 2002)* Chapter 3, at pp. 25-35.

99 Bentham J., *Rationale of Judicial Evidence* (1827) Book II, at p. 365: "[I]n perhaps every civilised nation upon earth...the ceremony distinguished by the name of an oath, or what in other languages is equivalent to that word, has been designed or understood to involve in it an address (or at least a reference) to a supreme being or beings; to invisible, supernatural, and omnipotent, or at least superior, agents; and the object of this address or reference has been to engage those superior powers, or to represent them as engaged, to inflict upon the witness punishment, in some shape or other, at some time or other, in the event of his departing knowingly from the truth on the occasion of such testimony."

100 See: Law Reform Commission of Ireland, *Report on Oaths and Affirmations (LRC 34-1990)* para. 2.6, at p. 5. Law Commission of New South Wales, Discussion Paper: *Oaths and Affirmations (Discussion Paper No. 8, 1980)* at p. 8: "The original view of the oath was that it summoned 'Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed they know that the Divine judgment has pronounced him to be a truth-teller.'"

101 Delisle, R., *Evidence: Principles and Problems* (4th ed., 1996) at p. 294: "In the earlier modes of trial, the oath was a direct appeal to the Almighty to witness the justness of the party's claim, and since it was then believed that a false appeal would be immediately visited with punishment, the claim would be upheld if the party survived the oath. As the mode of trial changed and witnesses informed
witness strongly of the Divine punishment somewhere in store for false
swearing"; thus ensuring the receipt of truthful testimony.

2.2.2. The classic statement of the understanding required of a witness before he / she could be admitted to give his / her evidence upon oath is contained in *R v White*, a trial on an indictment for horse-stealing, wherein a witness examined on the *voir dire*, stated that he had heard there was a God, and believed that those persons who tell lies would come to the gallows, however he acknowledged that he had never learned the catechism, was altogether ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, or what became of wicked people after death. The Court rejected him as an incompetent witness on the basis that:

"[A]n oath is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice."

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102 Law Commission of New South Wales, Discussion Paper: *Oaths and Affirmations* (Discussion Paper No. 8, 1980) at p. 8 citing Wigmore 2 Evidence, § 1816, and relying upon the following authorities: *R v White* (1786) 1 Leach 430, at pp. 430-431; 168 E.R. 317; and *The Queen's Case* (1820) 2 Brod. & B. 284, at p. 285, 129 E.R. 976. Phipson, S.L, *Best on Evidence* (12th ed., 1922) Vol. 2, § 161, at p. 148: "[T]he object of the law in requiring an oath is to get at the truth relative to the matters in dispute, by obtaining a hold on the conscience of the witness; and consequently that every person ought to be admitted to give evidence who believes in a Divine Being, the Avenger of falsehood and perjury among men, and who consents to invoke, by some binding ceremony, the attestation of that Power to the truth of his deposition."

103 See: *Lady Lise's Trial* (1685) 11 How. St. Tr. 297, at p. 326, per Jeffries C.J.: "[T]he belief of the witness that he will be divinely punished for lying affords a guarantee that he will try to tell the truth".

104 *R v White* (1786) 1 Leach 430, 168 E.R. 317.

105 *R v White* (1786) 1 Leach 430, at pp. 430-431, 168 E.R. 317. Taylor was critical of this "ordinary definition of an oath" on the basis that "the design of the oath is not to call the attention of God to man, but the attention of man to God, not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so...." Taylor, *A Treatise on the Law of Evidence* (12th ed., 1931) Vol. 1, para. 1382, at pp. 872-873.
2.2.3. Accordingly, in order to be considered a competent witness and admitted to give his/her evidence upon oath at common law, the prospective child witness had to convince the court that he/she believed that God would damn his or her soul for all eternity if he/she failed to tell the truth in the giving of evidence. This understanding of the obligation of the oath is evident from the preliminary examination conducted in relation to a potential child witness in a rather colourful Irish case decided in 1683, *The Trial of Laurence Braddon and Hugh Speke*. The child, having confirmed, when questioned, that the "father of lies" was the devil and that if he should swear to a lie and call God to witness it he should "go to hell-fire" was admonished in the following terms before being sworn: "if you take an oath, be sure you say nothing but what is truth, for no party, nor side, nor any thing in the world; for that God, that you say will call you to an account, and cast you into hell-fire, if you tell a lie, and witness to a falsehood, knows and sees all your acts, therefore have a care, the truth you must say, and nothing but the truth." 

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106 The test of the competence of a prospective witness thus coincided with the test for the admission of sworn evidence from such a witness, namely, whether the prospective witness understood the nature and consequences of an oath in its ancient and religious sense. 


108 *R v Braddon* (1684) 9 St Tr 1127, at pp. 1148-9, per Judge Jeffreys (K.B.).

109 Also known as: *R v Braddon* (1684) 9 St. Tr. 1127 (K.B.). This case arose out of the suicide of Arthur, Earl of Essex, on 13th July, 1683 while he was in custody in the Tower of London regarding allegations of high treason. The defendants, who pleaded not guilty, were charged with acts of sedition, namely, that they had, *inter alia*, unlawfully conspired to procure false witnesses and to prosecute a claim to prove that the said Earl of Essex had been murdered by persons unknown, in whose custody he had been held; the defendants had produced a number of witnesses – including a boy and girl, each aged 13 years – who claimed to have seen a bloody razor (with which the throat of the earl was cut) thrown out of the earl’s window in the Tower, which was collected by a nurse or maid in white clothing, who took the razor inside again. This was contrary to the findings of the coroner who claimed that the razor was found on the floor beside the, now deceased, earl. The case is significant, however, not for its unique fact scenario but for the clear emphasis on a deeply religious understanding of the nature and consequences of an oath required of adult and child witnesses alike.

110 The court also admonished the second child witness to tell the truth using religious language to explain the nature and consequences of the oath, however, this admonition is less pointed than that received by the other child witness earlier; the admonition in each case is tailored to address the perceived risks of falsehood inherent in the child witness: (1684) 9 St. Tr. 1127, at p. 1181 (K.B.).

111 *R v Braddon* (1684) 9 St. Tr. 1127, at pp. 1148-1149 (K.B.). The examination of this child witness focused particularly upon ascertaining the child’s understanding of his obligation to tell the truth and the consequences of a failure to tell the truth while under oath for the following reasons: (i) the child had a reputation, confirmed by his father in evidence, of not telling the truth (1684) 9 St. Tr. 1127, at p. 1142 (K.B.); (ii) there was a suggestion that the child had been coerced into constructing his ‘eyewitness account’ and signing a statement containing that account, by the first defendant, Laurence Braddon; the child admitted in evidence that he at first refused to sign the statement because the
2.3.0 The Brasier Test of Competence:

2.3.1 The case celebrated for containing the authoritative statement of the test for the reception of sworn evidence from potential child witnesses in this jurisdiction is R v Brasier. The accused was convicted of assault with intent to rape a child aged less than seven years, upon the testimony of the child’s mother and another woman to whom the child had complained. The child was neither sworn nor produced at the trial. The twelve judges concluded that the evidence of the mother and other witness constituted hearsay and should not have been admitted; the accused received a pardon.

The Court confirmed that no testimony could be legally received except upon oath but noted that a child aged less than seven years could be sworn and provide evidence upon oath if, after a preliminary examination conducted by the court, he / she demonstrated a “sufficient knowledge of the account was not true and he was afraid “of coming into danger”: (1684) 9 St. Tr. 1127, at p. 1150 (K.B.); and (iii) it was critically important that this child witness tell the truth since his evidence was central to the prosecution mounted by the defendants in an attempt to prove that the Earl of Essex was murdered, the very subject matter of the trial.

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account was not true and he was afraid “of coming into danger”: (1684) 9 St. Tr. 1127, at p. 1150 (K.B.); and (iii) it was critically important that this child witness tell the truth since his evidence was central to the prosecution mounted by the defendants in an attempt to prove that the Earl of Essex was murdered, the very subject matter of the trial.

112 R v Brasier (1779) 1 Leach 199, 168 E.R. 202 (Twelve Judges). As illustrated above, while not expressly laying down a test for the reception of sworn evidence from potential child witnesses, the earlier case of R v Braddon (1684) 9 St. Tr. 1127 (K.B.) in this jurisdiction, contained a similar analysis of the obligation of an oath. Equally, in the earlier case of Young v Slaughterford (1709) 11 Mod. Rep. 228 the competency test had been described in terms of the child possessing sufficient intelligence to properly appreciate the distinction between good and evil and the duty of speaking the truth; if the child knew the “danger of an oath”. Holt L.C.J. held, in relation to an appeal against a conviction for murder, that an infant under twelve years could be admitted as a witness if he knew the danger of an oath. The Court held that the child in question, a witness for the prosecution, had demonstrated the requisite understanding and the child was therefore admitted to evidence. See also: R v Powell (1775) 1 Leach 110, 168 E.R. 157 (Twelve Judges).

113 In East, Sir Edward, A Treatise of the Pleas of the Crown (1803) at pp. 441-3, the child, Mary Harris, is described as being five years of age.

114 The evidence against the prisoner consisted of: (i) the recent complaints made by the child of “all the circumstances of the injury which had been done to her” to her mother and another woman who lodged with her “immediately on her coming home”; (ii) the fact that the prisoner lodged at the place described by the child (the child claimed he was a soldier and accurately described his lodgings); (iii) the fact that the child “had received some hurt”; and (iv) the fact that the child had, “on seeing him the next day”, declared him to be the perpetrator of the act described by her. R v Brasier (1779) 1 Leach 199, at p. 200, 168 E.R. 202.

nature and consequences of an oath". The significance of the case in this context is the test which it laid down in relation to the admissibility of sworn evidence from child witnesses. The Court held that the admissibility of such evidence depended upon the "sense and reason" the child witness possessed of the "danger and impiety of falsehood"; this was to be determined by reference to the answers given by the child witness to the questions posed by the Court during the preliminary examination.

2.3.3 Clearly a finding of competence to give evidence upon oath, defined in these terms, was predicated upon or assumed an underlying belief by the witness in a supreme being or deity who would punish him / her for false testimony; accordingly, an absence of religious belief would render a witness incompetent. Maden v Catanach involved an objection taken to the competency of a witness, before she was sworn, on the ground of a want of religious belief. It was established during the voir dire that the witness did not believe in God, nor did she believe in the obligation of an oath any

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116 R v Brasier (1779) 1 Leach 199, at p. 200, 168 E.R. 202 (Twelve Judges). The test laid down in R v Brasier (1779) 1 Leach 199, 168 E.R. 202 was adopted in Australia in Cheers v Porter (1931) 46 CLR 521. See: R v White (1786) 1 Leach 430, at pp. 430-431, 168 E.R. 317. Law Reform Commission of Ireland, Report on Oaths and Affirmations (LRC 34-1990) para. 2.7, at p. 6: "It was a necessary corollary of this doctrine that, in pledging his eternal soul as security for his promise to testify truthfully, the witness should believe in a supreme being who would punish him sooner or later for any false testimony. In consequence, persons who were deemed to lack the requisite religious belief could not be sworn and were therefore not competent to testify." Similarly, in Omychund v Barker (1744) 1 Atkins 21, 26 E.R. 15 where the Court was presented with the question of whether to admit the evidence of a Gentoo, it was held by Willes C.J., with whom the rest of the Court concurred (Lord Hardwicke, Lee C.J., Willes C.J. and Parker C.B.) that persons who do not believe in God, or in a future state of rewards and punishments could not be competent to give sworn evidence. Omychund v Barker (1744) 1 Atkins 21, at p. 45, 26 E.R. 15, per Willes C.J.: "Though I have shewn that an Infidel in general cannot be excluded from being a witness, and though I am of opinion that infidels who believe a God, and future state of rewards and punishments in the other world, may be witnesses; yet I am clearly of opinion, that if they do not believe a God, or future state of rewards and punishments, they ought not to be admitted as witnesses."

117 Maden v Catanach (1861) 7 H. & N. 360, 158 E.R. 512 (Ex.). This was a civil case, where the plaintiffs (one of which was the witness whose competency was questioned) claimed 251., being the value of the plaintiffs' piano, which, it was alleged, the defendant wrongfully detained. The witness in question was essential to the establishment of the plaintiffs' claim.

118 Counsel for the plaintiffs countered this objection on the grounds that: (i) defective religious belief ought not to be treated as a ground of incompetency, so as to deprive the plaintiffs of their civil rights, although it could affect the credibility of the witness; (ii) if such defect were held to render the witness incompetent, it should be proved, like any other fact, by independent evidence, and not by questioning the witness herself; and (iii) in any event, since this witness did not object to taking the oath, she was not compellable to answer any questions until she had been sworn. The trial judge rejected the first two arguments and swore the witness for the purpose of the voir dire.
more than her word; she asserted that she was morally bound, by the solemn declaration she had taken, to speak the truth. The court duly rejected the witness as incompetent. The Court of Exchequer upheld the approach taken by the County Court and stated that it was in accordance with the law and practice, although it noted that whether or not it ought to be the law was another question. The Court concluded that:

"We are not here to make the law, as we have been invited to do, but to administer it; and by the law every witness must be sworn according to some religious ceremony; or, if that is to be dispensed with, it can only be done by the authority of an act of parliament, and in this case there is no such authority."  

2.3.4 In the wake of the acceptance of the Brasier test of competence, there remained some confusion as to whether it was necessary to constitute an understanding of the 'nature and consequences of an oath' that the prospective witness believe in a Supreme Being and a system of punishments and rewards in a future world – in this instance eternal damnation for the soul of the prospective witness consequent upon false testimony – or whether it was sufficient that the witness believe in a Supreme Being and some form of punishment in this world. This confusion was resolved in Attorney General v Bradlaugh where it was held that if there was any belief in a religion according to which it was

120 Madan v Catanach (1861) 7 H. & N. 360, at pp. 366-367, 158 E.R. 512 (Ex.).
121 Omychund v Barker (1744) 1 Atk. 21, 26 E.R. 15, at p. 31, per Chief Justice Willes (C.A.): “I am as clearly of opinion, that if they [Infidels] do not believe a God, or future rewards or punishments they ought not to be admitted as witnesses.” See also the Australian case: R v Tuck (1912) 2 W.W.R. 605, 5 D.L.R. 629, 19 C.C.C. 471 (Alta. C.A.).
122 Wigmore, 2 Evidence (3rd ed., 1940) § 1817 stated that “a belief, if genuine, of a sure punishment, whether material or spiritual, in the present existence, would be no less efficacious a preventative of falsehood than a belief in the punishment after death. The very nearness of the former sort would be a more vivid and forceful reminder than the distant indefiniteness of the latter...”
123 Attorney General v Bradlaugh (1885) 14 Q.B.D. 667. This trial was brought by the Attorney General against the defendant, a member of the House of Commons, for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act, 1866, as amended by the Promisey Oaths Act, 1968; a unique set of facts. However, it is clear from the tenor and language of his judgment that the Master of the Rolls intended his statements to be of wider application than the peculiar facts of the case and clarified what was meant by the “nature and consequences of an oath”; if the witness refused to take the oath or believed the oath had no binding effect on his or her conscience, or equally, if there was "no belief in spiritual retribution", the witness could not be competent.
supposed that a Supreme Being would punish a man in this world for doing
wrong that was sufficient to render such a person a competent witness.124

2.3.5

The moral, theological and cognitive sophistication required in order to
demonstrate such an understanding of the nature and consequences of an
oath was believed to be beyond the ken of children and young persons.
However, in the seminal decision in *R v Brasier*,125 the court specifically
rejected any suggestion that there was an age limit attached to the test of
competency which would exclude infants of tender years; indeed, the courts
both before and after this decision allowed witnesses as young as five126 and
six127 to be sworn.128 It is submitted that those older authorities cited in

124 Attorney General v Bradlaugh (1885) 14 Q.B.D. 667, at p. 697 per Brett M.R.: “[T]here is no
necessity that the person taking the oath should believe that he will be liable to be punished in a future
state. If there be any belief in a religion according to which it is supposed that a Supreme Being would
punish a man in this world for doing wrong, that is enough; but if he does not believe in a God, or if
believing in a God he does not think that God will either reward or punish him in this world or the
next, in either case according to the law of England as here declared a man cannot be a witness in any
case, or under any circumstances.” The authority for this statement is another report of Willes, C.J. in
Omyehund v Barker (1744) 1 Atkins 21, 26 E.R. 15. Wigmore suggests that the two reports of the
same judgment gave rise to the earlier period of uncertainty: 6 Wigmore, Evidence (Chad. Rev., 1979)
§ 1817, p. 385. See also: Sopinka, J., Lederman, S. and Bryant, A., The Law of Evidence in Canada

125 R v Brasier (1779) 1 Leach 199, at p. 200, 168 E.R. 202: “[T]here is no precise or fixed rule as to
the time within which infants are excluded from giving evidence; but their admissibility depends upon
the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected
from their answers to questions propounded to them by the Court....”


127 R v Brasier (1779) 1 Leach 199, 168 E.R. 202; R v Perkins (1840) 2 Moo.C.C. 135, at p. 139; 169
E.R. 54, at p. 55; and Young v Slaughterford (1709) 11 Mod. 228. In R v Holmes (1861) 2 F.&F. 788;
175 E.R. 1286 the court permitted the evidence of a six year old child complainant of rape to be
admitted, after a preliminary examination as to her understanding of the nature of an oath, which
revealed that the child – after some hesitation – believed that it was a “bad thing” to tell lies, that she
said her prayers and that she believed that those who told lies would “go to the wicked fire”: (1861) 2
F. & F. 788, at p. 789.

128 Report of the Committee on Sexual Offences Against Children and Youths, Sexual Offences
Against Children (Ottawa: Supply and Services Canada, 1984) (“Badgley Report”) Vol. 1, at p. 67:
“To make a child’s testimonial competency contingent upon or influenced by the child’s age fails to
take into account the cognitive and developmental differences among children of the same age and, in
the Committee’s view, is wrong in principle.” Further, at p. 371, the Report noted that: “[T]he common
law was itself equivocal in this regard. For example, one eighteenth century case stated that a child
under the age of seven years could, in appropriate circumstances be sworn, [R v Brasier] while
another case, decided in the same century, expressed the view that only a child nine years of age or
older could take the oath [R v Travers (1726) 93 ER 793 (KB)]. In Sankey v The King [1927] SCR
436, at p. 440 Chief Justice Anglin of the Supreme Court of Canada stated that 'of no ordinary child
over seven years of age can it be safely predicted, from his mere appearance, that he does not
understand the nature of an oath.' That an age-presumptive test of competency tends to be arbitrary is
also borne out by actual judicial experience with Canadian children of different ages. In one case, a
child of five years and nine months old was deemed competent to take the oath, while in another,
support of the proposition that — contrary to the decision in Brasier — an age limit applied at common law below which child witnesses were not sworn by the courts, are explicable by reference to the fact that the young child witnesses in these cases failed to demonstrate the requisite understanding of the obligation of an oath; while their youth resulted in a want of understanding — of the nature and consequences of the oath — it was their want of understanding and not their age which rendered them

[Strachan v McGinn (1936) 50 BCR 394 (SC)] a child four years old was qualified to give unsworn evidence [R v Pailleur (1909) 20 OLR 207 (CA)]."


130 In 1726, the Court in R v Travers (1726) 2 Strange 700, 93 E.R. 793 (Kingston Lent Assizes) attempted to settle the question of the age a child witness must attain before being considered competent by the court. The defendant in this case was acquitted of the rape of a child, then aged six years, when the Lord Chief Baron Gilbert refused to admit the child as a witness for the prosecution. At the Summer Assizes of 1726, an indictment was found against the defendant for an assault with intent to ravish the same child witness — then aged seven years — however, objection was taken to her competency as a witness; it was argued by counsel for the Crown — contrary to Young v Slaugherford (1709) 11 Mod. 228 — that it had formerly been held that no person under twelve years of age could be admitted as a witness, and that a child of six or seven years of age, “in point of reason and understanding, ought to be considered as a lunatick or madman”: (1726) 2 Strange 700, at p. 700. In relation to the age at which the evidence of a child witness will be received by the courts, it was held at p. 701 that: “The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten.” Raymond C.J. held that the child was not a competent witness and the defendant was acquitted of the charge of assault with intent to ravish the child. The Court referred to the case of The King v Steward (1704) 1 Strange 701 at the Old Bailey, wherein the evidence of a child witness aged ten years and ten months was permitted in relation to a charge of rape where other evidence pointed to the guilt of the defendant and the child gave a good account of the oath in preliminary examination; however, the Court unanimously rejected the evidence of the second child complainant on account of her youth — aged between six and seven years — “without inquiring into any of the circumstances to give it credit”: (1726) 2 Strange 700, at p. 701. See also: Hale’s History of the Pleas of the Crown, Historia Placitorum Coronce (London, 1778) Vol. 1, at p. 634, where it was asserted that a child of ten years of age could be a witness.

131 In R v Perkins (1840) 2 Mood. CC 135 Alderson B. stated the effect of Brasier succinctly thus: “It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a Judge will allow him to be sworn.” In Ireland, the Law Reform Commission conceded that it “may be that in practice children under the age of 8 are rarely, if ever, allowed to give evidence on oath in Ireland”, however it noted that, in light of both the level of religious understanding required of a child with regard to the nature of an oath and the age at which religious education usually begins, “the situation could hardly be otherwise”: Law Reform Commission of Ireland, Report on Child Sexual Abuse, (LRC 32–1990) (September, 1990) para. 5.09, at p. 52. See also: Walsh, D., Criminal Procedure (2002) at p. 857.

132 See, contra the decision in R v Pike (1829) 3 C&P 598 where Park J. refused to admit the dying declaration of a child of four years of age on the ground that: “As this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible....Indeed, it think that from her age we must take it that she could not possibly have had any idea of that kind.” However, in R v Perkins (1840) 2 Mood. CC 135, where the case for the prosecution depended principally on statements made by the deceased, a child of ten years, shortly before his death from a gun shot wound, the Court unanimously
incompetent witnesses. The inconsistency in the earlier authorities is also attributable to the fact that, in the absence of specific guidelines, the determination whether a particular child could be regarded as satisfying the test of competence rested entirely within the discretion of the trial judge.

2.4.0 Religious Instruction of Child Witnesses:

2.4.1 The importance of passing this test of competence lay in the fact that, if the court concluded that the child did not understand the nature and consequences of an oath, his/her evidence would be rejected, often with

held that these statements could be admitted if it could be shown that they were made by the deceased under the apprehension and expectation of immediate death: R v Bonner 6 Car. & P. 386; R v Woodcock 1 Leach 503; R v John 1 East's P.C. 358, 1 Leach 504, S.C.; R v Welbourne 1 Leach 503n, 1 East's P.C. 358; R v Christie Car. Sup. C.L. 202; R v Mosley 1 Moo. C.C. 97; R v Van Butchell 3 Car. & P. 631; R v Craven Lewin C.C. 77; and R v Simpson Lewin C.C. 78. The Court did not accept submissions to the effect that the statements could not be received because, due to the young age of the witness, he could not be considered a competent witness, had he survived; although the child failed to respond when asked if he understood the nature of an oath, when asked where he thought he would go if he lied, he responded “to hell”, and if he told the truth, “to heaven”. The Court reiterated that the test was one of understanding and not age and it appeared satisfied from the accounts of witnesses that the child had understood the obligation of an oath.

133 Phipson, S.L, Best on Evidence (12th ed., 1922) Vol. 2, § 155, described the effect of the decision in Brasier as follows at p. 142: “[T]he decision settled the modern law and practice relative to the admissibility of the testimony of children. As in the criminal law, ‘malitia supplet cetatem’ (malice supplies age) so here the maxim of the canonists was followed, ‘prudentia supplet cetatem’ (understanding supplies age)”. Equally, Fennell Caroline, The Law of Evidence in Ireland (1992) asserted at p. 81 that: “[T]here is no threshold age above which children are deemed to be competent. A young child may well be deemed competent to testify by the court, just as an older child may be deemed incompetent. It is a question of degree and assessment by the court on an individual basis.”

134 In commenting on the difficulties which this situation provoked, Taylor stated that: “If, relying on the opinion of the Judge that a certain important witness was competent to testify, a party determined upon calling him, and was thus enabled, in the first instance, to establish a just, or to resist an unjust, claim, it frequently happened that the Court above differed in opinion with the Judge who presided at the trial, the consequence of which was that the verdict was set aside without any regard to the real merits of the case, and the party who had obtained it was driven, at a large expense, and to his infinite annoyance, to seek for a second verdict, perhaps equally inconclusive.” Taylor, A Treatise on the Law of Evidence (12th ed., 1931), Vol. 1, para. 1343, at p. 848.

135 In Omychund v Barker (1774) 1 Atkins 29, 26 E.R. 15, Lord Chief Justice Lee asserted that it had been determined in the Old Bailey, upon mature consideration, that a child should not be admitted as an evidence without oath and Lord Chief Baron Parker likewise noted that it had been so decided at Kingston Assizes before Lord Raymond, where upon an indictment for rape, he refused the evidence of a child without oath. This was consistent with the decision of the Court in R v Powell (1775) 1 Leach 110, 168 E.R. 157 (Twelve Judges) where, in relation to an indictment for rape on an infant aged between six and seven years, the court held that an infant cannot, under any circumstances, be admitted to give evidence except upon oath; the prisoner had been acquitted on the unsworn testimony of the child. Having examined the older authorities, Phipson, S.L, Best on Evidence (12th ed., 1922) Vol. 2, § 154, noted at p. 141 that: “Through all this inconsistency and confusion we can trace two principles working their way: 1. That if the testimony of an infant of tender years is to be received at
the result that the charge could no longer be prosecuted against the accused; "[t]he traditional reliance on the religious nature of the oath therefore cannot be overemphasized". As a result, a practice developed at common law of giving a prospective child witness religious instruction before the competency examination in order that the child would be found to be competent to testify. Indeed, in some instances, the court would adjourn the competency hearing in order to facilitate the religious education of the child, when it became clear that the child was unable to demonstrate an understanding of the obligation of an oath. Once educated in the meaning of the oath, the child would return to the court where he / she would be pronounced a competent witness to give sworn evidence.

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all, it ought to be received from the infant itself, and not through a statement helped out by somebody else. 2. That a witness being an infant of tender years, is no ground for relaxing the rule, 'In judicio non creditur nisi juratis' ("In judicial proceedings no one is believed unless upon oath"): Cor. Car. 64.)

136 Law Reform Commission of Ireland, Report on Oaths and Affirmations (LRC 34-1990) para. 4.14, at p. 34.

137 R v Williams (1836) 7 C & P 321; R v Hall (1849) 14 JP 25, per Alderson B. Phipson, S.L., Best on Evidence (12th ed., 1922) Vol. 2, §156, at pp. 143-144: "When a material witness in a criminal case is an infant of tender years, the practice has been for the judge to examine him, with the view of ascertaining whether he is aware of the nature and obligation of an oath, and the consequences of perjury. And if it is ascertained before the trial that a material witness is of tender years and devoid of religious knowledge, the court will, in its discretion, postpone the trial, and direct that he shall in the meantime receive due instruction on the subject." (Emphasis in the original).

138 See: R v Anon (n.d.) 1 Leach 430n; 168 E.R. 317; R v Kinlock 18 How. St. Tr. 395; R v Murphy (1795) 1 Leach 430n, 168 E.R. 317; R v White (1786) 1 Leach 430, 168 E.R. 317; R v Wade (1825) 2 Mood. 86; 168 E.R. 1196; R v Williams (1835) 7 C & P 320; R v Milton (1841) Ir.Circ.Rep. 16; R v Baylitz (1849) 4 Cox 23; and R v Nicholas (1846) 2 Car. & K. 246, 175 E.R. 102. See also: Mapp v Gilhooley [1991] 2 IR 253 (S.C.).

139 Accordingly, in R v White (1786) 1 Leach 430, 168 E.R. 317 it was held that while that an infant witness who had no notion of eternity or of future state of reward and punishment could not be examined as a witness, the trial could properly be postponed until the following assizes to allow the witness to be instructed in the nature of this obligation. Mr. Justice Rooke mentioned this criminal prosecution in R v Murphy (1795) 1 Leach 430n, a case of the rape of a child of seven years, heard at the Old Bailey in 1795. The judge stated that, upon a conference with the other judges after his return from the circuit, they unanimously approved of what he had done. Although it was acknowledged in the later decision, R v Wade (1825) 2 Mood. 86, 168 E.R. 1196 that it may be permissible for the court to postpone a trial for the purpose of instructing an adult witness in the obligation of an oath, it was noted that that the jury should not be discharged during such postponement. In this case, the prisoner was charged with rape of a woman who, though adult and of sufficient intellect, had no concept of a future state of rewards and punishments. The trial judge, Bayley J., therefore stopped the case and discharged the jury in order that the witness might receive religious instruction on the obligation of an oath before the next assizes. It was held that an acquittal should have been directed and that the discharge of the jury was improper; an application for a pardon was therefore recommended. See also: R v Kinlock 18 How. St. Tr. 395. O Siochain, P.A., Outline of Evidence, Practice and Procedure in Ireland (1953) at p. 28: "A child of seven, or even five, years of age is allowed to give evidence where he shows that he knows the difference between a lie and the truth, and it is permissible and proper to give a child instruction on this matter for the purpose of giving evidence: R v Holmes 2 F & F 788."
However, it was emphasized by the court in *R v Williams* that, before the courts could swear a child witness who had received such religious instruction, the effect of the oath upon the conscience of the child “should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of the oath, recently communicated to her for the purposes of this trial”. Until the death of the deceased, the child witness in the ensuing murder trial had never heard of God, or a future state of rewards and punishments, had never prayed and did not understand the nature of an oath. Since that time, she had been given instruction on two occasions by a priest as to the nature and consequences of an oath, however, her description of the nature of an oath was very confused and she demonstrated “no intelligence as to religion or a future state”. It was argued that if the courts were to permit the calling of priests to dictate to a prospective witness the meaning of an oath, in order that such witness would pass the test of competency, a priest could be called in every case involving child witnesses to give instructions on the subject; the court rejected the testimony of the child on the basis that she had no “real understanding” of the nature of an oath. This decision represents a welcome – and justified – criticism of the practice of instructing a prospective child witness in the religious meaning of an oath in order that such child be declared competent at trial. While the distinction drawn by the court between religious instruction and religious education was itself the subject of criticism, it is submitted that the court was merely attempting to set a threshold of religious knowledge or understanding, without which a child

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140 *R v Williams* (1835) 7 C & P 320. Patteson J. stated that: “I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that, previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony.”

141 Phipson was critical of the distinction made by the court between religious instruction and religious education and opined that: “[T]he dogma – if indeed, Patteson J. intended to lay it down – that the child was incompetent to take an oath, because her sense of the binding obligation of the oath was not the result of her general religious education, was at variance with other authorities and is indefensible on principle.” Phipson, S.L., *Best on Evidence* (12th ed., 1922) Vol. 2 §156, at pp. 143-144.
could not be permitted to testify, even with the aid of specific religious instruction; that is, it was permissible to build upon the foundational knowledge acquired by the child before the trial, but not to instruct the child de novo in a concept until then alien to him / her.\(^\text{142}\)

2.4.3 Equally – as evidenced by the decision in *R v Nicholas*\(^\text{143}\) – the courts would only permit an adjournment in order to facilitate the religious instruction of a potential child witness where the child’s ignorance of the obligation of an oath “arises from neglect of moral training rather than from immaturity”.\(^\text{144}\)

The accused was charged with carnally knowing and abusing a girl, Margaret Hyde, of six years. Before the jury was sworn, the prosecution applied to have the trial postponed for the purpose of instructing the child as to the meaning of the oath, since it was considered that otherwise she would be declared an incompetent witness. The application was refused by Pollock C.B. on the basis that the “safety of public justice would be endangered”\(^\text{145}\) by postponing the trial in such a manner. The Court held that while such an approach might be permissible in relation to an older child, where the reason for his or her ignorance of the oath was the fact that their religious education had been neglected, and not because, as here, he or she was too young to have been taught.\(^\text{146}\) In relation to very young children, such as the complainant in this case, the Court asserted that it doubted that “the loss in

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\(^\text{142}\) It is respectfully submitted that a preferable interpretation of the words of Patteson J. – preferable, that is, to that advanced by Phipson *ibid* – is as follows. If, as in the *Williams* case, a child can demonstrate no understanding of God or future rewards or punishments (which would form part of general religious education) even in a very basic form, then such child should not be permitted to give evidence upon oath, since any religious instruction given to the child in relation to the meaning of an oath would be confined to the purposes of the trial and could not be said to form part of the child’s understanding; however, if a child demonstrated an understanding of fundamental religious ideas such as sin and punishment but could not explain the meaning of an oath, an adjournment could be granted.

\(^\text{143}\) *R v Nicholas* (1846) 2 Car. & K. 246, 175 E.R. 102.


\(^\text{146}\) The Court warned that it was not laying down any general rule, and acknowledged that there might be cases where a postponement for this purpose might be proper. In this regard, it was stated in *R v Nicholas* (1846) 2 Car. & K. 246, at pp. 246-247, 175 E.R. 102, at p. 102: “Still I can easily conceive that there may be cases where the intellect of the child is much more ripened, as in the cases of children of nine, ten or twelve years old; for example, where their education has been so utterly neglected that they are wholly ignorant on religious subjects. In those cases a postponement of the trial may be very proper...”
It is important to note that this approach – adjourning a trial in order to permit a key child witness to receive religious instruction for the purposes of passing the test of competency – is not merely of historical interest but has continued to find favour with the judiciary even in more modern times. In the Irish civil case, *Mapp v Gilhooley* the Supreme Court was critical of the approach adopted by the trial judge and stated its opinion that the correct approach would have been to adjourn the case to allow for religious instruction to be received by the child witness. The Supreme Court ordered a retrial and outlined the approach which should have been adopted by the trial judge in this case: grant an adjournment to allow sufficient time for the child witness to receive the religious instruction necessary to pass the competency examination before the admission of sworn evidence. It is interesting to note that the Supreme Court advocated this approach based on a trial record which described an almost perfunctory preliminary examination conducted by the trial judge which, in itself, revealed no more than that the child did not know what was meant by an oath and had not heard of an oath in his religious schooling; in other words, it does not appear that the Supreme Court considered it strictly necessary for the child to have demonstrated a highly developed religious and moral sensibility before a

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148 *Mapp v Gilhooley* [1991] 2 IR 253 (S.C.). This case involved an appeal against a finding of negligence by the High Court in relation to an incident which occurred in a school playground whereby the infant plaintiff (who was eight years old at the time of trial) suffered injuries. The main ground of appeal advanced was that the trial judge erred in law in permitting the plaintiff to give evidence when he was unsworn and incompetent as a witness; since the child had failed to display an understanding of the meaning or nature of an oath, he could not be permitted to give sworn evidence, however, there was at that time no statutory provision for the reception of evidence unsworn in civil proceedings.

149 *Mapp v Gilhooley* [1991] 2 IR 253, at p. 263, per Finlay C.J. (S.C.): "What should have been done, I am satisfied, on this occasion, having regard to the answers which the young boy gave to the learned trial judge upon inquiry as to his knowledge of an oath, was to have adjourned the commencement of the case for such time as might be necessary to enable this young child properly to be instructed in the meaning and importance of an oath and then to have sworn him. The conclusions reached by the learned trial judge as to his intelligence and capacity to understand the nature of the occasion on which he was giving an account of the accident would seem to suggest that had that course been adopted it would not have been a matter of any significant difficulty to have instructed him in the meaning of an oath."
court could grant an adjournment for the purposes of religious instruction. On the other hand, it seems fair to reiterate that a child should be ‘otherwise competent’ before such a course could properly be adopted by a trial judge; in this case, the trial judge was satisfied that the child “understood the importance of the occasion and the necessity for telling the truth” and that the child was “a remarkably bright and intelligent boy who had no difficulty in giving evidence”.

2.4.5 While it is undoubtedly true that such a measure would only be advocated and adopted where the child otherwise proved himself or herself to be competent,\textsuperscript{150} this approach illustrates the fallacy of the strict and traditional interpretation of an oath, and, more importantly, the judicial impatience with such interpretation amounting to a stumbling-block for an otherwise competent child witness; the court was prepared, in effect, to authorize the instruction of the child in order to ensure that the child satisfied the precondition to competence and thus guaranteed the admissibility of the child’s evidence.\textsuperscript{151} Such a practice offends against reason and is particularly objectionable in that it represents an interference by the judiciary – the independent arbiters of law – in the trial process with the specific purpose of ensuring the admissibility of evidence which is likely to be of value to one party and prejudicial to the other.\textsuperscript{152} It also illustrates the difficulties

\textsuperscript{150} The child would usually have answered satisfactorily the other questions posed by the court during the competency examination which questions were designed to test the child’s testimonial qualifications: observation, recollection and communication.

\textsuperscript{151} Heydon J.D., \textit{Cross on Evidence} (5\textsuperscript{th} Australian ed., 1996) at p. 311: “If the court comes to the conclusion that the child does not understand the nature and consequences of an oath, the evidence must be rejected unless it is considered to be worthwhile to adjourn the case so as to instruct the proposed witness in these matters or unless the relevant statute permits the witness to give unsworn evidence.”

\textsuperscript{152} In a case cited in \textit{Best on Evidence} this practice was described as objectionable on the ground that it was “like preparing or getting up a witness for a particular purpose”. Phipson, S.L, \textit{Best on Evidence} (12\textsuperscript{th} ed., 1922) Vol. 2, § 156, at pp. 143-144, citing as the source of the case, 1 Phill. Evidence (10\textsuperscript{th} ed.) at p. 10 and n.(3): “But in a recent case, where a father was charged with violating his daughter, aged twelve, Alderson B., refused to postpone the trial for the purpose of her being taught the nature of an oath, - stating that all the judges were of the opinion that it was an incorrect proceeding; that it was like preparing or getting up a witness for a particular purpose, and on that ground was very objectionable. If this be correctly reported, not only is it at variance with a series of previous authorities, but, as is remarked in the text work where the case is found, “By the strict application of this rule, a parent, by neglecting his moral duty as to the education of his child, may thus obtain an immunity for the commission of a heinous crime”.

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involved in attempting to apply the same test of competence to children as to adults. It is likely that many children lack the linguistic and analytical skills to enable them to demonstrate a satisfactory understanding of such a complex and morally sophisticated concept. The word "oath" itself is not common in everyday parlance and as such, children may not recognize the concept when questioned although at the same time they may understand the principle of speaking the truth in court and even that a failure to speak the truth in court will be punished. Such an approach is also open to the criticism – particular in relation to child complainants of sexual offences – that, in addition to the trauma of testifying in court in relation to the event or events witnessed or experienced, such court-authorised religious instruction of a child gave a child “an eternity in Hell to occupy her mind in addition to the trauma of abuse”.  

2.5.0 Adoption of Brasier Test of Competence in Ireland:

2.5.1 The Brasier test of competence was adopted in this jurisdiction by the Court of Criminal Appeal in Attorney General v O'Sullivan.  

The appellant had been convicted of an attempt to commit sodomy on the sworn evidence of a boy aged ten years. On appeal, it was argued on behalf of the accused, inter alia, that the complainant, being a child under fourteen years, should not have been allowed to give evidence without preliminary examination as to his competence to give evidence on oath; the application for leave to appeal against conviction was dismissed. Kennedy C.J., delivering the decision of the Court stated that the statutory reform permitting the reception of evidence unsworn from child witnesses upon the satisfaction of express conditions “does not, in our opinion, alter the previous law as to the reception of the evidence of children given on oath, that is to say, it was and is a question not of age...but of the intelligence and actual mental capacity

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155 Section 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914.
of the child witness, ‘its sense and reason of the danger and impiety of falsehood’.  

2.5.2 In relation to the competence of the child witness to give evidence on oath, it was noted that at no stage during this progress of this case through the District and Circuit Court was any objection taken or any suggestion made that the boy was incompetent to give evidence on oath. The Court concluded that he must have appeared sufficiently intelligent as to “discredit any objection on this ground”; the Court noted that the record showed the boy’s evidence to be “intelligent, coherent and credible”, withstanding severe cross-examination, and further observed that the child had been at school for several years and had been admitted to his First Holy Communion two years previously. Accordingly, the Court held that an objection to the child’s competence to testify upon oath could not be sustained.

2.5.3 The reference to the child’s First Holy Communion indicates a continued emphasis on the religious rather than the secular element of the obligation of an oath, without requiring the child to demonstrate such a vivid awareness of hell-fire and damnation as appears from the earlier authorities. However, the most interesting part of the Irish test of competence outlined in this case is that, although the Court of Criminal Appeal purported to apply the test laid down in Brasier, the test in fact set out in O’Sullivan required a greater level of sophistication from a potential child witness since it contained an additional testimonial qualification, namely, intelligence or mental capacity. One explanation for this apparent diversity is that the

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158 R v Brasier (1779) 1 Leach 199, at p. 200, 169 E.R. 202, at p. 202 (Twelve Judges). The test of competence was stated therein as follows: “[A]n infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such an infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court...”

159 The test in Brasier required the potential child witness to demonstrate to the satisfaction of the court a sufficient understanding of the nature and consequences of an oath “as an appeal to God to witness...”
Court in *O'Sullivan*, in rejecting the suggestion that there was a "precise limit of age fixed by any rule within which the evidence of children on oath is to be excluded" intended to enunciate a test which declared a child competent if he/she had the mental capacity or intelligence to understand the nature and consequences of an oath, rather than to require a child to satisfy a dual test of intelligence and understanding before a child could be admitted to give evidence. The placing of the comma between "intelligence and mental capacity" and "its sense and reason of the danger and impiety of falsehood" — a direct quotation from *Brasier* — lends support to this view; in other words, the child's understanding of the nature and consequences of an oath was an indication that he or she had a sufficiently developed mental capacity to be admitted as a witness.

2.5.4 Subsequent Irish cases involved a more straightforward application of the *Brasier* test. In *The People (Attorney General) v Rossiter*, the trial judge admitted the sworn evidence of a woman, aged twenty-four years but "of feeble mind"; on appeal, it was argued, *inter alia*, that the trial judge had misdirected himself in law in admitting the sworn testimony of the complainant, having regard to the answers given by her in the *voir dire* and the principles governing competency of witnesses of defective intellect. The questions posed by the trial judge in the *voir dire* were essentially of two types; those that established background information and those that related to the complainant's religious education and understanding.

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*the truth of what was being said, in the belief that lies would be met with divine retribution": Law Reform Commission of Ireland, *Consultation Paper on Child Sexual Abuse* (August, 1989), para. 5.02, at p. 81. However, on closer examination, the test in *O'Sullivan* appears to require that a child in Ireland demonstrate intelligence or mental ability in addition to an understanding of the nature and consequences of an oath.


161 In Canada, the *Brasier* test was cited with approval in *R v Antrobus* (1946) 3 C.R. 357, [1947] 2 D.L.R. 55 (B.C.C.A.) where it was further held that in order for a child to give sworn evidence, the child must believe in the existence of God and must believe that God will punish her if she does not speak the truth. The Court asserted that "[a]n oath is a religious sanction ... a special test, or security against the fabrication of testimony".

162 *The People (Attorney General) v Rossiter* (1951) 1 Frewen 118 (C.C.A.). The applicant was convicted in Wexford Circuit Criminal Court of having unlawful carnal knowledge of K.J., a woman "of feeble mind", contrary to s. 4 of the Criminal Law Amendment Act 1935.

163 The first category of questions sought to establish the witness's ability to observe, recollect and communicate; her full name, where she lived, with whom, her relationship with those living with her,
complainant's answers – with the exception of her first statement as to the meaning of an oath and her initial response to a question relating to the distinction between truth and falsehood – were apposite and indicated an understanding of the nature if not the consequences of an oath.

2.5.5 The Court of Criminal Appeal dismissed the appeal, holding that the trial judge had not erred in principle in admitting the evidence of K.J. or in his finding as to her competency to give evidence. It was stressed that, although some of the answers given by K.J., on the voir dire, had been unsatisfactory, the examination should be regarded as a whole and the trial judge’s exercise of his discretion to admit her sworn testimony ought not to be interfered with unless it were clearly proved that he had erred in principle;¹⁶⁴ this had not been done. In this regard the Court stated that:

“It must always be a matter of difficulty for a Judge to inquire from a person who is feeble-minded whether she has a knowledge and appreciation of an oath and of the obligation to tell the truth. The Judge’s questions as to her knowledge of the Commandments, Catechism and the instruction she received from the priest and teachers make it appear that he directed his examination towards these matters on the proper basis. The witness was in the presence of the Judge and while some of her answers are unsatisfactory, the examination must be treated as a whole and considered in the light of the appearance, demeanour and condition of the person in question.”¹⁶⁵

¹⁶⁴ The People (Attorney General v Rossiter (1951) 1 Frewen 118, at p. 120 (C.C.A.) (Murnaghan, Maguire and Davitt JJ.): “The exercise of his discretion by the trial Judge in such circumstances ought not lightly to be interfered with. In the opinion of this Court the exercise of his discretion ought not to be set aside unless it is clearly proved that he erred in principle.”

¹⁶⁵ The People (Attorney General) v Rossiter (1951) 1 Frewen 118, at p. 120 (C.C.A.).
While it is undeniable that the trial judge enjoys a distinct advantage in being able to observe a witness during the preliminary investigation of his/her competence, it is submitted that the difficulty in this case, if it be a difficulty, is not so much that some of the complainant’s answers were unsatisfactory, but rather that the trial judge failed to obtain from the complainant an indication of her understanding of the consequences of the failure to tell the truth when testifying upon oath. Thus, it would appear from this case that it is sufficient to establish a “knowledge and appreciation of an oath and of the obligation to tell the truth” before a complainant will be permitted to give sworn evidence.

Further guidance as to the modern approach to be adopted towards the reception of the sworn evidence of ‘suspect’ witnesses – such as persons of defective intellect or child witnesses – in this jurisdiction was provided in The People (Director of Public Prosecutions) v J.T. The applicant in this case sought leave to appeal his conviction of five counts of sexual offences against his daughter, the complainant, who, although aged twenty years at the date of the trial, suffered from Downs Syndrome. Following an examination by the trial judge as to her understanding of the oath, she was permitted to give evidence upon oath.

On appeal it was argued that the trial judge had erred in allowing the complainant to be sworn and to give evidence on oath without satisfying himself that she understood the concept and meaning of an ‘oath’ and ‘truth’ or without making any satisfactory enquiry as to whether she was competent to give sworn evidence. However, the Court of Criminal Appeal held that, having regard to the ‘run of the case’, the complainant could not be regarded

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167 The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141 (C.C.A.).
as an unreliable witness by reason of her handicap; she was able to understand the nature of the evidence she gave, to cope with cross-examination and her recollection could be relied upon. Furthermore, the Court held that the trial judge was justified in allowing her to be sworn and the transcript indicated that she understood the nature of an oath and what was meant by the truth. This interpretation of the test governing the reception of sworn evidence from persons of defective intellect is consistent with the approach adopted in Rossiter and confirms a shift away from the traditional emphasis on an awareness of the divine consequences of a failure to tell the truth after the administration of the oath, towards a test based on the 'suspect' witness’s understanding of the nature of an oath – still grounded in a religious context – and the duty to speak the truth while testifying; this approach is consistent with the third and simplest understanding of the obligation of the oath which views the oath, taken in circumstances of solemnity, as “a reminder [to potential witnesses] of their religious and moral duty to tell the truth” thus increasing the likelihood that such witnesses will testify truthfully.

168 The People (Direct of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141, at p. 151 (C.C.A.): “[T]here is nothing in the case to suggest that she was unable to understand the nature of the evidence she gave or indeed that her recollection could not be relied upon.”

169 The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141, at p. 151 (C.C.A.). Little guidance is provided in the report of this case, however, the preliminary examination conducted by the trial judge appears to have been somewhat perfunctory, without the traditional interrogation as to the potential witness’ understanding of the divine sanction of the oath. Ibid., at pp. 146-147: “[T]he judge asked her certain questions to ascertain if she understood the meaning of the word ‘oath’ to which she replied that she did. She was then asked if she understood what it meant to tell the truth and she said she did. At that the judge expressed himself satisfied and did not further question her and she was duly sworn.”

170 For the first and second understandings of the obligation of an oath, see sections 2.2.0-2.2.3: Traditional Understandings of the Obligation of an Oath.

171 Law Commission of New South Wales, Discussion Paper: Oaths and Affirmations (Discussion Paper No. 8, 1980) at p. 9. Similarly, Bentham noted in Bentham, J., Rationale of Judicial Evidence (1827) Bk II, ch. 6, s. 2, para. 2 that: “What gives an oath the degrees of efficacy it possesses, is, that in most points, and with most men, a declaration upon oath includes a declaration upon honour: the laws of honour enjoining as to these points the observance of an oath. The deference shewn is paid in appearance to the religious ceremony: but in reality it is paid, even by the most pious religionists, much more to the moral engagement than to the religious.”

172 It is interesting to note that in the early Irish case, R v Braddon (1684) 9 St. Tr. 1127, at p. 1181 (K.B.), the second child witness was simply questioned as to the consequences of telling a lie and not tested with regard to her understanding of the consequences of swearing to a lie: when asked what would become of her if she told a “lye”, she responded “if the devil will have me”. It may be that the court concluded that she was familiar with the divine sanction for a departure from the truth and therefore considered it unnecessary to question her further, however, upon a strict reading of the early caselaw, the record in this case shows only that the child understood the obligation to tell the truth in
Although this issue was not expressly addressed in the judgment of the Supreme Court, some support may be gleaned for this understanding of the obligation of an oath in the characterization of the purpose of the oath in the more recent civil case, *Mapp v Gilhooley*. In response to arguments on behalf of the defendants that the trial judge had erred in law and acted without jurisdiction in admitting the unsworn evidence of the plaintiff, in circumstances where the plaintiff was incompetent as a witness and in the absence of a statutory provision providing for the reception of unsworn evidence in civil proceedings – the Supreme Court held that it was a fundamental principle of the common law that for the purpose of trials in either criminal or civil cases, *viva voce* evidence must be given on oath or affirmation and explained that the broad purpose of the rule was to ensure so far as possible that such *viva voce* evidence “shall be true by the provision of a moral or religious and legal sanction against deliberate untruth”; an ordinary social context – the test subsequently employed before admitting unsworn evidence from child witnesses – rather than demonstrating her knowledge of the nature and consequences of an oath. On the other hand, since the child was being questioned as to her understanding of the obligation to tell the truth in a courtroom setting, it can be inferred that she was stating her belief of the consequences of lying in that context.

173 *Mapp v Gilhooley* [1991] 2 IR 253 (S.C.). The High Court found the defendant school-teachers guilty of negligence in failing to take due care and to adequately supervise the school yard, with the result that the infant plaintiff suffered injuries when the children formed into ‘trains’ and collided with each other.

174 *Mapp v Gilhooley* [1991] 2 IR 253, at p. 262, *per* Finlay C.J. (S.C.). The trial judge, Barr J., asked the plaintiff (Judge), aged eight years, whether he had ever heard of an ‘oath’ in his “Catholic religious classes”. When the plaintiff responded in the negative, the trial judge asked counsel what approach he should take; counsel suggested that the trial judge should hear the child’s evidence “and judge it as best you can”. Before admitting the child’s evidence, the trial judge admonished the child to tell the truth in the following terms: “You know, Jude, that it is very important that you tell the truth about what happened in this accident when you got hurt? You know that it is very important that you tell the truth about what happened that day, and I’m sure you will. So, we will carry on.” No objection was taken by counsel for the defendant. Since the plaintiff had failed to display an understanding of the meaning or nature of an oath, he could not be permitted to give sworn evidence; the plaintiff gave his evidence unsworn. Although the trial judge did not attempt in the preliminary examination to test the child’s understanding of the nature of a promise or the truth and lies, or to elicit an undertaking from the child to speak the truth, it is to be inferred that the trial judge reached the conclusion during the course of the child’s evidence that the child had sufficient intelligence to justify the reception of his evidence otherwise than on oath and that he understood the duty to speak the truth. Indeed, the trial judge stated in the course of his judgment that: “The plaintiff, who is now eight years of age, gave evidence at the trial. Although he was not sworn because he had not yet learned the meaning of an oath, I am satisfied that he understood the importance of the occasion and the necessity for telling the truth. He is a remarkably bright and intelligent boy who had no difficulty in giving evidence.” Moreover, as noted above, Finlay C.J. held at p. 263 that the appropriate course for the trial judge to have adopted, given the trial judge’s conclusions as to the intelligence of the child and his “capacity to
such a rule could not, therefore, be inconsistent with the Constitution, either on the basis of being discriminatory or on the basis of being an impermissible restriction of the right of access to the courts. The statutory exceptions to this principle at the time of the judgment, applied only to criminal cases; there were no relevant statutory exceptions applicable to trials in civil cases. Thus the Court concluded that, given the fundamental nature of this rule, the admission and acceptance of unsworn *viva voce* evidence in a civil case would result in a mistrial unless estoppel or fraud could be established. In the circumstances, the Supreme Court ordered a retrial.

2.5.10 It is submitted that the Court’s description of an oath as a moral or religious and legal sanction against deliberate untruth represents a continuation of the move away from a judicial insistence on an understanding of the nature and understand the nature of the occasion on which he was giving an account of the accident” would have been to adjourn the proceedings in order to allow the child to be instructed “in the meaning and importance of an oath” – which, Finlay C.J. opined would “not have been a matter of any significant difficulty” – and then to have sworn him: [1991] 2 IR 253, at p. 263 (S.C.). It was submitted by counsel for the defendant that it was a fundamental rule of the common law applicable to criminal and civil proceedings alike that the *viva voce* evidence of any witness ought to be given on oath or affirmation. Older authorities cited by counsel in support of this argument included: *R v Brasier* (1779) 1 Leach 199, 1 East P.C. 443, 168 E.R. 202; *Birch v Sir William Somerville* (1852) 2 l.r. CLR 253; *Sells v Hoare* (1822) 3 Br. & B. 322. It was submitted that the fact that the plaintiff had given his evidence unsworn in this case rendered the trial a nullity. Counsel for the plaintiff argued that a rule of common law requiring only sworn evidence (whether upon oath or affirmation) could not have survived the enactment of the Constitution because: (i) it would represent either an unjust and invidious discrimination against a child such as the plaintiff who, failing to understand the nature of an oath, would be prevented from giving evidence to substantiate his claim in tort; or, alternatively, (ii) because it represented an impermissible restriction of the infant plaintiff’s right of access to the courts.

More particularly, s. 30 of the Children Act 1908, as extended by s. 28(2) of the Criminal Justice Administration Act 1914.

*Mapp v Gilhooley* [1991] 2 IR 253, at p. 263, per Finlay C.J. (S.C.): “The learned trial judge did not have, in my view, any jurisdiction to accept the evidence of this young child unsworn even if both parties had expressly agreed to such a course. This is so even if he concluded that the child was a competent witness, in the sense that he understood what he was saying and was able to give a coherent and truthful account of what had occurred.” The Supreme Court held that an appellant seeking to rely on the admission of unsworn *viva voce* evidence as constituting a mistrial could only be prevented from so doing:

(a) by estoppel arising from an express or unambiguously implied representation that he was waiving his right to challenge the admission of such evidence by reason of the absence of an oath or affirmation, on which the opposing party has acted to his detriment in a manner which would make the finding of a mistrial an injustice, or

(b) by reason of a finding that for the party concerned to challenge the validity of the trial on appeal on this ground of want of oath or affirmation would constitute a virtual fraud or abuse of the process of the court.
consequences of an oath which envisages eternal damnation for the soul of the lying witness,\textsuperscript{179} although it is noted that "there continues to be some uncertainty as to the precise knowledge and understanding of religion required of a witness who wishes to take the oath".\textsuperscript{180} The result of this more permissive approach towards the competence of child witnesses to give evidence upon oath was the admission of a greater quantity of evidence from child witnesses – in particular, from younger children – than was possible under the more restrictive approach traditionally espoused by the law, while the maintenance of a high threshold of understanding required of the obligation of an oath – even as modified or refined – represented a strong safeguard for the right of the accused to a fair trial and fair procedures. The 'balance of fairness' remained heavily weighted in favour of the protection of the accused.

2.6.0 Criticisms of the Brasier Test of Competence:

2.6.1 Although the Brasier test of competence – and, more particularly, the individualized approach advocated therein – was quite progressive in that it focused on the understanding of an individual child, rather than assuming a want of understanding based on the child’s age or even his / her membership

\textsuperscript{179} Ontario Law Reform Commission, \textit{Report on the Law of Evidence} (1976) at p. 114: "The concept of an oath has undergone a process of development from superstition, through religious conviction based on divine sanctions, to the present situation which appears to many people to be a mere formal requirement to which temporal sanctions only are attached. There can be no doubt that in the English common law as it has been adopted in Canada, the oath as a safeguard for ascertaining the truth of the trial of cases is founded on a belief in divine retribution. One of the leading nineteenth century authorities, Starkie, put it this way: ‘this imposes the strongest obligation upon the conscience of the witness to declare the whole truth that human wisdom can devise; a willful violation of the truth exposes him at once to eternal punishment’. He went on to say: ‘A judicial oath may be defined to be a solemn invocation of the vengeance of the Deity upon the witness, if he do not declare the whole truth, as far as he knows it’: Starkie, \textit{A Practical Treatise of the Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings} (7th ed., 1842) at p. 21. On this thesis the qualification required of a witness to be sworn was a belief in the existence of God and in a future state of rewards and punishments, as well as a belief that divine punishment would be the consequence of perjury.” See also: Law Reform Commission of Canada, Study Paper: \textit{Competence and Compellability} (Study Paper No. 1, n.d.) at pp. 8-9.

\textsuperscript{180} Law Reform Commission of Ireland, \textit{Report on Oaths and Affirmations} (LRC 34-1990) para. 2.9, at p. 8.
of a category of ‘suspect’ witnesses, and notwithstanding any resulting partial relaxation of the requisite understanding of the obligation of an oath, the ‘oath’ test of competence was the subject of intense criticism.

2.6.2 First, it was asserted that the ‘oath’ test constitutes an ‘indirect’ test of the competence of children. It was submitted that the ‘oath’ test was dependent upon the child’s religious and moral understanding but was not determinant of the child’s reliability as a witness and did not meet directly “the real issues of psychological competency” since factors such as memory, the ability to make inferences and the capacity to communicate appropriately information relevant to the subject-matter of the proceedings were not considered or addressed; the child’s cognitive development, not his / her

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181 The Brasier approach, although pre-dating the Wallwork approach – outlined in the following section – is, in fact, more progressive than the latter. An approach which focuses on the individual child and his / her testimonial capabilities as a determinant of competence, rather than on the date of the child’s birth, is, without doubt, more likely to produce justice in any given case. The safeguards remain to protect the constitutional rights of the accused and to ensure that only those competent to give evidence will be permitted to be sworn. As indicated above, the Brasier case embodies a rejection of the blanket ban on the reception of evidence from very young children; this in turn ensures that a greater number of younger witnesses will be heard which may translate into a larger number of prosecutions and convictions since, in many cases, it is the evidence of the young child – particularly a young child complainant of sexual offences – which is central to the case being made. However, it should be noted that the following criticisms are directed not at the individualized approach contained in the Brasier test, but towards the test itself, its operation and efficacy as a test of competence. See: R v Brasier (1779) i Leach 199, at p. 200, 168 E.R. 202 (Twelve Judges); and R v Wallwork (1958) 42 Cr App R 153 (C.A.); and sections 2.10.0-2.10.10: Age as a Total Bar to Competence.


184 Australian Law Reform Commission, Report: Interim Evidence, (Canberra: ALRC Report No. 26, 1985) Vol. 1, para. 243, at p. 129: “Only the criterion that the witness should have the capacity to be truthful is tested by the common law formula. The capacity to understand which information is required, extract it from other stored information and express it clearly, is not tested as it would be if the test were framed in terms of cognitive development”. See also: Australian Law Reform Commission Report: Evidence, (Canberra: ALRC Report No. 38, 1987) at p. 150.
moral and religious development was the true indicator of competence.\textsuperscript{185} It was argued that although the ‘oath’ test represented an indirect test of competence, a direct and complete test of the child’s psychological competence was preferable; the principal weakness inherent in the religious interpretation of the obligation of an oath is that it renders incompetent to give sworn evidence children who either do not believe in or have not heard of a God, or a future state of rewards and punishments, or do not understand the nature and consequences of an oath – or, at the very least, do not demonstrate such belief or understanding to the satisfaction of the trial judge.\textsuperscript{186} It was considered that an undue and isolated emphasis on the child’s concept of dishonesty, as informed by his / her religious beliefs, could exclude the evidence of a child who had little moral or religious education but “whose cognitive development is sufficiently advanced to give reliable evidence”;\textsuperscript{187} at its highest, the ‘oath’ test assessed only one aspect of competence.\textsuperscript{188} Thus it was asserted in relation to the application of the ‘oath’ test that “[t]he way is open for people who are psychologically


\textsuperscript{186} Taylor, A Treatise on the Law of Evidence (12th ed., 1931) Vol. 1, para. 1382, at pp. 872-873, stated that such children should not be sworn since the oath could not achieve its purpose of affecting their consciences: “[A]s the administration of an oath supposes that the witness feels a moral and religious accountability to a Supreme Being, who will justly punish perjury, and from whom no secrets are hid, persons, insensible to the obligations of an oath, ought not to be sworn. The repetition of the words of an oath would, in their case, be an unmeaning formality.” Similarly, Schiff S., Evidence in the Litigation Process (4th ed., 1993) Vol. 1, asserted at p. 214: “The historic function and rationale of the oath are clear. Truthful testimony is crucial to the very purpose of the trial. As one device to encourage (if not guarantee) truth, the oath is imposed before witnesses even begin speaking. Fearing divine retribution the sworn witness suppresses any motive to lie. But, since the oath cannot influence the person without belief in divine retribution, the court simply refuses to listen to him.” While it is accepted that the repetition of the oath is, for many children, a meaningless formality, it is submitted that this indicates not that such children should not be sworn, but rather that the concept of the oath should be amended to meet these difficulties. See also: Ontario Law Reform Commission, Report on Child Witnesses (1991) at p. 36.


\textsuperscript{188} Law Reform Commission of Western Australia, Discussion Paper: The Evidence of Children and Other Vulnerable Witnesses (Project No. 87, April, 1990) at p. 8, para. 2.10: “What is meant by understanding the significance of the oath is nowhere thoroughly examined, but on a strict interpretation it does comote some understanding of religious ideas and of the ‘wrath of God’ which may fall upon a person who swears an oath upon the Bible and then lies. This is not a test which a very young child, however intelligent and truthful, may be expected to pass. This is also not a test which, when strictly interpreted, can properly be applied to a child who has not had any religious training. As a result, the evidence of very young children was often not available under the common law.”
competent to give evidence to be debarred as witnesses, and for psychologically incompetent people to give evidence”. 189

2.6.3 It was further contended that the ‘oath’ test, by requiring “an interrogation of a child as to his religious beliefs” in order to determine whether he / she had the necessary religious understanding of the nature and consequences of the oath – such that the oath would form a ‘hold’ over the child’s conscience – was more likely to traumatize the child than to “increase the reliability of his testimony”,190 the oath added an “unnecessary layer of complication”191 and only served to confuse the issue. The Advisory Group on Video Evidence noted in its report that a competence requirement was only useful if, by reference to the test which it imposed, it was possible to ascertain whether a child is likely to subsequently give a truthful and accurate account of events witnessed and concluded that it had not found any evidence that


190 Law Commission of New South Wales, Discussion Paper: Oaths and Affirmations (Discussion Paper No. 8, 1980) at p. 37. The English Criminal Law Revision Committee, Eleventh Report (1972) also noted in para. 205 that “the investigation sometimes made by the court as to whether the child believes in divine retribution for lying is really out of place when the question is whether he understands how important it is for the proceedings that he should tell the truth to the best of his ability about the events in question – in particular that he should not say anything against the accused which he does not really believe to be true and that he should say if he did not see something or does not remember it. For similar reasons the test...whether the child ‘understands the duty of speaking the truth’ seems inadequate; for even very young children understand this duty in a general way without necessarily understanding the particular importance of telling the truth in the proceedings.” Bala, Nicholas, Lee, Kang, Lindsay, Rod and Talwar, Victoria “A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses” (2000) 38 Osgoode Hall Law Journal 409, at p. 422: “It is apparent that children often find the inquiry into their religious beliefs embarrassing, especially if it looks like they do not appear sufficiently devout or knowledgeable about religious matters.”

191 Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990) para. 5.29, at p. 60: “[T]he oath serves to add an unnecessary layer of complication since the judge must explain not only the question of telling the truth but also the importance of the oath. The critical issue was for the child to know the difference between telling the truth and telling a lie, as one judge said, the oath only served to confuse the issue.”
the ‘oath’ test achieved this aim;\textsuperscript{192} it further observed that “it seems logical to suppose that a child who is not able to explain what the oath signifies, or what concepts like truth and duty mean, is rather less likely to be sophisticated enough to invent and consistently and successfully sustain falsehoods than other witnesses”.\textsuperscript{193} The courts themselves expressed dissatisfaction with and even questioned the value of testing the religious belief of young children on the basis that their testimony was open to observation\textsuperscript{194} as to the value to be placed on it.\textsuperscript{195}

\textsuperscript{192} Equally, in rejecting the proposition that the oath contained the greatest impetus for child witnesses giving truthful testimony and that other, secular tests of competence were not as effective in ensuring the reliability of the ensuing testimony, the Law Reform Commission of Ireland noted that children of all ages had a good understanding of the necessity to tell the truth in court, although the reason varied according to the age of the child: Law Reform Commission of Ireland, \textit{Report on Child Sexual Abuse}, (LRC 32-1990), para. 5.31, at pp. 60-61, relying upon the results of the study of Cashmore, J. and Bussey, K., \textit{Children’s Constructions of Court Proceedings}, (Paper presented at International Conference on Child Witnesses, Selwin College, Cambridge, June 1989). The Commission concluded in para. 5.31, at p. 61 that: “The results of that study and several other studies suggest that knowing how a particular child understands the consequences of telling the truth or telling a lie may be more helpful in determining the quality of their evidence than knowing whether they believe in God.”


\textsuperscript{194} In \textit{R v Holmes} (1861) 2 F. & F. 788 the prisoner was indicted for a rape on a child of six years. The trial judge’s attitude to the preliminary examination and the ‘oath’ test are instructive: the trial judge expressly asserted, at p. 789, that the question of the obligation of an oath “is a complicated question, which nine out of ten children could not answer” and, furthermore, concluded that “I do not know that it really advances the credibility of testimony to put such questions. The testimony given is open to observations to be made upon it as to its value.” The same trial judge, in a case at the last Spring Assizes for Surrey in 1862, posed the same question – “is it a good or a bad thing to tell a lie?” – of a child witness of the same age. Upon the child answering that it was a “bad thing” the Court admitted him to give evidence as a competent witness. Such a preliminary examination has, of course, the great dual advantages of simplicity and brevity, however, it is to be doubted whether such a form of examination can truly be said to establish the child’s testimonial qualifications.

\textsuperscript{195} The preliminary examination of the child complainant in \textit{R v Holmes} (1861) 2 F. & F. 788, at p. 789 reveals a confusion in relation to the concepts of competency – which the questioning of the child by the court is supposed to ascertain – and credibility – which the Court felt was damaged unnecessarily by the effect of the answers to the questions posed. Competence and credibility are not only distinct concepts, their assessment is carried out by two different bodies; the judge determines the former, while the jury weighs the latter. It may be, however, that the Court was advocating the adoption of the ‘Wigmore’ approach to the evidence of children; admit such evidence without the necessity for the satisfaction of pre-conditions or the establishment of competence by reference to the religious beliefs of the child witness, and let the child’s evidence speak for itself, with the jury attaching as much or as little weight to the evidence as it merits, given their assessment of the child’s credibility. See: section 2.16.0.
2.6.4 It was also argued that the ‘oath’ test of competence was inefficacious.\textsuperscript{196} It was considered unlikely to constitute a significantly greater incentive to give truthful testimony\textsuperscript{197} for those who held the requisite religious beliefs.\textsuperscript{198} Equally, for those who did not hold such beliefs, it was regarded as unlikely that they would feel obligated or constrained, on account of having sworn the oath, to only give truthful evidence.\textsuperscript{199} Moreover, it was asserted that “[a] witness’ sense of responsibility for telling the truth should issue neither from a reminder of divine retribution, nor from the solemn assumption before God of a moral obligation to speak the truth, but rather from his responsibility as a citizen in a democratic society”.\textsuperscript{200}

2.6.5 Equating competence with an understanding or appreciation of the religious significance of swearing an oath in a court of law\textsuperscript{201} disqualified countless numbers of children as witnesses\textsuperscript{202} which must have made many claims and

\textsuperscript{196} The purpose of the oath is self-evident; to ensure truthful testimony by obtaining a ‘hold’ on the conscience of the witnesses. In order to be permitted to give sworn evidence, a child witness must demonstrate an understanding of the divine sanction of an oath; the theory underlying the insistence on a religious interpretation of the ‘nature of an oath’ is that the child will be dissuaded from lying in his or her testimony out of fear of divine retribution or a future state of punishment.

\textsuperscript{197} It is often argued that the oath is the best guarantee of the truthfulness of testimony; the “\textit{highest possible security which men in general can give for the truth of their statements}”: Whitcombe, An Inquiry into Some of the Rules of Evidence Relating to the Incompetency of Witnesses (London, 1824) at p. 39. (Emphasis in the original).

\textsuperscript{198} See, however: Australian Law Reform Commission, Evidence Reference, Research Paper: Sworn and Unsworn Evidence (Research Paper No. 6, 1982) at p. 49: “[T]he oath and the affirmation are both likely to have only marginal impact upon the witnesses. It is likely also that those whom the oath affects would be no less affected by the affirmation. It is difficult to escape the conclusion, however, that there will be some witnesses whom the oath will affect marginally more than the affirmation. How important or significant this may be in a particular case it is impossible to tell”.

\textsuperscript{199} English Criminal Law Revision Committee, Eleventh Report (1972) at p. 165: “The oath has not prevented an enormous amount of perjury in the courts. A witness who wishes to lie and who feels that the oath may be an impediment can easily say that taking an oath is contrary to his religious beliefs.” See, contra Taylor, \textit{A Treatise on the Law of Evidence} (12\textsuperscript{th} ed., 1931) Vol. 1, para. 1382, at pp. 872-873.

\textsuperscript{200} Law Reform Commission of Canada, Study Paper: Competence and Compellability (Study Paper No. 1, n.d.) at p. 10: “The oath, therefore, is more than a harmless relic. It is a ritual which, even though only in a small way, contributes to the mythology of courtroom proceedings. Its very presence is incongruous at a time when we are attempting to have respect for the courts stem from the fairness of their proceedings and the solemnity of their tasks....This can be imparted to him just as effectively by the legislation which we propose to recommend, which reminds him of the purpose of the trial and the possible consequences of his evidence, as it can by the repetition of an oath.”

\textsuperscript{201} \textit{R v Brasier} (1779) 1 Leach 199, 168 E.R. 202; and \textit{R v White} (1786) 1 Leach 430, 168 E.R. 317.

\textsuperscript{202} The high degree of moral sophistication required of a witness before he or she would be permitted to swear an oath served to exclude potential adult witnesses as well as child witnesses: \textit{R v White} (1786) 1 Leach 430, 168 E.R. 317. See: Ontario Law Reform Commission, Report on Child Witnesses (1991) at p. 37 wherein the Commission noted that the oath had “\textit{become an unworkable test of}
defences simply impossible to prove to the requisite standard. This exclusionary rule, which refused to admit the evidence of children unless they could demonstrate the requisite understanding of the obligation of an oath, had a double negative effect on the administration of justice. First it allowed the guilty to escape conviction, at times, even prosecution, where the only significant prosecution witness was a young child. This was particularly true in relation to sexual offences or offences against other children where the child may have been the only witness; the ‘oath’ test constituted “an irrational and irrelevant obstacle to the giving of evidence by children in cases where they have valuable and relevant evidence to provide”. Secondly, it secured wrongful convictions by denying a child witness the opportunity to give evidence of the true version of events, such as an identification of the perpetrator. As early as 1827, the oath was already the subject of scathing criticism in this regard:

“[W]hether principle or experience be regarded, [the oath] will be found, in the hands of justice an altogether useless instrument; in the hands of injustice, a deplorably serviceable one.”

competency for children”, it had “impeded many young witnesses from offering crucial evidence at trials” and, moreover, that “studies indicate that there is no correlation between understanding the meaning of the oath and speaking the truth in court”.

Law Reform Commission of Ireland, Report on Oaths and Affirmations (LRC 34-1990) para. 2.7, at p. 6: “[I]t was a necessary corollary of this doctrine that, in pledging his eternal soul as security for his promise to testify truthfully, the witness should believe in a supreme being who would punish him sooner or later for any false testimony. In consequence, persons who were deemed to lack the requisite religious belief could not be sworn and were therefore not competent to testify.”

Hannibal M., Mountford L., The Law of Criminal and Civil Evidence (2002) at p. 286: “A consequence of the law taking a restrictive view of the value of child testimony resulted in the failure of many criminal prosecutions for offences of sexual or physical abuse of children, as often the child was the only witness the prosecution could call in order to prove its case. This was the position in the infamous case of Wallwork...where a five-year-old girl was regarded as being too young to give evidence against her father on a charge of incest.”

Belief in eternal damnation for false testimony as a pre-condition to giving evidence in court understandably excluded the evidence of many children, particularly children of tender years and even led to a reliance – often without success – on the hearsay evidence of adults to whom the child complainant had made a complaint of the alleged sexual offences: R v Brasier (1779) 1 Leach 199, 268 E.R. 202; and R v Pike (1829) 3 C&P 598.


Bentham J., Rationale of Judicial Evidence (1827) Book II, at p. 366. The Common Law Commissioners stated in their Report of 1852-3 that it was “painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law”: Second Report
It is likely that many children lack the necessary linguistic and analytical skills to enable them to demonstrate a satisfactory understanding of such a complex and morally sophisticated concept as the obligation of an oath with the result that, even where children understand the underlying principle, they may not recognize the word ‘oath’ and be able to apply this knowledge when questioned – in a manner which satisfies the court.  

"[I]f one insists on an answer from a child as to what divine retribution will follow a lie under oath is to insist on an answer that no adult, not even the most learned moral theologian, could give".  

It could also be argued that the religious understanding of the nature and consequences of an oath has no place in a modern secular society where the definite legal sanction of perjury is more likely to secure true testimony than the vague threat of divine wrath.


Stephen, Sir James Fitzjames, Digest of the Law of Evidence (1930) argued that the provisions of the Evidence Further Amendment Act 1869, 32 & 33 Vict. C. 68, which permitted a witness who objected to taking an oath or "being objected to as incompetent to take an oath" to make a solemn declaration in place of an oath, where the trial judge determined that the oath would have no binding effect on this conscience, should apply in the case of children; "if a person who deliberately and advisedly rejects all belief in God and a future is a competent witness, a fortiori a child who has received no instructions on the subject must be competent also". However, Phipson rejected this submission on the basis that a child could not object to that which it did not know or understand; he welcomed the approach, however, and advocated the enactment of legislation to that effect, permitting children to be sworn upon swearing a solemn declaration or affirmation and a promise to tell the truth:

Phipson, S.L, Best on Evidence (12th ed., 1922) Vol. 2, §156, at pp. 144-145: "With all deference to the learned author, this view of the statute, which does not appear to have been taken in practice, or to have occurred to or been adopted by any other writer on the subject, is not (though very desirable to be argued) a correct one..." See the judgment in Re Carter's Application (1984) The Times, 14 July, per Kerr L.J. (Q.B. Div.); "Section 2 of the Oaths Act 1978 expressly dealt with the form of the oath to be administered to children, as prescribed by section 28(1) of the Children and Young Persons Act 1963. But the 1978 Oaths Act makes no reference to section 38 of the [Children and Young Persons Act, 1933]. It follows, in my view, that the word 'oath' in section 38 cannot be read so as to include affirmation."


R v Hayes [1977] 2 All ER 288, [1977] 1 WLR 234, 64 Cr App Rep 194 (C.A.). Similarly, Fennell, Caroline The Law of Evidence in Ireland (1992) argued at p. 82 that "particularly in modern society, it may well be thought that the oath and the religious connotations inevitably attaching thereto, do not prove a useful yardstick for assessment of child competence". The Law Reform Sub-Committee of the
Judicial dissatisfaction with the exclusive effect of the traditional test\textsuperscript{213} led to the promotion of alternative tests for the reception of sworn evidence from children,\textsuperscript{214} namely: the ‘moral obligation’ test in Canada;\textsuperscript{215} and the secularised \textit{Haves} test in England.\textsuperscript{216}
2.7.0 ‘Moral Obligation’ Test of Competence:

2.7.1 One of the alternative interpretations proposed in relation to the meaning of the common law test, ‘the nature and consequences of an oath’, is that the child should appreciate that by taking an oath, he or she is assuming a moral responsibility.

2.7.2 The traditional understanding of the nature and consequences of an oath set down in Brasier continued to form the test for the competency of child witnesses in Canada until the decision in R v Bannerman, where, in dismissing the accused’s appeal against his conviction for sexual offences against two young children, the Manitoba Court of Appeal held that all that was required to satisfy the test for the reception of sworn evidence from child witnesses was an appreciation by the child witness that he / she is assuming a ‘moral obligation’ to speak the truth when testifying; the sole criterion for the admissibility of the sworn evidence of a child was that the judge be satisfied that the child understood the nature of an oath and it was not necessary for the child to also demonstrate an understanding of the consequences of an oath.

217 R v Brasier (1779) 1 Leach 199, 168 E.R. 202 (Twelve Judges).
219 R v Bannerman (1966) 55 W.W.R. 257, (1966) 48 CR 100 (Man. C.A.) affirmed without reasons (1966) 57 W.W.R. 736 (S.C.C.). The accused was convicted of having unlawful sexual intercourse with a girl aged less than fourteen years and of gross indecency with her brother. The prospective child witness in this case appeared to realize that it was ‘bad’ to tell a lie and stated that at ‘catechism’ they had told him to tell the truth but it was clear that he had no awareness of the consequences of a falsehood. The defence counsel argued that he could not be sworn unless he could answer that to lie upon oath would condemn his soul to hell, in other words, if he demonstrated an understanding not just of the nature of an oath but also of its consequences. See also: Ryan E., and Magee P., The Irish Criminal Process (1983) at p. 321.
The new test of ‘moral obligation’ and, in particular, the reasoning of the court in *R v Bannerman* is somewhat problematic. One of the express bases for the decision to depart from the English approach to the reception of sworn evidence – requiring an understanding of both the nature and the consequences of an oath – is the absence of the word ‘consequences’ in s. 16 of the Canada Evidence Act, which merely referred to the ‘nature’ of an oath. However, s. 16 set out the test for the reception of unsworn evidence and, on its face, had no application to evidence received under oath, rendering insignificant any such omission in relation to the test for sworn evidence. The court stated that its interpretation was necessary to allow a child witness who only understood the nature of an oath to give evidence since otherwise such a child would be prohibited from giving evidence either sworn or unsworn; this would be contrary to the intention of the legislation which is to allow a child witness who could not appreciate the nature and consequences of an oath, to give unsworn evidence upon fulfilling the conditions in section 16. This too presents difficulties since it dramatically reduces the difference between the tests for the reception of sworn and unsworn evidence – the former requiring an assumption of a ‘moral obligation’ to tell the truth and the latter requiring that a child understands the duty of speaking the truth – thereby raising the question

224 *R v Bannerman* (1966) 55 W.W.R. 257, at pp. 284-285, (1966) 48 C.R. 100, at p. 138, per Dickson J.A. (Man. C.A.): “[A]ll that is required when one speaks of an understanding of the ‘consequences’ of an oath is that the child appreciates it is assuming a moral obligation....” Dickson J.A. continued: “With the greatest respect, it appears to me that the Canadian Courts, in *Rex v Antrobus*... and in cases following that decision, have fallen into error, firstly in adopting the word ‘consequences’ from *Rex v Brasier*... and giving insufficient recognition to the absence of that word in s. 16 of the Canada Evidence Act, and, secondly, having adopted the word, interpreting it to mean ‘the spiritual retribution which follows the telling of a lie’ rather than ‘the solemn assumption before God of a moral obligation to speak the truth’. In my view, neither case law nor statute requires inquiry as to the child’s capacity to know what befalls him if he tells a lie under oath”. (Emphasis added).
225 However, the Manitoba Court of Appeal held that s. 16 of the Canada Evidence Act R.S.C. 1952, c. 307 set out the test for the reception of sworn evidence and was not solely addressed to the admissibility of unsworn evidence.
whether the retention of the distinction between the forms of evidence has any merit.\textsuperscript{226}

2.7.4 The principal advantage of such a test is that it side-steps the need to question the child in relation to his / her understanding of concepts such as eternal damnation therefore simplifying the inquiry as to competence\textsuperscript{227} while still ascertaining whether the child appreciates the \textit{significance} of the oath as a reminder of the obligation to give truthful testimony. Moreover, the controversy in relation to the distinction between the moral responsibility requirement for sworn and unsworn evidence has been addressed to a limited extent\textsuperscript{228} in Canada where it has been held that “\textit{while the distinction between the ability to testify under oath and the ability to give unsworn evidence under s. 16 has been narrowed by rejection in cases such as Bannerman of the need for a religious understanding of the oath, it has not been eliminated.”\textsuperscript{229}

\begin{footnotesize}
\begin{enumerate}
\item Delisle, R., \textit{Evidence: Principles and Problems} (4th ed., 1996) at p. 279: “If all that is required to give sworn evidence is that the child understand he has a moral obligation to speak the truth, how does that requirement differ from the requirement for giving unsworn evidence, which is that the child ‘understands the duty of speaking the truth’? Perhaps the answer lies in the second branch of \textit{Bannerman}: that ‘consequences’ deserves a new interpretation for this modern age and is limited to a recognition by the witness that an oath is a ‘solemn assumption before God of a moral obligation to speak the truth’.”
\item It has been held that the record should disclose the nature and scope of the judge's inquiry: \textit{R v Duguay} [1966] 3 C.C.C. 266, 48 C.R. 198 (Sask. C.A.). However, if it does not the appellate court will not necessarily assume that it was insufficient: \textit{R v Dunn} (1951) 99 C.C.C. 111 (B.C.S.C.). In \textit{R v Fabré} (1990) 62 C.C.C. (3d) 565 (Que. C.A.); leave to appeal to S.C.C. refused (1991) 63 C.C.C. (3d) vi (note) (S.C.C.) the complainant was eleven years old at the time of the trial. The trial judge held no inquiry pursuant to s. 16(1) of the Canada Evidence Act, yet permitted the child to give evidence on oath. No objection was made by either side at the time. The Quebec Court of Appeal held that, while this was an error of law, since it appeared that the witness was, in fact, able to communicate the evidence, this error was one of procedure only. The Court of Appeal dismissed the appeal on the basis that the appellant had not suffered any prejudice as a result of the trial judge’s error: s. 686(1)(b)(iv) of the Criminal Code. See also: \textit{R v Drolet} (1985) 68 N.S.R. (2d) 78, 159 A.P.R. 78 (T.D.).
\item Sopinka J., Lederman S., and Bryant A., \textit{The Law of Evidence in Canada} (2nd ed., 1999) at p. 687: “The test for the giving of unsworn testimony is whether the child's intellectual attainments are such that he or she is capable of understanding the simpler form of questions that it can be anticipated will be asked, is able to communicate the answer in an understandable manner, and understands the obligation to tell the truth. However, with respect to the giving of sworn testimony it will be extremely difficult to determine if the child understands the moral obligation to tell the truth beyond the understanding of the ordinary everyday obligation to tell the truth. It is doubtful whether the court's statements in \textit{Khan} do much to clarify matters. Further, whether the child give sworn or unsworn testimony, the inherent weaknesses of the evidence will still be present and the trier of fact will still have to consider the weaknesses as going to the weight of the evidence.”
\end{enumerate}
\end{footnotesize}
The test of the competence of a child witness to give evidence on oath was famously ‘secularised’ in the English decision, *R v Hayes*. The Court of Appeal recognised that the nature of society had changed dramatically since the religious test of competence had first been established and that the test as originally understood was inappropriate in a modern secular society.

In *R v Hayes* the appellant was convicted of four counts of indecent assault against three young boys. On appeal, it was argued that the trial judge had erred in admitting the evidence of the boys upon oath since the children claimed to have no knowledge of the existence of God and to have received no religious instruction at school. Following a preliminary examination which elicited inconsistent responses from the child witness, the boy was sworn. The Court of Appeal noted that the child’s answers to the earlier questions posed revealed a complete ignorance of the existence of God and, accordingly, acknowledged that, “if the essence of the sanction of the oath is a divine sanction, and if it is an awareness of that divine sanction which the court is looking for in a child of tender years”, the child in this case patently failed this test. However, the Court asserted that it was not

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231 Dennis I.H., *The Law of Evidence* (2nd ed., 2002) at p. 451: “[T]he Court of Appeal acknowledged that the reality that religious education in the late twentieth century may not correspond with the assumptions of an earlier and more devout age.”
233 The three children were aged eight, ten and eleven years at the date of the assaults, and nine, eleven and twelve years respectively at the date of trial.
234 The preliminary examination of one of the boys – aged twelve years – obtained from the child negative responses to questions regarding whether he received religious instruction at school, whether he had been taught about the Bible, God or Jesus, whether he had heard of God or knew what was meant by God. However, the child confirmed that he thought there was a God, that he knew what it meant to tell the truth, the importance of telling the truth, and the particular importance of not telling lies in that setting; when prompted, the child promised before God to tell the truth and agreed to “stick to that”.

McLachlin J. (S.C.C.) The Ontario Court of Appeal further stated at (1988) 27 (O.A.C.) 142, at p 148, that the difference between sworn and unsworn evidence is that in the case of unsworn testimony, the child witness need not understand that a moral obligation is being taken. See Mewett A., *Witnesses* (1995) at p. 4-12: “It must be allowed that the distinction between merely understanding the duty to tell the truth and appreciating the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath is a fine one, but given that it is quite proper to instruct the child beforehand, it is not an impossible distinction to draw.”
convinced that this was, in fact, the essence of the court’s task in determining whether a child was competent to give evidence upon oath; the test to be applied was whether the child had a sufficient appreciation of the solemnity of the occasion and was sufficiently responsible to understand that taking an oath involves telling the truth.235

2.8.3 Thus the Court upheld the trial judge’s decision to allow the children to give sworn evidence and adopted a new, secular test of competency, which became known as the ‘Hayes test’. A child could take an oath, provided it could be demonstrated that he / she appreciated the solemnity of the occasion and understood that the duty of speaking the truth in court involved a higher duty than in everyday life; the Court observed that it was “unrealistic not to recognize that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised”236 accordingly, it was no longer crucial to the child’s competence that he / she had not heard of God.237

2.8.4 The Court also noted that appellate courts should be slow to interfere with the decisions of trial judges in relation to the competence of a child to give sworn evidence, since the trial judge alone has the benefit of observing the demeanour and condition of the witness while answering questions put to


236 R v Hayes [1977] 1 WLR 234, [1977] 2 All ER 288, (1977) 64 Cr App R 194, at p. 196 per Bridge L.J., delivering judgment on behalf of the Court (C.A.): “It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell truth which is an ordinary duty of normal social conduct.”

237 The Court concluded that, where the preliminary examination revealed that the child was unaware of the existence of God, the trial judge could still properly admit the evidence of the child upon oath in the exercise of his discretion, if he was satisfied that the child appreciated the solemnity of the occasion and the duty to speak the truth while under an oath. The Court of Appeal in R v Khan (1981) 73 Cr App Rep 190, at p. 192, per Kilner Brown J. (C.A.) stated that the decision in Hayes was authority for the following two propositions: “One is that there the Court upheld the necessity for investigation in the case of a child of 12 and, secondly, that it does not necessarily follow that ignorance of the Deity or the existence of the Deity is necessarily fatal to the ability of that child to understand the nature of an oath.” See also: R v Campbell [1983] Crim LR 174 (C.A.); and R v X, Y and Z (1990) 91 Cr App Rep 36, [1990] Crim LR 515 (C.A.).
him / her as a witness;\textsuperscript{238} the transcript could not recreate this immediacy and the Court warned that "it may easily be that the judge comes to the conclusion that the way in which he has initially been phrasing his questions has been such that the child to whom the questions are directed has not sufficiently understood them, and may then attempt to phrase his questions in a different way".\textsuperscript{239}

2.8.5 The ‘Hayes test’ for the reception of sworn evidence from child witnesses was warmly welcomed by the English judiciary, long weary of the tortuous process of attempting to ascertain the level of the child’s theological understanding before admitting his / her evidence.\textsuperscript{240} It is undeniable that

\textsuperscript{238} In \textit{KP v Her Majesty’s Advocate} 1991 SCCR 933 (H.C. Justiciary) the appellant appealed his conviction for indictable offences of indecent conduct to the Scottish High Court of Justiciary on the ground, \textit{inter alia}, that the trial judge erred in failing to hear independent evidence as to the competence of the child witness, aged five years at the date of trial and two years at the time of the alleged events. In the preliminary examination of the child before the jury, the trial judge questioned the child as to whether he knew what it was to tell the truth and that he should not tell ‘fibs’ and further requested the child to promise to tell the truth; the child answered affirmatively on both occasions and the trial judge permitted him to give evidence. The Court held that the competence of any child witness is a matter for the trial judge to determine and whether or not independent evidence is necessary for such a determination is within the discretion of the trial judge; he was entitled to conclude that the child knew the difference between truth and falsehood. The appeal was refused on the basis that while another judge might have required such evidence in this case, the Court was not persuaded that no reasonable judge could have been satisfied that the child knew the difference between telling the truth and telling lies. The Court concluded that: "Having studied the interrogation of the witness which the trial judge carried out, we are of opinion that he followed the correct procedure, and that he was entitled to be satisfied that the child did understand the difference between telling the truth and telling lies. It must be kept in mind that the trial judge had an advantage which this court does not have of having seen and heard the child answering his questions; in determining an issue of this kind the demeanour of the child may be of considerable importance."

\textsuperscript{239} Similarly in \textit{R v X, Y and Z} [1990] Crim LR 515, (1990) 91 Cr App Rep 36 (C.A.) Lord Lane C.J. asserted at p. 41 that: "Whatever questions are asked or are not asked, the judge in the end really has to judge the situation upon the child's demeanour. He has to ask himself whether, having heard what the witness said, having seen the way the witness has said it, and watched the way the witness has behaved while the questions were being asked, it is someone who realises the gravity of the situation."  

\textsuperscript{240} The application of the new Hayes test is clearly illustrated by the decision of the Court of Appeal in \textit{R v X, Y and Z} [1990] Crim LR 515, (1990) 91 Cr App Rep 36 (C.A.). The appellants were convicted of charges of sexual abuse of five children, two boys - aged 9 and 10 years - and three girls - aged 8, 8½ and 12 years respectively. Three of the children gave evidence on oath; the children were then aged 8½, 10 and 11 years. The trial judge called each child individually and conducted a preliminary examination to determine the competency of the child to be sworn. In relation to one of the children, the trial judge, having asked the child whether he liked school and who his favourite football team proceeded to question the child with regard to his religious beliefs. While the child confirmed (by nodding) that he had been to church in the past, he indicated that he did not go to church and that he could not remember who Jesus was. However, the child was aware that he was in court to "give evidence" and confirmed - when prompted - that he knew that it was very important that he should tell the truth and confirmed that he would tell the truth. The Court of Appeal acknowledged that the trial judge could have gone on to ask the witness a number of further questions, such as whether the child understood the particular importance of telling the truth in those circumstances and that the Court
the result of the new secular test was the admission of evidence from child witnesses who, if they had been subjected to the traditional test governing the reception of sworn evidence, may not have been permitted to testify upon oath; "the modern emphasis is on whether a child is competent in broad terms rather than on whether he or she is aware of the divine sanction of the oath". 241 The preliminary examination conducted by the trial judge was also truncated in that now the court had only to determine whether the child appreciated the solemnity of the occasion and understood that the duty of speaking the truth in court involved a higher duty than in everyday life; 242 it is submitted that the former requirement scarcely merited inquiry since the formal surroundings, procedure and language of the courtroom would, without more, impress the solemnity of the occasion upon the child. 243

2.8.6 The ‘Hayes test’ proved such a success in England that it was even adopted by the legislature – albeit fortified by a series of presumptions in favour of the proposed child witness – as the test governing the reception of the unsworn evidence of children in the current statute in that jurisdiction. 244

would have "found it more satisfactory had he done so". However, applying Hayes, the Court held that the trial judge was entitled, in the exercise of his discretion, to swear the children. 241 Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, Speaking Up for Justice (London: Home Office, June 1998) at para. 11.15. 242 Applying a dictum of Bridge, L.J. in R v Hayes [1977] 1 WLR 234, at p. 237 A-D, [1977] 2 All ER 288, (1977) 64 Cr App R 194, at p. 196 (C.A.), Lord Lane C.J. in R v X, Y and Z [1990] Crim LR 515, (1990) 91 Cr App Rep 36 (C.A.) asserted at p. 41 that: "In order to determine whether the children should be sworn or not, the judge in the presence of the jury called the children before him one by one and asked certain questions in order to try to establish in his own mind whether they were apprised of the importance in these particular circumstances and the particular importance in the particular circumstances of telling the truth." 243 In R v X, Y and Z [1990] Crim LR 515, (1990) 91 Cr App Rep 36 (C.A.), Lord Lane C.J. observed at p. 42 that it was "not really sustainable" to argue that the child witnesses did not appreciate the solemnity of the occasion, given the photograph which had been shown to the Court which showed the courtroom "from the position where the children would be sitting". 244 Section 55(1) – (4) of the Youth Justice and Criminal Evidence Act 1999 provides: "(1) Any question whether a witness in criminal proceedings may be sworn for the purpose of giving evidence on oath, whether raised – by a party to the proceedings, or by the court of its own motion, shall be determined by the court in accordance with this section. (2) The witness may not be sworn for that purpose unless – he has attained the age of 14, and he has a sufficient understanding of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath. (3) The witness shall, if he is able to give intelligible testimony be presumed to have a sufficient appreciation of those matters if no evidence tending to show the contrary is adduced (by any party). (4) If any such evidence is adduced, it is for the party seeking to have the witness sworn to satisfy the
Pursuant to s. 55 of the Youth Justice and Criminal Evidence Act 1999, while a presumption of competence attaches to all witnesses — “whatever their age” — in order to give sworn evidence, three essential preconditions must be met. First, the witness must be aged fourteen years or more; secondly, he/she must have a “sufficient understanding of the solemnity of the occasion”. Finally, he/she must have a sufficient understanding of “the particular responsibility to tell the truth which is involved in taking an oath”. However, s. 55(3) of the Youth Justice and Criminal Evidence Act 1999 further reduces the proof necessary for the receipt of sworn evidence to proof of the age of a child (fourteen years or more) in the absence of any evidence of incompetence being adduced by either party; if the witness is able to give intelligible testimony — that is, if he/she is able to understand questions put to him/her as a witness and to give answers to them which can be understood — he/she is presumed to have the requisite sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath “if no evidence tending to show the contrary is adduced (by any party)”. Where such evidence is adduced, it is for the party seeking to
have the witness sworn to satisfy the court that, on the balance of probabilities, the witness has attained the age of fourteen years and has the requisite appreciation.\textsuperscript{251} Where a person is not permitted to be sworn for failure to comply with the conditions stipulated in s. 55 of the Youth Justice and Criminal Evidence Act 1999, the evidence of that person “shall be given unsworn”.\textsuperscript{252}

2.8.7 By this Act, the legislature in England has expressly provided that no child under the age of fourteen years can ever give sworn evidence, a provision which was doubtless intended to alleviate the difficulties experienced in relation to the assessment of the understanding and appreciation of the obligation of an oath in very young children. Moreover, by employing a series of presumptions in the application of the test for the reception of sworn evidence, the legislature has signaled an increased acceptance of the reliability of the evidence of child witnesses and the primacy of the ‘intelligibility’ test as a test of competence.

2.8.8 It is interesting to note that in Canada, unlike in England, the test for the reception of evidence under oath continued, even after the \textit{Bannerman} relaxation, to contain a religious element. While in England the prospective witness was required to understand the duty to speak the truth in court, the same witness in Canada had to understand the moral obligation, assumed before God, to speak the truth;\textsuperscript{253} while it was accepted that the child

\textsuperscript{251} See: s. 55(4) of the Youth Justice and Criminal Evidence Act 1999. Section 55(6) provides that expert evidence may be received by the courts on the question of the competence of the witness to give evidence upon oath.

\textsuperscript{252} Section 56(2) of the Youth Justice and Criminal Evidence Act 1999. Section 56(4) provides that: “Where a person (‘the witness’) who is competent to give evidence in criminal proceedings gives evidence in such proceedings unsworn, no conviction, verdict or finding in those proceedings shall be taken to be unsafe for the purposes of any of sections 2(1), 13(1) and 16(1) of the Criminal Appeal Act 1968 (grounds for allowing appeals) by reason only that it appears to the Court of Appeal that the witness was a person falling within section 55(2) (and should accordingly have given his evidence upon oath).”

\textsuperscript{253} The Manitoba Court of Appeal in \textit{R v Bannerman} (1966) 48 C.R. 100, at p. 138, \textit{per} Dickson J.A. (Man. C.A.) expressly doubted “whether the greater present day theologians or moralists have answered the question put to this thirteen year old boy with any degree of certainty or unanimity”, however, in the same decision Schultz J.A. held, at p. 120, that the child must demonstrate that she believes that there is a “moral obligation, reinforced by some religious belief” to tell the truth. Equally, Dickson J.A. referred at p. 138 to the “solemn assumption before God of a moral obligation to speak
witness did not need to understand the spiritual consequences of an oath, it was nonetheless held that the aim of the trial judge’s inquiry was to establish whether or not the child believed in God or another Almighty and whether the child appreciated that, in giving evidence upon oath, he was telling the Almighty that he would speak the truth.254

2.8.9 However, more recently, the Canadian courts have evidenced a distaste for the deeply religious basis of the former test for sworn evidence.255 In Horsburgh v R256 Laskin J.A. examined the older authorities and stated that:

“[A]t a distance of some 200 years from Omychund v Barker...the contention that the competency of a witness depends on demonstration that he or she is fearful of divine retribution (as an exclusive test) rather than early justice as the consequences of false testimony, is highly talismanic. The common law deserves better than that at the hands of the judiciary in the 20th century.”257

The Ontario Law Reform Commission, Report on the Law of Evidence (1976) asserted at p. 126 in relation to this passage that: “If this interpretation is to be adopted, ‘the solemn assumption before God’ surely contemplates a belief in God on the part of the child. This would often involve a complex theological discussion, inappropriate for the courtroom, and one in which most judges and lawyers are incompetent to participate. It is not clear what the learned judge meant by the last sentence quoted. In its content it would appear to refer to divine sanctions. However, it is open to the interpretation that the court is not concerned with an inquiry into ‘the child’s capacity to know’ the legal consequences of giving false evidence.”

254 R v Budin (1981) 58 C.C.C. (2d) 352 (Ont. C.A.). The Court stated at p. 356: “A moral obligation to tell the truth is implicit in such belief and appreciation” and that “a child must believe in God and know that an oath constitutes a declaration or promise to God to speak the truth” citing, at p. 355, per Jessup J.A., in support of these propositions, the following definitions of an oath from The Shorter English Oxford Dictionary and Jowitt’s Dictionary of English Usage respectively: “a solemn appeal to God (or to something sacred) in witness that a statement is true” and “an appeal to God to witness the truth of a statement”. Delisle, R., Evidence: Principles and Problems (4th ed., 1996) at p. 280: “The Budin case also emphasised that the counsel who tenders the child witness should instruct the child in the nature of an oath, and the child should be examined by the court, and not cross-examined on the matter by opposing counsel.”


257 Recent decisions of the Supreme Court of Canada, namely, R v Truscott [1967] SCR 309, at p. 368 (S.C.C.) and Horsburgh v The Queen [1967] SCR 746, at p. 777 (S.C.C.), state the test as requiring an understanding of the “moral obligation of telling the truth”. See also: R v Taylor (1970) 75 WWR 45, at p. 50-51, 1 C.C.C. (2d) 321, at pp. 327-328 (Man. C.A.) per Dickson J.A.: “After careful examination of the evidence I am not prepared to say that the Judge erred in permitting these witnesses to be
Accordingly, despite initial confusion, the Canadian ‘moral obligation’ test emptied the assessment of the competence of a child witness to give sworn evidence of its traditional religious underpinnings. First, no inquiry of a potential child witness was required in order to ascertain whether the child witness believed in God or a Supreme Being when determining whether such child should be permitted to give his / her evidence on oath. Secondly, despite the differences in terminology, the reasoning in Hayes was adopted; the important consideration, when a judge was determining whether a child should properly be sworn, was whether the child had a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which was involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.
2.8.11 This move towards the secularization of the oath mirrored the development in England\textsuperscript{262} even to the extent of adopting the English test for sworn evidence.\textsuperscript{263} By adopting their test, the Canadians also adopted their difficulties;\textsuperscript{264} arguably reducing to vanishing point the distinction between sworn and unsworn testimony and prompting the argument that there should only be one form of evidence received by the courts from child witnesses.\textsuperscript{265} As in England, the new ‘secularized’ test for the reception of sworn evidence from child witnesses in Canada was embodied (although not

a new trial. See: N. Bala "\textit{D.(R.R.)}: Too strict interpretation of the New Procedure for the Qualification of Child Witnesses" (1989) 69 C.R. (3d) 276; and Sopinka J., Lederman S., and Bryant A., \textit{The Law of Evidence in Canada} (2nd ed., 1999) who asserted at p. 689 that: “The Act abolishes any legal distinction between testifying upon a promise to tell the truth and upon oath or affirmation. The judge might very well have found that the child had the capacity to testify under oath or upon affirmation if the inquiry had been made, but this would not have assisted the accused in any way.”

\textsuperscript{262} By way of contrast, the Australian courts do not appear to have embraced this move away from the traditional understanding of the test for the receipt of sworn evidence. For example, in Queensland, the Supreme Court has held that an awareness of the divine sanction attending a breach of an oath is an essential prerequisite to the swearing of a witness: \textit{R v Brown} [1977] Qd R 220; \textit{Domonic v R} (1985) 14 A Crim R 419 (W.A. F.C.); \textit{Schlaefer v R} (1992) 57 SASR 423 (F.C.). In South Australia the requirement is that the child, being of or above the age of seven years, understands the obligation of the oath: Evidence Act 1929, s. 12(1). The Evidence Acts 1995 (Cth.) and (N.S.W.) provide at s. 13 that a person – whether child or not – incapable of understanding that in giving evidence he or she is under an obligation to give truthful evidence is not competent to give sworn evidence, though the person may be competent to give unsworn evidence.

\textsuperscript{263} MacKinnon J.A. recognised the social reality that for many adults the oath is devoid of spiritual and religious importance; it is the solemnity of the occasion which impresses the importance of telling the truth upon the witness. He held that competent child witnesses were in the same position as such adults in that they understood the oath as containing a moral obligation to tell the truth which is binding on the conscience of all who take it. See also: Sopinka J., Lederman S., and Bryant A., \textit{The Law of Evidence in Canada} (2nd ed., 1999) at p. 681.

\textsuperscript{264} Delisle is critical of this secularized test for sworn evidence since he sees little distinction between the understanding of the duty to speak the truth required before a child witness will be permitted to give evidence on oath and the understanding of the duty to speak the truth necessary in order to allow a child witness to give evidence unsworn. Delisle, R., \textit{Evidence: Principles and Problems} (4th ed., 1996) at p. 280: “Again the problem is raised, how does that differ from the duty to speak the truth?”

\textsuperscript{265} The Ontario Law Reform Commission asserted in its \textit{Report on the Law of Evidence} (1976) at p. 127 that: “The interpretation which the courts have placed on the words ‘understand the nature of an oath’ appears to produce a perplexing result…..Understanding the moral obligation to tell the truth is the test required [for the reception of sworn evidence] …. If this interpretation is correct, it follows that a child tendered as a witness who is ‘possessed of sufficient intelligence to justify the reception of his evidence’ and who ‘understands the duty of speaking the truth’ must qualify as a witness who may give evidence under oath. On this reasoning, there is now no authority for receiving the unsworn evidence of a child. No doubt the courts did not intend to produce this result when, by interpreting the meaning of the words ‘the nature of an oath’ as used in the statute was changed from the traditional meaning involving religious beliefs. This, however, appears to be the result. We think legislative action is imperative.”
expressly stated) in legislation\(^{266}\) which required an inquiry\(^{267}\) into whether a witness under fourteen years\(^{268}\) or a witness aged fourteen years or more whose mental capacity to give evidence upon oath was challenged – understood the nature of an oath or solemn affirmation and was able to communicate the evidence.\(^{269}\) If the witness did not understand the nature of an oath or solemn affirmation by reason of her / his lack of mental capacity, but was able to communicate the evidence, the witness was permitted to testify unsworn on promising to tell the truth; implying that the witness understood the duty to speak the truth in terms of everyday social conduct. If, on the other hand, the witness did not understand the nature of an oath or solemn affirmation \textit{and} was unable to communicate the evidence, that person could not testify at all, either sworn or unsworn.\(^{270}\)

2.8.12 While this remains the test today in Canada in relation to the reception of evidence from witnesses “of fourteen years of age or older whose mental
capacity is challenged"; the law governing the reception of the evidence of child witnesses was, once again, the subject of legislative amendment in 2005 and the current position in Canada may now be stated as follows. First, a person aged less than fourteen years is “presumed to have the capacity to testify”. Secondly, such person, when proposed as a witness, “shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation”. Thirdly, the evidence of such proposed witness shall be received by the courts if he / she is “able to understand and respond to questions”. Fourthly, a party challenging the capacity of such proposed witness bears the burden of satisfying the court that “there is an issue as to the capacity of the proposed witness to understand and respond to questions”; if the court is satisfied that there is an issue as to his / her capacity, it shall, before permitting him / her to give evidence, “conduct an inquiry to determine whether [he / she is] able to understand and respond to questions”. Fifthly, no such proposed witness shall be asked any questions regarding his / her understanding of the nature of the promise to tell the truth for the purpose of determining whether his / her evidence shall be received by the court; however, the court shall, before

271 See: Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 26. Section 16, as so amended, provides that: “(1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine (a) whether the person understands the nature of an oath or a solemn affirmation; and (b) whether the person is able to communicate the evidence. (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation. (3) A person referred to in subsection (1) who does not understand the nature of an oath or solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth. (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify. (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation”. See also: R v Parrott [2001] 1 S.C.R. 178, 194 D.L.R. (4th) 427, 150 C.C.C. (3d) 449 (S.C.C.); R v Hawkins [1996] 3 S.C.R. 1043, 111 C.C.C. (3d) 129, 2 C.R. (5th) 245 (S.C.C.); R v Rockey [1996] 3 S.C.R. 829, 110 C.C.C. (3d) 481, 2 C.R. (5th) 301 (S.C.C.); R v Peterson (1996) 106 C.C.C. (3d) 64, 89 O.A.C. 60 (Ont. C.A.); R v Farley (1995) 99 C.C.C. (3d) 76, 80 O.A.C. 337, 40 C.R. (4th) 190 (Ont. C.A.); and R v Marquard [1993] 4 S.C.R. 223, 108 D.L.R. (4th) 47, 85 C.C.C. (3d) 193 (S.C.C.).

272 Section 16.1(1) of the Canada Evidence Act, as inserted by the amendment in 2005, c. 32, s. 27.

273 Section 16.1(2) of the Canada Evidence Act, as inserted by the amendment in 2005, c. 32, s. 27.

274 Section 16.1(3) of the Canada Evidence Act, as inserted by the amendment in 2005, c. 32, s. 27. See also: section 2.15.0-2.15.16: Test Four: Intelligibility.

275 Section 16.1(4) and (5) of the Canada Evidence Act, as inserted by the amendment in 2005, c. 32, s. 27. See also: s. 55 of the Youth Justice and Criminal Evidence Act 1999 in England.
permitting such proposed witness to give evidence, require him / her to “promise to tell the truth”. Finally, the statute expressly provides that “for greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath”.

2.8.13 The effect of this legislative amendment is threefold. First, it unequivocally abandons the oath and the reception of sworn evidence from child witnesses and embraces a single form of evidence – evidence given otherwise than upon oath or solemn affirmation – from all witnesses aged less than fourteen years. Secondly, having asserted a presumption of competence in favour of child witnesses, it advocates the application of a ‘reverse onus’ intelligibility test to such witnesses in the event of a challenge to his / her competence; the burden of disproving competence – in terms of the ability to understand and respond to questions – is placed on the party challenging the child’s competence. Thirdly, it requires such child witness to promise to tell the truth before the court is empowered to receive his / her evidence. Fourthly, it alters the nature of the preliminary examination which may be conducted by the court; while the court may conduct an inquiry to determine the child’s ability to understand and respond to questions, the court may not, in the course of such inquiry, pose questions to the child witness aimed at ascertaining his / her understanding of the nature of the promise to tell the truth. Finally, this statutory provision expressly negates any suggestion that a hierarchy of forms of evidence exists, in which sworn evidence is ranked higher than unsworn evidence.

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276 Section 16.1(6) and (7) of the Canada Evidence Act, as inserted by the amendment in 2005, c. 32, s. 27.
277 Section 16.1(8) of the Canada Evidence Act, as inserted by the amendment in 2005, c. 32, s. 27.
278 In this regard, see the analysis of the criticisms of the ‘oath test’ of competence as it applies to child witnesses contained in sections 2.6.0-2.6.7.
279 See also: s. 53 of the Youth Justice and Criminal Evidence Act 1999 in England.
280 See: s. 33A of the Criminal Justice Act 1988, as inserted by s. 52 of the Criminal Justice Act 1991 and Sch. 9, s. 33 of the Criminal Justice and Public Order Act 1994 in England (‘reverse onus’ intelligibility test); repealed and replaced by ss. 53 and 55 of the Youth Justice and Criminal Evidence Act 1999 in England (presumption of competence and intelligibility test); and s. 27 of the Criminal Evidence Act 1992 in Ireland (intelligibility test). See also section 2.15.0-2.15.16: Test Four: Intelligibility.
281 See: s. 24 of Part III of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3).
Given the extent to which this issue has vexed both the judiciary and the legislatures in England and Canada, it is astounding that the question of the appropriate test to be applied to the reception of sworn evidence from child witnesses has received so little attention in this jurisdiction and remains, to this date, in a state of uncertainty. Although a movement away from the traditional Brasier\textsuperscript{282} conception of the test of competence and the obligation of an oath is discernable in the recent Irish caselaw analysed above,\textsuperscript{283} neither the ‘moral responsibility’\textsuperscript{284} nor the ‘Hayes test’\textsuperscript{285} has been expressly considered by the Irish judiciary. Clearly, either of the two reformed tests – the ‘moral obligation’ or the Hayes test – are preferable to the traditional ‘oath’ test, in light of the difficulties attendant on the Brasier test both as formulated and as applied by the courts and, more importantly still, in view of the fact that the ‘oath’ test – by assessing only a child’s moral or religious development – did not represent a reliable test of competence. Equally, it is submitted that the courts will hesitate to apply the old common law test for the reception of sworn evidence from child witnesses when it has been so clearly rejected as redundant in other jurisdictions.\textsuperscript{286} However, to so acknowledge is not to conclude the debate regarding possible reform of the competence test for sworn evidence. It has been argued that, rather than reform the test for the reception of evidence given upon oath, the oath itself should be abolished,\textsuperscript{287} at least insofar as the

\textsuperscript{282} See: \textit{R v Brasier} (1779) 1 Leach 119, 168 E.R. 202 (Twelve Judges); and sections 2.5.0-2.5.10.

\textsuperscript{283} See: \textit{Attorney General v O’Sullivan} [1930] IR 552 (C.C.A.); \textit{People (Attorney General) v Rossiter} (1951) 1 Frewen 118 (C.C.A.); \textit{The People (Attorney General) v Keating} [1953] IR 200, 1 Frewen 492 (C.C.A.); and \textit{The People (Director of Public Prosecutions) v J.T.} (1984-9) 3 Frewen 141 (C.C.A.).


\textsuperscript{286} Ryan and Magee noted that the judiciary in this jurisdiction may regard the Hayes test as easier to apply in practice “than one which had its origins in the more simplistic theology of earlier centuries”: Ryan E. and Magee P., \textit{The Irish Criminal Process} (1983) at p. 321. Fennell, however, is more cautious, and merely expresses the hope that the Irish courts would prove as mindful as the English of “the very particular religious connotations of an oath and the possibility for competence of a child to exist without an appreciation of same”: Fennell, Caroline, \textit{The Law of Evidence in Ireland} (1992) at p. 82. See also: Walsh, Dermot, \textit{Criminal Procedure} (2002) para. 18.03, at p. 857.

\textsuperscript{287} The Law Reform Commission considered the relevance of the oath in modern Ireland and concluded that the oath should be abolished for all witnesses: Law Reform Commission of Ireland, \textit{Report on Oaths and Affirmations} (LRC 34-1990) rec. no. 1, at p. 43. The Commission also examined
evidence of child witnesses is concerned, since to maintain the oath alongside the facility for giving evidence unsworn gives rise to the danger of the emergence – actual or perceived – of a hierarchy of forms of evidence,288 with jurors attaching greater value to evidence given upon oath than unsworn evidence;289 such hierarchy would unjustifiably disadvantage younger witnesses.290 Moreover, while a test along the lines proposed in

the possibility of a constitutional bar to the abolition of the oath, resulting from the combined effect of the constitutional guarantee of freedom of worship and the right to express opinions freely. However, the Commission pointed out in para. 4.26, at p. 39 that “the exclusion of children from giving evidence on the sole ground of their religious understanding might have difficulty in surviving constitutional scrutiny” since the State was precluded by virtue of Article 44.2.3 of the Constitution from imposing any disabilities or discriminating on the grounds of religious profession, belief or status. The Commission considered that it could also be regarded as an unjustified restriction on the child’s right of access to the courts. The Commission also regarded as constitutionally objectionable the requirement that a person state their objection to taking the oath before being permitted to affirm, as “an unjustified invasion of religious privacy” and on the grounds of freedom of conscience and the free profession and practice of religion pursuant to Article 44.2.1 and freedom of expression under Article 40.6.1(i), which rights combined to give a “co-equal right not to profess any religion and not to be required to express opinions”: para. 4.27, at p. 39. The Commission rejected the notion of retaining the oath and providing for affirmation as of right on the grounds of the difficulties involved – outlined above – “which in constitutional term may be regarded as importing elements of the right to fair procedures, to equality before the law and, more generally, as facilitating the administration of justice”: para. 4.28, at p. 39. It was concluded that the abolition of the oath was not contrary to the religious sentiment expressed in the Preamble to the Constitution since “[t]o abolish the oath is not by the same token to hold God’s name in any less reverence, nor does it demonstrate any lack of respect or honour for the free practice and profession of religion”: para. 4.30, at p. 40.288 Delisle was critical of the majority decision in R v Marquard [1993] 4 S.C.R. 223, 66 O.A.C. 161, 108 D.L.R. (4th) 47, 159 N.R. 81, 85 C.C.C. (3d) 193, 25 C.R. (4th) 1 (S.C.C.) as evidencing a “hierarchy of values of testimony depending on how the witness was assessed following the inquiry”. Delisle noted that, despite the abolition of the mandatory corroboration requirement for unsworn evidence, “according to the court, unsworn evidence given on a promise, is not as valuable as sworn as the trial judge is required to so charge the jury”: Delisle R., Evidence: Principles and Problems (4th ed., 1996) at p. 291.289 Such hierarchy in the forms of evidence was previously supported by the law; the corroboration requirements for sworn and unsworn evidence differed, with the result that it was possible for an accused to be convicted on the uncorroborated evidence of a child witness given upon oath, but not upon the unsworn evidence of a child witness. These restrictive rules – which are outlined in a later section – have now been abolished by way of statutory reform indicating a willingness to treat both forms of evidence with equality and to afford equal status to evidence given either sworn or unsworn. The Law Reform Commission noted that “it follows from the equal legal force which both forms enjoy that there should not be a higher standard of understanding for the oath and a lower one for affirmation”. Law Commission of Ireland, Report on Oaths and Affirmations (LRC 34-1990) para. 2.27, at p. 20. However, equally the Commission cautioned in para. 4.24, at p. 38 that “[i]t is precisely because religion plays a more important part in Irish life than in other societies where secular values predominate that the risk of evidence being given on affirmation being treated as a form of second-rate evidence is significantly greater”. See also Ontario Law Reform Commission, Report on Child Witnesses (1991) at p. 39: “A third reason for collapsing the distinction between sworn and unsworn evidence of children is to eliminate the possibility that the trier of fact will draw an inference about the value of the children from whether it was sworn or unsworn.”290 The Commission pointed out that the present requirement, that a witness state his or her grounds of objection to an oath before being permitted to take the solemn affirmation, exacerbates this danger since it ensures that the witness is regarded with suspicion from the outset, before he or she has even begun to give evidence and places an unnecessary – “albeit simple” – obstacle in the way of the
England and Canada is undoubtedly more appropriate in a secular society, the concern remains,\textsuperscript{291} that the \textit{Hayes} test - and, by extension, the \textit{Bannerman} test of 'moral obligation' - do not provide a dependable indication of the reliability of a child witness; the rejection of the criterion of 'moral responsibility' as a test of reliability or competence - particularly where operating as the sole criterion - is analysed in more detail in the following section.\textsuperscript{292}

2.8.15 One of the issues arising for determination is whether such secularization effectively removes any meaningful distinction between sworn and unsworn evidence or renders such distinction illusory.\textsuperscript{293} It has been argued that acceptance of his or her evidence: Law Commission of Ireland, \textit{Report on Oaths and Affirmations} (LRC 34-1990) para. 4.21, at p. 37. See also: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot Q.C.) (London: Home Office, 1989), para. 5.14, at p. 50.

\textsuperscript{291} Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, 1989), para. 5.11, at p. 48. The Advisory Group did not consider that such test was "\textit{any more likely to provide a dependable touchstone}" in relation to the determination of the competence of a witness - and the likelihood of a child providing reliable evidence - than the traditional religious interpretation of the oath.

\textsuperscript{292} See, in particular: sections 2.12.8-2.12.16, 2.13.0-2.13.6, 2.15.5, 2.15.8-2.15.10 and 2.15.13-2.15.14. Lyon, Thomas D., "Child Witnesses and the Oath" in Westcott, Helen, Davies, Graham and Bull, Ray (eds.) \textit{Children's Testimony: A Handbook of Psychological Research and Forensic Practice} (2002) (John Wiley & Sons Ltd) 245, at pp. 257-258: "First, young children should not be asked to define the truth and lies or explain the difference between the concepts. Young children are much better at choosing whether statements are the truth or lies and can be asked multiple questions to ensure that good performance is not attributable to chance. Second, when asked to identify lies as such, children should be asked about statements made by others rather than by the interviewer, given their reluctance to call the interviewer's statements lies. Although we did not directly test it we would also recommend against asking children to generate examples of lies as a means of testing their understanding; children will likely find such a task difficult and unpleasant. Second, young children should not be asked to describe the consequences of lying, particularly what would happen to them if they lied. Forced-choice questions about other children regarding the goodness or badness of lying or the negative consequences of lying are more sensitive to early understanding....Third, it is fair to presume that most children are competent to take the oath by five years of age, because even maltreated children with serious delays in receptive vocabulary perform well on our tasks by that age. Higher functioning non-maltreated children as young as three years of age have demonstrated good understanding of the meaning and wrongfulness of lying....Fourth, children should not be asked if they 'promise' that they 'will tell the truth' and that they 'won't tell any lies', because of younger children's difficulty in understanding the meaning of 'promise'."

\textsuperscript{293} Dennis, I.H. \textit{The Law of Evidence} (1999) argued at p. 150 that the \textit{Hayes} test reduced "\textit{almost to vanishing point}" the difference between the tests for sworn and unsworn evidence. Report of the Committee on Sexual Offences Against Children and Youths, \textit{Sexual Offences Against Children} (Ottawa: Supply and Services Canada, 1984) ("Badgley Report") Vol. 1 at p. 67, reiterated at p. 371: "The legal tests for the reception of children's evidence either upon oath (sworn) or not upon oath (unsworn) have become very close together in practice, notwithstanding that the corroboration requirements are completely different depending on whether the child gives sworn or unsworn evidence. The Committee considers that the subtle practical distinction between these two tests is too tenuous a basis upon which to attach a legal distinction."
while both forms of evidence require an appreciation of the obligation to tell the truth, the former also requires an understanding of the solemnity of the occasion and the higher obligation to tell the truth than that required in everyday social life; the distinction between what is required for sworn as opposed to unsworn evidence appears to be based upon the quality of the duty owed by the child witness. It may also have been intended that, before a child could be declared competent to give evidence upon oath, he/she would indicate an understanding of the legal (or secular) consequences of a failure to give truthful evidence in a criminal trial—either for himself, for the accused, or even both—whereas, in order for a child to be declared competent to give evidence unsworn, he/she was required simply to demonstrate to the court an understanding of the ordinary social duty of speaking the truth in everyday life.

The difficulty with such an analysis, however, is that it re-imposes the same type of demands upon children which were present in the old test for the reception of sworn evidence—such as a high level of cognitive development, linguistic skills and moral sophistication—and which formed

294 In this regard, Spencer and Flin reasoned that, in order to give sworn evidence, a child had to understand the particular importance of telling the truth in a court of law, whereas a child giving unsworn evidence had only to understand the importance of telling the truth per se: Spencer J. and Flin R., The Evidence of Children—The Law and the Psychology (2nd ed., 1993) at p. 52.

295 This is in contrast to the requirement at common law that the child demonstrate an understanding of the divine sanction of an oath, when giving sworn evidence.

296 In this instance, the child would be required to demonstrate an understanding of the concept of perjury, in other words, that legal sanctions existed to punish him/her for false evidence. Section 27(2) of the Criminal Evidence Act 1992 provides like penalties and sanctions to those applicable for the offence of perjury where a person gives false evidence unsworn.

297 In this instance, the child would be required to indicate, albeit in basic terms, that he/she understood that his/her uncorroborated evidence was sufficient to convict the accused and that, if his/her evidence be false, the accused could be wrongly convicted.

298 It is clear that the courts were attempting to require of prospective child witnesses a greater appreciation of the importance of telling the truth for sworn evidence as opposed to unsworn evidence. This is understandable given the difference in effect of the two forms of evidence; the unsworn evidence of a child witness required corroboration before a conviction could result, while no such requirement existed in relation to evidence given upon oath. Therefore, if, as is argued above, no real difference existed between the “added responsibility to tell the truth in court” and the “duty to speak the truth”, there should have been no corroboration requirement in respect of the unsworn evidence of children. It is interesting to note that, both in England and in Ireland, when the corroboration requirement was later abolished by the legislature, the new legislation also abandoned the express requirement that the child witness should understand the duty to speak the truth, thus ending this argument about a “distinction almost without a difference”: Spencer J. and Flin R., The Evidence of Children—The Law and the Psychology (2nd ed., 1993) at p. 52.
the basis for the court’s ultimate rejection of that test. Further, it is difficult to imagine the difference in practice between the answers given to questions posed during the preliminary examination of the competence of a child which would lead the court in one instance to conclude that the child understood the duty of speaking the truth in court and, in another instance, that the child merely understood the duty of speaking the truth in an everyday social context since the questioning of the child, in either case, would be conducted in a courtroom, not in an ordinary social setting.299

However, it is submitted that even if, in the culmination of the incremental movement identified in the recent Irish authorities, the ‘secularised’ test of competence is to be adopted in this jurisdiction, this difficulty simply does not arise since the legislation governing the admission into evidence of the unsworn evidence of child witnesses makes no express mention of an awareness of the obligation to tell the truth as a pre-condition to a finding of competence to testify otherwise than upon oath:300 as analysed in the following section, it is submitted that it contains a test of ‘intelligibility’ only and does not mandate an assessment of the child’s understanding of concepts such as ‘truth’, ‘lies’ or ‘promise’.301

2.8.17 The enactment of such statutory reforms permitting the reception of the evidence of children under fourteen years of age – or persons over fourteen years with a mental handicap – “otherwise than on oath or affirmation” where the court is satisfied that the child is “capable of giving an intelligible

299 Ontario Law Reform Commission, Report on Child Witnesses (1991) at p. 25: “In the Commission’s view, however, there is no longer a meaningful distinction between sworn and unsworn testimony in section 18 of the Ontario Evidence Act. In an attempt to avoid the corroboration requirement in the Evidence Act for the unsworn testimony of the child and to achieve equal treatment for adult and child witnesses, the courts have essentially collapsed the distinction between sworn and unsworn evidence and have rendered the two tests virtually indistinguishable... since Bannerman it is difficult to see how a child could fail the relaxed oath test yet satisfy the unsworn testimony test in section 18 of the Ontario Evidence Act.”

300 Accordingly, it is denied that the adoption of the Hayes test in Ireland would render illusionary the distinction between the tests governing the admission of the sworn and unsworn evidence of child witnesses.

301 See section 2.15.0-2.15.16: Test Four: Intelligibility.
account of events which are relevant to those proceedings\textsuperscript{302} has taken much of the heat out of the debate concerning reform of the traditional \textit{Brasier} test for the reception of sworn evidence from child witnesses in Ireland; a young child’s evidence may now be received unsworn, notwithstanding that such child may not satisfy the test governing sworn evidence, either as originally formulated, or as reformed by way of the \textit{Bannerman} ‘moral obligation’ formulation or the \textit{Hayes} secularised test of competence. However, since the legislative facility for giving evidence otherwise than on oath in this jurisdiction is expressly limited to children aged less than fourteen years, and the statutory provision employs \textit{permissive} rather than mandatory language in relation to the scope of the judicial authority to permit the reception of such evidence,\textsuperscript{303} it is submitted that the question of the appropriate test to determine the competence of a child to give sworn evidence remains important.

2.8.18 It is submitted that the principal concern of any test of competence must be whether it constitutes an accurate or reliable test of the cognitive development of a child witness and his / her consequent reliability as a witness. The following section conducts a thorough evaluation of the competing tests of competence advanced in each of the jurisdiction examined herein\textsuperscript{304} and concludes – for reasons outlined below – that the ‘intelligibility’ test of competence contained in s. 27 of the Criminal Evidence Act 1992 is the best litmus of the child’s testimonial qualifications and, accordingly of his / her psychological competence as a witness.

\textsuperscript{302} Section 27 of the Criminal Evidence Act 1992 (No. 12 of 1992). The long title of the Criminal Evidence Act, 1992 describes it as: “\textit{An Act to amend the law of evidence in relation to criminal proceedings and to provide for connected matters}.”

\textsuperscript{303} Section 27(1) of the Criminal Evidence Act 1992 provides that: “Notwithstanding any enactment, in any criminal proceedings, the evidence of a person under 14 years of age \textit{may} be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings”. (Emphasis added). See, \textit{contra}: Section 16.1 of the Canada Evidence Act, as inserted by the amendment in 2005, c. 32, s. 27.

\textsuperscript{304} See sections 2.10.0-2.10.10, 2.12.0-2.12.16, 2.13.0-2.13.6, 2.14.0-2.14.11, 2.15.0-2.15.16, 2.16.0-2.16.19 and 2.17.0-2.17.18 scrutinising: age as a total bar to competence; the dual test of intelligence and moral responsibility; the combined test of moral responsibility and rationality; the assessment of the twin conditions, moral responsibility and the ability to communicate; the ‘intelligibility’ test (and variations thereof); the abolition of all competence tests or pre-conditions; and the impact upon the accused of the relaxation of the competence requirements.
2.8.19 In line with the statutory schemes recently enacted in England and Canada, it is submitted that sworn evidence should be received from a child witness aged fourteen years or more — but less than eighteen years — in criminal proceedings in this jurisdiction where he/she satisfies the ‘intelligibility’ test, that is, he/she is capable of understanding questions posed and of giving answers which may reasonably be understood; while a general presumption of competence is not advocated, it is submitted that, where such witness satisfies the ‘intelligibility’ test, he/she may be presumed — until evidence tending to show the contrary is adduced — to have a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath. Moreover, if evidence is adduced tending to show that such witness does not meet the codified ‘Hayes test’, the party tendering such witness must satisfy the court, on the balance of probabilities, that the witness possesses the requisite appreciation or understanding.

2.8.20 It is submitted that the universal application of the ‘intelligibility’ test of competence to child witnesses — albeit in a modified form in relation to the reception of sworn evidence from child witnesses aged fourteen years or more — represents a fair balance of the competing interests involved, while avoiding engaging the courts in assessment of the moral responsibility of such children save in circumstances where there is evidence of a deficit of the requisite appreciation on the part of an individual child witness. It is

305 In this regard, see the reasons advanced for the rejection of the ‘abolitionist’ approach to tests of competence advanced in section 2.16.0-2.16.19: Wigmore’s ‘Come What May’ Approach.
309 Such interests include: the rights of the accused to a fair trial and fair procedures (pursuant to Articles 38.1 and 40.3 of the Constitution), the admission of all relevant understandable evidence, the rights of the child (including the constitutional right of access to the courts and the right to bodily integrity, guaranteed by Article 40.3 of the Constitution) and the requirements of the proper administration of justice. See: section 2.17.0-2.17.18: Impact upon the Accused of the Relaxation of Competence Requirements.
submitted that less emphasis should be placed on the *form* in which the child’s evidence is given – sworn or unsworn – and greater attention should be paid towards ascertaining the child’s testimonial capabilities prior to the receipt of his / her evidence, in the interests of the reconciliation and accommodation of the demands of: the rights of the accused; the admission of all relevant, understandable evidence; the protection of the child witness; and the proper administration of justice.
2.9.0 UNSWORN EVIDENCE APPROACH

2.9.1 Due to the significant difficulties encountered in the operation of the tests for the receipt of evidence on oath from child witnesses and as part of the wider reform of the law of evidence in light of the increasingly positive view of the capabilities of children as witnesses, the legislatures in a number of the jurisdictions considered herein intervened to enact statutory measures to permit the reception by the courts of unsworn evidence from child witnesses.

2.9.2 Initially, by way of counter-balance to this exception to the general proposition that all evidence must be given upon oath, the legislation permitting unsworn evidence to be given by child witnesses created a hierarchy of forms of evidence through the imposition of differing

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311 (1) Ireland: s. 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914; s. 27 of the Criminal Evidence Act 1992; (2) England: s. 38 of the Children and Young Persons Act 1933; repealed by s. 52 of the Criminal Justice Act 1991, which also inserted ss. 33A(1), 33A(2) and 33A(3) into the Criminal Justice Act 1988, s. 33A(2A) was added by the Criminal Justice and Public Order Act, 1994 (Sch. 9, s. 33); and ss. 53 and 55 of the Youth Justice and Criminal Evidence Act 1999; (3) Canada: s. 16 of the Canada Evidence Act, R.S.C. 1970, c. E-10; then R.S.C. 1985, c. C-5; am. 1987, c. 24, s. 18, now s. 16.1 of the Canada Evidence Act, R.S.C. 1985, c. C-5, 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27; (4) Australia: (Qld) s. 9(1) of the Evidence Act 1977; (Tas) s. 122C and s. 128(1) of the Evidence Act 1910; (WA) s. 106C of the Evidence Act 1966; (NSW) ss. 32-35 of the Oaths Act 1900 and s. 23(1) of the Evidence Act 1958; (Vic) s. 23 of the Evidence Act 1958; (SA) ss. 12 and 93A of the Evidence Act 1929; (NT) s. 25A of the Oaths Act 1939; and (5) Scotland: s. 24 of Part III of the Vulnerable Witnesses (Scotland) Act 2004.

312 Murphy P., Murphy on Evidence (7th ed., 2000) stated at p. 471: "Evidence given unsworn is, unless given in one of the cases recognised as being exceptional, a nullity, and any conviction or judgment based on it will be set aside on appeal" and cited as examples Marsham, ex parte Pethick Lawrence [1912] KB 362; and Birch v Somerville (1852) 2 ICLR 253.

313 Originally, unsworn evidence could be distinguished from sworn evidence in that the former required, as a matter of law, to be corroborated before it could ground a valid conviction, verdict or finding. Although this absolute requirement has been abandoned in most jurisdictions, it is arguable that the unsworn evidence of witnesses continues to be viewed as an inferior form of evidence in the
corroboration requirements for sworn and unsworn evidence. The effect of these mandatory corroboration requirements and their subsequent abolition on both the admissibility of the evidence of child witnesses and the rights of the accused is considered separately.  

2.9.3 The greatest concern of each of the legislatures in formulating a test for the reception of the unsworn evidence of child witnesses was to find a way of ensuring that the child possessed the testimonial qualifications necessary to justify the reception of the evidence otherwise than upon oath in order to guard against the admission of highly prejudicial and unreliable evidence; it was necessary, when formulating the test of competence to maintain a balance between the protection of the rights of the accused – including the constitutional right to a fair trial and fair procedures – and the admission of all relevant understandable evidence in the interests of the proper administration of justice.  

2.9.4 A number of different tests have been advanced – and are considered in greater detail below – representing a spectrum of approaches towards the admissibility of the evidence of children, ranging from highly restrictive tests to the abandonment of all pre-conditions to children’s competence, including: (i) combined tests of intelligence and moral responsibility; (ii)

hierarchy of forms of evidence; within this hierarchy, the evidence of an adult is regarded as superior to that of a child witness and the sworn evidence of a child witness is afforded a higher value than the unsworn evidence of a child witness. Given the oft highlighted narrowing distinction between the tests for sworn and unsworn evidence, it may be that such an attitude can no longer be defended.  

314 See: the analysis contained in sections 3.0.0-3.7.20 inclusive with regard to the corroboration requirements – past and present – applicable in relation to the evidence of child witnesses.  

315 Ontario Law Reform Commission, Report on the Law of Evidence (1976) at p. xi: “There must be guidelines which control the admissibility of evidence, but the guidelines must be such that they will not defeat the tribunal in its search for truth.”  

316 See: s. 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914 (Ireland); and s. 38 of the Children and Young Persons Act 1933 (England). In Scotland, prior to the adoption of s. 24 of the Vulnerable Witnesses (Scotland) Act 2004, in the absence of relevant statutory guidelines, the principal determinant of the child’s competence to give evidence unsworn appeared to be the court’s assessment of the child’s understanding of the obligation to tell the truth: Reeve v Lowe 1990 JC 96; Kelly v Docherty 1991 SLT 419; KP v HM Advocate 1991 SCCR 933; and M v Kennedy 1993 SCLR 69; and F v Kennedy (No. 1) 1993 SLT 1277, at p. 1280F; Quinn v Lees 1994 SCCR 159; M v Ferguson 1994 SCLR 487; S v Kennedy 1995 SLC 1087; and R, Petitioner 1999 SC 380. See also sections 2.12.0-2.12.16.
combined tests of moral responsibility and the ability to communicate;\(^{317}\) (iii) combined tests of moral responsibility and rationality;\(^{318}\) (iv) intelligibility tests;\(^{319}\) and (iv) the complete abolition of the requirement to satisfy a test as a pre-condition to a finding of competence.\(^{320}\) The most important questions to be answered in the evaluation of each of the tests outlined below for the reception of the unsworn evidence of child witnesses are these: which, if any, of the proposed tests is best suited to and most accurate in testing the competence of a child witness to give evidence unsworn and which, if any, test achieves an appropriate balance between competing interests.

2.9.5 If it is accepted that a measure of risk or unreliability attaches to the evidence of child witnesses – as it attaches to all witnesses – clearly the more restrictive the test employed to assess the competence of prospective child witnesses, the greater the protection afforded to the accused against potentially unreliable evidence. Equally, the adoption of a test which favours the admission of all relevant, understandable evidence is consistent with one of the principal rationales underlying the law of evidence, namely, the rational ascertainment of facts in the interests of justice. Given the

\(^{317}\) See: s. 16 of the Canada Evidence Act, R.S.C. 1970, c. E-10; subsequently R.S.C. 1985, c. C-5; am. 1987, c. 24, s. 18; now, s. 16.1 of the Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16, R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89, 2005, c. 32, s. 27 (Canada). See also: sections 2.14.0-2.14.11.

\(^{318}\) See: (NSW) s. 23(1) of the Evidence Act 1958; (SA) ss. 12a, 12(3) and 93A of the Evidence Act 1929; (Qld) s. 9 of the Evidence Act 1977; (Vic) s. 23 of the Evidence Act 1958; (WA) s. 106C of the Evidence Act 1906; (Tas) s. 128(1) of the Evidence Act 1910; and s. 13(3) of the Uniform Evidence Acts (Australia). See also: sections 2.13.0-2.13.6.

\(^{319}\) See: (i) Ireland: s. 27 of the Criminal Evidence Act 1992 and s. 28 of the Children Act 1997; and (ii) England: s. 33A(2A) of the Criminal Justice Act 1988, as amended by s. 52 of the Criminal Justice Act 1991 and Sch. 9, s. 33 of the Criminal Justice and Public Order Act 1994, and ss. 53 and 55 of the Youth Justice and Criminal Evidence Act 1999. See also: sections 2.15.0-2.15.16.

movement within the law of evidence in general—and the competency rules in particular—towards a more flexible, inclusive approach towards the evidence of children, the importance of this central question has increased.

2.10.0 Age as a Total Bar to Competence:

2.10.1 Before considering the statutory tests for the admission of evidence unsworn from child witnesses, it is important to highlight arguably the most restrictive approach to the reception of evidence unsworn from child witnesses, namely, the creation—either by statute or by judicial intervention—of an age limit below which the evidence of children may not be admitted or even considered for admission by the courts; where the laws “have cut, instead of attempting to unravel, the knot, by arbitrarily rejecting such testimony when the child is under a definite age”.

2.10.2 This approach found favour with the judiciary in England until recently, notwithstanding the absence of any express or implied age limit in the relevant statutory mechanism for the admission of evidence unsworn, which in fact evidenced a legislative intent that such evidence would, upon satisfaction of the two express conditions, be available from all witnesses however young. The English courts adopted a strict rule of excluding

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321 Like the abandonment of the mandatory corroboratory requirements, the relaxation of the competence requirements is “part of a larger trend in the evolution of evidence law in which courts have moved away from the tendency to view the evidence of certain classes of witnesses as inherently untrustworthy”: R v Marquard [1993] 4 S.C.R. 223, at p. 256, per L’Heureux-Dubé J. (S.C.C.).


324 Section 38 of the Children and Young Persons Act 1933. Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, December 1989) para. 5.9, at p. 48: “[I]ts effect has been to substitute a sort of age limit for witnesses where Parliament plainly intended there to be a test of understanding in each case. It has persisted despite modern thought about the rights and psychology of children, we suggest, because the traditional courtroom experience is so obviously an inappropriate one for the very young. Legal conservatism about practices and procedures and concern about the immediate welfare of child witnesses have both helped to ensure that our courts do not hear evidence which would be heard in other jurisdictions.”
evidence from children aged less than six\textsuperscript{325} and a practice of excluding evidence from children aged less than eight. This approach was in direct contrast to preceding case law\textsuperscript{326} which evidenced a greater willingness to focus on the individual child’s capabilities rather than imposing a general ban on the reception of evidence from all children below a certain age.\textsuperscript{327}

\textsuperscript{325} Although the child in \textit{R v Wallwork} (1958) 42 Cr App R 153 (C.A.) was aged five years at the time of trial, the exclusionary rule proposed in that case was extended by the Court of Appeal to a child aged six in \textit{R v Wright and Ormerod} (1987) 90 Cr App R 91 (C.A.).


\textsuperscript{327} The courts had received evidence from children as young as five: \textit{R v Murray} (1913) 9 Cr App R 248; \textit{R v Christie} [1914] AC 545, 561; \textit{R v Stanley} (1927) 20 Cr App R 58; \textit{R v Southern} (1930) 22 Cr App R 6. The courts also rejected the attempt to introduce further general restrictive practices in relation to the evidence of young children. In \textit{R v Moscovitch} (1924) 18 Cr. App. R. 37 (C.A.), the Court of Appeal held that a judge could not properly refuse to allow a child witness to give evidence on the grounds that the case was unfit for the child to be concerned with, since the judicial function was limited to an inquiry as to the individual child’s understanding of an oath or the duty to speak the truth. See also the earlier authorities cited in the foregoing section in relation to the reception of sworn evidence from child witnesses of a young age who demonstrated the requisite understanding of the obligation of an oath: \textit{Young v Slaughterford} (1709) 11 Mod. 228; \textit{R v Brasier} (1779) 1 Leach 199, 168 E.R. 202; and \textit{R v Perkins} (1840) 2 Moo.C.C. 135, at p. 139; 169 E.R. 54, at p. 55; \textit{R v Holmes} (1861) 2 F.&F. 788; 175 E.R. 1286; and \textit{Strachan v McGinn} [1936] 1 W.W.R. 412 (B.C.S.C.). Sir Matthew Hale agreed that an infant under fourteen years was not to be examined upon his oath as a witness but stated that “the condition of his person” – such as the child’s intelligence – or “the nature of the fact” could allow the examination of a child witness below such an age on oath in cases of witchcraft, buggery or rape. Hale, Sir Matthew, \textit{A History of the Pleas of the Crown or Historia Placitorum Coronce} (1778) Vol. 1, at p. 302. Moreover, Hale asserted in Vol. 2, at p. 278 that: “If an infant be of the age of fourteen years, he is as to this purpose of the age of discretion to be sworn as a witness, but if under that age, yet if it appears that he hath a competent discretion, he may be sworn.” In particular, Hale noted in Vol. 1, at pp. 634-635, that a child under twelve years of age could be sworn in an indictment for rape “if it appear to the court, that she hath the sense and understanding that she knows and considers the obligation of an oath, tho she be under twelve years” and further, that the evidence of a child of very tender years could, in the discretion of the court, be heard otherwise than upon oath, “to give the court information” although he conceded in Vol. 2, at pp. 283-284, that such evidence would not be sufficient in itself to support a conviction “without concurrence of other proofs”. Thus, pursuant to Hale’s theory, immaturity of the witness would affect his or her credibility but not necessarily his or her competence. Hale concluded in Vol. 2 at p. 784: “Yet such very young people under twelve years old I have not known examined upon oath, but sometimes the court for their information have heard their testimony without oath, which possibly being fortified with concurrent evidences may be of some weight, as in cases of rape, buggery, witchcraft and such crimes which are practiced upon children.”
2.10.3 The modern case which first espoused this restrictive rule was *R v Wallwork*\(^{328}\) wherein the court had been unable to persuade the five year old child complainant of incest to say anything when she was in the witness-box. In the course of his judgment, Lord Goddard C.J. asserted that the court "deprecates the calling of a child of this age as a witness" and expressed surprise that the trial judge had allowed her to be called. The court further observed that the jury "could not attach any value" to the evidence of such a young child;\(^{329}\) "it is ridiculous to suppose that they could". Lord Goddard C.J. concluded that "to call a little child of the age of five seems to use to be most undesirable, and I hope it will not occur again". Subsequently, in *R v Wright and Ormerod*,\(^{330}\) the Court, in approving the decision in *Wallwork*, asserted that "it must require quite exceptional circumstances to justify the reception of this kind of evidence". While the Court conceded that it must always be a matter for the trial judge to determine the competence of a witness upon examination and that there was no "finite injunction against ever allowing a child of this age [six years] to be called", it nonetheless cautioned that "[p]atently, the younger the complainant the more anxiously will the court deliberate before deciding to admit the evidence". The Court concluded that:

"[The decision in *Wallwork*] was nearly 30 years ago. So far as this Court is aware, the validity of, and good sense behind that proposition has remained untrammeled in the practice of the criminal courts....[O]f this there can be no doubt: that many, if not all, of the

\(^{328}\) *R v Wallwork* (1958) 42 Cr App R 153 (C.A.).
\(^{329}\) The Court also disapproved the trial judge's decision to allow hearsay evidence to be admitted; the witness's grandmother repeated in evidence the girl's account of what the father had done to her.
\(^{330}\) *R v Wright and Ormerod* (1990) 90 Cr App R 91 (C.A.). Indeed, this decision extended the rule in *Wallwork* since the child in question was six years old at the time of the trial. The mother of a five year old girl left the child playing with a ball outside her house. The child disappeared and was found inside a house occupied by the appellants. The appellants were charged with false imprisonment and indecent assault. At the trial, the child (now six years old) gave unsworn evidence to the effect that she had never been into the appellant's house at all, which was clearly contrary even to the position of the defence. A submission of no case to answer was rejected by the trial judge and the appellants were convicted on both counts. The Court of Appeal allowed the appeal and, expressly approving the decision in *Wallwork*, held that it must require quite exceptional circumstances to justify the reception of the evidence of a child of extremely tender years, for many if not all of the difficulties which beset the instant trial and gave rise to the appeal arose from the fact that the complainant was in that category.
difficulties that subsequently beset this trial and which gave rise to this appeal flow directly from the fact that the complainant was indeed a child of extremely tender years. The lesson of this trial lends especial force, in our judgment to the observations of Lord Goddard C.J. in Wallwork. It will, in our view, be a bold tribunal hereafter that does not heed the lesson.”

2.10.4 It appears that this exclusionary practice continued uninterrupted for more than four decades until its abandonment in R v Z:332 the Court of Appeal upheld the trial judge’s decision to allow a six year old child complainant to give evidence against the accused on a charge of incest. The Court held that the important question was whether the child possessed sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth; although a five year old child would rarely satisfy these statutory pre-conditions to admissibility and the younger the child, the greater the care required before admitting the child’s evidence,333

331 R v Wright and Ormerod (1990) 90 Cr App R 91, at p. 94 (C.A.). It is, however, worth noting that this case turned almost exclusively on the reliability of the evidence given by the child complainant at trial which varied considerably from the ‘recent complaint’ made by the child to her mother before the trial. Thus, the traditional concerns regarding the value of child witnesses and the reliability of their testimony appeared in this individual instance to be justified. That fact may go some way towards explaining the Court’s view that such deficiencies were present in child witnesses in general. Nonetheless, the decision embraces the judicial discretion involved in admitting the evidence of child witnesses and allows the reception of the evidence of children of tender years in ‘exceptional circumstances’. Thus the ‘tender years ban’ although strict and difficult to circumvent, could not be said to be all-encompassing. In this regard, Lord Lane C.J. in R v Z [1990] 2 QB 355, at p. 361, [1990] 2 All ER 971, [1990] 3 WLR 113 (C.A.) states that: “It is plain...that the reason lying behind the eventual decision of the court [in R v Wright and Ormerod] was not anything to do with the admission of the child’s evidence. To that extent those observations which I have read are obiter.”

332 R v Z [1990] 2 QB 355, [1990] 2 All ER 971, [1990] 3 WLR 113 (C.A.). The accused was found guilty of a charge of incest with his five-year old daughter, who was aged six years at the date of the trial. The trial judge, who viewed a video film of the child talking to a woman police constable and a social worker, questioned the child over a video link, heard submissions and concluded that although it was not appropriate for her to take the oath, she seemed sufficiently intelligent to be able to give her account of events and was thus competent to give unsworn evidence, within the meaning of s. 38(1) of the Children and Young Persons Act 1933. The Court of Appeal upheld the decision of the trial court stating that the decision whether a young child should be permitted to give evidence was within the trial judge’s discretion and that no minimum age was required by the legislation.

333 Murphy P., Murphy on Evidence (7th ed., 2000) at p. 464: “[T]he reported cases reveal a considerable divergence of opinion, and perhaps the best way of expressing the matter is that the younger the child, the more the court should approach the issue of competence with caution, and subject the child’s answers to a critical scrutiny. Ultimately...competence should depend on the individual characteristics of the child in question, rather than on any standard minimum age.” See also: Spencer, J.R., “Reforming the Competency Requirement” (1988) 138 N.L.J. 147.
nonetheless no fetter existed on the trial judge’s discretion with regard to the age of the potential child witness.\(^{334}\)

2.10.5 In relation to the *Wallwork* decision, the Court held that the decision – and the restrictive rule advocated therein – had been “overtaken by events”; the exclusionary rule was founded on two principal fears, namely, that the evidence of young children was inherently unreliable and that the experience of giving evidence in court was in itself a traumatic ordeal from which small children should be spared. However, Lord Lane C.J. noted that developments in psychology had shown young children to be more reliable as witnesses than previously thought and the introduction of special measures had made giving evidence less stressful for child witnesses. It was further noted that the repeal of statutory provisions prohibiting the conviction of an accused on the uncorroborated and unsworn testimony of a child of tender years signified a “change of attitude by Parliament, reflecting in its turn a change of attitude by the public in general to the acceptability of the evidence of young children and of increasing belief that the testimony of young children, when all precautions have been taken, may be just as reliable as that of their elders”.\(^{335}\) Thus, in the absence of the original dual justification for the restrictive rule, the Court held that there was no age limit below which a judge must reject the evidence of a child as a witness,\(^{336}\) but rather the courts must decide on the facts of each case.

\(^{334}\) *R v Z* [1990] 2 QB 355, [1990] 2 All ER 971, [1990] 3 WLR 113 (C.A.), Lord Lane C.J. stated at p. 359 that: “The question in each case which the court must decide is whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. Those criteria will inevitably vary widely from child to child, and may indeed vary according to the circumstances of the case, the nature of the case, and the nature of the evidence which the child is called upon to give. Obviously the younger the child, the more care the judge must take before he allows the evidence to be received. But the statute lays down no minimum age, and the matter accordingly remains in the discretion of the judge in each case.” Similarly, in *R v B* [1990] Crim LR 511 (C.A.), the Court of Appeal held that it was possible, in rare cases, for a child of five to satisfy the requirements of the competency test, but it was for the judge to exercise his discretion judicially in the light of established criteria.

\(^{335}\) *R v Z* [1990] 2 QB 355, [1990] 2 All ER 971, [1990] 3 WLR 113 (C.A.), The decision in *R v Z* [1990] 2 QB 355, [1990] 2 All ER 971, [1990] 3 WLR 113 (C.A.) was affirmed in *R v N* (1992) 95 Cr App R 256, [1992] Crim LR 737 (C.A.) where, the Court of Appeal upheld the decision of the trial judge to admit the unsworn evidence of the six-year-old complainant of attempted rape. The Court noted that neither s. 38(1) of the Children and Young Persons Act 1933, as amended, nor its statutory predecessors, provided a minimum or arbitrary age limit below which children were not permitted to give evidence. Having examined the decision in *Z*, the Court concluded
whether the requirements of the statutory pre-conditions to the admissibility of the evidence of children had been met.\textsuperscript{337}

2.10.6 This exclusionary rule does not appear to have ever been adopted in this jurisdiction, either by legislative measure\textsuperscript{338} or by judicial decision;\textsuperscript{339} indeed, it was expressly held in \textit{Attorney General v O'Sullivan}\textsuperscript{340} that no age that the principles therein enunciated were unequivocal; the trial judge alone had to determine, in relation to each potential child witness, whether the child had the intelligence and understanding necessitated under the statute, and, if so, whether that evidence could be received. While the Court acknowledged that greater care was required in relation to younger children in order to ensure that the statutory requirements had been complied with, it held that the fact that the child below ten years was too young to be prosecuted successfully for perjury was not a reason for excluding the evidence. The Court (Judge J.) concluded at p. 261 that: “The judge should not allow a child who in his judgment does not have the necessary intelligence and understanding to give evidence even if the child is older than 10 years: equally a child below that age who has the necessary understanding and intelligence may be permitted to do so. The mere fact that a child may not be prosecuted for perjury is not a reason for excluding the evidence of competent child witnesses.”

\textsuperscript{337} While the foregoing cases concerned the rejection of a minimum age limit with regard to the test for the reception of unsworn evidence from children of tender years expressed in s. 38 of the Children and Young Persons Act 1933 in England – combined tests of intelligence and moral responsibility – the \textit{Wallwork} approach has also been held to have no application to the intelligibility test of competence under the later English legislation, s. 33A(2A) of the Criminal Justice Act 1988, as amended by s. 52 of the Criminal Justice Act 1991 and cl. 33 of Sch. 9 of the Criminal Justice and Public Order Act 1994. See: \textit{Director of Public Prosecutions v M} [1998] QB 913, [1997] 2 All ER 749 (C.A.) wherein Phillips L.J. expressed approved the judgment of Lord Lane C.J. in \textit{R v Z} [1990] 2 All ER 971, [1990] 3 WLR 113, [1990] 2 QB 355 (C.A.) and held that a court should not refuse to admit the evidence of a child by reason of the child’s age alone – the child was aged four years at the date of trial – but should assess, by watching a video recording or questioning a child or both, whether he is able to understand questions and to answer them in a manner which is coherent and comprehensible and thus whether he is capable of giving intelligible testimony within the meaning of s. 33A(2A) of the Criminal Justice Act 1988, as amended.

\textsuperscript{338} The modern test governing the reception of the unsworn evidence of children, s. 27 of the Criminal Evidence Act 1992, like its statutory predecessors, does not set any minimum age threshold for the reception of evidence but applies the test of intelligibility in each individual case, subject to an upper limit of fourteen years, absent a mental defect. In this regard, O’Malley, T., \textit{Sexual Offences: Law, Policy and Punishment} (1996) states at p. 235 that: “The obvious legislative intention was to leave it to the trial judge to decide in each case if the child-witness was capable of giving an intelligible account of events.”

\textsuperscript{339} In this regard, the Law Reform Commission of Ireland, while noting that “there was a widespread belief that an informal age threshold operated which made it extremely unlikely that children of eight years or younger would appear as a witness” nonetheless positively asserted that: “There is no decision of which we are aware in Ireland which could possibly give rise to the rule of practice derived, rightly or wrongly, in England from \textit{Wallwork}, i.e. that the evidence of children under the age of 8, whether sworn or unsworn, can never be received.” Law Reform Commission of Ireland, \textit{Report on Child Sexual Abuse}, (LRC 32–1990) (September, 1990) paras. 5.06 and 5.09, at pp. 51-52. See further: Law Reform Commission of Ireland, \textit{Discussion Paper on Child Sexual Abuse} (August, 1989), paras. 5.23-5.24, at p. 92; and \textit{Report on Child Sexual Abuse} (LRC 32-1990) para. 5.05, at p. 50.

\textsuperscript{340} In \textit{O'Sullivan v Attorney General} [1930] IR 552, at p. 556, per Kennedy C.J. (C.C.A.), it was expressly held, in reliance on the decision in \textit{R v Brasier} (1799) 1 Leach 199, at p. 200, 168 E.R. 202, at p. 202, that the law as to the reception of the evidence of children was a question, not of age, but of the intelligence and actual mental capacity of the child witness and his sense and reason of the danger and impiety of falsehood. Although this case concerned the admission of sworn evidence from a child.
However, it should be noted that the Irish Court of Criminal Appeal in People (Attorney General) v Coughlan held that it regarded it as undesirable that young girls should be subjected to the ordeal of giving evidence if it could be avoided and that therefore, in circumstances such as those before the court, the prosecution should prefer a charge of unlawful carnal knowledge contrary to statute, to a charge of rape, where the child's evidence was necessary to prove lack of consent and use of force, particularly in view of the fact that the punishment for both offences was the same. While it is undeniable that these statements reveal a reluctance to require young children to give evidence – one of the underlying purposes of the Wallwork approach – they relate only to the situation where there is a choice between two offences, one involving the cross-examination of a young child as to the presence or absence of her consent to a sexual experience and the latter enabling the court to award the same sentence,

341 See also: Law Reform Commission of Ireland, Report on Child Sexual Abuse, (LRC 32–1990) (September, 1990) para. 5.09, at p. 52, where the Commission concluded that the law in Ireland remains as stated by Kennedy C.J. in O'Sullivan. It was conceded that it “may be that in practice children under the age of 8 are rarely, if ever, allowed to give evidence on oath in Ireland”, however, the Commission noted that, in light of both the level of religious understanding required of a child with regard to the nature of an oath and the age at which religious education usually begins, “the situation could hardly be otherwise”. The Commission further regarded as unsurprising, the reluctance of the judiciary to accept the unsworn evidence of children below that age. However, the Commission warned that: “That is very far from saying that a rule equivalent to that purportedly based on Wallwork has evolved in this country.”

342 The People (Attorney General) v Coughlan (1968) 1 Frewen 325 (C.C.A.).

This case involved an application by the accused for leave to appeal against his conviction of rape and unlawful carnal knowledge of a young girl, aged almost eight years, contrary to s. 1(1) of the Criminal Law Amendment Act 1935. Much of the argument before the court concerned the propriety of the trial judge’s decision to permit the child complainant to give her evidence unsworn, a matter which is discussed later, however it is the comments of the Court in relation to the desirability of young children giving evidence which are relevant to the question of whether the ‘Wallwork approach’ was ever accepted in this jurisdiction.

343 The People (Attorney General) v Coughlan (1968) 1 Frewen 325, at p. 327, per Haugh J. (C.C.A.):

“This Court is of the opinion that prosecutors in cases involving the carnal knowledge of young girls should seriously consider the possibility of being able to sustain a conviction without the necessity of calling such young girls as witnesses and thereby exposing them to the ordeal of having to recount in court what must have been for them a terrifying experience. This case is a good example of one in which the prosecution could well have been relieved of the necessity of being called as a witness if the prosecution had been content merely to lay one count, namely Count 2.” See also: O B v District Judge Patwell [1994] 2 I.LRM 465 (S.C.); and KM v Director of Public Prosecutions [1994] 1 IR 514 (H.C.), referring with approval to The People (Director of Public Prosecutions) v Rock (Unreported, Supreme Court, 18th March, 1993).
without the need to call upon the child to give evidence; it is submitted that to interpret this decision as indicating the acceptance of the Wallwork approach is to stretch the dicta in this decision beyond reason.

2.10.7 Similarly, the ‘Wallwork’ approach did not find favour in the courts of Canada,345 or Australia346 where the determining factor in an assessment of competence was the child’s testimonial qualifications or understanding rather than his / her age. The Court of Appeal in New Zealand expressly rejected any suggestion that an age limit applied in respect of child witnesses preventing the courts from accepting evidence from child witnesses below a specified age and asserted that the ‘Wallwork’ line of authority did not form any part of the law in New Zealand.347

345 In Canada, it was understood that the competency of a witness of tender years depended, not upon the age of the child, but upon the degree of intelligence and understanding possessed by the witness and his or her appreciation of the duty to be truthful. In Hildreth v Key (1960) 341 S.W. 2d 601, the Court stated that: “[T]here is no precise age at which a minor becomes a competent witness and the test of competency of a child of tender years includes four essential elements...(l) Present understanding or intelligence to understand, or instruction, an obligation to speak the truth; (2) mental capacity at the time of the occurrence in question truly to observe and to register such occurrence; (3) memory sufficient to retain an independent recollection of the observations made; and (4) capacity truly to translate into words the memory of such observation.” These four elements are reminiscent of Wigmore’s testimonial qualifications although, unlike Wigmore, this approach does not go so far as to suggest that all children should be allowed give evidence ‘for what it is worth’ but rather envisages some form of ‘filter examination’ of the prospective child witness in order to determine his or her individual competence prior to the child testifying. See also: Khan v The Queen [1990] 2 SCR 531, at p. 538, 79 CR (3d) 1, at p. 7 (S.C.C.).

346 The only age restrictions employed in Australia in relation to the evidence of children – in common with other jurisdictions – relate to the form in which young child witnesses may give evidence, rather than excluding the evidence of such children altogether; for example, pursuant to legislation in South Australia, a child under the age of 7 years may not give evidence on oath or by affirmation. See: Attorney General’s Reference No. 2 of 1987 (1987) 46 SASR 275 (C.C.A.); (SA) ss. 6(3) and 12 of the Evidence Act 1929, as amended. However, this could be considered to be in ease of the young child witness rather than an attempt to restrict or exclude his or her evidence since it has been notoriously difficult for young children to satisfy the test for the reception of sworn evidence at common law.

347 Re Accused [1991] 2 NZLR 649 (C.A.) per Jeffries J. in relation to the accused’s appeal from his conviction of indecent assault against his daughter, aged four years and two months: “We are of the view that here in New Zealand where a child’s evidence has always been received without the formality of oath-taking, but on a promise to tell the truth once it is established such a child has sufficient appreciation of the solemnity of the occasion, should be followed. See R v Macmahon (1910) 12 GLR 672 and R v Varella [1920] GLR 486, both cases in which girls between the ages of four and five years were permitted to testify. We think this practice is in accord with experience, and current opinion of professional educators and child psychologists.” The Court further stated that the jury in each case should be expressly informed that a child is not disqualified simply by reason of age alone and that there is no precise age which determines a child’s competency, rather the competence of a child depends on the child’s capacity and intelligence or understanding of the difference between truth and falsehood and of the duty to tell the truth; the jury alone determines the credibility of the child witness no less than an adult witness.
2.10.8 An approach which prescribes a minimum age below which no child can be considered a competent witness confers the unmistakable advantage of increased certainty on a notoriously confused area of the law. It also brings a "greater sense of realism" to the law relating to witnesses since "there is something unconvincing about a rule which cannot say clearly that a one-year-old child, for example, is not a competent witness". Before the introduction of statutory measures to assist children or vulnerable and intimidated witnesses in giving evidence, it could also have been argued that such a rule protects young children – such as child complainants of sexual abuse – from the trauma of testifying in open court against an accused person who was well known to the witness. However, outside of England, the advocates of the Wallwork approach have been both scarce and unconvincing.

2.10.9 The principal weakness of the Wallwork approach was its failure to recognize that children develop and mature at differing rates rendering it impossible to fix an age limit above which all children may be considered competent and below which children will not even be considered. Any age chosen will, of necessity, be arbitrary, fail to accommodate those children who develop more quickly or slowly than the average child and,

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348 Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) para. 5.18, at p. 91.
349 Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse, (August, 1989) para. 5.11, at p. 87 “Children’s intellectual and cognitive development does not proceed in a steady linear way. There are very considerable differences among children within the same age range. Thus, predictions based on age-related competence are very difficult to make. Even children as young as three or four, if questioned appropriately, can show impressive perceptual and memory skills and can make reliable witnesses.” Phipson also highlighted the practical impossibility of laying down a fixed age limit for competence, since “children of the same age differ so immensely in their powers of observation and memory”: Phipson, S.L, Best on Evidence (12th ed., 1922) Vol. 2, at § 151, at p. 138. Report of the Committee on Sexual Offences Against Children and Youths, Sexual Offences Against Children (Ottawa: Supply and Services Canada, 1984) (“Badgley Report”) Vol. 1 at p. 67: “To make a child’s testimonial competency contingent upon or influenced by the child’s age fails to take into account the cognitive and developmental differences among children of the same age and, in the Committee’s view, is wrong in principle.”
350 As stated by the Commission: “Whatever age is prescribed, there will always be some children who mature at a faster or slower pace than the norm. As regards children of slower pace there would not be a problem, since the court would be able to examine them for competence; but children developing at a faster pace than the norm would be excluded merely because other children tend to acquire competence at a later age. This would defeat the whole purpose of providing a legislative test for
“would be likely to do harm unless the minimum age were so low that it would lose all efficacy”.

It is submitted that the Wallwork approach to the competence of children to give evidence unsworn illustrates the “futility of attempting to state when children acquire competence when what is at issue is whether this child has acquired competence”.

2.10.10 The Wallwork approach also evidences a stereotypically negative view of the capabilities of children as witnesses which, although traditionally held by the law, has now been discarded as contrary to the findings of modern psychological research which suggest that the evidence of children was under-valued and unjustifiably perceived as unreliable. Accordingly, while the Wallwork approach may originally have been intended to constitute a safeguard against the admission of unreliable and inaccurate evidence from young child witnesses, it is submitted that it represented a


351 Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990), (September, 1990), at para. 5.03, at p. 50.

352 Law Reform Commission of Ireland, Discussion Paper on Child Sexual Abuse, (August, 1989), para. 5.20, at p. 91. Earlier in its consultation paper, at para. 5.16, at p. 86, the Law Reform Commission quoted with approval from Hederman, C., Children’s Evidence: The Need for Corroboration (London: Home Office Research and Planning Unit, Paper No. 41, 1987) at p. 28: “Although expressing caution about relying on the uncorroborated evidence of children under five, the Hederman Report concluded that: “the general implication of the studies reviewed is that children need not be de-barred from giving evidence simply on the basis of age. Their individual abilities and circumstances should be considered in deciding whether they would make competent and credible courtroom witnesses and whether they would sustain any psychological damage by so doing ....” Thus, the Commission rejected any application of the Wallwork approach in this jurisdiction: “[I]t is not correct, in our view, to assume that all children under a specified age are incompetent to give evidence”. Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990) para. 5.13, at p. 54.


354 Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, December 1989) asserted in para. 5.10, at p. 48 that: “The weight of recent research indicates that young children are no more likely to give inaccurate or untruthful evidence than other witnesses. Indeed the Government accepted the general force of this argument during the passage of the Criminal Justice Act, 1988 in relation to the proposal which was to become section 34.... In proposing this measure Ministers took account of a survey of modern research about child witnesses which concluded that children as young as five were likely to provide reliable evidence.” See also: Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990), para. 5.02, at p. 49.

355 The Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, December 1989) concluded in para. 5.9, at p. 48 that the Wallwork policy “could not be justified in principle at all”. Thus, in para. 5.8, at p. 48, the Group
serious imbalance of competing interests and presented an almost insurmountable obstacle to the successful prosecution of sexual offences against very young children; it “all but proclaim[ed] impunity to certain offences of a serious nature against the persons of children, which it is next to impossible to establish without receiving their account of what has taken place”.  

2.11.0 Procedure for Determining Competence: Preliminary Examination

2.11.1 As important as an evaluation of the tests of competence themselves, is the issue of how such tests operate in practice since the procedure adopted can materially affect the balance achieved between the rights of the accused, the interests of the child witness and the proper administration of justice.

2.11.2 The procedure for determining the competence of child witnesses has experienced a like relaxation of former restrictive practices as the tests of competence themselves. However, while the movement more recently has been towards a form of continuous assessment of the evidence of the child witness, the former strict practice was to require a detailed preliminary examination of every potential child witness as to his / her competence

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358 The importance of holding a preliminary inquiry as to the competence of a potential witness was stressed in the old authority, Spittle v Walton (1871) L.R. 11 Eq. 420, which concerned an inmate of a lunatic asylum said to suffer from mental delusions; the patient “imagined himself a criminal and about to be hanged, and his wife turned out of doors by three devils”. In accordance with the decision in R v Hill 20 L. J. (M.C.) 222; 2 Den. C. C. 254, it was held by Sir James Bacon V.C. that the trial judge must examine the person – alleged to be of unsound mind – tendered as a witness, to see whether he understood the nature and sanction of an oath, and witnesses could be called for this purpose. See also: R v Wakefield (1827) 2 Lew. 279. In relation to the reception of the unsworn evidence of child
by way of a questions and answer session – before he / she would be permitted to give evidence, either sworn or unsworn.\textsuperscript{359}

2.11.3 With the development of mechanisms to assist the child in giving evidence in court these procedural issues have become even more complex since the issue of competence has been interlinked with the availability of special measures; in England the new statutory scheme specifically requires the courts, in determining competence, to treat a vulnerable witness as having the benefit of any special measures direction which the court has given or proposes to give to the witness.\textsuperscript{360} Thus a child witness who might otherwise be determined incompetent to give evidence – for example, by reason of inorganic or environmental 'incompetence' such as where he / she is overcome by emotion and unable to testify – may be declared competent when assisted in giving evidence by one or more special measure, such as live television link or the appointment of an intermediary.\textsuperscript{361} While there is

\textsuperscript{359} An approach which requires a preliminary examination of a child's competence prior to the child giving evidence has several advantages. It recognizes the differing abilities and capabilities of individual children (and their differing rates of development) and tests each individual child before permitting the child to give evidence, rather than determining – à la Wallwork – that all children below a specified age are incompetent to give evidence. It may allow the child to familiarize himself or herself with the court environment prior to giving his or her examination-in-chief, by placing the child in the courtroom situation but demanding of the child only the answers to a series of reasonably straightforward questions. If the examination takes place in front of the jury, it may allow the jury to observe the child's demeanour and his or her answers to questions aimed at determining the child's understanding of the importance of telling the truth. However, it is equally arguable that to require an examination of each prospective child witness' competence prior to trial constitutes a waste of scarce resources such as court time and could expose the child to unnecessary intimidation or trauma by extending the court experience; the latter is less likely in the modern age where legislation provides for 'special measures' to assist the child in giving evidence. More importantly, such preliminary examination – if conducted in the presence of the jury – may also be prejudicial to the accused where it is subsequently determined that the child is incompetent and the jury have been exposed to the child since it may not be possible for the jury to disregard their impressions of the child when receiving other evidence in the trial.

\textsuperscript{360} Sections 19 and 54(3) of the Youth Justice and Criminal Evidence Act 1999 in England.

\textsuperscript{361} For example, a witness suffering from a speech defect may be able to understand questions posed and make himself understood to a family member or speech therapist appointed by the court as an interpreter or intermediary under s. 29 of the Youth Justice and Criminal Evidence Act 1999. See Hannibal M., Mountford L., \textit{The Law of Criminal and Civil Evidence – Principles and Practice} (2002) at p. 290: "The availability of the court's power to grant a special measures direction represents a positive step forward in assisting vulnerable witnesses to give evidence and, in certain situations, will enable a non-competent witness to be regarded as competent."
no equivalent express provision in the Criminal Evidence Act 1992, it is submitted that it is logical that a witness would not be declared incompetent where his or her ‘incompetence’ could be remedied by recourse to the modes of facilitating evidence set out in Part III.\textsuperscript{362}

2.11.4 A preliminary examination of the competence of every prospective child witness was required under the old common law test for the reception of sworn evidence\textsuperscript{363} and even under the earlier legislative tests for the reception of unsworn evidence from child witnesses; these tests contained pre-conditions to admissibility which required to be satisfied before the child’s evidence could be received by the court and it was considered that “[i]f no investigation [of the witness’s competence] is had at the trial the accused might be deprived of his legal rights”\textsuperscript{364}. The later statutory tests of

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\item Such special measures would include: (i) the authorisation of live television link under s. 13 of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001; or (ii) the appointment of an intermediary under s. 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001; and (iii) the provision of a support person or a one-way screen obscuring the child’s view of the accused while he / she gives evidence, pursuant to the court’s inherent jurisdiction to arrange its procedures in order to secure the proper administration of justice. However, this would only apply to cases which do not concern incompetence in the strict or all-encompassing sense, but rather relate to cases which involve potential witnesses who experience difficulties communicating their evidence in the standard manner, only one of the testimonial qualifications discussed above.
\item See: \textit{R v Hill} (1851) 2 Den 254, CCR; \textit{Dewdney v Palmer} (1839) 4 M & W 664; \textit{Wollaston v Hakewill} (1841) 3 Scott NR 593; \textit{Spittle v Walton} (1871) LR 11 Eq 420. There is authority for the issue of competence – a challenge to the child’s testimonial qualifications – being raised at any point during the trial: see \textit{Turner v Pearte} (1787) 1 Term Rep 717; \textit{Stone v Blackburn} (1793) 1 Esp 37. Accordingly, even after the child had been admitted to give evidence, his / her competence could be the subject of challenge.
\item In \textit{The People (Attorney General) v Keating} [1953] IR 200, 1 Frewen 492 (C.C.A.), the Court of Criminal Appeal condemned the actions of the trial judge in failing to conduct a preliminary examination of the “feeble-minded” complainant of unlawful carnal knowledge, contrary to s. 4 of the Criminal Law Amendment Act 1935. The trial judge had, two days prior to this case, dealt with a similar charge in relation to a different accused but involving the same complainant, and had at that time conducted an examination and found the girl competent to give sworn evidence. However, the Court of Criminal Appeal held that the fact that the trial judge had made the same investigation in another case did not dispense with the necessity to conduct the examination as to competency in the presence of the accused and the jury. The rationale of this ruling was explained by Maguire J. as follows at p. 201: “The Court is clearly of the opinion that an examination on the voir dire must take place in the presence of the accused and of the jury sworn to try his case. The fact that the Judge had made the same investigation in another case does not dispense with this necessity. If no investigation is had at the trial the accused might be deprived of his legal rights, and it is also of importance that the jury should have the advantage of hearing the evidence in open Court before them. This rendered the trial unsatisfactory and this application for leave to appeal must be treated as the hearing of his appeal. The appeal will be allowed, the conviction and sentence quashed, and a new trial directed.” While this case involved a “feeble-minded person” aged twenty-four years, it is submitted that this approach was also adopted in relation to child witnesses.
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competence—in particular, the ‘reverse onus’ intelligibility test—required such preliminary examination of an individual child only where there was good reason for suspecting the child’s competence, where either party challenged the child’s competence or where the trial judge, of his/her own motion, questioned the child’s testimonial abilities. This movement mirrors the development in the law regarding corroboration requirements away from mandatory full corroboration warnings in respect of all child witnesses towards requiring a cautionary instruction in relation to the evidence of an individual child witness only where there was an ‘evidential basis’ for such jury instruction. It also evidences an increased confidence in the capabilities of children as witnesses and a greater willingness to receive their evidence; this, in turn, reflects the new ‘balance’ struck between the admission of all relevant understandable evidence in the administration of justice and the protection of the rights of the accused.

2.11.5 Equally, it was necessary at common law that any objection to the competency of a child witness would be raised before the trial commenced, before the witness was sworn, or before the witness began to testify in examination-in-chief, since it was generally understood that the most appropriate time for the issue of competency to be raised, assessed and determined was the start of the trial, or, at the very least, as soon as the

365 See: sections 2.8.11-2.8.13 and 2.15.11-2.15.16 (‘reverse onus’ intelligibility test of competence); s. 33A(2A) of the Criminal Justice Act 1988, as amended by s. 52 of the Criminal Justice Act 1991 and Sch. 9, s. 33 of the Criminal Justice and Public Order Act 1994 in England; and s. 16.1 of the Canada Evidence Act, R.S.C. 1985, c. C-5, R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27 in Canada.

366 It was held that where the issue of the competence of a prosecution witness was raised, it should be determined at the outset and the burden of establishing the competence of such a witness rested on the prosecution: R v Yacoob (1981) 72 Cr App Rep 313 (C.A.). No witness was entitled to be sworn: R v Lee [1988] Crim LR 525 (C.A.).

367 It was held that where the issue of the competence of a prosecution witness was raised, it should be determined at the outset and the burden of establishing the competence of such a witness rested on the prosecution: R v Yacoob (1981) 72 Cr App Rep 313 (C.A.). No witness was entitled to be sworn: R v Lee [1988] Crim LR 525 (C.A.).

368 Wollaston v Hakewill (1841) 3 Scott. N.R. 593; and Bartlett v Smith (1842) 12 L.J.Ex 287. (1843) 11 M & W 483; Needham v Smith (1704) 2 Vern. 463; Lord Lovat’s Case (1746) 18 How. St. Tr. 596; and Yardley v Arnold (1840) 10 M. & W. 145. In Canada, the general rule—to which there are exceptions, such as where the basis of objection does not become apparent until after the child has begun to give evidence—is that any objection to the competency of a particular witness should be made at the time the witness is called and before he or she was sworn: Prescott v Jarvis (1849) 5 U.C.G.B. 489 (C.A.); R v Schneider [1927] 1 W.W.R. 306, [1927] 1 D.L.R. 999, 47 C.C.C. 61 (Sask. C.A.); and R v McKeever [1936] 3 D.L.R. 750, 66 C.C.C. 70, 10 M.P.R. 531 (N.S.C.A.).

369 In R v Yacoob (1981) 72 Cr App R 313 (C.A.) it was held that the beginning of the trial is the appropriate time for the issue of the competence and compellability of a prosecution witness to be
party was aware of the grounds for disqualification. However, this practice was also reformed with the effect that it was permissible to object to the competency of a child as a witness at any time during the trial, whether or not the disqualification was previously known. This movement in the law of evidence is unusual in that it represents an extension of the temporal limits for challenging the competence of child witnesses in criminal proceedings with a resultant strengthening of the protection afforded to the accused; even where a child has been found competent following a preliminary examination, the issue of his/her competence may nonetheless be revisited during the course of the trial in

raised and determined; here the question was whether one of the key prosecution witnesses had lawfully married the appellant in 1971, since this would affect her competence and compellability. In relation to this decision, Richardson, P.J. (ed.) Archbold, Criminal Pleading, Evidence and Practice 2005 (2005) para. 8-37, at p. 1146 comments: “Whilst this may be convenient, there is plainly no rule of law to this effect...”

370 Jacobs v Layborn (1843) 11 M. & W. 685. Taylor, A Treatise of the Law of Evidence (12th ed., 1931) Vol. 2, § 1392, at p. 879: “Indeed, it has been frequently said by Judges, and sometimes so held, that a party who is aware of the existence of any disqualification cannot lie by and allow the witness to be examined, and afterwards object to his competency, if he should dislike his testimony.”

371 However, it has been held that where the objection raised was as to the form of the evidence received rather than the competence of the witness to give such evidence, the objection can come too late: Sells v Hoare (1822) 3 Brod. & B. 232.

372 Thus, while it was traditionally necessary to determine the competency of a child as a witness before he/she was allowed to give evidence — that is, his/her competency could only be determined before he/she began to testify — nonetheless a challenge to the competence of a child witness could be made at any time during the trial; the issue of competence could therefore be revisited after the preliminary examination found the child to be a competent witness.

373 The decision of the Court in Attorney General v O'Sullivan [1930] IR 552 (C.C.A.) also indicates the time at which objection may be raised to the reception of the sworn evidence of a child witness: while any such objection ought, strictly speaking, to be made and the witness questioned by the court during the voir dire, it is still permissible for objection to be received during examination-in-chief or even cross-examination. It was held by Lord Kenyon in Stone v Blackburn (1793) 1 Esp. 36 in respect of challenges to the competency of the plaintiff’s witnesses by virtue of their interests, made after the witnesses had given evidence-in-chief and had been cross-examined, that objections to the competency of witnesses never come too late and may be made at any stage of the cause. See also: Turner v Pearse (1787) 1 T.R. 717. However, an objection made after the evidence was complete and verdict given was held to be too late in R v Kneightley (1893) 14 NSWR 45 (F.C.).

374 The decision in Stone v Blackburn (1793) 1 T.R. 717 was affirmed in Jacobs v Layborn (1843) 11 M. & W. 685, 12 L.J.Ex. 427 where it was held that an objection to the competency of a witness may be raised at any time during the trial, whether or not the disqualification was previously known, although it should be noted that there was no preliminary examination of the witness in question in this case. This practice was not welcomed by everyone. In Yardley v Arnold 10 M. & W. 141, Parke, B., stated at p. 145 that: “I cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise questions to his competency. I think all such should be put on the voir dire, and that, when once sworn-in-chief, his competency should be taken for granted.” See also Taylor, A Treatise on the Law of Evidence (12th ed., 1931) Vol. 2 § 1392, at p. 880: “In ordinary cases, if the objection to the competency of a witness be not taken until after the trial, it will be considered as coming too late, and the Courts will not grant a new trial for this cause alone, unless the incompetency were known and concealed by the party producing the witness, or other evidence can be given of mala praxis on his part.”
light of a challenge made by either party — or, it would appear, by the court of its own motion — and, where such challenge is successful, the child may then be declared incompetent.

2.11.6 Although the issue as to who bears the burden of proving the child’s competence in such preliminary examination — or in any subsequent objection — and what standard of proof must be satisfied has not expressly been resolved in this jurisdiction, it would appear that — absent a ‘reverse onus’ test of competence — the burden of proving competence remains...
throughout on the party tendering the witness.\textsuperscript{380} With regard to the applicable \textit{standard} of proof, the law in England has experienced a recent relaxation: the prosecution need no longer prove a child witness’s competence, when challenged, to the criminal standard of proof beyond all reasonable doubt,\textsuperscript{381} but rather need satisfy the court of the child’s competence only on the civil balance of probabilities.\textsuperscript{382} The lowering of the standard of proof required of the prosecution to establish the competence of a witness when such competence is challenged by another party\textsuperscript{383} should have the effect of making it easier for the prosecution to prove that a child witness – whose competence has been challenged by the defence – is competent to testify (whether on oath or otherwise) and is consistent with one of the principal underlying rationales of the law of evidence, namely, the admission of all relevant understandable evidence.\textsuperscript{384}

2.11.7 Where a child witness, who has been declared competent following a preliminary examination, is subsequently and during the course of his / her evidence, found to be incompetent, the court may reject the evidence of such witness and withdraw it from the consideration of the jury.\textsuperscript{385} The court

\textsuperscript{380} See: \textit{The People (Attorney General) v Kehoe} [1950] IR 70 (C.C.A.); and the older authority relied upon in \textit{Kehoe, R v Hill} (1851) 2 Den 254. See also: s. 54(2) of the Youth Justice and Criminal Evidence Act 1999 in England.


\textsuperscript{382} Pursuant to s. 54(2) of the Youth Justice and Criminal Evidence Act 1999 in England, where a question is raised as to the competence of a witness – by either party or the court of its own motion – the legal burden of proof is now on the party calling the witness, once challenged by the other party, to satisfy the court on a balance of probabilities, that the witness is competent; thus, the prosecution now need only prove its witness’s competence to the civil standard of proof.

\textsuperscript{383} It is arguable that, by lowering the standard of proof required to establish the competence of a prosecution witness, the legislature are merely confirming the statutory presumption of competence applied to all witnesses by virtue of s. 53(1) of the Youth Justice and Criminal Evidence Act 1999.

\textsuperscript{384} Requiring, in relation to competence, the party challenging the competence of the witness to bear the evidential burden and the party tendering the witness to bear the legal burden to the civil standard of proof, appears to represent a fair solution to the difficulties posed by objections to the competence of a child witness and the worthy aim of including all relevant evidence, that the jury might reach a just verdict based on all the facts.

\textsuperscript{385} A clear illustration of this practice is provided by the old authority, \textit{R v Whitehead} (1866) L.R. 1 C.C.R. 33, where the Court for Crown Cases Reserved held that the evidence of an incompetent witness could be withdrawn from the jury; the incompetency did not become apparent until during the
may, within its discretion, continue the hearing in the absence of the incompetent witness’s evidence, however, if it is considered that a fair trial is impossible in the circumstances, the court may discharge the jury. Where the incompetency is merely temporary, such as where a child witness is so overcome with emotion as to make further questioning impossible or impractical, the judge may not declare the witness incompetent and withdraw his/her evidence from the jury, rather the judge may adjourn until the incapacity has ceased; if the witness regains composure, he/she

examination-in-chief of the witness, who had previously been declared competent after a preliminary examination on the voir dire. The prisoner was charged with assault with intent to ravish and rape a girl of seventeen years who was deaf and dumb. Although an expert was appointed to act as an interpreter for the child, it became apparent during the course of her testimony that the expert, contrary to his initial belief, was not able to communicate with and make himself understood to the witness. The evidence of the prosecutrix was, accordingly, withdrawn from the jury. The judge found the prisoner guilty of an assault with intent to ravish on the basis of evidence provided by the prosecutrix’s sister and two other witnesses. See also: Stone v Blackburn (1793) 1 Esp. 37; Turner v Peart (1787) 1 TR 717; and R v Moore (1892) 61 LJMC 80. In Canada, see: R v Steinberg [1931] O.R. 222, 257 (C.A.) per Grant J.A., quoted with approval in R v Hawke (1975) 22 C.C.C. (2d) 19, 43 (Ont. C.A.); R v Deol (1981) 58 C.C.C. (2d) 524 ( Alta. C.A.); and R v Clark (1983) 35 C.R. (3d) 357 (Ont. C.A.).

R v Whitehead (1866) LR 1 CCR 33 (C.C.R.); and R v Stretton (1986) 86 Cr App R 7. See also: Jacobs v Layborn (1843) 11 M & W 985 where Lord Abinger stated: “[I] can add the testimony of my own experience, which has been of more than forty years, that, whenever a witness was discovered to be incompetent, the judge always struck the evidence which he had given out of his notes”; R v Garner 2 Car.&K. 920, where a confession, which afterwards proved to be inadmissible, was received in evidence, Patteson, J., was of opinion that the proper course would have been for the judge to have struck the evidence of the confession out of his notes; Vaughan v Worrall, 2 Sw. 400 where Lord Eldon C. stated: “When, after the witness has been cross-examined to the bone, on the last question it appears that he has an interest in the suit, the judge must say that no attention could be given to his evidence”; and Needham v Smith 2 Vern. 464, where Lord Keeper King stated that: “Though a witness is examined an hour together at law, if in any part of his evidence it appears that he was a party interested, the Court will direct the jury that he is no witness, nor any regard to be had to his evidence.”

In certain circumstances, it may even be appropriate for the trial judge to declare a mistrial where the court is of the opinion that the prejudice to the accused due to the evidence received from the incompetent witness is too great to allow the trial to continue even where the jury have been made aware of this potential prejudice and have been directed to reject it; in other words, where it would be unfair to the accused simply to direct the jury not to consider the evidence: R v Harbor [1979] 2 W.W.R. 105, 45 C.C.C. (2d) 65 (Sask. Q.B.); and R v Lawless (1994) 98 Cr App R 242 (C.A.). If an error is made by the judge when ruling on the competence or compellability of a witness, a resulting conviction may be quashed: R v Deacon [1973] 2 All ER 1145, 57 Cr App Rep 688, (C.A.); R v Conti (1973) 58 Cr App Rep 387 (C.A.); Hoskyn v Metropolitan Police Commissioner [1979] AC 474, 67 Cr App Rep 88 (H.L.). As to the ratification of unsworn evidence by a witness who is subsequently sworn, see: R v Lee [1988] Crim LR 525 (C.A.).

In R v Wyatt (1990) Crim LR 343 (C.A.) the Court of Appeal rejected the argument that the judge should have permitted an adjournment longer than 15-20 minutes to facilitate the witness regaining her composure when she became very upset during cross-examination; the witness remained distressed after the adjournment and the trial judge ended the cross-examination. The Court of Appeal upheld this response as within the judge’s discretion. In R v Simpson (1994) 99 Cr App R 48 (C.A.) an application
may continue giving evidence since incapacity – and therefore, in this illustration, incompetence – is co-extensive with the defect suffered, namely trauma or profound upset.

2.11.8 In relation to the preliminary examination itself, it was traditionally understood – both in this jurisdiction and in England – to be the responsibility of the trial judge to examine potential child witnesses in order to assess their competence; subjecting the preliminary examination to judicial control represented an important safeguard for the rights of the accused to a fair trial and fair procedures. While the inquiry was usually conducted and concluded prior to the commencement of the child’s testimony, it was nonetheless permissible for the trial judge to ask such questions – that is, questions to determine the competency of the child – “at any time while the witness is giving evidence.” Accepted practice would appear to have demanded that counsel be present during the examination which was usually conducted in open court, although it was the trial judge who was made to discharge the jury on the basis of prejudice suffered as a result of the effect on the jury of the profound distress experienced by the child witness during cross-examination. However, the Court of Appeal upheld the decision of the trial judge not to discharge the jury and stated that it would be intolerable if the distress of a witness, however acute when describing sexual abuse, should be regarded as making the evidence unfit for the ears of the jury; all that was required was a warning by the judge to the jury of the possibility that the witness’s distress was caused by the knowledge that she was not telling the truth rather than the memory of the incident itself.

See: Attorney General v O’Sullivan [1930] IR 552 (C.C.A.); People (Attorney General) v Rossiter (1951) 1 Frewen 118 (C.C.A.); The People (Attorney General) v Keating (1953) IR 200, 1 Frewen 492 (C.C.A.); The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141 (C.C.A.); and Mapp v Gilhooley [1991] 2 IR 253 (S.C.). More recently, s. 54(6) of the Youth Justice Criminal Evidence Act 1999 in England has confirmed that the competency of a witness must be determined by the court (where the court considers that necessary) in the presence of the parties. The questioning must also take place in the court room rather than in the judge’s private chambers: R v Dunne (1929) 21 Cr App R 176 (C.A.).


The New Zealand courts require a degree of formality in the execution of the preliminary examination and also insist that, although the examination is conducted by the trial judge, counsel should be permitted to be present and even to participate. In R v Accused (1991) 2 NZLR 649 (C.A.) the grounds of appeal against conviction included a claim that the trial judge had erred in allowing a four year old complainant to give evidence and in conducting an ‘informal’ competence hearing with
who determined the competence of the potential witness; the level of participation permitted of counsel for the prosecution and defence varied between the jurisdictions. Although the control of the conduct of this examination remained with the trial judge, there is authority in this jurisdiction to the effect that the trial judge could permit counsel tendering the proposed witness to examine him / her to demonstrate his / her competence; counsel for the party challenging such proposed witness’s competence was then permitted to cross-examine him / her and even to call evidence in relation to the issue of competence. It is submitted that a

the four-year-old child complainant in his chambers, in the absence of counsel. The Court of Appeal held that such informal ‘chambers hearing’ was undesirable; any examination of the competence of a child witness should be conducted by the trial judge in circumstances where counsel are presented with adequate opportunity of participation. The Court of Appeal stated the correct procedure as follows: “Where a trial of an adult on charges of sexual misconduct with a child takes place before a jury it is the Judge’s duty to examine that child before the jury as to his or her understanding of the obligations to tell the truth in the circumstances of the trial. The child should be asked to promise to tell the truth and if the Judge is satisfied that is understood by the witness then the evidence should continue…. We think this practice is in accord with experience, and current opinion of professional educators and child psychologists.”

R v Macmahon (1910) 12 GLR 672 and R v Varella (1920) GLR 486 followed. See also: R v Dunne (1928) 21 Cr. App. R. 176 (C.A.). The courts in New Zealand have also held that it may be unjust to rule on competence if the child is not before the judge: R v P (1992) 9 CRNZ 119, per Penlington J.

Anon., Children’s Evidence (1956) 90 I.L.T.&S.J. 231, at p. 232: “As at common law, so under the Children Act, it is the duty of the Judge or Justice and not of the parties or their advocates to examine a child as to his or her competence to give evidence – sworn or unsworn under section 30.” In Australia also, the examination of the child witness – as to his or her competency and as to the form which such evidence should take – is conducted by the trial judge and not by the legal representatives of the parties: counsel has no right to cross-examine the prospective witness during an examination of his or her competency. See: Heydon J.D., Cross on Evidence (5th Australian ed., 1996) at pp. 311; R v Lyons (1889) 15 VLR 15; R v Z [1990] 2 QB 355; R v Schlaefer (1992) 57 SASR 423; and R v Garvey [1987] 2 Qd R 623. In Canada, s. 16.1(5)-(7) of the Canada Evidence Act, as amended (2005, c. 32, s. 27) unequivocally provides that it is the court who conducts the competence inquiry. See, previously: R v Bunnerman (1966) 55 W.W.R. 257, (1966) 48 CR 100 (Man. C.A.) (both counsel and trial judge conducted the examination); R v Jing Foo (1939) 54 BCR 202, 73 CCC 103, at p. 105 (Co. Ct) (not permissible for counsel to ask questions to enable the court to determine competence of witness); and R v Budin (1981) 58 C.C.C. (2d) 352 (Ont. C.A.) (held that the trial judge – not the legal representatives – ought to pose questions to the child in the assessment of his / her competency.)

In Canada, unlike in England, (but as in New Zealand) the trial judge could permit counsel to ask questions or conduct the inquiry provided the trial judge retains control of the conduct of the inquiry. See: R v Peterson (1996) 27 O.R. (3d) 739, 106 C.C.C. (3d) 64, at 72-73 (C.A.); leave to appeal to S.C.C. refused (1996) 96 O.A.C. 79n, 206 N.R. 233, 109 C.C.C. (3d) vin. This decision is contrary to the earlier decision of the Ontario Court of Appeal which held that ‘absent an extraordinary set of circumstances’ a trial judge should not permit counsel to ask questions: R v Salmon (1972) 10 C.C.C. (2d) 184 (Ont. C.A.). The new statutory scheme makes no mention of the role of counsel in the competence examination: s. 16.1 of the Canada Evidence Act, as amended (2005, c. 32, s. 27).

In People (Attorney General) v Kehoe [1951] IR 70 (Central C.C.) the Central Criminal Court held that, whenever objection is taken to the competency of a witness, the party taking the objection has the right to cross-examine the witness upon the issue of competency and to call evidence as to competency if he desires; here, counsel for the accused objected to the competence of the ‘feeble-minded’ complainant. While the ultimate determination of the competency or incompetency of the witness is
procedure of preliminary examination which allowed counsel to participate in the questioning of the prospective child witness facilitated a thorough or vigorous interrogation of the child prior to the receipt of his / her evidence which, in turn, would have provided a high level of protection to the accused against the admission of potentially unreliable and prejudicial evidence; moreover, placing the conduct of the preliminary examination within the overriding control of the trial judge ensured, in so far as practicable, a fair balancing of the competing interests involved.

2.11.9 The requirements in relation to the form of questioning utilised in the preliminary examination of prospective child witnesses have also been relaxed with the result that a potentially far greater number of children may ‘satisfy’ the court of their competence than was possible under the stricter model previously employed by the courts. The type of questions traditionally asked of children in the preliminary examination in order to test the competence of the child included: the age of the child, where he / she went to school, whether he / she learned about God in school, whether he / she could define ‘truth’ or ‘falsehood’, whether he / she knew the difference between truth and lies and whether the child understood the importance of telling the truth and promised to only tell the truth in court.

2.11.10 It has been argued that such questions do not adequately test the competence of a potential child witness or reveal the testimonial qualifications of the individual child; in particular, that such form of questioning does not ascertain the child’s understanding of the obligation within the trial process for the trial judge, he or she may allow counsel tendering the witness to examine the witness to demonstrate competency and, afterwards, counsel for the party taking the objection may cross-examine and call evidence if he so desires: R v Wakefield Lew 279; R v Hill 2 Den CCR 254; Dewdney v Palmer 4 M&W 664. In delivering the judgment of the Court, Maguire J. stated at p. 71 that: “I propose to follow the practice in R v Hill (2 Den CCR 254), which I accept and believe to be correct. Counsel for the Attorney General will examine the witness to demonstrate her competency, and counsel for the accused will be permitted to cross-examine and to call evidence upon this issue, if he thinks proper. The final determination of the issue is for the judge alone.”

In R v Khan (1981) 73 Cr App R 190 (C.A.) the Court of Appeal held that where there was an inquiry about a child’s understanding of the nature of an oath, the questions and answers should be recorded so that they appeared in the official transcript.

to tell the truth, and/or the child’s power of comprehension, illustrated by his/her ability to define concepts such as ‘truth’, ‘lies’ and ‘promise’. However, the New Zealand Court of Appeal trenchantly rejected such arguments in *R v Accused*, wherein it concluded that, in so arguing, counsel was seeking to introduce into the preliminary examination a level of questioning that was ill-suited to its nature and purpose. The Court noted that the questions are merely “preliminary tests of capacity and competence” before the substantive evidence of a child witness is embarked upon and that it would be “a damaging misjudgment in balance if a child witness were subjected to an emphatic test of general cognitive skills in the preliminary questioning on competence”. The Court further noted that a lengthy interrogation seeking definitions of words or concepts was undesirable in light of the presence of safeguards such as the power of the courts to declare a child incompetent after any preliminary examination, during the child’s evidence or even cross-examination. Similarly, in England, the courts have urged that the competence of a potential child witness is to be determined “in the course of ordinary discourse” and is

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399 *R v Accused* [1991] 2 NZLR 649 (C.A.). The appellant was found guilty of indecent assault of his daughter, aged four years and two months. The prosecution relied mainly, but not exclusively on the evidence of the child complainant. The child was questioned by the trial judge in the presence of the jury. The court received favourable answers—only in the form ‘yeah’ or ‘nah’ answers but always apposite—to questions regarding her age, her understanding of the nature of a promise, the truth and what it is to tell lies. The child then positively promised the judge to tell the truth and negatively promised him not to tell lies or to tell anything which was not the truth. On appeal, counsel for the accused argued that these questions did not adequately test the competence of the child witness, more particularly, the child’s understanding of the obligation within the trial process to tell the truth, since the trial judge had failed to alert the child to the fact that this was “a criminal trial of the utmost importance”. This argument was rejected by the Court of Appeal on the basis that the examination by the trial judge of the child took place in the courtroom before the jury and counsel “with all the solemnity of such an occasion”, therefore any such statement by the trial judge would have been unnecessary. Counsel for the accused further criticized the trial judge’s examination on the grounds that it did not test the child’s powers of comprehension in that he did not seek from her definitions of promise, truth or lies. Again, the Court of Appeal dismissed this argument, recognizing that people of all ages use words correctly to convey meaning in ordinary speech but at the time if pressed sometimes cannot give very precise, or even adequate linguistic definitions.

400 *R v Accused* [1991] 2 NZLR 649 (C.A.). The Court of Appeal stated at p. 652 that: “There are safeguards. If the evidence appears as it unfolds to be unsatisfactory then the Judge, depending on the other evidence in the trial, has statutory powers. If the case for the prosecution goes to the jury then the Judge should refer to the evidence of the child witness as it applied in the case... As with all witnesses the jury is the sole judge of the credibility of a child who gives evidence.” The Court further emphasized that: “A jury determines the overall assessment of any witness, child or otherwise, who testifies before them on all of the evidence given from the witness box”. 401 *R v Hampshire* [1996] Q.B. 1, at pp. 7-8, [1995] 2 All ER 1019, per Auld J. (C.A.). See also: *R v N* (1992) 95 Cr App R 256 (C.A).
not to be resolved by the court in response to an adversarial examination and cross-examination by counsel.

2.11.11 Another vexed question in relation to the conduct of the preliminary examination of children is whether, due to their immaturity of intellect, it is permissible to employ *leading* questions. It may be argued that to lead the child through questioning designed to test the child’s competence to give evidence is to assist the child in satisfying the test and thus may upset the balance required in order to protect the constitutional rights of the accused to a fair trial; while it is generally considered permissible to lead an adult witness in relation to questions concerning matters which are not directly relevant to the subject matter of the case and are merely asked as a matter of formality, for example, to establish the identity of the witness, it is these exact questions – such as the child’s age or where he/she goes to school – which may be asked of a child in order to assess his/her competency in a preliminary examination. Therefore, it is argued that it would be impermissible to lead a child through these questions since they form part of the test of admissibility which the child must pass before being permitted to give evidence. The use of leading questions has been permitted in Canada\textsuperscript{402}, although it should be noted that this finding was made in the context of a critique of the highly religious nature of the common law test governing the reception of sworn evidence; the leading questions were permitted by way of ‘compensation’ for the rigidity of the test of competence and, in light of the subsequent relaxation and secularization of this test, it is submitted that

\textsuperscript{402} It was in *R v Bannerman* (1966) 55 W.W.R. 257 (Man. C.A.) affirmed without reasons (1966) 57 W.W.R. 736 (S.C.C.) that Dickson J. held that it was permissible for the trial judge, in conducting his inquiry into the competence of a potential child witness to give evidence upon oath, to ask leading questions of the child, such as “if you tell a lie, do you think you will go to Hell?” In relation to the reception of sworn evidence from the witness, the trial judge or somebody appointed by him or her may instruct the child as to the nature of an oath and may ask leading questions to determine whether or not the child has understood his or her instructions: *R v Bannerman* (1966) 55 W.W.R. 257 (Man. C.A.) affirmed without reasons (1966) 57 W.W.R. 736 (S.C.C.); *R v Brown* (1951) 99 C.C.C. 305, 12 C.R. 388, 27 M.P.R. 315 (N.B.C.A.). This same procedure is applied where the competency of an adult witness to give evidence on oath is challenged on the grounds of mental deficiency: *R v Hawke* (1974) 3 O.R. (2d) 210, at 215, 16 C.C.C. (2d) 438 (H.C.J.); revd on other grounds (1975) 7 O.R. (2d) 145, 22 C.C.C. (2d) 19, 29 C.R.N.S. 1 (C.A).
the Canadian courts may adopt a different attitude. It is submitted that posing leading questions of a potential child witness may upset the ‘balance’ to be achieved between the competing interests, however, it is nonetheless acknowledged that “the outcome of the competency examination may depend as much on the questioner’s ability to ask the right question as in the witness ability to answer”. Accordingly, it is submitted that questions posed should be framed in a developmentally appropriate manner taking into account children’s difference since an effective test of competence should, in turn, provide an effective safeguard for the rights of the accused.

2.11.12 The aspect of procedure governing the examination of the competence of child witnesses which has produced the most debate is the desirability or propriety of conducting the preliminary questioning of the child before the jury or within a voir dire. The position in Ireland is less than clear since, unlike our nearest neighbour, the courts in this jurisdiction have not debated this issue in any detail. It would appear that older authorities in Ireland – consistent with the approach advocated at the time in England but since

403 It is submitted that it was the growing judicial impatience with the common law test – requiring potential child witnesses to demonstrate an understanding of the concepts of divine retribution and eternal damnation as direct consequences of lying while testifying under oath – which prompted the Court of Appeal to find that leading questions were permissible and that, in light of the secularization of this test of competence – now requiring an appreciation of the assumption of a moral obligation to tell the truth – it may no longer be necessary, or even desirable, for the court to lead a child through questions designed to ascertain his or her competence.


406 See: R v Lyons (1921) 15 Cr App R 144 (C.A.); R v Dunne (1928) 21 Cr. App. R. 176 (C.A.), (1930) 46 L.Q.R. 137; R v Southern (1930) 22 Cr App R 6 (C.A.); R v Reynolds [1950] 1 All ER 335, [1950] 1 KB 606 (C.A.), A.L. Goodhart, (1950) 66 L.Q.R. 157; R v Khan (Lal) (1981) 73 Cr App 90 (C.A.); R v Bird (1988) The Times, 22 June (C.A.); and R v N (1992) 95 Cr App R 256, [1992] Crim LR 737 (C.A.). This approach – requiring the presence of the jury during the preliminary examination of a potential witness – was also adopted in Western Australia: R v H & T (1983) 11 A Crim R 406 at 410; and Lau v R (1991) 6 WAR 30 (F.C.). Similarly, in Canada, although the examination was conducted by the trial judge, the voir dire took place in the presence of the jury since it was believed that the evidence given by the prospective witness during the inquiry (including his / her demeanour) could assist the jury in weighing his / her evidence if the witness was subsequently found competent to testify: R v Ferguson (1997) 86 B.C.A.C. 154, 112 C.C.C. (3d) 342, at pp. 354-358 (C.A.); R v David James N (1992) 95 Cr. App. R. 256 (C.A.); but see R v Harburg [1979] 2 W.W.R. 105, 45 C.C.C. (2d) 65 (Sask. Q.B.); R v Deakin [1995] 1 Cr. App. R. 471 (C.A.) (expert testimony as to competency to be heard in the absence of the jury); and Toohey v Metro Police Commissioner [1965] 1 All E.R. 506, at p. 512 (H.L.) (the examination should take place in the presence of the jury “since the dispute would be
rejected—dictated that the jury would be present during the preliminary examination or *voir dire*.  

2.11.13 Traditionally, the reasoning underlying the requirement that the questioning of the potential child witness by the trial judge—in order to ascertain whether he/she possessed the requisite capabilities or testimonial qualifications to be admitted as a witness—be conducted in the presence of the jury was that such preliminary examination of the potential witness—and his/her demeanour while questioned—would assist the jury in assessing the credibility of such child if found by the court to be a competent witness. Furthermore, it was not sufficient for the jury merely for their use and their instruction*). The New Zealand inquiry is also conducted by the trial judge in the presence of the jury. See: *R v P* (1992) 9 CRNZ 119, at p. 125 where it was stated that the rationale for the presence of the jury during the competence inquiry is that it assists the jury in determining what weight to give to the witness’ evidence. See also: *R v Accused* [1991] 2 NZLR 649 (C.A.).  

See: *R v Norbury* (1992) 95 Cr. App. R. 256 (C.A.); *R v Robinson* (1993) The Times, 25 November (C.A.); *R v Deakin* [1994] 4 All ER 769, [1995] 1 Cr App Rep 471, [1995] Crim LR 411 (C.A.); and *R v Hampshire* [1995] 3 WLR 260, [1996] QB 1, [1995] 2 All ER 1019, [1995] 2 Cr App Rep 315 (C.A.); and s. 54(4) of the Youth Justice and Criminal Evidence Act 1999 in England. See also, in Ireland: *People (Attorney General) v O’Brien* 1 Frewen 343 (C.C.A.); *People (Attorney General v Keating* [1953] IR 200, at p. 201 (C.C.A.); and *Attorney General v Lannigan* [1958] Ir. Jur. Rep. 59 (Circ.C.C.). The Law Reform Commission of Ireland, *Discussion Paper on Child Sexual Abuse* (August, 1989) para. 5.04, at p. 83: “The enquiry by the judge as to whether the child has the capacity to give sworn evidence must take place before the jury.” However, this statement was made on the basis of the English decisions in *R v Dunne* (1928) 21 Cr App R 176 (C.A.) and *R v Reynolds* [1950] 1 All ER 335, [1950] 1 KB 606 (C.A.), which have since been discredited and therefore, it is submitted that this statement no longer applies in this jurisdiction. However, see, contra: McGrath, Declan *Evidence* (2005) at p. 64, citing *People (Attorney General v Keating* [1953] IR 200, at p. 201 (C.C.A.) and *Attorney General v Lannigan* [1958] Ir. Jur. Rep. 59, at p. 61 (Circ.C.C.): “In a criminal case, the accused is entitled to have the jury present during the examination of competency but may waive that right and have the issue determined in the absence of the jury”.  

For example, in *R v Reynolds* [1950] 1 KB 606, [1950] 1 All ER 335, [1950] 34 Cr App R 60, at p. 64 (C.A.). Goddard, L.C.J. stated that: “[A]lthough the duty of deciding whether the child may be sworn or not lies on the Judge and is not a matter for the jury, it is most important that the jury should hear the child’s answers and see its demeanour when questioned, because those matters will enable the jury to come to a conclusion as to the weight they should attach to its evidence.”  

In *R v Reynolds* [1950] 1 KB 606, [1950] 1 All ER 335 (C.A.) a school-attendance officer had been called to assist the court in determining the child's ability to give evidence on oath; the trial judge directed that the jury leave the courtroom during which time the expert witness was examined and cross-examined so that when the jury returned, the child was sworn and gave evidence upon oath. On appeal, it was held by the Court of Criminal Appeal (Lord Goddard C.J.) that it should be regarded as most exceptional that any evidence should be given otherwise than in the presence of the jury in a criminal trial and, therefore, the hearing of the evidence of the expert witness in the absence of the jury constituted such an irregularity that the conviction could not stand. This decision was the subject of criticism in an article published in (1950) 66 L.Q.R. 157, wherein it was argued, at p. 158, that: “What slender authority there is on this point [the absence of the jury during the examination] seems to be against the view expressed by Lord Hewart, because in *R v Bayliss* (1850) 4 Cox. Cr R. 23 and in *Anon, 1 Leach Cr. L (4th ed) 430n, the child was examined before the jury had been empanelled.”
to be *present* during the preliminary examination of the prospective child witness; the questioning had to be conducted within the *hearing* of the jury.\(^{411}\) Accordingly, where such questioning was conducted in the absence of the jury, this represented a material irregularity which, in turn, constituted a ground upon which any subsequent conviction of the accused could be quashed;\(^{412}\) it was also considered that the exclusion of the jury for the purposes of the conduct of the competency examination of a potential witness could be prejudicial to the accused since "the matter was enveloped with an air of mystery and suspicion, from which it was at any rate possible that the jury might draw the inference that they had been asked to leave the court because circumstances of a character damaging to the accused were to be discussed".\(^{413}\)

2.11.14 Although it was conceded that the determination of the competency of a potential witness is a matter for the trial judge and not for the jury, it was

\(^{411}\) In *R v Bird* (1988) *The Times*, 22 June (C.A.) it was argued before the Court of Appeal that the conviction of the accused of four counts of indecent assault against a nine-year-old girl should be quashed on the ground that the preliminary examination as to the child's competence to give unsworn evidence was conducted in such a manner as to be inaudible to the jury. The child sat up beside the trial judge on the bench during the examination and it was contended that, accordingly, the questions which he directed to her and the answers which she gave could not be heard; as a result, there was "no way in which the jury could assess what reliance they could place" upon the evidence of the child. Given the lack of clarity surrounding what actually occurred at the trial, the Court of Appeal regarded it as improper and unnecessary to state more than that: "If the matter were established in this case and if it were a fact that the jury did not hear the questions and answers directed by the judge to the child so as to be able to assess her demeanour and the reliance that could be placed upon her, we would be of the view that the fact that the learned judge, in contradistinction to the cases of Dunne and Reynolds, in this case ruled that she should give unsworn evidence, would be such as to give rise, in all probability, to a quashing of the convictions in any event."

\(^{412}\) In *R v Dunne* (1928) 21 Cr. App. R. 176 (C.A.), the trial judge conducted the preliminary examination of the child complainant of incest in his chambers and found her to be competent. However, the Court of Appeal later quashed the conviction and held, at p. 178, that: "It goes without saying that what the judge did in that matter was suggested purely by feelings of kindness and consideration for the youthful witness. The question for this court is, can a conviction stand after an incident of that kind has occurred? It is admittedly an incident without parallel....In the result, something was said to or by this witness which was not in the hearing or presence of the jury or of the accused. The court is clearly of opinion that, in these circumstances, the appeal must be allowed and the conviction quashed." See also: *R v Accused* [1991] 2 NZLR 649 (C.A.).

argued that “it is most important that the jury should hear the answers which the child gives and see the demeanour of the child when she is questioned, because it will enable the jury to come to a conclusion as to the weight which they should attach to her evidence”.414 It was also suggested that the child should not be exposed to unnecessary repetition of his / her evidence as he / she is “likely to be damaged by constant reiteration of the same material before different groups of people at court; first, the judge and counsel and them again, before the judge, counsel and the assembled jury”.415 However, an exception was carved out of this rule in respect of expert evidence as to a prospective witness’s capacity to tell the truth;416 it

414 R v Reynolds [1950] 1 KB 606, at p. 610, [1950] 1 All ER 335, at p. 337 (C.A.). The Court continued: “If that was the reason why the court in Rex v Dunne held that it was essential that the evidence should be given in the presence of the jury, in this case that is so a fortiori, it seems to me, when a witness is called to assist the court by telling it what his experience may be, of the child and of the character or impression that he may have formed of the child. The jury would then have all the facts before them with regard to the child's truthfulness, or reputation for truthfulness, and all the information which could be given on the question whether the child was one who would be likely to tell the truth and on whose evidence they could rely.” It would appear from this extract that, while the officer was ostensibly giving evidence as to the child's schooling and home situation, in fact such evidence constituted evidence of the child's reputation for truthfulness, which in turn would assist the court to determine the child’s competence. It is submitted that this constituted indirect evidence of the competence of the child witness. Therefore, the basis upon which the decision in Deakin was distinguished from Reynolds - that the former concerned expert evidence as to the witness’s competence, while the latter involved expert evidence merely as to the child’s background – is ill-founded. The decision in Reynolds is somewhat confusing. The Court distinguishes a voir dire held to assess the admissibility of confession evidence from the preliminary examination in question and it expressly disavows that it is the expert evidence which was introduced in this case in the absence of the jury which caused the Court to quash the conviction. In other words, the Court relied on the authority of Dunne, where the examination of the child herself was conducted in the absence of the jury, to hold that the examination of an expert witness testifying in relation to the child’s background, held in the absence of the jury, constituted an irregularity; the Court extended the rationale of Dunne to include the hearing of expert testimony as to the schooling and family life of a potential child witness in the absence of the jury, but it expressly rejected the contention that this finding was based on the admission of expert evidence. The Court of Appeal in R v Hampshire [1995] 3 WLR 260, [1995] 2 Cr App Rep 315 (C.A.) was also highly critical of the decision in Reynolds [1950] 1 All ER 335, [1950] 1 KB 606 (C.A.) and, in particular, in its treatment of the earlier decision in R v Dunne (1928) 21 Cr. App. R. 176 (C.A.). Lord Goddard C.J. argued that “nothing was said by the Court in Dunne to justify [the] view taken of its reasoning” by the Court in Reynolds; indeed, Lord Goddard C.J. contended that “it attributes a ratio to the court’s judgment in Dunne which was not there and not necessary for its decision either”. 415 R v N (1992) 95 Cr App R 256, [1992] Crim LR 737 (C.A.).

416 The rule of practice purportedly established in Reynolds, relying on the decision in Dunne – that competence examinations should take place in the presence of the jury – was distinguished and not followed in R v Deakin [1994] 4 All ER 769, [1995] 1 Cr App Rep 471, [1995] Crim LR 411. In this case, the appellant appealed his conviction for indecent assault on the ground, inter alia, that the determination of the complainant’s competence was a matter of admissibility which fell to be assessed by the trial judge in the absence of the jury; the evidence of the psychologists regarding the testimonial qualifications of the prosecutrix – who had Downs Syndrome – ought to have been given in the absence of the jury, since the jury could have been unduly influenced by this evidence and inferred
was held that such evidence turned on the question of admissibility and was therefore a matter for the judge alone and would not assist the jury in deciding whether to accept the evidence of the prospective witness by observing the manner of his answers to the questions posed in his/her preliminary examination.

2.11.15 The presence of the jury is open to fundamental criticisms. The determination of the competence of a witness is a matter solely within the jurisdiction of the trial judge to determine; the jury can have no role in this regard. Furthermore, for the jury to use evidence, given for the sole

from the testimony of the psychologists as to the truthfulness of the prosecutrix that they believed her account. Although the Court of Criminal Appeal recognized and affirmed the rule that all evidence should be given in the presence of the jury in a criminal trial, it held that that rule and the rule requiring questions relating to the competence of a witness to be answered by the witness himself/herself in the presence of the jury did not apply to expert evidence as to a witness’ capacity to tell the truth; in the circumstances, it was held that although the calling of the psychologists in the presence of the jury was an irregularity, since the appellant had suffered no prejudice thereby, no miscarriage of justice had occurred. The appeal was dismissed.

In R v Deakin [1994] 4 All ER 769, [1995] 1 Cr App Rep 471 (C.A.), it was held at p. 473 that it “is right in law that questions relating to the competence of the witness in question should be answered by the witness himself in the presence of the jury” since it may be of assistance to the jury in determining whether to accept the veracity of the evidence of the complainant “by observing the manner of his or her answers to the judge’s questions”. However, it was noted that the “evidence of the experts is in an altogether different category”; the jury would not be assisted in their task by hearing such evidence, which “was concerned with the capacity of the complainant to tell the truth”.

As early as 1779, Sir Matthew Hale, stated in relation to the division of labour between judge and jury that: “For in many cases there may be reason to admit such witnesses to be heard, in cases especially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are triers of the credit of the witnesses as well as the truth of the fact: it is one thing, whether a witness be admissible to be heard, another thing, whether they are to be believed when heard.” Hale, Sir Matthew, The History of the Pleas of the Crown or Historia Placitorum Corone (1778) Vol. 1, at p. 635. See also: R v Deakin [1994] 4 All ER 769, [1995] 1 Cr App Rep 471, [1995] Crim LR 411 (C.A.).

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purpose of ascertaining the competency of the child as a witness, for another purpose – namely, to assess the child’s credibility – “is in conflict with the general principle that a jury is under the duty to decide a case on relevant evidence and on relevant evidence only”. 421 Equally, it is arguable that the general principle that “everything that a witness says must be said in the presence of the jury” 422 does not apply here since, until the termination of the preliminary examination and the determination of the trial judge as to the competence of the child, he / she is not yet a ‘witness’. 423 Finally, it is submitted that the presence of the jury during the preliminary examination raises difficulties in relation to the balance to be achieved between the rights of the accused and the admission of all relevant evidence. As highlighted above, where a witness, declared competent during a preliminary examination, is subsequently found to be incompetent, the court may have to either direct the jury to disregard that witness’s evidence or even discharge the jury where the prejudice to the accused is too great to permit the trial to proceed; it may, however, be very difficult for the jury to

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421 A.L. Goodhart, (1950) 66 L.Q.R. 157, at p. 158. The author posed the question: “On such a hearing would it be competent for a jurymen to suggest that the child be asked a question he desired to put to it on the ground that it would enable him thereafter to weigh her evidence?” In Demirok v R (1977) 137 C.L.R. 20, 14 A.L.R. 199 (H.C. Austr.), the High Court of Australia held that: “The question whether a witness is competent is solely for the judge to consider and there is no reason why the jury should be present when evidence is being given on that question. Evidence which is relevant solely to the question of competence should not be used by the jury for some other purpose, such as determining the credibility of the witness. If the evidence given on the voir dire happens also to be relevant to a question the jury has to decide, and is admissible, it may be given again before the jury: see Basto v R (1954) 91 CLR 628 at 639-40... If evidence which the judge has to consider on the voir dire in deciding a question of competence or admissibility is likely to be prejudicial to the accused, it should be received in the absence of the jury.” See also: Keane, Adrian The Modern Law of Evidence (6th ed., 2006) at pp. 36-39.


423 In R v Deakin [1994] 4 All ER 769, [1995] 1 Cr App Rep 471, at p. 477, [1995] Crim LR 411 (C.A.) the Court held that “the rule, if it be a rule, that the jury should hear all the evidence given in a case does not here apply because at the time the evidence of the psychologists was given, the complainant was not a witness”; the judge could not rule on the competence of the prosecutrux until after he had heard the evidence of the psychologists. One of the principal weaknesses in the decision in Deakin is that the logic of the reasoning of Farquharson L.J. – that where an issue arises as to the competence of a witness, he / she does not become a witness until the trial judge has conducted a preliminary examination or otherwise determined his / her competence – applies with equal force to the evidence given by the potential child witness herself as to the evidence of an expert evidence with regard to competence. Accordingly, it is submitted that the Reynolds line of authority, and this distinction in particular, does not stand up to scrutiny.
disregard evidence, once heard.\textsuperscript{424} Similarly, where the jury is present during a preliminary examination, they may form opinions as to the credibility of the witness before the witness has even begun to give evidence and, even where such witness is found incompetent, the jury may be favourably disposed towards believing the witness’s account of events.\textsuperscript{425}

2.11.16 It is submitted that the modern authorities, in England,\textsuperscript{426} and Australia\textsuperscript{427} approve the absence of the jury during any preliminary examination of the

\textsuperscript{424} See: \textit{R v Deakin} [1994] 4 All ER 769, [1995] 1 Cr App Rep 471, [1995] Crim LR 411 (C.A.). The judge admitted that this point was not significant on the facts of that case since the prosecution would not have proceeded if the judge had decided not to admit the evidence of the complainant.

\textsuperscript{425} In \textit{Attorney General v Lannigan} [1958] Ir.Jur.Rep. 59 (Circ. C.C.) a distinction was drawn in relation to cases of unlawful carnal knowledge of a feeble-minded woman or girl. It was urged in that case that when the complainant’s competence as a witness might depend on whether she was feebleminded or not, since that was in the event a question for the jury, the judge’s decision as to competence should be arrived at after a \textit{voir dire} conducted in the absence of the jury. Judge Fawsitt in the Circuit Court held at p. 60 that: “The first of the objections raised by counsel for an accused is that the test of competency of the complainant should be carried out in the absence of the jury. I am sympathetic with this point of view. I have no doubt that, if the jury trying the case were to be present and see the girl in the witness box answering the questions which are put to her, they would form some conclusion as to her competency. This conclusion might or might not coincide with my finding and this must influence their eventual finding as to her state of mind. It has been submitted on behalf of the State that the jury have a right to hear the examination and it would be a help in reaching a decision in the charge (of unlawful carnal knowledge) and in support of this submission the case of Attorney General v Keating has been cited. In particular the judgment of Maguire J. where he says ‘If no investigation is had at the trial the accused might be deprived of his legal rights...’ is cited to me. These legal rights are the right to cross-examine the complainant on her competency. Here the application to have the examination made with the jury absent is being made by counsel for the accused and, accordingly, he has voluntarily elected to forego this right. I consider the part of the judgment stressed by counsel for the Attorney General in support of his proposition to be a dictum, merely expressing the view of the court on a matter extraneous to the issue to be decided, and therefore not binding on me. I will therefore have the examination carried out in the absence of the jury.”

\textsuperscript{426} The decision in \textit{R v Hampshire} [1995] 3 WLR 260, [1996] QB 1, [1995] 2 All ER 1019, [1995] 2 Cr App Rep 315 sounded the death knoll for the \textit{Reynolds} line of authority and held that the proper procedure was for the judge to resolve the matter in a \textit{voir dire} in the absence of the jury. The Court noted that: “The court [in Deakin] seems to have regarded Dunne and Reynolds and other authorities as support for the proposition that a judge’s inquiry of the child must be in the presence of the jury. But, as we have observed, however long established the practice, it does not appear to us to be supported by the authorities cited.” Accordingly, it was held by the Court of Appeal that although a trial judge was under no duty to conduct a preliminary investigation of a child’s competence, he or she retained the power to do so where there was a question as to the child’s knowledge of the difference between truth and falsehood and the importance of telling the truth. It was asserted that such preliminary examination should be conducted in open court in the presence of the accused because it was part of the trial but need not be held in the presence of the jury; the jury’s function was to assess the child’s evidence, including its weight, from the evidence he or she gave on the facts of the case following a positive determination of the child’s competence, and the exercise of assessing competence was not a necessary aid to that function. See also: \textit{R v Norbury} (1992) 95 Cr App R 256 (C.A.); \textit{R v Robinson} (1993) \textit{The Times}, 25\textsuperscript{th} November; and \textit{R v Deakin} [1994] 4 All ER 769, [1995] 1 Cr App Rep 471, [1995] Crim LR 411 (C.A.).

\textsuperscript{427} \textit{Demirok v R} (1977) 137 C.L.R. 20, 14 A.L.R. 199 (H.C. Austr.) wherein Gibbs J. stated that he was in agreement with Goodhart’s criticisms of the case (1950) 66 L.Q.R. 157, and expressly rejected the
potential child witness as to his / her competence; there is also authority in this jurisdiction to the effect that it is permissible to exclude the jury during the preliminary examination.\footnote{In People (Attorney General) v O'Brien [1989] 2 Qd R 373 (C.C.A.), reversing R v Garvey [1987] 2 Qd R 623; R v Caine (1993) 68 A Crim R 233 (C.C.A. Vic.) and s. 23(2), Evidence Act 1958 (Vic); and Heydon J.D., Cross on Evidence (5th Australian ed., 1996) at p. 316.}

2.11.17 However, it is also clear that a legal issue which is resolved during a *voir dire* in the absence of the jury may be revisited by counsel in the course of the trial and in the presence of the jury in more limited capacity; cross-examination may affect the *weight* of such evidence but not its *admissibility*.\footnote{In People (Attorney General) v Ainscough [1960] IR 136, 1 Frewen 514 (C.C.A.) it was held that where, as in the instant case, a disputed confession is ruled admissible in the *voir dire*, counsel for the accused may cross-examine the police officer again in the presence of the jury as to the circumstances surrounding the confession; such cross-examination only affecting the weight of the evidence and not its admissibility. Following the *voir dire*, the trial judge determined that the statement was admissible, but omitted to inform the accused that he was entitled to cross-examine the officer in the presence of the jury as to the circumstances surrounding the statement not in order to challenge its admissibility (which had already been the subject of a positive ruling by the trial judge) but in relation to the weight to be attached to the statement by the jury. On appeal against the resulting conviction, the Court of Criminal Appeal held that the failure of the trial judge to remind the accused afresh of his right to cross-examine the detective officer in the presence of the jury amounted to a misdirection of the jury, in as much as the consequent failure of the accused to challenge the statement by cross-examination in the jury's presence might have misled the jury as to the weight to be attached to the objection made to the admission of the statement.}

Thus, the principal argument in favour of conducting the preliminary examination in the presence of the jury – that it enables them to observe the demeanour of the witness and assess his / her credibility – is defused since the jury may have adequate opportunity for such observation *post* the preliminary examination, but with the in-built safeguard that such observation can only be conducted in relation to witnesses already found to
be competent. The courts in England also advocated that, where a child was found to be a competent witness – following a preliminary examination in the absence of the jury – such child should be admonished by the trial judge, in the presence of the accused and the jury, as to the importance of telling the truth. More recently, the legislature in England has given statutory effect to this change in practice, providing that any proceedings for the determination of the question of competence or of the mode in which any child witness’s evidence may be received, shall take place in the absence of the jury. While the High Court of Australia has also expressly rejected the English line of authority requiring competency examinations to be conducted in the presence of the jury, there is also some authority in support of a ‘hybrid approach’ whereby, although the examination presumptively takes place in the absence of the jury, where the evidence given on the voir dire is also relevant to an issue or question to be

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430 It should be noted that People (Attorney General) v Ainscough [1960] IR 136, 1 Frewen 514 (C.C.A.), involved an unrepresented accused, in relation to whom the Court owes greater duties, however, in the context of the evidence of children, this decision could be interpreted to mean that, even where a prospective child witness is held to be competent upon the voir dire, counsel for the accused may cross-examine the child as to his or her understanding, not in order to re-challenge the child’s competence, but in order that the jury may assess his or her credibility as a witness.

431 In R v Hampshire [1996] QB 1, [1995] 2 All ER 1019, [1995] 2 Cr App Rep 319 (C.A.), the Court recommended an admonition in the following terms at p. 11: “Tell us all you can remember of what happened. Don’t make anything up or leave anything out. This is very important.” Thus the decision in Hampshire, permitted the admonition of a child witness but not the investigation of the competence of a potential witness, to be conducted in the presence of the jury. This is consistent with the argument that a person does not become a witness until declared competent by the trial judge. Since a person is a witness at the time of an admonition, this forms part of the trial in which the jury are entitled to participate. However, the Court finally closed the door on the Reynolds line of authority by concluding at p. 11 that: “[T]he court’s view in Reynolds of the ratio in Dunne cannot in itself be a basis for imposing, or for construing, the recent statutory change as continuing to impose a duty upon the judge to conduct a preliminary investigation of the competence of a child witness in the presence of the jury.” See also: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, 1989) para. 5.15.

432 Equally, in Australia, s. 189(4) of the Uniform Acts further provides that the jury should be absent during the inquiry: applied in R v Caine (1993) 68 A Crim R 233. See also: Heydon J.D., Cross on Evidence (5th Australian ed., 1996) at p. 316.

433 Section 54(4) of the Youth Justice and Criminal Evidence Act 1999 in England. The Act further provides, at s. 55(5), that any proceedings for the determination of the question whether a witness may be sworn for the purpose of giving evidence on oath, shall take place in the absence of the jury. Thus whether the court is determining the competence of a child witness or the mode in which any child witness’ evidence may be received, the jury is excluded from the courtroom. This neatly destroys any argument – such as that made in Deakin – that the jury need only be excluded in “competence cases” and not where the court is simply determining the question of the appropriate mode in which the child witness will give evidence. See also: Murphy P., Murphy on Evidence (7th ed., 2000) at p. 446.
determined by the jury and such evidence is otherwise admissible, it may be
repeated in the presence of the jury.

2.11.18 It is submitted that the exclusion of the jury from the examination is a
positive step in the protection of the accused and the proper administration
of justice; in so far as practicable, the jury should only be exposed to
evidence which has previously been deemed admissible, in light of the
potential prejudicial effects of such evidence and the fact that judicial
directions to the jury may represent an inadequate safeguard for the rights of
the accused.

2.11.19 As indicated above, the law of evidence in many of the jurisdictions
examined herein has moved away from the strict requirements of

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434 Basto v R (1954) 91 CLR 628, at pp. 639-640. See also Ligertwood, A., Australian Evidence (3rd ed., 1998) at p. 441 wherein it was asserted that: “Authority, and the uniform Acts s. 189(4), favour this
enquiry presumptively taking place in the absence of the jury, although some judges advocate that
where the matters to be elicited are relevant to the witness’s credit, the jury should be present.”
Reliance was placed, in this regard, upon the decision in R v Lau (1991) 6 WAR 30, at p. 35, per
Seaman J., at pp. 41-55, per Murray J. and at pp. 57-59, per Owen J.; and R v Deakin [1994] 4 All ER
whose competency is in question should be in the presence of the jury but any additional expert
evidence on competency should be heard in the jury’s absence).

435 Given the potential for prejudice to the accused, it is submitted that it is fairer that the jury should
be absent during the determination of the competency of a child witness, particularly a very young
child; to expose the jury to a child witness who is subsequently deemed incompetent to give evidence
is to run the risk that undue weight will be attached to aspects of the competency examination such as
the demeanour of the child, which the jury may (albeit subconsciously) consider in reaching a verdict.

436 In Demirok v R (1977) 137 C.L.R. 20, 14 A.L.R. 199 (H.C. Austr.), the High Court of Australia
rejected the English approach advocated in the Reynolds line of authority in a case involving the
question of the competence and compellability of a spouse of the accused in giving evidence for the
prosecution on charges of murder. In the absence of the jury, the trial judge informed the accused’s
wife that, pursuant to s. 400(2) of the Crimes Act, 1958 (Vic), she could not be compelled to give
evidence for the prosecution; on the direction of the trial judge, this examination was repeated in the
presence of the jury and she again stated that she did not wish to give evidence. When summing up,
the trial judge explained to the jury that the accused’s spouse could not be compelled to give evidence,
that she had been called because it was the Crown’s duty to call a material witness and he directed the
jury not to speculate or make inferences as to the evidence she might have given. On appeal, the
majority of the High Court of Australia held that the conviction should be set aside and a new trial
ordered, holding that the calling of Mrs. Demirok to the witness box was erroneous and, although the
direction given by the trial judge was correct, it could not be said that no substantial miscarriage of
justice occurred; in particular, Gibbs J. held that the possibility could not be excluded that the jury
were improperly influenced by the fact that she refused to give evidence. Murphy J. further held, in
relation to the remedial measures taken by the trial judge were insufficient to reverse the prejudice
suffered by the applicant: “The trial judge gave a warning concerning the incident, described
Mrs Demirok as a material witness, and said that it was the Crown’s duty to call her, and that no
inference was to be drawn that she was with the accused when he attacked the deceased. This does not
excuse the breach of s 400. An accused should not be put in the position where a judicial direction is
relies on to overcome the prejudicial effect of evidence admitted contrary to a statutory prohibition.”

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preliminary examination of the competency of potential child witnesses. It would appear that the courts both in England\textsuperscript{437} and – to a lesser extent – in this jurisdiction\textsuperscript{438} have adopted an approach which envisages a form of continuous assessment of the competence of a child witness, in lieu of a rigorous question and answer session conducted by the trial judge in every case before the child can be admitted as a witness; pursuant to this new approach, the witness may be declared incompetent and his / her evidence rejected where, in the course of giving evidence, he / she becomes incomprehensible or appears to be of unsound mind.

2.11.20 In Ireland, support for the ‘continuous assessment’ form of determination of competence is derived from the decision of the Court of Criminal Appeal in \textit{Attorney General v O’Sullivan}\textsuperscript{439} wherein the Court rejected the submission that a preliminary examination was necessary in every case to determine the competence of a child witness to give evidence upon oath;\textsuperscript{440} Kennedy C.J. held that counsel had “quite misread” s. 30 of the Children Act 1908,\textsuperscript{441} the


\textsuperscript{438} \textit{Attorney General v O’Sullivan} [1930] IR 552 (C.C.A.), citing \textit{The Queen v Whitehead} (1866) L.R. 1 C.C.R. 33. Healy, John \textit{Irish Laws of Evidence} (2004) para. 2-14, at pp. 50-51: “There would not appear to be any fixed or absolute rule that the trial judge must always conduct a voir dire of the child’s competence as a preliminary issue”.

\textsuperscript{439} \textit{Attorney General v O’Sullivan} [1930] IR 552 (C.C.A.).

\textsuperscript{440} In \textit{Attorney General v O’Sullivan} [1930] IR 552, at p. 553 (C.C.A.) it was argued on appeal that the complainant, a child of ten years, should not have been permitted to give sworn evidence of attempted sodomy by the appellant without first undergoing a preliminary examination. It was contended that where a witness was of ‘tender years’ (under fourteen years) it was the duty of the Court to satisfy itself, first, of the child’s competence to give evidence at all, since every child under the age of fourteen years was in the same position as a lunatic and, accordingly, a preliminary examination was necessary to determine his / her competence to give evidence. Secondly, it was asserted that an inquiry was necessary to determine his competence to give evidence on oath. Since there was no such preliminary examination in this case, it was asserted that the verdict depending upon the evidence of the boy should be set aside, citing: \textit{R \textit{v Lyons}} (1921) 15 Cr App R 144 (C.C.A.); \textit{R \textit{v Southern}} (1930) 22 Cr App R 6 (C.C.A.); \textit{R \textit{v Hill}} 2 Den. 254; \textit{R \textit{v Holmes}} 2 F.&F. 788; and \textit{R \textit{v Bayliss} 4 Cox C.C. 23.}

\textsuperscript{441} Section 30 of the Children Act, 1908, as amended by s. 28(2) of the Criminal Justice Administration Act, 1914 together with the definition of “child” in s. 131 of the Children Act, 1908, meaning “a person under the age of fourteen years”. \textit{Attorney General v O’Sullivan} [1930] IR 552, at p. 556, per Kennedy C.J. (C.C.A.): “[Counsel for the appellant] cited cases in which it was held that before the unsworn testimony of a child could be received under the provision of the section enabling departure from the ordinary law requiring that the evidence be given upon oath, there must be a determination of the fact that the child does not understand the nature of an oath. The section does not, in our opinion, alter the previous law as to the reception of the evidence of children given upon oath, that is to say, it was and is a question, not of age, for there is no precise limit of age fixed by any rule within which the evidence of children on oath is to be excluded, but it is a question of the intelligence
purpose of which was to enable a child ‘of tender years’ who did not, in the opinion of the Court, understand the nature of an oath, to give evidence otherwise than upon oath if, in the opinion of the Court, the child had sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth. However, it is submitted that the authority of this decision in support of a form of ‘continuous assessment’ of the competency of child witnesses is diluted by the following factors: (i) the facts of the case were such that there could be no real doubt as to the child’s competence to give evidence upon oath; and (ii) even if this decision can be interpreted as laying down a more general proposition – that preliminary examination of a child witness is not a pre-condition in every case to the reception of evidence from a child witness giving – it is submitted that it would appear to be limited to sworn evidence and would not necessarily extend to the reception of the unsworn evidence of a child witness.

and actual mental capacity of the child witness, ‘its sense and reason of the danger and impiety of falsehood’: R v Brasier 1 Leach 199.”

442 The Court noted that the child had given a deposition upon oath, in relation to which he had been cross-examined in the District Court by the solicitor for the accused. The boy was again sworn and examined in the Circuit Court, where he was further cross-examined by counsel for the defence and questioned by the trial judge; “from first to last no objection was taken or suggested against the boy’s evidence on the ground that he was incompetent to give evidence on oath”: Attorney General v O’Sullivan [1930] IR 552, at pp. 556-557, per Kennedy C.J. (C.C.A.). On these facts the child had been examined as to his competence to give evidence on oath prior to trial; he had already undergone a preliminary examination, in which case the finding of the Court of Criminal Appeal was simply that there was no necessity for a further formalized examination prior to trial which was specifically aimed at discovering whether or not the child understood the nature and consequences of an oath. In this regard, Kennedy C.J. noted at p. 557 that: “He must have presented an appearance of such intelligence as to discredit any objection on this ground.... In these circumstances, the attempt to raise in this Court an objection to his competence as a witness on oath cannot, in our opinion, be sustained.” (Emphasis added).

443 It would appear that this is how the decision was interpreted in an article in Anon., “Children’s Evidence” (1956) 90 I.L.T.&S.J. 231, at p. 232: “[I]n this country, the decision in Attorney General v O’Sullivan (supra) shows that such preliminary examination must not necessarily be held; that where no objection is raised to a child being sworn, then the competency of the child to give evidence on oath may be decided, after the child has been sworn, by the general behaviour and answers of the child during examination and cross-examination.”

444 With to the latter, the comments of the Court are, of course, obiter dicta but it would appear from the judgment that, pursuant to the legislation, some form of initial examination was common practice at the time in order to determine that the child did not in fact understand the nature of an oath, but was possessed of sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth, before the unsworn testimony of a child could be received by the court. Accordingly, this interpretation of the law at the time in Ireland indicates that it was not necessary to subject every child to a preliminary examination to determine that the child understood the nature of the oath prior to accepting the child’s evidence, (since such a determination could be made during the course of the child’s evidence) however, it was necessary to hold such a preliminary examination if the evidence of the child was to be received unsworn. It is submitted that such an anomalous distinction by
2.11.21 The issue of the timing of the court's opinion that the child satisfies the statutory pre-conditions for the reception of unsworn evidence was revisited in *People (Attorney General) v Coughlan.* Upon application to the Court of Criminal Appeal, it was argued by counsel for the applicant that the trial judge's questioning of the child complainant in this case did not "show a sufficient basis on which the learned trial judge could have formed an opinion as to whether the child understood the duty of speaking the truth". It is clear that the trial judge regarded the child's understanding of the nature of an oath as unsatisfactory, since he refused to admit the child's evidence upon oath, however, it is not clear that the trial judge established, before the child gave her evidence that the child was a competent witness to give unsworn evidence; that she was possessed of sufficient intelligence and understood the duty to speak the truth. However, this does not mean that the trial judge did not reach that conclusion during the course of the child's evidence. Moreover the terms of the then statutory provision governing the competence of children did not appear to necessitate a preliminary reference only to the mode of the child's evidence could not have been intended by the Court of Criminal Appeal in the aftermath of *Attorney General v O'Sullivan* [1930] IR 552 (C.C.A.). Therefore, it is submitted that the statement that preliminary examination is not a necessary pre-condition to the swearing of the child is limited, as indicated above, to a situation where there has already been sufficient opportunity to observe and assess the child and where no objection has been raised with regard to the child's competence, whether the evidence of such child is to be received on oath or otherwise. In this regard, it should be noted that the decision of Denham J. in *Eastern Health Board v M.K. and M.K.* [1999] 2 IR 99, [1999] 2 ILRM 321 (S.C.) contains dicta suggesting that – at least in the context of the admission of hearsay evidence – a determination as to the competence of the child should be made by way of preliminary examination: "A fair procedure requires the court as a specific matter, often it may be a preliminary issue, to determine whether or not the child should give evidence to the court." Equally, in the earlier judgment – also in relation to the admission of hearsay evidence – of O'Flaherty J. in *Southern Health Board v C.H.* [1996] 1 IR 219 opined that since the child was then 6½ years old, she should be examined anew by the District Court to determine that she was in fact incompetent to give evidence. Although these cases appear to clearly reject the existence of a 'continuous assessment' approach in Ireland, it is submitted that it must be remembered that both cases were concerned with incompetency as a pre-condition to the admission of hearsay evidence.

445 *The People (Attorney General) v Coughlan* (1968) 1 Frewen 325 (C.C.A.). The applicant, aged 18½ years at the date of the incident, was convicted in the Central Criminal Court of rape and unlawful carnal knowledge of a young girl, aged almost eight years, contrary to s. 1(1) of the Criminal Law Amendment Act 1935. The child complainant was permitted to give her evidence unsworn.

446 The preliminary examination criticized by counsel involved a very short exchange between the trial judge and the child witness in which the child confirmed her age and, in response to a direct question, asserted that an 'oath' meant: "You are talking to God". Without posing any further questions, the trial judge determined that she should not be sworn and allowed her to give unsworn evidence.

inquiry into the child’s testimonial qualifications; it is arguable that while the practice may have developed of ascertaining the child’s compliance with the section before the child’s evidence is admitted, this determination could be made after the child has commenced to give evidence but before the child has concluded his / her evidence. However, this argument proceeds upon the assumption that a child’s evidence is “received” when the child has concluded his / her evidence since, until then it is open to counsel for the defence to object to the child’s competence; it is equally arguable that the child’s evidence is “received”, within the meaning of the statutory provision, when the child, having been “tendered as a witness”, is declared competent by the trial judge, after a preliminary examination to determine whether the child satisfies the test for the reception of unsworn evidence. The distinction in the language of the section between the child being “tendered as a witness” and the evidence of the child being “received” would suggest that, in the first place, the child is not yet a witness, while in the latter, the child is a witness in the trial, the court having formed the opinion that he or she is competent. Unfortunately, the Court of Criminal Appeal did not take this opportunity to resolve this ambiguity, rather its decision was based on considerations other than the wording of the

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448 The terms of s. 30 of the Children Act 1908, as amended by s. 28 of the Criminal Justice Administration Act 1914 do not appear to necessitate a preliminary inquiry into the child’s intelligence or understanding of the duty to speak the truth, although since they apply only to children of tender years who do not understand the nature of an oath, it would appear that these last constitute pre-conditions to the reception of the child’s unsworn evidence. The section merely requires that the court form the opinion that the child has sufficient intelligence to justify the reception of the evidence and that he / she understands the duty of speaking the truth, however, the section is silent as to when this opinion must be formed.

449 On balance the latter view appears to afford more meaning to the purpose of the section – namely, to admit the unsworn evidence of a child of tender years, upon satisfaction that such child complies with the statutory test of competence – particularly in light of the fact that the child’s competence is a matter of law to be determined by the trial judge, in the absence of the jury. As indicated above, if a child is to be permitted to give his or her evidence before any adequate assessment has been made as to his / her competence, there is a greater risk that the accused will, contrary to his constitutional right to a trial in due course of law, be prejudiced by the admission of the evidence of an incompetent witness (or, improperly obtained evidence) in that the jury will be influenced by this inadmissible evidence when reaching its conclusion as to the guilt or innocence of the accused. That is not to say that objection cannot be raised in relation to the competency of a child witness during the course of the child’s evidence and, where such objection is made out, the evidence may be withdrawn from the jury and the jury directed to disregard it; however, even then, the child will give his / her evidence following a determination that he / she satisfies the conditions of the statute.
section. The recent legislative scheme for the reception of the evidence of children otherwise than upon oath refers only to such evidence being “received” where the court is satisfied that the child is capable of giving an intelligible account of events which are relevant to the proceedings. Although it is conceded that this test would accommodate the application of a form of ‘continuous assessment’ of the competence of a child witness, it is submitted that, in the absence of unequivocal judicial or statutory authority for the abandonment of the preliminary examination and having regard to the need to achieve a balance the competing interests, a preliminary examination of the competence of a child witness – in the form analysed below – continues to be required.

2.11.22 The English courts have also embraced the ‘continuous assessment’ form of competency examination in respect of child witnesses; it has been held that although a trial judge is under no duty to conduct a preliminary

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450 The Court noted that the ground of appeal which claimed that the trial judge had failed to establish that the child was competent to give sworn evidence was not covered in the notice of application for leave to appeal, nor had any objection been raised at any stage to the reception of the unsworn evidence of the child witness, or any application made for the jury to be discharged on the ground that the evidence had been improperly received. Rather, this ground of appeal was advanced before the Court after counsel for the applicant had examined the transcript of the trial, a practice expressly disapproved by the Court. In these circumstances, the Court refused to consider this ground of appeal – which, it noted, raised “troublesome and difficult matters for consideration” – on the basis that it had not had “the advantage of hearing argument advanced thereon on behalf of the prosecution”.

451 Section 30 of the Children Act 1908, as amended by s. 28 of the Criminal Justice Administration Act 1914 provided that where a child of tender years, who was tendered as a witness, did not in the opinion of the court understand the nature of an oath, the evidence of that child “may be received” though not given upon oath, if, in the opinion of the court, the child was possessed of sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth. Section 27(1) of the Criminal Evidence Act 1992 provides that if the evidence of a child witness “may be received” otherwise than on oath or affirmation if the court is satisfied that he / she “is capable of giving an intelligible account of events which are relevant to those proceedings”.

452 In particular, in light of the fact that it is not a pre-condition to the reception of such evidence that the child does not understand the nature of an oath and that ‘intelligibility’ is defined in terms of events relevant to the proceedings.

453 Those interests include, inter alia, the admission of all relevant, understandable evidence, the proper administration of justice and the protection of child witnesses from undue trauma and the rights of the accused.

454 See in particular: sections 2.14.0-2.14.15 and 2.15.0-2.15.16.

investigation of a child's competence, he / she retains the power to do so where there is a question as to the child's knowledge of the difference between truth and falsehood and the importance of telling the truth.

2.11.23 While the 'continuous assessment' approach is clearly consistent with the rationale of obtaining all relevant understandable evidence in the interests of assisting the jury in the proper administration of justice, it cannot be denied that allowing child witnesses to give evidence without any prior determination of his / her competence may permit the admission of highly prejudicial but unreliable evidence and, furthermore, that the prejudicial effect of such evidence may not be sufficiently counterbalanced by any judicial direction to the jury to disregard such evidence – where the child

456 The position in England prior to the Hampshire decision was that prior investigation of the competence of child witness was required before such children would be permitted to give evidence, at least unsworn. In R v Lyons (1921) 15 Cr. App. Rep. 144, at pp. 145-146 (C.A.), the Court of Appeal in England quashed the appellant's convictions on charges of carnal knowledge and attempted carnal knowledge of two girls aged less than nine years on the ground that there had been a miscarriage of justice. The two children had been permitted to give unsworn evidence as witnesses without any prior assessment of their competence or "the preliminary test of intelligent apprehension of facts"; whether they possessed sufficient intelligence to justify the reception of their evidence and whether they understood the duty of speaking the truth. The trial judge further erred in that he failed to warn the jury of the danger of convicting upon the uncorroborated and unsworn testimony of children of tender years. In the later case, R v Surgenor, (1940) 27 Cr App R 175, [1940] 2 All ER 249 (C.A.) it was held by the Court of Appeal that, where a child of tender years appears as a witness, it was the duty of the trial judge to satisfy himself as to whether the child should be sworn or not, and he ought not to accept the decision of the committing justices – that the nine year old girl give evidence unsworn – without any further investigation. However, the Court of Appeal dismissed the appeal noting that no harm had resulted from this irregularity; the child appeared to be intelligent, the jury accepted her evidence, leading the Court to surmise at p. 176 that "it is not likely that they would have rejected it if she had been sworn", and, in any event, the child's evidence was not critical in establishing the guilt of the accused. To the extent that these two cases appear inconsistent, it is submitted that Lyons should be distinguished from Surgenor on the ground that the former case involved a failure to investigate the child's competence to give evidence – which failure led to the conviction being quashed – while the latter case concerned a failure to investigate afresh the child's ability to give evidence upon oath, in other words, it was the mode or form of her evidence that was in question and not the more fundamental question of her competence.

457 R v Hampshire [1996] QB 1, at pp. 7-8, [1995] 2 All ER 1019, [1995] 2 Cr App Rep 319 per Auld J. (C.A.): "In our view, the effect of the recent statutory changes has been to remove from the judge any duty to conduct a preliminary investigation of a child's competence, but to retain his power to do so if he considers it necessary, say because the child is very young or has difficulty in expression or understanding. Where there has been an application under s 32A of the 1988 Act to rely on video-recorded evidence, the judge’s pre-trial view of the recording, if the interview has been properly conducted, should normally enable him to form a view as to the child's competence. Where it has left him in doubt, or where the child's evidence-in-chief is not to be given by a video recording and his or her competence as a witness is questionable, he should conduct a preliminary investigation into the matter. Whether or not he conducts such a preliminary investigation, he has the same duty as in the case of an adult witness, namely to exclude or direct disregard of the evidence, if and when he concludes that the child is not competent.”
witness is subsequently found to be incompetent. The arguments both for and against this approach are considered in more detail below.\footnote{Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, 1989), para. 5.4, at p. 46: “Obviously children with differing levels of intelligence and at various developmental stages entertain notions of quite varying sophistication and accuracy about the oath and concepts like truth and duty. The task of establishing whether a particular witness has reached an adequate standard can be an extremely difficult one and some judges find the procedure very unsatisfactory.” See, in particular: sections 2.17.0-2.17.14 in relation to the impact upon the accused of the relaxation of the competence requirements.}

2.11.24 In Scotland, this movement within the law of competence – away from the strict requirement of preliminary examination of every potential child witness – has culminated in a statutory prohibition on the conduct of a preliminary examination to determine the competence of a potential child witness prior to receiving his / her evidence for what it might be worth.\footnote{Section 24(2) of Part III of the Vulnerable Witnesses (Scotland) Act 2004, (c. 3).} It provides that the court must not, at any time before the witness gives evidence, take any step intended to establish whether the witness understands the nature of the duty of a witness to give truthful evidence or the difference between truth and lies. A similar provision is included in the new Canadian statutory provision governing the conduct of a judicial inquiry in circumstances where the court is satisfied that there is an issue as to the capacity of the proposed witness to understand and respond to questions.\footnote{Section 16.1(5) and (7) of the Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16; 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27. Subsection (7) specifically provides that: “No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.” See, in particular: sections 2.16.0-2.16.19 and the analysis therein of the total abolition of all pre-conditions to or tests of the competence of children to give evidence as witnesses in criminal proceedings.} The merits or otherwise of the approach underlying these statutory measures is examined in detail in the following analysis of the legislative tests governing the reception of evidence unsworn from child witnesses.\footnote{See, in particular: sections 2.16.0-2.16.19 and the analysis therein of the total abolition of all pre-conditions to or tests of the competence of children to give evidence as witnesses in criminal proceedings.} However, it is worth noting – as detailed above – the movement of the pendulum in practice from the exclusion of the evidence of child witnesses and the concomitant protection of the interests of the accused towards the unquestioning inclusion of the evidence of child
witnesses with potentially adverse consequences for the interests of the accused and, in particular, his / her right to a fair trial and fair procedures.

2.12.0  **Test One: Intelligence and Moral Responsibility**

2.12.1  According to one of the oldest statutory tests, a prospective child witness was considered by the court to be competent to give evidence unsworn in any criminal proceedings where the following conditions were satisfied:

(i) the child was of tender years;

(ii) he / she did not, in the opinion of the court, understand the nature of an oath;

(iii) but was possessed of sufficient intelligence to justify the reception of the evidence; and

(iv) understood the duty of speaking the truth.

2.12.2  This test was first introduced in Ireland by s. 30 of the Children Act 1908, however, identical provisions appeared in England and in

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462 This test was employed by an earlier English legislature in 1885 to provide for the receipt of the unsworn evidence of a child complainant or witness of tender years in prosecutions for the unlawful carnal knowledge of a girl under the age of thirteen: s. 4, Criminal Law Amendment Act 1885, (48 & 49 Vict., c. 69). See: *The Queen v Paul* (1890) 25 Q.B.D. 202 (Crown Cases Reserved).

463 The third and fourth requirements in this test are reminiscent of the principles established in *R v Brasier* (1779) 1 Leach 199, 168 E.R. 202 (Twelve Judges) for the reception of the sworn evidence of child witnesses, namely, that it was a question of the intelligence and actual mental capacity of the child witness and his sense and reason of the danger and impiety of falsehood. See also: *Attorney General v O'Sullivan* [1930] IR 552 (C.C.A.).

464 Section 30 of the Children Act 1908, (8 Edw. 7, c. 67). The long title to this Act describes the Act thus: “An Act to consolidate and amend the Law relating to the Protection of Children and Young Persons, Reformatory and Industrial Schools, and Juvenile Offenders, and otherwise to amend the Law with respect to Children and Young Persons”. Section 30 provided that: “Where, in any proceeding against any person for an offence ... the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of that child may be received, though not given upon oath; if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of the child, though not given upon oath, but otherwise taken and reduced into writing in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848, or of this Part of this Act, shall be deemed to be a deposition within the meaning of that section and that Part respectively....”

465 Section 28(2) of the Criminal Justice Administration Act 1914, (4 & 5 Geo. 5, c. 58). The long title of this Act described it as: “An Act to diminish the number of cases committed to prison, to amend the Law with respect to the treatment and punishment of young offenders, and otherwise to improve the
Given the difficulties experienced in relation to the admission of children’s evidence on oath, these provisions represented a significant improvement in the law’s attitude towards children as witnesses and evidenced a greater reluctance to exclude such evidence from criminal proceedings. However, there remained “in effect, a presumption against competency, both in the legal and the factual sense, which [had] to be overcome.”

2.12.3 Although the facility for giving evidence unsworn was expressly restricted to children “of tender years”, this phrase was not defined in the legislation; rather, it was “a matter for the good sense of the court” and was a question not of maturity but of age. In the seminal Irish case, Attorney

Administration of Criminal Justice”. The scope of s. 30 of the Children Act 1908 was broadened significantly by virtue of this amendment which extended the test for the reception of the unsworn evidence of children to cover all criminal proceedings.

Section 38 of the Children and Young Persons Act 1933. See also an identical provision enacted in Trinidad (s. 19 of the Children Ordinance of Trinidad and Tobago (Revised Ordinances, 1940; c. 4, No. 21) as examined by the Privy Council in Melville v The King [1946] AC 101; 62 TLR 164 (P.C.).

In Canada, the Criminal Law Amendment Act 1890, (S.C. 53 Vict., c. 37, s. 13) replicated the provisions of s. 4 of the Criminal Law Amendment Act 1890 in England, however, the legislation was amended three years later to provide for the reception of such unsworn evidence “in any legal proceeding where a child of tender years” is called as a witness: The Canada Evidence Act, 1892, S.C. 56 Vict., c. 31, s. 25 was continued as s. 16 of the Canada Evidence Act: Canada Evidence Act, R.S.C. 1970, c. E-10, then R.S.C. 1985, c. C-5. See, now: s. 16.1 of the Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16; 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27.


In R v Campbell [1956] 3 WLR 219, [1956] 2 QB 432, [1956] 2 All ER 272, 40 Cr App Rep 95 (C.A.) the Court of Appeal examined the meaning of the phrase “tender years” in s. 38 of the Children and Young Persons Act, 1933. Lord Goddard C.J., delivering the judgment of the Court stated at p. 436 that: “It will be observed that there is no definition in the Children and Young Persons Act 1933, of what is meant by ‘a child of tender years’ though ‘child’ is defined [by s. 107] as a person under the age of fourteen. Whether a child is of tender years is a matter for the good sense of the court, and, though it may be difficult to decide whether a child understands the obligation of an oath, a court probably would have no difficulty in deciding whether he or she was of tender years.” Accordingly, where no age is specified and the legislation merely describes the child witness as a “child of tender years” the decision as to whether a child comes within the terms of the statute is a matter within the discretion of the trial judge: R v Campbell [1956] 2 QB 431, 2 All ER 272 (C.A.); R v N (1992) 95 Cr App R 356 (C.A.); R v Hampton (1966) 55 WWR (NS) 432 (B.C.C.A.); and Brunsgard v Jennings [1974] WAR 36.

In R v Khan (1981) 73 Cr App Rep 190 (C.A.) the Court of Appeal examined the meaning of the phrase “tender years” and concluded that it was a matter not of maturity but of age. The child witness in this case was aged twelve at the date of trial and was the key witness for the prosecution in relation to a charge against the appellant of living wholly or in part on the earnings of her prostitution, while aged eleven years. The Court stated that it was irrelevant that the child appeared to be a girl in excess of her age and noted, at p. 191, per Kilner Brown J. that she had been “thoroughly corrupted”, which,
General v O'Sullivan\textsuperscript{472} it was submitted by counsel for the appellant that s. 30, concerning children of “tender years” taken together with s. 131\textsuperscript{473} of the Children Act 1908, as amended, referred to “a person under the age of fourteen years”;\textsuperscript{474} however, the judgment of the Court of Criminal Appeal simply highlighted the lack of statutory definition of the term “tender years” and did not expressly adopt counsel’s suggested meaning.\textsuperscript{475} It would appear that the interpretation of the phrase and its possible application to a prospective child witness was a matter within the discretion of the court, such discretion to be exercised judicially; while it “may be very rarely that a five-year old will satisfy the requirements of [this test of competence]...nevertheless, the discretion remains to be exercised judicially by the Judge according to the well known criteria of the exercise of judicial discretion.”\textsuperscript{476}

the Court acknowledged, at p. 192, “brings about a degree of maturity”; however, “for all practical purposes” she was a child of “tender years” since she was, at the date of trial, only twelve years old. The Court concluded: “[I]t seems to this Court that what is meant by ‘tender years’ may very well differ according to the type of child who is about to give evidence but, as a general working rule, it is the experience of all three members of this Court that for a preferred witness who is under the age of 14 the precaution [of warning the jury as to the danger of convicting on the uncorroborated testimony of a child of tender years] which has been well established becomes necessary.” However, it should be noted that it was stated at p. 193 per Kilner Brown J. that: “The Court is informed, and has no reason to disagree, that there is no direct authority upon [the question of the meaning of ‘tender years’].” Thus it is clear that the Court did not consider the earlier authority of \textit{R v Campbell} [1956] 3 WLR 219; [1956] 2 QB 432; [1956] 2 All ER 272; 40 Cr App Rep 95 (C.A.) when examining the meaning of this phrase.\textsuperscript{477} \textit{Attorney General v O'Sullivan} [1930] IR 552 (C.C.A.).

Section 131 of the Children Act 1908 provided that: “The expression ‘child’ means a person under the age of fourteen years”.\textsuperscript{478} Similarly, the Advisory Group on Video Evidence commented in relation to the interpretation of the phrase ‘a child of tender years’ in the Pigot Report that “[f]or practical purposes a person under fourteen years of age is a child of tender years.” Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, 1989), para. 5.2, at p. 45. The Ontario Law Reform Commission, \textit{Report on Child Witnesses} (1991) asserted at p. 27 in relation to the use of this phrase in s. 18 of the Ontario Evidence Act that: “Unfortunately no statutory definition of this term ['child of tender years'] is to be found in the Act. In their attempt to give content to these words, courts have relied upon the common law presumption that children under fourteen years are incompetent witnesses and have imputed to the term ‘child of tender years’ a child under the age of fourteen. According to this interpretation, trial judges are required to conduct competency examinations of all child witnesses who have not reached fourteen years at the date of trial.”\textsuperscript{479} \textit{Attorney General v O'Sullivan} [1930] IR 552, at p. 556, per Kennedy C.J. (C.C.A.). “The purpose of [s. 30, as amended] is to enable a child of tender years (age not defined by the statute) who does not, in the opinion of the Court, understand the nature of an oath, to give evidence not upon oath if, in the opinion of the Court, the child has sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.” (Emphasis added).

While it was a necessary pre-condition to the admission of the unsworn evidence of a child witness that the court form the opinion that the child did not understand the nature of an oath, it is clear from the foregoing section that – given the restrictive understanding of the obligation of an oath traditionally held by the courts – this requirement did not present a significant obstacle to the reception of the child’s evidence otherwise than upon oath; indeed, the difficulties experienced by children in satisfying the test for the reception of sworn evidence constituted a major impetus for the introduction of statutory measures permitting children to give evidence unsworn. Nonetheless this requirement informed the preliminary examination of the child – and the nature of the questions to be posed – as to his/her competence to give evidence otherwise than upon oath.

The two principal pre-conditions to a finding of competence in respect of a child witness involved satisfying the court that: (i) the child possessed sufficient intelligence to justify the reception of the evidence; and (ii) understood the duty of speaking the truth. The courts were required to

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477 See, in particular, sections 2.1.0-2.8.20 in relation to the development and reform of the approach of the judiciary and legislature towards the reception of sworn evidence from child witnesses.

478 The Supreme Court of Canada expressly considered the extent of the inquiry necessitated by s. 16 of the Canada Evidence Act, R.S.C. 1970, c. E-10, before a child witness – of nine years – would be permitted to give evidence otherwise than upon oath in *Sankey v The King* [1927] SCR 436 (S.C.C.); in particular, how to determine that a child of tender years “does not understand the nature of an oath”. Anglin C.J.C. asserted that the duty of the presiding judge to satisfy himself that the child did not understand the “nature of the oath” was quite distinct from his duty to satisfy himself that “she was possessed of sufficient intelligence to justify the reception of her evidence” and that she understood “the duty of speaking the truth”. The Chief Justice held at pp. 439-440 that: “Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not understand the nature of an oath, as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term ‘child of tender years’ is not defined. Of no ordinary child over seven years of age can it be safely predicated from his mere appearance, that he does not understand the nature of an oath... A very brief inquiry may suffice to satisfy the judge on this point. But some inquiry would seem to be indispensable. The opinion of the judge, so formed, that the child does not understand the nature of an oath, is made by the statute a pre-requisite to the reception in evidence of his unsworn testimony. With the utmost respect, in our opinion there was, in this instance, no material before the judge on which he could properly base such an opinion. He apparently misconceived the duty in this regard imposed upon him by the statute.”

assess these dual requirements of intelligence and moral responsibility on an individual basis, having regard to the testimonial qualifications of each individual child witness, rather than the child’s age.\footnote{In \textit{R v N} (1992) 95 Cr App R 256, [1992] Crim LR 737 (C.A.) the Court of Appeal upheld the decision of the trial judge to permit a child complainant of sexual abuse – aged six years – to give evidence unsworn, having heard the evidence of social workers and police officers who had interviewed the child and having conducted a preliminary examination in the presence of the jury. The Court held that the question for the trial judge to determine was whether the child had the intelligence and understanding required by s. 38(1) of the Children and Young Persons Act 1933, as amended – the equivalent of the Irish test in s. 30 of the Children Act 1908 – and, if so, whether that evidence should be received, there being no minimum age limit below which children were not permitted to give evidence. The Court concluded that: “[The trial judge] directed himself on the basis that the case was one of those ‘rare and exceptional’ cases where, notwithstanding the child’s age, the evidence should be put before the jury. We can see no ground for concluding that his decision and judgment were open to any criticism.” See also: the Canadian decision, \textit{Khan v The Queen} [1990] 2 SCR 531, at p. 538, 79 CR (3d) 1, at p. 7 (S.C.C.). In the trial of a physician for the sexual assault of the child complainant – aged three years, six months at the time of the alleged assault and four years, eight months at the date of trial – the trial judge held that although the child satisfied the requirements for the reception of unsworn testimony, the child was precluded from giving evidence on account of her young age. However, the Supreme Court of Canada held that the competency rules in s. 16 of the Canada Evidence Act did not distinguish between children of various ages and that, accordingly, even very young children ought to be permitted to testify. McLachlin J. held that since the child complainant was found to have possessed sufficient intelligence to justify the reception of her evidence and understood the duty to speak the truth, the child ought to have been permitted to give evidence otherwise than upon oath in relation to the alleged sexual assault. McLachlin J. asserted that if age were a “determinative consideration” as to whether a child was a competent witness, “there would be a danger that offences against very young children could never be prosecuted”. See also: R Bessner, \textit{“Khan: Important Strides Made by the Supreme Court Respecting Children’s Evidence”} (1990) 79 CR (3d) 15. 
\textit{Australian Law Reform Commission, Evidence Reference, Research Paper: Competence and Compellability of Witnesses} (Research Paper No. 5, 1982) at p. 30: “[E]ach judge might have a different notion of what he understands as intelligence. One judge might regard a child who answers promptly and clearly as being intelligent, another might be of the opinion that a child who answers promptly and clearly as being intelligent. Yet in the former example, the child might simply be one who is confident and at ease in social situations; in the latter case, further probing might reveal that the child cannot truly grasp the subtle concepts which are involved in the questions”. See also: \textit{Australian Law Reform Commission, Interim Report on Evidence}, (Report No. 26, 1985) Vol. 1, para. 244.}

2.12.6 The first requirement, namely, that the child possess sufficient intelligence to justify the reception of the evidence, was intended to assess the child’s testimonial qualifications: observation, recollection and communication. The ‘intelligence’ requirement has been criticized as an ineffective measure of the competence of a child witness. These critics identify in particular, the lack of definitional boundaries to this pre-condition: “\textit{the meaning of intelligence is left at large for the judge to interpret and each judge might have a different notion of what he understands as intelligence}”.\footnote{In R v N (1992) 95 Cr App R 256, [1992] Crim LR 737 (C.A.) the Court of Appeal upheld the decision of the trial judge to permit a child complainant of sexual abuse – aged six years – to give evidence unsworn, having heard the evidence of social workers and police officers who had interviewed the child and having conducted a preliminary examination in the presence of the jury. The Court held that the question for the trial judge to determine was whether the child had the intelligence and understanding required by s. 38(1) of the Children and Young Persons Act 1933, as amended – the equivalent of the Irish test in s. 30 of the Children Act 1908 – and, if so, whether that evidence should be received, there being no minimum age limit below which children were not permitted to give evidence. The Court concluded that: “[The trial judge] directed himself on the basis that the case was one of those ‘rare and exceptional’ cases where, notwithstanding the child’s age, the evidence should be put before the jury. We can see no ground for concluding that his decision and judgment were open to any criticism.” See also: the Canadian decision, \textit{Khan v The Queen} [1990] 2 SCR 531, at p. 538, 79 CR (3d) 1, at p. 7 (S.C.C.). In the trial of a physician for the sexual assault of the child complainant – aged three years, six months at the time of the alleged assault and four years, eight months at the date of trial – the trial judge held that although the child satisfied the requirements for the reception of unsworn testimony, the child was precluded from giving evidence on account of her young age. However, the Supreme Court of Canada held that the competency rules in s. 16 of the Canada Evidence Act did not distinguish between children of various ages and that, accordingly, even very young children ought to be permitted to testify. McLachlin J. held that since the child complainant was found to have possessed sufficient intelligence to justify the reception of her evidence and understood the duty to speak the truth, the child ought to have been permitted to give evidence otherwise than upon oath in relation to the alleged sexual assault. McLachlin J. asserted that if age were a “determinative consideration” as to whether a child was a competent witness, “there would be a danger that offences against very young children could never be prosecuted”. See also: R Bessner, \textit{“Khan: Important Strides Made by the Supreme Court Respecting Children’s Evidence”} (1990) 79 CR (3d) 15. 
\textit{Australian Law Reform Commission, Evidence Reference, Research Paper: Competence and Compellability of Witnesses} (Research Paper No. 5, 1982) at p. 30: “[E]ach judge might have a different notion of what he understands as intelligence. One judge might regard a child who answers promptly and clearly as being intelligent, another might be of the opinion that a child who answers promptly and clearly as being intelligent. Yet in the former example, the child might simply be one who is confident and at ease in social situations; in the latter case, further probing might reveal that the child cannot truly grasp the subtle concepts which are involved in the questions”. See also: \textit{Australian Law Reform Commission, Interim Report on Evidence}, (Report No. 26, 1985) Vol. 1, para. 244.} Accordingly, ‘intelligence’ could be interpreted as “\textit{the ability to carry on}
abstract thinking”, “the ability to acquire capacity” or “the power of good responses from the point of view of truth or fact”.482 It is further submitted that it would be preferable to frame a test of competency in terms of the child’s cognitive development rather than in terms of intelligence, since the former test would “assess the child’s actual state of mental functioning rather than ... concentrate on his potential”.483 Accordingly, it was submitted that the ‘intelligence’ test allowed psychologically incompetent people to give evidence484 and may also have excluded the evidence of psychologically competent child witnesses.

482 Australian Law Reform Commission, Interim Report on Evidence, (Report No. 26, 1985) Vol. 1, para. 244. In the Australian Law Reform Commission, Evidence Reference, Research Paper: Competence and Compellability of Witnesses (Research Paper No. 5, 1982) at p. 31, it was noted that: “The variety of definitions creates a difficulty for those wishing to define competency in terms of intelligence. For example, Thorndicke’s definition – ‘the power of good responses from the point of view of truth or fact’ – would certainly include all those children who could be regarded as ‘intelligent’. Yet the flaw in Thorndike’s concept is that the child who meets this criteria must have ‘arrived’ at a certain stage; this definition excludes children who do not yet have the requisite power, although they might have it in the future – these too might usually be regarded as ‘intelligent’. Certainly, this latter group would be considered intelligent under Woodrow’s definition – ‘the ability to acquire capacity’ – which places emphasis on the child’s potential. However, from the point of view of psychological competency in a witness, having the potential to ‘acquire capacity’ or the give ‘good responses’ in the future is of little value in practice if the child cannot perform well as yet.” See also: Law Reform Commission of Tasmania, Discussion Paper: Child Witnesses in Sexual Assault (Discussion Paper No. 1, October 1987) (Kate Warner) at pp. 22-23, and later at p. 26 where it is asserted that: “Criticisms of the rules of competence appear to be unanimous in asserting that both modern psychological research and practical experience in courts demonstrate that the present law is based upon questionable assumptions. The present rules by which competence is judged arbitrarily give less weight to evidence of some children and can totally exclude the evidence of others by employing such a vague criterion as ‘intelligence’. While the rules of evidence are based upon assumptions about the inherent unreliability of children’s evidence, valuable evidence can be rejected on such grounds as ‘as jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could’: R v Wallwork (1958) 42 Cr App R 153.”

483 Australian Law Reform Commission, Evidence Reference, Research Paper: Competence and Compellability of Witnesses (Research Paper No. 5, 1982) at p. 31. See also: Australian Law Reform Commission, Interim Report on Evidence, (Report No. 26, 1985) Vol. 1, para. 244: “A highly intelligent child of five – for example, one who has great potential for abstract reasoning and who performs well on standard IQ tests – will be a poor witness if he is still at the pre-operational stage compared with an eight year old of lesser intelligence who is in the concrete operations stage.”

484 Australian Law Reform Commission, Interim Report on Evidence, (Report No. 26, 1985) Vol. 1, para. 245. The test recommended by the Law Commission of Australia rendered a person incompetent as a witness only where such person was “incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence” or who is “incapable of giving a rational reply to a question about a fact”.

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2.12.7 A variation and, arguably, wider expression of this test\textsuperscript{485} was adopted in some of the jurisdictions in Australia\textsuperscript{486} and required the court to form the opinion that the child possessed sufficient intelligence to give reliable evidence before admitting his / her evidence unsworn. A further variation of the ‘intelligence test’ – and the most progressive – was applied in New Zealand where witnesses under the age of twelve years could be heard otherwise than upon oath, in both civil and criminal proceedings, following an investigation to ascertain whether the child was “sufficiently intelligent to be capable of giving a rational account of what he or she has seen and heard, and understands the duty of speaking the truth”.\textsuperscript{487} While maintaining the ‘moral responsibility’ test, this test of competence represents a clear progression towards a direct test of the cognitive development of the potential child witness and even embodies elements of the ‘intelligibility’ and (Australian) ‘rationality’ tests discussed below.\textsuperscript{488}

2.12.8 In practice, however, it appears that the focus of the courts was directed towards the ‘moral responsibility’ element of the test; the preliminary examination of a potential child witness consisted of an inquiry into whether the child understood the meaning of ‘truth’ and a ‘promise’, followed by an undertaking by the child to tell the truth. There seemed to be “no requirement, as a matter of practice, that a witness explain the difference

\textsuperscript{485} This test is arguably wider than a test which simply requires the child to demonstrate “sufficient intelligence to justify the reception of the evidence”. Ligertwood regards the Australian version of this test as “wide enough to encompass the whole question of the cognitive development of the child”: Ligertwood, A., Australian Evidence (3rd ed., 1998) at p. 443.

\textsuperscript{486} (Qld) s. 9(1) of the Evidence Act 1977; (Tas) s. 122C of the Evidence Act 1910 (child under 14); (WA) s. 106C of the Evidence Act 1906 (child under 12). While many of these ‘intelligence’ tests were originally twinned with a ‘moral responsibility’ test such as that contained in s. 30 of the Children Act 1908, as amended, in Ireland, these statutes later abandoned the latter requirement while retaining the ‘intelligence’ test of competence; the trial judge simply admonished the child with regard to the importance of telling the truth. Thus, for example, in Queensland, pursuant to s. 9(1) of the Evidence Act 1977 if the child is considered sufficiently intelligent by the court, the judge is required to admit his or her testimony after explaining the duty to testify truthfully “whether or not the child understands that duty”. See also: R v T [1993] 1 Qd R 454, at pp. 456-457 per Thomas J. (Byrne J. concurring) (C.A.).

\textsuperscript{487} Section 13 of the Oaths and Declarations Act 1957 (NZ).

\textsuperscript{488} See sections 2.13.0-2.13.6 in relation to the combined test of moral responsibility and rationality and sections 2.15.0-2.15.16 in relation to the ‘intelligibility’ test employed in this jurisdiction and variations thereof.
between truth or lies" and the variation of the ‘intelligence’ test was “rarely, if ever, tested directly.” The effectiveness of the ‘moral responsibility’ test as a test of the competence of potential child witnesses is discussed below.

Either of these variations on the ‘intelligence’ test are preferable to the ‘intelligence test’ simpliciter since both the Australian and New Zealand tests provide direction for the court in the conduct of its inquiry into the child’s competence; the requirement of intelligence is informed by either the child’s ability to give reliable evidence or – with regard to the latter more specific variation – to the child’s capacity to give a rational account of what he / she has seen and heard. However, it is submitted that the continued reliance on the imprecise concept of ‘intelligence’ – even as informed in these variations – rendered these tests ineffective determinants of competence.

The second requirement embodies a threshold of moral development which must be satisfied before the child can be permitted to give evidence unsworn; traditionally, the preliminary examination of the child involved

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490 New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 74, at p. 17: “The second part of the competence requirement, requiring the ability to give a rational account of past events, is not currently tested in any direct way. The possibility that it assists in an assessment of communication skills is of little weight, given that a person who is unable to give coherent evidence would not normally be called as a witness.”
491 See, in particular: sections 2.12.8-2.12.16, 2.13.0-2.13.6, 2.15.5, 2.15.8-2.15.10 and 2.15.13-2.15.14.
492 See: S v Kennedy 1996 SLT 1087, per Lord Justice-Clerk, cited by the Court of Session in R, Petitioner 1999 SC 380, at p. 383D (this section does not appear in the SLT): “How to carry out a preliminary examination of a child witness is very much up to the judge or sheriff faced with that task. Different judges or sheriffs will no doubt approach this task in different ways. Much will also depend upon the way in which the child responds to initial questioning.” Having approved this passage, the Court of Session in R, Petitioner 1999 SC 380 cautioned at p. 383E that: “A child who on fuller examination is held to understand the crucial difference between truth and falsehood may initially, if faced with a bald question on the matter, give a negative answer – as occurred in S v Kennedy. Equally, it seems to us that a child who does not know the difference between what is true and what is false might well give an affirmative answer. While much may turn on impression and demeanour, we do not think that such a simple affirmative by the child can provide sufficient basis for an affirmative answer by the court.” See also: Rees v Lowe 1990 JC 96; KP v Her Majesty’s Advocate 1991 SCCR 933; Kelly v Docherty 1991 SLT 419; and M v Kennedy 1993 SCLR 69.
questioning designed to elicit the child’s understanding of ‘truth’, the distinction between truth and falsehood and the duty of speaking the truth. As outlined in the foregoing section, this honesty test is often distinguished from the parallel test which must be satisfied before evidence can be received upon oath by highlighting the non-religious understanding required of this moral responsibility test, that is, the duty to speak the truth “in terms of ordinary everyday social conduct”.

2.12.11 Debate still resounds as to the desirability of requiring a child to pass an ‘honesty test’ before being permitted to give evidence unsworn. Those in favour of the requirement argue that a child who does not have – or, more

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493 R v Khan (1988) 27 O.A.C. 142, at 147-148, 42 C.C.C. (3d) 197, 64 C.R. (3d) 281 (C.A.); affd [1990] 2 S.C.R. 531, 41 O.A.C. 353, 113 N.R. 53, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, 11 W.C.B. (2d) 10 (S.C.C.): “To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed as to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so.” However, it should be noted that it is inadequate merely to ask the child if he / she understands the duty to speak the truth. The judge should ask questions from which the judge makes the assessment of understanding: R, Petitioner 1999 SC 380, 1999 SLT 1233, 1999 SCLR 341. In this case, the appellant was charged with lewd and libidinous conduct against his daughter, the child witness at the centre of the case. The sheriff asked the child whether she knew the difference between telling the truth and telling a lie, to which the child nodded. Reports before the court indicated that the child could be articulate and outgoing and, in the circumstances, the sheriff was satisfied that the child was a competent witness and admonished her to tell the truth. On appeal, the Court of Session held that the child was not a competent witness and evidence of what she had said on a previous occasion was hearsay and should have been excluded. The Court concluded at p. 383 that the examination conducted in the instant case was insufficient to determine the competency of the child witness; the Court was not satisfied that “[the sheriff’s] single question, met with only a simple affirmative” could constitute a “sufficient examination”. The Court pointed out at p. 382C that the question of whether a child knows the difference between truth and falsehood is a question “for the court, and not simply a question to be put to the child”. (Emphasis added).

494 R v Khan (1988) 27 O.A.C. 142, at 147, 42 C.C.C. (3d) 197, 64 C.R. (3d) 281 (C.A.); affd [1990] 2 S.C.R. 531, 41 O.A.C. 353, 113 N.R. 53, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, 11 W.C.B. (2d) 10 (S.C.C.): “An appreciation of the assumption of ‘a moral obligation’ or a ‘getting a hold on the conscience of the witness’ or (to refer to the factors stressed in Fletcher, supra) an ‘appreciation of the solemnity of the occasion’ or an awareness of an added duty to tell the truth over and above the ordinary duty to do so are all matters involving abstract concepts which are not material to a determination whether a child’s unsworn evidence may be received.”

495 R v Khan (1988) 27 O.A.C. 142, at 147-148, 42 C.C.C. (3d) 197, 64 C.R. (3d) 281 (C.A.); affd [1990] 2 S.C.R. 531, 41 O.A.C. 353, 113 N.R. 53, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, 11 W.C.B. (2d) 10 (S.C.C.). McLaughlin J. of the Supreme Court of Canada, on appeal from the Ontario Court of Appeal, agreed with this analysis. However, it is worth noting that the Court in this instance was analyzing the terms of s. 16 prior to its amendment in 1987 and the Court appeared to place reliance on the fact that corroboration was required for a child’s unsworn evidence received under this provision: “It is to be borne in mind that under s. 16(2) the child’s unsworn evidence must be corroborated by some other material evidence. Any frailties that may be inherent in the child’s testimony go to the weight to be given the testimony rather than its admissibility.”
importantly, who cannot demonstrate to the satisfaction of the court—
sufficient moral awareness should not be permitted to give evidence since
such a witness is not competent. Quite apart from the fact that there is no
scientific way of testing a child’s moral awareness, the presence or absence
of an understanding of the duty to speak the truth is not, it is submitted, a
matter which determines the competence of a child,\textsuperscript{496} but rather which
affects the child’s credibility as a witness, that is, it goes to the weight of his
or her evidence and not to its admissibility; “requiring a witness to
demonstrate an understanding of the duty to tell the truth, presumably to
give meaning to their promise to tell the truth, does not help accurately
predict whether a witness will tell the truth or will give reliable
evidence”\textsuperscript{497}. The decision of the Ontario Court of Appeal in \textit{R v Walsh}\textsuperscript{498} is
instructive in this regard. The witness for the Crown was a professed
Satanist but did not suffer from any mental disorder or defect. Although the
trial judge held that the witness was incompetent since he did not recognize
any social duty to speak the truth in court, the Court of Appeal reversed this
ruling and held that a disposition to lie does not disqualify a person from
testifying and an adult who does not suffer from intellectual disorders or

\textsuperscript{496} Bala, Nicholas, Lee, Kang, Lindsay, Rod and Talwar, Victoria “A Legal and Psychological Critique
of the Present Approach to the Assessment of the Competence of Child Witnesses” (2000) 38 Osgoode
Hall Law Journal 409, at p. 445: “The present competence examination is based on the assumption
that if children demonstrate an understanding of what a lie is and the negative moral implications of
lying, they should be more likely to tell the truth in the court. The authors’ studies fail to confirm this
assumption. To the contrary, their research suggests that there is no relationship between a child’s
performance on the cognitive assessment of their understanding of such concepts as truth and lies, and
their actual lie – or truth-telling behaviour. Furthermore, this research is consistent with a larger
body of psychological theory and research about child development and truth-telling behaviour.” See
also: Lyon, Thomas D, “Child Witnesses and the Oath” in Westcott, Helen, Davies, Graham and Bull,
Ray (eds.) \textit{Children’s Testimony: A Handbook of Psychological Research and Forensic Practice}

\textsuperscript{497} New Zealand Law Commission, Preliminary Paper: \textit{The Evidence of Children and Other
Vulnerable Witnesses} (Preliminary Paper No. 26, 1996) para. 31, at p. 9. In para. 72, at p. 17 of the
same Preliminary Paper, the New Zealand Law Reform Commission asserted that: “The operation of
the present competence rules does not accurately predict whether a witness will give honest or
accurate testimony. A witness’s ability to understand the duty to tell the truth provides no guarantee
that the witness will tell the truth or intends to do so. However, to the extent that a witness’s
understanding of the need to tell the truth may increase the likelihood that they will tell the truth, the
oath, affirmation or declaration may have a symbolic value. The most useful way of assessing
credibility seems to be that undertaken by the fact-finder when making a verdict choice.”

\textsuperscript{498} \textit{R v Walsh} (1978) 45 C.C.C. (2d) 199 (Ont. C.A.).
defects resulting in incompetency, is not incompetent because he lacks a sense of moral responsibility. Sopinka explains this theory thus:

"The testimonial qualifications relating to a witness's capacity to observe, record, recall and communicate should be distinguished from the requirement relating to the responsibility to testify truthfully. A mental condition or belief which affects the witness's moral responsibility to tell the truth is not a defect which affects competency."

2.12.12 At best, the 'moral responsibility' test is an indirect test of competence; it is arguable that "[i]f a child has the ability to grasp the concept of dishonesty, then it is likely that he has acquired the other characteristics of the concrete operations stage" and is therefore a competent witness. This reasoning was adopted by the Scottish Court of Session in R, Petitioner wherein the Court, when examining the test of competence for child witnesses, asserted that the concept of an 'obligation to tell the truth or an 'understanding of the difference between truth and falsehood' was an all-encompassing phrase, containing within it many of the tests traditionally used to test competence within other jurisdictions, such as intelligence, understanding and moral development. The Court went on to warn that, depending on the case, it could be important - whether at the stage of examination or admonition – to "test or warn the child not merely in relation to the difference between truth

499 Pursuant to the test in R v Hill (1851) 5 Cox. C.C. 259 (C.C.R).
500 Sopinka J., Lederman S., and Bryant A., The Law of Evidence in Canada (2nd ed., 1999) at pp. 675-676: "Moral defect goes to credibility only. Since the witness appreciated that he was liable to penal sanctions if he gave false evidence, he appreciated the duty of speaking the truth in the relevant sense."
502 R, Petitioner 1999 SC 380. Also reported as: R v Walker 1999 SLT 1233; and AR v Walker (Reporter for Aberdeenshire) 1999 SCLR 341. This case and, indeed, each of the Scottish cases considered herein were decided prior to the introduction of the new statutory scheme governing the competence of child witnesses, namely, s. 24 of Part III of the Vulnerable Witnesses (Scotland) Act 2004, c. 3, and are examined herein in light of the contribution which they can make to the analysis of the moral responsibility test of competence.
503 R, Petitioner 1999 SC 380, at p. 386D: "While the question at issue in the preliminary examination of a child is conveniently stated in terms of 'knowing the difference between telling the truth and telling lies' or the like, these apparently simple words (even leaving aside all the issues which are essentially a matter of assessing the quality of the evidence) appear to us to have built into them quite a complex range of questions as to intelligence, understanding, maturity, moral sense, and much else."
and deliberate falsehood, but in relation to matters which might be dealt with at the stage of actual evidence” and matters “which may go deeper, affecting the child’s fundamental ‘trustworthiness’ or understanding”. 504

Thus, the Scottish court appeared to advocate a preliminary examination which tests not only the child’s truthfulness, but the far broader concept of the child’s trustworthiness, which, it seems, includes inter alia, the child’s cognitive and moral development. 505

2.12.13 In response to this argument it is asserted, first, that a direct test of competence – which assesses the child’s cognitive development – is preferable to an indirect test of competence. Secondly, it is submitted that there wide variations in the age at which an individual child comprehends the notion of dishonesty, 506 which itself may be attributable to differences in their moral or ethical training within or without the family. This test is also an incomplete test of competence in that it does not examine or ascertain the presence or absence of other important testimonial qualifications; it focuses

504 R. Petitioner 1999 SC 380, at p. 386G. The Court had earlier cited the statement of the Lord President in M v Kennedy 1993 SCLR 69 to the effect that: “The test of admissibility is essentially this, whether the child is likely to give trustworthy evidence”. It should be noted, however, that the Court recognized that these observations were not strictly necessary to determine the issues in the present case and stated that it did “not wish to say anything which might be taken as laying down what should or should not be covered by the preliminary examination”. 505 The Court warned, in relation to ‘truthfulness’ that: “If a child naturally accepts what is told by a parent, it may well in good faith produce that as ‘truth’, although it is in fact simply hearsay, or (perhaps more dangerously) an account which the child has come to believe is its own recollection, when it is in fact the fruit of suggestibility, fantasy or deliberate coaching”: R. Petitioner 1999 SC 380, at p. 386H. This would appear to be consistent with Wigmore’s analysis of the competency of witnesses, since he regarded ‘trustworthiness’ as the overall test of competence, encompassing all the three testimonial qualifications – observation, recollection and communication. Similarly, the Scottish court in M v Kennedy 1993 SCLR 69 concluded that the test of admissibility is essentially “whether the child is likely to give trustworthy evidence”; the capacity to give a spontaneous account affects the quality of the evidence and not its admissibility. 506 Australian Law Reform Commission, Evidence Reference, Research Paper: Competence and Compellability of Witnesses (Research Paper No. 5, 1982) at p. 28: “[I]t is not until the child is in the final phase of the concrete operations ... that he will fully grasp the meaning of dishonesty. According to Piaget, a child of six equates a lie with saying naughty words and with untrue statements. For 8 and 9 year olds a lie is a statement that departs from objective facts. A child’s statement that he saw a mouse as big as an elephant is a big lie because mice are never as big as elephants ...” It was further noted at p. 29 that: “A child of six, for example, in a religious or highly ethical family might have a far better notion of the nature of dishonesty than a child in a family where matters of morality are never discussed and the child has had minimal ethical training. This may be the case even if the second child is somewhat older and generally at a more advanced stage of cognitive development. Thus the second child might be a more able witness yet be prevented from giving his testimony.” See also Australian Law Reform Commission, Interim Report (Report No. 26, 1985) Vol. 1, at para. 243.
solely on a sub-division within the third testimonial qualification ‘communication’.\(^\text{507}\) Furthermore, while it may test the child’s understanding of the difference between truth and falsehood and even the duty of speaking the truth, it is asserted that such a – non-contextualised – test is inadequate since “even very young children understand this duty in a general way without necessarily understanding the particular importance of telling the truth in the proceedings”.\(^\text{508}\)

2.12.14 Equally, as indicated above, it is submitted that ‘honesty tests’, by requiring young children to explain to the satisfaction of the court, the meaning of sophisticated abstract concepts such as ‘truth’ or ‘falsehood’ may exclude from the court’s consideration the relevant evidence of children who, although able to recollect events observed and to communicate that recollection in a way that can be understood, are nonetheless unable to engage in an analysis of the difference between ‘truth’ and ‘lies’;\(^\text{509}\) indeed

\(^{507}\) Australian Law Reform Commission, Evidence Reference, Research Paper: Competence and Compellability of Witnesses (Research Paper No. 5, 1982) at p. 29: “[T]hese tests are designed to ensure that the witness will be honest, but do not meet other requirements of being able to give sound testimony”. A test which focuses primarily on the child’s ability to understand questions posed to him or her as a witness and to give answers which can be understood tests far more than the child’s ability to distinguish between truth and falsehood. If the Wigmorian analysis of three testimonial qualifications – observation, recollection and communication – is adopted, then it is clear that this test comes closer to testing all three than a test of moral responsibility; ‘communication’ encompasses both a minimum degree of cognitive development, or intelligibility and a sense of moral responsibility. ‘Communication’ was described by Wigmore as a “capacity mentally to understand the nature of questions put and to form and communicate intelligent answers” while moral responsibility is referred to as the “duty to make the narration correspond to the recollection and knowledge”: 2 Wigmore, Evidence (3rd ed., 1940) § 495, at p. 587.

\(^{508}\) English Criminal Law Revision Committee, Eleventh Report (1972) para. 205, cited in New South Wales Law Reform Commission, Discussion Paper on Oaths and Affirmations (1980) at p. 37 wherein it was asserted that the true inquiry should be “whether [the child] understands how important it is for the proceedings that he should tell the truth to the best of his ability about the events in question – in particular that he should not say anything against the accused which he does not really believe to be true and that he should say if he did not see something or does not remember it”.\(^\text{509}\) Spencer, J.R., “Reforming the Competency Requirement” (1988) 138 N.L.J. 147 was highly critical of the requirement that a potential child witness demonstrate an understanding of the duty to speak the truth, since, he argued that even articulate children who could communicate intelligibly could be unable to explain a concept such as ‘truth’: “By the age of two a child can usually recognise faces and can talk a little. By the age of three many children talk fluently. But until the age of five or so a child will often be unable to understand an abstract concept such as ‘duty’ or ‘truth’.” See also: Birch, “Children’s Evidence” [1992] Crim LR 262. In the Scottish case KP v Her Majesty’s Advocate 1991 SCCR 933 the trial judge, in rejecting the submission of counsel for the defence that the child had not demonstrated a sufficient understanding of the difference between truth and falsehood in the preliminary examination, stated: “Well, [counsel for the defence] I appreciate the difficulties that you are under in this case and I appreciate also the difficulty of trying to ascertain what is undoubtedly a
“it seems logical to suppose that a child who is not able to explain what the oath signifies, or what concepts like truth and duty mean, is rather less likely to be sophisticated enough to invent and consistently and successfully sustain falsehoods than other witnesses”. Finally, it is noted that it does not logically follow from the fact that a potential child witness failed to demonstrate the requisite level of understanding of the distinction between truth and falsehood, that the court should then refuse to hear or admit any evidence from such child – in particular, where that child is a potentially crucial witness in the prosecution of the offence with which the accused is charged, such as where the child is the complainant of a sexual offence allegedly committed by the accused – in circumstances where it is asserted that there is “little” or “no” “relationship between a child’s
understanding of the difference between truth and falsehood and her ability to give reliable answers”. Accordingly, it is submitted that this requirement does not represent an effective test of competence.\footnote{Spencer, J.R., “Reforming the Competency Requirement”, (1988) 138 N.L.J. 147: “The sensible reform would surely be to delete the words ‘and understands the duty of speaking the truth’ altogether, leaving the words ‘if ... he is possessed of sufficient intelligence to justify the reception of the evidence’ as the only test. This may be thought to go too far, bearing in mind that the Criminal Justice Bill will also remove the existing ban on convicting on the uncorroborated evidence of an unsworn child. It is questionable whether the theoretical possibility of a conviction solely on the word of an immature child is really any worse than the existing possibility of a conviction on the sole word of an accomplice mental patient or convicted perjurer. But if it is thought so, the answer is to create a new and improved safeguard by requiring the judge to stop the case at the end of the evidence for both prosecution and defence if he thinks a conviction on the totality of the evidence would be unsafe or unsatisfactory.”}{513}

2.12.15 It is beyond dispute that the dual requirements of ‘sufficient intelligence to justify the reception of the evidence otherwise than upon oath’ and ‘moral responsibility’, as interpreted and applied by the courts, served to exclude the evidence of many psychologically competent young children, with a resulting adverse impact upon the prosecution of offences, such as sexual offences, where the child’s evidence may have been critical. This exclusionary approach was further strengthened by the apparent overriding judicial discretion enjoyed by the trial judge to deny a child witness – who had satisfied the statutory pre-conditions to competence – the opportunity to give evidence unsworn; section 30 of the Children Act 1908, as amended provided that the evidence of such child “may” not “shall” be received.\footnote{Section 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914 provided that where a potential child witness of tender years did not, in the opinion of the court, understand the nature of an oath, the unsworn evidence of that child “may be received” if, in the opinion of the court, the child was possessed of sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth.}{514} It also appeared that if there was evidence to suggest that the child witness had been improperly coached or the evidence had been wrongfully obtained or there was any other good reason to exclude the child’s evidence, the trial judge would take all such matters into account in the exercise of his
discretion to permit or refuse the reception of the child’s evidence;\textsuperscript{515} such matters affected the admissibility, rather than the weight of the child’s evidence.

2.12.16 The ‘balance’ in this combined test of ‘intelligence’ and ‘moral responsibility’ was clearly weighted in favour of the accused, however, it is submitted that the resulting exclusion of the evidence of children and the silencing of child witnesses was contrary to the proper administration of justice and the determination of the guilt or innocence of accused persons with regard to all relevant admissible evidence in the exercise of the court’s truth-seeking function.

2.13.0 \textbf{Test Two: Moral Responsibility and Rationality}

2.13.1 The combined test of moral responsibility and rationality favoured in many of the Australian jurisdictions represented an improvement in the attitude of the law towards the admissibility of the evidence of children. A child witness\textsuperscript{516} is declared competent where he / she:

(a) understands the difference between the truth and a lie; and

(b) is able to understand and to respond rationally to questions posed.\textsuperscript{517}


\textsuperscript{516} The legislation in each of the jurisdictions permitting the reception into evidence of the unsworn evidence of children varied with regard to the age limit placed upon child witnesses for these purposes. For example, Qld: s. 9, Evidence Act 1977 (children under 18 years); NSW: s. 32-35 of the Oaths Act 1900, s. 23(1) of the Evidence Act 1958 (children under 12 years); Vic: s. 23 of the Evidence Act 1958 (children under 14 years); SA: s. 12 of the Evidence Act 1929 (children aged 12 years and under); and WA: s. 106C of the Evidence Act 1906 (children under 12 years). See also Tas: s. 128(1) of the Evidence Act 1910; and s. 13(3) of the Uniform Evidence Acts. See also: \textit{R v Caine} (1993) 68 A Crim R 223 (C.C.A. Vic.); \textit{Andrews v Armitt} (1971) 1 SASR 178 (F.C.); \textit{R v Domonic} (1985) 14 A Crim R 419 (W.A. F.C.).

\textsuperscript{517} However, it is also possible in some of the Australian jurisdictions for adults to give what is termed ‘informal evidence’ which is evidence given without oath or formality, where the witness does not understand the obligation of an oath or affirmation or that he / she is under an obligation to give truthful evidence. In fact, it is not a necessary pre-condition to the receipt of such evidence in all jurisdictions that the witness be required to speak to truth and to be liable to punishment if the truth is not spoken. See Cth: s. 13 of the Evidence Act 1995; Qld: s. 2 of the Oaths Act Amendment Act of 1884; NSW: s. 13 of the Evidence Act 1995; Vic: s. 23 of the Evidence Act 1958; SA: s. 9 of the Evidence Act 1929; WA: s. 100A of the Evidence Act 1906; NT: s. 25A of the Oaths Act 1939.
2.13.2 Under the uniform Evidence Acts, a person is incompetent if he / she is "incapable of giving a rational reply to a question about a fact". Section 13(4) provides that a person is not competent to give evidence about a fact if: (a) the person is incapable of hearing or understanding, or of communicating a reply to, a question about the fact; and (b) that incapacity cannot be overcome.

2.13.3 The adoption of this single and simplified test for the reception of the evidence of children in criminal proceedings — and the concomitant abandonment of the distinction between sworn and unsworn testimony — was proposed and adopted in reliance on the understanding that "without it, the courts would be faced on occasions with evidence of no probative value, thus adding to the cost and expense of the trial". The test is premised upon the understanding that all witnesses are competent unless the contrary is proven. It requires the trial judge to determine whether a witness understands the difference between the truth and a lie — not unlike the test of ‘moral responsibility’ discussed above — and is able to understand and respond rationally to questions posed; however, it remains open to the

518 Section 13(3) of the uniform Evidence Acts. This does not prevent the witness from being ‘competent to give evidence about other facts’.
519 Where such incapacity can be overcome but at substantial cost or delay and adequate evidence will be tendered from another source, the witness, although competent, cannot be compelled to testify: section 14. Ligertwood, A., *Australian Evidence* (3rd ed., 1998) at p. 445: "The uniform Acts in s. 13(5) presume until the contrary is proved (on the balance of probabilities (s. 142)), that witnesses are competent to testify. Thus the persuasive burden lies upon the party seeking to establish incompetence."
520 Australian Law Reform Commission, Evidence Reference, Research Paper: *Competence and Compellability of Witnesses* (Research Paper No. 5, 1982) at p. 41: "An approach similar to that adopted in Stephen’s Test is recommended. The provision should state the general proposition that all persons are competent to give evidence. Then, by way of exception, the clause should state that all persons shall be competent to give evidence unless the court considers that they are incapable of: (i) understanding the questions put to them; (ii) giving rational responses; (iii) understanding that they are obliged to give truthful answers; (iv) communicating their answers through any cause which cannot be met by mechanical aids or use of interpreters or other reasonable means."
522 Stephen, Sir James Fitzjames, *Digest of the Law of Evidence* (1930) Article 107, at p. 123: "A witness is incompetent if in the opinion of the judge he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth."
trial judge to revise his / her opinion at any point during the witness’s testimony and to declare such witness incompetent for failure to satisfy these dual requirements.\textsuperscript{523} Equally, the trial judge may exercise his / her discretion to exclude evidence – even the evidence of a child witness who appears to satisfy the dual requirements – where its prejudicial effect outweighs its probative value.\textsuperscript{524}

2.13.4 It should be noted that there is some authority for the view that a version of the ‘rationality test’ applied in Ireland at one point.\textsuperscript{525} In stating that a witness may be incompetent by reason of infancy or defective intellect, O’Siocháin\textsuperscript{526} defines incompetence as the: “\textit{inability to (a) \textit{u}nderstand the nature of an oath, and (b) \textit{t}o give rational testimony}.” He further notes that “at common law a child not able to understand the nature of an oath, but otherwise able to give rational testimony unsworn, is incompetent as a witness”; although he acknowledges that statutory intervention has ensured the admissibility of the unsworn evidence of children.\textsuperscript{527} The author cites no

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\textsuperscript{523} Australian Law Reform Commission, Report: Evidence (Report No. 38, 1987) at p. 150: “A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence, is not competent to give evidence. A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact.”

\textsuperscript{524} The trial judge retains a discretion to exclude evidence which may be unduly prejudicial to the accused or may act unfairly against the accused in criminal proceedings. Such exclusion may be premised on the unreliability of the evidence. The courts have highlighted the dangers of suggestion in the case of child witnesses as a result of the ways in which they have been interviewed: \textit{R v Lyndon (1987) 31 A Crim R 111 (S.C. Qld.); C v Minister of Community Welfare (1989) 52 SASR 304; R v Warren (1994) 72 A Crim R 74, at p. 83 (C.C.A. N.S.W.); R v Dunphy (1994) 98 Cr App R 393 (C.A.). These cases highlight the need for guidelines for the interviewing of children and other vulnerable witnesses during the course of investigation. Equally, in \textit{R v Horsfall (1989) 51 SASR 489} the trial judge exercised this discretion to declare the child victim of sexual assault incompetent where the child witness’s testimony was the product of hypnotherapy which, in the judge’s opinion, carried too great a risk of unreliability through suggestion for her testimony to be put before the jury.

\textsuperscript{525} The Law Reform Commission had initially – in its Consultation Paper – recommended the adoption of this test in this jurisdiction: Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) paras 5.27-5.31, at pp. 95-96. However, in its Report it preferred the test of ‘intelligibility’ outlined in sections 2.15.0-2.15.16 below and eventually enacted in the form of s. 27 of the Criminal Evidence Act 1992: Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 34-1990) paras. 5.17-5.18, at p. 55.

\textsuperscript{526} O Siocháin, P.A., Outline of Evidence, Practice and Procedure in Ireland (1953) at p. 28.

\textsuperscript{527} O Siocháin, P.A., Outline of Evidence, Practice and Procedure in Ireland (1953) at p. 29: “But a question as to the weight and degree of reliability to be attached to such evidence will always arise in such circumstances, and such evidence will always be received with great caution.” See also Heffernan, Liz Evidence: Cases and Materials (2005) at p. 77: “Historically, the competence of children raised two distinct but related concerns: first, whether the child had the necessary intelligence to testify and, specifically, to answer questions put by counsel in a rational and coherent manner; and, secondly, whether the child was sufficiently mature to understand the nature and
authorities in support of this view of the test of competence and it is respectfully submitted that the test in this jurisdiction was that laid down in *Brasier*,\(^{528}\) rather than a test of rationality.

2.13.5 While this test of competence continues to include an ‘honesty’ test such as that rejected in the foregoing section, the test of ‘rationality’ contained in this test is welcome in that it focuses more directly upon the child’s cognitive abilities. Rationality may be defined as:

> “1. the state or quality of being rational or logical
> 2. the possession or utilization of reason or logic...”\(^{529}\)

2.13.6 However, it is difficult to imagine how the child’s rationality or sense of reason and logic could be tested in practice and it is even doubtful whether the ability to give rational testimony is a sound test of competence since the capabilities of observation, recollection and communication are not dependent on logic. Thus, while there is “little conflict as to the acceptability of the underlying approach”,\(^{530}\) that is, an attempt to formulate a test which accurately assesses the child’s cognitive abilities, it is submitted that a test which examines the child’s ability to understand questions posed and to give answers which can reasonably be understood is both an easier test to apply and a better indicator of the competence of an individual child as a witness.

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\(^{528}\) *R v Brasier* (1779) 1 Leach 199, 168 E.R. 202 (Twelve Judges). See also: *Attorney General v O'Sullivan* [1930] IR 552 (C.C.A.).

\(^{529}\) *Collins Dictionary of the English Language* (1979), at p. 1213.

2.14.0  Test Three: Moral Responsibility and Ability to Communicate

2.14.1 Representing a further step along the path towards a true test of the cognitive development of a child witness, the post-1987 version of s. 16 of the Canada Evidence Act\textsuperscript{531} contained a competence test which required inquiry into whether the proposed witness, a person under fourteen years of age:\textsuperscript{532}

(a) understood the nature of an oath or solemn affirmation; and

(b) was able to communicate the evidence.

2.14.2 The section further provided that: (i) a child witness who understands the nature of an oath or affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation; (ii) a child witness who does \textit{not} understand the nature of an oath or a solemn affirmation but is able to communicate the evidence, may testify on promising to tell the truth; and, finally, (iii) a child witness who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.\textsuperscript{533}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{531} R.S.C. 1985, c. C-5, s. 16; am 1987, c. 24, s. 18. This remains the test of competence today in Canada in relation to proposed witnesses aged fourteen years of age or older "whose mental capacity is challenged": s. 16(1)-(5) of the Canada Evidence Act, R.S.C., 1985, c. C-5; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 26.
\item \textsuperscript{532} The new provision extended the availability of unsworn evidence beyond children of ‘tender years’ so that it was possible for a child over the age of fourteen years whose mental capacity was challenged to give evidence unsworn where he/she was deemed incompetent to give evidence upon oath. In other words, where the child witness did not understand the nature of an oath or solemn affirmation but was able to communicate the evidence, the child witness could testify upon promising to tell the truth. This amendment extended the applicability of s. 16 to encompass a larger class of children than previously since children of ‘tender years’ constituted a smaller and less easily defined category of children than children aged less than fourteen years. Thus, while this test of competence applied primarily to children under fourteen years of age, it could also apply to a person whose mental capacity is challenged, although the party challenging the mental capacity of a proposed witness of fourteen years of age or more bore the burden of satisfying the court "that there is an issue as to the capacity of the proposed witness to testify under an oath or solemn affirmation": section 16(5). The section did not expressly state the standard of proof which must be satisfied in this regard. See the identical provisions contained in the new version of s. 16(5) of the Canada Evidence Act, R.S.C., 1985, c. C-5; R.S.C. 1985, c. 19 (3\textsuperscript{rd} Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 26 in relation to the evidence of persons aged fourteen years or more whose mental capacity is challenged.
\item \textsuperscript{533} The Ontario Court of Appeal in \textit{R v Krack} (1990) 39 O.A.C. 57, 73 O.R. (2d) 480, 56 C.C.C. (3d) 554 (Ont. C.A.) commented on the effect of this amendment to s. 16 as follows: "We note that the inquiry is now mandatory, that the statutory requirement of corroboration of the unsworn evidence of a child has been eliminated and that the question whether a particular child is of tender years is no longer left to the discretion of the court.”
\end{itemize}
\end{footnotesize}
2.14.3 The part of the above test of competence which distinguished the Canadian test of competence from those employed in other jurisdictions was the requirement of an ‘ability to communicate’.\textsuperscript{534} This testimonial requirement was particularly important as it formed a pre-condition to the receipt of both sworn and unsworn evidence by the courts. The meaning of the phrase “able to communicate” in s. 16 has been the subject of detailed analysis in Canada.\textsuperscript{535}

2.14.4 In \textit{R v Marquard},\textsuperscript{536} the accused was charged with aggravated assault of her 3½ year old granddaughter.\textsuperscript{537} The accused appealed her conviction contending that the trial judge had erred in failing to conduct an adequate inquiry into whether the complainant could rationally communicate evidence about her injury.\textsuperscript{538} It was submitted that, in order to “conduct an inquiry to determine...whether the person is able to communicate the evidence” within the meaning of s. 16, it is insufficient to establish the child’s ability to understand the truth and communicate;\textsuperscript{539} the judge must

\textsuperscript{534} See however, the decision of the Scottish Court of Session in \textit{M v Kennedy} 1993 SCLR 69, analysed in paras. 2.15.16 and 2.15.17.


\textsuperscript{537} It was the prosecution’s case that the accused had put the child’s face against the door of the stove in order to discipline her. While the accused testified that she had discovered the child screaming, after she had burned herself with a butane lighter, the child gave unsworn evidence, upon a promise to tell the truth, that her ‘Nanna’ had put her on the stove.

\textsuperscript{538} The trial judge questioned the child, Debbie-Ann, on her schooling and her appreciation of the duty to tell the truth. The child repeated many times that ‘You have to tell the truth’ and when she was asked whether it was important or unimportant to tell the truth, she asserted that it was important. At the end of the questioning, the judge asked defence counsel whether she had omitted any questions but he replied ‘I can’t say that there is anything I think Your Honour has omitted.’ In further questioning by Crown counsel, the child demonstrated that she knew the difference between the truth and a lie. Hence, the trial judge held that while she did not believe the child capable of understanding an oath, her unsworn evidence should be accepted.

\textsuperscript{539} Mewett A., \textit{Witnesses} (1995) at p. 4-10: “While the new provisions do not expressly require a finding that the child understand what the truth is, it seems clear that this must be implicit in the phrase ‘ability to communicate the evidence’. In any case in \textit{R v McGovern} (1993) 22 C.R. (4th) 359 (C.A.) it was held that a promise to tell the truth necessarily entails a knowledge of what the truth is. Whether expressed or not, understanding the difference between truth and falsehood must be part of testimonial competence or else the promise to tell the truth has no meaning.”
also be satisfied that the child is competent to testify about the events at issue in the trial, which necessitates an inquiry into the child’s ability to perceive and interpret the events in question at the time they took place as well as the child’s ability to recollect accurately and communicate them at trial. By way of response to this argument, the prosecution argued that the word ‘to communicate’ demonstrated an intention on the part of Parliament to exclude all other aspects of testimonial competence and thus the ability of the witness to perceive and interpret the events at the time they occurred and his/her ability to recollect them at the time of the trial did not form part of the test; the only requirement was that the child be able to ‘communicate’ the evidence.

2.14.5 McLachlin J. in the Supreme Court rejected both of these propositions as extreme and stated that the true interpretation of s. 16 lay somewhere in the middle. McLachlin J. adopted the Wigmorean analysis of the testimonial qualifications that together comprise competence and asserted that the trial judge must satisfy himself/herself that the witness possessed these capacities:

“The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable. The enquiry is into capacity to perceive, recollect and communicate, not whether the witness actually perceived, recollects and can communicate about the event in question. Generally speaking, the gauge of capacity is the witness’s performance at the time of trial. The

540 McLachlin J. stated in *R v Marquard* [1993] 4 S.C.R. 223, at p. 236 (S.C.C.) that: “It seems to me that the proper interpretation of s. 16 lies between these two extremes. In the case of a child testifying under s. 16 of the Canada Evidence Act testimonial competence is not presumed. The child is placed in the same position as an adult whose competence has been challenged. At common law, such a challenge required the judge to inquire into the competence of the witness to testify.”


procedure at common law has generally been to allow a witness who demonstrates capacity to testify at trial to testify. Defects in ability to perceive or recollect the particular events at issue are left to be explored in the course of giving the evidence, notably by cross-examination.\textsuperscript{543}

2.14.6 Thus, the Supreme Court held that the phrase ‘able to communicate the evidence’ in s. 16 indicated more than mere verbal ability and required the judge to “explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court”.\textsuperscript{544} If the child satisfied this test – demonstrated the “basic ability to perceive, remember and communicate”\textsuperscript{545} – his / her evidence could be received unsworn by the court pursuant to s. 16(3) upon a promise to tell the truth.\textsuperscript{546}

2.14.7 In a strong dissenting opinion, L’Heureux-Dubé J. criticised the approach adopted by McLachlin J. and asserted that once a child’s ability to communicate – understood as the ability to understand and respond to

\textsuperscript{543} Thus it would appear that the judge has only to determine if the child is capable of telling the truth and not whether he or she is telling the truth. Similarly, the trial judge must determine in the competency examination whether the child witness is capable of perceiving, recollecting and articulating the events which he or she has witnessed and not the credibility of the child’s assertion that he or she actually perceived, recollects and can communicate the occurrence. In this regard, McLachlin J. stated in \textit{R v Marquard} [1993] 4 S.C.R. 223, at p. 236 (S.C.C.) that: “It is not necessary to determine in advance that the child perceived and recollects the very events at issue in the trial as a condition of ruling that the child’s evidence be received. That is not required of adult witnesses, and should not be required for children.” See also: \textit{R v Parrott} [2001] 1 S.C.R. 178, 194 D.L.R. (4th) 427, 150 C.C.C. (3d) 449, para. 14 (S.C.C.).


\textsuperscript{545} \textit{R v Marquard} [1993] 4 S.C.R. 223, 66 O.A.C. 161, 108 D.L.R. (4th) 47, 159 N.R. 81, 85 C.C.C. (3d) 193, 25 C.R. (4th) 1 per McLachlin J., at p. 237: “The test I have expounded is not based on presumptions about the incompetency of children to be witnesses nor is it intended as a test which would make it difficult for children to testify. Rather, the test outlines the basic abilities that individuals need to possess if they are to testify. The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate. This established, deficiencies of perception, recollection of the events at issue may be dealt with as matters going to the weight of the evidence.”

\textsuperscript{546} In \textit{R v Caron} (1994) 72 O.A.C. 287, 19 O.R. (3d) 321, at 327, 94 C.C.C. (3d) 466, at p. 471 (Ont. C.A.) Arbour J.A. considered the above passages from \textit{Marquard} and stated that in order to be found capable of communicating his or her evidence, a witness must demonstrate some ability not only to distinguish between fact and fiction – the child witness in that case demonstrated an ability to distinguish with respect to colour – but also a capacity and a willingness, limited as it may be in the case of a young child, to relate to the court the essence of what happened to her.
questions – was established under s. 16, any limitations due to deficiencies in recollection or perception affected weight rather than admissibility. Since the adequacy of a child’s powers of perception and recollection, even if set at a low threshold, could be assessed differently by different judges, limiting the inquiry to the ability of the child to understand and respond to questions – as prescribed by s. 16 – would be far simpler, easier to determine and would ensure consistency and predictability with regard to the admission of the evidence of children. Indeed, L’Heureux-Dubé J. characterized the approach of the majority of the Court as a subversion of the purpose of the legislative reform, namely, “to do away with presumptions of unreliability and to expand the admissibility of children’s evidence”.548

2.14.8 In *R v Farley*549 the Ontario Court of Appeal analysed the meaning of the phrase ‘able to communicate the evidence’, in relation to a complainant of sexual assault who was aged twenty-six at the time of the trial but who had the comprehension of a three-year-old child. The Court held that the phrase referred to the cognitive and communicative ability of the prospective witness and included the ability to perceive events (including the ability to interpret), the ability to recollect what was perceived and the ability to communicate that recollection.550 However, it was noted that the capacity to perceive entailed not only an ability to perceive events as they occur but also an ability to differentiate between that which was actually perceived

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547 *R v Marquard* [1993] 4 S.C.R. 223, 66 O.A.C. 161, 108 D.L.R. (4th) 47, 159 N.R. 81, 85 C.C.C. (3d) 193, 25 C.R. (4th) 1 per L’Heureux-Dubé J. (S.C.C.): “My colleague has found that, in addition to determining whether the child can communicate the evidence, s. 16 requires the trial judge to conduct a general inquiry into the ability of the child to observe and recollect events before the evidence can be received. She does so, on the basis of the common law requirements which govern the admission of evidence of witnesses whose testimonial competence is questioned. In her view, there is nothing in s. 16 of the Act which indicates an intention to vary the common law rule. I disagree. Such a result would, in my opinion, run counter to the clear words of s. 16 of the Act...”


550 Delisle R., *Evidence: Principles and Problems* (4th ed., 1996) at p. 273, adopting the Wigmorian analysis: “The testimonial qualifications of any witness are to be gauged according to that witness's ability, first, to observe, second, to accurately recall her observation, and, third, to communicate her recollection to the trier of fact. The witness's ability to communicate has two aspects: the intellectual ability to understand questions and to give intelligent answers, and the moral responsibility to speak the truth.”
and that which the person may have imagined, been told by others or otherwise have come to believe. Similarly, the capacity to recollect involved an ability to maintain a recollection of his / her actual perception of the prior event and to distinguish this recollection from information provided by other sources, such as statements made by others to the witness: in other words, the ability to maintain an independent recollection of the events. In addition, the capacity to communicate included the ability to understand questions and to respond to them in an intelligible manner.551

2.14.9 In light of the dearth of recent Irish authorities, the Canadian analysis of the testimonial qualification of communication provides invaluable assistance to the Irish judiciary in relation to the interpretation of the criteria of ‘intelligibility’ in s. 27 of the Criminal Evidence Act 1992, and further, in relation to the creation of a test of competency which is effective in assessing the reliability of a potential child witness. The Supreme Court of Canada has determined that testimonial competence encompasses, the basic ability to perceive,552 remember and communicate, with deficiencies in relation to each of these qualities going to the weight of the evidence rather than its admissibility. The clear distinction drawn by the Court between capacity and reality – that is, the capacity to recollect as distinct from the actual ability to recollect specific details of the event witnessed or experienced – is to be welcomed and, it is hoped, would be adopted in this jurisdiction as a correct statement of the law, since a test of competence which focuses on the child’s capacity to give an intelligible account of

551 R v Farley (1995) 80 O.A.C. 337, 23 O.R. (3d) 445, 99 C.C.C. (3d) 76, 40 C.R. (4th) 190 (Ont. C.A.) Doherty J.A. stated the meaning of the phrase ‘able to communicate’ thus: “The cognitive and communicative components of the competence test found in s. 16(3) refer to capacity, and not to the proposed witness’s actual perception, recollection, and narration of the relevant events. A person may have the capacity to perceive, recall and recount and yet be unable to perform one or more of those functions in a given situation...It must also be stressed that the cognitive and communicative components of s. 16(3) set a relatively low threshold for testimonial competence. Once the capacity to perceive, remember, and recount is established, any deficiencies in a particular witness’s perception, recollection, or narration go to the weight of that witness’s evidence and not to the witness’s competence to testify.”

552 Perception, as opposed to observation, encompasses the concept of interpretation of the events witnessed, which in turn aids recollection since the witness can rationalise the experience, leading to easy ‘file retrieval’.
events relevant to the proceedings can easily be mistaken for a requirement that the child actually give an intelligible account of such events.

2.14.10 However, while the decision of the majority in *Marquard* is admirable in that it represents a succinct and incisive analysis – not unlike that favoured by Wigmore – of the theory of testimonial qualifications which define competency, it is submitted that the dissenting judgment of L’Heureux-Dubé J. is highly persuasive, since it represents a far simpler test, which can be applied with ease and would ensure a high degree of consistency in relation to the receipt of the evidence of children.

2.14.11 The difficulty with the test proposed by the majority is that the concepts involved are highly sophisticated and admit of subjective interpretation with varying results and suggests the necessity to conduct a general inquiry into the capabilities of the child before admitting the child to give evidence, whereas a test which declares a child competent where he/she is capable of giving an intelligible account of events relevant to proceedings – such as where the child demonstrates an understanding questions posed to him/her as a witness and responds in a manner that can be understood – translates more easily into practice and could also have the effect of uncovering the child’s capacity of perception and recollection depending on the questions posed; thus any defects of perception, recollection or communication in the child’s actual testimony would affect the witness’ credibility rather than acting as an obstacle to his or her competence and resulting in the exclusion of relevant evidence. It is submitted that the criticism advanced by L’Heureux-Dubé J. of the approach of the majority – as running counter to the trend in the modern law of evidence to reject the traditional suspicion with which the evidence of children was regarded and to adopt a more liberal approach to the issue of the competence of child witnesses – indicates that this test of competence, as interpreted by the majority, \(^{553}\) may yet be weighted too heavily against inclusion of the evidence of children.

2.15.0 Test Four: Intelligibility

2.15.1 The test which, it is submitted, best achieves a balance between the competing concerns of the admission of all relevant comprehensible evidence and the protection of the rights of the accused – in particular, against the admission of unreliable and highly prejudicial evidence – is the ‘intelligibility’ test. Under the terms of this test, a prospective child witness will be permitted to give evidence unsworn provided:

(i) the child is under 14 years of age, or, being aged 14 years or more, has a “mental handicap”; and  

(ii) the court is satisfied that the child is capable of giving an intelligible account of events relevant to those proceedings.

2.15.2 Unlike the earlier statutory tests of competence, this test prescribes an age limit for the reception of evidence otherwise than upon oath – fourteen years.
below which children are entitled to give evidence unsworn provided they satisfy the other statutory pre-condition to admissibility, namely, 'intelligibility'. However, notwithstanding its importance with regard to the form in which a child could give evidence, no guidance is given stipulating whether the important date for the purposes of assessing the child's age in relation to his / her capability to give evidence was either the date of commencement of the proceedings or the first day of the trial. Given the often significant delay between the commencement of proceedings and the date of trial, it could be argued that a child should not be considered too old to qualify under the unsworn evidence test merely as a

556 In this regard, Healy notes that: “Whether and to what extent 14 years is intended either as a cut-off point or as a guide is less clear....The provision is clearly enabling, and it does not appear to intend to oust the trial judge’s discretion to accept the sworn evidence of a child under 14 years or the unsworn evidence of a child over 14 years, although it may be expected that a stronger case would need to be made for either. The common law tends against operating a fixed chronological scale for competence or capacity with respect to testifying and most other actions.” Healy, John Irish Laws of Evidence (2004) para. 2-13, at p. 50.

557 If the child was aged fourteen years or more, absent a mental handicap, he / she was not permitted to give evidence otherwise than upon oath. Accordingly, if such child failed the test for the admission of sworn testimony, he / she was considered incompetent to give evidence. This defect in the law was removed by virtue of s. 56 of the Youth Justice and Criminal Evidence Act 1999 in England, which provides that where a witness, aged fourteen years or over, fails the test for the receipt of sworn evidence, the court may accept his / her oral testimony unsworn. However, the current Irish legislation, the Criminal Evidence Act 1992, is silent in this regard and it is arguable that the situation which prevailed in England before the ameliorating provisions of the Youth Justice and Criminal Evidence Act 1999, still applies in this jurisdiction; in R v Brasier (1779) 1 Leach 199, 168 E.R. 202, which was adopted in this jurisdiction in Attorney General v O'Sullivan [1930] IR 552 (C.C.A.), the Court held that no testimony could be received except upon oath and that if a child was found incompetent to take an oath, his or her testimony could not be received. Obviously, a person aged more than fourteen years who is without a mental handicap cannot give unsworn evidence under the terms of the statute in any event. The question which is yet to be clearly determined is whether a child aged less than fourteen (or an older person with a mental handicap) who was allowed to give evidence on oath and is subsequently found to be incompetent to give this form of evidence, can be permitted to give his / her evidence unsworn, particularly in view of the fact that the only condition of competency under s. 27 of the Criminal Evidence Act 1992, is intelligibility. With regard to its statutory forerunner, s. 30 of the Children Act 1908, the Law Reform Commission noted in relation to the decision of the Court of Criminal Appeal in O'Sullivan [1930] that it failed to "address the question of what should be done in a case where under the law as it stands the child is sworn and gives his evidence but during cross-examination his capacity to give sworn evidence is successfully challenged": Law Reform Commission of Ireland, Discussion Paper on Child Sexual Abuse, (August, 1989) para. 5.08, at p. 85. The Commission further asserted that any 'saving measure' which would allow the court to treat the evidence as unsworn testimony in lieu of striking out the evidence and withdrawing it from the jury, could be constitutionally suspect, since it retrospectively imbues with validity that which was invalid.

558 Section 2(3) of the Criminal Evidence Act 1992 simply provides that: “Where in any criminal proceedings the age of a person at any time is material for the purposes of any provision of this Act, his age at that time shall for the purposes of that provision be deemed, unless the contrary is proved, to be or to have been that which appears to the court to be or to have been his age at that time.” It could not in good sense be argued that the relevant date was the date of the event the subject matter of the proceedings since a person could testify as an adult to sexual abuse committed while the witness was still a child.

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result of attaining his or her fourteenth birthday between the time of initiating the proceedings and the date of commencement of trial. However, since the competence of the child is determined by the trial judge either at the start (traditionally) or during the course of the trial (the modern ‘continuous assessment’ approach) it may also logically be argued that the relevant date is the first day of the trial,\textsuperscript{559} since the first day of trial is a definite date about which there can be little argument, it is perhaps preferable to use this date as the benchmark rather than the date of the initiation of the proceedings since the latter date may be contested.\textsuperscript{560} The courts have dealt with this issue by permitting ratification upon oath of evidence previously given by a child witness to the court in circumstances where an error was made in respect of the child’s age and the child had, at the relevant time, exceeded the age limit for the receipt of his / her evidence unsworn. However, this course was only open to the courts where such ratification constituted simple “confirmation upon oath that an earlier

\textsuperscript{559} The ‘date of trial approach’ was adopted by the trial judge in \textit{R v Lee} [1988] Crim LR 525 (C.A.), who, acting under the mistaken impression that the complainant in relation to charges of rape and unlawful sexual intercourse was a child of tender years – she was, in fact, aged fifteen years and six months at the date of the trial – admitted her unsworn evidence, following a preliminary examination during which the child was questioned as to her understanding of the obligation of an oath and it was concluded that she was not competent to give sworn evidence. The complainant then gave her evidence unsworn and was cross-examined, re-examined and cross-examined further; her evidence was contradictory and unsatisfactory in many respects. Upon discovering the child’s age, the trial judge recalled her and informed her that she was entitled to give sworn evidence; she was then sworn and, when invited, she affirmed her earlier account. The Court of Appeal allowed the accused’s appeal against conviction and held that the complainant’s unsworn testimony did not constitute evidence, since the complainant was not, at that time a child of ‘tender years’ and, accordingly did not fall within the terms of s. 38 of the Children and Young Persons Act 1933. It was noted that a witness is not entitled to be sworn, and that witnesses unable to understand the nature of the oath by reason of mental defect, weak intellect, or intoxication were not competent. It was held that, in the circumstances of the case, it was not proper to allow ratification on oath of previous unsworn evidence, given the inconsistencies in the unsworn evidence; the trial judge had erred in simply asking the complainant if her earlier evidence was correct since, in light of the internal contradictions, all of the evidence could not, logically, have been correct. The Court of Appeal concluded that a material irregularity had occurred and ordered that the conviction be quashed. The Court concluded that: “\textit{When the Judge concluded that the evidence of the complainant was not admissible unsworn under section 38(1) of the Children and Young Persons Act, he ought to have discharged the jury and ordered a retrial. We can understand his reluctance to do this, but we have reached the conclusion that it was only by taking this course that his earlier mistake could be put right. It hardly needs to be said that on a retrial the complainant’s competence and capacity to understand the nature of the oath could and should have been investigated.”} See, also the decision of Kinlen J. in \textit{White v Ireland} [1995] 2 IR 268, at p. 283 (H.C.).

\textsuperscript{560} Such as where a summons lapses without having been served and is re-issued, the question would arise whether it should be the date of the issue of the first summons or the issue date of the renewed summons which should apply.
Accordingly, ratification was not permissible in order to: (i) correct a mistake made in receiving evidence unsworn which ought to have been sworn; or (ii) where the evidence to be ‘ratified’ was internally inconsistent. It should be noted that the reception of video-recorded evidence – as the evidence-in-chief of a child witness – posed particular problems in this context since the oath was often not administered, if at all, until just before the cross-examination of the witness.

562 R v Lee [1988] Crim LR 525 (C.A.). See also: R v Hampshire [1996] QB 1, at p. 12, [1995] 2 All ER 1019, [1995] 2 Cr App Rep 319 per Auld J. (C.A.): “Clearly, where there is an issue as to the competence of a witness, it should be dealt with at the earliest possible moment, not as an act of purported ‘ratification’ after the evidence has been given (see R v Lee [1988] Crim LR 525). However, here there was no such issue, and the recorder was properly anxious to do all that he could to remedy what he regarded as his earlier procedural error. He is not to be criticised for that.” In R v Sharman [1998] 1 Cr App Rep 406 (C.A.) the Court of Appeal held that failure to administer the oath was not a mere technicality but amounted to a material irregularity in the trial. The defendant was convicted of various counts of sexual offences against children: two counts of indecent assault, two counts of gross indecency with a child, one count of attempted rape and two counts of rape. One of the witnesses gave evidence partly by way of a video recording made when she was aged thirteen, and partly by way of oral evidence by live link; she was not sworn or asked to affirm at any stage, although she was aged fourteen at the date of the trial. The Court of Appeal accordingly quashed the conviction and ordered a retrial.

563 R v Brasier (1779) 1 Leach 199, 168 E.R. 202; R v Marsham, ex p. Lawrence [1912] 2 K.B. 362; R v Hill (1851) 2 Den. 254; and R v Dunning [1965] Crim. L.R. 372 applied. In R v Lee [1988] Crim LR 525 (C.A.) the Court of Appeal held that the proper course for the trial judge to have adopted would have been to have “directed himself whether there was evidence from which he could conclude that the girl understood the nature of the oath and was competent”, before swearing her as a witness. If there was no such evidence – as, it is submitted, was the case here – he should have questioned the girl further. However, the Court acknowledged that, even if such evidence had transpired from further questioning, it would have been wrong to swear the child at that point given the Court’s conclusion that it would not be proper in these circumstances to allow the child to ratify her earlier – inconsistent – evidence. See also: R v Simmonds [1996] Crim LR 816 (C.A.), and Phipson on Evidence (15th ed., 2000) at p. 170.
564 The difficulty of an ‘over-age witness’ was again encountered in R v Simmonds [1996] Crim LR 816 (C.A.). The appellant was convicted of the indecent assault of an eleven-year-old girl. Although the child was aged fourteen at the date of the trial, she was not sworn before being cross-examined and previous video recordings were admitted into evidence as her evidence-in-chief. Her evidence was internally inconsistent. The trial judge permitted the child to be sworn then questioned her in the presence of the jury asking her both whether the contents of the video taped interviews were true and whether her answers given in cross-examination were true; the witness responded affirmatively in both respects. The Court of Appeal held that remedial measures taken by the trial judge – the two simple questions posed – were not “effective to transform answers which were not evidence given under oath into evidence which could be treated as if it had been given under oath”. The Court asserted that it was unnecessary to say more on this point since, unlike in Lee, there was here no explanation by the trial judge to the jury of what had occurred, no warning to the jury that the answers given by the witness did not constitute evidence in the case “unless and until they were given that character by some subsequent ratification”. In the absence of such a warning, the Court held that the conviction was unsafe and should be quashed; the appeal was allowed.

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This ‘intelligibility test’ was adopted in Ireland by virtue of s. 27 of the Criminal Evidence Act 1992.\textsuperscript{565} Although not defined in the legislation, ‘intelligibility’ is understood as the child’s ability to understand questions posed and give answers which can reasonably be understood.\textsuperscript{566} The “intelligibility test” is limited to the demonstrated capability of the child of giving “an intelligible account of events which are relevant to those proceedings”.\textsuperscript{567} Since the child, in any preliminary examination, would not be examined as to his actual knowledge of the events the subject-matter of the proceedings, it could be said that this test is not conducive to a preliminary examination of the competence of a child witness and that, instead, the child’s competence – and, indeed the legal relevance of the events described by the child to the proceedings – must be scrutinised with reference to this test throughout the course of his or her evidence, thereby incurring the risk that the child, having once been determined competent,

\textsuperscript{565} The Criminal Evidence Act 1992 (No. 12 of 1992). Section 27 provides that: “Notwithstanding any enactment, in any criminal proceedings, the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.” By virtue of s. 2(1) of the Criminal Evidence Act 1992, “criminal proceedings” includes proceedings before a court-martial and proceedings on appeal. The reference to the reception of evidence otherwise than on “affirmation” constitutes a recognition of the ability of a person to give sworn evidence either on oath or on solemn affirmation, a facility which did not exist at the time of the earlier legislation: s. 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914. Healy, John Irish Laws of Evidence (2004) asserts in para. 2-10, at p. 49: “[U]ntil recently the judges required proof that the child could give both an intelligible and reliable account. The additional requirement of reliability may now be considered at odds with the legislative preference for assessment only of the child’s ability to give an intelligible account, with respect to giving unsworn evidence in Ireland under s. 27 of the 1992 Act ....” However, it is respectfully suggested that there is no authority to support the existence of a separate pre-condition to competence – namely, reliability – prior to the enactment of s. 27 and, moreover, that the case cited, The People (Director of Public Prosecutions) v J.T. (1988) 3 Frewen 141 (C.C.A.) does not provide such authority.

\textsuperscript{566} Under the modern legislation in England – s. 53(1) and s. 55(8) of the Youth Justice and Criminal Evidence Act 1999 – a person is regarded as “able to give intelligible testimony” if he or she is able to: (i) understand questions put to him or her as a witness; and (ii) give answers to them which can be understood. The interpretation of the meaning of ‘intelligibility’ has not been expressly addressed in this jurisdiction, however, it is to be hoped that the Irish courts will adopt this interpretation of the phrase ‘intelligibility’ in the application of the test of competence contained in s. 27 of the Criminal Evidence Act 1992.

\textsuperscript{567} The Irish legislature has also adopted the intelligibility test in relation to the reception of the unsworn evidence of child witnesses in civil proceedings. Section 28 of the Children Act 1997, mirrors exactly the provisions of s. 27 of the Criminal Evidence Act 1992, in that it permits the reception of the unsworn evidence of children aged less than fourteen years where the child is capable of giving an intelligible account of events which are relevant to the civil proceedings. Once again, the legislation provides that the unsworn evidence of a child witness may corroborate the sworn or unsworn evidence of any other person, however, this provision is unnecessary in civil proceedings and probably resulted from an indiscriminate transposition of the terms of the criminal statute.
would subsequently be found to be incompetent and the jury would have to be directed to disregard his / her — often highly prejudicial — evidence. However, as noted above, this is to confuse the child’s capacity with the child’s actual abilities; a preliminary examination can only test the child’s capabilities and cannot test the child’s actual abilities of perception, recollection and communication at the time of the events which are relevant to the proceedings.  

2.15.4 A test which demands “sufficient intelligence to justify to the reception of the evidence” differs from the “intelligibility” test in that the former test requires an examination of the quality of the witness, while the latter test measures the quality of the evidence given by the witness. Accordingly, the former condition is both more difficult both to measure and to satisfy while the latter test represents a relaxation of the rules governing the competence of children and the adoption of a more practical and realistic approach towards the evidence of children. In addition, it should be noted that empirical research relating to children as witnesses indicates that competence is a contextual rather than an absolute quality so that, for example, “the younger child may not have mastered the concept of logic, but can nonetheless answer simple questions”.


569 New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 41, at p. 11: “[A] test of this nature, which focuses on communication abilities, is preferable to one purporting to test intellectual development. A test of communication ability seems the only one capable of fulfilling its purpose. If the issue is raised, the judge will need to ask the child some questions which, even if not directly relevant to the proceedings, should provide a guide to their ability to communicate effectively on matters which are relevant to the proceedings.”

570 In this regard, it is submitted that the assertion of O’Malley that the “new formula does not differ very dramatically from the old” is not borne out by an examination of the two legislative provisions, however it is accepted that the new test is “certainly designed to facilitate rather than restrict the admission of evidence.” O’Malley, T., Sexual Offences: Law, Policy and Punishment, at p. 235. Healy, John Irish Laws of Evidence (2004) para. 2-12, at p. 50: “By identifying intelligibility as the sole criterion when considering whether to receive the unsworn evidence of a child under 14 years, the legislature signalled a vital shift in policy, which is to encourage and receive the evidence of children, where relevant, with any concerns in individual cases instead affecting the evidence’s weight or value by the close of trial”.

571 Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990), (September, 1990), at para. 5.03, at p. 50. In its previous Discussion Paper on Child Sexual Abuse, (August, 1989) at para. 5.21, at p. 91 the Commission cited the following passage from the Australian Law Reform
While it would appear that the ‘intelligibility’ test assesses all three of the testimonial qualifications comprised in competence – observation, recollection and communication – it is interesting to note that the legislature has, in this statutory provision, abandoned the express requirement that the child understand the obligation to speak the truth or otherwise establish to the satisfaction of the court a sense of moral responsibility\(^\text{572}\) as a precondition to a finding of competence. As indicated above, this requirement was the subject of intense criticism as, inter alia, an ineffective test of competence premised upon an unjustified skepticism regarding the capabilities of children as witnesses. However, the pruning of this requirement from the test of competence in relation to the admission of unsworn evidence from potential child witnesses was disapproved in this jurisdiction as “unfortunate” in light of the “dire consequences which a conviction on a count of child sexual abuse can have under our present sentencing system” and having regard to the limited practical value of the penalty against the falsification of evidence.\(^\text{573}\) It is submitted that to so argue is to fail to recognize that the admission of the unsworn evidence of a

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572 Waish, Dermot, *Criminal Procedure* (2002) para. 18.05, at p. 858: “The focus of the test here is not on the witness’ capacity to understand the nature and consequences of an oath, but his capacity to give an intelligible account of the events relevant to the proceedings.” It is respectfully submitted that Walsh’s statement is somewhat misleading since a potential child witness was never required to demonstrate to the satisfaction of the court an understanding of the nature and consequences of the oath in order to be permitted to give unsworn evidence; indeed, it was previously a pre-condition for the reception of the evidence of a child otherwise than upon oath that he / she was unable to understand the obligation of an oath. Accordingly, to the extent that Walsh’s statement may be interpreted as indicating that, prior to this legislative reform, the focus of the test of the competence of a child to give unsworn evidence was on his / her ability to understand the nature and consequences of an oath, it is inaccurate and misleading. However, it may be that the author was simply referring to the need to establish the absence of such understanding in the competence test contained in s. 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914.

573 O’Malley, T., *Sexual Offences: Law, Policy and Punishment* (1996), at p. 235: “The penalty...may seem a sufficient deterrent against the falsification of evidence, but this is of limited practical value. A child under the age of seven years is completely immune from protection for any offence and a child between the ages of seven and 14 years is entitled to a rebuttable presumption of incapacity.”
child witness, even in the absence of a mandatory corroboration requirement or warning, does not, of itself, guarantee a conviction; there are contained in the trial process and the rules of evidence many safeguards designed to protect the constitutional rights of the accused against an unfair trial or a trial otherwise than in due course of law. The test of competency is not intended solely as a bulwark against interference with the accused’s rights, rather it has as its function the determination of the reliability of a potential child witness and, in this regard, it is worth reiterating that a test of competence which includes a requirement that a child understand the duty of speaking the truth does not guarantee reliability of testimony. 574

2.15.6 It should be noted that, in common with its statutory predecessor, notwithstanding that a child may satisfy both the age requirement and the intelligibility test, the court appears to retain a discretion to reject the evidence of the child and declare him / her to be an incompetent witness since s. 27 of the Criminal Evidence Act 1992 is not stated in mandatory but in discretionary terms. This may simply be a statutory acknowledgement of a greater judicial discretion to exclude evidence wherever its prejudicial effect outweighs its probative value575 or may refer to a more specific exclusionary discretion allowing the court to rule a potential child witness incompetent – and direct the jury to disregard such evidence as they had already heard – where, for example, the witness, during the course of his /

574 The Law Reform Commission of Ireland acknowledged the difficulty of arriving at a test of competence which would command universal acceptance, however, they recommended confining the test to ascertaining “whether the child has the necessary verbal skills to give an account of the relevant events which is intelligible to the Tribunal”. The Commission was not dissuaded from this view by arguments that innocent people could be convicted on the uncorroborated testimony of small children; it was noted that, given the inherent safeguards of the criminal process itself “tilted as sharply as it is in favour of the accused, the possibility to any serious miscarriage of justice occurring is so remote that it can reasonably be discounted”: Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990) para. 5.17, at p. 54.

575 See: Keane, Adrian The Modern Law of Evidence (6th ed., 2006) at pp. 45-46 and 48-52. It is asserted at p. 48 that: “[T]he trial judge, as part of his inherent power and overriding duty in every case to ensure that the accused receives a fair trial, always has discretion to refuse to admit legally admissible evidence if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value. Exercise of the discretion is a subjective matter, each case turning on its own facts and circumstances. The judge must also balance on the one hand the prejudicial effect of the evidence against the accused on the minds of the jury and on the other its weight and value having regard to the purpose for which it is adduced. Where the former is out of all proportion to the latter, the judge should exclude it.”
her testimony, appeared to be of unsound mind, became incoherent or failed to testify in a way that made sense, or where it appeared that the child's evidence had been unduly influenced or was the subject of coaching by a third party.

2.15.7 The modern test of competence in England – as prescribed by statute – is also an ‘intelligibility’ test, although it differs from that enacted in this jurisdiction in that it provides a general presumption of competence for all witnesses at every stage in a criminal proceedings, regardless of age, and regards any witness as incompetent if it appears to the court that person is not able to:

(a) understand questions put to him/her as a witness; and

(b) give answers to them which can be understood.

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578 Murphy P., Murphy on Evidence (7th ed., 2000) at p. 445: “Under the corresponding provision of s. 1(a) of the Criminal Evidence Act 1898 (which is replaced by the 1999 Act) it was held that the expression, ‘at every stage in the proceedings’, meant that the accused is entitled to give evidence not only before the jury at trial, but at committal proceedings, on the voir dire, and in mitigation of sentence: R v Rhodes [1899] 1 QB 77; R v Wheeler [1917] 1 KB 285.”
579 Section 53(1) of the Youth Justice and Criminal Evidence Act 1999 in England provides that: “At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.” This represents a statutory codification of the general rule at common law that all witnesses – subject to the exception of, inter alia, children – were competent to give evidence. Hannibal M. and Mountford L., The Law of Criminal and Civil Evidence (2002) at p. 289: “This may be regarded as the codification of the Court of Appeal’s decision in R v Hampshire [1995] 3 WLR 260....” Sections 53 and 54 of the Youth Justice and Criminal Evidence Act, 1999, came into force on 24th July, 2002 by virtue of the Youth Justice and Criminal Evidence Act 1999 (Commencement No. 7) Order 2002 (S.I. 2002 No. 1739). They do not apply to proceedings instituted before that date.
580 Murphy P., Murphy on Evidence (7th ed., 2000) at p. 465: “It would be surprising if the courts did not take more or less the same age ranges as a rule of thumb in applying s. 53(3) as the courts did in classifying a child as one ‘of tender years’ at common law. As a matter of practicality, if not of law, some very young children will necessarily be found to be incompetent. And there may be other cases of a borderline nature, in which the court will be disposed to exercise its discretionary power to exclude the evidence of a young child.”
581 Section 53(3) of the Youth Justice and Criminal Evidence Act 1999 in England provides that: “A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to – (a) understand questions put to him as a witness, and (b) give answers to them which can be understood.” A witness who can satisfy these two criteria is considered “able to give intelligible testimony” by virtue of section 55(8) of the Youth Justice and Criminal Evidence Act 1999. See also: Hannibal M. and Mountford L., The Law of Criminal and Civil Evidence – Principles and Practice (2002) at p. 285; and Keane, Adrian The Modern Law of Evidence (6th ed., 2006) at pp. 133-136.
This same dual test – understanding questions posed and giving answers which can be understood – is used to assess competence and to determine the form in which a witness, having attained the age of fourteen years,\(^{582}\) may give his / her evidence; for the purposes of determining whether the evidence of a young witness should be received upon oath, this dual test is described as the ability to give "intelligible testimony".\(^{583}\) Furthermore, where a witness is able to give intelligible testimony, he / she shall be presumed to have a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath, "if no evidence tending to show the contrary is adduced (by any party)"\(^{584}\), where such evidence is adduced, it is for the party seeking to have the witness sworn to satisfy the court that, on the balance of probabilities, the witness has attained the age of fourteen years and has the requisite appreciation.\(^{585}\) Where the witness is competent to give evidence, in the sense of satisfying the test of ‘intelligibility’, but is not permitted to give evidence upon oath – either by reason of the fact that he / she has not attained the age of fourteen years or he / she does not possess the requisite appreciation – such witness shall give evidence unsworn.\(^{586}\) Accordingly,

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\(^{582}\) Section 55(2)(a) of the Youth Justice and Criminal Evidence Act 1999.

\(^{583}\) Section 55(8) of the Youth Justice and Criminal Evidence Act 1999 in England provides that: "For the purposes of this section, a person is able to give intelligible testimony if he is able to – (a) understand questions put to him as a witness, and (b) give answers to them which can be understood".

\(^{584}\) Section 55(2)(b) and s. 55(3) of the Youth Justice and Criminal Evidence Act 1999.

\(^{585}\) Section 55(4) of the Youth Justice and Criminal Evidence Act 1999. Furthermore, s. 55(6) of the Act of 1999 provides that expert evidence may be received on the question. Although s. 54(2) provides that it is for the party calling the witness to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence, that is to say, able to give intelligible testimony, once this has been established, however, the onus of proof shifts to any party challenging the competency of the proposed witness to establish (by adducing evidence) that such witness does not have the requisite appreciation both of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath. Murphy P., Murphy on Evidence (7th ed., 2000) at p. 447: "The one difference is the issue of the burden of proof. Because of the presumption that a competent witness also possesses the appreciation necessary to take the oath, the burden of proof rests on the party calling the witness only if evidence is adduced by any party tending to show that the witness should not take the oath (s. 55(4)). As under s. 53, the standard of proof in such a case is the balance of probabilities."

\(^{586}\) Under s. 56 of the Youth Justice and Criminal Evidence Act 1999, where a child aged less than fourteen is a competent witness but does not appreciate the solemnity of the occasion or the particular responsibility to tell the truth, he / she is not permitted to give his or her evidence on oath and must give such evidence unsworn. Similarly, in relation to a competent witness, aged fourteen years or more, where: (i) evidence is adduced to rebut the presumption that he / she has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath; and (ii) the party seeking to have him sworn fails to satisfy the court, on
under this statutory scheme, it is not necessary to establish an understanding of the obligation to tell the truth in the context of unsworn evidence in order to prove intelligibility since the former is only required in addition to the latter where the witness is to give evidence on oath; although, in relation to sworn evidence, proof of intelligibility carries a rebuttable presumption that the witness also has sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath.

2.15.9 As in the modern Irish statutory provision described above, there is no express mention in the legislation of the more general understanding of the obligation to speak the truth, which was traditionally required before a witness was permitted to give evidence unsworn. That does not resolve the question of whether such an understanding can be implied into the concept of intelligibility itself and in that way form a pre-condition to competency to give evidence, sworn or unsworn. It is submitted that a balance of probabilities, that he / she has such an appreciation, such witness must, likewise, give his / her evidence unsworn. This represents a welcome change in the previous law and minimizes the risk of the loss of crucial evidence. See: Hannibal M. and Mountford L., The Law of Criminal and Civil Evidence – Principles and Practice (2002) at p. 291.

587 It is submitted that, as asserted by McEwan, Jenny “In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999 (2000) EvProv 4(1): “Judges have moved on from the old method of engaging a potential child witness in metaphysical debate on the difference between truth and falsehood. Instead, they have been taking account of a child’s actual ability to communicate.” It is arguable that, like the former English test of whether a child was ‘incapable of giving intelligible testimony’ pursuant to s. 33A(2A) of the Criminal Justice Act 1988, as amended, there is no need to decide whether the witness knows the difference between truth and lies, or even the importance of telling the truth: G v Director of Public Prosecutions [1997] 2 All ER 755, [1998] QB 919, at pp. 924-925, (C.A.) approving Auld J., obiter, in R v Hampshire [1995] 3 WLR 260, at p. 268, [1996] QB 1 (C.A.). However, it is also stated that a person should be treated as incompetent (or unable to understand questions put to him / her as a witness and unable to give answers to them which can be understood) if he / she is unable to distinguish truth from fiction or fact from fantasy: R v D (1995) The Times 15 November per Swinton Thomas L.J. (C.A.): “Once a child can give a comprehensible account and distinguish between fact and fiction, whether the child is telling the truth or not is a matter for the jury.” When s. 55(3) is examined alongside s. 55(8), it appears that the former argument may be more convincing, although the relationship between the ability to give intelligible testimony and an appreciation of the obligation to tell the truth in the Youth Justice and Criminal Evidence Act 1999 is complex. Dennis, I.H. The Law of Evidence (2nd ed., 2002) asserted at p. 455 in relation to the ‘reverse onus’ test of intelligibility in s. 33A(2A) of the Criminal Justice Act 1988, as amended, that: “Built into the notions of the ability to understand questions about the offence and to answer them meaningfully seems to be an essential basic sense of objectivity of experience. In other words, the court must be satisfied, if the issue is raised, that the ‘intelligibility’ of the child’s evidence incorporates an understanding of the concept of ‘what really happened’ and of the ability to describe it. Without these elements it is difficult to see how the child’s evidence could be coherent or
witness, although incapable of distinguishing between truth and fiction, fact and fantasy, may be capable of giving answers which can be understood, although such answers may not be believed; therefore, it is submitted that any defect in the child’s understanding of the obligation to speak the truth is not a bar to competency, although it may, and indeed should, affect the credibility of a witness and the weight to be attached to his/her evidence.

2.15.10 It is clear from this examination of the modern English approach to the competence of child witnesses that the English statutory scheme is more inclusive of the evidence of children than its Irish counterpart. While the ‘intelligibility’ test is a common feature of both jurisdictions, its application in England reflects a greater confidence in the capabilities of children as witnesses. The provisions of the Youth Justice and Criminal Evidence Act 1999, are obviously designed to reduce to a minimum the number of obstacles in the way of children testifying, whether sworn or unsworn, in order to facilitate the reception of all relevant understandable evidence in relation to the subject-matter of the proceedings. The ‘intelligibility’ test itself enjoys the huge advantage of being easy to apply to any individual child; the Act is designed to ensure that, in the majority of cases,

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589 Murphy P., Murphy on Evidence (8th ed., 2003) at p. 536: “The modern practice is opposed to the suspicion which attached to the evidence of children at common law. In deference to this, the rules requiring corroboration of their evidence have been abolished and they are now competent on the same basis as adults. Time will tell whether these developments are necessarily as desirable as Parliament has assumed.”


591 As noted above, it is far easier to determine whether a child understands questions put to him or her as a witness and gives answers to them which can be understood, than to determine whether a child has sufficient intelligence to justify the reception of the evidence and an understanding of the duty to speak the truth.
intelligibility will be the sole criterion for determining the competence of a child witness, since there is no express requirement that the child understand the duty of speaking the truth, where his / her evidence is to be given unsworn, and proof of intelligibility implies a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth involved in taking an oath – in the absence of proof to the contrary – where the witness is to be sworn.592 The Act has the further twin benefits of extending the presumption of competence to child witnesses – subject, where challenged, to the test of ‘intelligibility’ – and regarding the unsworn evidence of children as equal in value to the sworn evidence of children,593 thereby dismantling any perceived hierarchy of forms of evidence. In response to the imbalance in favour of the exclusion of the evidence of children in earlier schemes governing the admission of such evidence

592 In addition, as noted above, s. 55(4) of the Youth Justice and Criminal Evidence Act 1999, which governs the situation where a party adduces evidence tending to show that a witness lacks the requisite appreciation, reduces the standard of proof of such appreciation – borne by the party seeking to have the witness sworn – to the civil standard of proof.

593 Murphy P., Murphy on Evidence (7th ed., 2000) asserts at pp. 447-448 that the weight of unsworn evidence, “given the circumstances which must be found to exist before it is permitted”, will be less than that of sworn evidence and further advocates a warning – not a resurrection of the corroboration warnings – but “given that there must have been a finding that the witness (whether child or adult) lacks an appreciation of the solemnity of the occasion or of the responsibility involved in taking an oath, some comment by the judge may well be found to be appropriate.” However, it is submitted that this approach risks the trial judge trespassing into the exclusive domain of the jury. The test of competency and the form in which a witness gives evidence are matters of law for the determination of the trial judge. In contrast, the weight to be attached to the evidence and the credibility of the witness are matters for the assessment of the jury. Given this division of labour, it may be inappropriate for the trial judge to direct the jury in relation to the tests to be satisfied before evidence can be received from a witness sworn or unsworn, where such direction is made with a view to, or even with the effect of, assisting the jury in determining the weight to be attached to such evidence. While Murphy’s concern that the evidence of a child – in relation to whom there has been a finding by the trial judge that he or she lacks an appreciation of the solemnity of the occasion or the particular responsibility to tell the truth which is involved in taking an oath – should be treated in a like manner and afforded the same weight as a witness whose competency is understandable, nonetheless, a child witness who is permitted to give evidence unsworn has satisfied the court that he or she is able to understand the questions put to him or her as a witness and give answers to them which can be understood; all witnesses who are permitted to give evidence, whether sworn or unsworn, are considered by the court to be capable of giving intelligible testimony. In the absence of statutory support for a theory of hierarchy of forms of evidence, it is submitted that the weight to be attached to the evidence of a witness – that is, an individual witness, rather than a class of witnesses – whether sworn or unsworn, is a question for the determination of the jury alone. The abolition of the corroboration requirement and mandatory corroboration warning in relation to the unsworn evidence of children coupled with the new tests of competency minimize the differences between sworn and unsworn testimony and appear to evidence a legislative intention to treat both forms of evidence equally. See also: s. 16.1(8) of the Canada Evidence Act, R.S.C., 1985, c. C-5; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27, which provides that “if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath”.
(sworn or unsworn), this statutory scheme attempts to establish a new 'balance', favouring the inclusion of such evidence save in specified circumstances; “[T]his relatively simple provision is the culmination of a period of about two centuries of uncertainty, during which common law rules which erred greatly on the side of incompetence were succeeded by statutory provisions which were tentative and often confusing”.594

2.15.11 However, a statutory predecessor595 of the modern English approach to the evidence of children contained a variation on the 'intelligibility' test which placed an even greater emphasis on inclusiveness.596 Pursuant to this test, the evidence of a child witness could be received by the courts where:

(i) the child was under 14 years of age;597

(ii) unless it appeared to the court that the child was incapable of giving intelligible testimony.598

595 Section 33A(1), (2) and (3) of the Criminal Justice Act 1988 were inserted by s. 52 of the Criminal Justice Act, 1991; s. 33A(2A) was added by the Criminal Justice and Public Order Act 1994 (Sch. 9, s. 33). See also the modern statutory scheme in Canada, analysed above in sections 2.8.12 and 2.8.13: s. 16.1 of the Canada Evidence Act, R.S.C., 1985, c. C-5; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27.
596 Section 33A of the Criminal Justice Act 1988, as amended, provides: “(1) A child’s evidence in criminal proceedings shall be given unsworn. (2) A deposition of a child’s evidence may be taken for the purposes of criminal proceedings as if that evidence had been given on oath. (2A) A child’s evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony. (3) In this section ‘child’ means a person under fourteen years.” This legislation adopted the recommendations of the Advisory Group on Video Evidence which had suggested inter alia that: (i) the general requirement to formally prove a child’s competence to give evidence should be abolished; (ii) young people aged between 14 and 17 should be allowed to give sworn evidence; and (iii) children below 14 should always give unsworn evidence. Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, December 1989) para. 5.13, at p. 50.
597 As in Ireland, the Criminal Justice Act 1988, as amended, in England drew a distinction for the purpose of the form of evidence given by a competent witness, between a witness aged below fourteen years and a witness aged fourteen years and above. The legislation stipulated that a witness aged less than fourteen years was a "child" for the purposes of the legislation and could only give unsworn testimony pursuant to s. 33A of the Criminal Justice Act 1988, as amended by s. 52 of the Criminal Justice Act 1991 and Sch. 9, s. 33 of the Criminal Justice and Public Order Act 1994.
598 Dennis, I.H. The Law of Evidence (2nd ed., 2002) at pp. 454: “This appears to set up a statutory presumption of competency which relieves the party tendering the witness from the normal requirement to prove the competency of the witness if competency is challenged, in the case of the prosecution to the criminal standard of proof. If seems to be envisaged that the child will begin to give evidence without inquiry as to competency and will be stopped only if it becomes clear that he or she cannot give an intelligible account. There is no such presumption of competency under the [Youth Justice and Criminal Evidence Act] scheme, although in practice this is unlikely to make any difference".
2.15.12 Intelligibility’ was interpreted as the ability to “understand questions and to answer them in a manner which is coherent and comprehensible”. It was further noted that where a child satisfied the test of ‘intelligibility’ the language of the statutory provision was mandatory, the trial judge did not enjoy a residuary discretion to exclude the evidence of the child and any question whether the child was telling the truth was a question of credibility or weight for the jury to assess.

2.15.13 Despite the clear wording of this statutory provision and the non-partial repeal of the provisions of earlier English legislation – providing a combined test of ‘intelligence and moral responsibility’ – some commentators still argued that the requirement of an understanding of a duty to speak the truth remained; meaning that only the first pre-condition to competence was repealed and not the second. As noted above, it was asserted that a child’s testimony could only really be considered ‘intelligible’ if the child demonstrated a capacity to distinguish between fact and fantasy or truth and falsehood and thus, to this extent at least, a child

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599 Director of Public Prosecutions v M [1997] 2 Cr App R 70, at p. 75, per Phillips L.J. (C.A.). In the new Canadian statutory scheme, s. 16.1 of the Canada Evidence Act, R.S.C., 1985, c. C-5; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27, an even simpler definition of ‘intelligibility’ is adopted; namely, the ability “to understand and respond to questions”.

600 Director of Public Prosecutions v M [1997] 2 Cr App R 70, at p. 75, per Phillips L.J. (C.A.): “The words of [s.33A(2A)] are mandatory. Care must always be taken where a question is raised as to whether a young child is capable of giving intelligible testimony. But where the child is so capable the Court does not enjoy some wider discretion to refuse to permit the child’s evidence to be given, subject of course to rules of evidence, such as section 78 of the Police and Criminal Evidence Act, which apply to all witnesses.” See also: s. 16.1(3) of the Canada Evidence Act, R.S.C., 1985, c. C-5; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27. Section 16.1(4) and (5) further provides that a party who challenges the capacity of the proposed witness under fourteen years has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions; if the court is so satisfied, it shall conduct an inquiry to determine whether the child is able to understand and respond to questions.

601 Director of Public Prosecutions v M [1997] 2 Cr App R 70 (C.A.). This case involved an allegation of indecent assault by the twelve year old accused against a child, aged four at the time of the alleged assault, and aged 5½ at the time of the trial. Counsel for the defence argued that the video recording of the child could not be admitted as evidence on account of her young age and the risks of influence from members of her family with whom she had discussed the subject-matter of the trial. However, the Court of Appeal held that, if a child satisfies the test of competence, the trial judge had no discretion to exclude his or her evidence.

602 murphy, P. Murphy on Evidence (1992) concluded at pp. 434-435 that the test of competency, following the amendments made to the Criminal Justice Act 1988 by the Criminal Justice Act 1991, was whether the child understood the duty of telling the truth in a court of law.

603 R v D (1995) The Times 15 November, per Swinton L.J. (C.A.): “If a child, by reason of extreme youth or for any other reason, is unable to distinguish between truth and fiction or between fact and
should be examined prior to the reception of his / her unsworn evidence. In the absence of any such express requirement and in the face of an unqualified repeal of the earlier provisions, it is extremely difficult to agree with this proposition; it is reiterated that it is unnecessary to consider a child’s awareness of the duty to speak the truth as a pre-condition to his / her competence, 604 since it is not an effective indicator of competence and since cross-examination of the child by counsel should reveal any inconsistencies or fabrications in the child’s evidence which may cause the jury to conclude that the child is not a credible witness and that little weight should be attached to the child’s evidence.605

2.15.14 However, there is an interesting middle-ground, which is particularly persuasive. Notwithstanding the absence of any formal requirement that a child understand the duty of speaking the truth before he / she is permitted to give evidence unsworn, it is submitted that built into the notion of intelligibility is a “basic sense of the objectivity of experience” and “an understanding of the concept of ‘what really happened’”606 since, without these elements, testimony could not be described as coherent or

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604 Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, A Private or Public Nightmare? (Wellington: October 1988) (“Geddis Report”) at p. 16: “Some commentators have confused the issue of whether or not a child understands the importance of telling the truth with whether or not they can separate fact from fiction. In other words, they would agree that if there is doubt in this regard, then how can one even know that the child realises what the ‘truth’ is, let alone the importance of ensuring that it is spoken. We fail to see how this point can be clarified by an exploration of their understanding of the somewhat abstract concept of the duty to speak the truth. We are not aware of any factual basis to an assumption that if the child is unable to demonstrate an understanding of the duty to speak the ‘truth’, he or she is unlikely to accurately recount past events. Indeed under the present process, it is possible that a child could be deemed ‘incompetent’ to testify because of a failure to demonstrate an ‘adequate’ understanding of the duty to speak the truth when they are quite capable of giving a factually accurate account of the relevant events to which they were a witness. Thus we would contend that an exploration of the child’s understanding of truth is not pertinent to the issue of the child’s ability to separate fact from fantasy. This is not a issue of competency, it is an issue of reliability.”

605 Dennis, I.H. The Law of Evidence (1999) at p. 423: “[T]he only condition of competency is intelligibility. The child’s knowledge of the difference between truth and lies can be explored in cross-examination. A lack of understanding of truth could be used to attack the child’s credibility, but it would not preclude the child from giving testimony at all.”

comprehensible. Even if such argument is accepted, it is submitted that it is unnecessary under this statutory scheme to conduct a preliminary examination to test the child’s understanding of the distinction between fact and fantasy since such coherence and ‘objectivity’ can only properly be examined during the course of the child’s evidence and cross-examination.607

2.15.15 The official object of this statutory scheme was to establish one class of child witness “undifferentiated in the eyes of the jury”.608 Children over fourteen years were to be treated as adults and were permitted to give sworn evidence without the prior requirement of a preliminary examination as to competency, save in the same circumstances as applied to adult witnesses;609 that is, this presumption of competence meant that a preliminary examination of the competence of the child was not necessary unless it appeared to the court that the child was incapable of giving intelligible testimony, whereas in Ireland, a preliminary examination could be required to prove that a child was capable of giving intelligible testimony.610 Equally, a child under fourteen years was required to give unsworn evidence; the court was prohibited from conducting a preliminary examination of such child solely on the basis of the child’s age, but was permitted to so examine the child, in its discretion, if the child appeared to

607 See: s. 16.1(7) of the Canada Evidence Act, R.S.C., 1985, c. C-5; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27; and s. 24(2) of Part III of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3).
609 Spencer and Flin concluded that: “[C]hild witnesses are now in the same position as adult witnesses, who usually have to undergo no competency examination before they give evidence, but who may be stood down if they reveal themselves unable to communicate intelligibly.” Spencer J. and Flin R., The Evidence of Children – The Law and the Psychology (2nd ed., 1993) at p. 63.
610 As a result of the reversed onus, the judge was not required to investigate the child and could regard the child as a competent witness unless one of the parties (or the court of its own motion) raised the issue; the presumption of competence or “intelligibility” had to be disproved, rather than, as in Ireland, the intelligibility of the child had to be proven. Thus the English test represented a greater acceptance of the unsworn evidence of child witnesses than the Irish test, and evidenced a greater willingness to treat such evidence in a like manner as the evidence of adults. Cross and Wilkins, Outline of the Law of Evidence (7th ed., 1996) at p. 65: “Under the new law the judge is expected to decide whether the child is capable of giving intelligible testimony by allowing the child to start to give testimony rather than by applying any preliminary test.”
fail the ‘intelligibility’ test.\footnote{In \textit{R v Hampshire} [1995] 3 WLR 260, [1996] QB 1 (C.A.) the Court of Appeal held that a competence examination or inquiry need only be made where it appeared to the prosecution, the defence or the judge that the child was incapable of giving evidence because of his age or where he had difficulty in expressing himself. The case involved an indecent assault against a five year old child and was decided before the amendment to the Criminal Justice Act, 1988 (as amended by the Criminal Justice Act, 1991) by the Criminal Justice and Public Order Act, 1994 (inserting s. 33A(2A)) came into effect. May R., \textit{Criminal Evidence} (4th ed., 1999) noted at p. 436 that “s. 52, as originally drafted, provided that the power of the court to determine that a person is not competent applied equally to children as it applied to other persons. The purpose of this provision must have been to ensure that the witness could communicate in an intelligible and coherent manner. The amendment enacted in the 1994 Act makes this purpose clear.”} Accordingly, this test came to be characterized as a ‘reverse onus test of intelligibility’;\footnote{Dennis, I.H. \textit{The Law of Evidence} (1999) at pp. 421-422. Dennis regarded this provision as reversing the usual onus of proof where objection is taken to the competency of a witness. He argued that the party tendering the child was entitled to “rely on a statutory presumption of competency which the opposing party [would] have to rebut by showing that the child [was] incapable of giving intelligible testimony.”} rather than requiring the party tendering the child witness to establish his / her competency, the child witnesses enjoyed a ‘presumption’ of competency which required to be disproved by the party challenging the competency of the child witness.\footnote{The note in relation to this section in the Annotated Statutes, at 33-221, reads: “[Section 33 of Sch. 9 of the Criminal Justice Public Order Act, 1994 inserting subs. (2A) into s. 33A of the Criminal Justice Act, 1988, as amended] amends s. 33A of the Criminal Justice Act, 1988 in order to make it plain that the competency examination is abolished. This procedure required the court (before the witness gave evidence) to examine the child to ensure that he or she understood the nature of the oath. Now, the child should give evidence and only be stopped if it becomes clear that he or she cannot give an intelligible account. This was the intention of those presenting the legislation to Parliament: Standing Committee B, col. 1026, February 24, 1994. However, if the witness appears incapable of giving intelligible evidence the court has a discretion under the section to exclude his or her evidence. Section 52 of the 1991 Act, as originally drafted, provided that the power of the court to determine that a person is not competent applied to children as it applied to other persons. The purpose of this provision must have been to ensure that the witness could communicate in an intelligible and coherent manner. The amendment enacted in this paragraph makes this purpose clear.”}

2.15.16 This ‘reverse onus test of intelligibility’ illustrates the clear progression away from the traditional reluctance to admit the evidence of children – founded upon long established perceptions regarding their capabilities of observation, recollection and communication – towards an approach whereby children are encouraged to give evidence for what it is worth, subject only to a requirement that they be able to understand questions put to them as witnesses and to give answers which can be understood and ever closer to the following approach which advocates the total abolition of pre-
conditions to the competence of child witnesses. As such, this statutory scheme advocates a treatment of child witnesses equal to that of adult witnesses and “represents a striking victory for the principle of listening to the child’s story whatever its age”.615

2.16.0 Test Five: Wigmore’s ‘Come What May’ Approach

2.16.1 The approach favoured by the Father of Evidence, Wigmore, was to abolish all competency requirements or pre-conditions and to allow all children to give evidence ‘come what may’;616 this approach, in effect, confers a rebuttable presumption of competence on all children. Since admissibility of the child’s evidence is not – initially, at least – in question, the child is permitted to give evidence without preliminary examination and the jury simply determines the weight to be attached to the child’s testimony based on the credibility of the witness and any defects apparent in his / her evidence. Pursuant to this approach children would, for the purposes of their

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614 Scottish Executive, Central Research Unit, Vulnerable and Intimidated Witnesses: Review of Provisions in Other Jurisdictions (Edinburgh: The Scottish Office, 2002) at p. 29: “There are, therefore, theoretical and practical issues about the application of the changes to the competency requirements which suggest that, although the changes have increased the number who can testify, there remains inconsistency and variation in its impact”.

615 Dennis, I.H. The Law of Evidence (2nd ed., 2002) at p. 456. The legislature further confirmed an intent to treat the unsworn evidence of children in the same manner as the evidence of adults – or, at the very least, the same manner as the sworn evidence of children – by abolishing the corroboration requirement for the unsworn evidence of children. The new legislation further abandoned the mandatory corroboration warning in relation to such evidence so that “[i]n this sense the testimony of children is no longer treated as a formal category of evidence different from and inferior to the testimony of adults.”

616 Wigmore succinctly stated the premise underlying this approach as follows: “Recognising on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. To this result legislation must come. To be genuinely strict in applying the existing requirement is either impossible or unjust; for our demands are contrary to the facts of child-nature.” 2 Wigmore, Evidence, (3rd ed., 1940) § 509, at p. 601. See also: Phipson, S.L, Best on Evidence (12th ed., 1922) Vol. 2, §158, at p. 147, where the author quotes from an older text, Ph & Am. Evidence, at p. 7: “Independently of the sanction of an oath”... “the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; and what is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive.”
competence and the admissibility of their evidence, be treated by the law in the same manner as adults.617

2.16.2 The aspect of Wigmore’s theory of competence which excited so much interest and continues to generate debate today, is his recommendation that the disqualifications in relation to infancy and mental derangement should be abolished without replacement. Wigmore was impatient with the practice of attempting to measure degrees of credibility and incapacity and to “define that point at which total incredibility ceases and credibility begins” which he regarded as an exercise “to discover the intangible”.618 He advocated the abolition of such convoluted tests of competence and the introduction of a practice whereby a child witness – like an adult witness – was simply allowed to take the stand and give his / her account of events relevant to the proceedings, for what such account was worth.619 In this regard, he urged that:

“The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to discredit him when he is truly an imbecile or suffers under a dangerous delusion. It is simpler and safer to let the jury perform the process of measuring the

617 While the other approaches advanced see the differences between children and adults as a justification for differing tests or thresholds of competence, this approach favours treating children in the same manner as adults; this approach is premised upon the results of modern psychological studies which reveal that children, while more likely to imagine an event and subsequently believe such an event to have been perceived in reality (or to be coached to such effect), are no more likely than adults to lie during testimony and in fact may even be less likely to lie – or, at least, to lie without detection – than their adult counterparts since children lack the cognitive and linguistic ability to sustain a fabrication.


619 See also: Spencer, John and Flin, Rhona The Evidence of Children: The Law and the Psychology (1990) at p. 60: “However a gloomy view we take of the abilities of children, surely the evidence of even the youngest child has some element of value and is worth putting before the court – the same way as the reaction of an animal may be information that has some element of value, even though the animal has no sense of the duty to speak the truth. If a tracker dog recognises a scent and tracks a suspect then this fact can be put before the court, and a court might also be told that a dog appeared to recognise someone if this was relevant – and there is obviously no question of submitting a dog to a competency examination. Yet if it is a small child and not a dog, the criminal courts will probably refuse to admit the evidence at all. The rules of evidence...seem to rate little children less than dogs”. 175
impeached testimony and of sifting out whatever traces of truth may seem to be contained in it."620

2.16.3 The arguments in support of this ‘come what may’ approach are many and various. First, it is asserted that each of the competence tests examined herein – and variations thereof – betray a mistrust of the capabilities of juries to evaluate and weigh the evidence of children which is both unjustified621 and runs counter to the trust placed in juries to perform tasks of great significance and import in a criminal trial, for example, the determination of the guilt or innocence of an accused.622 It is submitted that the evidence of children should be admitted without first having to overcome the obstacle of satisfying a prior test or pre-conditions of competence, and the jury should then be permitted “to take into account, in determining the weight which should be given to their testimony, those characteristics of the witness that would formerly have disqualified him”.623

620 2 Wigmore, Evidence, (3rd ed., 1940) § 501, at p. 594. Wigmore noted that this approach was advocated as early as 1853 by the English Common Law Practice Commissioners (Jervis, Cockburn, Martin, Barmwell, Willes, and Walton) in their proposals of reform in the Second Report, at p. 10: “Plain sense and reason would obviously suggest that any living witness who could throw light upon a fact in issue should be heard to state what he knows, subject always to such observations as may arise as to his means of knowledge or his disposition to tell the truth”. These recommendations were further approved by Phipson, S.L. Best on Evidence (12th ed., 1922) at § 62 and 144 and Taylor, A Treatise on the Law of Evidence (12th ed., 1931) at § 1210.

621 Scottish Executive, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, May 2002) para. 7.14, at p. 34: “The rationale of any competence test would seem to be to ensure that only evidence which can be assumed to have a certain inherent worth or reliability is led in court. Assessing the value and reliability of evidence is, however, an essential part of the process of deciding the facts of the case. Interposing an initial test of competence to give evidence may mean that those whose job it is to decide the facts are simply deprived of information which might very well be relevant, and whose value they would be perfectly able to judge.”

622 Report of the Committee on Sexual Offences Against Children and Youths, Sexual Offences Against Children (Ottawa: Minister of Supply and Services Canada, 1984) (“Badgley Report”) Vol. 1 at p. 68 (repeated at p. 371): “Permitting the trier of fact to determine the weight that should be accorded a child’s testimony and generally to assess the child’s credibility without ‘qualifying’ the child witness beforehand, is by no means unprecedented in common law jurisdictions.”

623 Law Reform Commission of Canada, Study Paper: Competence and Compellability (Study Paper No. 1, n.d.) at p. 1. See: Ontario Law Reform Commission, Report on Child Witnesses (1991) at pp. 40-41: “The Commission takes the position that no special competency examinations should be required of child witnesses.... The Commission further proposes that in the small number of cases in which the judge is of the opinion that the child does not understand the promise to tell the truth (due to, for example, the extreme youth of the child), the judge shall nevertheless hear the evidence and may act on it, if, at the end of the case, he or she is satisfied that the evidence is reliable.” Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, A Private or Public Nightmare? (Wellington, October 1988) (“Geddis Report”) at p. 16: “It is our view that the competency test serves no useful function and should be abandoned. The weight to place on
Secondly, as noted above, it is submitted that exclusionary rules of evidence—such as the restrictive tests of competence outlined above—are wrong in principle since they confound one of the principal rationales underlying the rules of evidence, namely, the admission of all relevant, understandable evidence. The strict tests of competence—formed by the traditional misperceptions regarding the unreliability of children as witnesses—proved a blunt instrument in the hands of the law of evidence, and led to the exclusion of the evidence of countless numbers of child witnesses, many of whom possessed evidence crucial to the prosecution of the charges against the accused, in the absence of which a successful prosecution was impossible. It followed that abolition of the competence requirements for the child’s testimony would be determined by the trier of fact.” Law Reform Commission of Canada, Report on Evidence (Ottawa: Supply and Services Canada, 1977) ss. 50-53: “There are no special rules of competency in the Code with respect to children. The frailties inherent in the testimony of immature witnesses should affect the weight of the evidence rather than its admissibility.” See also: Law Reform Commission of Tasmania, Discussion Paper: Child Witnesses in Sexual Assault (Discussion Paper No. 1, October 1987) (Kate Warner) at p. 5; and New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996), para. 75, at p. 17.

Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, December 1989) para. 5.12, at p. 49. The Group advocated the removal of the then competency requirement in relation to potential child witnesses, however, the most radical proposal made by the Pigot Report was that such requirement should not be replaced. The Group argued that it was wrong in principle for the courts to refuse to consider any “relevant understandable evidence” and that a child should be allowed to give evidence for what it was worth. The demonstrated maturity and understanding of the child, as well as the coherence and consistency of his/her testimony would therefore be matters for the jury to weigh and would, together with the demeanour of the witness, affect the credibility of the child witness rather than his/her competence; a question of weight and not admissibility of evidence. Thus, the Group concluded in para. 5.12, at pp. 49-50, that: “We think that this would be a much more satisfactory proceeding and one far better attuned to the principle of trial by jury, modern psychological research and the practice in other jurisdictions than the present approach which appears to us to be founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all.”

Young, Professor Alison Harvison “Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues” (1992) 11 Can.J.Fam.L. 11, at p. 21: “In short, there is no justification for precluding children from testifying when they are capable of communicating. There is always a risk that witnesses are unreliable; that is precisely what the trier of fact is there to decide. The competency rule has violated two main ideals of our system of justice. First, it has been truth-defeating to the extent that it has precluded the reception of evidence and resulted in automatic acquittals for lack of significant evidence, and second, it has frequently deprived children of the protection of the criminal justice system.”

Ligertwood, A., Australian Evidence (3rd ed., 1998) at p. 442: “The bottom line is to receive as much relevant evidence as possible, and, although good reasons exist for having formal requirements, in most cases, these should not be permitted to stand in the way of the receipt of sufficiently reliable testimony, particularly where there may be no other evidence available and crimes will otherwise go
child witnesses would permit the courts to receive such evidence for what it was worth – leaving to the jury the question of the appropriate weight to be attached thereto – thereby increasing the amount of relevant evidence available to the court and facilitating the proper administration of justice.  

2.16.5 The adverse impact upon criminal proceedings of the exclusion of the evidence of a child witness was particularly severe in the context of the difficulties presented by the prosecution of sexual offences against children since, by its very nature, such an offence is likely to be committed in private with only the child complainant as witness and with little or no corroborative evidence; "the remedy of excluding such a witness who may be the only person who knows the facts, seems inept and unpunished." See also: McCormick on Evidence (1972) para. 72; Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's L.J. 345, at p. 393.

Scottish Executive, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, May 2002) para. 7.14, at p. 34: "Doing away with any requirement for the competence of a witness to be tested before being allowed to give evidence would mean that whatever information can be obtained from the witness could simply be assessed for what it is worth, in the light of the whole circumstances in which it is given. Evidence might still be led about the nature and extent of the witness's mental impairment or disorder, but it would be for the judge or jury to weigh that evidence, along with the evidence the witness had actually given, and decide whether the evidence given by the witness was reliable or credible. If the witness had not been able to understand or take the oath, that would simply be another factor to be considered." See also: McCormick on Evidence (1972) para. 72; Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's L.J. 345, at p. 393.

Scottish Executive, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, May 2002) para. 7.14, at p. 34: "Doing away with any requirement for the competence of a witness to be tested before being allowed to give evidence would mean that whatever information can be obtained from the witness could simply be assessed for what it is worth, in the light of the whole circumstances in which it is given. Evidence might still be led about the nature and extent of the witness's mental impairment or disorder, but it would be for the judge or jury to weigh that evidence, along with the evidence the witness had actually given, and decide whether the evidence given by the witness was reliable or credible. If the witness had not been able to understand or take the oath, that would simply be another factor to be considered." See also: McCormick on Evidence (1972) para. 72; Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's L.J. 345, at p. 393.

Scottish Executive, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, May 2002) para. 7.14, at p. 34: "Doing away with any requirement for the competence of a witness to be tested before being allowed to give evidence would mean that whatever information can be obtained from the witness could simply be assessed for what it is worth, in the light of the whole circumstances in which it is given. Evidence might still be led about the nature and extent of the witness's mental impairment or disorder, but it would be for the judge or jury to weigh that evidence, along with the evidence the witness had actually given, and decide whether the evidence given by the witness was reliable or credible. If the witness had not been able to understand or take the oath, that would simply be another factor to be considered." See also: McCormick on Evidence (1972) para. 72; Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's L.J. 345, at p. 393.

Scottish Executive, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, May 2002) para. 7.14, at p. 34: "Doing away with any requirement for the competence of a witness to be tested before being allowed to give evidence would mean that whatever information can be obtained from the witness could simply be assessed for what it is worth, in the light of the whole circumstances in which it is given. Evidence might still be led about the nature and extent of the witness's mental impairment or disorder, but it would be for the judge or jury to weigh that evidence, along with the evidence the witness had actually given, and decide whether the evidence given by the witness was reliable or credible. If the witness had not been able to understand or take the oath, that would simply be another factor to be considered." See also: McCormick on Evidence (1972) para. 72; Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's L.J. 345, at p. 393.
It was asserted that "children cannot fully enjoy the protection the law seeks to afford them unless they are allowed to speak effectively on their own behalf" in criminal proceedings arising from allegations of sexual abuse and, to this end, the abandonment of competence requirements was advocated.

2.16.6 A further objection to the competency tests was the view that the assessment and determination of the psychological competence of a young witness was a process and conclusion outside the expertise of the courts and for which they were inadequately equipped; "judges are not well placed to make an assessment of a witness's cognitive ability". Moreover, it was noted that the various legal tests of competency were ineffective in evaluating the psychological competency of a child witness and that, furthermore, it was impossible to find a comprehensive test of competency which would

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630 McCormick, McCormick on Evidence (2nd ed., 1972) at pp. 140-141.
632 New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 34, at pp. 9-10. The Commission recognized that the courts have no particular expertise in relation to the matter they are assessing "thus increasing the likelihood of subjective and widely varying determinations", however, the Commission acknowledged in reply to this difficulty that "the whole of the judicial process involves the court...making findings on matters of considerable scientific complexity": Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989), para. 5.23, at p. 92.
633 Ontario Law Reform Commission, Report on Child Witnesses (1991) at p. 41: "Why are so many law reformers urging that competency assessments of children be dispensed with? Many argue that competency assessments are poor indicators of the reliability of the testimony offered by the child witness: D Whitcomb, ER Shapiro and LD Stellwagen, When the Victim is a Child: Issues for Judges and Prosecutors (Washington DC, US Dept of Justice, Nat Institute of Justice, August 1985) at p. 38. Furthermore, although young children appreciate the difference between truthfulness and lying, they have difficulty, as do most adults, articulating a definition of truth. Another reason put forward for the abolition of competency assessments is that moral knowledge is not helpful in predicting a child's truthfulness: Spencer and Flin The Evidence of Children: The Law and the Psychology (1990) at p. 275. An avowed purpose of a competency assessment is for the court to ascertain whether a child is likely to furnish honest testimony. Yet many argue that it is discriminatory to subject young children to such scrutiny when no rules exist to assess the morality of adult witnesses prior to admitting their evidence." Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, A Private or Public Nightmare? (Wellington, October 1988) ("Geddis Report") at p. 6: "It is our view that the competency test serves no useful function and should be abandoned. The weight to place on the child's testimony would be determined by the trier of fact." See also: New South Wales Law Reform Commission, Discussion Paper on Oaths and Affirmations (1980) at p. 35.
634 Law Reform Commission of Canada, Report on Evidence (Ottawa: Supply and Services Canada 1975), at p. 88: "Because of the impossibility of stating and applying a standard of mental
predict with accuracy the reliability of the child witness;\textsuperscript{635} "[t]he inherent difficulty in distinguishing between degrees of mental incapacity, suggests that, similarly, a child's infirmity would be better treated as a matter of credit than of competency."\textsuperscript{636}

2.16.7  It was further observed that, in light of the results of modern psychological studies and the resulting volte face regarding the reliability of children as witnesses,\textsuperscript{637} it is wrong in principle to treat children in a different manner to adults with regard to their competence as witnesses;\textsuperscript{638} rather child

\textsuperscript{635} Law Reform Commission of Ireland, \textit{Report on Child Sexual Abuse} (LRC 32-1990), para. 5.17, at p. 54: Before recommending confining the test of competence to ascertaining "whether the child has the necessary verbal skills to give an account of the relevant events which is intelligible to the Tribunal", the Commission acknowledged the difficulty of arriving at a test of competence which would command universal acceptance. In the Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, December 1989) para. 5.11, at p. 49, the Group argued that a competence requirement was only useful if the test which it imposed revealed whether a child was likely to subsequently give a truthful and accurate account, however, the Group could find no evidence that the then competence requirement achieved this objective and recommended the abolition, without replacement, of the competence requirement for child witnesses. See also: New Zealand Law Commission, Preliminary Paper: \textit{The Evidence of Children and Other Vulnerable Witnesses} (Preliminary Paper No. 26, 1996) para. 72, at p. 17.


\textsuperscript{637} See: Murray, \textit{Research Paper on Evidence from Children, Alternatives to In-Court Testimony in Criminal Proceedings in the United States of America}, (1988) at p. 58 where she states: "Although many significant areas still are under-researched, the body of established knowledge on child development and dynamics does suggest that children's ability to answer questions about witnessed or experienced events is better than both law and common belief formally recognised, and that even very young children can respond to the demands of testimony when questions are posed in a developmentally appropriate way." See also, to the same effect: Davies, G., "Afterword", in Davies G. and Drinkwater J. (eds.) \textit{The Child Witness – Do the Courts Abuse Children?} 70, at p. 71 (Issues in Criminological and Legal Psychology, Vol. 13, British Psychological Society for the Division of Criminological and Legal Psychology, 1988); Law Reform Commission of Ireland, \textit{Report on Child Sexual Abuse} (LRC 32-1990) para. 5.02, at p. 50; and Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, December 1989) para. 5.10, at pp. 48-49 wherein the Group interpreted the enactment of s. 34 of the Criminal Justice Act 1988 – abolishing the mandatory corroboration requirement in relation to the unsworn evidence of children – as an indication of the English government's acceptance of the "general force of this argument".

\textsuperscript{638} Law Reform Commission of Tasmania, Discussion Paper: \textit{Child Witnesses in Sexual Assault} (Discussion Paper No. 1, October 1987) (Kate Warner) at pp. 58-59: "It can also be argued that given that the bias against children's evidence is largely unfounded and that their deficiencies as witnesses can often be overcome by appropriate questioning, it is wrong in principle to have rules of evidence which distinguish between adults and children as witnesses." Report of the Committee on Sexual Offences Against Children and Youths, \textit{Sexual Offences Against Children} (Ottawa: Supply and Services Canada, 1984) ("Badgley Report") Vol. 1 at p. 32: "We believe that there should be no special rules with respect to the child's legal competence to give evidence in court. We recommend
witnesses should enjoy a like (rebuttable) presumption of competence as adult witnesses.

2.16.8 One of the principal arguments against dispensing with a formal requirement of competence in relation to potential child witnesses is that it removes one of the important safeguards of the accused's constitutional right to a fair trial in due course of law; the accused is entitled to a trial involving only the evidence of competent witnesses and if the competency test were to be abandoned, it would increase the risk that inadmissible evidence – or the evidence of an incompetent witness – would be received to the prejudice of the accused. By way of response, it has been asserted that, even absent the formal competence requirements for child witnesses, there are sufficient safeguards for the accused person in the present system of rules of evidence; these rules empower the courts to exclude the evidence of a witness permitted to testify and to direct the jury to disregard such evidence as they had already heard, where the witness appeared to be of unsound mind, became incoherent while testifying or failed to testify in a manner that was comprehensible.639 It was understood that such powers should be exercised sparingly, "after considerable thought and perseverance",640 particularly in relation to young child witnesses, in order

that a child's evidence should be received and considered in the same light as that of adults. Our research indicates that the assumptions about the untrustworthiness of young children and their inability to recall events with respect to sexual offences are largely unfounded." The Report continued at p. 67 (repeated at p. 371): "The Committee's research findings indicate that the conventional assumptions about the veracity and powers of recall and articulation of young children are largely unfounded and, in any event, vary significantly among different children, as they do among adults."

639 New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 61, at p. 14: In relation to the implications of the abolition of a competence requirement, the Commission noted that, even if its recommendations were to be adopted in New Zealand, the courts still retained the power to exclude evidence where the child was not capable of communicating effectively on the ground that "the evidence may mislead the court or jury or result in unjustifiable consumption of time". In the event of a witness appearing incoherent after he or she had begun to testify, the court could warn the jury to disregard such evidence as the witness had given or even discharge the jury in an appropriate case, although the Commission conceded that it was unclear whether such a measure afforded adequate protection for a defendant in a criminal case: para. 62, at p. 15. However the Commission argued in para. 68, at p. 16 that: "The only change of significance, however, is that a child's evidence is not ruled inadmissible solely on the grounds of a failure to make and understand a promise, as required under the current competence test."

640 Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot, Q.C.) (London: Home Office, December 1989) para. 5.13, at p. 50: "We think that this power, applied
that a proper balance would be achieved between the competing interests of
the rights of the accused and the principle of hearing all evidence relevant to
the proceedings.\textsuperscript{641} The introduction of a new safeguard was also
recommended to redress any perceived imbalance in the abolition of the
formal competence requirement for child witnesses, namely, the admonition
of child witnesses, in open court and in the presence of the jury, to give a
"full and truthful account"\textsuperscript{642} in terms suitable to their age and
understanding,\textsuperscript{643} although it was acknowledged that children in a
courtroom context "will hardly be unaware of the significance of the

\textit{where necessary at the preliminary hearing or trial, is all that is needed.}" In this way, the evidence of
children would be treated in the same manner by the law as the evidence of adults.

\textsuperscript{641} Report of the Committee on Sexual Offences Against Children and Youths, \textit{Sexual Offences
Against Children} (Ottawa: Supply and Services, 1984)("Badgley Report") Vol. 1 at p. 68 (repeated at
p. 371) Recommendation No. 18: “The Committee recommends that the Canada Evidence Act, the
Young Offenders Act and each provincial and territorial evidence act be amended to provide that: (1)
Every child is competent to testify in court and the child’s evidence is admissible. The cogency of the
child’s testimony would be a matter of weight to be determined by the trier of fact, not a matter of
admissibility. (2) A child who does not have the verbal capacity to reply to simply framed questions
could be precluded from testifying. (3) The court shall instruct the trier of fact on the need for caution
in any case in which it considers that an instruction is necessary. In the Committee’s view these
reforms would help to ensure that Canadian children receive the full benefit of the protection the law
seeks to afford them.”

\textsuperscript{642} Such an admonition could be modeled on the old Scottish admonition which cautioned children in
the following terms: “Tell us all you can remember of what happened. Don’t make anything up or
leave anything out. This is very important.” See: \textit{Rees v Lowe} 1990 JC 96; \textit{Kelly v Docherty} 1991 SLT
419; \textit{M v Kennedy} 1993 SCLR 69; \textit{Quinn v Lees} 1994 SCCR 149; and \textit{R, Petitioner} 1999 SC 380. This
form of admonition was expressly approved in the Report of the Advisory Group on Video Evidence
5.15, at p. 51. Like the Advisory Group on Video Evidence, the New Zealand Law Commission
envisaged that a form of admonition would be given by the trial judge to the potential child witness to
“impress upon a witness the importance of telling the truth, and explain what that means, in order to
give meaning to the promise”: New Zealand Law Commission, Preliminary Paper: \textit{The Evidence of
alternative method of securing the truth is contained in s. 16.1(6) of the Canada Evidence Act, R.S.C.,
1985, c. C-5; R.S.C. 1985, c. 19 (3\textsuperscript{rd} Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27 which provides
that the court shall, before permitting a proposed witness under fourteen years of age to give evidence,
require them to promise to tell the truth.

\textsuperscript{643} The Advisory Group on Video Evidence was not in favour of a warning to the jury that unsworn
child witnesses could not be prosecuted for perjury since s. 38(2) of the Children and Young Persons
Act, 1933, created an offence akin to perjury and carrying the penalties of perjury where a child
willfully gives false evidence which, had the evidence been sworn, would have rendered the child
guilty of perjury. In any event, the Group noted, in the Report of the Advisory Group on Video
para. 5.16, at p. 51 that: “we hardly think that jurors can actually suppose that in modern conditions it
is likely that penal sanctions will be employed against small children under the age of eight who will
be principally affected by our proposals”. 182
occasion" which "they will mostly necessarily have been made to understand to the best of their ability".644

2.16.9 Finally, it was contended that the difficulties presented by the evidence of child witnesses betrayed problems with the court procedure for receiving such evidence rather than with the admissibility of the evidence itself or with the competence of the child witness; the question arose as to "whether or not the court is competent to elicit the information that the child does possess".645 It was suggested that, rather than excluding the evidence of child witnesses,646 special measures should be introduced, sensitive to the different needs of child witnesses and to the trauma involved for a child giving evidence in criminal proceedings in the conventional manner, to facilitate the reception of the best evidence from child witnesses.647

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645 Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, A Private or Public Nightmare? (Wellington, October 1988) ("Geddis Report") at p. 16. Similarly, in the report of the Scottish Executive, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, May 2002) it was asserted in para. 7.3, at p. 32 that: "The question of someone's competence must therefore be looked at in the light of what can be done to assist them to give evidence, not as a separate question".
646 The New Zealand Law Commission conceded that difficulties could arise in relation to the evidence of some witnesses due to problems of observation, communication and recollection, however, it argued that such problems were "more appropriately addressed by ensuring that procedures for giving evidence enhance reliability and effective communication, rather than simply excluding the evidence": New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 55, at p. 13.
647 Melton G., and Thompson, R., "Getting Out of a Rut: Day Tours to Less Travelled Paths in Child Witness Research" in Ceci, Toglia and Ross (eds.), Children's Eye Witness Memory, (1987) cited in Murray, Research Paper on Evidence from Children, Alternatives to In-Court Testimony in Criminal Proceedings in the United States of America, (1988) at pp. 70–71: "Children's statements are likely to be more accurate if obtained by direct questioning, the temporal sequence of events is closely followed, external memory aids are used and the questioner assumes responsibility for clarifying the child's understanding of inquiries and for clearing up inconsistencies in the child's account. Conversely, the same children are likely to perform poorly when a global narrative of the account is solicited or the temporal order of events is violated." Similarly, the New Zealand Law Commission noted that any difficulties in communication, "psychological vulnerability or potential sources of unreliability" could be resolved by adopting measures to facilitate witnesses in giving their evidence and thus reducing the trauma of the witness experience: New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 75, at p. 17. The Commission asserted in para. 73, at p. 17 that: "The ability of children and other groups of witnesses to give accurate evidence has in the past been underestimated. Difficulties for children and other groups of vulnerable witnesses, particularly those with intellectual disabilities and mental disorders, may relate as much to communication skills in the courtroom, including those of the interviewer and lawyer, as to other factors bearing more directly on reliability, such as capacities of perception, reasoning and recall. There seem to be no compelling reasons for requiring all young children's competency to be tested."
2.16.10 The Wigmore ‘come what may’ approach represents the far end of the spectrum of competence tests examined herein – the opposite end of the spectrum to the Wallwork approach outlined above – in that it embodies the abandonment of all formal competence requirements for child witnesses. Moreover, it is clear from the analysis of the preceding tests of the competence of children that the various legislative reforms evidence a steady progression from a position of exclusion towards this indiscriminating inclusiveness.648

2.16.11 The jurisdiction closest to ours which has embraced this abolition of the competence test for child witnesses is Scotland. The new Scottish statutory scheme649 provides that: “The evidence of any person called as a witness (referred to in this section as ‘the witness’) in criminal or civil proceedings is not inadmissible solely because the witness does not understand –

(a) the nature of the duty of a witness to give truthful evidence,

or

(b) the difference between truth and lies.”

2.16.12 This legislative provision further provides for the abolition of the preliminary examination of child witnesses as to their competence, asserting that “the court must not, at any time before the witness gives evidence, take any step intended to establish whether the witness understands those matters” 650.

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648 Dennis, I.H. The Law of Evidence (1999) at p. 150: “The general tenor of the campaign for reform was for removal of all technical restrictions on child witnesses, and the adoption of a policy of listening to the evidence of any child capable of giving an intelligible story.” Law Reform Commission of Western Australia, Discussion Paper: The Evidence of Children and Other Vulnerable Witnesses (Project No. 87, April 1990) at p. 32, para. 4.1: “In facilitating the giving of evidence by child witnesses, an obvious first step is to abolish technical rules which prevent children who are capable of assisting the court from giving sworn testimony because they are either too young, or lack the religious training necessary to take the oath....In fact the overwhelming trend in the Anglo-Australian legal system is towards facilitating the giving of evidence by young children.” See also: Ontario Law Reform Commission, Report on Child Witnesses (1991) at p. 40.

649 Section 24(1) of Part III of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3).

650 Section 24(2) of Part III of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3). See also: s. 16.1(7) of the Canada Evidence Act, R.S.C., 1985, c. C-5; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27 which provides that no proposed witness under fourteen years of age shall be
While the legislation itself describes this provision as abolishing "the competence test for witnesses in criminal and civil proceedings", the statutory provision outlined above clearly only prohibits the exclusion of the evidence of a witness on the grounds that he / she does not understand the nature of the duty of a witness to give truthful evidence or the difference between truth and lies – the 'moral responsibility' test. It does not expressly abolish any competence requirement founded upon the understanding, communication capabilities or cognitive development of the witness.

Pursuant to the judgment of the High Court of Justiciary in Rees v Lowe, the test of competence in Scotland prior to the enactment of the new legislation stipulated that a child would be permitted to give evidence unsworn in any criminal proceedings where:

(i) the child was of tender years;

asked any questions regarding his / her understanding of the nature of the promise to tell the truth for the purpose of determining whether his / her evidence shall be received by the court.

651 Section 24(2) of Part III of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3). See also Scottish Executive, Vulnerable Witnesses (Scotland) Act 2004 Information Guide (Edinburgh: The Scottish Office, 2005) in which it is asserted at p. 5: "The Act abolishes the 'competence test'. The court is no longer entitled to ask preliminary questions of the witness to ascertain whether the witness understands the difference between truth and lies and the duty to give truthful evidence".

652 Rees v Lowe 1990 JC 96 (H.C. Justiciary) (sheriff had simply informed the three-year-old child complainant that she was to answer the questions put to her as best she could but did not investigate whether she knew the difference between truth and falsehood, nor did he admonish her to tell the truth; High Court of Justiciary allowed the appeal and quashed the conviction, holding that the sheriff had erred in failing to carry out a preliminary examination of the child complainant and instead carrying out a form of continuous assessment of the child's competence; held that the proper approach was to examine the child prior to allowing him / her to give evidence as to his / her understanding of the difference between truth and lies and, further, admonish him / her as to the importance of telling the truth). Followed in: KP v Her Majesty's Advocate 1991 SCCR 933; Kelly v Docherty 1991 SLT 419; Quinn v Lees 1994 SCCR 159; M v Kennedy 1993 SCLR 69; and R, Petitioner 1999 SC 380.

653 See: Quinn v Lees 1994 SCCR 159 (appellant appealed his conviction of the assault of three boys by setting his dog on them; two of the boys were aged thirteen and one was aged sixteen years; Lord Justice-General Hope examined the rules governing the procedure to be adopted in Scotland in relation to the evidence of children; held that a child under the age of twelve is not usually put on oath but rather is admonished to tell the truth, following a preliminary examination which confirms the child's ability to differentiate between truth and falsehood; a child of fourteen years or more usually gives evidence on oath and "no question arises as to any preliminary procedure"; the trial judge must "satisfy himself" that a child aged between twelve and fourteen understands the nature of an oath since, "unless he is so satisfied", a child aged less than fourteen cannot be put on oath). See also: Ross, Margaret and Chalmers, David Walker and Walker: The Law of Evidence in Scotland, (2000) at p. 198; and Scottish Law Commission Discussion Paper: The Evidence of Children and Other Potentially Vulnerable Witnesses (Discussion Paper No. 75, June 1988) at para. 2.4.
the court was satisfied that he or she knew the difference between telling the truth and telling lies;

(iii) the court had admonished the child to tell the truth.

2.16.15 In practice, the competence test for child witnesses in Scotland operated by way of a two stage process. First the child was questioned by way of preliminary examination to determine whether the child understood the distinction between truth and falsehood; once the court was satisfied the child possessed the requisite understanding, the trial judge would admonish the child as to the importance of telling the truth.654

2.16.16 However, there remained confusion as to whether the Scottish competency test for child witnesses contained further requirements or pre-conditions to admissibility. Such additional requirements were variously expressed as: (i) a requirement that the child possess the ability to understand what he / she had witnessed655 and to give an account of it;656 (ii) a reverse onus

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654 See: KP v Her Majesty’s Advocate 1991 SCCR 933 (H.C. Justiciary) (child witness aged five years testifying to alleged indecent assault when child was two years old; trial judge questioned child in preliminary examination as to whether he knew what it was to tell the truth, admonished that he should not tell ‘fibs’ and further requested the child to promise to tell the truth; child answered affirmative and was permitted to give evidence; on appeal, High Court of Justiciary held that the competence of any child witness was a matter for the trial judge to determine and whether independent evidence was necessary for such determination fell within that discretion; held that the trial judge was entitled to conclude that the child knew the difference between truth and falsehood; appeal refused); and Kelly v Docherty 1991 SLT 419, approving Rees v Lowe 1990 JC 96.

655 The Scottish Executive, in its report, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, May 2002) stated the test of competence in para. 7.4, at p. 32, as a test of understanding: “There is no rule to the effect that a child below a certain age cannot give evidence, but the judge must be satisfied that the child is competent before the child is allowed to give evidence. The judge must make a preliminary assessment of the child’s level of understanding and admonish the child to tell the truth. This process has become known as the ‘competence test’. It applies in both criminal and civil proceedings.”

656 Ross, Margaret and Chalmers David, Walker and Walker: The Law of Evidence in Scotland (2000) at p. 374: “A child is admissible if he appears to be able to understand what he has seen or heard and to give an account of it and to appreciate the duty to speak the truth.” See also: Evidence in the Stair Memorial Encyclopaedia, vol. 10, at para. 531. The Scottish Law Commission Discussion Paper: The Evidence of Children and Other Potentially Vulnerable Witnesses (Discussion Paper No. 75, June 1988) at para. 2.2 also advanced this requirement as an aspect of the test of competency, asserting that the older authorities evidenced what it termed a “quasi-presumption” to the effect that a child witness was not considered competent unless the contrary was shown. More recently, the Scottish Executive observed in its Executive Summary of the report, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, 2002) at p. 4 that: “Currently, someone who cannot understand and communicate what they have experienced, or who cannot properly understand the duty to speak the truth in court, cannot give evidence. Children are questioned by the judge before they
'intelligibility' test,\(657\) (iii) a presumption "that a child of any age is legally competent to give evidence subject to his or her verbal abilities and understanding of truth and falsehood being adequately confirmed in the course of a preliminary conversation between the judge and the child";\(658\) (iv) regarding as competent only those witnesses "whose powers of observation and memory, and whose knowledge of the duty to speak the truth, are so far developed that they will be likely to give trustworthy evidence";\(659\) and / or (v) requiring of a potential child witness "sufficient intelligence to understand the obligation to speak the truth".\(660\)

2.16.17 These arguments were considered by the Court of Session in \textit{M v Kennedy},\(661\) wherein it was argued that the sheriff had erred in receiving the evidence of a child witness who, for some time prior to the trial, was an

testify to ensure that they are 'competent'. With adults, competence is assumed, but it can be challenged by a party to the case.”

\(657\) Scottish Law Commission Discussion Paper: \textit{The Evidence of Children and Other Potentially Vulnerable Witnesses} (Discussion Paper No. 75, June 1988) at para. 2.3: The Commission noted with approval the change in attitude evidenced by the modern law of Scotland from a "quasi-presumption" against competence to a rebuttable assumption of competence: "By contrast, we have the impression that nowadays many judges tend to approach the question of competency from the other end. That is to say, they assume that a child is prima facie a competent witness but may, upon a preliminary conversation with the child, reach the conclusion that the child is either incapable of giving intelligible evidence or is not yet able to understand the difference between right and wrong, and so is unable to undertake to tell the truth." Thus the Commission concluded that the modern approach favoured a presumption that all children were competent witnesses “unless there is good reason” to determine otherwise: Proposal No. 14, at p. 82.


\(660\) Macdonald, Right Hon. Sir John \textit{A Practical Treatise on the Criminal Law of Scotland}, (5th ed., 1948) at pp. 285-286, cited in \textit{M v Kennedy} 1993 SCLR 69: “Children, however young, may be examined if they have sufficient intelligence to understand the obligation to speak the truth, and of this it is the duty of the Judge to satisfy himself by examination, and also, if he sees fit, by the evidence of others.”

\(661\) \textit{M v Kennedy} 1993 SCLR 69 (Court of Session). The child witness (aged less than thirteen years) – a suspected victim of sexual abuse at the hands of the appellant – was, for some time prior to the trial, an elective mute. The preliminary examination of the child witness was conducted over several hours and two separate days; on the first day, the sheriff was unable to persuade the child to communicate with him at all, however, on the second day, the sheriff was satisfied that although the child was not very co-operative, she did know the difference between telling the truth and telling lies. The child was admonished to tell the truth and gave her evidence for the most part by nodding or shaking her head in response to leading questions. The Court of Session dismissed the appeal and held that, in order to decide whether the evidence of a child is admissible, it is not necessary for a court to establish \textit{ab ante} that the child is able to give a spontaneous account of events, this being something which relates to the quality of the evidence and not to its admissibility; the test of admissibility is essentially whether the child is likely to give truthful evidence.
elective mute; it was argued that the sheriff ought to have held that the child was an incompetent witness because of her inability to communicate spontaneously. The Scottish court, having heard submissions advancing many of the additional competence requirements canvassed above, concluded that the correct procedure was for the sheriff to first examine the child as to his / her understanding of the difference between truth and lies and, if satisfied in this regard, to admonish the child to tell the truth. The court noted that the requirement that the child is able to understand what he / she is to be asked about is not dealt with separately because it is “so closely bound up with the question whether the child understands the difference between truth and falsehood”. Thus, the court concluded that the test of admissibility was essentially “whether the child is likely to give trustworthy evidence”; the capacity to give a spontaneous account affects the quality of the evidence and not its admissibility. Therefore the court upheld the procedure adopted by the sheriff and his conclusion that the child witness was competent to give evidence; in so doing, the court affirmed that the test of competence was a test of ‘moral responsibility’ alone.

2.16.18 However, as noted above, the more recent decision of the Court of Session in R, Petitioner found that, while the question at issue in the preliminary

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662 Counsel for the appellant had argued that there were three pre-requisites to the competence of a child witness: (i) an ability to understand what the child is to be asked about, (ii) an ability to give an account of it and (iii) an ability to appreciate the duty to speak the truth. However, the Court rejected this analysis on the basis that it “[read] too much into the statement [in Walker and Walker] and the emphasis which it gives to the ability to provide an account of what the child is to be asked about is misplaced”. The Court further noted that the second pre-requisite advocated by counsel for the appellant as forming part of the conditions of competency, was not supported by any authority and was “at variance with the procedure to be followed in the case of a child witness” described in Rees v Lowe 1990 JC 96 and Kelly v Docherty 1991 SLT 419. While the question in this case arose in the context of civil proceedings, the Court in its judgment refers to both civil and criminal authorities and accordingly, it is submitted, this decision is also relevant in the context of criminal proceedings. It is likely, however, that a jury in a criminal trial would be more profoundly affected by the inability of a child to spontaneously communicate than a judge sitting alone when determining the weight to be attached to such a child’s evidence.

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664 In R, Petitioner 1999 SC 380 the Court of Session held that the proper approach was to conduct a preliminary examination to determine whether the child understood the difference between truth and falsehood and, once that was established, the trial judge or sheriff should admonish the child witness to tell the truth; “the overall admissibility of the child as a witness must be determined at the initial stage of examination, and not during admonition, or on the basis of eventual evidence”. The manner of conducting the preliminary examination was a matter for the trial judge and depended on the way in which the child responded to the questioning; the questioning in the instant case – a single question,
examination of a child was conveniently stated in terms of “knowing the difference between telling the truth and telling lies” or the like, “these apparently simple words ... appear to us to have built into them quite a complex range of questions as to intelligence, understanding, maturity, moral sense and much else”. Accordingly, the Court cautioned that the preliminary examination or admonition stages could be more expansive in their assessment of the child’s competence than simply testing or warning the child of the difference between truth and deliberate falsehood but could include consideration of matters affecting the child’s fundamental “trustworthiness” or “understanding”.

2.16.19 In light of the fact that the new legislation evidences a clear parliamentary intention to abolish the competency requirements or the test of competence for all witnesses – including child witnesses – and to prohibit the preliminary examination of witnesses as to their ‘competence’, it is not clear whether the courts will, or are permitted to continue to require satisfaction as to the child’s cognitive development – absent any question of his / her ‘moral responsibility’ – prior to admitting such child to give evidence or whether the courts will simply conduct a form of continuous assessment of the child’s psychological competency during the course of his / her testimony and cross-examination, excluding a witness who appears to fall below an acceptable threshold of cognitive development. Given the decision met only with a simple affirmative – was insufficient to determine the competency of the child witness. The Court also noted that there was a distinction between the preliminary examination stage and the admonition stage “as a matter of logic and function” but stated that “provided the distinction between the two is kept in mind”, there was no absolute necessity for the strict temporal line between to the two and that there may well be situations “in which what passes between the court and the child before the child is actually admitted as a witness may on occasion be dual-purpose, contributing to the examination, but also opening up the admonitory stage”. Also reported as: R v Walker 1999 SLT 1233; and AR v Walker (Reporter for Aberdeenshire) 1999 SCLR 341.

R, Petitioner 1999 SC 380, at p. 386D (Court of Session).
R, Petitioner 1999 SC 380, at p. 386G (Court of Session), approving the statement of the Lord President in M v Kennedy 1993 SCLR 69 to the effect that the test of admissibility was whether the child was likely to give trustworthy evidence. The Court concluded by calling for a study “with contributions from skills outside law” of the area of competency of child witnesses, and asserted that, in the absence of such study, “it is not clear to us that sufficient guidance can be given to judges and sheriffs either as to what it is that they are trying to discover about the child, or as to how to discover it”, whether by talking to the child directly in the preliminary examination and/or with the assistance of other material such as, perhaps, expert witnesses: R, Petitioner 1999 SC 380, at pp. 3861–387A.
in *R, Petitioner*\textsuperscript{667} and the finding that the concept of ‘trustworthiness’ – or the child’s understanding of the difference between telling the truth and telling lies – comprises a larger test of cognitive development, it is submitted that the latter view is more likely. Accordingly, it is submitted that the new Scottish legislation – despite its less than perfect wording – operates to abolish *in toto* both the competence test and preliminary examination for potential child witnesses and allows children to give evidence ‘for what it is worth’ in line with Wigmore’s recommendations.\textsuperscript{668}

### 2.17.0 Impact upon the Accused of the Relaxation of Competence Requirements:

#### 2.17.1

The question remains: whether the relaxation – to the point, in some jurisdictions of abolition – of the competence requirements for child witnesses, and the resulting steady progression from a position of exclusion to a greater inclusiveness of the evidence of children, reflects a fair balance between the desirability of the admission of all relevant understandable evidence in the interests of the proper administration of justice, the rights of the child and the protection of the rights of the accused, including the right to a fair trial and fair procedures?\textsuperscript{669}

#### 2.17.2

Article 38.1 of the Constitution provides that “*no person shall be tried on any criminal charge save in due course of law*”. This phrase, ‘due course of

\textsuperscript{667} *R, Petitioner* 1999 SC 380 (Court of Session).

\textsuperscript{668} The Scottish Executive suggested that: “The abolition of the test [of competence] would mean that there would be no need for the sheriff or judge to carry out any preliminary questioning to see if the child understood the difference between truth and lies and the duty to tell the truth, and then make a formal decision that the child was competent. If it was decided to call the child to give evidence, whether in the court itself, or by means of a live television link, the child would simply be questioned about the events witnessed, and the judge and/or jury would take account of the age and apparent level of understanding of the child in deciding what weight to give their evidence”. Scottish Executive, *Vital Voices: Helping Vulnerable Witnesses to give Evidence* (Edinburgh: The Scottish Office, May 2002), para. 7.11, at p. 33.

\textsuperscript{669} Concern has been expressed regarding the possible imbalance in the abolition of competency requirements for child witnesses (the ‘Wigmore’ approach). Myers, “The Testimonial Competence of Children”, 25 *J of Family Law* 287, at p. 308: “There is little argument about the need for testimony by victims of sexual offences, but the courts will not ignore defence arguments that abolition of any competency requirements may offend principles of basic fairness and due process of law in some cases.”
law’, encompasses “fair and just treatment for the person so charged, having due regard to the rights of the State to prosecute for the offence charged and to ensure that the person so charged will stand his trial” and, moreover, requires a “fair and just balance between the exercise of individual freedoms and the requirements of an ordered society”. Accordingly, this constitutional guarantee includes within its scope basic concepts of justice, fairness, fair procedures, “the dignity of the individual” and “the public interest in the integrity of the justice system” and the conduct of criminal trials. That said, it is important to note that the understanding of what is fair and proper in the conduct of a criminal trial has always been the subject of change and development; “[r]ules of evidence and rules of procedure have gradually evolved as

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670 The Criminal Law (Jurisdiction) Bill 1975 [1977] IR 129, at p. 152, (1976) 110 ILTR 69, at p. 80, per O’Higgins C.J. (S.C.). In The State (Healy) v Donoghue [1976] IR 325, at p. 335, (1976) 110 ILTR 9, at p. 13 (H.C.), Gannon J. described it as “a phrase of very wide import which includes in its scope not merely matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function.”

671 D v Director of Public Prosecutions [1994] 2 IR 465, at p. 473, per Denham J. (S.C.): “The unenumerated rights of Article 40, s. 3 incorporate a right to fairness of procedures”.

672 The State (Healy) v Donoghue [1976] IR 325, at p. 348, (1976) 110 ILTR 9, per O’Higgins C.J. (S.C.): “It is justice which is to be administered in the courts, and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual... [Considered in the light of Articles 34 and 40.3] 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”.

673 See the dissenting judgment of Denham J. in the recent Supreme Court decision, People (Director of Public Prosecutions) v Redmond (Unreported, Supreme Court, 6^th April 2006) [2006] IESC 25 wherein she asserted in para. 15 that: “I am satisfied that the learned Circuit Court judge has an inherent jurisdiction, and indeed a duty, to act to ensure the due process of law, which includes the concepts of justice, the dignity of a person, and the public interest in the integrity of the justice system. Such inherent jurisdiction may arise in relation to the plea given by an accused.”

674 In Heaney v Ireland [1994] 3 IR 593, at p. 605, [1994] 2 ILRM 420, at p. 430 (H.C.) Costello J. described it thus: “It is an Article couched in peremptory language and has been construed as a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice. Those basic principles may be of ancient origin and part of the long established principles of the common law, or they may be of more recent origin and widely accepted in other jurisdictions and recognised in international conventions as a basic requirement of a fair trial. Thus, the principle that an accused is entitled to the presumption of innocence, that an accused cannot be tried for an offence unknown to the law, or charged a second time with the same offence, the principle that the accused must know the case he has to meet and that evidence illegally obtained will generally speaking be inadmissible at trial, are all principles which are so basic to the concept of a fair trial that they obtain constitutional protection from this Article. Furthermore, the Irish courts have developed a concept that there are basic rules of procedure which must be followed in order to ensure that an accused is accorded a fair trial and these basic rules must be followed if constitutional invalidity is to be avoided.” See also: Re Haughey [1971] IR 217 (S.C.).
It is in this context that it is queried whether the recent reforms of the law of competence and the subsequent lowering of the threshold competence requirements – or even entire abolition thereof – infringe the accused’s constitutional rights to a fair trial and fair procedures, in circumstances where these reforms were prompted by attitudinal changes towards the testimonial capabilities of children following the results of psychological research indicating that such capabilities may approximate those of adult witnesses.

2.17.3 The courts have a duty to protect and vindicate fundamental constitutional rights and to ensure that such rights are not set at nought or circumvented; the courts’ powers in this regard are “as ample as the defence of the Constitution requires”. The right of the accused to a fair trial and his / her right to fair procedures are among such rights. Moreover, in the context of the constitutionality of the adoption of the ‘intelligibility’ test of competence – or even the total abolition of competence requirements for child witnesses – it should be noted that it has been held that among the incidents of a jury trial in a criminal case, is the duty of a trial judge to ensure that “prejudicial matter of no probative value is not admitted in evidence before the jury”; this principle is illustrated by reference to the

675 The State (Healy) v Donoghue [1976] IR 325, at p. 350, per O’Higgins C.J. (S.C.). The Chief Justice also noted that: “The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him”.
676 In In re Greendale Developments Ltd (in liquidation) [2001] 1 I.L.R.M. 161 (S.C.) it was held that this jurisdiction extends to an inherent duty to protect constitutional justice even in a case where there has been what appears to be a final judgment and order, although it will only be exercised in the most exceptional circumstances, when a constitutional right or justice lies to be protected.
677 Attorney General v Open Door Counselling Ltd (No. 2) [1994] 2 IR 333, at p. 350, [1994] 1 ILRM 256, at p. 269, per Denham J. (S.C.) (dissenting in the result) held that it was the duty of the Supreme Court to “ensure that the Constitution, and justice, are upheld”.
678 As stated by Ó Dálaigh C.J. in The State (Quinn) v Ryan [1965] IR 70, at p. 122 (S.C.) referring to the courts as “custodians of [fundamental] rights”.
679 The Irish Times Limited v Ireland [1998] 1 IR 375, at p. 402, [1998] 2 I.L.R.M. 161, at p. 190, per Barrington J. (S.C.): “A fundamental duty of a trial judge is to ensure that the trial before him is conducted in due course of law. Different generations of lawyers may have different insights into what is required by ‘due course’ or ‘due process’ of law. But the general incidents of a jury trial in a criminal case were well known to the framers of the Constitution. Had they intended to change these incidents one would have expected them to say so. Among these incidents is the duty of a trial judge in a criminal case to ensure that prejudicial matter of no probative value is not admitted in evidence before the jury. Thus if a question is raised as to whether an alleged confession was or was not made by the accused voluntarily the judge will investigate the voluntariness of the confession in the absence
practice of the trial judge determining the admissibility of a confession – the voluntary nature of which has been challenged – in the absence of the jury prior to its admission into evidence. By analogy, it is submitted that, to expose the jury to the potentially highly prejudicial evidence of an incompetent child, without any pre-conditions or preliminary examination as to competence, may run contrary to the accused’s right to trial in due course of law; in particular, it is submitted that an accused person enjoys a constitutional right – as an aspect of his / her right to a fair trial and fair procedures – to have the reliability of potentially prejudicial evidence tested prior to its admission into evidence against him / her.

2.17.4 It is submitted that the ‘intelligibility’ approach by requiring, by way of preliminary examination, assurance of the child’s basic ability to understand questions posed to him / her and to give answers which may be reasonably understood, not only affords greater recognition to the differences inherent in child witnesses – examined below – but also contains an important and effective safeguard against the admission of evidence of no probative value which is potentially highly prejudicial to the accused, in breach of the accused’s right to a fair trial and fair procedures. This safeguard is markedly absent from approaches involving the total abolition of even the most rudimentary competency tests for child witnesses, regardless of their youth; consequently, it is submitted that such approaches, in affording greater weight to the admission of the evidence of child witnesses – regardless of its inherent value or dangers – than to the rights of the accused, risk creating an of the jury before deciding whether or not to admit it in evidence. This is because a jury of laymen could hardly be expected to exclude from their minds damaging evidence such as an alleged confession of guilt even though the alleged confession might be of no probative value in law. There would be little point however in the judge conducting his inquiry in the absence of the jury if the press were free to report everything which happened in the absence of the jury and if the members of the jury could read all about it in their newspapers.” (Emphasis added).

It is accepted that judicial directions to the jury to disregard such evidence, following a finding that the child witness was incompetent, may be sufficient to safeguard the rights of the accused or to avoid the real risk of an unfair trial. See, further, section 3.7.0-3.7.23 in relation to the impact upon the rights of the accused of the abolition of the traditional mandatory corroboration requirements and the remedial effect of judicial directions to the jury.

See, in particular: sections 1.0.16.-1.0.21 and 2.17.13.-2.17.16.
imbalance adverse to the accused and, ultimately, to the proper administration of justice.

2.17.5 Although the harmonious approach to interpretation is usually applied to resolve conflicts between constitutional rights,\(^{682}\) where such interpretation is not possible, the courts have tended to apply the ‘hierarchy of constitutional rights’ approach;\(^{683}\) in relation to the right to trial in due course of law, the courts have tended to locate the right to a fair trial and fair procedures in an elevated position in such hierarchy.\(^{684}\) Accordingly, it has been held, for example, that the community’s right to have offences prosecuted is inferior to the accused’s right to a fair trial and fair procedures\(^{685}\) and that the right to trial in due course of law is also superior...

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\(^{682}\) *Dillane v Ireland* [1980] ILRM 167, at p. 170, per Henchey J. (S.C.): “[T]he doctrine of harmonious interpretation ... requires, where possible, the relevant constitutional provisions to be construed and applied so that each will be given due weight in the circumstances of the case.”

\(^{683}\) In *The People v Shaw* [1982] IR 1, at p. 63, (S.C.) Kenny J. asserted that: “There is a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail. This is the law for the exercise of all three powers of government and flows from the conception that all three powers must be exercised to promote the common good: see the Preamble to the Constitution. The decision on the priority of constitutional rights is to be made by the High Court and, on appeal, by this Court. When a conflict of constitutional rights arises, it must be resolved by having regard to (a) the terms of the Constitution, (b) the ethical values which all Christians living in the State acknowledge and accept and (c) the main tenets of our system of constitutional parliamentary democracy”. In the same decision, Griffin J. observed at p. 56 that: “[Where a harmonious application of constitutional rules is not possible] the hierarchy or priority of conflicting rights must be examined, both as between themselves and in relation to the general welfare of society. This may involve the toning down or even the putting into temporary abeyance of a particular guaranteed right so that, in a fair and objective way, the more pertinent and important right in a given set of circumstances may be preferred and given application”.

\(^{684}\) In *D v Director of Public Prosecutions* [1994] 2 IR 465, at p. 473 (S.C.), Denham J. held that: “The applicant’s right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right. A court must give some consideration to the community’s right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant’s right to fair procedures is superior to the community’s right to prosecute. If there is was a real risk that the accused would not receive a fair trial then there would be no question of the accused’s right to a fair trial being balanced detrimentally against the community’s right to have alleged crimes prosecuted.”

\(^{685}\) *B v Director of Public Prosecutions* [1997] 3 IR 140, at p. 196, per Denham J. (S.C.): “The community’s right to have offences prosecuted is not absolute, but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant’s right would prevail”. *Kelly v O’Neill* [2000] 1 IR 354, at p. 367, [2000] 1 ILRM 507, at p. 522 (S.C.), per Denham J.: “If there was a real or serious risk that an accused would not receive a fair trial then the balancing of his right to a fair trial against the community’s right to prosecute would not arise. The test for the court is as to whether there was a real risk that an accused would not receive a fair trial. To enable an accused person obtain a fair trial not only should the trial be conducted in accordance with fair procedures but the jury should reach its verdict by reference only to evidence admitted at the trial and not by reference to facts, alleged or otherwise, contained in statements or opinions aired by the media outside the trial: *Z v Director of*
to any rights arising from Article 34.1 of the Constitution.\textsuperscript{686} There is also authority to suggest that where there is doubt as to where the fair balance lies between competing rights, "the balance should be tipped in favour of the administration of justice, of a fair trial".\textsuperscript{687}

\textbf{2.17.6} Notwithstanding the elevated position enjoyed by the right to a fair trial / fair procedures in any asserted hierarchy of constitutional rights, it is submitted that this right - or "bundle of principles and maxims"\textsuperscript{688} - cannot be considered in isolation.\textsuperscript{689} It must be examined in the context of the other constitutional rights arising in order to achieve the best possible balance.
between competing interests. It is submitted that “categorising the rights and placing them in the appropriate hierarchy does not dispose of this matter”; the court, in carrying out its duty to protect the constitutional right to trial in due course of law, may have to “balance competing rights, to consider the rights of different persons and groups of persons and of the community”.691

2.17.7 A number of points may be made in this regard. First, the right to a trial in due course of law is not simply the right of the accused; “it is in the interest of the community as a whole that the right should be protected and vindicated by the State and its organs”.692 Secondly, the rights of the child witness / complainant and the protection of his / her welfare must also be weighed in the balance.693 Thirdly, the child’s personal constitutional rights

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690 The Irish Times Limited v Ireland [1998] I R 375, at pp. 399-400, [1998] 2 I.L.R.M 161, at p. 185, per Denham J. (S.C.): “The test to be applied is whether there is a real risk that the accused would not receive a fair trial if the trial was held in public. Further, the test requires a second step. If it were determined on evidence that there was a real risk of a trial being unfair if it were held in public then the trial judge should consider whether the real risk can be avoided by appropriate rulings and directions. This two-part process was not applied or applied appropriately.”

691 Director of Public Prosecutions v Gilligan (Unreported, Supreme Court, 23rd November 2005), [2005] IESC 78, para. 8.1, at p. 38, per Denham J.: “[I]t is the duty of the Judicial branch of government to protect the constitutional right of fair trial, the right to due process. In carrying out this duty the court may have to balance competing rights, to consider the rights of different persons and groups of persons and of the community. It is necessary to analyse the situation to see if there has been an unfair process, or a breach of the constitutional rights of any person.” In re Article 26 and the Criminal Law (Jurisdiction) Bill 1975 [1977] IR 129, O’Higgins C.J. (S.C.), delivering the decision of the Court, held at p. 152 that ‘due course of law’ in Article 38.1 “requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society.”

692 Kelly v O’Neill [2000] I R 354, at p. 375, per Keane J. (S.C.). See also: The People (Director of Public Prosecutions) v Quilligan (No. 2) [1989] IR 46, at p. 60, per Walsh J. (S.C.): “[The accused] are entitled as of right to a fair trial, but the People, who in the Director of Public Prosecutions have brought this prosecution, are also entitled to have the matter tried and fairly tried in accordance with law. So far this has not been afforded to them”.

693 Director of Public Prosecutions v Gilligan (Unreported, Supreme Court, 23rd November 2005), [2005] IESC 78, para. 8.2, at p. 41, per Denham J.: “While applying these principles to protect the rights of an accused the court will also have regard to the right of the People that offences be prosecuted. This may require the court to balance competing rights. On a hierarchy of constitutional rights, the applicant’s right to a fair trial is superior to the community’s right to have the matter prosecuted: Z v Director of Public Prosecutions [1994] 2 I.R. 476. In balancing competing positions the test is whether there is a real or serious risk of an unfair trial for the accused: D v Director of Public Prosecutions [1994] 2 I.R. 465. The right of the People is also part of the equation. This incorporates the right to have an accused prosecuted; the right to have a fair trial system in the community; and to guard against unfair trials which may lead to miscarriages of justice. The position of victims (and their families) should not be excluded from this equation either.” (Emphasis added). Scottish Executive, Executive Summary, Vital Voices: Helping Vulnerable Witnesses to give Evidence (Edinburgh: The Scottish Office, 2002) at p. 1: “It is important to balance the interests of the witness against the interests of the accused or the parties to a civil case. A witness’s evidence always has to be
as an individual member of the family unit must be taken into consideration and vindicated in case of injustice done.\textsuperscript{694} For example, where the child is a complainant of sexual abuse against a family member, the child’s right to bodily integrity\textsuperscript{695} and right of access to the courts\textsuperscript{696} must be considered by


\textsuperscript{696} See Article 40.3 of the Constitution as applied in: \textit{Tuohy v Courtney} [1994] 3 IR 1, at pp. 45, 47, \textit{per} Finlay C.J. (S.C.); \textit{The State (Quinn) v Ryan} [1965] IR 70, (1966) 100 ILTR 105; \textit{O’Brien v Keogh} [1972] IR 144; \textit{O’Domhnaill v Merrick} [1984] IR 151; \textit{Brady v Donegal County Council} [1989] ILRM 282, at p. 287, \textit{per} Costello J.; and \textit{MacGairbhith v Attorney General} [1991] 2 IR 412, at p. 413, \textit{per} O’Hanlon J. In the decision of Kenny J. in \textit{Macaulay v Minister for Posts and Telegraphs} [1966] IR 345, at p. 358, this right was described as follows: “[T]here is a right to have recourse to the [High Court] to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee of Article 40.3 seems to be to be a necessary inference from Article
the courts and vindicated in case of injustice done. This approach would appear to support the use of the ‘intelligibility’ test of competence and the balance thereby achieved between these competing rights.

2.17.8 Equally, in the context of the evidential rules governing the competency of children to give evidence, it is important to note that the courts in this jurisdiction have held that “the administration of justice itself requires that the public has a right to every man’s evidence” with the sole exception of that evidence which is excluded by law or by the Constitution. The exercise of the judicial power carries with it the power to compel the attendance of witnesses, the production of evidence and, a fortiori, the answering of questions by the witnesses. Furthermore, the sole power of resolving any conflict of interest involved in the non-disclosure of evidence resides in the courts; this is described as “the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or in vindication of the innocent”. While these statements were intended to refer to the principal issues arising in these cases, namely, the competence and compellability of a spouse, and the competence of a witness in a Witness Protection Programme respectively, it is submitted that they can nonetheless be applied with equal force to the evidence of children; subject to the foregoing, they support an inclusive approach to the evidence of children such as the ‘intelligibility’ test in this jurisdiction. Arguably, these principles are even

34.3.1... If the High Court has this full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution), it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution, or for the purpose of asserting or defending a right given by the Constitution, for if it did not exist, the guarantees and rights in the Constitution would be worthless”. It is submitted that, particularly in the context of child complainants of sexual offences, to set the threshold for competence for child witnesses unduly high or to apply such requirements as there are – namely, intelligibility – too strictly is to empty the child’s constitutional right to access to the courts of content.

697 Director of Public Prosecutions v Gilligan (Unreported, Supreme Court, 23rd November 2005), [2005] IESC 78, para. 12, at pp. 77-78, per Denham J. expressly adopting the approach of Walsh J. in The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141, at p. 160 and adding the rider: “The administration of justice requires that the public has a right to every man’s evidence except for that evidence which is excluded by law or the Constitution” (Emphasis added). Walsh J. had confined the exception from this general proposition to the law of privilege.

consistent with allowing all "relevant understandable evidence" to be admitted through total abolition of statutory competency thresholds for child witnesses, although as indicated above, it is submitted that this latter approach fails to adequately respect the accused’s right to a fair trial, in particular, his / her right to have the reliability of potentially prejudicial evidence tested prior to its admission into evidence against him / her.

Similarly, it has been acknowledged by the courts that exclusionary rules – such as the old competency rules governing child witnesses – "[suffer] from the marked disadvantage that [they constitute] a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice". The concept of ‘justice’ is central to and informs the guarantee of a trial ‘in due course of law’ in Article 38.1 and the

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700 It is submitted that the ambit of exclusionary rules is further expanded by their application by the courts in their efforts to safeguard the constitutional rights of the accused. In The People (Director of Public Prosecutions) v Breathnach [1981] 2 Frewen 43 (C.C.A.) the Court of Criminal Appeal held that: “Because our system of law is accusatorial and not inquisitorial, and because (as has been stated in a number of decisions of this Court) our Constitution postulates the observance of basic or fundamental fairness of procedures, the Judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or of the circumstances in which it was obtained, it falls below the required standards of fairness. The reason for exclusion here is not so much the risk of an erroneous conviction as the recognition that the minimum of essential standards must be observed in the administration of justice. Whether the objection to the statement be on constitutional or other grounds, the crucial test is whether it was obtained in compliance with basic or fundamental fairness, and the trial judge will have a discretion to exclude it ‘where it appears to him that the public policy, based on a balancing of public interest, requires such exclusion’ - per Kingsmill Moore J. at p. 161 of the report of O’Brien’s case.” See also: Trimbole v Governor of Mountjoy Prison [1985] IR 550, at p. 573, per Finlay C.J. (S.C.).
701 The People (Director of Public Prosecutions) v Kenny [1990] 2 IR 110, at p. 134, per Finlay C.J. (S.C.). While this finding was made in the context of the exclusionary rule governing unconstitutionally obtained evidence, it is submitted – as, indeed, it was expressly acknowledged by Finlay C.J. – that this finding applies equally to all other exclusionary rules, including the traditional competence requirements for child witnesses.
702 In The State (Healy) v Donoghue [1976] I.R. 325 (S.C.), O’Higgins C.J. stated at p. 348 that: "[T]he concept of justice, which is specifically referred to in the preamble in relation to the freedom and dignity of the individual, appears again in the provisions of Article 34 which deals with the Courts. It is justice which is to be administered in the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual. No court under the Constitution has jurisdiction to act contrary to justice... [Article 38.1] must be considered in conjunction with Article 34; with Article 34.1.1, 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 subs. 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
guarantee of fair procedures in Article 40.3 expressly subordinates the law to justice. Accordingly, if, by virtue of a mis-application or an unduly strict reading of a statutory test of competence for child witnesses, a trial judge erroneously finds the child incompetent and excludes his / her evidence, and “the jury is not permitted to consider the evidence or the charge brought against an accused or to pronounce on his guilt or innocence, can it be said that justice has been accorded to the State and to society?”; it has been held that it cannot and that therefore “a situation would exist which the Constitution prohibits”. Accordingly, it is submitted that the modern legislative test of competence of children – the ‘intelligibility’ test – not only safeguards the rights of the accused but is also consistent with the court’s truth-seeking functions and the proper administration of justice.

2.17.10 Even if it were to be held that the basic test of cognitive ability embodied in the ‘intelligibility’ test currently contained in Irish legislation offends
against the accused’s right to a fair trial and fair procedures, it is submitted that it would nonetheless be upheld where it satisfied the ‘balance’ and ‘proportionality’ tests applied by the courts in this jurisdiction. Although the competing constitutional rights in issue would depend upon the facts of the individual case, as indicated above, they could include the child’s personal rights – such as the right to bodily integrity and the right of access to the courts – the community’s right to everyone’s evidence and the proper administration of justice and the community’s right to have offences prosecuted. It is submitted that it cannot be said that the ‘balance’ contained in the ‘intelligibility test’ – permitting the admission of evidence from child witnesses who are able to demonstrate an understanding of questions asked and to give answers which may reasonably be understood – is so contrary to reason and fairness as to constitute an unjust attack on the accused’s constitutional rights; rather, as illustrated above, such test is both consistent

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705 This test is contained in the decision in Tuohy v Courtney [1994] 3 IR 1, at p. 47, [1994] 2 ILRM 503, at p. 514, per Finlay C.J. (S.C.): “[T]he Oireachtas in legislating for time limits on the bringing of actions is essentially engaged in a balancing of constitutional rights and duties. What has to be balanced is the constitutional right of the plaintiff to litigate against two other contesting rights or duties, firstly, the constitutional right of the defendant in his property to be protected against unjust or burdensome claims and, secondly, the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims. The court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual’s constitutional rights”. (Emphasis added).

706 Quinlan v Attorney General (Unreported, High Court, McKechnie J., 16 September 2004) para. 103: “Whilst the proportionality principle is an invaluable tool in testing constitutional limits, it must be remembered, however, that every case must be judged in accordance with its own circumstances, which inevitably involves a consideration of the aims and objectives to be pursued and the legislative means adopted to achieve these results.”

707 Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990) para. 7.02, at p. 67: “[A] deep-seated assumption is embedded in society and reflected in our law that young children are unreliable and incompetent witnesses. This assumption, we are satisfied, is erroneous, and inimical to the constitutional rights of young citizens who, although they may not be endowed with an adult’s capacity better to withstand the ordeal of giving evidence, have the same right, under Article 40 of the Constitution, to the defence and vindication of their personal rights. Accordingly, in order to defend and vindicate the rights of all young citizens, the State must ensure that there is no removable obstacle barring their access to the Courts. In order properly to vindicate the right of a child to bodily integrity, our laws should ensure that where it is possible for the child to give evidence for the People in a prosecution of his or her alleged abuser, such evidence should be made available. In order to ensure this availability it will be necessary to modify some of the usual attributes of a criminal trial. Such modification must not, however, constitute a denial of the right to trial in due course of law given to an accused by Article 38 of the Constitution.”
with the accused’s right to a fair trial and fair procedures and the proper administration of justice.

2.17.11 In addition to the ‘balance’ test,\textsuperscript{708} such statutory reforms must pass the ‘proportionality test’ which provides that: (i) the impugned provision must be rationally connected to the objective; (ii) they must impair the accused’s constitutional rights as little as possible; and (iii) they must be such that their effects on the accused’s constitutional rights are proportionate to the objectives sought to be obtained by the legislative reforms.\textsuperscript{709} While both statutory reforms – either the ‘intelligibility’ test or the total abolition of competency requirements – have as their objective the reception of all relevant understandable evidence in the interest of the proper administration of justice which, it is submitted, rather than infringing the accused’s right to a fair trial and fair procedures is consistent therewith, it is submitted that the latter statutory reform could permit the admission (at least initially) of the prejudicial evidence of an incompetent child witness, thereby infringing the accused’s right to trial in due course of law and / or the accused’s constitutional right to his / her good name. It is submitted that any infringement of the accused’s rights occasioned by the application of the ‘intelligibility’ test is minimal and proportionate to the aims sought to be achieved by the legislative reforms;\textsuperscript{710} however, it cannot likewise be said that the total abolition of competency requirements for child witnesses represents the least interference strictly necessary with the rights of the

\textsuperscript{708} See the judgment of Finlay Geoghegan J. in \textit{Enright v Ireland} [2004] 1 I.L.R.M. 103 (H.C.) wherein the ‘balance’ test and the ‘proportionality’ tests were treated as cumulative rather than alternatives.


\textsuperscript{710} Accordingly, it has been held that while the Oireachtas in upholding other constitutional rights – such as the rights of spouses and dependent children to be protected against physical violence – is entitled to abridge the constitutional right to due process of other persons – and, indeed, his / her right to a good name – the extent of that abridgement must be proportionate, that is, no more than is reasonably required in order to secure that the constitutional right in question is protected and vindicated: \textit{D.K. v Judge Crowley} [2002] 2 IR 744, \textit{per} Keane C.J. (S.C.), citing with approval the decision in \textit{Heaney v Ireland} [1966] 1 IR 580. See also: \textit{Re Employment Equality Bill} [1997] 2 IR 321, at p. 383, \textit{per} Hamilton C.J. (S.C.)
accused in order to receive the evidence of child witnesses since there is a less intrusive and proportionate means available to achieve this objective, namely, the 'intelligibility' test.

2.17.12 In determining whether sufficient counterbalancing measures or safeguards for the rights of the accused are provided for in the 'intelligibility' test and the 'abolitionist' approach, it is important to have regard to the operation of such approaches in practice; in particular, the difficulties presented by the 'incompetent' child witness. As indicated above, the principal criticism of the latter approach is that the response of the courts to a child witness who is demonstrably incompetent or becomes incoherent during his / her testimony or cross-examination, is for the trial judge to warn the jury to disregard the evidence of such child witness and to determine the issues arising in the criminal proceedings without reference to the child's evidence. However, while it is accepted — in the following section\textsuperscript{711} — in relation to the application of the rules of corroboration to the evidence of child witnesses that judicial directions to the jury provide an adequate safeguard for the rights of the accused, it should be noted that, in that context, all that is required is a cautionary instruction in relation to the quality of the child's evidence and, accordingly, the weight which the jury may attach thereto. Competence, on the other hand, involves the admissibility of the child's evidence and requires the jury — where a finding of incompetence has been made in respect of a child witness since the commencement of the trial — to entirely disregard the evidence of the child witness and to approach the determination of the guilt or innocence of the accused as though the child's evidence had never been received by the court. In these circumstances, it is doubted whether the judicial direction to the jury alone will be sufficient to counterbalance the prejudice to the accused by the admission of the evidence of an incompetent witness, contrary to his / her right to a trial in

\textsuperscript{711} See sections 3.7.0-3.7.23 in relation to the impact upon the rights of the accused of the reforms — both judicial and statutory — of the corroboration requirements in respect of the evidence of child witnesses.
due course of law' as outlined above;\textsuperscript{712} while such judicial direction can operate successfully to minimize the adverse impact of prejudicial evidence, it is submitted that it cannot entirely \textit{reverse} the effects of evidence which ought never to have been admitted.\textsuperscript{713}

2.17.13 It is submitted that it is the function of the trial judge, in the protection of the rights of the accused, to perform the '\textit{gate-keeper}' function assigned to him / her in this regard and to filter out incompetent witnesses and inadmissible evidence before ever it reaches the jury.\textsuperscript{714} In this regard, it should be remembered that the test of competence advocated herein is merely a basic test of the child's ability to understand questions posed to him / her and to give answers which may reasonably be understood. Such test – applied by way of brief preliminary inquiry – cannot be said to represent an obstacle to the admission of the evidence of psychologically competent child witnesses, yet it should provide protection to the accused against the prejudicial effects of the admission of the – untested – inadmissible evidence of incompetent child witnesses. In this regard it should also be noted that as the legislation containing the 'intelligibility' test – the Criminal Evidence Act 1992 – post-dates the Constitution, it is submitted that the presumption of constitutionality would attach thereto and it would be presumed that the Oireachtas intended any proceedings, procedures, discretions or adjudications permitted, provided for, or prescribed by any such enactment would be conducted in accordance with the principles of constitutional justice and that any departure from those principles would be restrained or corrected by the courts.\textsuperscript{715}

\begin{itemize}
\item \textsuperscript{712} See also: McGrath, Declan \textit{Evidence} (2005) para. 4-48, at p. 145 wherein the author doubts the effect of the corroboration warning on the jury: "Whether a jury will in fact heed such a warning is a matter of some conjecture". \textit{A fortiori}, it is submitted that the judicial direction to the jury may be insufficient to safeguard the rights of the accused in relation to the \textit{incompetency} of a child witness.
\item \textsuperscript{713} It is submitted that using judicial directions to the jury to attempt to erase the prejudicial effect of the inadmissible evidence of an incompetent witness is reminiscent of the old adage of locking the stable door after the horse has bolted.
\item \textsuperscript{714} Roberts, Paul and Zuckerman, Adrian \textit{Criminal Evidence} (2004) at p. 67: "The task of subjecting the jury's verdict to the discipline of law falls primarily to the trial judge. Amongst the trial judge's most important functions is to filter the information presented to the jury by applying rules of evidence and the judge's own discretion to exclude inadmissible material from the trial."
\item \textsuperscript{715} \textit{East Donegal Co-operative Livestock Mart Ltd. v Attorney General} [1970] IR 317 (S.C.).
\end{itemize}
2.17.14 The compatibility of the ‘intelligibility’ approach and the total abolition of competency requirements for child witnesses with the rights of the accused under the European Convention on Human Rights — in particular, his / her right to a fair trial — must also be considered. It has been held that issues of admissibility of evidence — and, in particular whether evidence was properly admitted — are primarily matters for regulation by national law and for determination by national courts. Accordingly, it would appear that

716 Article 6 of the European Convention on Human Rights provides, so far as it is relevant, that: “(1) In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.... (3) Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” While it may be thought that where a child witness is found to be incompetent during his / her evidence-in-chief and his / her evidence is subsequently withdrawn with a judicial direction to the jury to disregard same, that this deprives the accused of the right to examine or have examined this witness pursuant to Article 6(3)(d). However, it is submitted that such argument stretches the meaning of Article 6(3)(d) and, indeed, the meaning of ‘witness’ since the effect, in theory at least, of the trial judge’s ruling is that the evidence was never admitted and the child was never a competent witness.


718 Poleshchuk v Russia (2006) 42 E.H.R.R. 35, para. 36 (E.Ct.H.R.), citing Garcia Ruiz v Spain (2001) 31 E.H.R.R. 22, para. 28 and Pesti v Austria (2000) 29 E.H.R.R. CD229: “The Court, however, reiterates that, according to Art.19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties in the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Art.6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by domestic law and the national courts.” See also: Doorson v Netherlands (1996) 22 EHR 330, para. 67. See, however the decision of the Court in Barbera, Messegue and Jabardo v Spain (1989) 11 EHR 360, at paras. 87, 89, wherein the Court found a violation of Article 6 and expressed reservations regarding the ‘confessions’ made by the defendants after a long period in detention without communication where the defendants alleged the confessions were the product of torture. The Court has also considered whether a violation of Article 6 occurred in relation to the admission of evidence of accomplices offered immunity from prosecution, or undercover agents placed in a prison to eavesdrop on conversations involving the accused (X v Federal Republic of Germany
the rules of evidence governing the competence of child witnesses – or the abolition thereof – may fall outside of the competence of the European Court of Human Rights. However, it is submitted that such considerations may be comprised (albeit indirectly) within the role of the European Court of Human Rights in determining whether the proceedings as a whole were fair.\textsuperscript{719} It is also important to note that while the Court has held that there must be an effective procedure during a criminal trial by which to challenge the admissibility of evidence obtained unlawfully or in breach of Convention rights, the existence of a \textit{voir dire} has been held to be sufficient since such procedure can result in the exclusion of the evidence.\textsuperscript{720} By analogy, it is submitted that, where there is any doubt as to the ‘competence’ of a potential child witness and the admissibility of his / her evidence, the rights of the accused are adequately safeguarded by a preliminary examination which investigates – albeit in a perfunctory manner – the child’s intelligibility. By way of contrast, the absence of any such safeguard against the admission of the inadmissible evidence of an incompetent witness in the ‘abolitionist approach’ raises questions as to its compatibility with the guarantees contained in Article 6 of the Convention.

\textsuperscript{719} See: \textit{Khan v United Kingdom} (2001) 31 EHRR 45, paras. 34 and 38; \textit{Schenk v Switzerland} (1988) 13 EHRR 242, paras. 45-46; \textit{Edwards v United Kingdom} (1993) 15 EHRR 417, at para. 34; and \textit{Miailhe v France (No. 2)} (1997) 23 EHRR 491, para. 43. In \textit{Nielsen v Denmark} (1988) 11 EHRR 175, para. 52 it was held that: “[T]he question whether the trial conforms to the standard laid down by paragraph 1 [will be] decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration of one particular incident. Admittedly one particular incident or one particular aspect ... may have been so prominent or may have been of such importance as to be decisive for the general evaluation of the trial as a whole. Nevertheless, even in this contingency, it is on the basis of an evaluation of the trial in its entirety that the answer must be given to the question whether there has been a fair trial”. Emmerson, Ben and Ashworth, Andrew \textit{Human Rights and Criminal Justice} (2001) para. 15-05, at p. 418: “The Convention does not lay down a comprehensive set of rules for the admissibility of evidence, which is primarily a matter for regulation through national law. The Court’s function is to determine whether the proceedings in question, taken as a whole, were fair, and whether the rights of the defence under Article 6 were adequately respected.”

\textsuperscript{720} See: \textit{G v United Kingdom} (1983) 35 D.R. 75 (E.Cm.H.R.) wherein the European Commission on Human Rights upheld the fairness of a trial in the face of a claim by the applicant that he had been forced by police to sign his confession before being permitted to speak to his solicitor since the trial of the applicant contained a \textit{voir dire} where, having heard legal argument in relation thereto, the trial judge ruled in favour of the admission of the confession. Reid, Karen A \textit{Practitioner’s Guide to the European Convention on Human Rights} (1998) at p. 85: “A failure by the applicant or his counsel to object to any evidence is an important, if not necessarily decisive factor, bearing in mind the courts’ general duty to ensure the fairness of the proceedings of their own motion. Also relevant are any aspects which might remedy or mitigate the alleged unfairness and where the matter was subject to careful scrutiny by the appeal courts”.

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2.17.15 However, the permissibility of abolishing all competency requirements for the reception of the evidence of children in lieu of maintaining the ‘intelligibility’ test of competence does not necessarily or comprehensively address the desirability of adopting the ‘abolitionist’ approach to the evidence of children in lieu of the current basic test of children’s testimonial capabilities. While the abandonment of competency requirements or pre-conditions for the reception of evidence from child witnesses – prompted by the positive findings of psychological research into the abilities of children as witnesses – purports to equalize child and adult witnesses, it prompts the question: is there something inherently different about child witnesses which requires the law to treat them differently in order to afford them equality?

2.17.16 While it is accepted that the overwhelming evidence arising from the results of modern psychological studies regarding the capabilities of children indicate that children may be as reliable witnesses as adults, it is submitted that it does not necessarily follow as matter of logic that child witnesses should be treated in an identical manner to adult witnesses for the purpose of assessing their competence. In reforming the law of competence to ensure equal value is attributed to the evidence of child and adult witnesses alike, it is important to both recognize and accommodate relevant differences between adults and child witnesses. It is respectfully submitted that approaches which advocate the abolition of all competence requirements for child witnesses operate under the erroneous premise that by homogenizing the treatment of child and adult witnesses, equality is restored. However, equality “endorses the recognition of pertinent differences and requires that persons be treated differently to the extent that there is a relevant difference between them”, so that to “treat persons the same when they are in fact already unequal is to perpetuate rather than to eliminate inequality”. As asserted above, it is submitted that the differences inherent in children

cannot be reduced to immature linguistic or communicative skills, rather they extend to all aspects of the child’s person:

“Children differ from adults in the way they perceive, organize and think about the world around them and about their own experiences. Such differences are found in reasoning, judgement, knowledge and the mastery of academic skills required by the kind of questions witnesses encounter.”

2.17.17 Requiring child witnesses to submit to a rudimentary test of ‘intelligibility’ – that is, an assessment of their ability to understand questions posed and to give answers which may reasonably be understood – does not re-introduce the misconception that children are not reliable witnesses but rather recognizes that child witnesses are not ‘miniature adults’ and that, in order to afford child witnesses true equality, their inherent differences must be accommodated; “[w]hile the evidence of all witnesses must be carefully assessed, children are to be treated differently from adults, and their evidence should be assessed taking account of the capacities of children not adults.”

2.17.18 It is submitted that, for the reasons outlined above, provided the ‘intelligibility test’ is interpreted – as advocated above – as the basic ability to understand questions posed and give answers which can reasonably be understood it represents the most appropriate balance between the rights

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722 Saywitz, Karen, “Developmental Underpinnings of Children’s Testimony” in Westcott, Helen, Davies, Graham and Bull, Ray (eds.) Children’s Testimony: A Handbook of Psychological Research and Forensic Practice (2002) 1, at p. 6. Similarly Bala, Nicholas “The Supreme Court Sends a Clear Message (Again): Children are not Adults” (1999) 27 C.R. (5th) 195, asserted at p. 195: “Children have different strengths and capacities from adults; they do not perceive or communicate in the same way as adults. Children can be reliable witnesses offering important information to the justice system, provided that their stage of development and capacities are respected.”

723 Bala, Nicholas “The Supreme Court Sends a Clear Message (Again): Children are not Adults” (1999) 27 C.R. (5th) 195, at p. 195: “While the evidence of all witnesses must be carefully assessed, children are to be treated differently from adults, and their evidence should be assessed taking account of the capacities of children, not adults.”

724 See ss. 53(1) and s. 55(8) of the Youth Justice and Criminal Evidence Act 1999 in England. As discussed above, this test is to be preferred to the formulation of the test by the majority of the Supreme Court of Canada as the “basic ability to perceive, remember and communicate” since the

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of the accused, the rights of the child and the community and the proper administration of justice.

3.0.0 CORROBORATION OF THE EVIDENCE OF CHILD WITNESSES

3.0.1 The tests of competence outlined herein did not represent the sole obstacle to the acceptance of evidence from a child witness or complainant by the common law courts. Even where the child was regarded as a competent witness and the court was therefore prepared to admit his/her evidence, there remained a further hurdle to be overcome, namely, the corroboration requirements concerning the evidence of children.725

3.0.2 Corroboration requirements were also grounded upon the law’s perception of children, as a class of witnesses, as inherently suspect or unreliable and the concomitant need to avoid prejudice to the accused in the interests of a fair trial.726 If child witnesses were unreliable, then it followed that the evidence of child witnesses should not be permitted, in the absence of other independent confirmatory evidence implicating the accused in the offence alleged, to ground a conviction; or, at the very least, the trier of fact should

725 Gillies, Peter Law of Evidence in Australia (2nd ed., 1991) at p. 595: “Corroboration, it will be observed, is, unlike many other rules or doctrines of evidence, not concerned with admissibility. Evidence which is alleged to be corroborative is admitted pursuant to the same general principles of evidence which determine the admissibility of all other forms of evidence. The corroboration principles, rather, bear upon the use which may be made upon certain types of evidence (i.e., where they provide that single witness testimony cannot be acted upon without corroboration), or they condition the evaluation of certain types of evidence (where they require the jury to be warned in relation to certain testimony, that it should look for corroboration of it).”

726 The most draconian measure available to the law to deal with the difficulties presented by ‘unreliable’ witnesses and the need to safeguard the interests of the accused, was to declare such witnesses incompetent to give evidence; this nihilistic approach – outlined in the previous section – was adopted at common law in relation to witnesses who were incapable of understanding the oath, such as young children. The legislature subsequently enacted statutory provisions enabling the reception of such evidence otherwise than upon oath upon the satisfaction of strict pre-conditions demonstrating the competence of the child witness to give evidence. This approach guaranteed so far as practicable that prejudicial evidence, the reliability of which was regarded as suspect, would not be admitted against the accused. Equally, however, it often ensured that highly relevant and probative evidence was excluded from the court’s consideration with a resulting adverse effect on the proper administration of justice. The corroboration requirements at common law and under statute constituted alternative forms of exclusionary rules designed to achieve the same purpose, namely, the exclusion of unreliable prosecution evidence; the strictest form of such requirements was embodied in the statutory provisions – such as those governing the admission of the unsworn evidence of children – which prohibited the conviction of an accused in the absence of independent evidence implicating the accused in the offence charged in some material particular. Dennis, I.H. The Law of Evidence (2nd ed., 2002) at pp. 524-525: “The question for the law of evidence is what measures, if any, should be taken against the risk of error from accepting the evidence of suspect witnesses... The choice of measure is itself influenced by a range of factors: historical tradition, institutional structure, legal and social culture, the nature and degree of the perceived risk of error, extraneous policy considerations.” See also: Ligertwood, Andrew Australian Evidence (3rd ed., 1998) § 4.2, at p. 178.
be warned that it was dangerous to convict an accused on the evidence of a child witness in the absence of such corroborative evidence, but that it remained free to do so if it was persuaded beyond reasonable doubt of the guilt of the accused.\footnote{Report of the Committee on Sexual Offences Against Children and Youths, Sexual Offences Against Children (Ottawa: Minister for Supply and Services Canada, 1984) ("Badgley Report") Vol. 1 at p. 369: "The law traditionally has assumed that the testimony of children may suffer from certain frailties which diminish its reliability and which render it incautious for a court to make a legal determination on the basis of a child's testimony standing alone. A child's relative immaturity, susceptibility to errors in perception, limited powers of recall and articulation, vulnerability to the persuasive influence of others and other factors have variously been put forward as justifying the different treatment of children's as opposed to adults' evidence." Rules requiring corroboration of the testimony of particular categories or classes of witness, of particular evidence or in relation to specific offences constituted an exception to the general rule that the evidence of a single unconfirmed prosecution witness is sufficient to ground a conviction if such a witness is deemed credible and reliable by the trier of fact and if the evidence is admissible and relevant, notwithstanding the number of witnesses to the contrary. See: \textit{Radford v MacDonald} (1891) 18 O.A.R. 167, at p. 171 (Ont. C.A.)\textit{ per} Osler J.A. For a detailed history of the "History of Rules of Number", that is, rules requiring a number of witnesses or corroboration in order to found a conviction, see: 7 Wigmore \textit{Evidence} (3\textsuperscript{rd} ed.) § 2032-2034, at pp. 241-259.}

The law of corroboration developed into a highly complex and technical area of the law of evidence inspiring intense academic and judicial debate. Although corroboration requirements also applied to other categories of ‘suspect’ witnesses,\footnote{Paciocco and Stuesser use the term “unsafe” in this regard: Paciocco, David and Stuesser, Lee \textit{The Law of Evidence} (3\textsuperscript{rd} ed., 2002) at p. 424.} it should be noted that, the effect of the corroboration requirements in relation to child witnesses was particularly acute since, when combined with the other exclusionary rules herein examined – that is, the pre-conditions to be satisfied before a child witness could be regarded as competent – and the requirement that children give evidence in the same manner as adults, they served to exclude the evidence of children from our criminal justice system in all but exceptional cases. The radical reforms of the corroboration requirements – both judicial and statutory\footnote{See sections 3.5.0-3.5.6 and 3.6.0-3.6.11 with regard to the evaluation of the legislative and judicial reforms of the traditional corroboration requirements, including the adoption of the ‘common sense’ approach to corroboration. See also: sections 3.7.0-3.7.23 in relation to the analysis of the impact of these reforms upon the rights of the accused, in particular, his / her right to a fair trial and fair procedures.} – examined herein advocated a discretionary or ‘individualised’ approach to the issue of corroboration and revealed an increased acceptance of the evidence of child witnesses as \textit{"part of a larger trend in the evolution of evidence law in}
which courts have moved away from the tendency to view the evidence of certain classes of witnesses as inherently untrustworthy".\footnote{\textit{R v Marquard} [1993] 4 S.C.R. 223, at p. 256 (S.C.C.) \textit{per} L’Heureux-Dubé J., who dissented in other respects from the majority, citing in support of this proposition: \textit{R v Khan} [1990] 2 S.C.R. 531 (S.C.C.); \textit{R v B(G)} [1990] 2 S.C.R. 3 (S.C.C.); \textit{R v W(R)} [1992] 2 S.C.R. 122 (S.C.C.); and \textit{Petrovec v The Queen} [1982] 1 S.C.R. 811, at p. 823 (S.C.C.). As stated by Paciocco: “The trend is away from technical corroboration requirements, enabling triers of fact to evaluate information free from inappropriate general assumptions about the lack of credibility of certain classes of evidence.” Paciocco, David and Stuesser, Lee \textit{The Law of Evidence} (3\textsuperscript{rd} ed., 2002) at p. 426. Dennis, I.H. \textit{The Law of Evidence} (2\textsuperscript{nd} ed., 2002) at p. 528: “The use of caution warnings has become the preferred technique of both the courts and Parliament in recent years. This is in line with the more general move in the law of evidence away from strict rules of evidence, with limited categories of exception, to more flexible principles which give substantially greater discretion to trial judge both as to the evidence they admit and to how they direct juries on its evaluation".\footnote{Traditionally, there were two distinct types of corroboration requirements. The first, imposed by statute in relation to offences such as speeding or perjury, required corroboration in order to support a conviction;\footnote{See for example: (i) the offences of procuration of women (for the purposes of unlawful carnal knowledge, unlawful carnal knowledge by intimidation, false pretences or the administration of drugs, or prostitution) contrary to s. 3 of the Criminal Law Amendment Act 1885 as amended by s. 8 of the Criminal Law Amendment Act 1935; (ii) s. 1(4) and s. 2(2) of the Treason Act, 1939; and (iii) s. 105 of the Road Traffic Act 1961 (repealed in relation to offences committed after 31\textsuperscript{st} October 2002: s. 25(2) of the Road Traffic Act 2002). See also: \textit{Director of Public Prosecutions v Connaughton} (Unreported, Court of Criminal Appeal, 5\textsuperscript{th} April, 2001).} if an accused person was convicted of such offences in the absence of corroboration this constituted an error of law and, accordingly, his / her conviction could be overturned on appeal. Legislative provisions in each of the common law jurisdictions examined herein permitting children of ‘tender years’ to give evidence unsworn\footnote{The rationale of the inequality of treatment as between the sworn and unsworn evidence of children with regard to corroboration requirements was founded upon the belief that the oath was the best means of assuring the truthfulness of a witness’s account and, where evidence was received from a child otherwise than upon oath and only upon a promise to tell the truth, a further safeguard was required to ensure the veracity of the evidence received, namely, the presence of corroborative evidence. The corroboration requirements in relation to the evidence of children in New Zealand differed from those prevailing in England due principally to the equality of treatment of the sworn and unsworn evidence of children in New Zealand: s. 13 of the Oaths and Declarations Act 1957. There was no requirement at common law in New Zealand that the \textit{unsworn} evidence of a child witness or complainant be corroborated \textit{as a matter of law}, in other words, there was no requirement that an accused be acquitted in the absence of corroboration of the unsworn evidence of a child. Furthermore, while the New Zealand courts embraced the concept of ‘corroboration warnings’, such warnings were only required in relation to the evidence of certain categories of child witnesses, that is, child
corroboration requirement. In Ireland, s. 30 of the Children Act 1908, as amended, provided that where a child witness or complainant of ‘tender years’ did not, in the opinion of the court, understand the nature of an oath, the evidence of the child could be received, though not given upon oath, if, in the opinion of the court, the child was possessed of sufficient intelligence to justify the reception of the evidence and understood the duty of speaking the truth; this permissive provision was qualified by the proviso that a person “shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.” The effect of such a corroboration requirement was to ensure that, even where the jury were convinced that a

complainants of sexual offences: *R v Mountain* [1945] NZLR 319, at p. 321 (C.A.); *R v Spring* [1958] NZLR 468 (C.A.); and *R v Parker* [1968] NZLR 325 (C.A.). In addition, the corroboration warning required as a matter of practice in New Zealand was not identical to that employed by the courts at common law in England.

Principal among these were: (1) Ireland: s. 30 of the Children Act 1908, as amended and extended by s. 28(2) of the Criminal Justice Administration Act 1914; (2) England: s. 4 of the Criminal Law Amendment Act 1885; s. 30 of the Children Act, 1908; and s. 38 of the Children and Young Persons Act 1933; and (3) Canada: s. 16 of the Canada Evidence Act and s. 586 of the Criminal Code.

Section 28(2) of the Criminal Justice Administration Act 1914 provided that: “The provisions of section thirty of the Children Act, 1908 (which enables the evidence of a child of tender years to be received though not given upon oath), shall apply to proceedings against persons for offences not mentioned in that section, in like manner as they apply in respect of proceedings against persons for offences mentioned in that section”.

While a “child” was defined in s. 131 of the Children Act 1908, as “a person under the age of fourteen years”, the qualification “of tender years” was nowhere defined in the legislation. In relation to the question whether a child could be said to constitute a ‘child of tender years’ in accordance with s. 38(1) of the Children and Young Persons Act 1933, Lord Goddard C.J. in *R v Campbell* [1956] 2 All ER 272, at p. 274, [1956] 2 QB 432 (C.A.) remarked at p. 436 that: “Whether a child is of tender years is a matter for the good sense of the court, and, though it may be difficult to decide whether a child understands the obligation of an oath, a court probably would have no difficulty in deciding whether he or she was of tender years.”

A similar statutory scheme existed in England; s. 38(1) of the Children and Young Persons Act 1933 provided that where, in any proceedings against any person for any offence, any child “of tender years” called as a witness “does not in the opinion of the court understand the nature of an oath”, his evidence could nonetheless be received by the court, though not given upon oath, where the child was “possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth”, provided that, “where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him”. Likewise, in Canada, s. 586 of the Criminal Code prohibited the conviction of an accused person “upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicated the accused”, with virtual identical provisions contained in s. 16(2) of the Canada Evidence Act and in the statutory measures adopted in each of the jurisdictions: see s. 18(2) of the Ontario Evidence Act.
child witness was telling the truth\textsuperscript{737} and, on the basis of such evidence, were satisfied beyond a reasonable doubt of the guilt of the accused, they were \textit{obliged} to acquit the accused in the absence of corroborative evidence of the child’s unsworn account.\textsuperscript{738} Equally, where there was no corroboration in circumstances where corroboration was required as a matter of law, the trial judge could direct an acquittal.\textsuperscript{739}

\textbf{3.1.2} The second form of corroboration requirement mandated – either as a rule of practice or as a rule of law\textsuperscript{740} – only a corroboration \textit{warning} and thus it was permissible in the latter instance for an accused to be convicted in the absence of corroboration provided that the trier of fact had received the ‘full corroboration warning’.\textsuperscript{741} Such warning was in two parts; both cautionary

\textsuperscript{737} The statutory schemes providing for the admission of unsworn evidence from child witnesses in England and Ireland provided that a child who made a statement material in the proceedings which he/she knew to be false or did not believe to be true, would be guilty of a like offence and would be liable to be punished as if he/she had committed perjury: s. 38(2) of the Children and Youth Persons Act 1933, now s. 57 of the Youth Justice and Criminal Evidence Act 1999 in England; and s. 30(b) of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914, now s. 27(2) of the Criminal Evidence Act 1992 in Ireland.

\textsuperscript{738} In \textit{Attorney General v O’Sullivan} [1930] IR 552, Kennedy C.J. (C.C.A.) asserted at p. 557 that: “If the boy’s evidence had been given and received unsworn under sect. 30 of the Children Act 1908, as amended by sub-sect. 2 of sect. 28 of the Criminal Justice Administration Act 1914, the accused could not have been convicted unless the evidence was ‘corroborated by some other material evidence in support thereof implicating the accused’. In that case, corroboration is a statutory requirement for conviction”.

\textsuperscript{739} For example, where the unsworn evidence of a child of tender years was not corroborated – that is, where the trial judge was of the opinion that there was no evidence capable of amounting to corroboration in law – the trial judge could stop the proceedings; it would not be sufficient to warn the jury of the dangers of acting on the uncorroborated evidence of a child witness in circumstances where corroboration was required as a matter of law by the statute permitting the admission of such evidence. See: \textit{R v Shillingford} (1968) 52 Cr App R 188 (C.A.). However, where only a corroboration warning was required and there was no corroboration, the trial judge was required to draw this to the jury’s attention, in addition to warning them of the dangers of acting on the uncorroborated evidence of the suspect witness.

\textsuperscript{740} In \textit{R v Baskerville} [1916] 2 K.B. 658, at p. 663 (C.A.), Lord Reading C.J. asserted in relation to the requirement that a full corroboration warning be given in respect of the evidence of an accomplice, that “[t]his rule of practice has become virtually equivalent to a rule of law” so that a conviction would be quashed where it was obtained in circumstances where a trial judge failed to give such a warning. See also: \textit{R v Tate} [1908] 2 K.B. 680.

\textsuperscript{741} Although the courts have not been consistent in their approach, the failure on the part of the trial judge to give the ‘full corroboration warning’ in respect of the dangers of convicting on the uncorroborated evidence of a child witness was generally considered fatal to any resulting conviction in England (the ‘peremptory’ approach): \textit{Davies v Director of Public Prosecutions} [1954] AC 378; \textit{R v Cleal} [1942] 1 All ER 203; \textit{Director of Public Prosecutions v Kilbourne} [1973] AC 729, at pp. 750-751, per Lord Reid (H.L.); and \textit{R v Spencer} [1987] AC 128, at p. 133, per Lord Hailsham, and at p. 141, per Lord Ackner (children); \textit{R v Chymes} (1960) 44 Cr App R 158 (C.A.); \textit{R v Trigg} (1963) 1 WLR 305; \textit{R v O’Reilly} [1967] 2 QB 722; \textit{R v Henry} (1968) 53 Cr App R 150 (C.A.); \textit{R v Dossi} (1918) 13 Cr App R 158 (C.A.); and \textit{R v Midwinter} (1971) 55 Cr App R 525 (C.A.). It appears that a more liberal
and permissive. The first part involved a direction by the trial judge to the effect that: (i) it was dangerous to rely upon the uncorroborated evidence of a witness within the relevant category of unreliable witnesses requiring the full corroboration warning; (ii) outlining "why reliance on the witness's unsupported evidence might be considered dangerous"; (iii) explaining what, in law, was meant by the term 'corroboration'; (iv) explaining which items of evidence were capable of amounting to corroboration in the proceedings then before the trier of fact and which items were not so capable; and (v) explaining that it was the function of the jury to determine whether the evidence, expressly identified by the trial judge as

attitude was adopted by the courts in Australia, although many of these cases are explicable by reference to the presence of substantial corroboration of the account of the child: Vetrovec v The Queen [1982] 1 S.C.R. 811, at p. 820, per Dickson J. (S.C.C); Kelleher v R (1974) 4 ALR 450 (H.C. Austr.), Hicks v The King (1920) 28 CLR 36, 26 ALR 109 (H.C. Austr.); and similarly, in England: R v Graham (1910) 4 Cr App R 218 (C.A.); and R v Pitts (1912) 8 Cr App R 126 (C.A.). Moreover, the courts in England, Australia and New Zealand generally favoured the 'peremptory approach' in relation to the evidence of child complainants of sexual offences: Hargan v The King (1919) 27 CLR 13, 20 SR (NSW) 360, 36 WN (NSW) 139 (H.C. Austr.); Longman v The Queen (1989) 168 CLR 79 (H.C. Austr.); R v Warren (1919) 14 Cr App R 4 (C.A.); Paine v The Queen [1974] Tas SR 117 (C.C.A.); and R v Parker [1968] NZLR 325, at p. 328, per Turner J. (C.A.). The highly restrictive approach adopted by some English courts - even in cases where there was ample corroborative evidence to support the conviction - is illustrative of the then prevalent deep-seated mistrust of the evidence of children, whereas the Australian courts appeared more willing to consider the facts of the individual case and to hold that there had been no substantive miscarriage of justice, betraying a less pessimistic view of the reliability of child witnesses. See: R v Schlaefer (1984) 37 SASR 207 (C.C.A.) wherein King C.J. held that the trial judge's failure to give a specific corroboration warning regarding the evidence of one of two child complainants of sexual offences "is not an error of law, but is a blemish in the trial which falls to be considered with other factors in determining whether there has been a miscarriage of justice". See also: Ligertwood, Andrew Australian Evidence (3rd ed., 1998) § 4.10, at p. 187; Gillies, Peter Law of Evidence in Australia (2nd ed., 1991) at p. 627; and Heydon, J.D., Cross on Evidence (6th Australian ed., 2000) § 15140, at pp. 371-372.


In Director of Public Prosecutions v Hester [1973] AC 296, [1972] 3 All ER 1056, [1972] 3 WLR 910, 57 Cr App Rep 212, (approving the decision in R v Coyle [1926] NI 208) Lord Morris observed at p. 309 in relation to the form of corroboration warning which ought to be delivered to the jury, that: "As this is no mere idle process it follows that there are no set words which must be adopted to express the warning. Rather must the good sense of the matter be expounded with clarity and in the setting of a particular case....The common sense and the common experience of men and women on a jury will guide them when they have to decide what measure of credence and dependence they should accord to evidence that they have heard." See also: R v Goddard (1962) 46 Cr App R 456, per Lord Parker C.J.; R v Beck [1982] 1 All ER 807, at p. 814; R v Sherrin (No. 2) (1979) 21 SASR 250; R v Duke (1979) 22 SASR 46; R v Henry (1988) 39 A Crim R 374 (C.C.A. N.S.W.); Chidiac v R (1991) 171 CLR 432, at pp. 440-441, per Mason C.J.; R v Bellino (1992) 59 A Crim R 322, at p. 355, per Pincus J.A. (C.C.A. Qld.); R v Small (1994) 33 NSWLR 575, at p. 593, per Hunt C.J.; Markovina v R (1996) 16 WAR 354, at pp. 364-369, per Malcolm C.J.
capable in law of amounting to corroboration,\textsuperscript{745} in fact constituted corroboration of the suspect witness’s evidence.\textsuperscript{746} The permissive part of the corroboration warning concerned a direction by the trial judge to the trier of fact that it was nonetheless entitled to convict the accused upon the uncorroborated evidence of the suspect witness if satisfied of the credibility of the witness and of the guilt of the accused beyond reasonable doubt.\textsuperscript{747}

3.1.3 The categories of ‘suspect’ witness requiring the full corroboration warning at common law included accomplices,\textsuperscript{748} complainants of sexual offences\textsuperscript{749}
and child witnesses giving evidence upon oath.\textsuperscript{750} There is no doubt that the

above categories overlapped to some extent. A child witness could require a warning on account of: (i) his / her age or status as a child;\(^{751}\) (ii) the nature of the offence allegedly committed against him / her, such as sexual offences;\(^{752}\) (iii) his / her participation in the offence committed by the accused within the meaning of the legal term 'accomplice';\(^{753}\) or even (iv) the fact that he / she had a purpose of his / her own to serve; or (v) the fact that he / she was a patient in a mental hospital.\(^{754}\)

\(^{751}\) This warning was required whether the child witness giving sworn evidence was testifying on his or her own behalf, or in corroboration of the evidence of another child witness, whether the latter witness gave evidence sworn or unsworn.\(^{752}\)

While the law in New Zealand required a full corroboration warning in relation to the evidence of child complainants of sexual offences – as detailed below – it is important to note that the Court of Appeal held in \textit{R v Arnold} [1980] 2 NZLR 111 (C.A.) in relation to a child complainant of charges of rape and indecency that the trial judge did not err in law in failing to give two corroboration warnings in respect of the evidence of the complainant both on account of the sexual nature of the offences charged and the age of the complainant. Woodhouse J. concluded, at p. 122, that: "[W]hat have tended to become almost itemised aspects of the corroboration rule are at bottom no more than a reflection of principles of fairness and applied commonsense and we would deprecate any belief that whenever such a warning must be given there will be an automatic need for the Judge to sift through every possible facet of the considerations that arise. In some circumstances the addition of explanation to explanation could easily leave the student bemused, let alone a lay jury about to do their conscientious best to grapple with a real problem in a practical and just way."

\(^{753}\) It should be noted, however, that the courts in England, Australia and New Zealand rejected the proposition that a child complainant of sexual offences could be considered in law an 'accomplice' to such offences for the purposes of requiring a corroboration warning: \textit{Davies v Director Of Public Prosecutions} [1954] AC 378; [1954] 1 All ER 507; \textit{R v Tatham} (1921) 15 Cr App R 132; \textit{R v Pitts} (1912) 8 A Crim R 126; \textit{R v Halligan} [1973] 2 NZLR 158 (C.A.); and \textit{R v Terry} (Unreported, Wellington, 21 December 1972, Court of Appeal). In \textit{Director Of Public Prosecutions v Kilbourne} [1973] AC 729, [1973] 1 All ER 440, [1973] 2 WLR 254, 57 Cr App Rep 381, per Lord Reid (H.L.); and \textit{R v K} [1984] 1 NZLR 264 (C.A.).

The common law also developed an analogous set of corroboration requirements in respect of the evidence of witnesses whose reliability was in question – that is, who “by reason of his particular mental condition and criminal connection, fulfill[s] analogous criteria” – but who did not belong to any one of the traditional categories of ‘suspect’ witnesses outlined above: \textit{R v Spencer} [1986] 2 All ER 928, at p. 938 (H.L.). These included: (i) patients in a mental institution; and (ii) persons with a purpose of their own to serve; (iii) persons of bad character; or (iv) ‘down and outs’. See: \textit{R v Beck} [1982] 1 WLR 461; \textit{R v Bagshaw} [1984] 1 All ER 971; \textit{R v Spencer} [1986] 2 All ER 928; \textit{R v Prater} [1960] 2 QB 464; \textit{R v Asghar} [1995] Cr App R 223; \textit{R v K} [1984] 1 NZLR 264 (C.A.) (child witness’s admitted hostility towards accused made it necessary to treat his evidence with caution); \textit{R v Harawira} [1989] 2 NZLR 714 (C.A.) (evidence of the mentally ill witness); \textit{R v Hartley} [1978] 2 NZLR 199, at pp. 206-208; and \textit{R v Smith} (1993) 10 CRNZ 184. See also the decision of the Irish Court of Criminal Appeal in \textit{People (Director of Public Prosecutions) v Gillane} (Unreported, Court of Criminal Appeal, 14th December, 1998). This form of corroboration requirement was termed the “discretionary full corroboration warning”: Andrews, John A. and Hirst, Michael \textit{Andrews and Hirst on Criminal Evidence} (4th ed., 2001) § 9.05, at p. 242.
Furthermore, a ‘child witness’ giving sworn evidence who ceased to be a ‘child’ for the purpose of this corroboration requirement before the commencement of the trial could nonetheless qualify for a corroboration warning by virtue of his / her membership of another ‘suspect’ category of witness. At common law, the traditional requirement that a corroboration warning be given in respect of the evidence of each of these categories of suspect witnesses developed from a judicial practice founded upon the perceived unreliability of such witnesses to a strict legal requirement providing a fertile ground for appeals.

Rationale underlying Corroboration Requirements:

Although their underlying rationale may have varied as between each of the ‘suspect’ categories of witness, corroboration requirements, in common

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755 The courts both in this jurisdiction and in England stressed that the categories of ‘suspect’ witnesses whose evidence required corroboration warnings or cautionary instructions was not closed: People (Attorney General) v Casey (No. 2) [1963] IR 33, at p. 37, per Kingsmill Moore J. (S.C.); and Director of Public Prosecutions v Kilbourne [1973] AC 729, [1973] 1 All ER 440, [1973] 2 WLR 254, 57 Cr App Rep 381 (H.L.).

756 In B v R (1992) 110 A.L.R. 432 (H.C. Austr.), the High Court of Australia noted that the rationale for giving a jury warning in relation to the potential unreliability of the evidence of children “does not lie in the nature of the offence”, but in other considerations: R v Pahuja (1987) 49 SASR 191, at p. 216. The Court (Dawson and Gaudron JJ.) held that: “The fact that young children may be under the influence of others and are apt to allow their imaginations to run away with them and to invent untrue stories is one justification which has been advanced. Again, it has been said that the warning is required in relation to children who, though old enough to understand the nature of an oath and so competent to give sworn evidence, are yet so young that their comprehension of events and of questions put to them or their own powers of expression may be imperfect. No such reasons were given by the trial judge for warning the jury that it would be unsafe to convict upon the uncorroborated evidence of the daughter, although the rule of practice that such a warning should be given in relation to the sworn evidence of a young child is, under s 76F(3)(b) of the Evidence Act, unaffected by the abolition by s 76F(1) of the similar rule of practice in relation to the evidence of complainants in the case of prescribed sexual offences.” See: R v Dossi (1918) 13 Cr App R 158, at p. 161; and Director of Public Prosecutions v Hester [1973] AC 296, at p. 325 (H.L.).

757 Mewett, Alan W, Witnesses (1995) at 12-2: “What developed into the highly technical and complicated requirements of corroboration unquestionably began with individual trial judges expressing their views as to the wisdom of relying on the evidence of a single witness in a specific sort of case, evolved into a rule of practice to be followed by all judges, and culminated in a rule of law, at first by virtue of the common law and then by way of various provisions.” To the same effect, see: Sopinka, J., Lederman S. and Bryant A. The Law of Evidence in Canada (2nd ed., 1999) § 17.2, at p. 972; and Schiff, Stanley Evidence in the Litigation Process (4th ed., 1993) Vol. 2 at pp. 907-908.

758 In respect of the rationale underlying the corroboration requirements as applied to complainants of sexual offences, see, inter alia: Hale, Sir Matthew, History of the Pleas of the Crown or Historia
with many exclusionary evidentiary rules, were premised upon a protectionist philosophy; the protection of the accused from the prejudicial effects of unreliable evidence. Lord Morris opined that the corroboration rules were founded upon the “accumulated experience of courts of law, reflecting general knowledge of the ways of the world” which indicated that there were many circumstances and situations in which it was “unwise” to found settled conclusions on the testimony of one person alone, and which rendered “sound policy” rules of law or practice which were designed to avert the peril that findings of guilt might be “insecurely based”. In the context of the prosecution of sexual offences, such requirements reflected an understanding that: (i) there were “some suggestions which can readily be made but which are only with more difficulty rebutted”; (ii) it was necessary to guard against motives of self-interest, self-exculpation or vindictiveness, which were difficult to detect and could operate to pervert the proper administration of justice; and (iii) in some situations “the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse” and/or where “owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood”.

Placitorum Coronve (1736) Vol. 1, at pp. 633-635; Glanville Williams, “Corroboration – Sexual Cases” [1962] Crim. L.R. 662, at pp. 662-663; Wigmore, 7 Evidence (3rd ed.) § 2061, at p. 354; May, Richard Criminal Evidence (5th ed., 2004) § 15-01, at p. 441; Mathieson, Donald L., Cross on Evidence (New Zealand ed., 2001) para. 8.10, at p. 2217. With regard to the basis for the corroboration warning in relation to the evidence of accomplices, see: McGrath, Declan “The Accomplice Corroboration Warning” (1999) Irish Jurist 170. In Hargan v The King (1919) 27 CLR 13, 20 SR (NSW) 360, 36 WN (NSW) 139 (H.C. Austr.) Isaacs J. asserted that the corroboration warning represented a “recognition of the justice and fairness to the accused in that class of cases, that the jury should be warned – not in specific or set form of words, but in effect warned – that though corroboration is not strictly essential it is necessary to scrutinize with very special care the evidence of the prosecutrix before accepting it so as to condemn the accused”: (1919) 27 CLR 13, at p. 24. Thus, the High Court of Australia concluded at p. 21, per Barton J. that “when the summing-up conveys to the jury that which may be legally done without its being qualified by that warning which would deter them, except upon weighing the evidence with the utmost care, from taking what it technically the legal course – it seems to me that if the person is convicted in the absence of that guidance there is a miscarriage of justice”.

Director of Public Prosecutions v Hester [1973] AC 296, [1972] 3 All ER 1056, [1972] 3 WLR 910, 57 Cr App Rep 212 (H.L.). (Emphasis added). Lord Morris noted at p. 309 that the rules which had evolved were founded upon the central principle of the common law that “a person should only be convicted of a crime if those in whose hands the decision rests are sure that guilt has been established” and that “such certainty ought never to be reached in dependence on the testimony of but one witness”; accordingly, it was stated that the rules of corroboration were based on “experience, wisdom and common sense” in order to guard against the risk or danger of a wrong conviction. Thus, Lord Morris
3.2.2 The justification usually advanced for the mandatory corroboration requirements in respect of the evidence of children was their immaturity which, it was believed, led to incomplete, inaccurate, misleading or distorted testimony. As observed in relation to competence, children were regarded as inherently unreliable witnesses on account of their poor testimonial qualifications – perception, recollection and communication – and by reason of their susceptibility to influence by adults, particularly trusted persons, and figures in authority. Children were regarded as the servants of their imagination and it was believed that children, particularly young children, had not yet developed the cognitive skills necessary to

noted that there were certain statutory provisions which required more than the evidence of a single witness before a conviction would be allowed to stand and that, in certain other instances, “the courts have given guidance in terms which have become rules” requiring that juries be warned of the dangers of convicting on the uncorroborated testimony of a witness – such as a complainant of sexual offences, or the evidence of children – although the jury remains free to convict if convinced of the truth of the evidence in question. See also: The People (Attorney General) v Casey (No. 2) [1963] IR 33, at p. 37, per Kingsmill Moore J. (S.C.).

7 Wigmore, Evidence (3rd ed.,) § 506. Wigmore asserted that the basis of the rule of practice requiring the trial judge to warn the jury of the danger of convicting on the evidence of a child, even where such evidence was given under oath was the “mental immaturity of the child”, that is, his or her: (i) capacity of observation; (ii) capacity of recollection; (iii) capacity to understand questions put and to frame intelligent answers; and (iv) moral responsibility.

Paciocco asserted that the corroboration requirements in respect of the evidence of children were “premised on antiquated and inaccurate assumptions that these witnesses are inherently unreliable”: Paciocco, David and Stuesser, Lee The Law of Evidence (3rd ed., 2002) at p. 426. See, in particular: sections 1.0.4-1.0.8 above.

7 Lord Diplock in Director of Public Prosecutions v Hester [1973] AC 296, [1972] 3 All ER 1056, [1972] 3 WLR 910, 57 Cr App Rep 212 (H.L.) contended that the basis for such development was a common sense approach to the dangers posed by potentially unreliable evidence. Lord Diplock asserted at p. 324 that: “[C]ommon sense, the mother of the common law, suggests that there are certain categories of witnesses whose testimony as to particular matters may well be unreliable either because they may have some interest of their own to serve by telling a false story, or through defect of intellect or understanding or, as in the case of those alleging sexual acts committed on them by others, because experience shows the danger that fantasy may supplant or supplement genuine recollection. For brevity I will hereafter refer to evidence of this kind as ‘suspect’ evidence and the witnesses who give it ‘suspect’ witnesses.” (Emphasis added).

7 In The People (Attorney General) v Casey (No. 2) [1963] IR 33, at p. 37 (S.C.) Kingsmill Moore J. asserted that: “Such accumulated judicial experience eventually tends to crystallise into established rules of judicial practice, accepted rules of law and statutory provisions... The suggestibility and lack of responsibility of children of tender age find recognition in the statutory provision that their unsworn evidence shall not be sufficient to convict of an offence, unless corroborated by other material evidence implicating the accused, and even when such evidence is received under oath it is customary for judges to tell juries that they should not convict unless they have weighed the evidence with the most extreme care.” (Emphasis added).
distinguish with any certainty between truth and falsehood, fact and fantasy.\textsuperscript{765}

3.2.3 The corroboration requirements emphasised the importance – in relation, inter alia, to child witnesses – of “confirmation from some other source than the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged”\textsuperscript{766} in order to minimise the risk of a miscarriage of justice such as the conviction of the innocent.\textsuperscript{767} Sir James Stephen provided a more sophisticated formulation of the underlying rationale for the corroboration requirements in respect of these categories of ‘suspect’ witnesses as the risk of the admission and acceptance of unreliable, even false, evidence in circumstances where the reliability and falsity of such evidence could not easily be assessed and where the means of detection of such falsity were limited;\textsuperscript{768} as such, the corroboration requirements betrayed a mistrust, not merely of the evidence of ‘suspect’ witnesses, but also of the capabilities of

\textsuperscript{765} In Kendall v The Queen [1962] S.C.R. 469, at p. 473 (S.C.C.) the Supreme Court of Canada considered the position in relation to the corroboration requirements, if any, for adult witnesses giving evidence as to events witnessed when they were children. More importantly, the decision contains a very useful analysis of the rationale underlying the corroboration requirements as they applied to child witnesses. Delivering the judgment of the Court, Judson J. noted with approval Wigmore’s asserted premise for the rule of practice requiring a corroboration warning by the trial judge in respect of the evidence of a child witness, however, Judson J. opined, at p. 473, that the objection based upon “moral responsibility” disappears when child witnesses are of “mature years” and “understand the duty to speak the truth”.\textsuperscript{766} Director of Public Prosecutions v Hester [1973] AC 296, at p. 325, [1972] 3 All ER 1056, [1972] 3 WLR 910, 57 Cr App Rep 212, per Lord Diplock (H.L.): “The danger sought to be obviated by the common law rule in each of these three categories of witnesses is that the story told by the witness to the jury may be inaccurate for reasons not applicable to other competent witnesses; whether the risk be of deliberate inaccuracy, as in the case of accomplices, or unintentional inaccuracy, as in the case of children and some complainants in cases of sexual offences.” (Emphasis added).\textsuperscript{767} People (Attorney General) v Casey (No. 2) [1963] IR 33, at p. 37, per Kingsmill Moore J. (S.C.): “[A]part from the directions and warnings suggested by the facts of an individual case, judicial experience has shown that certain general directions and warnings are necessary in every case and that particular types of warnings are necessary in particular types of cases.” \textsuperscript{768} Stephen, Sir James A General View of the Criminal Law of England (1863) at p. 249: “The circumstances may be such that there is no check on the witness, and no power to obtain any further evidence on the subject. Under these circumstances juries may, and often do, acquit. They may very reasonably say, ‘We do not attach such credit to the oath of a single person of whom we know nothing, as to be willing to destroy another person on the strength of it’. This case arises where the fact deposed to is a passing occurrence – such as a verbal confession or a sexual crime – leaving no trace behind it, except in the memory of an eye or ear-witness....The justification of this is that the power of lying is unlimited, the causes of lying and delusion are numerous, and many of them are unknown, and the means of detection are limited.”
the jury, as triers of fact to sift and weigh the evidence presented in a manner productive of justice.769

3.2.4 While the basis for the corroboration requirements appeared reasonable,770 in practice “they frequently proved to be technical and inflexible obstacles to the proper administration of justice”.771 It was the universal nature of the requirements – admitting of no exceptions – which attracted the criticism that the rules were “fasten[ing] upon this branch of the law of evidence a blind and empty formalism”.772 No allowance was made for the facts of an individual case or, in particular, for the trial judge’s belief that such a warning was not merited on the facts, such as where the credibility of an individual witness was not in doubt;773 indeed, where a trial judge gave the warning in anything less than its full terms or indicated a lack of enthusiasm for the warning in the context of a given case – such as the trial judge in R v Henry774 in relation to a brutal rape – the Court of Appeal would overturn any resulting conviction, unless it could apply the proviso that no miscarriage of justice had resulted therefrom. Mere membership of a category of assumed ‘suspect’ witnesses – as distinct from demonstrated

769 McEwan noted that the corroboration rules were developed at a time when jurors were often uneducated and illiterate and when the punishments were of such severity that “men could be hanged for stealing a shilling, and could not be heard in their own defence”: R v H [1995] 2 All ER 865, per Lord Griffiths, at p. 879 cited in McEwan, Jenny Evidence and the Adversarial Process: The Modern Law (2nd ed., 1998) at p. 110.

770 Gillies, Peter Law of Evidence in Australia (2nd ed., 1991) asserted at p. 596 that the corroboration rules in respect of the evidence of children and other ‘suspect’ witnesses were “rooted by and large in considerations of experience and common sense”.


772 Vetovec v The Queen [1982] 1 S.C.R. 811, at pp. 821-823, per Dickson J. (S.C.C.). Dickson J. continued, at p. 823, to recommend that: “Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an ‘accomplice’ no warning is necessary.”


774 R v Henry (1968) 53 Cr App R 91 (C.A.). The trial judge had suggested that, in the circumstances of the case – a brutal rape of the complainant – the warning was “not very helpful”. The Court of Appeal held that such direction was “insupportable on any view of the law” and quashed the conviction.
individual unreliability – was sufficient to invoke these requirements,\textsuperscript{775} controverting the alleged protectionist nature of the requirements.

3.2.5 Moreover, it was arguable that, rather than safeguarding the rights of the accused to a fair trial, the highly technical nature of the corroboration requirements in respect of child witnesses operated to confuse juries\textsuperscript{776} or even to prejudice the interests of the accused by reiterating and highlighting for the attention of the jurors evidence adverse to the accused. In this regard, it should be noted that the English Court of Appeal held that it was \textit{not} mandatory to give the full corroboration warning: (i) in respect of the evidence of a complainant of sexual offences in circumstances in which the only issue between the parties was the identification of the accused as the perpetrator, that is, where the commission of the sexual offence itself was not disputed by the defence;\textsuperscript{777} or (ii) in relation to the evidence of an accomplice who, when giving evidence on behalf of the prosecution, gave evidence which was primarily favourable to the accused since it was considered that more harm would have been done to the accused by giving the warning – and thus emphasising again evidence prejudicial to the accused – than by not giving it.\textsuperscript{778}

\textsuperscript{775} It should be noted that although the trial judge enjoyed no discretion as to whether to give the corroboration warning in respect of the evidence of a suspect witness – or, indeed, the ingredients of such warning – the strength and degree of such warning could vary depending on the circumstances of the case and the gravity of the risk or unreliability posed by the evidence of an individual suspect witness.

\textsuperscript{776} In \textit{R v Arnold} [1980] 2 NZLR 111 (C.A.) in relation to a child complainant of charges of rape and indecency that the trial judge did not err in law in failing to give two corroboration warnings in respect of the evidence of the complainant both on account of the sexual nature of the offences charged and the age of the complainant.


\textsuperscript{778} \textit{R v Royce-Bentley} [1974] 1 WLR 535 (C.A.).
3.3.0 What Amounted to Corroboration for the purposes of these Requirements?

3.3.1 The legal term ‘corroboration’, occupying a central position and operating as a fulcrum to all of the corroboration requirements both at common law and under statute, generated great controversy by reason of the rigidity of its definition and application. The definition of corroboration adopted and applied in most common law jurisdictions was that expressed by Lord Reading C.J. in the English case, *R v Baskerville*, namely, “independent testimony which affects the accused by connecting or tending to connect him with the crime”, that is, “evidence which implicates him...which confirms in

779 (1) Ireland: *R v Baskerville* [1916] 2 KB 658, at p. 667, per Reading L.C.J. was cited with approval in *People (Attorney General) v Phelan* (1950) 1 Frewen 98; *People (Attorney General) v Williams* [1940] IR 195 (“independent evidence of material circumstances tending to implicate the accused in the commission of the crime”); and *People (Attorney General) v Travers* [1956] IR 110, at p. 114, Sullivan C.J. defined corroboration as “independent evidence of material circumstances tending to implicate the accused in the commission of the crime with which he was charged”. See also: *Attorney General v Levison* [1932] IR 158, at p. 165, where O’Byrne J. defined corroboration as “evidence of any material circumstance tending to connect the accused with the crime and to implicate him in it”, although this latter formula omits to expressly emphasise the requirement of independence so central to the *Baskerville* definition; (2) New Zealand: *The Queen v Hicks* [1970] NZLR 865 (C.A.); *R v Pollock* [1973] 2 NZLR 491 (C.A.); *R v Lewis* [1975] 1 NZLR 222 (C.A.); and *R v Hartley* [1978] 2 NZLR 199 (C.A.) (accomplices); *R v Harrison* [1966] NZLR 887 (C.A.); *R v Collins* [1976] 2 NZLR 104 (C.A.); *R v McLean* [1978] 2 NZLR 358 (C.A.); *R v Ranga* [1979] 1 NZLR 678 (C.A.); *R v Poa* [1979] 2 NZLR 378 (C.A.); *R v Moana* [1979] 1 NZLR 181 (C.A.); *R v Toia* [1982] 1 NZLR 555 (C.A.); *R v A* [1984] 1 NZLR 264 (C.A.); *R v Ogden* [1985] 1 NZLR 344 (C.A.); and *R v Daniels* [1986] 2 NZLR 106 (C.A.) (complainants of sexual offences); and (3) Canada: *Gouin v R* [accomplices] [1926] SCR 539, [1926] 3 DLR 649, 46 CCC 1 (S.C.C.); *Hubin v The King* [1927] S.C.R. 469 (S.C.C.) (complainants of sexual offences, corroboration requirements contained in the then s. 1002 of the Criminal Code); *Kendall v The Queen* [1962] S.C.R. 469 (S.C.C.) (sworn evidence of a child); and *Paige v The King* [1948] S.C.R. 349 (S.C.C.) (the unsworn evidence of a child complainant of unlawful carnal knowledge contrary to s. 301(2) of the Criminal Code).

780 *R v Baskerville* [1916] 2 K.B. 658, 12 Cr App Rep 81, [1916-17] All ER Rep 38 (C.A.). The case itself concerned the nature of corroboration required in respect of the evidence of two accomplices, that is, two young male complainants of acts of gross indecency, contrary to s. 11 of the Criminal Law Amendment Act 1885, who, by their own statements, were considered accomplices in the offence. The trial judge had warned the jury that they ought not to convict the prisoner upon the evidence of the boys unless, in their opinion, it was corroborated in some material particular affecting the accused and further directed them that a letter signed by the accused inviting the two boys to his flat and enclosing £10 amounted to evidence capable of corroborating the boys’ evidence; the jury convicted the accused. On appeal from conviction, the Court of Appeal held that there was ample evidence capable of corroborating the accounts of the two young complainants. Having examined the older authorities, the Court confirmed at p. 665 that “the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner”: *R v Birkett* (1813) R. & R. 251; *R v Atwood* 1 Leach 464; *R v Jones* (1809) 2 Camp. 131; *R v Hastings* (1835) 7 C. & P. 152; *R v Andrews*, 1 Cox C.C. 183, per Coleridge J.; *R v Avery* 1 Cox C.C. 206; *R v Stubbs* Dears. 555, per Parke B; *R v Wilkes* 7 C.&P. 272; *R v Farler* 8 C.& P. 107 per Lord Abinger C.B.; *R v Dyke* 8 C.& P. 261; and *R v Birkett* 8 C.&P. 732 considered.
some material particular not only the evidence that the crime has been committed but also that the prisoner committed it". 781

3.3.2 Accordingly, in each of the common law jurisdictions examined herein, ‘corroboration’, within the meaning of the traditional Baskerville formula, came to be understood – both under common law and when required by statute in relation to the unsworn evidence of child witnesses782 – to refer to evidence possessing the following characteristics: (i) independence, that is, independence of the person whose testimony required corroboration, also known as the ‘rule against self-corroboration’; 783 (ii) showing that a crime had been committed; (iii) confirming 784 the evidence of the complainant or witness whose evidence required corroboration; 785 and (iv) implicating or

782 While the Baskerville definition of corroboration referred to the corroboration requirements at common law, the language of this definition was employed in many of the provisions creating statutory corroboration requirements – such as the statutory provisos governing the corroboration requirements for the unsworn evidence of child witnesses – and, accordingly, the Baskerville definition was usually applied equally to corroboration required as a matter of statute as it was to corroboration required as a matter of common law. Bojczuk, William Evidence Textbook (5th ed., 1993) at p. 135: “[T]he courts are jealous of their own definition and wherever possible construe Acts of Parliament as defining a need for corroboration as defined at common law.”
784 Many attempts were made by the judiciary to emphasise that the term ‘corroboration’ was not a technical term or a term of art but simply referred to ‘confirmation’. In Director of Public Prosecutions v Hester [1973] AC 296, at pp. 321-322, (H.L.) Lord Pearson noted that the word “corroboration” had no special meaning in itself but was connected with the Latin word “robur” and the English word “robust” and thus meant to “strengthen” or “support”. He further held that the terms of s. 38(1) of the Children and Young Persons Act 1933 which provided that “the accused shall not be liable to be convicted of the offence unless that offence is corroboration by some other material evidence in support thereof implicating [the accused]” were helpful to explain what kind or degree of corroboration should be sought. Similarly, Lord Diplock opined that, as in the 19th century cases, the term ‘corroboration’ in Baskerville was not used in any other sense than ‘confirmation’ and, as used in the proviso to s. 38(1) of the Children and Young Persons Act 1933 “is not a term of legal art” and “bears no different meaning from that which it would have borne if the word, commoner in ordinary usage, ‘confirmed’ had been substituted for it.” Similarly, in Director of Public Prosecutions v Kilbourne [1973] AC 729, at p. 741, (H.L.) Lord Hailsham asserted that the word “corroboration” “is not a technical term of art, but a dictionary word bearing its ordinary meaning”. See also: Murphy, Peter Murphy on Evidence (8th ed., 2003) § 18.2, at p. 639; and Hannibal, Martin and Mountford, Lisa The Law of Criminal and Civil Evidence (2002) at p. 343.
785 It should be noted, however, that despite the rigid and technical definition of corroboration and the high standard demanded of evidence before it could be classified as corroborative within the meaning of Baskerville, corroborative evidence was never required to prove the suspect witness’s account of events, since otherwise the suspect witness’s evidence could be disregarded entirely: R v Baskerville [1916] 2 K.B. 658, at p. 667 per Lord Reading C.J. (C.A.). The corroborative evidence had merely to
tending to implicate the accused in relation to a material particular in the
offence alleged. Thus, in order to constitute ‘corroborative evidence’, the
evidence – which also had to be relevant, admissible and credible – had
to demonstrate not only that the offence was committed but that it was
committed by the accused; it was not sufficient if the evidence simply
bolstered the witness’s credibility by supporting his / her account of
events.

3.3.3 While the highly restrictive nature of the concept of corroboration – both as
defined and as applied by the courts – ensured the highest level of protection
for the accused from evidence which was perceived to be unreliable, it
operated to exclude the evidence of child witnesses – or, more particularly,
child complainants – in all but exceptional cases. The inherent technicality
and the exclusionary effects of the traditional corroboration requirements in
respect of the evidence of children are manifest in the following analysis of
the practical application of the Baskerville formula of corroboration.

confirm or support the suspect witness’s account of events in a material particular, that is, to implicate
the accused in the offence alleged or to show or tend to show not only that an offence was committed
but that it was committed by the accused: Doney v R (1990) 171 CLR 207, at p. 211, 96 ALR 539, at p.
541; R v Andrews (1992) 60 A Crim R 137, at pp. 151-153, per Matheson J., and pp. 166-167, per
Olsson J. (S.A. C.C.A.); R v Mullins 3 Cox C.C. 526, at p. 531, per Maule J.; R v Chen [1993] 2 VR
139, at pp. 154-156; and R v Hunt (1994) 76 A Crim R 363, at pp. 364-366, per Fitzgerald J.

In respect of complaints of sexual offences, medical evidence tending to show that a sexual assault
had occurred was held not to amount to corroboration since it could not implicate the accused in the
crime alleged, merely indicate that such offence had occurred: The Attorney General v Troy (1950) 84
ILTR 193; The People v D (Unreported, Court of Criminal Appeal, ex tempore, 27th July, 1993); and

See: Keane, Adrian The Modern Law of Evidence (5th ed., 2000) at p. 198; and Hannibal, Martin

452 (H.L.) per Lord Hailsham: “Corroboration can only be afforded ... by a witness who is otherwise
to be believed. If a witness’s testimony falls of its own inanition, the question of his... being capable of
giving corroboration does not arise.” See also: Director of Public Prosecutions v Hester [1973] AC
296, at p. 315, per Lord Morris where he stated that “[c]orroborative evidence will only fill its role if it
itself is completely credible” and Director of Public Prosecutions v Boardman [1975] AC 421, at p.
455, [1974] 3 All ER 887 where Lord Hailsham stated that “unless a witness was intrinsically credible
he could neither afford corroboration nor be thought to require it”. It should be noted, however, that
the credibility of a witness cannot be determined in isolation, but rather must be assessed in the context

Bojczuk, William Evidence Textbook (5th ed., 1993) at p. 35: “There is some confusion in the cases
and statutes about whether it is the witness or his evidence which must be corroborated. In principle,
the difference between corroboration of a witness and corroboration of his evidence is that evidence
which supports the credibility of the witness would corroborate him, whereas evidence which supports
the story he has told corroborates his evidence. At common law the correct approach is to ask whether
there is corroboration of the evidence given by the witness...."
The rule against self-corroboration excluded from the definition of corroboration evidence of the child witness himself / herself, that is, the witness’s own testimony, his / her previous consistent statements and – with regard to complaints of sexual offences – ‘recent complaints’. The distressed condition of the child complainant of sexual offences constituted a very limited exception to this rule – since the distress emanates from the complainant himself / herself – and was thus considered capable of amounting to corroboration of the complainant’s account, albeit only in specific and highly restrictive circumstances such as those prevailing in R v Whitehead [1929] 1 KB 99, at p. 102, [1928] All ER Rep 186, at p. 188, per Lord Hewart C.J. (C.A.). In rejecting as corroboration evidence of a conversation between the complainant – aged 16 years – and her mother some time after the alleged offence, Lord Hewart C.J. asserted that: “In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated” and “[a] girl cannot corroborate herself, otherwise it is only necessary for her to repeat her story some 25 times in order to get 25 corroborations of it”. See also R v Christie [1914] AC 545, [1914-15] All ER Rep 63; and the Australian cases: Ridley v Whipp (1916) 22 CLR 381, at p. 389; and Eade v R [1924] 34 CLR 154, at p. 157. The ‘independence’ requirement was thus intended to minimise the risk of collusion between witnesses. Bojczuk, William Evidence Textbook (5th ed., 1993) noted at p. 36 that: “It is for a judge, not a jury, to decide whether a real risk exists that potentially corroborative evidence is contaminated (i.e., that it is not truly independent), since in carrying out that task he is deciding question of admissibility. If he finds such a risk exists, he has no discretion to let the evidence go to the jury as corroboration: R v Ananthanarayanan (1993) The Times 16 March.”

This excludes evidence of what the complainant said to a third party in complaint and the evidence of that third party as to the contents of the complainant’s complaint. Likewise the complainant’s statement to the police during the investigation of the offence alleged is excluded from qualifying as corroborative evidence on the grounds that it lacks the necessary independence. Such evidence may, however, be admitted to show consistency in the evidence of the witness and, therefore, go towards the assessment of the witness’s credibility, provided it satisfies the conditions of the ‘recent complaint doctrine’: People (Director of Public Prosecutions) v Brophy [1992] ILRM 709 (C.C.A.); People (Director of Public Prosecutions) v Symott (Unreported, Court of Criminal Appeal, 29th May, 1992); G v Director of Public Prosecutions [1994] 1 IR 374; People (Director of Public Prosecutions) v Gavin [2000] 4 IR 557; People (Director of Public Prosecutions) v Jethi (Unreported, Court of Criminal Appeal, ex tempore, 7th Feb, 2000); R v Lillyman [1896] 2 QB 167; and R v Lowell 17 Cr App Rep 163; Eade v R [1924] 34 CLR 154, at p. 157; R v E (1996) 39 NZWLR 450, at pp. 457-461, per Sperling J. (a jury direction to this effect is required).

There was no test of general application to determine if the distressed condition of a complainant would constitute corroboration, rather it depended upon the facts of an individual case and whether a causal connection could be established between the distressed condition – as observed by a third party – and the alleged commission of the offence charged. In R v Flannery [1969] VR 586, at p. 591 it was stated thus: “...regard must be had to such factors as the age of the prosecutrix, the time interval between the alleged assault and when she was observed in distress, her conduct and appearance in the interim, and the circumstances existing when she is observed in the distressed condition. Without attempting to enumerate exhaustively the circumstances in which such evidence may amount to corroboration, we are of opinion that if, regard being had to factors of the kind we have mentioned, the reasonable inference from the evidence is that there was a causal connexion between the alleged assault and the distressed condition, evidence of the latter is capable of constituting corroboration. If such inference is not open, the evidence is not, in our opinion, capable of amounting to corroboration. We should add that except in special circumstances, such as existed in Redpath’s case evidence of
the complainant was observed by a third party, a short time after the alleged commission of the offence, to be in a distressed condition, in circumstances where the complainant was unaware that he/she was under observation, thus minimising the risk that such ‘distress’ was contrived or simulated by the complainant. However, even if capable of amounting to corroboration, it was considered advisable to warn the jury that such evidence should carry little weight.

R v Redpath (1962) 46 Crim App R 319. The evidence of an independent third party to the effect that the child complainant—aged seven years—had been observed emerging from the moor (the location of the alleged offence) in a distressed condition at a time shortly after the alleged commission of the indecent assault and in circumstances wherein the child was unaware she was being observed, was capable of constituting corroboration of the child’s evidence that the accused had indecently assaulted her. By way of contrast, evidence of the child’s recent complaint to her mother, upon returning home, and the evidence of her mother as to the child’s distress were not capable of constituting corroboration. See also: R v Zielinski (1950) Cr App R 193.

The trial judge would direct the jury that the complainant’s distress was not capable of amounting to corroboration where there was a delay between the alleged incident and the witnessed distress on the part of the complainant: R v Moana [1979] 1 NZLR 181 (C.A.); R v Poa [1979] 2 NZLR 378 (C.A.); and R v Sailor [1994] 2 Qd R 342 (C.A.).


R v Knight (1966) 50 Cr App R 122, at p. 125; [1966] 1 WLR 230, at 233, Lord Parker C.J. stated that juries should be advised that “except in special circumstances little weight ought to be given to that evidence”. See also: R v Wilson (1973) 58 Crim App R 304, at 313; R v Redpath (1962) 46 Cr App R 319; R v Chauhan (1981) 73 Cr App R 232 (C.A.); R v Dowley [1983] CRIM LR 168 (C.A.); R v Luizi [1964] CRIM LR 605 (CCA); and R v Roach [1988] VR 665, at pp. 668 and 672; R v Flannery [1969] VR 586, at p. 591; R v Wilson (1973) 58 Cr App R 304; R v Byczko (No. 2) (1977) 17 SASR 460, at p. 463. However, it should be noted that the Australian courts rejected any suggestion that this was an inflexible rule of general application since the question of the appropriate weight to be attached to any evidence is, of course, a matter for the jury: R v McDougall [1983] 1 Qd R 89, at p. 91 (C.C.A.); R v Riossetter [1984] 1 Qd R 477, at p. 481; R v McKeon (1986) 31 A Crim R 357, at p. 362; and Wilson v The Queen [1985] WAR 279, at p. 284.
Although corroborative evidence could be direct, circumstantial,\(^797\) real or documentary, what was of greater importance was that corroboration could also be ‘cumulative’;\(^798\) while one piece of evidence alone could not amount to corroboration of a child’s account of the sexual offences alleged\(^799\) – usually failing the ‘implication’ element of corroboration – several pieces together could form a chain of circumstantial evidence which could in law amount to corroboration.\(^800\) Thus, medical evidence indicating that intercourse had taken place, when combined with evidence that the accused alone had been in the company of the child complainant at the time of the alleged sexual offence, that her underwear was torn and that she had suffered injuries consistent with a lack of consent, could amount to

\(^{797}\) In \(R v Baskerville\) [1916] 2 K.B. 658, at p. 667 (C.A.) Lord Reading C.J. held that circumstantial evidence of the accused’s connection with the crime alleged was sufficient to amount to corroboration; it was not necessary that there be direct evidence of the accused’s commission of the crime since “otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice”. See: \(R v McInnes\) (1990) 90 Cr App R 99 (C.A.); \(R v Galluzzo\) (1986) 23 A Crim R 211 (C.C.A. N.S.W.); \(R v Hills\) (1988) 86 Cr App R 26; and \(BRS v R\) (1997) 148 ALR 101, at p. 106, per Brennan C.J. and at pp. 111-112, per Toohey J.

\(^{798}\) In \(R v McInnes\) (1990) 90 Cr App R 99 (C.A.) the Court of Appeal held that the child’s description of the interior of the car was capable of amounting to corroboration of her allegation of kidnapping. See also: \(R v Hills\) (1988) 86 Cr App R 26, at p. 31; \(Thomas v Jones\) [1921] 1 KB 22, at p. 33; \(Hicks v The King\) (1920) 28 CLR 35; \(Eade v The King\) (1924) 34 CLR 154, at p. 158; \(R v Edwards\) (1964) 84 WN (Pt 1) (NSW) 42, at pp. 46-47; \(R v Powell\) (1979) 23 SASR 52; \(R v Freeman\) [1980] VR 1, at pp. 12-13; \(R v Nanette\) [1982] VR 81, at pp. 84-85; and \(R v Kalajzich\) (1989) 39 A Crim R 415, at p. 429ff.

\(^{799}\) The majority of the Supreme Court of Canada in \(Warkentin v R\) [1977] 2 S.C.R. 355, at p. 379 (S.C.C.) rejected any contention that the corroborative evidence mandated under s. 142 of the Criminal Code in relation to sexual offences should be “pigeon-holed in three different slots, namely, intercourse, non-consent and identity”. The Court noted that when supporting evidence is circumstantial “it is the whole that must be examined and not each piece individually” and warned that “[t]he corroborative evidence should not be broken up into fragments”. The Court concluded at p. 382 that: “The Crown when presenting a case based on circumstantial evidence is like a painter whose work is not to be judged after each stroke of the brush but simply at the end of the day. In the case at bar, the five pieces of evidence indicated by the trial judge to the jury as capable of constituting corroborative evidence should only be looked at together as a completed painting. Taken one by one, they do not tend to show that intercourse has taken place without the consent of the complainant with one or the other of the accused. Taken as a whole, however, they are certainly capable of establishing these three elements of the crime mentioned in the indictment.”

\(^{800}\) In \(Director of Public Prosecutions v Reid\) [1993] 2 IR 186 the complainant asserted that the accused had forced her into his house where he raped her with the volume of the television set very high to muffle her cries. The court found the following amounted to ‘cumulative corroboration’: (i) the severe injuries to the complainant’s genitalia indicating the absence of consent to sexual intercourse; (ii) the distress of the complainant as observed by her parents and the gardai, again indicating the absence of consent; and (iii) the fact that the accused’s television was set to a very high volume when the gardai visited his home shortly after receipt of the complaint. See also: \(R v Tripodi\) [1961] CR 186 at pp. 190-191 (F.C.); \(R v Fuhrer\) [1961] VR 500, at p. 509 (F.C.); \(R v Davy\) [1964-5] NSWR 40, at p. 45 (C.C.A.); \(R v Colless\) [1964-5] NSWR 1243, at p. 1245; \(R v Lindsay\) (1977) 18 SASR 103, at pp. 117-120 (F.C.); \(R v Duke\) (1979) 22 SASR 46, at p. 52 (F.C.); \(Medcraft v R\) [1982] WAR 33 (C.C.A.); and \(R v Galluzzo\) (1986) 23 A Crim R 211 (N.S.W. C.C.A.).
corroboration of the complainant’s evidence that she had suffered a sexual assault or rape at the hands of the accused.\textsuperscript{801}

3.3.6 Equally, corroboration could emanate from the actions – or even inaction – of the accused himself or herself. False statements or lies by the accused both in and out of court could constitute corroboration\textsuperscript{802} where a number of strict pre-conditions were satisfied: (i) it was deliberate; (ii) it related to a material issue; (iii) the motive for the lie was a realisation of guilt and a fear of the truth, rather than an attempt to bolster up a just cause or motivated by shame or a wish to conceal disgraceful behaviour from his / her family; and (iv) the statement was clearly shown to be a lie by evidence other than that of the witness to be corroborated, that is, either by admission or by evidence from an independent witness.\textsuperscript{803} While it was accepted that admissions by


\textsuperscript{802} \textit{R v Lucas} [1981] QB 720, at p. 724; \textit{R v West} (1983) 79 Crim App R 45; \textit{Eade v R} (1924) 34 CLR 234; \textit{Buck v R} (1982) 8 A Crim R 357, at p. 363; \textit{Hemsley v R} (1988) 36 A Crim R 334, at p. 339; \textit{Williams v R} (1987) 25 A Crim R 234, at p. 243; \textit{Collings v R} (1976) 2 NZLR 104 (C.A.); \textit{Perera v R} [1982] VR 901 (F.C.); \textit{Toia v R} [1982] 1 NZLR 555 (C.A.); \textit{Edwards v R} (1993) 178 CLR 193, at pp. 210-211, \textit{per} Deane J. (emphasising the requirement of independence; the “untruthfulness of the relevant statement must be established otherwise than through the evidence of the witness whose evidence is to be corroborated”). Even in the aftermath of the abolition of the corroboration requirements, the ‘Lucas warning’ may still be given to juries in the following circumstances, outlined by Kennedy L.J. in \textit{R v Burge} [1996] 1 Cr App R 163, at pp. 173: “1. Where the defence relies on an alibi; 2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant; 3. Where the prosecution seek to show that something said, either in or out of court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved; 4. Where, although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.”

\textsuperscript{803} \textit{R v Lucas} [1981] QB 720, at p. 724 (C.A.). Prior to the judicial statement of this test, it appears that the courts employed a ‘totality of circumstances’ test to determine whether a lie by the accused was capable of amounting to corroboration: \textit{White v The Queen} [1956] S.C.R. 709, at p. 711, \textit{per} Abbott J. (S.C.C.); \textit{Dawson v McKenzie} (1908) 45 SLR 473, \textit{per} Lord Dunedin (“a false statement...may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made”); \textit{Macdonald v The King} [1947] S.C.R. 90, at p. 99, \textit{per} Taschereau J. (S.C.C.) (“[t]he behaviour of a witness as well as his contradictory or untrue statements are questions of fact from which a jury may properly infer corroboration”); \textit{Credland v Knowler} (1951) 35 Cr App R 48; and \textit{Corfield v Hodgson} [1966] 2 All ER 205.
the accused could constitute corroborative evidence,\textsuperscript{804} there was some disagreement as to whether silence by the accused in the face of an allegation of wrongdoing or liability in circumstances where it was reasonable to expect a reply could in law amount to corroboration.\textsuperscript{805} However, the failure of the accused to give evidence in his defence could, under no circumstances, amount to corroboration.\textsuperscript{806}

3.3.7 The judiciary was also exercised in relation to the question whether the evidence of one witness in a class of suspect witnesses could corroborate the evidence of another witness in a class of suspect witnesses – whether the same class or another – for the purposes either of the mandatory corroboration requirement or the corroboration warning. Contrary to the cautious approach otherwise adopted by the common law judiciary in relation to the evidence of children, the courts were prepared to countenance

\begin{itemize}
  \item \textsuperscript{804} \textit{R v Dossi} (1918) 13 Cr App R 158, per Atkin J. \textquotedblleft The question of corroboration often assumes an entirely different aspect after the accused person has gone into the witness-box and has been cross-examined\textquotedblright; (admission by accused of platonic or innocent fondling of child corroborative of indecent assault); \textit{R v McConnan} [1951] SASR 22 (admission of brief physical contact by teacher with pupils not corroborative of indecent assault; as consistent with innocence as guilt); \textit{R v Lindsay} (1977) 18 SASR 103, at p. 109; \textit{Fox v The Queen} (1984) 7 A Crim R 28; and \textit{R v Melrose} [1989] 1 Qd R 572, at p. 576, per Connolly J. (admission by accused in rape prosecution that he ran away).
  \item \textsuperscript{805} In \textit{People v Quinn} [1955] IR 57 the Court of Criminal Appeal held that the direction of the trial judge to the effect that the 'silence' of the accused when charged with unlawful carnal knowledge in Newbridge Garda Station could amount to corroboration was contrary to the privilege against self-incrimination; when charged the accused responded \textquotedblleft I will not make any statement\textquotedblright. However, see: \textit{R v Cramp} (1880) 14 Cox CC 390 (accused's silence when father of girl confronted him with pills, asserting that accused gave them to her to procure abortion held to be corroborative); \textit{R v Mitchell} (1892) 17 Cox CC 503, at p. 508; \textit{R v McKelvey} [1914] QSR 48, at pp. 53-54; \textit{Ex p Freeman} (1922) 39 WN(NSW) 73, at p. 75; \textit{Thatcher v Charles} (1960) 104 CLR 57; and \textit{R v Feigenbaum} [1919] 1 KB 431 (silence of the accused when arrested and told of charges held to amount to corroboration). A similar rule applied at common law in relation to the accused's refusal to consent to the taking of samples of hair, blood, urine or tissue, if such refusal appeared to be grounded upon a fear of just incrimination: \textit{R v Smith} (1985) 81 Cr App R 285; \textit{R v Martin} [1992] 1 NZLR 313. However, see: \textit{R v Whitehead} [1929] 1 KB 99, [1928] All ER Rep 186 (C.A.) (accused's statement, when charged with unlawful intercourse with a girl aged less than sixteen, that he did not wish to say anything, was held not to corroborate her evidence); followed in \textit{R v Keeling} [1942] 1 All ER 507 (C.A.); \textit{Hall v R} [1971] 1 WLR 298, [1971] 1 All ER 322, per Lord Diplock (P.C.) (accused has a right at common law to remain silent); and \textit{R v Tate} [1908] 2 KB 680 (C.A.) (accused's silence when arrested was held not to corroborate evidence of accomplice).
  \item \textsuperscript{806} \textit{R v Jackson} [1953] All ER 872, at p. 873, per Lord Goddard C.J. (C.A.): \textquotedblleft One cannot say, because a man has not gone into the witness box to give evidence that that of itself is corroboration of the evidence of accomplices. It is a matter which the jury could very properly take into account and very probably would, but it is not a right direction to give a jury and it should be clearly understood that it [a direction that the accused's failure to testify could constitute corroboration] is wrong in law\textquotedblright. See also: \textit{R v Blank} [1972] Crim LR 176; and \textit{Cracknell v Smith} [1960] 1 WLR 1239, [1960] 3 All ER 569. Similarly, a failure to cross-examine cannot constitute corroboration: \textit{Dingwall v R Wharton (Shipping) Ltd.} [1961] 2 Lloyd's Rep 213, at p. 219 (H.L.).
\end{itemize}
the concept of mutual corroboration in respect of the evidence of two child witnesses; notwithstanding the traditional view that the evidence of children was subject to the influence of childish fantasy and imagination rendering such evidence unreliable, the probability of the imaginations of two children – previously unknown to each other – producing an account of events in similar terms implicating the accused in the offence alleged, was considered slight and, accordingly, mutual corroboration of the evidence of child witnesses was permissible.

3.3.8 However, such mutual corroboration was limited in the following important respect: while the sworn evidence of a child could corroborate the sworn or unsworn evidence of another child or even the evidence of an adult witness and the unsworn evidence of a child could corroborate the sworn evidence of another accomplice: Director of Public Prosecutions v Kilbourne [1973] AC 729, at pp. 747ff, 751, 752, 759 and 760 (H.L.). This ruling was made despite earlier authority to the contrary: R v King [1967] 1 All ER 379, at pp. 384-385. The Court also rejected any suggestion that there was a general rule to the effect that one suspect witness could not corroborate another, since it noted that to hold otherwise would be to confuse relevance and weight. See also: Heydon, J.D., Cross on Evidence (6th Australian ed., 2000) § 15145, at pp. 372-373.

8.08 In the context of child complainants and witnesses of sexual offences, Lord Hailsham (with whom Lord Morris expressly agreed) asserted in Director of Public Prosecutions v Kilbourne [1973] AC 729, at pp. 748-749, [1973] 1 All ER 440, (H.L.) that: "When a small boy relates a sexual incident implicating a given man he may be indulging in fantasy. If another small boy relates such an incident it may be a coincidence if the detail is insufficient. If a large number of small boys relate similar incidents in enough detail about the same person, if it is not conspiracy it may well be that the stories are true. Once there is a sufficient nexus it must be for the jury to say what weight is given to the combined testimony of a number of witnesses." Heydon, J.D., Cross on Evidence (6th Australian ed., 2000) § 15040, at pp. 356-357: "It is neither illogical nor nonsensical to treat the evidence of [one child witness] as a matter which would entitle you to act on [another child witness'] evidence with more confidence than might be the case if it stood alone."

8.09 Director of Public Prosecutions v Kilbourne [1973] AC 729, [1973] 1 All ER 440, [1973] 2 WLR 254, 57 Cr App Rep 381 (H.L.) (mutual corroboration of sexual offences against a number of young boys; each boy gave evidence upon oath for the prosecution; held that since the evidence of one group of boys was admissible in relation to the charges concerning the other group and that evidence was relevant to matters in dispute and implicated the accused in the criminal conduct alleged, that evidence, if believed, constituted corroboration; held it was immaterial that the evidence of the boys in both groups was mutually corroborative or that each boy was, technically, an accomplice in relation to the offence committed against him; rejected the suggestion that there was a general rule prohibiting the mutual corroboration of the evidence of persons falling within the meaning of the term 'accomplice' and, in particular, such a rule did not apply to 'accomplices' who gave independent evidence of separate incidents as proving system and negativing accident, and where the circumstances were such as to exclude the danger of a jointly fabricated account of events).
evidence of another child,\footnote{While the sworn evidence of a child witness did not require corroboration as a matter of law, the sworn or unsworn evidence of a child could amount to corroboration for the purpose of the corroboration warning given by the trial judge to the jury in respect of the evidence of another child given upon oath, although, having received the warning, the jury were free to convict in the absence of corroboration.} it was not possible for the unsworn evidence of one child to corroborate the unsworn evidence of another child witness.\footnote{Thus, if the only evidence implicating the accused was that of unsworn children, regardless of their number, such evidence could not be mutually corroborative and the trial judge was obliged to stop the case: \textit{R v Campbell} [1956] 2 All ER 272, at p. 276, [1956] 2 QB 432, at p. 438 (C.A.). Ligertwood, Andrew \textit{Australian Evidence} (3\textsuperscript{rd} ed., 1998) observed in § 4.9, at p. 186 that “[t]his approach cannot be justified by natural rules of probability” and, later at p. 187, he concluded that: “These technicalities have no rational foundation in natural rules of probability and only help criminals avoid conviction. This has now been appreciated by most legislators in Australia”.} Equally, where the evidence given in corroboration of the sworn evidence of a child was the unsworn evidence of a child of tender years, a particularly careful jury warning\footnote{In \textit{Director of Public Prosecutions v Hester} [1973] AC 296, [1972] 3 All ER 1056, [1972] 3 WLR 910, 57 Cr App Rep 212 (H.L.), Viscount Dilhorne emphasized the need for a particularly careful warning to the jury in relation to the weight to be placed on the evidence of two children, “one sworn and one unsworn, when their evidence is being relied on as mutually corroborative of each other”.} was required in respect of such evidence.\footnote{\textit{R v Masher} (1934) 25 Cr App Rep 1, at pp. 20-21, \textit{per} Lord Hewart C.J. distinguished.} In this regard, it was asserted that:

“Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed would be to rule it out because of its essential nature and indeed because of its virtue. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible evidence. All of this emphasises the importance of directing a
jury that the evidence of children must be examined with special care. The need for such special care is manifest where vital issues fall to be determined only on the evidence of children."\(^{814}\)

3.3.9 The English decisions refusing to allow the unsworn evidence of one child witness to corroborate the unsworn evidence of another child witness\(^ {815} \) were based in part upon the wording of the proviso to s. 38 of the Children and Young Persons Act 1933;\(^ {816} \) it was held that the unsworn evidence of a child admitted pursuant to this provision required corroboration by "some other material evidence", that is, not merely material evidence other than that requiring corroboration,\(^ {817} \) but evidence admitted otherwise than by


\(^{815}\) A similar approach to the mutual corroboration of the unsworn evidence of children was adopted by the courts in Australia: \textit{R v Skafle} (1940) 58 WN (NSW) 9 (C.C.A.). See also: \textit{Eade v R} (1924) 34 CLR 154; \textit{R v Rima} (1892) 14 ALT 138 (F.C.); \textit{R v Mlaka} [1971] VR 385, at p. 392 (F.C.); and \textit{Croft v R} (1917) 19 WALR 49 (F.C.). Equally, this restrictive approach found favour with the Canadian courts: \textit{Paige v The King} [1948] S.C.R. 349, at p. 352, \textit{per} Estey J. (S.C.C.) (charge of unlawful carnal knowledge of a girl corroborated by the unsworn evidence of her younger brother; held that the unsworn evidence of one child could not corroborate the unsworn evidence of another child since each of the parties was "possessed of the same inherent danger" or unreliability and that the "purpose of corroboration is to remove that danger and this cannot be accomplished by evidence which itself cannot alone be acted upon because it is subject to the same danger and objection"; the unsworn evidence of a child of tender years received pursuant to s. 16 of the Evidence Act lacked probative value since it required corroboration to found a conviction and, accordingly, could not constitute independent evidence which tended to show that the accused committed the crime charged); \textit{R v Whistnant} (1912) 5 Alta. L.R. 211, 3 W.W.R. 486, 8 D.L.R. 468, 20 C.C.C. 322 (C.A.); \textit{R v Shorten} [1918] 3 W.W.R. 5 (Sask. C.A.); affd (1919) 57 S.C.R. 118, [1918] 3 W.W.R 5, at 9. (S.C.C.). It would appear, however, that the unsworn evidence of children in Queensland, received pursuant to s. 9 of the Evidence Act, 1977, could be mutually corroborative.

\(^{816}\) Section 38(1) of the Children and Young Persons Act 1933 provides that: "[W]here [unsworn] evidence [of a child of tender years] admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him." (Emphasis added).

\(^{817}\) This broader, more permissive view of mutual corroboration of the unsworn evidence of children was embraced by the New Zealand Court of Appeal in \textit{R v Halligan} [1973] 2 NZLR 158, at p. 160 (C.A.), a case concerning allegations of indecent assault by two child complainants, aged six and eight years respectively. The Court of Appeal held that, while there was a general rule that the evidence of one accomplice could not corroborate the evidence of another, there was no general rule that the evidence of one child could not corroborate that of another, nor that the evidence of one complainant in a sexual case could not corroborate that of another. Turner P. held that the trial judge did not err in instructing the jury that, if they were to accept the evidence of the child complainants, then "the evidence of each of these children could be accepted as corroborating that of the other". It is important to note that both of the child complainants in this case gave evidence \textit{unsworn}, upon promising to tell the truth; s. 13 of the Oaths and Declarations Act 1957 in New Zealand gave this evidence the same force and effect as if it had been given under oath. Accordingly, this decision runs contrary to the English authorities and indeed legislation which stated that the \textit{unsworn} evidence of one child was \textit{not} capable of corroborating the \textit{unsworn} evidence of another child witness. See also: \textit{R v Spring} [1958] NZLR 468, at p. 474, \textit{per} North J. (C.A.)

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virtue of this provision, namely, *sworn* evidence. This restrictive approach was criticized as “*arbitrary*” and it was doubted whether such interpretation was either sensible or intended by the legislature. However, as similar wording was employed in s. 30 of the Children Act 1908, as amended, it is submitted that a similarly restrictive approach would have been adopted here had the question arisen prior to the enactment of s. 28 of the Criminal Evidence Act 1992.

3.3.10 Equally controversial was the question whether evidence of the previous misconduct of the accused or similar fact evidence could constitute corroboration; a question with particular relevance to the prosecution of sexual offences against children. As the law’s acceptance of the evidence of ‘suspect’ witnesses grew, a number of exceptions were carved out of the exclusionary rule, permitting ‘misconduct evidence’ to amount to

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818 In *Director of Public Prosecutions v Hester* [1973] AC 296, at p. 323, [1972] 3 All ER 1056, [1972] 3 WLR 910 (H.L.), Lord Diplock stressed that the proviso was not to be given a strict literal meaning so as to prohibit a conviction “merely because uncorroborated evidence is given on behalf of the prosecution by an unsworn child, if apart from the evidence of the child there is sufficient other evidence of the guilt of the accused” since, he argued, “[s]o preposterous an intention cannot reasonably be ascribed to Parliament”. The House of Lords held that the intention of the proviso was “that a conviction should not take place in reliance upon or on the basis of unsworn evidence which is not corroborated”. Accordingly, it was held that an accused person could not be convicted on the basis of unsworn evidence admitted pursuant to s. 38(1) in the absence of corroboration and, further, that such corroboration could not be supplied by the unsworn evidence of another child or children. However, at p. 326, Lord Diplock expressly rejected any suggestion that there was a common law rule of general application to the effect that “evidence of a witness which is itself suspect for a reason which calls for a warning of the danger of convicting on it unless it is corroborated, is incapable in law of amounting to corroboration of the evidence of another witness whose evidence is also suspect for the same or any other reason which calls for a similar warning”; he held that it was impossible to infer that Parliament – which had provided that the unsworn evidence of a child required corroboration by evidence other than the unsworn evidence of another child – had intended to further limit the power of the jury to rely on the evidence of an unsworn child in support of a conviction. Lord Pearson summarised this proposition succinctly as follows at p. 321: “Therefore, the evidence of an unsworn child or several unsworn children cannot be taken as corroboration of the evidence of another unsworn child.”

819 Ligertwood, Andrew *Australian Evidence* (3rd ed., 1998) § 4.9, at p. 185: “Having discarded one arbitrary limit [the so-called prohibition on mutual corroboration] the House of Lords imposed another....Whether this interpretation is sensible or was intended by the legislature is extremely doubtful. What must be emphasised is that the decision relies upon the use of the word ‘other’ in the relevant section. In jurisdictions where this word is absent, and no other limitations are attached to the corroborative evidence permitted, the natural argument of mutuality should be decisive and the unsworn evidence of more than one child can be acted upon.”

820 Such evidence – demonstrating that an accused was guilty of criminal or civil wrongdoing, or misbehaved on a previous occasion – was inadmissible where it tended to show that the accused committed the crime before the court, if the previous misconduct was only relevant as illustrating a disposition to commit crimes generally or the type of crime which was before the court. In *Makin v*
corroboration where it was admissible in a number of limited situations:  

(i) where it illustrated whether the acts alleged to constitute the offence charged were designed or accidental;  

(ii) to rebut a defence otherwise open to the accused, such as innocent association;  

(iii) where it showed a propensity which was more specific than that of committing a particular crime, since it involved the commission of that crime in a particular manner or with a particular person;  

(iv) where such evidence corroborated the witness’s account of statements – such as confessions or false denials –  

Attorney General for New South Wales [1894] AC 57, Lord Hershell famously asserted at p. 65, that: “It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is now being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it admissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused”. See also: Attorney General v Fleming [1934] IR 166; Attorney General v Joyce [1929] IR 536; People (Attorney General) v Kirwan [1943] IR 279; People (Attorney General) v Dempsey [1961] IR 288; People (Director of Public Prosecutions) v O’Sullivan (1979) 2 Frewen 1, at p. 9 (C.C.A.); People (Director of Public Prosecutions) v Wallace (1982) 2 Frewen 125, at p. 129 (C.C.A.).

It may also be admissible where it operates as circumstantial evidence showing an aspect of the relationship between the accused and victim: R v Sakail [1993] 1 Qd R 312 (C.C.A.); and Heydon, J.D., Cross on Evidence (6th Australian ed., 2000) at p. 390. Equally, misconduct evidence was admissible: (i) where it was relevant to an issue before the jury such as intent or to show that an article was adapted for the commission of an offence; or (ii) where it formed part of the res gestae. See: Attorney General v Fleming [1934] IR 166; People (Attorney General) v Halvin (1952) 1 Frewen 132 at p. 134; Toppin v Feron (1909) 43 ILTR 190; People (Director of Public Prosecutions) v Wallace (1982) 2 Frewen 125; Attorney General v McCabe (1926) IR 129; Attorney General v Joyce (1929) IR 526; and R v Bond [1906] 2 KB 389.


In R v Hartley [1941] 1 KB 5 (C.A.) evidence of previous occasion of buggery of H by the accused was admissible as corroborative of the commission of that offence on a particular day; while there was no corroboration of H’s complaint in respect of the latter charge, his evidence with regard to the previous occasion was corroborated by a witness who observed the accused take H into his office, lock the door and draw the blinds. The Court of Criminal Appeal held that H’s evidence in relation to the previous occasion of buggery was admissible since a person alleging that offence was entitled to demonstrate that the offence had been committed habitually; it was held that the corroboration of H’s complaint in relation to the previous occasion constituted corroboration of H’s evidence with regard to the more recent occasion of buggery. See also: R v H [1995] 2 AC 597, 2 All ER 865; R v Witham [1962] Qd R 49 (CCA); R v McConnell [1972] Tas SR (NC) 3; K v R (1992) 34 FCR 227 (FC); B v R (1992) 174 CLR 599, 110 ALR 432; and R v Massey [1997] 1 Qd R 404 (CA).

Tapper, Colin Cross and Tapper on Evidence (9th ed., 1999) expresses the exception in broader terms as follows at p. 242: “Evidence which tends to show that the accused incited a course of conduct resulting in the commission of the crime charged certainly supports the evidence against him. Accordingly anything which confirms a witness’s story with regard to such incitement will be held to constitute support when this is required, and it sometimes happens that the alleged incitement takes the form of a reference to previous misconduct”. 237
made by the accused.826 The modern test for the admission of such evidence in this jurisdiction involves a deliberate weighing of the competing interests involved in order to determine whether the probative value of such evidence outweighs its prejudicial effect;827 once admissible, such evidence may amount to corroboration of the offence before the court828 and is undoubtedly of great assistance to the prosecution in cases involving alleged sexual offences against children.829

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826 In *R v Mitchell* (1952) 36 Cr App R 79 (indecent assault of girl S by the accused, a clergyman; S gave sworn evidence of the assault and also testified that the accused told her about his behaviour with a girl, J; held that J’s evidence of the accused’s conduct corroborated the evidence of S since S could not have heard of J from anyone other than the accused when the two girls lived in different parts of the country).


829 See: *Director of Public Prosecutions v Kilbourne* [1973] AC 729, [1973] 1 All ER 440 (H.L.) (question of general public importance certified, whether and in what circumstances the sworn evidence of a child victim as to an offence charged can be corroborated by the admissible but uncorroborated evidence of another child victim as to similar misconduct of the accused on a different occasion; evidence of all five children in this case was sworn; held evidence of boys in each group was admissible to prove system and to negative the defence of innocent association; held that the sworn evidence of a child victim of sexual offences could be corroborated by the evidence of another child victim of alleged similar misconduct where such evidence is otherwise admissible and, under the general law regarding relevance, is probative of the facts in dispute and indicative of the guilt of the accused, and if and when believed by the jury; approved by the High Court of Australia in *Pollitt v R* (1992) 174 CLR 558, at p. 600, per Dawson and Gaudron JJ. (Mason C.J. and Brennan J. agreeing) and applied by the Federal Court in *R v K* (1992) 59 A Crim R 113, at pp. 119-120 (F.C.). See also: *Director of Public Prosecutions v Boardman* [1975] AC 421, [1974] 3 All ER 887 (H.L.); and *R v H* [1995] 2 AC 597. In *People (Director of Public Prosecutions) v BK* [2000] 2 IR 199 (C.C.A.) (accused charged with a number of sexual offences against young boys alleged to have taken place in a children’s residential home; application for separate trials; Court accepted that the effect of allowing the counts relating to different boys to be tried together would be, de facto, to provide corroboration of the charges against the accused where there was none in law; ‘balancing test’ – whether probative value outweighed prejudicial effect – applied; held that counts 1 and 2 had been improperly joined with counts 8 and 9, however, evidence on counts 8 and 9 was cross-admissible).
3.4.0 Critique of Traditional Corroboration Requirements

3.4.1 It is clear that, given both the technicality and the rigidity of the *Baskerville* definition of corroboration, — described as “cumbersome and counter-productive” — the list of evidence capable in law of amounting to corroboration was necessarily restricted and the task of the trial judge, to specify for the jury those items of evidence in the proceedings capable of amounting to corroboration if accepted by the jury, was unenviable, if not impracticable. If the trial judge incorrectly identified as corroborative an item or items of evidence which did not satisfy the *Baskerville* definition, it provided the accused with a ground for appeal against conviction.

3.4.2 The *Baskerville* definition of corroboration also made the task of the prosecution extremely difficult since, where manipulated, it admitted of the possibility of ‘selective defence tactics’, rendering useless corroborative material in respect of aspects of the complainant’s account which were not denied by the accused and requiring corroboration of other aspects of the complaint for which there may have been no separate corroboration.

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830 Described by Lord Taylor C.J. as “arcane, technical and difficult to convey” in *R v Cheema* (1994) 98 Cr App R 195, at p. 205. Mewett, Alan W, *Witnesses* (1995) at 12-2 – 12-3: “So long as corroboration was regarded as a non-technical concept meaning merely some confirmatory evidence making the witness’s testimony more likely to be true, it could probably be said that the rule was, in general, a salutary one that did little harm and, in many cases, a great deal of good. But, as is so often the case with legal rules, it began to crystallise into a very formal and rigid requirement.” In the Law Reform Commission of Canada, Study Paper: *Evidence: Corroboration*, (Study Paper No. 11, 1975) it is asserted at p. 7 that an “enormous superstructure ... has been erected on the original basic proposition that the evidence of some witnesses should be approached with caution”.

831 Tapper, Colin *Cross and Tapper on Evidence* (9th ed., 1999) at p. 243 wherein the old form of corroboration warning and definition of corroboration was deplored as “ritual incantation”.

832 See: *R v Thomas* (1959) 43 Cr App R 210; and *R v Kendrick* [1997] 2 VR 699 (C.A.). In the Australian case, *R v Kalajzich* (1989) 39 A Crim R 415, it was noted at p. 455 that the incorrect identification by the trial judge of evidence as potentially corroborative was not necessarily fatal to the conviction, but it could be in an appropriate case. Similarly, in *R v Arnold* [1980] 2 NZLR 111, at p. 123 the New Zealand Court of Appeal (in a judgment delivered by Woodhouse J.), applying *R v Collings* [1976] 2 NZLR 104, at p. 121 and *R v Moana* [1979] 1 NZLR 181, at p. 185-186 held in relation to proceedings involving sexual offences, if a trial judge was required to search for “possible items of corroboration that cannot easily be pinned down” then the trial judge should be “quite sure, before any material that may seem to qualify is left with the jury, that it really will add something significant to the complainant’s own evidence” since a misdirection could necessitate a further trial.

833 Fennell, Caroline *The Law of Evidence in Ireland* (2nd ed., 2003) at p. 140; McGrath, Declan *Evidence* (2003) at p. 144; *People (Director of Public Prosecutions) v Patrick Collins* (Unreported, Court of Criminal Appeal, 22nd April, 2002); *People (Attorney General) v Coleman (No. 2)* (1945) 1 Frewen 64; and Ligertwood, Andrew *Australian Evidence* (3rd ed., 1998), at pp. 235-236.
Similarly, the *Baskerville* definition – as incorporated into the full corroboration warning\(^\text{834}\) – was criticised as “a frequent source of bewilderment to juries”, \(^\text{835}\) “an exercise without meaning and a fertile ground for appeals with little merit”, \(^\text{836}\) as betraying a distrust of capabilities of juries when presented with the evidence of a ‘suspect’ witness\(^\text{837}\) and even as an obstacle to the proper performance of the judicial function in the administration of justice.\(^\text{838}\)

3.4.3 As the corroboration requirements applied without exception or regard to the circumstances of the case or the reliability of the individual witness,\(^\text{839}\) it

\(^{834}\) In *Director of Public Prosecutions v Hester* [1973] AC 296, at p. 327, [1972] 3 All ER 1056, [1972] 3 WLR 910, Lord Diplock noted with disapproval that the usual practice was for the trial judge to treat the jury to “a general exposition of the law as to the corroboration of the evidence of children using for that purpose a succession of verbal formulae culled from decisions of appellate courts and hallowed by usage”. In this regard, he cautioned that: “[T]o incorporate in the summing-up a general disquisition on the law of corroboration in the sort of language used by lawyers, may make the summing-up immune to appeal on a point of law, but it is calculated to confuse a jury of laymen and, if it does not pass so far over their heads that when they reach the jury room be attached to evidence requiring corroboration, have the contrary effect to a sensible warning couched in ordinary language directed to the facts of the particular case.” Lord Diplock also noted that this already complex formula was further complicated where the possibility of mutual corroboration arose as between the evidence of children, sworn and unsworn.

\(^{835}\) *Director of Public Prosecutions v Hester* [1973] AC 296, at p. 327, [1972] 3 All ER 1056, [1972] 3 WLR 910, per Lord Diplock (H.L.) Such confusion could arise not only from the technical definition of corroboration (Baskerville) and the difficulties involved in its application to the evidence before them, but also due to the form of the corroboration warning itself and the seeming inherent contradiction between the prohibitive and permissive parts thereof: Keane, Adrian *The Modern Law of Evidence* (5th ed., 2000) at p. 203. See also the following passage from The Right Honourable Henry Joy, *On the Evidence of Accomplices* (1836, Dublin, Milliken & Son) at p. 14: “[T]he technical distribution between evidence which does, and evidence which does not, amount to corroboration is subtle and difficult for a Judge to apply, difficult for a jury to understand, and leads to a disturbing number of mistrials.”

\(^{836}\) Delisle, Ronald J. *Evidence: Principles and Problems* (4th ed., 1996) at p. 427. Tapper, Colin Cross and Tapper on *Evidence* (9th ed., 1999) at p. 235: “[M]uch of the momentum for reform was sustained by the technicality with which the old law of corroboration was engulfed, principally in the definition of what amounted to corroboration, and in the obligation upon the judge to direct the jury in detail as to what could and could not amount to corroboration. This was seen as a tricky and time-consuming exercise which made the task of the jury difficult, and occasionally led to unmeritorious acquittals. As cases involving multiple counts and many defendants tended to increase, reflecting the need for economy in the trial process, and the increasing complexity of offences, especially of commercial fraud, so the problem became more acute.”

\(^{837}\) Law Reform Commission of Canada, Study Paper: *Corroboration* (Study Paper No. 11, 1975) at p. 5: “[W]e should not premise a system of evidence on the assumption that all jurors are ignoramuses and without experience in evaluating evidence and making judgments.” See also: Dennis, I.H. *The Law of Evidence* (2nd ed., 2002) at p. 526.

\(^{838}\) Law Commission Report on *Corroboration of Evidence in Criminal Trials* (Law Com No 202, Cm 1620), para. 2.7, adopted by the Royal Commission on Criminal Justice (Cm 2263, 1993).

\(^{839}\) See: *Vetrovec v The Queen* [1982] 1 S.C.R. 811, at p. 823 (S.C.C.) where Dickson J. concluded that: “Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic
followed that even where a trial judge was satisfied of the reliability of an individual witness, once that witness belonged to a class of witness regarded by the law as ‘suspect’, the trial judge was obliged to either require corroboration of the evidence of that witness – such as where a child witness gave evidence unsworn – or to deliver to the jury the ‘full corroboration warning’ in respect of his / her evidence; it was submitted that such practice represented “a violation of the principles of common sense, the dictates of morality and the sanctity of a juror’s oath”.  

3.5.0 The ‘Common Sense’ Approach to Corroboration:

3.5.1 Judicial impatience with this fossilisation of the concept of corroboration and the rigidity of its application led to the development of an alternative and competing definition known as the ‘common sense’ approach.  

[incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the facts which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an ‘accomplice’ no warning is necessary.”

840 The Right Honourable Henry Joy in his treatise, On the Evidence of Accomplices (1836) at p. 4. He continued at pp. 4-5: “Suppose the jury to whom a judge had given such a recommendation were to turn upon him and say, ‘Your Lordship has told us that the witness is competent, and that we are the exclusive judges of the credit that is due to him; and the oath that we have taken binds us to find a true verdict according to the evidence; we have duly considered the circumstances under which the witness appears before us; we have examined his testimony not only with sober caution, but with the most scrutinising jealousy, and we have not a doubt of its truth; does your Lordship persist in recommending us to reject it, in opposition to our perfect conviction, our consciences, and our oath?’” Joy asserted that this question would not fail to produce considerable embarrassment to the judge and further observed that the rule was not supported by anything fixed or certain “such as ought to be the basis of a uniform and never-varying rule”. Joy recommended leaving the credit of the suspect witness [accomplice] to be dealt with by the jury, subject to such observations upon it from the judge as each particular case might suggest.

841 It was not only the legislature who were responsible for effecting reform of the rules of corroboration; the judiciary also sought to revise the corroboration requirements at common law in order to reflect modern thinking in relation to the capabilities of children as witnesses. The judicial review of the corroboration requirements involved a revised approach both to the meaning of the term ‘corroboration’ itself and to the mandatory requirement of the corroboration warnings in respect of the evidence of witnesses traditionally perceived by the common law as ‘suspect’.

842 Dennis does not regard the Baskerville and Vetrovec or ‘common sense’ definitions as alternative and competing, rather he views them as opposite ends of a spectrum (strong and weak) of meanings attributable to the term ‘corroboration’. Dennis, I.H. The Law of Evidence (2nd ed., 2002) at p. 526: “Corroboration simply means evidence which supports or confirms other evidence. The concept does, however, have strong and weak versions. The strong version of corroboration denotes supporting evidence which is independent of the witness to be corroborated and which itself tends to implicate the
approach eschewed the formalistic interpretation of ‘corroboration’ characteristic of the Baskerville definition in favour of an approach arguably connected more closely to the original rationale underlying the corroboration requirements and the approach advocated by Wigmore\textsuperscript{843} who asserted that:

"[W]hatever restores our trust in him personally restores it as a whole; if we find that he is desiring and intending to tell a true story, we shall believe one part of his story as well as another; whenever, then, by any means, that trust is restored, our object is accomplished, and it cannot matter whether the efficient circumstance related to the accused’s identity or to any other matter. The important thing is, not how our trust is restored, but whether it is restored at all”.

3.5.2 In lieu of the technical requirements of independence and implication, the jury were required to seek “something in the nature of confirmatory evidence” before relying upon the evidence of a witness whose reliability was in question; to ask themselves whether the supporting or confirmatory evidence strengthened the belief that the suspect witness was telling the truth.\textsuperscript{844} This approach continued to require a strong direction from the trial

\textsuperscript{843} 7 Wigmore Evidence (3\textsuperscript{rd} ed.) § 2033, at p. 259. However, this analysis was the subject of criticism in The Supreme Court Law Review (1994) 5 S.C.L.R. (2d) 460-461, at p. 461: “Theoretically, the analysis in Wigmore is no doubt correct, but it may be a difficult concept to apply to individual cases and to convey to a jury. While the central issue in the case may indeed be distilled to whether the unsavoury witness is desiring and intending to tell a true story, detecting that desire and intention can prove elusive. Further, it is rare that a witness’s whole story is true or false. Thus confirming one part of it does not as a matter of common sense necessarily restore our trust in the witness and the story as a whole.”

\textsuperscript{844} In R v McNamara (No. 1) (1981) 56 C.C.C. (2d) 193, at pp. 278-279 (Ont. C.A.) this test was stated as follows: “An elaboration of the Baskerville rule, where circumstantial evidence is relied upon as corroborative, is that evidence to be corroborative must be more consistent with the truth than with the falsity of the accomplice’s evidence on the vital issue or issues, and if in the view of the jury the facts, even though independently proved, are equally consistent with the truth as with the falsity of the accomplice’s evidence on the vital issue or issues, they are not corroborative. Another and, perhaps, preferable way of stating the Baskerville rule, where circumstantial evidence is relied on as corroborative, is that corroboration is independent evidence which makes it probable that the accomplice’s testimony with respect to the vital issue or issues is true.” See, in this jurisdiction: People (Director of Public Prosecutions) v Reid [1993] 2 IR 186, at p. 197 (C.C.A.) per Keane J: “The Court is satisfied that there was evidence which the jury was entitled to treat as (to use Hale’s formulation)
judge alerting the jury to the risks inherent in “adopting, without more, the evidence of the witness” together with illustrations from the evidence before the jury of the type of evidence capable of providing such confirmation, while abandoning those aspects of the Baskerville definition which had proven most difficult to satisfy.

3.5.3 Although the origins of this approach can be traced back to the decision of Baron Garrow in 1820 in the Trial of William Davidson and Richard Tidd for High Treason, this approach found favour more recently in the decisions of the Supreme Court of Canada in Warkentin v R and Murphy

'concurring circumstances which [gave] greater probability to the evidence of the prosecutrix'. The evidence of Dr. Randalls as to the condition of the complainant's genitals, of the complainant's parents and the gardai as to her distressed condition and of the gardai as to the setting of the volume of the television set at a very loud level and as to the statement of the applicant that he had been in all evening were all matters which were independent of the complainant's own evidence and which could, in the view of the jury, have tended to confirm her account.” See also: Director of Public Prosecutions v Gilligan (Unreported, Supreme Court, 23rd November, 2005), [2005] IESC 78, per Denham J., in relation to the evidence of a witness in the Witness Protection Programme.


Andrews, John A. and Hirst, Michael Andrews and Hirst on Criminal Evidence (4th ed., 2001) § 9.01, at p. 239: “Corroboration, or corroborative evidence, can be defined as evidence which tends to confirm the truth or accuracy of certain other evidence by supporting it in some material particular. To fulfil this function it must itself be both admissible and credible, and it must ordinarily come from a source independent of any testimony which is to be supported by it.” Mewett, Alan W., Witnesses (1995) at 12-19 – 12-20: “It would appear, as was and is ... the case with corroboration, that the jury cannot be told what evidence is confirmatory, since that would usurp their function, but may only be told what evidence is capable of being confirmatory, though if this would result in prosecution evidence being unfairly stressed to the detriment of the accused, it would appear preferable not to itemise in detail this potential confirmatory evidence. If there is no evidence that is even capable of being confirmatory then the jury must be told this. There is probably no harm in using the term 'corroborative evidence' to the jury, so long as the trial judge does not define it in the technical pre-Vetrovec sense, but only in the sense of confirmatory of the witness' testimony, but it is probably better to avoid the term.” (Emphasis in the original).

Trial of William Davidson and Richard Tidd for High Treason (1820) 33 How. St. Tr. 1338, at p. 1483, per Garrow B. (charging the jury): “It may not be unfit to observe to you here that the confirmation to be derived to an accomplice is not a repetition by others of the whole story of the accomplice and a confirmation of every part of it; that would be either impossible or unnecessary and absurd; ... and therefore you are to look to the circumstances to see whether there are such a number of important facts confirmed as to give you reason to be persuaded that the main body of the story is correct... You are, each of you, to ask yourselves this question: Now that I have heard the accomplice and have heard other circumstances which are said to confirm the story he had told, does he appear to me to be so confirmed by unimpeachable evidence, as to some of the persons affected by his story or with respect to some of the facts stated by him, as to afford me good ground to believe that he also speaks the truth with regard to other prisoners or other facts, with regard to which there may be no confirmation? Do I, upon the whole, feel convinced in my conscience that his evidence is true and such as I may safely act upon?”

Warkentin v R [1977] 2 S.C.R. 355 (S.C.C.). De Grandpre J., delivering the judgment for the majority in a case concerning the gang rape of an 18 year old Indian girl by four men, considered the judgments of the House of Lords in Hester and Kilbourne and concluded that the term ‘corroboration’
both of which concerned allegations of rape by more than one accused.

3.5.4 The Supreme Court of Canada placed the final nail in the Baskerville coffin in its judgment in Vetrovec v The Queen. The Court identified three principal difficulties with the Baskerville definition of corroboration. First, it tended to obscure and confuse the reason behind the corroboration warning since the courts were encouraged to focus on whether the ‘corroborative evidence’ conformed to the Baskerville formula, resulting in a divorce of ‘corroboration’ from the issue of credibility. Secondly, the increased complexity and technicality of the warning and definition were criticized as

was not a word of art but rather a matter of common sense and, accordingly, should not be given a narrow legalistic reading which would impose artificial restraints upon trial judges in their instructions to juries or to themselves. As stated by de Grandpré J., at p. 378: “To insist that nine separate issues be submitted to the jury, namely intercourse, absence of consent and identity, in relation to each of the three accused individually, is to forget the realities of life; rape being a crime of the shadows, the Crown would never be in a position to adduce evidence of such a quality as to satisfy the criteria when applied separately to nine different issues. On that basis, one can well imagine the difficulties in the way of the Crown if the rape had been committed by six, eight or ten persons.” The majority of the Supreme Court dismissed the appeal and de Grandpré J. further noted at p. 381 that “when the charge to the jury is perfect and is only attacked because the trial judge would have been wrong in listing the possible corroborative elements, a Court of Appeal should be very reluctant to intervene and declare the charge amounts to a misdirection” and submitted that this applied a fortiori to the Supreme Court which was “twice removed...from the scene”.

Murphy v R [1977] 2 S.C.R. 603 (S.C.C.) (appeal from [1975] 2 W.W.R. 723, 21 C.C.C. (2d) 351 (B.C.C.A.)) In response to the argument that evidence of the complainant’s distraught condition, if admissible, could not in any way corroborate her evidence alleging rape by Butt – who denied sexual contact, consensual or otherwise – the majority of the Court held that the jury were entitled to consider all of the evidence and the complainant’s distressed condition as corroboration not only of Murphy’s but also of Butt’s rape of the complainant; the fact that Murphy admitted intercourse with the complainant could not deprive the whole of the evidence of its corroborative effect as to each of the accused. Spence J. asserted at pp. 616-617 that: “It would be intolerable if evidence which was admissible and relevant as corroboration of the complainant’s evidence were made inadmissible or ineffective by some admission made by the accused.” The majority refused to adopt a restrictive approach to corroboration in line with the selective defence tactics employed in respect of one of the accused, holding that such tactics could not deprive the whole of the evidence of its corroborative effect.

Vetrovec v The Queen [1982] 1 S.C.R. 811 (S.C.C.), relying, in part upon the decision of Lord Diplock in Director of Public Prosecutions v Hester [1972] 3 All E.R. 1056, at pp. 1071, 1073 and 1075 (H.L.) and Lord Hailsham L.C. and Lord Reid in Director of Public Prosecutions v Kilbourne [1973] 1 All E.R. 440, at pp. 447 and 456 respectively (H.L.). See also: R v B(G) (No. I) [1990] 2 S.C.R. 3, at pp. 28-29 (S.C.C.). Mewett, Alan W., Witnesses (1995) at 12-8 to 12-9: “The case of Vetrovec v R is, however, the case which clearly did effect a fundamental change. While Warkentin and Murphy were concerned with a statutory requirement of a corroboration warning, Vetrovec involved the common law requirement of a warning to the jury about acting on the uncorroborated evidence of an accomplice...the court discarded any technical meaning that corroboration had acquired over the years, in favour of the more natural meaning of whether the additional evidence tended to confirm or support the evidence needing corroboration.”
providing a fertile ground for appeals. Finally, the Court observed that the definition itself appeared unsound in principle in requiring evidence which implicated the accused rather than simply strengthening the credibility of the accomplice; if the rationale for the corroboration requirement was the unreliability of the witness and the belief that he / she had good reason to lie, then it was logical to seek evidence “which tends to convince us that he is telling the truth” and while “[e]vidence which implicates the accused does indeed serve to accomplish that purpose...it cannot be said that this is the only sort of evidence which will accredit the accomplice”.851 The Court also highlighted the potentially prejudicial effect on the accused of the corroboration warning:

“The accused is in the unhappy position of hearing the judge draw particular attention to the evidence which tends to confirm the testimony the accomplice has given. Cogent prejudicial testimony is thus repeated and high-lighted.”852

3.5.5 In place of the strict and overly technical corroboration requirements criticized by the Supreme Court,853 Dickson J. outlined the “proper practice

851 Vetrovec v The Queen [1982] 1 S.C.R. 811, at p. 826, per Dickson J. (S.C.C). Dickson J. further asserted at p. 831 that the question which had to be borne in mind was whether the supporting evidence strengthened the belief that the suspect witness was telling the truth. Dickson J. concluded at pp. 831-832 that: “What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the evidence of the particular case of the type of evidence, documentary or testimonial, which might be drawn upon by the juror in confirmation of the witness’ testimony or some important part thereof. I do not wish to be taken as saying that such illustration must be carried to exhaustion. However, there is, in some circumstances, particularly in lengthy trials, the need for helpful direction on the question of sifting the evidence where guilt or innocence might, and probably will turn on the acceptance or rejection, belief or disbelief, of the evidence of one or more witnesses.”


853 Vetrovec v The Queen [1982] 1 S.C.R. 811, at p. 830 (S.C.C.) Dickson J. asserted that: “This Court has in the past declared its willingness to depart from its own prior decisions as well as decisions of the Privy Council and the House of Lords...The present case is an appropriate occasion to exercise this discretion. The law of corroboration is unduly and unnecessarily complex and technical.” Citing in support of this discretion of departure: Reference re Agricultural Products Marketing Act [1978] 2 S.C.R. 1198 (S.C.C.); AVG Management Science Ltd v Barwell Developments Ltd [1979] 2 S.C.R. 43 (S.C.C.). However, Schiff expressed some concern as to its propriety in light of the binding nature of the doctrine of stare decisis. He asserted that: “While the arguments in Vetrovec attacking common law
to be followed in the trial court where as a matter of common sense something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character." The Supreme Court subsequently extended the application of this new ‘common sense’ or Vetrovec interpretation of corroboration to the unsworn evidence of child witnesses in R v B(G).

It should also be noted that within the judgment of Lord Reading C.J. in R v Baskerville itself there is a second, simpler formulation of the meaning of corroboration; Lord Reading C.J. asserted that what was required was “some...
additional evidence rendering it probable that the story of the ['suspect' witness] is true and that it is reasonably safe to act upon it". This understanding of corroboration has been adopted in a number of recent cases in this jurisdiction. Unlike the traditional definition for which the Baskerville decision is celebrated, this 'probability' definition of corroboration benefits from a large degree of flexibility; although conversely it could be argued that it lacks any real certainty of boundaries or definitional limits. Moreover, it is a far less technical or complex definition, and, importantly, a definition which a jury would find easier to apply to the facts of any given case. However, the greatest attraction of this alternative and indeed, almost hidden, definition of corroboration — the ‘alternative Baskerville formula’ — is that, like the ‘common sense’ approach, it focuses the attention of the tribunal on the credibility and reliability of the evidence of the ‘suspect’ witness requiring corroboration and the effect or impact upon the rights of the accused of acting upon such evidence; the underlying rationale of all corroboration requirements. While the traditional corroboration requirements and Baskerville definition of corroboration were intended to safeguard the rights of the accused against the prejudicial evidence of unreliable witnesses — such as children — it is submitted that, as interpreted and applied, these requirements presented an obstacle not only to the admission of the evidence of children, but also to the court’s truth-seeking function and the proper administration of justice. It is submitted that the reformulation of the meaning of corroboration — both in the ‘common sense’ approach and the ‘alternative Baskerville formula’ — represented a welcome recalibration of the weighting attributed to the competing interests involved.

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858 See, in particular: People (Director of Public Prosecutions) v Reid [1993] 2 IR 186, at p. 197, per Keane J. (C.C.A.). See also: Director of Public Prosecutions v Gilligan (Unreported, Supreme Court, 23rd November, 2005), [2005] IESC 78, para. 8.5, at p. 45, per Denham J., in relation to the evidence of a witness in the Witness Protection Programme. While Denham J. cited the traditional definition of Lord Reading C.J. in R v Baskerville [1916] 2 K.B. 658 (C.A.) and that of O’Byrne J. in The People (Attorney General) v Levison [1932] I.R. 158, at p. 165, she equated the first of the three elements of corroboration identified above — that it tends to implicate the accused in the commission of the offence — with this alternative definition, namely, "[i]t renders it more probable that the accused committed the crime".
3.6.0 Legislative and Judicial Reform of Traditional Corroboration Requirements:

3.6.1 The judicial liberalisation of the definition of corroboration constituted only one aspect of the overall reform of the corroboration requirements, both judicial and legislative. The mandatory corroboration warning in respect of the sworn evidence of children was placed – by virtue of both legislative and judicial intervention – upon a discretionary footing while the requirement of corroboration as a pre-condition to conviction founded upon the unsworn evidence of children was abandoned by statutory provisions in each of the jurisdictions.

859 (1) Ireland: s. 28(2) of the Criminal Evidence Act 1992; (2) England: s. 34(2) of the Criminal Justice Act 1988 as amended by s. 101(2) and Schedule 13 of the Criminal Justice Act, 1991; (3) New Zealand: s. 23AB (complainants of sexual offences) and s. 23H (child complainants of sexual offences) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act, 1989; (4) Canada: s. 659 of the Criminal Code R.S.C., 1985, c. C-46, s. 659; R.S.C., 1985, c. 19 (3rd Supp.), s. 15; 1993, c. 45, s. 9. See also: Department of Justice, Equality and Law Reform, The Law on Sexual Offences: A Discussion Paper (Dublin; Stationery Office, 1998), para. 5.8.2

860 The People (Director of Public Prosecutions) v Ferris (Unreported, Court of Criminal Appeal, 10th June, 1992); The People v D (Court of Criminal Appeal, ex tempore, 27th July, 1993); The People (Director of Public Prosecutions) v JC (Unreported, Court of Criminal Appeal, 7th November, 1994); The People (Director of Public Prosecutions) v MJM (Unreported, Court of Criminal Appeal, 28th July, 1995); The People (Director of Public Prosecutions) v Molloy (Unreported, Court of Criminal Appeal, 28th July, 1995); The People v Murphy (Unreported, Court of Criminal Appeal, ex tempore, 3rd November, 1997); The People (Director of Public Prosecutions) v Morrissey (Court of Criminal Appeal, 10th July, 1998); The People (Director of Public Prosecutions) v Kiernan (Court of Criminal Appeal, ex tempore, 19th October, 1998); The People (Director of Public Prosecutions) v Donnelly (Court of Criminal Appeal, 22nd February, 1999); The People (Director of Public Prosecutions) v Nolan (Court of Criminal Appeal, 27th November, 2001); The People (Director of Public Prosecutions) v Wallace (Unreported, Court of Criminal Appeal, 30th April, 2001); The People (Director of Public Prosecutions) v C [2001] 3 IR 345 (C.C.A.); People (Director of Public Prosecutions) v JEM [2001] 4 IR 385, per Denham J. (C.C.A.); The People (Director of Public Prosecutions) v O'Conner (Unreported, Court of Criminal Appeal, 29th July, 2002); The People (Director of Public Prosecutions) v Acheampong (Unreported, Court of Criminal Appeal, 11th July 2002); The People (Director of Public Prosecutions) v Ferris (Unreported, Court of Criminal Appeal, 10th June, 2002); The People (Director of Public Prosecutions) v PC [2002] 2 IR 285; The People (Director of Public Prosecutions) v Gentleman [2003] 4 IR 22 (C.C.A.); McGrath, D “Two Steps Forward, One Step Back: The Corroboration Warning in Sexual Cases” (1999) 9 ICLJ 22. See also: R v Makanjuola [1995] 3 All ER 730; and R v R (John David) [1996] Crim LR 909 (CA).

861 (1) Ireland: s. 28(1) of the Criminal Evidence Act 1992 and s. 7 of the Criminal Law (Rape) (Amendment) Act 1990; (2) England: s. 34(2) of the Criminal Justice Act 1988 and s. 32(1) and (2) of the Criminal Justice (Public Order) Act 1994; and (3) Canada: s. 586 of the Criminal Code and s. 16 of the Canada Evidence Act R.S.C. 1970, c. E-10, s. 16 (rep. & sub. 1987, c. 24, s. 18) were repealed by ss. 15 and 18 of an Act to Amend the Criminal Code and Canada Evidence Act S.C. 1987, c. 24 from 1st January 1988.
In Ireland, s. 28(1) of the Criminal Evidence Act 1992\textsuperscript{862} abolished the rule applicable to all criminal proceedings whereby an accused could not be convicted on the basis of the unsworn evidence of a child of tender years in the absence of corroboration. Section 28(3) also abolished the restriction attaching to the mutual corroboration of the unsworn evidence of children; it provided that unsworn evidence received by virtue of s. 27 of the Criminal Evidence Act 1992 “may corroborate evidence (sworn or unsworn) given by any other person”.\textsuperscript{863}

Similar statutory measures have been adopted in England,\textsuperscript{864} Canada,\textsuperscript{865} and Australia.\textsuperscript{866} It follows that an accused in any of the jurisdictions examined...

\textsuperscript{862} Abolishing s. 30 of the Children Act 1908, as amended by s. 28(2) of the Criminal Justice Administration Act 1914. See also, to the same effect: s. 28(1) of the Children Act 1997 (No. 40 of 1997) in relation to applicable civil proceedings. Subsection (3) provided that s. 28(1) applied equally to a person with a mental disability who had attained the age of 14 years as to a child who had not attained that age.

\textsuperscript{863} Similarly, s. 28(4) of the Children Act 1997 provides, in relation to all civil proceedings, that unsworn evidence received by virtue of that section “may corroborate evidence (sworn or unsworn) given by any other person”.

\textsuperscript{864} In England, s. 38(1) of the Children and Young Persons Act 1933, was abrogated by s. 34 of the Criminal Justice Act 1988 – and, with it, the rule that a conviction could not be founded upon the uncorroborated evidence of a child of “tender years” received otherwise than upon oath – and was subsequently repealed in its entirety by s. 101(2) and Schedule 13 of the Criminal Justice Act 1991. Sections 53 to 56 of the Youth Justice and Criminal Evidence Act 1999, contain no corroboration requirements in respect of the evidence of those witnesses (including children) traditionally regarded as suspect.

\textsuperscript{865} Section 586 of the Criminal Code and s. 16 of the Canada Evidence Act R.S.C. 1970, c. E-10, s. 16 (rep. & sub. 1987, c. 24, s. 18) were repealed by s. 15 and s. 18 of an Act to Amend the Criminal Code and Canada Evidence Act respectively from 13 January 1988 with the result that the corroboration requirements in respect of the unsworn evidence of child witnesses were abolished. The amended s. 16 of the Canada Evidence Act made no mention of corroboration requirements; unlike the new statutory provision in relation to the evidence of complainants of sexual offences, it did not expressly forbid the court from treating corroboration as a pre-condition to conviction nor did it prohibit the giving of a corroboration warning in respect of the evidence of child witnesses given otherwise than upon oath. The new version of s. 16 is equally silent with regard to corroboration: s. 16.1 of the Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16; R.S.C. 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 27. See also: Law Reform Commission of Canada, Report on Evidence (1975); and Report of the Committee on Sexual Offences Against Children and Youths (Ottawa: Minister for Supply and Services Canada, 1984) (“Badgley Report”).

\textsuperscript{866} In Australia, all such statutory corroboration requirements – including those relating to the unsworn evidence of children – were abandoned by virtue of s. 164 of the Uniform Acts. Accordingly, of all the Australian jurisdictions, South Australia alone retains a corroboration requirement in respect of the evidence of unsworn child witnesses in s. 12(3) of the Evidence Act 1929, although it should be noted that this provision applies only to children with insufficient cognitive capacity to give rational responses to questions posed and to children who do not understand the promise to give truthful testimony. See: \textit{R v Simmons} (1997) 68 SASR 81. Ligertwood, A., \textit{Australian Evidence} (3rd ed., 1998) noted at p. 179 that “most parliaments have come to realize that to require corroboration in most cases is to go too far” and analysed the resulting reforms at p. 441 as follows: “[W]ary of the interests of accused in criminal cases, the initial approach of this legislation was to provide that the unsworn
herein may now be convicted on the uncorroborated and unsworn evidence of a young child, or, indeed, where the only corroboration provided is the unsworn evidence of another young child; the hierarchy of forms of evidence which had existed prior to the enactment of these statutory reforms has therefore been dismantled.  

This reform was prompted by, inter alia: (i) an impatience with the complexity and technicality of the corroboration requirements; (ii) an increased acceptance of the reliability of the evidence of children due, in particular, to the results of psychological studies concerning the capabilities of children and, in particular, the effect of sensitive and age-appropriate questioning upon the reliability of testimony; (iii) an understanding that the high standard of proof required in criminal trials combined with the tests of competence for child witnesses was sufficient to protect the accused from the effects of potentially unreliable evidence; and (iv) the desire to ensure that all relevant admissible evidence be heard in criminal proceedings to testimony of children could not be acted upon without corroboration. In the face of the criticism that to protect accused by imposing a corroboration requirement discriminates against the testimony of children and unreasonably frustrates the conviction of the guilty, only in South Australia do corroboration requirements still exist, and in very limited circumstances.”

The ‘hierarchy’ referred to is the hierarchy previously existing between the sworn and unsworn evidence of child witnesses, with sworn evidence occupying an elevated status: Cannon Ruth and Neligan, Niall Evidence (2002) conclude, at p. 71, that “there is no longer any advantage for a child in giving evidence on oath”. Similarly, in *R v McGovern* (1993) 88 Man R. (2d) 18, 82 C.C.C. (3d) 301, at 307 (Man. C.A.); leave to appeal to S.C.C. refused (1993) 92 Man R. (2d) 79n, 164 N.R. 239n, 84 C.C.C. (3d) vin, 25 C.R. (4th) 123n (S.C.C.) the Manitoba Court of Appeal held that the weight which should be given to a child’s evidence is not affected by the form of the witness’s commitment to tell the truth, which further erodes the already brittle distinction between sworn and unsworn evidence.

*R v B(G)* [1990] 2 S.C.R 3 (S.C.C.). Wilson J. opined at p. 15 that: “As mentioned, the provision requiring corroboration of proof based on the unsworn evidence of a child has also been repealed and the provisions allowing unsworn children to give evidence have become more liberal. These changes are evidence of the decline in importance of the need for corroboration due to the recognition that the trier of fact is competent to weigh the evidence and credibility of all witnesses. It also reflects a desire to overcome technical impediments in the prosecution of offences.” See also: Sopinka, J., Lederman S. and Bryant A. *The Law of Evidence in Canada* (2nd ed., 1999) § 17.60, at p. 1000.


Thus the strict statutory requirement of corroboration in relation to the unsworn evidence of children was criticised on the basis that: “If a child is competent to testify, is able to understand what it means to tell the truth, and is of sufficient intelligence to speak to the events, and the fact to which the child testifies is simple in terms of observation and understanding, why should the jury be forbidden to act upon such testimony in an appropriate case, subject to the protection of the very strict standard of criminal proof?”: Ligertwood, Andrew *Australian Evidence* (3rd ed., 1998) § 4.8, at p. 185.
allow the proper administration of justice.\textsuperscript{871} In the aftermath of these statutory reforms, the Canadian courts,\textsuperscript{872} in particular, charted the change in the attitude of the law towards the evidence of child witnesses from an over-cautious reluctance to accept their evidence save in limited circumstances – where the presence of safeguards such as corroborative evidence ensured the reliability of the evidence – to the relaxation of the tests of competence of children as witnesses and an abolition of statutory corroboration requirements; characterised as part of the “present evolution away from stereotyping various classes of witnesses as inherently unreliable”.\textsuperscript{873}

3.6.5 The Supreme Court of Canada highlighted two major changes in the law relating to the evidence of children. First, the “removal of the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution”;\textsuperscript{874}

\textsuperscript{871} See \textit{R v B(G)} [1990] 2 S.C.R. 3, at p. 26 (S.C.C.) wherein Wilson J. concluded that: “Since the only evidence implicating the accused in many sexual offences against children will be the evidence of the child, imposing too restrictive a standard on their testimony may permit serious offences to go unpunished and perhaps to continue”. Ligertwood, Andrew Australian Evidence (3rd ed., 1998) summarised his opposition to the technicalities inherent in the corroboration rules succinctly at § 4.9, at p. 187 as follows: “[they] have no rational foundation in natural rules of probability and only help criminals avoid conviction”. He asserted that the strict corroboration requirement in respect of the unsworn evidence of young children “forbids the court from attempting to maximise the information relevant to the credibility of certain categories of witnesses” and, moreover, that this prohibition was based “not upon scientific observation, but upon hunches and impressions”.


\textsuperscript{873} See \textit{R v W(R)} [1992] 2 S.C.R. 122, at p. 132, per McLachlin J. (S.C.C.) illustrated by reference to the abolition of s. 586 of the Criminal Code, a statutory scheme prohibiting the conviction of an accused on the unsworn testimony of a child in the absence of corroboration. The Supreme Court of Canada in \textit{R v Marquard} [1993] 4 S.C.R. 223 (S.C.C.) also examined the nature of the charge which the trial judge may give to the jury in relation to the child’s evidence. The Court reiterated the warning in \textit{R v W(R)} [1992] 2 S.C.R. 122, 137 N.R. 214; 54 O.A.C. 164; 74 C.C.C. (3d) 134; 13 C.R. (4th) 257, (S.C.C.), at p. 114 against applying negative stereotypes to the evidence of children and adopted the reasoning of the Court of Appeal of British Columbia in \textit{R v K(V)} [1991] C.R. (4th) 338, at p. 350 (B.C.C.A) where the Court held that the focus of the new discretion to give a warning to the jury is the potential for the witness’s evidence to be unreliable. In other words, no automatic assumptions of unreliability arise by reason of the age of the witness, or the nature of the complaint: there must be an evidentiary basis upon which it would be reasonable to infer that the witness’ evidence is, or may be, unreliable. Applying these principles, the Court in \textit{Marquard} concluded that a warning was required in that case to alert the jury to the risks involved in accepting the evidence of the child witness: the child was very young; her evidence was given unsworn but under a promise to tell the truth; she was unable to give much detail about the incident and defence counsel had great difficulty eliciting responses from the child during cross-examination; and she had told a different story at a different time.
that is, the statutory reforms “revoke[d] the assumption formerly applied to all evidence of children, often unjustly, that children’s evidence is always less reliable than the evidence of adults”.875 Secondly, the Court emphasized what it termed “new sensitivity to the peculiar perspectives of children”876 and the resulting “apprehension that it may be wrong to apply adult tests for credibility to the evidence of children”,877 this ‘common sense’ approach to the issue of credibility of child witnesses involved a recognition that flaws or inconsistencies in the evidence of children should not be given the same effect as a similar defect in the testimony of an adult and that, while the credibility of child witnesses – like all witnesses – should be carefully examined, the standard of ‘reasonable adult’ was an inappropriate measure of the credibility of a child witness.878 Thus, the Court advocated an individualized approach to the assessment of the

875 R v W(R) [1992] 2 S.C.R. 122, at pp. 132-133, per McLachlin J. (S.C.C.). McLachlin J. noted in this regard that the statutory reforms did “not prevent the judge or jury from treating a child’s evidence with caution where such caution is merited in the circumstances of the case” but that “if a court proceed[ed] to discount a child’s evidence automatically, without regard to the circumstances of the particular case, it will have fallen into an error.” See also: R v S(R.D.) [1997] 3 S.C.R. 484, at pp. 498-499, per Major J. (S.C.C.).

876 R v W(R) [1992] 2 S.C.R. 122, at p. 133, per McLachlin J. (S.C.C.). McLachlin J. also noted at p. 144 that: “Every person giving testimony in court, of whatever age, is an individual whose credibility in evidence must be assessed by reference to criteria appropriate to her or his mental development, understanding and ability to communicate” and that “with children as with adults, there can be no fixed and precise formula to be followed in warning a jury about potential problems with a witness’s evidence…”

877 See also: R v S(W) (1994) 29 C.R. (4th) 143, at p. 151 (Ont. C.A.). The Supreme Court referred with approval to the earlier decision of Wilson J. in R v B(G.) [1990] 2 S.C.R. 30, at pp. 54-55 (S.C.C.) and the “more benign” attitude of the courts towards the evidence of child witnesses: “In recent years we have adopted a much more benign attitude to children’s evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development.”

878 R v B(G) [1990] 2 S.C.R. 30, at pp. 54-55, (S.C.C.) wherein Wilson J. asserted that the courts, in determining credibility, should not seek to impose “the same exacting standard on [child witnesses] as it does on adults”. The Court emphasised that this did not mean that the courts should not carefully assess the credibility of the young witness or that the standard of proof should be lowered in relation to the evidence of children. Rather it was intended to convey the idea that a “flaw”, inconsistency or contradiction in the testimony of a child should not be accorded the same weight or significance as a similar flaw in the evidence given by an adult witness: “While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it...The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the ‘reasonable adult’ is not necessarily appropriate in assessing the credibility of young children.” In R v W(R) [1992] 2 S.C.R. 122, at p. 134 (S.C.C.) McLachlin J. expressly approved this approach to the difficulties presented by the evidence of child witnesses and rejected as impossible and, indeed, undesirable, any attempt to state strict rules as to when a witness’s evidence should be assessed by reference to the ‘adult’ or ‘child’ standards, since, it was claimed that to do so would be to “create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law’s approach to children’s evidence have been designed to dispel”.

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evidence and credibility of a witness, whatever his / her age, with reference to criteria appropriate to his / her “mental development, understanding, and ability to communicate”. The Court concluded by describing the new ‘balance’ achieved by the reforms of the corroboration requirements between the competing interests as follows:

“[T]hese changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a ‘common sense’ basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.”

3.6.6 The mandatory corroboration warning required in respect of the sworn evidence of child witnesses was also the subject of statutory reform. Section 28(2) of the Criminal Evidence Act 1992 – adopting a similar formula to
that earlier employed in relation to the evidence of complainants of sexual
offences—provides that any requirement, at a trial on indictment, that the
jury be given a warning by the judge about convicting the accused on the
uncorroborated evidence of a child is abolished in relation to cases where
such warning is required “by reason only that the evidence is the evidence of
a child”; it shall now be for the judge to decide, in his discretion and having
regard to “all the evidence given”, whether the jury should be given the
warning and if the judge decides to give “such a warning as aforesaid”, it
shall not be necessary to use any particular form of words to do so. Similar
statutory provisions have been enacted in England, Canada, and
Australia.

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882 Section 7 of the Criminal Law (Rape)(Amendment) Act 1990 (No. 32 of 1990) provides that: “(1)
Subject to any enactment relating to the corroboration of evidence in criminal proceedings, where at
the trial on indictment of a person charged with an offence of a sexual nature evidence is given by the
person in relation to whom the offence is alleged to have been committed and, by reason only of the
nature of the charge, there would, but for this section, be a requirement that the jury be given a
warning about the danger of convicting the person on the uncorroborated evidence of that other
person, it shall be for the judge to decide in his discretion, having regard to all the evidence given,
whether the jury should he given the warning; and accordingly, any rule of law or practice by virtue of
which there is such a requirement as aforesaid is hereby abolished. (2) If a judge decides, in his
discretion, to give such a warning as aforesaid, it shall not be necessary to use any particular form of
words to do so.” See: Hanly, “Corroborating Rape Charges” (11) (4) (2001) ICLJ 2; K Mack,
“Continuing Barriers to Women’s Credibility: A feminist perspective on the proof process” (1993) 4
Crim Law Forum 327; and McGrath, D “Two Steps Forward, One Step Back: The Corroboration
Warning in Sexual Cases” (1999) 9 ICLJ 22.

883 No distinction is drawn in the reforming statutory provision between the unsworn and sworn
evidence of child witnesses; since the mandatory corroboration requirement has been abandoned in
respect of the former, it is submitted that a trial judge is now empowered, in the exercise of his
discretion and applying a ‘totality of circumstances’ approach, to warn the jury about the dangers of
convicting the accused on the uncorroborated evidence – whether sworn or unsworn – of a child
witness. See also: Gillies, Peter Law of Evidence in Australia (2nd ed., 1991) at p. 598: “The abolition
of any requirement that a child’s unsworn evidence be corroborated, does not necessarily mean that a
warning does not have to be given in a specified case of child testimony…”

884 Pursuant to this statutory provision, while it is no longer mandatory for a trial judge to warn the jury
of the dangers of acting on the uncorroborated evidence of a child witness, the trial judge is not
prohibited from giving such a warning – as in the second model of reform – but retains the discretion
to so warn the jury if such a warning is required on the facts of the individual case.

885 See also: s. 34(3) of the Criminal Justice Act 1988, as amended by s. 32(2) of the Criminal Justice
and Public Order Act 1994 (abolishing the mandatory requirement to give a corroboration warning in
respect of the evidence of child witnesses); and s. 32(1) of the Criminal Justice and Public Order Act
1994 (analogous provision in relation to complainants of sexual offences and accomplices). Section
32(3) of the Criminal Justice and Public Order Act 1994 made similar provision abolishing the
mandatory corroboration warning in respect of the evidence of children in summary proceedings.

15; 1993, c. 45, s. 9.

887 This common law corroboration requirement has been abrogated by legislation in many of the
jurisdictions in Australia which now leaves to the discretion of the trial judge whether to give such a
164 of the Evidence Act 1995; Qld: s. 632(2) of the Criminal Code; SA: s. 12A of the Evidence Act
3.6.7 In direct contrast to the modern approach adopted by the other jurisdictions examined herein in relation to the direction to be given to the jury in respect of the evidence of children – and in contrast with its own statutory provisions abolishing the mandatory corroboration warning in respect of complainants of sexual offences\(^\text{888}\) – the legislature in New Zealand favoured the express prohibition of the mandatory corroboration warning traditionally required at common law in relation to the evidence of children. Section 23H of the Evidence Act 1908, as amended,\(^\text{889}\) abandons the traditional common law approach to the evidence of child witnesses outlined above by providing that: (i) the judge shall not give any warning to the jury relating to the absence of corroboration of the evidence of the child complainant\(^\text{890}\) if the judge would not have given such a warning had the

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1929; and s. 164(3) of the Uniform Acts. See also: \textit{R v Lubke} (1988) 15 NSWLR 318 (C.C.A.). Some of the legislative provisions go so far as to prohibit any suggestion by the trial judge that children are classified by the law as an unreliable class of witness and/or that it is unsafe to act on the uncorroborated evidence of a child, although the trial judge’s power to direct the jury and comment upon the evidence in the interests of justice is often expressly preserved. Vic: s. 23(2A) and (2B) of the Evidence Act 1959; NT: s. 9C of the Evidence Act 1939; WA: s. 106D of the Evidence Act 1906; and Tas: s. 122D(2) of the Evidence Act 1910. It is submitted that, even where this power is not expressly preserved, it remains open to the trial judge to so comment upon the evidence in an individual case where the interests of justice so demand.\(^\text{888}\) Section 23AB (complainants of sexual offences) and s. 23H (child complainants of sexual offences) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. Section 23AB of the Evidence Act 1908, as amended, provides in relation to the evidence of complainants of sexual offences that “no corroboration of the complainant’s evidence shall be necessary for that person to be convicted; and in any such case the Judge shall not be required to give any warning to the jury relating to the absence of corroboration”. Subsection (2) of s. 23AB goes on to state that “[i]f, in any such case, the Judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words shall be required”. See also: \textit{R v Daniels} [1986] 2 NZLR 106 (C.A.) wherein Cooke P. concluded at p. 112 that: “The old assumption that there is generally some special danger in convicting of a sexual crime on the evidence of the complainant alone no longer prevails, in the face of statutory change. The crucial requirement now is simply that in every case the Judge should make it clear to the jury that they must not convict unless the Crown proves its case beyond reasonable doubt. He should of course draw their attention to any particular dangers that may appear to arise in any particular case. Provided that he does this adequately, the exact form of words is unimportant. Technical errors when speaking of ‘corroboration’ may not necessarily be material, as long as they do not invite the jury to follow an unsafe line of reasoning or leave the impression that the crucial burden of proof beyond reasonable doubt has in some way been watered down”.\(^\text{889}\) Section 3 of the Evidence Amendment Act 1989 inserted ss. 23C to 23I (provisions in relation to the reception of the evidence of children) into the Evidence Act 1908.\(^\text{890}\) The applicability of s. 23H is limited by virtue of s. 23C of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989, to proceedings involving a sexual offence where either the complainant has not, at the commencement of the proceedings, attained the age of 17 years or the complainant is of or over 17 years and is mentally handicapped. However, the judiciary in New Zealand have expanded the applicability of ss. 23C to 23I to child abuse of a non-sexual nature
complainant been of full age; and (ii) the judge shall not instruct the jury on
the need to scrutinise the evidence of young children generally with special
care nor suggest to the jury that young children generally have tendencies to
invention or distortion. It is submitted that if this was the only provision
contained in the statutory reform of the corroboration requirements relating
to child witnesses, it would represent a clear imbalance between the
competing interests of fairness to the accused and the protection of child
witnesses, however, the general discretion of the trial judge to comment
upon the evidence – including its admissibility or even sufficiency – is
expressly preserved by virtue of the provisions of s. 23H(d) of the Evidence
Act 1908, as amended.891

3.6.8 Thus, the courts in each of the jurisdictions examined herein proceeded
from a position – at common law – wherein the permissible range of their
actions were heavily circumscribed by the restrictive effects of the
legislative provisions and judicial precedent governing corroboration
warnings in respect of ‘suspect’ witnesses – such as children – to a situation
where, in the absence of statutory guidance, they appeared to enjoy an
unfettered discretion as to: (i) whether to give the jury a cautionary
instruction in respect of such evidence; and (ii) the form and content of any
such direction. The question arose whether the extent of the reform was
simply to render discretionary that which had heretofore been mandatory,

891 Section 23H(d) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989
states that nothing in the foregoing provisions “shall limit the discretion of the Judge to comment on –
(i) specific matters raised in any evidence during the trial; or (ii) matters, whether of a general or
specific nature, included in the evidence of any expert witness to whom section 23G of this Act
applies”. Similarly, in Longman v The Queen (1989) 168 CLR 79 (H.C. Austr.) the High Court held
that, aside from any particular rule, or indeed the statutory abolition of any particular rule requiring
that a warning be given in respect of the evidence of a witness or a class of witnesses, the “general law
requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of
miscarriage of justice arising from the circumstances of the case” and, therefore, the evidence of a
witness may, on the facts of the individual case rather than as a result of his or her membership of one
of the traditional classes of suspect witnesses, require a warning to be given. Citing: Bromley v The
Queen (1986) 67 ALR 12 (H.C. Austr.); Carr v The Queen (1988) 165 CLR 314; and Duke v The
Queen (1989) 38 A Crim R 305 (H.C. Austr.).
namely the full corroboration warning, as defined in *Baskerville*.

However, this proposition has been firmly rejected by the courts in England — most notably in the leading case *R v Makanjuola and Easton* — Australia, Canada, and in this jurisdiction; it is asserted that to so

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892 See: *The People (Director of Public Prosecutions) v Donnelly* (Unreported, Court of Criminal Appeal, 22nd February, 1999) (blood stains on the complainant’s bed could not provide corroboration of her testimony against the appellant as it did not satisfy the *Baskerville* test of corroboration); *The People (Director of Public Prosecutions) v D* (Unreported, Court of Criminal Appeal, ex tempore, 27th July, 1993); *The People (Director of Public Prosecutions) v PC* [2002] 2 IR 285 (C.C.A.); and *The People (Director of Public Prosecutions) v Mollov* (Unreported, Court of Criminal Appeal, 28th July, 1995) wherein it was stated by Flood J. at p. 6 that “The Court is deeply concerned with the undoubted inconsistency in the attitude and approach of the jury. It is all the more concerned by the fact that the trial judge in his charge to the jury makes no reference whatsoever to corroboration and the need for corroboration in sexual offences and of the danger to act [sic] without corroboration. The Court is fully aware and alive to the fact that there is no statutory obligation on the trial judge to warn the jury of the dangers of acting on the complainant’s evidence alone in the absence of corroboration. Nonetheless, this Court is of the view that where the charge is essentially supported by the evidence of the complainant alone without collateral forensic evidence or any other form of corroboration, it is a prudent practice for the trial judge to warn the jury that unless they are very very satisfied with the testimony of the complainant that they should be careful not to convict in the absence of corrobvative evidence.”


893 In *Director of Public Prosecutions v Hester* [1973] AC 296, at p. 328, [1972] 3 All ER 1056, [1972] 3 WLR 910, (H.L.) Lord Diplock cautioned that the corroboration warning should be tailored to the particular circumstances of an individual case — rather than containing what he termed a “general disquisition on the law of corroboration couched in lawyer’s language” — in order that it could perform its proper function in a criminal trial by jury, and he emphasized that it would be “highly dangerous to suppose that there [was] any such thing as a model summing-up appropriate to all cases of this kind”. This approach was approved by Lord Hailsham in *Director of Public Prosecutions v Kilbourne* [1973] AC 729, at p. 740, [1973] 1 All ER 440, [1973] 2 WLR 254, (H.L.) who argued that there was “no magic formula to be used” and where he further asserted that the use of the word ‘corroboration’ itself was neither necessary nor particularly desirable in a corroboration warning, given that it was not commonly used in everyday speech and could confuse the jury; if the term were used, the trial judge was required to explain its meaning to the jury.

894 *R v Makanjuola and Easton* [1995] 1 WLR 1348, [1995] 3 All ER 730, [1995] 2 Cr App Rep 469, [1996] Crim LR 44 (C.A.) wherein it was held that there was no evidential basis apart from the suggestion by counsel for the accused in cross-examination to throw doubt upon the complainant’s accounts of indecent assault or to suggest that they had been fabricated. See also: *R v Walker* [1996] Crim LR 742 (C.A.); *R v R* [1996] Crim LR 815 (C.A.); *R v L* [1999] Crim LR 489, (C.A.) per Lord Bingham C.J. and Henry L.J. who asserted that the “old case-incrusted corroboration direction…glazed the eyes of juries over generations”;

895 There was also initial concern in Canada — now rejected as unfounded — that the repeal of the statutory corroboration requirements in respect of the evidence of children (and the other traditional
hold would be to rule that the respective legislatures had enacted the statutory reforms in vain since practice— including the technical and complex formula of the ‘full corroboration warning’— would continue unchanged.

3.6.9 The following propositions may be distilled from the caselaw. First, the reforming statutory provisions abrogate the requirement to give a corroboration warning in respect of a suspect witness— such as a child—

Professor Birch asserted that: “If full warnings survive, albeit only on a discretionary basis, the result will be the partial failure of section 32, which would then remove only the need to give the full warning in all cases, and would do nothing to meet the criticism concerning its complexity in cases where it is used. The reform can only work in the way intended if trial judges resist the temptation to give a full direction, and the Court of Appeal backs them up”. Birch, “Corroboration: Goodbye to all That?” [1995] Crim LR 524, at p. 526.

The People (Director of Public Prosecutions) v Kiernan (Court of Criminal Appeal, ex tempore, 19th October, 1998) (one ground of appeal was the ‘modified warning’ given by the trial judge in respect of the corroborative evidence of a witness to a charge of rape and sexual assault; having explained the meaning of corroboration, the trial judge explained that the only evidence capable of being corroborative was that of the witness, Mr. Cruise, she then recapitulated his testimony, pointing out inconsistencies therein and telling the jury it was a matter for them what they could make of it; the trial judge then warned the jury about the inconsistencies in the complainant’s evidence; held that the trial judge had adopted “an impeccable course, in applying, not only the words, but the spirit of the section”). The People v Murphy (Unreported, Court of Criminal Appeal, ex tempore, 3rd November, 1997) (trial judge defined corroboration in the traditional Baskerville sense but then described dirt on the complainant’s clothes and body as corroborating evidence which supported her account, notwithstanding the lack of independence; held that there had been no misdirection; O’Flaherty J. noted “[t]he modern law does not require a judge to say anything about corroboration if he is of such a mind”). The People (Director of Public Prosecutions) v JEM [2001] 4 IR 385 was expressly approved by Keane C.J. in The People (Director of Public Prosecutions) v Wallace (Unreported, Court of Criminal Appeal, 30th April, 2001) where he asserted that: “[T]he express legislative provision for the abolition of the mandatory warning...must not be circumvented by trial judges simply adopting a prudent or cautious approach of giving the warning in every case where there is no corroboration or where the evidence, might not amount, in the view of the trial judge, to corroboration” since, to do so “would be to circumvent the clear policy of the legislature and that, of course, the courts are not entitled to do”.

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simply because a witness falls into one of those categories. Secondly, it is a matter for the trial judge's discretion what, if any, warning he considers appropriate in respect of such a witness, as indeed in respect of any other witness in whatever type of case; whether he chooses to give a warning and the terms of such warning will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.

Thirdly, in some cases, it may be appropriate for the trial judge to warn the jury to exercise caution before acting upon the unsupported evidence of a

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900 The People (Director of Public Prosecutions) v C [2001] 3 IR 345 (C.C.A.) (appeal from conviction for rape on grounds, inter alia, that trial judge had erred in failing to exercise his discretion to give the jury a warning on the issue of corroboration; held by the Court of Criminal Appeal at p. 361 that it was "no longer a rule of law or practice that a jury must be warned of the dangers of convicting of [sic] the uncorroborated evidence of a complainant in a trial concerning a sexual offence by reason of the nature of the offence"; not a case where the only evidence against the appellant was that of the complainant of sexual offences, here there was a substantial body of evidence capable of amounting to corroboration including the appellant's own testimony; held that it had not been demonstrated to the court that there was any ground on which the trial judge could be said to have exercised his discretion in this case improperly). In relation to the definition of corroboration, Murphy J. asserted that: "Corroborative evidence does not mean that evidence of the complainant must be corroborated in every material respect. The fact that there is a conflict of evidence between witnesses or between what one witness has said on one occasion or on another occasion does not mean that the trial judge is required to direct the jury on the dangers of convicting on uncorroborated evidence. This is a matter for his discretion." In Canada, Delisle, Ronald J. Evidence: Principles and Problems (4th ed., 1996) asserted at p. 430: "The common sense displayed in Vetrovec mandates that we ought not to automatically characterise a witness's capacity for truth-telling depending on whether they belong to a particular class of people. No one should assume that all children are inherently suspect." In Tasmania, Victoria, Western Australia and the Northern Territory not only are all the warning requirements abolished, but also it is expressly provided that the judge must not suggest that children's evidence is unreliable as a class: (NT) s. 9C of the Evidence Act 1939; (Tas) s. 122D of the Evidence Act 1910; (Vic) s. 23(2A) of the Evidence Act 1959 (compare s. 23(2B)); (WA) s. 106D of the Evidence Act 1906.

901 In The People (Director of Public Prosecutions) v Ferris (Unreported, Court of Criminal Appeal, 10th June, 1992) the Court was satisfied that there was no reason to interfere with the trial judge's exercise of his discretion not to give a warning in relation to the evidence of a complainant of sexual offences. However, the Court was critical of the fact that counsel for the prosecution had told the jury that the trial judge had determined not to give a corroboration warning, although it conceded that it would not warrant setting aside a conviction. Fennelly J. asserted at p. 17 that: "Where the corroboration warning is not given, it is better to leave it at that. Once the judge is not going to give the warning to the jury, it is both unnecessary and likely to be confusing to tell them of that fact. Firstly, it unnecessarily introduces a technical rule of law which will not be explained to them. Secondly, if they do not understand it, they may infer that the judge has ruled that the complainant's evidence should be accepted and that some normal requirement of corroboration can, therefore, be dispensed with". See also: R v Daniels [1986] 2 NZLR 106 (C.A.) where Cooke P. noted at p. 112 that - post the enactment of s. 23AB of the Evidence Act 1908, as amended - it "will often be preferable not to use the term corroboration, which has acquired somewhat technical associations and is liable to expose the summing up to unmeritorious challenge in the event of a conviction". See also: B v R (1992) 110 A.L.R. 432 (H.C. Austr.). It is still considered important in Australia for the trial judge to draw the attention of the jury to 'unreliabilities' in the evidence before the court in order to protect the accused and in the interests of the proper administration of justice, pursuant to s. 165(1) – (4) of the uniform Acts. See also: R v Morgan [1978] 1 WLR 735; and Ligertwood, A., Australian Evidence (3rd ed., 1998) at pp. 441-442.
witness, where there is an "evidential basis" for suggesting that the evidence of the individual witness may be unreliable; if any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches. Where the judge does decide to give some warning in respect of a witness: (i) it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece 902 There is no guidance in the judgment as to what constitutes either: (i) an 'evidential basis' sufficient to trigger the court's discretion to urge caution; or (ii) 'supporting material'. This is not surprising given the emphasis in the judgment on flexibility and an 'individualised' approach to the question of confirmatory evidence; the decision whether to give a warning and the terms and strength of any warning given are matters for the judge's discretion and are dependent on his or her view of the circumstances of the case, the issues raised, and the content and quality of the witness's evidence. The modern approach is succinctly stated as follows by Wilson J. in the Canadian case, R v Potvin [1989] 1 S.C.R. 525, at 557, 21 Q.A.C. 258, 93 N.R. 42, 47 C.C.C. (3d) 289, 68 C.R. (3d) 193 (S.C.C.): "Vetrovec, in my view, represents a rejection of the formalistic and a priori categories concerning the trustworthiness of evidence both with regard to warnings and corroboration. In every case, it is for the trial judge on the basis of his or her appreciation of all the circumstances and, may I add, on the basis of the application of sound common sense, to decide whether a warning is required." Affirmed in R v B(G) (No. 1) [1990] 2 S.C.R. 3 (S.C.C.); R v Bevan [1993] 2 S.C.R. 599, 13 O.R. (3d) 452n, 104 D.L.R. (4th) 180, 154 N.R. 245, 82 C.C.C. (3d) 310, 21 C.R. (4th) 277 (S.C.C.); and R v K(V) (1991) 4 C.R. (4th) 338 (B.C.C.A.). Paciocco asserts that a warning may be needed "where, based on an objective assessment, the court should suspect the credibility of that witness" or "in any case where there are serious reasons to be concerned about the credibility or reliability of an important witness": Paciocco, David and Stuesser, Lee The Law of Evidence (3rd ed., 2002) at p. 427. See also: R v Daniels [1986] 2 NZLR 106, at p. 112, per Cooke P. (C.A.).
legal direction;\(^9\) it will be for the judge to decide the strength and terms of the warning;\(^9\) and (iii) it does not have to be invested with “the whole florid regime of the old corroboration rules” since to do so would be to “re-impose the straitjacket of the old corroboration rules”.\(^9\)

3.6.10 It is submitted that the new ‘discretionary warning’ appears more akin to a cautionary instruction – such as that utilised in respect of identification evidence\(^9\) – to alert the jury to the weaknesses inherent in the evidence, to outline why it is regarded as unreliable and to warn the jury against placing too much weight on the evidence in question. There is no strict requirement that corroborative evidence be found before the jury can rely on such evidence and the strength and terms of the direction are within the discretion

\(^9\) R v O’Reilly [1967] 2 All ER 766, [1967] 2 QB 722, at p. 727, per Salmon L.J (C.A.): “[T]he rule that the jury must be warned does not mean that there has to be some legalistic ritual to be automatically recited by the judge, that some particular form of words or incantation must be used and, if not used, the summing-up is faulty and the conviction must be quashed”. See also: R v Marquard [1993] 4 S.C.R. 223 (S.C.C.) per McLachlin J., relying upon the decision in Vetrovec v The Queen [1982] 1 S.C.R. 81, at p. 831, per Dickson J. (S.C.).

\(^9\) R v Makanjuola and Easton [1995] 1 WLR 1348, at pp. 1351-1352, [1995] 3 All ER 730, at pp. 732-733, per Lord Taylor C.J. (C.A.). Where a witness has been shown to be unreliable, the trial judge might consider it necessary to urge caution and, moreover, in a more extreme case, such as where a witness could be shown to have lied, made previous false complaints, or to bear the defendant some grudge, it may be appropriate to give a stronger warning whereby the trial judge would suggest that it would be wise to look for what the Court of Appeal termed “supporting material” before acting on the impugned witness’s evidence. The Court stressed that these observations were merely illustrative of some, not all, of the factors which trial judge could take into account in measuring “where a witness stands in the scale of reliability” and, accordingly, “what response they should make at that level in their directions to the jury”.\(^9\)

\(^9\) R v Makanjuola and Easton [1995] 1 WLR 1348, at pp. 1351-1352; [1995] 3 All ER 730, at pp. 732-733, per Lord Taylor C.J. (C.A.). Lord Taylor C.J. asserted that: “The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving ‘discretionary’ warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the contents and manner of the witness’s evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness’s evidence.”

\(^9\) See, in particular: The People (Attorney General) v Casey (No. 2) [1963] IR 33, at pp. 39-40, per Kingsmill Moore J. (S.C.); R v Turnbull [1977] QB 224, at p. 230, [1976] 3 All ER 549, at p. 553; People (Attorney General) v O’Driscoll (1972) 1 Frewen 351; People (Director of Public Prosecutions) v McDermott [1991] 1 IR 359, at p. 362; and The People (Director of Public Prosecutions) v Kavanagh (Unreported, Court of Criminal Appeal, ex tempore, 7th July, 1997), at p. 9, per O’Flaherty J.
of the trial judge having regard to the facts of the individual case;\textsuperscript{909} moreover, the ‘discretionary warning’ is delivered as part of the trial judge’s summing-up of the evidence in that particular case, as distinct from a generalised caution founded in misperceptions and stereotype.

3.6.11 ‘Corroboration’, as it was traditionally understood, is no longer required, although the court may – and should where the circumstances so dictate – instruct the jury to look for ‘supporting material’ to confirm the evidence of a particular witness whose reliability is in question.\textsuperscript{910} Similarly, neither the ‘full corroboration warning’ nor the categories of ‘suspect’ witnesses beloved of the common law exist in the aftermath of these statutory and judicial reforms.\textsuperscript{911} The law now favours a more flexible, discretionary and individualised approach, wherein the jury is made aware – in simple terms, not unduly burdened with technical concepts and complex reasoning – of the weaknesses in the particular child witness’s evidence and of the need for caution.\textsuperscript{912}

\textsuperscript{909} In \textit{The People (Director of Public Prosecutions) v Nolan} (Court of Criminal Appeal, 27th November, 2001) in refusing to give a corroboration warning, following an unsuccessful application of no case to answer on the evidence – due to the alleged weakness of the evidence given the inconsistencies therein – the trial judge asserted that: “I have thought about this a lot. [I] intend to give a very mild direction that the jury, conscious of these inconsistencies, should only convict after assessing the complainant’s evidence with great care. It think that is sufficient to meet any problems that arise here because I think that the medical evidence is capable of corroboration of the fact that there was no consent, but nonetheless, I think that justice demands that some sort of warning be given... Then, having drawn the jury’s attention to the inconsistencies, I’ll tell them that they must assess her evidence with great care.” Tapper, Colin Cross and Tapper on Evidence (10th ed., 2004) at p. 259: “The judge may now direct the jury in a balanced way, and is free to mention both the weaknesses and strengths in general of the evidence of children.” See also: \textit{R v L} [1999] Crim LR 489; \textit{Reference of A Question of Law (No 1 of 1999)} [1999] WASCA 53, 106 ACR 408; \textit{R v RAN} (2001) 152 CCC 3d 464.

\textsuperscript{910} In \textit{R v Daniels} [1986] 2 NZLR 106 (C.A.) Cooke P. observed at p. 112 in relation to the statutory abolition of the mandatory corroboration warning in respect of complainants of sexual offences that: “Obviously there will be cases where in the interests of justice it will be right to draw the attention of the jury to evidence supporting or confirming, tending against or contradicting, pointing to or against the truth of the complainant’s allegations. Indeed in any case where there is significant evidence on either side apart from the complainant it will probably be essential for the Judge to give a fair review or summary of it”. See also: Mathieson, Donald L., \textit{Cross on Evidence} (New Zealand ed., 2001) at p. 222.

\textsuperscript{911} It is submitted that the legislature and judiciary in each of the jurisdictions examined herein appear united in their focus upon the frailties in or dangers posed by the evidence of \textit{individual} witnesses – including child witnesses – rather than on the perceived reliability or unreliability of \textit{classes} of witnesses.

\textsuperscript{912} The Supreme Court Law Review of 1995 asserted that: “It is now well settled that no rule of general application compels the trial judge to warn the jury of the frailties of a child’s evidence or to require corroboration of that evidence. That obligation arises only when the circumstances of the case
3.7.1 Impact upon the Accused of the Reform of the Corroboration Requirements:

3.7.2 Notwithstanding all of this new-found statutory and judicial enthusiasm for the evidence of children, it should be noted that the rationale underlying the old corroboration rules has not disappeared along with them; “it would be foolhardy to assume that the danger once feared in every case now exists in none” or that the “accumulated judicial wisdom of more than a century...[evaporated] overnight”. Nor has the concept of corroboration or ‘supporting evidence’ or the logic underpinning it vanished in the wake of the statutory and judicial reforms outlined above.

provide a clear foundation for concern about the reliability of that evidence. To this principle the Court has added that trial judges must guard against stereotyping the evidence of children. It will be noted, however, that these principles only restate the basic axiom of probative value and prejudice. The child has been allowed to testify and thus the focus of concern is not on the admission of evidence but on the risk that prejudice to the accused might be severe if the probative value of the evidence is compromised by indications of unreliability.” (1995) 6 S.C.L.R. (2d) 436-437, citing in support of these principles: "Vetrovec v The Queen [1982] 1 S.C.R. 811 (S.C.C.); R v W(R) [1992] 2 S.C.R. 122 (S.C.C.); and R v B(G) (No. 1) [1990] 2 S.C.R. 3 (S.C.C.).

Keane, Adrian The Modern Law of Evidence (5th ed., 2000) at p. 210: “The rationale underlying the proviso to s. 38(1) and the common law rule was the danger that the evidence of a child especially if unsworn, but even if sworn, may be unreliable by reason of childish imagination, suggestibility, or fallibility of memory. These dangers remain....” Professor Birch argued that: “The evidence of individual witnesses who formerly fell into the categories requiring a corroboration warning to be given does not, overnight, become credible. Evidence which in 1994 would have been alleged to be motivated by self-interest or spite will be challenged on precisely the same grounds in 1995. It is not the purpose of [the new legislation] to require or permit the judge to remain mute in the face of all such disputes; on the contrary, judicial comment will be called for in many cases...” Birch “Corroboration: Goodbye to All That” [1995] Crim LR 524. See also: Mirfield, “Corroboration after the 1994 Act” [1995] Crim LR 448.

R v W(R.S.) (1992) 74 C.C.C. (3d) 1, at p. 8 (Man. C.A.) per Justice Twaddle: “Whilst the previously held views as to the unreliability of complainants in cases of sexual assault have now been discarded, it would be foolhardy to assume that the danger once feared in every case now exists in none. The rationale for the old rules of practice requiring corroboration was not grounded in stereotypical thinking alone.” Equally, Peter Gillies regarded the rules as a desirable safeguard for the rights of the accused against unreliable evidence: “[T]he corroboration principles have grown up precisely because experience has shown that certain types of testimony do, on occasions, tend to be unreliable. While there may be thought to be little point in requiring corroboration as a universal condition of making a finding based upon suspect testimony, given the imposition of a burden of proof upon the person alleging criminal or civil liability, there is much to be said for requiring the trial judge to warn a jury in respect of certain classes of testimony, or at least, vesting in the judge a discretion to do this specifically by reference to classes of suspect testimony. This should adequately alert the jury to the potential for falsehood associated with a given type of testimony.”


Andrews, John A. and Hirst, Michael Andrews and Hirst on Criminal Evidence (4th ed., 2001) § 9.01, at p. 239: “[T]he concept of corroboration cannot suddenly be ignored. Even apart from those few cases in which strict corroboration rules still hold sway, cases will arise in which judges may be

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The rejection of rigid stereotypes and complex, technical categorisation of classes of witness — including children — as ‘suspect’, the classification of evidence as capable or incapable of amounting to corroboration, and the abandonment of the application of universal mandatory rules without exception or regard to the circumstances of individual cases, is clearly welcome. However, it is submitted that to substitute an imbalance in evidentiary rules in favour of the accused for an imbalance in favour of protection of the interests of vulnerable witnesses — such as young children — is to throw out the commonsense baby with the corroboration bathwater.917

In the context of any discussion of the impact upon the rights of an accused person of the abandonment of the strict corroboration requirements in respect of the evidence of children, it should be noted that while the traditional common law approach to the evidence of children — including restrictive competence tests and corroboration requirements — was undoubtedly founded upon a view of the capacities of children as witnesses which has since been revealed as unduly negative, it does not follow that the law must now treat child witnesses in exactly the same manner as adult witnesses in all respects since this would be to misinterpret, and, indeed, to overstate the results of modern psychological research and, furthermore, would fail to either recognize or accommodate children’s difference; children are not ‘miniature adults’ possessing equally developed cognitive and linguistic skills or moral reasoning.918 To adopt an entirely unguarded approach to the evidence of children is therefore to over-compensate for the exclusionary rules of the past; it is important to ensure that the stereotypical thinking underlying assumptions about the credibility of child witnesses

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917 Keane, Adrian The Modern Law of Evidence (5th ed., 2000) at p. 207: “It is to be hoped that commonsense guidance and helpful directions of this kind will not be regarded as ‘attempts to re-impose the straitjacket of the old corroboration rules’. It would be a pity if the commonsense baby were to be thrown out with the corroboration bath water.”

918 See: sections 1.0.16-1.0.21 and 2.17.13-2.17.16 above.
"are not replaced by an equally pernicious set of assumptions about the believability of complainants which would have the effect of shifting the burden of proof to those accused of such crimes".919

3.7.5 The statutory abolition of the mandatory corroboration requirements in relation to the evidence of children was the subject of a constitutional challenge in both New Zealand and Canada; the decision of the court in each of the jurisdictions and its rejection of the arguments advanced on behalf of the accused is instructive.

3.7.6 In *R v Accused (CA 160/92)*920 the New Zealand Court of Appeal considered the question of the fairness to the accused of some of the legislative reforms enacted to facilitate the reception of the evidence of child complainants of sexual offences.921 In the course of the appeal, it was submitted by counsel for the accused that the balance had swung too far against the defence in...
sexual abuse trials, having regard, in particular to: (i) the absence of a
general time limitation with regard to prosecutions for serious crime; and
(ii) "the changes introduced by Parliament to reduce the ordeal of
complainants and to remove what have been perceived as outdated
obstacles to successful prosecutions of guilty persons" including the
statutory abolition of the corroboration warning in respect of the evidence of
sexual complainants, the introduction of special rules in relation to the
evidence of child complainants in sexual cases and the prohibition on the
imposition of the jury direction to scrutinize the evidence of young children
generally with special care. The Court acknowledged that all of this
legislative activity, combined with the approach of the courts had
"significantly shifted the balance in sexual trials, especially perhaps those
relating to child abuse" and observed that the "task of counsel for the
defence has certainly become harder".

3.7.7 However, the Court asserted that, notwithstanding the foregoing, what it
termed the "basic ingredients of a fair trial" remained. These basic
ingredients include: the limits upon custodial interrogation; the accused’s
entitlement to know the substance of the charges against him / her; his / her
statutory and common law rights regarding the disclosure of certain
information; the right to detailed notice before trial of the prosecution
evidence; the right to cross-examine prosecution witnesses, subject to
reasonable restraints; the right to give evidence in his / her own defence; the
fact that the accused enjoys 'the benefit of the doubt', "invariably
underlined by trial judges in emphatic directions that the prosecution must
establish its case beyond reasonable doubt"; and the right of appeal, in the
event of conviction, on grounds including miscarriage of justice. Moreover,
the Court noted that the above-mentioned developments in the law had been

922 Section 23AB of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.
923 Sections 23C to 23I of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.
924 Section 23H of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.
925 R v Accused (CA 160/92) [1993] 1 NZLR 385, at p. 392, per Cooke P. (C.A.). Furthermore, the
Court drew attention to other developments which, it submitted, had "also moved the balance towards
the prosecution", such as: statutory provisions for electronic surveillance; DNA testing; and "a more
liberal attitude to 'similar fact' evidence and hearsay evidence".
3.7.8 In *R v Bickford* the Ontario Court of Appeal considered whether the repeal of the statutory corroboration requirements in respect of the unsworn evidence of child witnesses operated retrospectively to the trial of the accused on charges of offences of sexual assault against a four year old child, contrary to s. 246.1 of the Criminal Code, allegedly committed prior to the statutory amendment. The Court was further required to consider whether such retrospective effect would be contrary to any vested right of the accused and, in particular to his right to a fair trial and fundamental justice, guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms.

3.7.9 The statutory provisions requiring corroboration of the unsworn evidence of a child complainant were in force at the time of the commencement of the prosecution of the accused – by the swearing of an information – but had been repealed by the time of the accused’s trial. There was no corroboration of the child’s unsworn account and the trial judge acquitted the accused, holding that the statutory amendment could not have retrospective effect in relation to offences committed before it had come into force on the basis that: (i) the statutory amendment changed the law in a “substantial and fundamental way” and thus should not be applied
retrospectively; and (ii) the retrospective application of the abolition of the corroboration requirements deprived the accused of an absolute defence and, accordingly, was so fundamentally unfair and contrary to justice that it constituted a breach of the accused’s rights pursuant to s. 7 of the Charter.

3.7.10 The Court of Appeal allowed the appeal and directed a new trial. After an examination of the leading Canadian authorities in relation to the presumption against retrospective effect,\(^\text{931}\) the Court held that it had been established that: (i) as a matter of fundamental principle, a statute could not be construed as having retrospective effect unless such a construction was made evident by its terms or arose by necessary implication; (ii) the presumption did not apply to enactments which related only to procedural or evidentiary matters, that is, adjectival law; and (iii) statutes which, while procedural in character, affected vested rights adversely, had to be construed as prospective.\(^\text{932}\) Since the statutory provisions requiring corroboration of the unsworn evidence of a child were procedural or evidentiary in nature and did not constitute a change in the substantive law, the Court held that the amendment containing the abolition of these corroboration requirements could operate retrospectively.

3.7.11 It was further submitted on behalf of the accused that the amendment adversely affected a vested right in that it denied him the defence of ‘lack of corroboration’ – a complete defence to the charges – and, accordingly, should not be construed retrospectively. The Court asserted that an accused person had no right to have the charge against him / her proved by corroborating evidence or to require corroboration as a pre-condition to


conviction; the accused’s right was to be tried according to the law, evidentiary rules and procedural requirements in effect at the time of his trial. The Court found that “no person can be said to have a vested right in procedure or a right in the manner of proof that may be used against him”; corroboration was stated to be a procedural or evidentiary matter going only to the proof of the offence and in relation to which an accused person could have no vested or accrued right, such as would prevent the statutory amendments taking retrospective effect. Relying upon the decision in \textit{R v Firkins}, Robins J.A. stated that:

“I am of the opinion that even if s. 586 can be said to have conferred a ‘right’ on the respondent, it cannot appropriately be described as a ‘vested’ or ‘accrued’ right. The ‘right’ the respondent had was to be tried according to the rules and practices in force at the time of his trial. The rules or practices with respect to corroboration are evidentiary or procedural requirements that may change from time to time. When the respondent’s trial commenced in April, 1988, s. 586 had been repealed and was of no force or effect. There was therefore


The Court noted that in \textit{Wildman v The Queen} (1984), 14 C.C.C. (3d) 321, 12 D.L.R. (4th) 641, [1984] 2 S.C.R. 311, 55 N.R. 27 (S.C.C.) the Supreme Court of Canada held that the statutory amendment giving effect to the partial abolition of the common law rule that a wife was not competent to give evidence for the prosecution against her husband had retrospective effect, since the accused had no vested right in the non-compellability of his wife. See also the decision of the European Commission on Human Rights in \textit{X v United Kingdom} (1976) 3 D.R. 95 (E.Cm.H.R.) wherein the Commission held that it was not a breach of Article 7 of the Convention – which prohibits the retroactive application of criminal offences to penalise conduct which was not criminal at the time – for the English Court of Appeal to have upheld a conviction by reference to a precedent in the law of evidence decided after the applicant’s conviction since the protections contained in Article 7 do not apply to the law of evidence.

\textit{R v Firkins} (1977) 37 C.C.C. (2d) 227, at pp. 231-232, 80 D.L.R. (3d) 63, 39 C.R.N.S. 178 (B.C.C.A.) per Farris C.J.B.C.: “I have misgivings as to whether it is appropriate to characterize the requirement in the old s. 142 that the Judge should charge in respect of the need for corroboration as a ‘right’ of the accused. Be that as it may, it is not appropriate to describe it as a ‘vested right’ or ‘right accrued’. An accused person has the ‘right’ to be tried according to law. The law prescribes certain rules and practices in respect of the admission of evidence and the Judge’s charge to the jury. These are procedural requirements that are changed from time to time. No one has a ‘vested right’ that hearsay evidence cannot be used against them, to give but one example. The right of the accused to be tried according to law means according to the rules and practices in force at the time of his trial.”
no longer any right, if one had ever existed, available to be acquired."936

3.7.12 Furthermore, the Court found that the change in the corroboration rules did not constitute an infringement of the accused’s rights to fundamental justice and a fair trial, pursuant to s. 7 of the Canadian Charter of Rights and Freedoms since the elements of the offence with which the accused was charged remained the same, that is, “the substance of the law he is alleged to have violated remains unchanged”.937 The Court pointed out that the accused’s right to make full answer and defence remained unimpaired and the prosecution continued to bear the strict burden of proving its case beyond a reasonable doubt. While the Court conceded that, as a result of the statutory amendment of s. 586 of the Criminal Code and s. 16(2) of the Canada Evidence Act, the child’s testimony was no longer presumed unreliable and was placed in the same position as that of any other witness, it was pointed out that “the cogency of her testimony is a matter of weight to be determined by the trier of fact”.938 Accordingly, it asserted that a change in the law of corroboration “whether effected by statute or by judicial decision...is applicable to trials taking place after the date of the change, notwithstanding that the events giving rise to the charge occurred before the change”.939

937 R v Bickford (1989) 51 C.C.C. (3d) 181, at p. 185, per Robins J.A. (Ont. C.A.). See also: R v Firkins (1977), 37 C.C.C. (2d) 227, at pp. 231-232, per Farris C.J.B.C., 80 D.L.R. (3d) 63, 39 C.R.N.S. 178 (B.C.C.A.); and R v Inkster (1988) 69 Sask. R. 1, per Hrabinsky J. (Sask. Q.B.). The latter case also involved a challenge to the retrospective effect of s. 586 of the Criminal Code. It was therein held at p. 4 that: “[Section 586] defines the procedure and the proof by which the substantive law is applied in practice. I find that the repeal of s. 586 applies retrospectively. The repeal of s. 586 does not change the essential elements of the offences charged. It merely relates to matters with respect to the proof of the offence.”
939 R v Bickford (1989) 51 C.C.C. (3d) 181, at pp. 185-186, per Robins J.A. (Ont. C.A.). Robins J.A. concluded at p. 190: “In sum, it is my view also that neither s. 586 of the Criminal Code nor s. 16(2) of the Canada Evidence Act granted the respondent any substantive right to require that a witness’s evidence be corroborated. The repeal of these sections was applicable to his trial notwithstanding that he had been charged and arraigned prior to the date upon which the amendments were proclaimed in force.... In my opinion, the change does not operate so as to deprive the respondent of a fair trial, nor does it deprive him of any of the rights guaranteed by s. 7 or indeed by any other provision of the Charter. For the reasons already stated, he had no vested right in the evidentiary or procedural rule that required a child witness’s testimony to be corroborated, nor can he be said to have acquired such a right because the prosecution against him began before the rule was abolished. By the same token,
3.7.13 The constitutionality of the abolition of the mandatory corroboration requirement in respect of the evidence of unsworn children was also considered in this jurisdiction – albeit briefly – in *White v Ireland*. Although judicial determination of the constitutionality of s. 27 of the Criminal Evidence Act 1992 was specifically reserved by the Court “to such time as it is in fact in issue and the case has been fully argued,” Kinlen J. nonetheless observed that it was “a matter for the legislature”. While the Court acknowledged that an accused person has a constitutional right pursuant to Article 38.1 of the Constitution to be tried only in “due course of law”, Kinlen J. asserted that he / she “never had a constitutional right, per se, not to be convicted without corroboration”; although “[f]rom 1908 to 1992 it was a statutory right”, the legislature had changed the statute, so that whereas in 1908, corroboration was required, “[n]ow it appears you do not need it”. Kinlen J. concluded by noting that the trial judge may warn of the dangers of uncorroborated evidence in his charge to the jury, since “a judge will naturally be very conscious of affording to every accused person a fair trial”.

3.7.14 While the foregoing *dicta* are, strictly speaking *obiter*, it is submitted that this decision provides authority for the proposition that where the jury are properly directed as to the dangers in accepting an individual witness’s uncorroborated evidence, the accused’s right to a fair trial and fair procedures is adequately protected. It is submitted that neither Article 38.1 nor Article 38.5 required corroboration of the unsworn evidence of child witnesses or that mandatory corroboration warnings be delivered in respect

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he has no vested right to rely on a lack of corroboration defence that may have been open to him before the law was changed”.

940 *White v Ireland* [1995] 2 IR 268 (H.C.).

941 *White v Ireland* [1995] 2 IR 268, at p. 283, *per* Kinlen J. (H.C.). The child in question in this case would attain the age of fourteen years that same month, accordingly, the issue of the constitutionality of s. 27 of the Criminal Evidence Act 1992 – and the abandonment of the abolition requirement in respect of the unsworn evidence of child witnesses – was characterised by Kinlen J. as “academic” in this case.


of the evidence of all child witnesses giving evidence upon oath; while such universal and mandatory practices or rules of law may have provided strong protection for the rights of the accused, they were not necessitated by due process or “due course of law” and, equally, their statutory and judicial abandonment does not amount to an infringement of the accused’s right to a fair trial and fair procedures in circumstances where the trial judge is still empowered to deliver a cautionary instruction to the jury warning against convicting the accused on the uncorroborated and potentially unreliable evidence of a particular witness, that is, where there is an evidential basis for such warning.\footnote{In Heaney v Ireland [1994] 3 IR 593, at pp. 605-606, [1994] 2 IRM 420, at p. 430 (H.C.) Costello J. stated in relation to the requirements of Article 38.1 of the Constitution that: “It is an Article couched in peremptory language and has been construed as a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice. Those basic principles may be of ancient origin and part of the long established principles of the common law, or they may be of more recent origin and widely accepted in other jurisdictions and recognised in international conventions as a basic requirement of a fair trial. Thus, the principle that an accused is entitled to the presumption of innocence, that an accused cannot be tried for an offence unknown to the law, or charged a second time with the same offence, the principle that an accused must know the case he has to meet and that evidence illegally obtained will generally speaking be inadmissible at his trial, are all principles which are so basic to the concept of a fair trial that they obtain constitutional protection from this Article. Furthermore, the Irish courts have developed a concept that there are basic rules of procedure which must be followed in order to ensure that an accused is accorded a fair trial and these basic rules must be followed if constitutional invalidity is to be avoided”.

In relation to the evidence of accomplices, this principle was stated as follows by Maguire C.J. in Attorney General v Mazure [1946] IR 448, at pp. 448-449 (S.C.): “A line of authorities in England and in this country have made it comparatively simple for this Court to consider whether the direction given by a Judge to a jury in a case depending upon unconfirmed accomplice evidence are correct and adequate. The basic principle is that such testimony is admissible and, being admissible, may be acted on. The law, however, as a safeguard against injustice being done to accused persons, requires that the trial Judge should warn the jury of the danger of acting on such evidence and may, if he so thinks proper, advise them not to act upon it. He should not, however, withdraw such evidence from the jury”.}

3.7.15 It is worth remembering that the traditional corroboration requirements in respect of the evidence of children were introduced in order to counterbalance the perceived unreliability of children as witnesses;\footnote{In Heanev v Ireland [1994] 3 IR 593, at pp. 605-606, [1994] 2 IRM 420, at p. 430 (H.C.) Costello J. stated in relation to the requirements of Article 38.1 of the Constitution that: “It is an Article couched in peremptory language and has been construed as a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice. Those basic principles may be of ancient origin and part of the long established principles of the common law, or they may be of more recent origin and widely accepted in other jurisdictions and recognised in international conventions as a basic requirement of a fair trial. Thus, the principle that an accused is entitled to the presumption of innocence, that an accused cannot be tried for an offence unknown to the law, or charged a second time with the same offence, the principle that an accused must know the case he has to meet and that evidence illegally obtained will generally speaking be inadmissible at his trial, are all principles which are so basic to the concept of a fair trial that they obtain constitutional protection from this Article. Furthermore, the Irish courts have developed a concept that there are basic rules of procedure which must be followed in order to ensure that an accused is accorded a fair trial and these basic rules must be followed if constitutional invalidity is to be avoided”.

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tests of competence of child witnesses, it was suggested that an accused person enjoys a right – as an aspect of his / her constitutional right to a fair trial and fair procedures – to have the reliability of suspect and potentially prejudicial evidence tested prior to its admission into evidence against him / her.

3.7.16 By analogy, it is submitted that an accused person enjoys a right to require the jury to receive a judicial direction as to the need for caution when dealing with the evidence of individual child witnesses, where there is an evidential basis for doubting the reliability of that child witness and not merely because the witness is a child. This asserted right is in line with the courts' jurisprudence regarding an 'unfair trial' – or a 'real risk' of an unfair trial – within the meaning of Article 38.1 of the Constitution; "it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge". It has been held that, having regard to the fundamental role of juries in our criminal justice system, it is necessary, in order for an accused to have a fair trial, not only that the trial be conducted in accordance with fair procedures, but the jury reach its verdict only by reference to the evidence lawfully before it; it is the function and role of a trial judge in the conduct of criminal proceedings to ensure that this occurs.

3.7.17 The trial judge is also entitled, in the exercise of his / her discretion, to withdraw evidence from the jury in extreme circumstances where such evidence is so tenuous as not to qualify for consideration by the jury; that

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946 Z v Director of Public Prosecutions [1994] 2 IR 476, at p. 507, per Finlay C.J., who continued: "The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial." See also: The Irish Times Limited v Ireland [1998] 1 IR 375, at pp. 399-400, [1998] 2 ILRM 161, at p. 185 (S.C.), per Denham J.: “The test to be applied is whether there is a real risk that the accused would not receive a fair trial if the trial was held in public. Further, the test requires a second step. If it were determined on evidence that there was a real risk of a trial being unfair if it were held in public then the trial judge should consider whether the real risk can be avoided by appropriate rulings and directions. This two-part process was not applied or applied appropriately.”


948 People (Director of Public Prosecutions) v Egan [1990] ILRM 780, at p. 790, per O’Flaherty J. (S.C.): “It should be said, however, that a trial judge is entitled to and should withdraw the case from
is, where it is "so tenuous that it would clearly be perverse for a jury properly directed as to the onus of proof upon the prosecution to act upon it".\textsuperscript{949} However, as indicated above, before discharging the jury, the trial judge must be satisfied that the risk of an unfair trial cannot be avoided by appropriate rulings and directions and, in this regard, the courts have demonstrated great confidence in the ability of jurors to remain faithful to their oath and to deliberate without reference to any evidence or material which has, since the start of the trial, been ruled inadmissible; "[s]ave in exceptional circumstances, a trial judge should have confidence in the ability of the jury to understand and comply with such directions, to disregard any inadmissible evidence and to give a true verdict in accordance with the evidence".\textsuperscript{950} Furthermore, it is submitted that the
deepen the jury where the evidence implicating the accused is shown to be so tenuous as not to merit consideration by the jury.... [I]f 'tenuous' evidence were left to the jury and the jury acted upon it I have no doubt that the Court of Criminal Appeal would be entitled to intervene. A verdict founded on such unsatisfactory evidence would mean that the trial itself was unsatisfactory and that the verdict
founded upon it was unsafe and unsatisfactory". See also: \textit{People (Director of Public Prosecutions) v Gillane} (Unreported, Court of Criminal Appeal, 14\textsuperscript{th} December 1998) (held that the evidence of two 'down and outs' did not fail this standard and had properly been placed before the jury); and \textit{Ligertwood, Andrew Australian Evidence} (3\textsuperscript{rd} ed., 1998) § 4.3, at p. 179. \textit{People (Director of Public Prosecutions) v Morrissey} (Unreported, Court of Criminal Appeal, 10\textsuperscript{th} July, 1998) (accused convicted of offences involving sexual abuse of his daughter, the complainant; complainant's evidence supported by the testimony of her mother but serious inconsistencies as between their evidence; held trial judge had misdirected the jury that the evidence of the mother could be treated as corroboration of the evidence of the complainant; held that "[t]he mere fact that two parties in conspiracy with each other give the same evidence does not make the evidence of one corroboration of the evidence of the other"). See also: \textit{R v Thompson} (1992) 57 SASR 397.

\textsuperscript{949} \textit{People (Director of Public Prosecutions) v O'Shea (No. 2)} [1983] ILRM 592, at p. 594, per Finlay P., delivering the unanimous decision of the Supreme Court: "One of the functions of a trial judge in a criminal trial is to reach a decision at the conclusion of the evidence tendered on behalf of the prosecution as to whether there is evidence which if accepted by a jury could as a matter of law lead to a conviction. This may frequently occur in practice in cases where there is a gap in the evidence tendered on behalf of the prosecution and where some vital link in the chain of proof is missing. It also arises in my view, however, and not infrequently, in cases where an apparent link in the chain of proof is so tenuous that it would clearly be perverse for a jury properly directed as to the onus of proof upon the prosecution to act upon it". Expressly approved by O'Flaherty J. in \textit{The People (Director of Public Prosecutions) v Egan} [1990] ILRM 780, at p. 790.

\textsuperscript{950} \textit{The Irish Times Limited v Ireland} [1998] 1 IR 375, at p. 387, [1998] 2 ILRM 161, at p. 174 (S.C.) per Hamilton C.J. In \textit{Z v Director of Public Prosecutions} [1994] 2 IR 476, in relation to adverse pre-trial publicity involving the accused, Hamilton P. (as he then was), asserted at p. 496 that: "It is the duty and obligation of juries to act with complete impartiality, complete detachment and without letting matters of sympathy, prejudice, sentiment or emotion take any part and it is the obligation and duty of the trial judge to so instruct them. To have regard to factors other than the evidence, properly admitted and given at the trial, would be to disregard their oath and the clear directions given to them by the trial judge. After eighteen years practice as a member of the Bar of Ireland and over nineteen years service as a judge, I share in the confidence that our judicial system has in juries to act with responsibility in accordance with the terms of their oath, to follow the directions given by the trial judge and a true verdict give in accordance with the evidence." This passage was cited with approval.
reasoning of the New Zealand Court of Appeal in *R v Accused (CA 160/92)*⁹⁵¹ and the Ontario Court of Appeal in *R v Bickford*⁹⁵² – as echoed, *obiter*, in *White v Ireland*⁹⁵³ – and, in particular, the assertion that no person can be said to have a vested right in procedure or a right in the manner of proof that may be used against him, is equally applicable in this jurisdiction. An accused person is *not* entitled to insist on the additional protection afforded by the traditional mandatory corroboration requirements since fair procedures do not require such safeguards in circumstances where the rights of the accused are adequately protected by the other core aspects of the criminal trial, in particular, the onus and standard of proof and the availability of judicial directions to the jury to avoid a real risk of an unfair trial;⁹⁵⁴ “it is wrong to suggest that an accused should have a right to the continued protected afforded by such rules simply because they have (erroneously) offered such protection in the past”.⁹⁵⁵

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⁹⁵⁴ See also: *Director of Public Prosecutions v Judge Haugh* [2000] 1 IR 184 (H.C.) in relation to the questionnaire circulated by the respondent in advance of a trial by reason of the intense pre-trial publicity surrounding the accused. The High Court held that fair procedures did not require the safeguards suggested by the respondent by reason of his ruling that there was no real or serious risk that the first notice party would receive an unfair trial: *The People (Attorney General) v Lehman (No. 2)* [1947] IR 137 followed. In the course of his judgment, O’Donovan J. asserted at p. 212 that: “[D]oes it necessarily follow that the absence of the ‘additional safeguards or procedures over and above the norm’ which the respondent has suggested might be adopted in the matter of selecting persons to serve on a jury to try the charges preferred against the first notice party would lessen the likelihood that he would obtain a fair trial?...[W]hat purpose is served by the additional safeguards or procedures suggested by the respondents I suppose that they could be justified on a ‘to be sure to be sure’ basis but is that a good reason for departing from the norm I would have thought that if, having considered a challenge that an accused person might not obtain a fair trial because of prejudice resulting from pre-trial publicity, the court concludes that there is no serious risk of that happening, it is wholly inappropriate for the court to depart from the established system of selecting persons to serve on a jury to try that accused. As might be said colloquially ‘if it is not broken, don’t fix it!’”
However, even if the judicial and legislative reforms relaxing the corroboration requirements in respect of the evidence of child witnesses can be said to amount to an infringement of the accused’s constitutional right to a fair trial and fair procedures, it is reiterated that an abridgement of such rights is permissible in upholding the constitutional rights of others – here, the child’s constitutional rights, *inter alia*, to bodily integrity and access to the courts – and the community’s right to everyone’s evidence save in exceptional circumstances, where the extent of such abridgement is proportionate and no more than is reasonably required in order to ensure that the other constitutional rights in question are vindicated.956

It is clear from the decision in *The People (Director of Public Prosecutions) v Gillane*957 that an appropriate direction by the trial judge to the jury in respect of evidence of dubious reliability is considered an adequate safeguard for the rights of the accused; the appellate court will be slow to find that the trial judge erred in failing to withdraw the evidence from the jury. The applicant was convicted of soliciting two ‘down and outs’ to murder his wife. It was argued on behalf of the accused that his conviction was unsafe as it was based on the evidence of one of the witnesses whose testimony, it was submitted, was unreliable since: (i) he gave evidence that he had a microchip inserted in his head during surgery in the Mater Hospital; (ii) he believed that people could read his mind; (iii) in his interview with the gardaí, he described the person who solicited him in a manner which positively excluded the appellant, since he identified the

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956 See: *Enright v Ireland* [2004] 1 I.L.R.M. 103 (H.C.); *Quinlan v Attorney General* (Unreported, High Court, McKechnie J., 16th September 2004); *D.K. v Judge Crowley* [2002] 2 IR 744 (S.C.); *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *In re Article 26 and the Planning and Development Bill 1999* [2000] 2 IR 321; *The People (Director of Public Prosecutions) v Kelly* (Unreported, Supreme Court, 4th April, 2006); *Tuohy v Courtney* [1994] 3 IR 1, [1994] 2 ILRM 503; and *Heaney v Ireland* [1996] 1 IR 580, [1997] 1 ILRM 117 (H.C.), following the test proposed by the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103 (S.C.C.) and *Chaulk v R* [1993] 3 SCR 1303 (S.C.C.). The task of the court is to determine whether the balance contained in the legislation – s. 28 of the Criminal Evidence Act 1992 – is so contrary to reason and fairness as to constitute an unjust attack on the plaintiff’s right to fair procedures. To this test must be added a proportionality test as follows: (i) are the impugned provisions rationally connected to the objective, (ii) do they impair the plaintiff’s constitutional rights as little as possible, and (iii) are they such as their effects on the plaintiff’s constitutional rights are proportional to the objectives sought to be obtained by the Act.

957 *The People (Director of Public Prosecutions) v Gillane* (Unreported, Court of Criminal Appeal, 14th December, 1998).
person as having a black moustache and hazel eyes, whereas the appellant had no moustache and had blue eyes; and (iv) one of the gardaí gave evidence to the effect that the witness’s eyesight was poor and the witness himself described himself as colour blind.

3.7.20 The Court noted that the mechanism normally adopted in response to potentially unreliable evidence is to warn the jury of the reasons why it is considered unreliable and of the dangers of acting thereon. The Court held that, under Article 38.5 of the Constitution, juries are the ultimate arbiters of fact empowered to resolve conflicts of evidence;\(^{958}\) provided that they are given appropriate directions, evidence should be left to the jury for a determination as to the weight to be attached to it, even if such evidence is of dubious quality.\(^ {959}\) Furthermore, the Court held that the evidence of the

\(^{958}\) The People (Director of Public Prosecutions) v Egan [1990] ILRM 780, at p. 784, per McCarthy J. (S.C.) (in relation to the question certified for the Court, namely, whether the Court of Criminal Appeal was correct in holding that it had no jurisdiction to substitute its own subjective view for the verdict of the jury): “I share the views expressed by Griffin J. in Mulligan and by Hederman J., in the instant case. The jurisprudence of the Court of Criminal Appeal since 1924, as, form time to time, endorsed by this Court, is clear. Save where a verdict may be identified as perverse, if credible evidence supports the verdict, the Court of Criminal Appeal has no power to interfere with it. The concepts of lurking doubt, feel of the case, gut feeling, or back of my mind, are foreign to the judicial role as I understand it.... To permit verdicts on criminal trials to be upset upon such subjective consideration would seem to me to be a denial of the validity of trial by jury”. Citing with approval: The People (Director of Public Prosecutions) v Mulligan (1980) 2 Frewen 16, at pp. 20-23, per Griffin J. (C.C.A.).

\(^{959}\) The Court held that: “Certainly the ideas that Mr B expressed as to what was done to him are inaccurate and impossible but on the other hand he emerges from the transcripts of evidence as a positive clear and forceful witness of the events which he describes...The jury, were, of course, in a better position to assess Mr B and the reliability or otherwise of his evidence than this Court is from a reading of the transcripts. Mr B’s evidence about his operation and what was done to him is totally peripheral and irrelevant to the issues in this case. It is not grounds for withdrawing the case from the jury’s consideration. Moreover in this State all citizens are equal before the law. There are no class divisions or distinctions. Mr B and Mr D may be and indeed were down and out but their sworn testimony must be given the same attention and respect as the testimony of the better dressed and the more comfortably circumstanced.” In The People (Director of Public Prosecutions) v Egan [1990] ILRM 780, at pp. 788-789, per O’Flaherty J., citing The People (Attorney General) v Williams [1940] IR 195, at p. 205, per Meredith J.: “For the purpose of this judgment I do not have to find whether there was corroboration of the complainant’s evidence in this case or not because the trial judge told the jury that, in his opinion, there was not corroboration. Neither do I have to comment on the extent of the warning that was requisite in this case because, as the cases previously cited point out this is a matter clearly within the discretion of the trial judge but it is only right to say that the judge gave warnings in very strong terms. At one stage of his charge he said: ‘it would obviously be extraordinarily dangerous to convict in this case’. Towards the end of his charges he again reminded the jury of ‘the inherent danger that there is in accepting or convicting where you are left with virtually nothing but the evidence of the complainant on her own’. But once the warning requirement has been complied with, as it clearly was in this case, the jury is entitled to convict on the complainant’s uncorroborated evidence. As Meredith J. said in the Williams case: ‘the weight of
witness, B, was not of a standard which required the trial judge to withdraw it from the jury.

3.7.21 The right to trial by jury was examined by Henchy J. in The People (Director of Public Prosecutions) v O'Shea where it was held that Article 38.5 contained a right to the evolved and evolving common law trial by jury, that is, a trial before a judge and jury in which the judge would preside, “ensure that all conditions necessary for a fair and proper trial of that nature are complied with”, decide all matters deemed to be matters of law, and direct the jury as to the legal principles and rules they are to observe and apply; and in which the jury, constituted in a manner calculated to ensure the achievement of the exercise of their functions, would be “the arbiters, under the governance of the judge, of all disputed issues of fact and, in particular, the issue of guilt or innocence”. It is submitted that, as part of his / her function in ensuring that all conditions necessary for a fair and proper trial of the accused, the trial judge may, in his / her discretion, warn the jury of the need for caution when considering the evidence of a particular child witness in the circumstances of an individual case. It is

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961 See: Longman v The Queen (1989) 168 CLR 79 (H.C. Austr.) where the High Court allowed the appeal from the accused’s conviction for sexual offences against his young step-daughter and a new trial was ordered. It was held that while s. 36BE(1) of the Evidence Act 1906 (WA) dispensed with the requirement to warn of the general danger of acting on the uncorroborated evidence of alleged victims of sexual offences as a class, it did not affect the requirement to warn about other perceptible risks of miscarriage of justice. The Court noted that a warning could be required due to the circumstances of the case other than, albeit in conjunction with, the sexual character of the issues which the alleged victim’s evidence was tendered to prove. Thus, the Court held that what the statutory provision abolished was the requirement to give a warning, not a judge’s discretion to comment on the
submitted that it is not necessary, in the interests of safeguarding the rights of the accused, to revert to the old corroboration requirements in respect of the evidence of children; the individualised discretionary cautionary instruction should provide adequate protection. This approach is subject to the trial judge’s control of the trial court and the right and duty of the trial judge – requiring constant vigilance throughout the trial – to make decisions to achieve a fair trial. As stated by Kingsmill Moore J. in *The People (Attorney General) v Case* (No. 2):

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circumstances of the case; by force of s. 36BE(1)(a) alleged victims of sexual offences no longer formed a class of especially suspect witnesses, but neither did they form a class of especially trustworthy witnesses and their evidence was subject to comment on credibility in the same way as the evidence of alleged victims in other criminal cases, but to comment only. In the instant case, the Court highlighted the delay in prosecution, the nature of the allegations, the age of the complainant at the time of the events alleged, the alleged awakening of a sleeping child by indecent acts and the absence of complaint either to the applicant or to the complainant’s mother. Furthermore, the Court noted that one factor which may not have been apparent to the jury and which therefore required not merely a comment but a warning was the applicant’s loss of those means of testing the complainant’s allegations which would have been open to him had there been no delay in prosecution; the fairness of the trial had been necessarily impaired by the long delay and it was imperative that a warning be given to the jury. See also: *Bromley v The Queen* (1986) 67 ALR 12 (H.C. Austr.); *Carr v The Queen* (1988) 165 CLR 314; *Duke v The Queen* (1989) 38 A Crim R 305 (H.C. Austr.).

962 Professor Alan Mewett (1987-88) 30 Crim. L.Q. 257 welcomed the amendments to the statutory corroboration rules in relation to the evidence of child witnesses and, in particular, the balance which they achieved between the desirability of obtaining all relevant admissible evidence and the protection of the rights of the accused. He regarded these amendments as “a sensible, but not excessive step, towards ensuring that such evidence is fairly received without prejudicing the rights of the accused and the protections he is entitled to”. He asserted that: “With the repeal of s. 586 and no mention being made in the new s. 16 of the Canada Evidence Act of the requirement of corroboration, we have almost completely got rid of any absolute requirement for corroboration in criminal cases, and a good thing too. A jury, properly instructed on the question of the burden of proof, and a fortiori a judge, not only do not need any rule but may be seriously hampered by one. There is no reason to suppose that any apprehended danger of the wrongful conviction of an innocent person will actually materialize or that a jury will not carefully scrutinize the evidence of young children. It may be that in appropriate cases, the trial judge will continue to instruct the jury to exercise special caution, but there is no need for any absolute rule.”

963 By way of analogy, see the recent decision of the Supreme Court in *Director of Public Prosecutions v Gilligan* (Unreported, Supreme Court, 23 November 2005), [2005] IESC 78, per Denham J., in relation to the evidence of a witness in the Witness Protection Programme, wherein it was held that the testimony from persons receiving a benefit under a witness protection programme should be viewed with caution; while such evidence was not inadmissible, it should be scrutinised carefully. The credibility of such a witness should be analysed in the light of all the evidence in the case and all the facts of the case should be analysed to determine the weight, if any, to be given to the evidence. The trial judge should give a warning to a jury of the dangers of relying on such evidence without corroboration, however, once the warning had been given, the trier of fact could determine the appropriate weight to be attached to such evidence and could convict in the absence of corroborative evidence. Such an approach was subject to the trial judge’s control of the court and the right and duty of the trial judge to make decisions to achieve a fair trial, which required constant vigilance as matters could change in the course of a trial.


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“It is the function of a judge in his charge to give to the jury such direction and warnings as may in his opinion be necessary to avoid the danger of an innocent man being convicted, and the nature of such directions and warnings must depend on the facts of the case”.965

3.7.22 Accordingly, it is submitted that trial judges should be alive to the need to issue a cautionary instruction to the jury in respect of the evidence of individual child witnesses in order to safeguard the rights of the accused.966

In determining whether such a warning – tailored in strength and content to the circumstances of the case967 – is necessary, the trial judge may have regard to, inter alia,968 the child’s intelligibility969 and testimonial capabilities – observation, recollection and communication – as demonstrated by his / her testimony and, in particular, his / her response to cross-examination, including indications within the child’s testimony of “unusual forgetfulness” or influence by a third party.970 It is submitted that it

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965 The People (Attorney General) v Casey (No. 2) [1963] IR 33, at p. 37, per Kingsmill Moore J. (S.C.). See also: 7 Wigmore Evidence (3rd ed.) § 2033, at p. 259: “The readiness of the modern American professional mind to cling to rules formally requiring corroboration is due mainly to the natural desire to protect the litigants from the unrestrained and inexperienced mental processes of the jury. But the true way to afford this protection is to empower the judge to comment on the testimony. Restore to general practice this time-honoured and orthodox function of the judge and there will be neither need nor demand for the abstract mechanical rules of number or of corroboration.”

966 The Canadian courts in particular have emphasized that the courts should exercise caution against applying negative stereotypes to the evidence of children, while recognizing the importance of drawing the attention of the trier of fact to the weaknesses in the evidence presented in a particular case: R v W(R) [1992] 2 S.C.R. 122, at p. 134 (S.C.C.) reiterated by McLachlin J. in R v Marquard [1993] 4 S.C.R. 223 (S.C.C.).

967 It is submitted that if the warning is tailored to the individual circumstances of the case, it is neither necessary nor desirable for the trial judge to attempt to ‘balance’ any warning with a statement to the effect that children can often be good witnesses since to so inform the jury is to deal in generalities or abstractions rather than the individual facts of the case and the individual witness’s testimonial qualifications. See: See: R v L [1999] Crim LR 489 (C.A.); Phipson, Phipson on Evidence (15th ed., 2000) § 13-09, at p. 305; and Hannibal, Martin and Mountford, Lisa The Law of Criminal and Civil Evidence (2002) at p. 350.

968 As outlined above, a warning may be given in respect of the evidence of any witness where there is an evidential basis for such warning, that is, where the circumstances of the case, the issues raised and the content and quality of the witness’s evidence suggest the need for such a warning.

969 It is submitted that requiring a trial judge to consider the ‘intelligence’ of the child is to offer imprecise and unhelpful guidance for the exercise of this discretion for the same reasons – outlined above in the section charting the spectrum of tests for the admission of the evidence of children unsworn – that it is an unsuitable test of the competence of child witnesses.

970 See: May, Richard Criminal Evidence (5th ed., 2004) §15-13, at p. 448. In R v Marquard [1993] 4 S.C.R. 223 (S.C.C.) a child complainant, aged only 3½ years, gave unsworn evidence against her grandmother, the accused, in support of the charge of aggravated assault, to the effect that her ‘Nana’ put her in (or on) the stove in order to discipline her; the majority of the Court allowed the appeal
is unhelpful and, indeed, misleading for the trial judge to be guided by the age of the child witness\textsuperscript{971} when determining whether to issue a cautionary instruction in respect of his / her evidence\textsuperscript{972} since to do so is to fail to recognize that children of the same age may be at quite different stages developmentally and while one eight year old child may warrant a strongly worded warning with regard to his / her evidence, another eight year old child may require no warning at all. As stated by Green C.J. in the Australian case, \textit{Paine v The Queen}:\textsuperscript{973}

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overall but the Court unanimously held that the trial judge had fairly pointed out the problems inherent in the child’s testimony to the jury and had adequately cautioned them. The Court conceded that the evidence of the child complainant in the instant case required a warning from the trial judge as to the risks of accepting it on the basis that: (i) she was very young; (ii) she was unable to give much detail about the incident; and (iii) she had given a different account of events at an earlier stage in the investigation and prosecution of the charge. However, both the majority and the minority agreed that the warning given by the trial judge had been adequate in highlighting these problems to the jury. See also Tapper, Colin \textit{Cross and Tapper on Evidence} (9\textsuperscript{th} ed., 1999) at p. 216: “It should still be noted that the reasons for the rule advanced in \textit{R v Dossi} (1918) 13 Cr App R 158, 161 namely that children are more susceptible to the influence of third persons, and may allow their imagination to run away with them, could still persuade the judge to exercise his discretion so as to give an appropriate warning. Although not absolutely mandatory, some warning of the difficulties faced by the defence when charged with the sexual abuse of those who were then children, when the trial took place many years later, is desirable.”

\textsuperscript{971} In this regard, the author respectfully disagrees with the following passage from Keane, Adrian \textit{The Modern Law of Evidence} (6\textsuperscript{th} ed., 2006) at p. 244: “In the case of children, the relevant factors include the age and intelligence of the child, whether the evidence is given on oath and, if the evidence is unsworn, how well the child in question understands the duty of speaking the truth”. (Emphasis added). As stated in \textit{R v K(V)} (1991) 4 C.R. (4\textsuperscript{th}) 338, at p. 351, 68 C.C.C. (3d) 18 (B.C.C.A.): “The focus of the new discretion, which has replaced the old common law rules of practice is the potential for the witness’ evidence to be unreliable. No automatic assumptions of unreliability may arise because of age, or the nature of the complainant. There must be an evidentiary basis upon which it would be reasonable to infer that the witness’ evidence is, or may be, unreliable. Absent such evidentiary foundation, it could not possibly be argued that failure to exercise that discretion resulted in a miscarriage of justice.” See also: Mewett, Alan W., \textit{Witnesses} (1995) at 12-19—12-20.

\textsuperscript{972} Keane, Adrian \textit{The Modern Law of Evidence} (5\textsuperscript{th} ed., 2000) at p. 210: “[B]ut whether such a direction should be given, and if so, its precise terms, are matters dependent on the circumstances of the case. In the case of children, these are likely to include the age and intelligence of the child, whether the evidence is given on oath and, if the evidence is unsworn, how well the child in question understands the duty of speaking the truth. In \textit{R v Price} itself, the Court of Appeal thought that it was sufficient for the trial judge to have told the jury to take into account the fact that the witness was a child. In other cases, a stronger direction will be called for.” See: \textit{R v Price} [1991] Crim LR 379 (C.A.) (held that a direction to treat the evidence of a six year old complainant of sexual offences with caution was not required simply because she was a child of tender years, since to do so would be to reintroduce the abrogated rule requiring a mandatory corroboration warning in respect of the evidence of child witnesses). See also: \textit{R v L.L} [1999] Crim LR 489 (C.A.).

\textsuperscript{973} \textit{Paine v The Queen} [1974] Tas SR 117 (C.C.A.) Only part of the judgment is reported, accordingly, reliance is placed on the transcript of the unreported judgment of Green C.J. as extracted in Waight, P.K., and Williams, C.R. \textit{Evidence: Commentary and Materials} (5\textsuperscript{th} ed., 1998) at pp. 951-953. See also: \textit{R v Accused} (CA 298/88) [1989] 2 NZLR 698 (C.A.) where the Court of Appeal noted that while the trial judge had failed to direct the jury as to the need for special consideration of the evidence of the child complainant of sexual offences, he had presented the defence case fairly to the jury and had given them the general instruction in relation to assessing the reliability and credibility of witnesses. It
“[T]here is no rule of law or practice which requires judges in this State in every case to instruct juries of the danger of acting upon the uncorroborated sworn evidence of children. In my view, whether any such warning is given to the jury is a matter for the trial judge’s discretion. No doubt it if appeared to the trial judge that there was some risk that a youthful witness did not fully understand the questions put to him or was not expressing himself adequately or appeared liable to be indulging in fantasy or was liable to be influenced by others as to the evidence he might give, then the trial judge should give an appropriate warning to the jury about the dangers of relying upon that evidence without corroboration and, in fact, as such defects are not peculiar to children, no doubt in the exercise of his general discretion to comment on the evidence a trial judge would do so in the case of any witness who betrayed these characteristics. But it would be undesirable, in my view, to restrict this flexible approach by adopting a fixed rule of law or of practice as to the occasions when such a warning should be given.”

3.7.23 The Irish courts have also rejected the restrictive approach adopted by the English courts to the standard of review applicable to the exercise by the trial judge of his / her discretion in determining whether to issue a cautionary instruction with regard to the evidence of a particular witness;974 was held that the ‘invention/distortion’ warning advocated in R v Parker [1968] NZLR 325 (C.A.) in respect of the evidence of children must now be read in the light of statutory abolition of the corroboration warning and the results of psychological studies indicating that assumptions about the unreliability of children which underpinned the traditional approach of the law to the evidence of children “may not now be adopted with the same uncritical acceptance”. The Court held on the facts of the case and, in particular, given the age (12 years) and testimonial qualifications of the child complainant, the instructions given by the trial judge were adequate notwithstanding his failure to give the ‘invention/distortion’ warning advocated in Parker; held also that no injustice to the accused resulted from this omission. Casey J. concluded that: “[O]rdinary human experience indicates that with younger children particular, it still remains prudent for a judge to give such advice to a jury and this would be appropriate in all cases, whether sexual or not. However, this is essentially a counsel of prudence, not an inflexible rule, and in appropriate cases a trial judge will make his own assessment and determine whether such a warning should be given”.

974 The People (Director of Public Prosecutions) v JEM [2001] 4 IR 385, at p. 402, per Denham J. rejecting the eighth proposition advanced by Lord Taylor C.J. in R v Majanjuola and Easton [1995] 1 WLR 1348, at pp. 1351-1352 (C.A.), namely: “Finally, this court will be disinclined to interfere with a
it is submitted that the standard of 'a real or serious risk of an unfair trial'\textsuperscript{975} is both more appropriate and provides better protection for the rights of the accused.\textsuperscript{976} In other words, when a warning is needed in order to "avoid a miscarriage of justice", it must be given, but when none is needed to avoid a miscarriage of justice, none need be given; "[t]he possibility of a miscarriage of justice is both the occasion for the giving of a warning and the determinant of its content".\textsuperscript{977}

3.7.24 In conclusion, since the 'corroboration' warning can only ever have been required in relation to the evidence of child witnesses where there was an evidential basis or danger in relying on the evidence of the individual child,

\textit{trial judge’s exercise of his discretion save in a case where that exercise is unreasonable in the Wednesbury sense"}, referring to the decision in \textit{Associated Provincial Picture Houses Ltd v Wednesbury Corporation} [1947] 2 All ER 680, [1948] 1 KB 223; restated with approval by Lord Bingham C.J. in \textit{R v R} [1996] Crim LR 815.\textsuperscript{975} \textit{D v Director of Public Prosecutions} [1994] 2 IR 465, at p. 467, [1994] 1 ILRM 435, at p. 437, per Finlay C.J. (S.C.). In \textit{Z v Director of Public Prosecutions} [1994] 2 IR 476, at p. 507 (S.C.), Finlay C.J. asserted that: "An onus to establish a real risk of an unfair trial ... necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of the trial must be an unavoidable unfairness of trial". See also: \textit{Nolan v Director of Public Prosecutions} [1994] 3 IR 626, at p. 632, per Blayney J.; \textit{PC v Director of Public Prosecutions} [1999] 2 IR 25, at p. 58, per Denham J.; and \textit{Bowes and McGrath v Director of Public Prosecutions} [2003] 2 IR 25, at p. 34, per Hardiman J. McGrath, Declan Evidence (2005) at p. 178, citing \textit{Bromley v R} (1986) 161 CLR 315, at p. 507 (S.C.), Finlay C.J. asserted that: "An onus to establish a real risk of an unfair trial ... necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of the trial must be an unavoidable unfairness of trial". See also: \textit{Kelleher v R} (1974) 131 CLR 534; and \textit{Bromley v R} (1986) 161 CLR 315. Ligertwood continues: "In theory, the approach goes no further than a judge’s general duty to instruct the jury adequately so there is no risk of a miscarriage of justice. However, the preconceptual nature of the common law creates judicial categorisations such that, when certain fact situations arise, a prudent trial judge will always carefully consider the need for warning, and appellate judges will readily infer an intolerable risk of injustice where no, or what is regarded as an inadequate, warning has been given." The Supreme Court of Canada in \textit{R v Marquard} [1993] 4 S.C.R. 223, at p. 239, per McLachlin J. (S.C.C.) also adopted the following statements in \textit{R v KY} (1991) 4 C.R. (4th) 338, at p. 350 (B.C.C.A.), per Wood J.A. to the effect that there are some cases concerning child witnesses "where the failure or refusal of the trial judge to exercise the discretion to give such a caution will raise the spectre of an injustice and, may, therefore, result in reversible error". Wood J.A. continued at pp. 350-351: "The focus of the new discretion, which has replaced the old common law rules of practice, is the potential for the witness’ evidence to be unreliable. No automatic assumptions of unreliability arise because of age, or the nature of the complaint. There must be an evidentiary basis upon which it would be reasonable to infer that the witness’ evidence is, or may be, unreliable." \textsuperscript{977} \textit{Bromley v The Queen} (1986) 161 CLR 315, at p. 325, per Brennan J. See also: \textit{R v Miletic} [1997] 1 VR 593, at p. 605.
rendering discretionary – necessitated only where such evidential basis exists – that which was mandatory in respect of all child witnesses, regardless of necessity, cannot be said to infringe the accused’s right to a fair trial or fair procedures. Moreover, in light of the duty of the court to ensure the fairness of procedures – and, in the exercise of this duty, to issue a cautionary instruction warning the jury of the dangers of relying on the evidence of a particular child witness where a failure to do so would result in a real or serious risk of an unfair trial for the accused – it is submitted that the rights of the accused are adequately safeguarded by the modern approach to the corroboration requirements in respect of the evidence of child witnesses.
4.0.0 SPECIAL MEASURES IN THE EXAMINATION OF CHILD WITNESSES IN CRIMINAL TRIALS

4.0.1 Traditionally, those children who satisfied the strict competence requirements applicable to child witnesses were required to give evidence – whether sworn or unsworn – in the same manner as adult witnesses; in the formal surroundings of the courtroom, in the direct physical presence of the accused, the jury and members of the public, by way of a continuous narrative in response to questioning in examination-in-chief, tested by way of cross-examination either by counsel for the accused or even by the accused in person. The ‘evidential revolution’ – which encompassed changes to the laws of competence and corroboration – sought to remove this further obstacle to the reception of the evidence of child witnesses through the introduction of ‘special measures’.

978 Australian Law Reform Commission, Report: Seen and Heard: Priority for Children in the Legal Process (ALRC Report No. 84, 1997) para. 4.10: “Even where a child has the developmental and legal capacities to participate in legal processes, appropriate participation can be extremely difficult because the processes themselves are not designed for participation by children. Laws and regulations are made and implemented by adults, and the attributes, decision-making processes and language used in legal processes reflect this fact.” Not alone was the courtroom an alien environment, the highly formalized procedures, legal terminology and apparel of court officers, including the judge and the legal representatives questioning the child witnesses, heightened the child’s sense of isolation and confusion. Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, A Private or Public Nightmare? (Wellington, 1988) (“Geddis Report”) at p 23: “Courts are designed with adults in mind....Testifying in such an environment can increase the child’s feelings of being small and helpless.....” The requirement that the child respond to questions posed sufficiently loudly that he or she might be heard by the judge, legal representatives, the accused and the jury represented a further source of stress for the child, particularly where the subject-matter of the questions involved disclosures of an intimate nature, such as sexual abuse. See: McEwan, Jenny, Evidence and the Adversarial Process (2nd ed., 1998) at p. 135.


980 Hannibal, Martin and Mountford, Lisa (2002) The Law of Criminal and Civil Evidence: Principles and Practice note at p. 333 that the traditional method of examination of all witnesses – including child witnesses – can be characterized principally by “an emphasis on the primacy of the trial and the principle of orality as the preferred and most highly probative means of giving evidence”.

981 See sections 2.0.0-3.7.23 and the analysis therein of the development and reform of the rules of competence and corroboration with regard to child witnesses and their evidence respectively and the impact of such reforms upon the rights of the accused.

982 Mewett A., Witnesses (1995) at p. 4-17: “What has caused some concern in recent years, particularly in criminal cases in which a child is a victim whose testimony may be crucial to the prosecution, is the further question of whether that child is capable of effectively giving, in the intimidating atmosphere of a courtroom, what is frequently embarrassing testimony or of effectively giving testimony when face-to-face with the accused, who may be someone related to or well known to the child. This is not a question of capacity...” (Emphasis in original). Glaser, J.R. “Sentencing, Children’s Evidence and Children’s Trauma” [1990] Crim LR 371, at p. 371. See also: Jones, David
4.0.2 Special measures are measures – usually statutory\(^{983}\) in nature – which give effect to proposed changes in standard courtroom layout and procedure or even in the law of evidence itself in order to facilitate the reception of evidence from child witnesses or other ‘vulnerable witnesses’ in criminal proceedings by reducing the trauma associated with the witness experience when giving evidence by conventional means.\(^{984}\)

4.0.3 These measures were introduced in response to the findings of psychological research which demonstrated that the traditional approach to the examination of child witnesses was inherently flawed and resulted in distress and trauma to the child witness\(^{985}\) with concomitant dual adverse effects on the quality of the child’s evidence\(^{986}\) – or even the total loss of

\(^{983}\) As outlined below, some of the measures contained in the first category – ‘Type One Special Measures’ – such as the provision of a support person or the erection of a one-way screen to obscure the child’s view of the accused while the child witness gives evidence, are understood to derive from the court’s inherent jurisdiction to arrange its procedures to promote the proper administration of justice whereas the measures contained in the second category – ‘Type Two Special Measures’ – such as the live television link, or the use of an intermediary through whom questions to be put to the child witness were put, were thought to require statutory authority.

\(^{984}\) Burton, Evans and Sanders locate these evidentiary reforms in the context of “the increasing international recognition that victims should be accorded rights to dignity and fair treatment in the [criminal justice system] and that [vulnerable or intimidated witnesses] should be, as far as possible, put on a level playing field with other witnesses”; the authors assert that “the special help given to [these witnesses] should be seen as enabling them to give evidence as effectively as any other witness and to minimise the trauma and stress of giving evidence” and that, similarly, “victims in general are seen as having rights with the same objectives”. See: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) at p. 6.

\(^{985}\) Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) asserted in para. 2.10, at p. 15 that: “[M]ost children are disturbed to a greater or lesser extent by giving evidence in court. The confrontation with the accused, the stress and embarrassment of speaking in public especially about sexual matters, the urgent demands of cross-examination, the overweening nature of courtroom formalities and the sense of insecurity and uncertainty induced by delays make this a harmful, oppressive and often traumatic experience.” The Report concluded in para. 2.12, at p. 15 that: “We are satisfied that a majority of children are adversely affected by giving evidence at trials for serious offences under existing circumstances.”

\(^{986}\) Dennis, I.H., The Law of Evidence (2nd ed., 2002) at p. 496: “It is widely accepted that certain witnesses are ‘vulnerable’ in the sense that their experiences as victims of offences, or their particular personality characteristics, or their susceptibility to intimidation, may mean that they are liable to
such evidence – and on the administration of justice. As indicated above, the findings of psychological research also indicated that the very characteristics of the traditional adversarial model which seek to elicit only the truth and to discourage falsehood in adult witnesses may have the opposite effect when applied to child witnesses – truth-defeating as opposed to truth-seeking; although both direct physical confrontation and cross-examination are regarded as powerful deterrents against or detectives of false evidence and important safeguards for the rights of the accused when applied to adult witnesses, in relation to children, these characteristics “may offer a convenient means of intimidating the witness, resulting in serious, damaging effects on the child’s testimony” and, indeed, to the well-being of the child.

4.0.4 It is important to reiterate that by requiring child witnesses to give evidence in the conventional manner – and so treating child witnesses as ‘miniature adults’ – the law of evidence also failed to recognize or accommodate the fact that the needs of child witnesses and the experience of being a witness suffer more than the normal amount of stress that is associated with being a witness and are unlikely to be able to give best evidence without the help of certain protective measures.”

987 See, in particular: sections 1.05-1.06 in the Introduction.
988 Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) observed in para. 2.17, at p. 18 that “the formality and solemnity of the courtroom context which are often thought to promote truthfulness by witnesses may actually have a deleterious effect on the fullness and accuracy of children’s testimony”. See also: Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.01, at p. 67. In R v A [1997] NZFLR 920 (H.C.) the Court noted at p. 920, per Neazor J., that “[r]eliance on the solemnity of the Court procedure, including giving evidence in the presence of the accused, as an inducement to a witness to tell the truth in my view does not weigh against the use of screens or closed-circuit television because those circumstances are some of the things likely seriously to inhibit the child from giving evidence.”
989 Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, A Private or Public Nightmare? (Wellington, 1988) (“Geddis Report”) at p. 23: “For children, fear of the defendant’s presence in the courtroom is frequently mentioned as one of the most traumatic aspects of the criminal justice system. Historically, looking the defendant in the eye as one accuses him or her of a crime was held to be an acid test of the truth. But when the accuser is a child, this confrontation may offer a convenient means of intimidating the witness, resulting in serious, damaging effects on the child’s testimony. This may be especially so in intra-familial child sexual abuse cases. The interests of justice are not served when victims are unable to effectively give their evidence due to the close physical proximity of the accused.”
990 Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) para. 2.15, at p. 17: “As a result some child victims are left with feelings of anger, resentment, frustration and even guilt which many experts believe could be to some extent dispelled by legal procedure which enabled them to speak fully and freely.” See also: Tapper C., Cross and Tapper on Evidence (9th ed., 1999) at p. 209.
may be very different to those of an adult witness.\textsuperscript{991} Psychologists have also found that children routinely misunderstand the witness role,\textsuperscript{992} believing that they have been brought to court to establish their own innocence\textsuperscript{993} or to be punished for not telling the police what they witnessed or experienced when initially questioned and perceiving the aim of questions posed to them during the trial as ascertaining whether they are telling the truth and whether they were involved in the commission of the offence or even implicating them in the offence with which the accused is charged.\textsuperscript{994} Children were found to harbour five principal concerns in relation to giving evidence as a witness in criminal proceedings: (i) nervousness about speaking in front of people; (ii) fear of making mistakes in court; (iii) fear of being ‘tripped up’ by the defence lawyer; (iv) fear of being punished for making a ‘mistake’ or not being believed notwithstanding the veracity of their testimony;\textsuperscript{995} and (v) fear of retaliation.

\textsuperscript{991} Australian Law Reform Commission, Report: \textit{Seen and Heard: Priority for Children in the Legal Process} (ALRC Report No. 84, 1997) para. 14.57: “In general, rules of evidence attempt to ensure that the trial process is fair for the parties. However, these same rules often prevent witnesses from fully explaining their evidence. They often interfere with the ability of the judge and/or jury to hear the words of a child witness and the special context in which they are spoken.” See also: Paciocco, David \textit{The Law of Evidence} (2\textsuperscript{nd} ed., 1999) para. 9.1, at p. 295; Glaser, J.R. “Sentencing, Children’s Evidence and Children’s Trauma” [1990] Crim LR 371, at p. 371; and Jones, David “The Evidence of a Three-Year Old Child” [1987] Crim LR 677, at p. 677.

\textsuperscript{992} Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) para. 7.10, at p. 67. Birch, D.J. “Children’s Evidence” [1992] Crim LR 263, noted at pp. 275-276, citing Cashmore, Judy and Bussey, Kay, “Children’s Conceptions of the Witness Role” in Children’s Evidence in Legal Proceedings, \textit{An International Perspective} (1989) 177 at p. 181: “Many children still seem unaware of what the court is really for; believing, for example, that they may be punished if they tell the truth but are disbelieved. And the attitude that it is unethical for prosecuting counsel to seek to strike up any rapport with the child before trial surely does not have to be adhered to as strongly as seems to be the case, particularly if the child has pre-recorded her evidence-in-chief.”


\textsuperscript{995} Cashmore, Judy and Bussey, Kay, “Children’s conceptions of the witness role” in Spencer, J.R., Nicholson, G., Flin, R. and Bull R., \textit{Children’s Evidence in Legal Proceedings: An International Perspective} (1990) 177, at pp. 182-183: “[F]ear of being punished for making a mistake (not lying)...seems to be related to their perception that if they do something wrong or are not believed, they are guilty and will be punished. Some young children seem to assume that if they do something...
by the accused, since children attribute to themselves responsibility or
‘blame’ for the outcome of the trial, namely, the conviction of the
accused.996 This misperception of the witness role, combined with the child
witness’s under-developed intellectual and emotional resources ensured
that, for many children, the deleterious effects of giving evidence via the
conventional method were acute and even sustained.997

4.0.5 The trauma suffered by the child by reason of the witness experience also
had a detrimental effect on the quality – in terms of completeness,
coherence and accuracy – of the child’s evidence which, in turn, ran
contrary to one of the fundamental rationales underlying the rules of
evidence – namely, the rational ascertainment of facts, taking into account
all of the relevant understandable evidence available – and compromised the
proper administration of justice;998 the diminution or loss of such crucial
prosecution evidence could enable the unjustifiable acquittal of a guilty
accused or even ensure that the prosecution was not brought in the first
place.999

4.0.6 The underlying purpose of the evidentiary reforms introducing these
‘special measures’ was to obtain the best evidence from the child by

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996 See: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and
Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online
Report 01/2006) at p. 64.
997 Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot
998 Spencer, J.R. “Children’s evidence in legal proceedings in England” in Spencer J.R., Nicholson, G.,
113, at p. 117: “All this is bad for the child.” and it is bad for justice, too, because when the child is
unable to utter it means the court is deprived of an important source of evidence.”
at p. 83: “[W]ith a small child such confrontation does not make it tell the truth, but makes it too
frightened to say anything at all; which, whilst excellent for child-molesters and their defending
lawyers, is bad for everybody else.” He further argued that: “If the basic traditions of British justice
really require the Colin James Evanses of the paedophile world to confront their four-year-old
accusers face to face, even if this makes it impossible to get a word of evidence out of them it is the
traditions of British justice which need re-examining, not the video-link proposal.” See also: Report of
the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot QC) (London:
minimising the stress associated with being a witness in criminal proceedings and accommodating the relevant differences between child and adult witnesses, while preserving the rights of the accused; they were premised upon an understanding that the “adversarial trial is no longer its own justification; it must adapt itself to the needs of witnesses, and not vice versa” and, indeed, that fairness to witnesses can be accomplished without compromising fairness to the accused – “it is not necessary to choose one over the other”.

4.0.7 The primary focus of these reforms was directed towards facilitating the last two of the three testimonial qualifications, namely, recall and communication either by altering the design or procedures of the courtroom or by rethinking some of the central features of the adversarial trial, for example, by dispensing with the strict requirement of physical confrontation between the accused and the child witnesses – either by mechanical (screen) or technological means (live television link) – or through the introduction of additional actors into the criminal justice system, namely, support persons or intermediaries.

1000 See: New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, October 1996) at para. 86 which asserted that the impetus for the reform was threefold: (i) the belief that sexual abuse of children is a serious and widespread problem and that barriers to prosecution and obtaining valid evidence from children ought to be minimized; (ii) ordinary courtroom procedures may not allow children and some other groups of witnesses to give the best evidence they are capable of giving; and (iii) ordinary courtroom procedures may cause unnecessary distress or trauma for some groups of witnesses.
1001 Hoyano, Laura “Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses” [2000] Crim LR 250, at p. 273 where she asserted that the “great merit of the Youth Justice Criminal Evidence Act 1999 is the overt acknowledgement that the truth-seeking purpose of the criminal trial can best be achieved by modifying the orthodox adversarial trial where its rigours impede that objective”. See also: Birch D., “A Better Deal for Vulnerable Witnesses?” [2000] Crim LR 223, at p. 240.
4.1.0 Types of Special Measures:

4.1.1 While other categorizations are possible, the special measures herein examined are divided into two groups. The first category of special measures contains those measures which merely adjust standard courtroom layout, design or procedure in order to facilitate the reception of the evidence of child witnesses by reducing the formality of the courtroom – for example, by removing the requirement for legal representative or even the

1002 Such as that suggested by the Scottish Law Commission, Discussion Paper: The Evidence of Children and Other Potentially Vulnerable Witnesses (Discussion Paper No. 75, June 1988) para. 5.32, at p. 85: “Special measures...can, we think, be classified into two broad categories. First, there are those like the Israeli interrogator system or the American hearsay exception which are designed in certain circumstances to make it unnecessary for a child to give evidence in a formal sense at all. Second, there are those which acknowledge that formal evidence will be taken from a child in person, but which seek in one way or another to make that experience less stressful and less demanding. In this category are modifications to the rules of evidence to allow a child’s evidence to be supported or supplemented by prior statements made by him; arrangements involving the use of screens or closed circuit television; and procedures for taking pre-trial depositions.” While it is accepted that, within the second category of special measures, as outlined in the categorisation adopted in this section, there is a spectrum ranging from minor amendment of the substantive law of evidence to quite radical measures facilitating the reception of evidence from child witnesses, it is respectfully submitted that the classification utilised herein is preferable since it clearly recognises the contribution – albeit on a more modest scale – made by the special measures contained in the first category.

1003 This category also contains the small scale practical measures proposed to alleviate the stress suffered by child witnesses when required to give evidence in the same manner as adult witnesses including: (i) the assignment of the smallest, brightest and least intimidating courtroom available; (ii) dispensing with the requirement that the child give evidence from the witness box and instead permitting him or her to give evidence from the body of the court; (iii) the provision of sound amplification in all courtrooms to project the voices of small children; and (iv) the assignment of a separate waiting area for child witnesses, furnished with toys, books and games for children. See also: Birch, D.J. “Children’s Evidence” [1992] Crim LR 263, at pp. 275-276: “Other steps which could be taken without changing the law include improved provision for children waiting to give evidence (it’s not much use having a live link for testimony if the child encounters the accused in the waiting area); the training of all those involved in the trial process in how best to handle a child witness (including such matters as when it is appropriate to allow a child to play out what happened instead of seeking to elicit a verbal account); and improvements in the preparation of a child for the experience of going to court....All of these would be in the interests of the child; none would damage the interests of justice.”

1004 Such measures include: (i) clearing the court of persons other than those entitled as a matter of law to be present during the child’s testimony; and (ii) restricting the reporting of proceedings involving child witnesses, particularly in proceedings involving sexual offences.
judge to wear legal apparel\textsuperscript{1005} — or by dispensing with some of the conventional features of an adversarial trial.\textsuperscript{1006}

4.1.2 The aim of such measures is to produce a ‘child-friendly courtroom’ to facilitate the reception of the best evidence from child witnesses,\textsuperscript{1007} while preserving many of the key characteristics of the adversarial trial and encroaching – if at all – to the least extent possible on the rights of the accused; the child witness is still required to give evidence by conventional means, that is, by way of ‘live’ examination-in-chief and cross-examination, and in the physical presence of the accused, albeit with the benefit of the concessions provided by this category of special measures, such as the

\textsuperscript{1005} One of the most alien features of the formal courtroom experience from a child’s perspective is the apparel worn by the judge and counsel during criminal proceedings. The wigs and gowns distance the court personnel from the child witness and lend an air of solemnity to the proceedings which may intimidate the child, thus adversely affecting the quality of the child’s evidence. The removal of this visual barrier was recommended by: Law Reform Commission, Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.35, at pp. 81-82 and Recommendation No. 62, at p. 96; Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) para. 7.11, at p. 67; and Scottish Law Commission, Discussion Paper: The Evidence of Children and Other Potentially Vulnerable Witnesses (Discussion Paper No. 75, June 1988) para. 5.4, at p. 66 and para. 5.8, at p. 68. Section 13(3) of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001 provides that, while evidence is being given through a live television link by a person under 18 years of age or a person with a mental handicap — either at the trial or in proceedings under Part IA of the Criminal Procedure Act 1967 as amended — neither the judge, nor the barrister / solicitor concerned in the examination of the witness, shall wear a wig or gown. This prohibition does not expressly apply to a situation where the evidence of the witness is being given through an intermediary, pursuant to s. 14 of the Criminal Evidence Act 1992, however, since s.14(1) restricts the availability of an intermediary to child witnesses who are giving or are to give evidence via a live television link, it is submitted that wigs and gowns will not be worn in any event. The courts in England, may direct, pursuant to s. 26 of the Youth Justice and Criminal Evidence Act 1999, that the wearing of wigs and gowns be dispensed with during the giving of the witness’s evidence in order to reduce the stress of testifying, particularly in the case of very young child witnesses; this special measures direction is available — in all criminal proceedings — to all witnesses whether eligible for assistance by virtue of s. 16 (on the grounds of age or incapacity) or s. 17 (on the grounds of fear or distress about testifying). Dennis asserts that, in the absence of this legislative provision, the court would “[a]lmost certainly” enjoy the inherent power to direct the removal of wigs and gowns, however, he notes that this legislative provision “removes any doubt about the existence of this power”: Dennis, I.H., The Law of Evidence (2nd ed., 2002) at p. 520. McEwan argues that counsel may have a duty to comply with such a special measures direction requiring them to remove wigs and gowns: McEwan, Jenny “In defence of vulnerable witnesses: the Youth Justice and Criminal Evidence Act 1999” (2000) 4 E&P 1, at p. 12.

\textsuperscript{1006} Such measures include: (i) the provision of a support person during the testimony of the child witness; and (ii) the use of one-way or two-way screens for the duration of the child witness’s evidence.

\textsuperscript{1007} Murphy P., Murphy on Evidence (7th ed., 2000) describes this category of special measures as “essentially administrative” in nature in para. 16.19, at pp. 502-503, contrasting them favourably with the more “drastic” or “Draconian” special measures in the second category.
provision of support – both personal and mechanical – during the child’s evidence.

4.1.3 Many of the special measures in this first category do not enjoy statutory regulation or authority; the courts give effect to such measures in the exercise of their inherent jurisdiction to conduct proceedings in a manner conducive to justice in any individual case. Although these reforms may have been small in scale, they nonetheless constituted an important aspect of the move towards greater recognition of the child’s witness experience and of the ways in which the needs of a child witness differ from those of his/her adult counterpart.

4.1.4 The second category of special measures encompasses those measures which require statutory amendment of the law of evidence and a more radical rethinking of the traditional adversarial model of criminal justice in

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1008 It should be noted, however, some of the suggested procedures could benefit from the clarity associated with statutory regulation: Seabrooke, Stephen and Sprack, John *Criminal Evidence and Procedure: The Essential Framework* (2nd ed., 1999) noted at p. 40 that, under Part II of the Youth Justice and Criminal Evidence Act 1999 in England: “the court’s discretionary common law power to erect screens is confirmed and put into statutory form.”

1009 Tapper, Colin *Cross and Tapper on Evidence* (9th ed., 1999) at p. 214. Some guidance was provided by the Lord Justice General Hope in Scotland in his *Memorandum on Child Witnesses* for the exercise of this judicial discretion in the form of factors to which the presiding judge should have regard in determining whether to authorise any of these special measures, namely: (i) the age and maturity of the child; (ii) the nature of the charge or charges and the nature of the evidence which the child is likely to be called upon to give; (iii) the relationship, if any, between the child and the accused; (iv) whether the trial is summary or on indictment; (v) any special factors placed before the court concerning the disposition, health or physique of the child; and (vi) the practicability of departing from normal procedure, including the size and layout of the court and the availability of amplification equipment. See: Lord Justice General Hope, *Memorandum by the Lord Justice General on Child Witnesses* (1990) paras. 4(a)-(f). These factors were virtually identical to those suggested by the Scottish Law Commission in its *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Scot. Law Com., Report No. 125, 1990) para. 2.21, at p. 9. Moreover, these factors applied to each of the special measures; the court would first determine in each case whether cause had been shown authorising the use of a special measure to facilitate the receipt of the evidence of a child witness and, secondly, having regard to the circumstances of the particular case, which special measure appeared likely to be the most beneficial and effective.

1010 Including: (i) Part III of the Criminal Evidence Act 1992, as amended, and Part III of the Children Act 1997, as amended, in Ireland; (ii) ss. 32 and 32A of the Criminal Justice Act 1988, as amended and ss. 16-40 of the Youth Justice and Criminal Evidence Act 1999 in England; (iii) Part I of the Vulnerable Witnesses (Scotland) Act 2004, replacing ss. 56-59 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, ss. 33-35 of the Prisoners and Criminal Proceedings (Scotland) Act, 1993, s. 271 of the Criminal Procedure (Scotland) Act 1995, as substituted by s. 29 of the Crime and Punishment (Scotland) Act 1997 in Scotland; (iv) s. 486.1, s. 486.2 and s. 486.3 of the Criminal Code in Canada, as inserted by An Act to Amend the Criminal Code 2005, c. 32, s. 15; and (v) ss. 23C-231 of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 in New Zealand.
order to address the special needs of child witnesses; they advocate a treatment of child witnesses which is entirely different from that afforded to adult witnesses in an attempt to recognize and address the different needs of children when giving evidence in criminal proceedings and are intended to produce the best evidence from child witnesses by permitting the child to give such evidence in less formal surroundings and in the absence of direct physical confrontation with the accused.

4.1.5 Although the purpose of such statutory schemes was to “ensure that the old technicalities of evidence and traditional approaches to the giving of evidence...shall not necessarily prevail against the desirability of getting at the truth and doing so by an effective machinery which enables the children to give evidence without undue stress, while at the same time preserving the accused’s rights to a fair trial” ‘type two special measures’ raise fundamental questions as to whether – and if so the permissible or desirable extent to which – the accused’s rights can be curbed in order to further a legitimate public policy such as the protection of child witnesses.

1011 Such measures include: (i) the giving of evidence – both examination-in-chief and/or cross-examination and re-examination by way of live television link; (ii) the use of an intermediary through which questions posed to the child witness by counsel for the accused or the accused are channeled; and (iii) the restriction or prohibition on the cross-examination of a child witness by the accused in person.

1012 Report of the Advisory Group on Video Evidence, (Chairman, His Honour Judge Pigot QC) (London: Home Office, December 1989) noted in para. 2.38, at p. 26 that the proposed special measures contained in the Report constituted only part of the solution to the giving of evidence by child witnesses in cases involving sexual offences; it was suggested in para. 7.9, at p. 67 that “a fundamental change of attitude towards children in the legal context” was required.

1013 R v Lewis [1991] 1 NZLR 409, at p. 411 (C.A.). See also: R v S [1993] 2 NZLR 142 (C.A.) per Hardie Boys J.: “[The statutory scheme is] designed to facilitate the giving of evidence by child complainants and to do away with some discredited notions concerning the quality of their evidence”. However, the reactive nature of some of the statutory schemes enacted has elicited strong criticism. McEwan, Jenny, Evidence and the Adversarial Process (2nd ed., 1998) stated at pp. 136-137 that: “Legislative intervention so far has been untidily piecemeal, a product of hasty reaction to difficulties as they have emerged over the last few years. The messy scissors-and-paste technique employed in the relevant statutory amendments has prevented until very recently a remotely coherent approach to the problem of child witnesses.”

1014 The Advisory Group on Video Evidence acknowledged in its Report (Chairman, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) para. 2.38, at p. 26 that its proposals were “radical” but argued that they constituted “fair and humane solutions” to the “intractable social problems” posed by the “difficulties which exist in bringing those who commit offences against children to justice and the damage which courts often inflict upon many children”. The Group observed in para. 1.13, at p. 6 that: “[I]n other parts of the world where the quality of justice is not inferior to our own, listening to what very small children have to say and providing suitable means for children to describe their experiences outside the public arena of the courtroom is not regarded as
Parameters of Special Measures:

The parameters of special measures to assist children in giving evidence in criminal proceedings may be limited in two principal ways: (i) by restricting availability to a list of applicable offences; and (ii) by adopting a restrictive definition of ‘child’ witness.

It is submitted that the approach adopted by the statutory schemes in each of the jurisdictions examined herein towards the parameters of special measures illustrates an underlying policy determination regarding the appropriate balance to be achieved between the protection of child witnesses from undue trauma when testifying in criminal proceedings and the receipt of the best evidence in the interest of the proper administration of justice and the rights of the accused to a fair trial and fair procedures. The more inclusive the approach of the legislature towards the classes of offences and witnesses in respect of which these reforms are available, the more the pendulum swings in favour of protection of the child witness, while a restrictive approach lays greater emphasis upon safeguarding the rights of the accused.

unusual, unreasonable, or a threat to the principle that the prosecution must discharge the burden of proof.”

It is also possible to restrict the availability of special measures by permitting only complainants or victims of offences – as opposed to witnesses – to enjoy the benefit of these measures. Apart from the statutory scheme in New Zealand – ss. 2323C-231 of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 – the legislation enacted in each of the common law jurisdictions considered herein generally extend eligibility to avail of these special measures to child witnesses and do not confine their application to child complainants or victims. The provisions of Part III of the Criminal Evidence Act 1992, as amended – with the exception of s. 16(1)(b) of the Criminal Evidence Act 1992, as amended by s. 20 of the Criminal Justice Act 1999 providing for the admission into evidence of pre-trial video recordings – extend eligibility for special measures to child witnesses. Similarly, the special measures direction provisions in the Youth Justice and Criminal Evidence Act, 1999 in England apply “not just to the victim of an offence, but to all witnesses, whether for prosecution or defence”: R(D) v Camberwell Green Youth Court [2003] Crim LR 659, [2002] 2 Cr App R 16, para. 13, per Rose L.J. (Q.B. Div.). The Pigot Report rejected the proposition that alleged victims alone should benefit from the special procedure proposed in the report, stating that child witnesses of some of the very worst violent and sexual offences are “as badly affected by the experience as some victims” and, further, that children are “too often witnesses of sexual offences against other children”: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) para. 2.37, at pp. 25-26.
4.3.0 Availability of Special Measures – Applicable Offences:

4.3.1 Although the modern trend has been to extend the availability of special measures to all criminal proceedings\(^{1016}\) the original statutory schemes introducing special measures to assist child witnesses in giving their evidence were more tentative and expressly restricted their availability to criminal proceedings involving one or more criminal offence from a list of such offences prescribed in the relevant legislation.

4.3.2 The most restrictive of these statutory schemes remains in force in New Zealand\(^{1017}\) to this date and permits the use of special measures only by child complainants of sexual offences.\(^{1018}\) By so limiting the availability of special measures, the legislature advocated a ‘balance’ which, for the most part, valued the rights of the accused over the protection of child witnesses from undue trauma while testifying. However, it is important to note that the limitations of this scheme have been neatly circumvented by the New Zealand judiciary through reliance on the inherent jurisdiction of the courts to do justice in every case.\(^{1019}\) The inclusive approach adopted by the

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\(^{1016}\) Modern statutory schemes such as those enacted in England (Youth Justice and Criminal Evidence Act 1999) and in Scotland (Part I of the Vulnerable Witnesses (Scotland) Act 2004) do not restrict the availability of special measures to a list of specified applicable offences but rather provide heightened protection to child witnesses who are giving or are to give evidence in respect of certain offences, such as offences of a sexual or violent nature. See also: s. 486.1-(1)-(6) (provision of a support person), s. 486.2-(1)-(8) (provision of a screen or live television link) and s. 486.3-(1)-(5) (prohibition of cross-examination of witness by accused in person) of the Criminal Code in Canada, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, which refers to “any proceedings against an accused”.

\(^{1017}\) See: ss. 23C-23I of the Evidence Act 1908 (No. 56 of 1908) as inserted by s. 3 of the Evidence Amendment Act 1989 (No. 104 of 1989) and as amended by s. 28 of the Summary Proceedings Amendment Act 1993 (No. 47 of 1993) – inserting paragraph (a)(ia) into Section 23C – and ss. 8(5) and 8(6) of the Crimes Amendment Act 1995 (No. 49 of 1995) – amending paragraph (a)(iii) and substituting paragraph (b) of s. 23C respectively.


\(^{1019}\) \textit{R v Moke and Lawrence} [1996] 1 NZLR 263, at p. 269, \textit{per} Thomas J. (C.A.): “The legislative package enacted in 1989 with the objective of providing protection for complainants in sexual cases was widely regarded as enlightened legislation. It behoves the Courts to be no less enlightened.” The Court of Appeal further noted that legislation permitting the admission into evidence of videotaped interviews with child complainants as evidence-in-chief in cases of ill-treatment, cruelty or neglect was in force in the United Kingdom at that time: ss. 32 and 32A of the Criminal Justice Act 1988, as amended. The Court held that it could have regard to the provisions of such legislation in determining whether or not to exercise its inherent jurisdiction in the instant case and stated at p. 270, \textit{per} Thomas
judiciary was founded upon an understanding that the courts should exercise their inherent jurisdiction in harmony with the relevant legislation, since the legislature was to be presumed to have enacted the legislation in the public interest and to further the ends of justice; equally, it was held that where it was necessary to utilize the court’s inherent jurisdiction, this was done for the same purpose – to give effect to the stated policy of the legislature in a parallel sphere – so that the legislature and the courts could effectively function in tandem without upsetting the constitutional balance between the two organs of government.

4.3.3 In Ireland, the applicable offences in respect of which special measures – such as live television link or the provision of an intermediary – are available include sexual offences, offences involving the threat of violence to a person and the offence of ‘child trafficking’ and ‘child sexual

1020 In R v Moke and Lawrence [1996] 1 NZLR 263 (C.A.) the two accused were charged with willfully ill-treating three of their four children by striking them with their hands, fists, feet, sticks and a vacuum cleaner pipe, contrary to s. 195 of the Crimes Act 1991. Notwithstanding the fact that this form of child abuse fell outside of the range of offences outlined in the Evidence Act 1908, as amended, to which the special measures applied – that is, sexual offences – the Crown sought to introduce into evidence videotaped interviews with the three children – aged nine, six and four years respectively – which interviews were conducted in accordance with the Evidence (Videotaping of Child Complainants) Regulations 1990 (SR 1990/94). It was held by the Court of Appeal that the court might invoke its inherent jurisdiction whenever the justice of the case so demanded, even in respect of matters which are regulated by statute or by rules of Court provided that it did not contravene any statutory provision; the need to do justice was paramount. The Court relied upon, inter alia, the following caselaw: Taylor v Attorney-General [1975] 2 NZLR 675; Broadcasting Corporation of New Zealand v Attorney-General [1982] 1 NZLR 120; Television New Zealand Ltd v Solicitor-General [1989] 1 NZLR 1; and R v Accused (T4/88) [1989] 1 NZLR 660. See also: Jacob, “The Inherent Jurisdiction of the Court” (1970) CLP 23, at p. 24.

1021 Section 12 of the Criminal Evidence Act 1992 (No. 12 of 1992) as amended by s. 10 of the Child Trafficking and Pornography Act 1998 (No. 22 of 1998) outlines the offences in respect of which the special measures contained in Part III are available, namely: (i) a sexual offence; (ii) an offence involving violence or the threat of violence to a person; (iii) an offence consisting of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, such a sexual offence or such an offence involving violence or the threat of violence; or (iv) an offence (child trafficking and sexual exploitation) under s. 3 of the Child Trafficking and Pornography Act 1998.

1022 See: s. 13 of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 (No. 10 of 1999) and s. 257(3) of the Children Act 2001 (live television link); and s. 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001 (intermediary). The live television link is also available in proceedings under s. 4E or 4F of Part IA of the Criminal Procedure Act 1967 in relation to applicable offences.

1023 The combination of sexual offences and offences involving violence or the threat of violence was also previously adopted in Canada. Section 486(2.1) of the Criminal Code R.S.C. 1985, c. C-46, which...
Although such statutory parameters to the availability of special measures clearly encompass a far greater number of vulnerable child witnesses than one which is limited to complainants of sexual offences alone, it is nonetheless not difficult to envisage situations in which the protection afforded by the special measures could greatly facilitate the reception of the evidence of a child witness – and even prevent the loss of such crucial evidence – where the offence with which the accused is charged does not, on a strict interpretation, qualify as an applicable offence; where the child has been the subject of cruelty or neglect without any physical violence or sexual offences having been committed against him or her, or a victim of Munchausen’s by proxy, the child may suffer the same level of trauma or stress as a witness eligible for assistance under Part III of the Criminal Evidence Act 1992, as amended.

4.3.4 While the offence of cruelty to persons under sixteen years of age was expressly included amongst the applicable offences prescribed by previous English legislation in additional to the dual combination of offences of a
sexual or violent nature,\textsuperscript{1025} it was the purposive approach adopted by the English courts towards the meaning of an "offence which involves an assault on, or injury or a threat of injury to, a person"\textsuperscript{1026} which extended the reach of special measures to include a wider class of child witnesses. The judicial determination that an offence involved a threat of injury if its circumstances were such that injury to a person was a real possibility – that is, the consequences of the offender’s activity, when viewed objectively, presented a threat – enabled the English courts to extend the facility of special measures to offences not expressly included among the list of applicable offences, such as arson\textsuperscript{1027} and even attempted abduction;\textsuperscript{1028} it was held that there were sound policy reasons for giving a wide and purposive approach to the parameters of special measures.

\textsuperscript{1025} Sections 32 and 32A of the Criminal Justice Act 1988, as amended by s. 55 of the Criminal Justice Act 1991 in England stipulated as the applicable offences in respect of which special measures – such as live television link and the admission into evidence of pre-trial video recorded evidence – were available: the commission, attempt, conspiracy, aiding, abetting, counselling or procuring of an offence which involves an assault on, or injury to or a threat of injury to a person; offences of cruelty to persons under 16 years of age contrary to s. 1 of the Children and Young Persons Act 1933 and sexual offences. See: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) para. 2.37, at pp. 25-26.

\textsuperscript{1026} Although it would arguably be open to the judiciary in this jurisdiction to adopt a broad and purposive construction of s. 12 of the Criminal Evidence Act 1992, as amended, similar to that embraced by the English courts, it should be noted that the English concept of "injury, or threat of injury" is wider than the Irish "violence or the threat of violence" and, it is submitted the former would encompass the offence of child neglect through starving, while the latter would not, since the focus in the English provision was on the effect of the action – namely, injury to a person, not necessarily the child himself or herself – rather than on the action itself.

\textsuperscript{1027} In \textit{R v Lee} [1996] 2 Cr App Rep 266 (C.A.). The Court of Appeal held that s. 32(2) of the Criminal Justice Act 1988, as amended, related not to an offender but to an offence and that it did not necessarily involve any threat of injury to any particular person and certainly not the person who was to give or was giving evidence via live television link or by way of pre-trial video-recorded evidence; it was the circumstances of the offence which had been operative as opposed to the intention of the offender. Accordingly, the Court held that the actions of the appellant – in forcing his way into the family home and had, in the presence of his six-year old son, set fire to the child’s mother – had created a threat of injury to the child and that the offences committed had likewise created that danger, notwithstanding the fact that no assault, injury, or threat of injury was directly or expressly made by the appellant to the child witness.

\textsuperscript{1028} \textit{R v McAndrew-Bingham} [1999] 1 WLR 1897 (C.A.). The Court of Appeal asserted that the fact that an offence under s. 2 of the Child Abduction Act 1984 could be committed without the use or even threat of physical force did not prevent it being categorized as an assault. Furthermore, it was noted that, in view of the underlying policy reason of preventing or minimizing trauma to a child resulting from the ordeal of giving evidence by conventional means – in open court and in the immediate physical presence of the accused – there was no reason to believe that Parliament intended to exclude the offence from the definition in s. 32(2)(a) of the Criminal Justice Act 1988, as amended, nor was there any other reason for excluding it, such as the fact that no force was used or threatened or because of the "relative lack of seriousness" of the offence indicated by the maximum statutory penalty.
4.3.5 The principal difficulty with an approach to special measures which defines the parameters of availability by reference to specified offences is that it risks both under- and over-inclusion;\(^\text{1029}\) it is premised upon the illogical assumption that all child witnesses of particular offences are vulnerable and in need of the court’s protection from giving their evidence in the conventional manner and that no child witness of unspecified offences requires such assistance.\(^\text{1030}\)

4.3.6 Modern statutory schemes\(^\text{1031}\) neither restrict the availability of special measures to a list of defined applicable offences nor depend upon judicial ingenuity to expand those categories, rather they authorise the use of special measures in all criminal proceedings upon the satisfaction of certain conditions while providing heightened protection – by way of a series of


\(^{1030}\) The Scottish Law Commission in para. 1.7 of its Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (1990) criticized the restriction of the availability of special measures to sexual offences only as both illogical and without justification and recommended that the proposed special measures be available to all children – that is, persons below the age of sixteen years – who were required to give evidence in criminal proceedings, where the court, in the exercise of its discretion, was satisfied that the stated grounds for availing of the measures had been established. However, this recommendation was made by the Commission in the context of an understanding that the special measures outlined would only be used in a small number of appropriate cases and that, in general, most child witnesses would be able to give evidence by conventional means; in other words, the special measures were to constitute the exception rather than the rule. See also: Law Commission of New Zealand, Report: Evidence – Reform of the Law (Report No. 55, Vol. 1, 1999) para. 447 wherein the Commission recommended extending the provisions of s. 23D of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989, to allow an application to be made for directions allowing a child complainant of any offence – not only sexual offences – to give evidence by alternative means, although no such direction would prevent the child witness giving evidence in the ordinary way if he / she so wished.

\(^{1031}\) See: Part II of the Youth Justice and Criminal Evidence Act 1999 in England; and Part I of the Vulnerable Witnesses (Scotland) Act 2004 in Scotland. See also: s. 486.1(1)-(6), s. 486.2(1)-(8) and s. 486.3(1)-(5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15 in Canada.
complex and cross-referenced presumptive rules – to child witnesses who are giving or are to give evidence in respect of certain offences, such as offences of a sexual or violent nature. The statute begins from an understanding that child witnesses would be spared the ordeal of testifying in the standard manner in open court at all stages of the proceedings – including the cross-examination of the child – and mandates the reception of evidence from the child outside the confines of the courtroom or immediate presence of the accused. For example, the ‘primary rule’ in respect of child witnesses in England obliges the court to give a

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1032 The complexity of the overall structure and individual provisions of the Youth Justice and Criminal Evidence Act 1999 have been the subject of intense and sustained criticism: Birch D., “A Better Deal for Vulnerable Witnesses?” [2000] Crim LR 223, at p. 240; Dennis, I.H., The Law of Evidence (2nd ed., 2002) at pp. 516-517 (asserting that there is a serious question “whether it was necessary to create such a labyrinthine procedure” and critical of the inequality of treatment between the two categories of child witnesses “in need of special protection” with reference to the offence with which the accused is charged); Seabrooke, Stephen and Sprack, John Criminal Evidence and Procedure: The Essential Framework (2nd ed., 1999) at p. 39 (where it is stated that the section is “quite remarkable for the complexity of its wording”); Hoyano, Laura “Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses” [2000] Crim LR 250, especially at pp. 257-259 and p. 261 (criticising the “unhappy compromise” in the provisions between achieving certainty while maintaining flexibility); McEwan, Jenny “In defence of vulnerable witnesses: the Youth Justice and Criminal Evidence Act 1999” (2000) 4 E&P 1, at pp. 12-15; Munday, Roderick Evidence (2nd ed., 2003) para. 4.43, at p. 165 (asserting that the relevant provisions “descend into almost obsessive detail”); and Keane, Adrian, The Modern Law of Evidence (6th ed., 2006) at pp. 155 and 163-166 (where the scheme is criticized as “needlessly complex (in parts almost impenetrable), unduly inflexible and, in the case of children, makes a crude distinction between sexual offences and offences of physical violence”).

1033 Burton, Evans and Sanders have observed that professionals in the various agencies in England find it easier – or were more concerned – to identify some categories of witnesses as vulnerable and intimidated than others; they posited a “hierarchy of identification”, whereby “witnesses at the top of that hierarchy were much more likely to be identified as [vulnerable or intimidated] than those lower down the hierarchy” and described the hierarchy as follows: “1. Child victims of sexual offences. 2. Child witnesses to sexual offences. 3. Child victims of violent offences. 4. Child witnesses to violent offences. 5. Adult victims of sexual offences. 6. Adult witnesses to sexual offences. 7. Adult victims of violent offences. 8. Adult witnesses to violent offences. 9. Child and adult victims/witnesses of and to other offences.” See: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) at p. 32. See also: Burton, Mandy, Evans, Roger and Sanders, Andrew “Implementing Special Measures for Vulnerable and Intimidated Witnesses: The Problem of Identification” [2006] Crim. L.R. 229, at pp. 236-237.


1035 Similarly, in Scotland, section 271A of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 provides that child witnesses in all criminal proceedings may give their evidence with the benefit of at least one special measure subject to the notification requirements contained in s. 271A(2)-(13); the court may only order that a child witness give evidence without the assistance of a special measure where the child has expressed a wish to give
special measures direction in relation to the witness which provides for: (i) a pre-trial video recording of an interview with the child made with a view to its admission as evidence-in-chief of the witness to be admitted in evidence; and (ii) which further provides that any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) be given via live television link. With regard to child witnesses “in need of special protection” – that is, child witnesses in respect of certain specified offences – this ‘primary rule’ is modified in that it is expressly subject to fewer pre-conditions and, in relation to child evidence in the absence of any special measure and the court considers that appropriate or if the use of a special measure would give rise to a significant risk of prejudice to the trial and that risk significantly outweighs any risk of prejudice to the interests of the child. However, pursuant to s. 271B, where the child witness is aged less than 12 years and is to give evidence at a trial in respect of any of a list of specified offences, the court shall not make an order which has the effect of requiring the child witness to be present in the courtroom or any part of the court building in which the courtroom is located for the purpose of giving evidence unless satisfied: (i) where the child witness has expressed a wish to be so present for the purposes of giving evidence, that it is appropriate; or (ii) in any other case, that the taking of the evidence of the child witness without the child witness being so present would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made. The list of offences includes: murder, culpable homicide, sexual offences, any offence which involves an assault on, or injury or threat of injury to, any person (including any offence involving neglect or ill-treatment of, or other cruelty to, a child), abduction and plagium. Section 21, incorporating reference to s. 27 (admission into evidence of pre-trial video evidence) and s. 24 (live television link) of the Youth Justice and Criminal Evidence Act 1999. Where a child witness gives evidence in relation to offences pursuant to s. 35(3)(a), (b), (c) and (d) of the Youth Justice and Criminal Evidence Act 1999, that is, sexual offences, and offences involving violence, kidnapping, false imprisonment, abduction or assault on, injury to or threat of injury to a person, he / she is deemed by the statute to be “in need of special protection” pursuant to s. 21; a statutory sub-division of child witnesses. The ‘primary rule’ takes effect subject to: (i) the “availability” of the special measure in question in relation to the witness within the meaning of s. 18(2) of the Youth Justice and Criminal Evidence Act 1999; (ii) the proviso in s. 27(2) that if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted; and (iii) the rule does not apply to the extent that the court is satisfied pursuant to s. 21(4) that compliance with it would not be likely to maximise the quality of the witness’s evidence so far as practicable, “whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason”. The primary rule applies equally to child witnesses “in need of special protection” – that is, a child witness in proceedings involving offences of kidnapping, false imprisonment, child abduction, wilful neglect or offences involving assault or injury – with the notable exception that the primary rule as it applies to child witnesses in need of special protection is not subject to the third limitation, namely, the requirement that the court be satisfied that compliance with the rule would be likely to maximise the quality of the witness’s evidence so far as practicable. Dennis argues that, in relation to this category of child witnesses ‘in need of special protection’ – excluding child witnesses or complainants of sexual offences – “video recorded cross-examination is now optional rather than mandatory” and that “cross-examination via live link will be ordered unless the court determines under section 19(2) that a video recording is likely to improve the quality of the evidence”: Dennis, I.H., The Law of Evidence (2nd ed., 2002) at p. 517. However, it is respectfully submitted that the express non-application of the third exception to the application of the primary rule implies that the primary rule must apply to the
witnesses or complainants of sexual offences, provides for the admission of the entirety of the child’s evidence — not merely his / her evidence-in-chief — by way of pre-trial video recordings.1°39

4.3.7 However, it is submitted that it would be preferable, in the interests of the rational ascertainment of facts, to dispense with offence-based restrictions together with the modern presumptive rules regarding the availability of special measures to child witnesses in favour of an individualized approach or a case-specific finding of necessity on the civil standard of proof on the balance of probabilities.1°4° It is submitted that the focus of the courts should be on the probability or likelihood of trauma being suffered by the individual child witness if required to give evidence in the conventional manner — which would necessarily include consideration of the nature of the offence witnessed or experienced by the child but would not be confined to such a consideration — and should be assessed in relation to the individual child witness rather than assumed on the basis of his / her age or membership of a class of child witnesses or having regard to the nature of evidence of such witness — so that special measures directions under s. 24 and s. 27 apply — even where compliance with the rule would not be likely to maximise the quality of the witness’s evidence so far as practicable, or where it is likely that the quality of the witness’s evidence would be maximised by the granting of a special measures direction under section 28. It is submitted that this interpretative approach is consistent with the terms of s. 21(2) which provide that the court must first have regard to s. 21(3) to (7) before having regard to s. 19(2) when determining whether any special measure or measures would be likely to improve the quality of evidence given by a witness and, if so, which measure or measures would be likely to maximise so far as practicable the quality of such evidence; section 21(2) further provides that those special measures required to be applied to a witness by virtue of s. 21 shall be treated as if they were measures determined by the court, pursuant to s. 19(2) to be measures which would be likely to maximise, so far as practicable, the quality of the witness’s evidence. See also: Stockdale, Michael Criminal and Civil Evidence: 2000-2001 (2000) para. 9.4.3.3.3, at p. 229.1°39 See: ss. 21 and 22 (read together with ss. 27 and 28) of the Youth Justice and Criminal Evidence Act 1999.

1°4° New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 130. The Commission stated that such a test would be consistent with the aims of reforms to the law of evidence since it “would refer to the purpose of rational ascertainment of facts (that is, the promotion of reliable evidence and effective communication) as well as the desirability of minimizing unnecessary distress” but cautioned that those “goals would be balanced against the need to ensure the fairness of the proceeding, and, in particular, that a defendant in a criminal case has a fair trial”. The test proposed by the Commission included consideration of the following factors: (i) the age of the witness; (ii) the physical, intellectual or psychological disability of the witness; (iii) the linguistic or cultural background of the witness; (iv) the nature of the proceeding or criminal offence; (v) the relationship of the witness to any party in the proceeding; (vi) procedural fairness; (vii) reduction of stress on the witness; and (viii) the preference of the witness (required in relation to children by the UN Convention on the Rights of the Child).
the offence with which the accused person is charged. It is submitted that the exercise of this judicial discretion should only follow from an assessment of the impact of the special measure upon the rights of the accused and upon the child witness, but may also be informed by factors such as: (i) the age of the witness; (ii) the physical, intellectual, or psychological disability of the witness; (iii) the nature of the proceeding or criminal offence; and (iv) the relationship of the witness to any party, such as the accused, in the proceedings.

It is accepted within the following analysis that the form of ‘presumption of trauma’ contained in the statutory scheme in this jurisdiction in relation to the availability of the live television link facility – as distinct from the more radical presumptive rules employed in other jurisdictions – does not infringe the rights of the accused to a fair trial and fair procedures. However, it is nonetheless noted that an approach which requires case-specific findings of vulnerability – rather than limiting availability to specified offences and / or employing presumptive rules in relation to the eligibility of witnesses of particular offences to avail of such special measures – represents the optimum balance between competing interests; it

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1041 New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 123: “We consider that many of the reasons for allowing children, or intellectually disabled adults, to give evidence in alternative ways apply irrespective of whether the witness is a complainant and whatever the nature of the crime alleged. These reasons include the possibility of memory deterioration, unfamiliarity with the courtroom environment, adverse reaction to stress and a lack of sophisticated communication skills.” See also: Scottish Law Commission Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (Scot. Law Com., Report No. 125, 1990) para. 4.55, at p. 27 where it was argued that “if one of the purposes of a provision like the Canadian section 715.1 is to secure additional evidence which, by its near contemporaneity, is likely to be fuller and more accurate than evidence given in court, we can see no reason why that advantage should be conferred in the trial of certain offences but denied in others.”

1042 An alternative model is provided by the new Canadian statutory scheme which stipulates that the use of a support person, a screen or the live television link facility shall be available upon application to the court to eligible witnesses “unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice”: s. 486.1(1) (support person), s. 486.2(1) (live television link and screen) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.

facilitates protection of the greatest number of child witnesses from undue trauma in the interests of the proper administration of justice while simultaneously ensuring the highest level of protection for the rights of the accused.

4.4.0 Availability of Special Measures – Eligible Witnesses:

4.4.1 The jurisdictions considered herein vary in their prescription of the classes of witness considered eligible to avail of special measures; although it is agreed that these protective measures should be available to child witnesses, there is no real consensus as to who constitutes a ‘child witness’ for this purpose.

4.4.2 While an inclusive interpretation of the term ‘child witness’ – in the same way as non-specificity of applicable offences or the enumeration of a very broad range of applicable offences – will inevitably result in a greater number of persons giving evidence with the assistance of special measures, it should be noted that since the purpose of all special measures is to reduce the trauma experienced by a child when acting as a witness in criminal proceedings and thereby improve the quality of the child witness’s evidence, an all-encompassing approach may ‘over-compensate’ and benefit those who are not, strictly speaking, in need of the protection.\textsuperscript{1045} This, in turn,

\textsuperscript{1045} New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 132 which also suggested that regard should be had to the linguistic or cultural background of the witness. The Commission had cautioned in para. 131 that “there is no reason to think that most, or even many, members of one particular group are in fact vulnerable, or that any person should be regarded as vulnerable simply because they belong to a particular group”. Similarly, the Canadian courts are required to take into account the following factors when determining whether to authorize the use of a support person, a screen, the live television link facility or to prohibit the accused from personally cross-examining a witness: “the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance that the judge or justice considers relevant”. See: s. 486.1(3), s. 486.2(3) and s. 486.3(3) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15. However, it is important to note that these provisions – and these factors – apply in relation to all witnesses; child witnesses and witnesses with mental or physical disabilities are presumptively entitled to the use of these special measures – “unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice” or “unless the judge or justice is of the opinion that the proper
could have implications for the fairness of the proceedings in relation to the accused person by upsetting the delicate balance required to be maintained between the protection of child witnesses, the elicitation of the best evidence and the preservation and vindication of the constitutional rights of the accused.

4.4.3 Conversely, it is arguable that an unduly narrow definition of the term ‘child witness’ – in the same manner as the arbitrary selection of a particular offence or offences as the only offences to which special measures can apply – may result in a failure to protect vulnerable witnesses from the stress of testifying in open court and even lead to the loss of highly relevant evidence, where a child is unwilling or unable to testify by conventional means or in the traditional court setting. The balance to be achieved is fine.

4.4.4 In Ireland, as in Canada, persons aged less than eighteen years are considered eligible – as ‘child witnesses’ – to avail of the special measures examined herein in respect of proceedings involving one or more of the applicable offences. Accordingly, the live television link facility is available to assist persons under eighteen years of age, other than the accused “unless the court sees good reason to the contrary”.

\[\text{administration of justice requires the accused to personally conduct the cross-examination}^{1046}\] accordingly, it is not necessary to have regard to these factors when determining applications made by or on behalf of such witnesses.

1046 A child witness must be under eighteen years in order to be eligible to give evidence: (i) from outside the courtroom or from behind a screen or other one-way device, pursuant to s. 486.2 of the Criminal Code as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15; or (ii) with the benefit of a support person, pursuant to s. 486.1(1). Equally, the prohibition on cross-examination of a witness by the accused in person – a statutory measure not yet adopted in this jurisdiction – is confined to witnesses aged less than 18 years pursuant to s. 486.3 of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.

1047 It should be noted in this context that the age limit in this jurisdiction was, prior to the amendment of Part III of the Criminal Evidence Act 1992 by the provisions of s. 257(3) of the Children Act 2001, less than seventeen years; the age limit recommended by the Law Reform Commission of Ireland in its Consultation Paper and Report, which served as the impetus or catalyst for the enactment of Part III of the Criminal Evidence Act, 1992. See: Law Reform Commission of Ireland, \text{Consultation Paper on Child Sexual Abuse} (August, 1989); and Law Reform Commission of Ireland, \text{Report on Child Sexual Abuse} (LRC 32-1990) (September, 1990).

1048 Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001. The facility of video-recorded evidence pursuant to ss. 15 and 16 of the Criminal Evidence Act 1992, as amended by ss. 19 and 20 of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001 also extends to the recording of
provision of an intermediary to assist a person who is giving evidence via live television link, upon application of the prosecution or the accused, is limited to persons under eighteen years of age, upon satisfaction of the court that, having regard to the age or mental condition of the witness, the interests of justice require that any question to be put to the witness, be put through an intermediary.

While neither the use of a one-way screen to obscure the child witness’s view of the accused while giving evidence, nor the provision of a support person to accompany the child witness while testifying are the subject of statutory authority or regulation in this jurisdiction, it is submitted that both are available in the exercise of the court’s inherent jurisdiction to arrange its procedures in order to promote the proper administration of justice; such measures ought to be available at least on the same basis as those special measures contained in Part III of the Criminal Evidence Act 1992, as amended.
In England, previous statutory schemes favored a split definition of the relevant age limit for child witnesses in relation to obtaining the benefit of special measures, namely: less than seventeen years in respect of sexual offences and less than fourteen years in respect of an attempt, conspiracy to commit, aiding, abetting, counselling, procuring or inciting the commission of or committing offences which involved an assault on, or injury or a threat of injury to a person, cruelty to persons under sixteen years. However, the lack of coincidence between the definition of ‘child witness’ depending upon the nature of the offence with which the accused was charged was criticized and the modern statutory scheme in England has simplified the definition of ‘child witness’ and extended eligibility to avail of special measures.

It is submitted that ‘child witness’ in this context, would refer to persons aged less than eighteen years, rather than persons aged less than seventeen years, as originally recommended by the Law Reform Commission of Ireland, in light of the like amendment of Part III of the Criminal Evidence Act 1992 introduced by s. 257(3) of the Children Act 2001. Although the Commission’s recommendations were confined in their application to child complainants of sexual offences, it is submitted that, in line with s. 12, as amended, screens are at least available in proceedings concerning sexual offences, offences involving violence or the threat of violence and offences of child trafficking or sexual exploitation. See: Law Reform Commission, Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.11, at p. 72 and paras. 7.34-7.35, at pp. 81-82 and Recommendation No. 60, at p. 96; Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) paras. 5.29, at p. 95, 7.085 at p. 176, 7.098, at p. 180 and Recommendation No. 50, at p. 207. However, it is submitted that a presumption of trauma does not apply; the use of screens may be authorised by the courts, either upon application or of its own motion, in the exercise of its inherent — and unfettered — jurisdiction. See, further: sections 4.7.0-4.7.20 and 4.14.0-4.14.4 below.

1052 Section 32(2) and (6) and s. 32A of the Criminal Justice Act 1988, as inserted by s. 54 and 55(6) of the Criminal Justice Act 1991. The Pigot Report rejected suggestions in relation to the age limit applicable to the proposed special measures that all child witnesses under the age of sixteen should benefit from any change in the law and concluded that “the general age limit should coincide with the legally accepted point at which a child becomes a young person” that is, the measures should be available to child witnesses aged less than fourteen years in proceedings concerning offences involving violence. However, the Group distinguished offences of violence from sexual offences for the purposes of fixing an age limit on the grounds of the “obvious different and special considerations” involved in sexual offences – which differences were not outlined or analysed – and concluded that the proposed special measures should be available to child witnesses in relation to the latter offences, where the child was aged less than seventeen years rather than fourteen: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) at para. 2.36. See also: Howard, M.N. Phlpson on Evidence (15th ed., 2000) para. 10-33, at p. 215.

1053 Tapper, Colin Cross and Tapper on Evidence (9th ed., 1999) at p. 211, fn. 13: “It creates confusion that the age limits for video recording, which need not be on oath but is still capable of amounting to evidence in chief, are different from those for giving oral testimony on oath, given that the witness must be available for cross-examination.”
measures to all persons aged less than seventeen at the time of the hearing.\textsuperscript{1054}

4.4.7 Similarly, in New Zealand, an age limit of less than seventeen years applies to the availability of special measures although the scope of this statutory scheme is further expressly restricted to child complainants of sexual offences.\textsuperscript{1055} While the courts have exercised their inherent jurisdiction in harmony with the statutory scheme to expand the scope of special measures to include complainants of non-sexual offences,\textsuperscript{1056} it has refused to extend the availability of special measures to child witnesses of non-sexual offences, such as ill-treatment,\textsuperscript{1057} holding that the question as to whether the special provision allowing the reception of videotapes as the evidence-in-chief of a child should be further extended to non-sexual cases where the child witness was not a victim was a question best left to the legislature.\textsuperscript{1058}

\textsuperscript{1054} The Youth Justice and Criminal Evidence Act 1999 in England extends availability of special measures to two categories of witness: (i) witnesses eligible on grounds of personal characteristics such as age or incapacity (s. 16); and (ii) witnesses eligible for assistance on grounds of fear or distress about testifying (s. 17). Child witnesses belong to the first category. The main significance of the distinction between the two categories concerns the range of special measures available to each category; witnesses qualifying for assistance under s. 16 may benefit from any of the special measures outlined in ss. 23 to 30 inclusive, while witnesses qualifying pursuant to s. 17 may only avail of the measures set out in ss. 23 to 28, inclusive. Thus a court is not empowered to direct that an intermediary be made available (s. 29) or that certain aids to communication would be provided (s. 30) in order to assist the latter category of witness in giving his or her evidence.

\textsuperscript{1055} Section 23C(b)(i) and (ii) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.


\textsuperscript{1057} In \textit{R v M} [1997] NZFLR 920 (H.C. Wellington) the accused was charged with the murder of her son, aged 18 months, resulting from a pattern of ill-treatment. One of the main witnesses for the Crown was the accused’s daughter, aged 10½ years; the Crown applied to have pre-trial video recordings of interviews with this child as to the accused’s abuse of the deceased child – made while the deceased child was still alive and in hospital – admitted into evidence as her evidence-in-chief, any further evidence being given from behind a screen or by way of closed circuit television. The Court held that there was no real argument as to the social utility of allowing children who may be required to give evidence as witnesses in relation to offences other than sexual offences with screens or by closed-circuit television when the evidence in the particular case establishes the need because of the nature of the case and the degree to which the child may be adversely affected by being required to give evidence either because of the closeness of the child’s involvement or because of relationships with the adults involved. The Court asserted that it was a factor to be weighed whether the child was a complainant without whose evidence the trial could not proceed or a witness who was a useful or valuable, but not a necessary witness, however, it held that the overriding factor – the importance of which was recognized by the legislature as the basis for ss. 23C – 23I – was the wellbeing of the child who was required to give evidence.

\textsuperscript{1058} The High Court in \textit{R v M} [1997] NZFLR 920, at p. 920, expressed concern as to where the line was to be drawn and concluded that, whilst it was satisfied that the inherent jurisdiction of the court could properly be invoked to direct that a child witness in circumstances such as the present child witness

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4.4.8 The most restrictive approach to the definition of child witness is contained in the modern Scottish legislation\textsuperscript{1059} which prescribes an age limit of less than sixteen years on the date of commencement of the proceedings in which the trial is being or is to be held;\textsuperscript{1060} the statutory scheme also contains presumptive rules in favour of special measures to assist child witnesses aged less than twelve years giving evidence in respect of applicable offences, including offences of a sexual or violent nature.\textsuperscript{1061}

4.4.9 While the maximum age limits set by the statutory definitions of ‘child witness’ ranges across the jurisdictions from less than sixteen years to less than eighteen years, provision is also made in the statutory schemes of England\textsuperscript{1062} and Canada\textsuperscript{1063} for the extension of such age limits in particular

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\textsuperscript{1059} See: section 271(1)(a) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004, replacing sections 56-59 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1990; ss. 33-35 of the Prisoners and Criminal Proceedings (Scotland) Act, 1993 (c. 9); s. 271 of the Criminal Procedure (Scotland) Act 1995 (c. 46) as substituted by s. 29 of the Crime and Punishment (Scotland) Act, 1997 (c. 48).

\textsuperscript{1060} Section 271(3) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 provides that “proceedings shall be taken to have commenced when the indictment or, as the case may be, the complaint is served on the accused”.

\textsuperscript{1061} Section 271B of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 provides that where a child witness is aged less than twelve years and is to give evidence in a trial in respect of an applicable offence, the court shall not make an order which has the effect of requiring the child witness to be present in the courtroom or any part of the court building in which the courtroom is located for the purpose of giving evidence unless satisfied: (i) where the child witness has expressed a wish to be so present for the purposes of giving evidence, that it is appropriate for the child witness to be so present for that purpose; or (ii) in any other case, that the taking of the evidence of the child witness without the child witness being so present would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made.

\textsuperscript{1062} Under the Youth Justice and Criminal Evidence Act 1999, in order to qualify for eligibility as a child witness under s. 16, the witness must be aged less than 17 years at both stages of the decision-
circumstances – for example, where the ‘child’ exceeded the age limit during the course of giving evidence at the trial of the accused – enabling witnesses who have surpassed the age threshold to continue to enjoy the benefit of special measures whilst giving evidence. By way of contrast the Irish legislation is silent as to the time at which the age limits apply; arguably leaving to the judiciary the determination whether any such extension is permissible. Such ‘judicial’ extension of the statutory age limits in relation to eligibility for special measures has been authorised by the New Zealand courts through the exercise of the court’s inherent jurisdiction.

making process in respect of the eligibility of a witness to avail of special measures; that is, at the determination whether, in the opinion of the court, any special measure (or combination thereof) would be likely to improve the quality of the witness’s evidence and, if so, which special measure(s). Where the child witness attains the age of 17 after he / she has commenced giving evidence with a special measure (s. 21(8)) or after video recordings have been made pursuant to s. 28 for admission into evidence as the cross-examination and re-examination of such witness – his / her examination-in-chief being provided by an earlier video recording pursuant to s. 27 – the special measures direction shall continue to have effect (s. 22). Such witnesses are referred to as “qualifying witnesses” and “qualifying witnesses in need of special protection” respectively. The previous statutory scheme in England had permitted an extension of the applicable age limits in respect of the admission into evidence of relevant video recordings (s. 32A(7)), but not in relation to the use of the live television link facility (s. 32(6) of the Criminal Justice Act 1988, as amended). See: R v Day [1997] 1 Cr App Rep 181 (C.A.); Spencer, J.R. and Flin R., *The Evidence of Children: The Law and the Psychology* (2nd ed., 1993) at p. 184; and Stockdale, *Criminal and Civil Evidence.* 2000-2001 (2000) at p. 228.

Must the child be aged less than 14 or 18 years respectively: (i) at the date of the offence with which the accused is charged, or the last of the offences with which the accused is charged; (ii) at the date of the institution of proceedings; (iii) at the date of the application for the use of the special measure in question where the leave of the court is required; or (iv) at the date of the commencement of the trial? Section 2(3) of the Criminal Evidence Act 1992 simply provides – in identical terms to s. 19(2) of the Children Act 1997 – that, where in any criminal proceedings the age of a person at any time is material for the purposes of any provision of the Act, his age at that time shall for the purposes of that provision be deemed, unless the contrary is proved, to be or to have been that which appears to the court to be or to have been his age at that time.

The special measures in New Zealand – contained primarily in ss. 23C – 23I of the Evidence Act 1908, as amended – are available only to child complainants, that is, complainants who have not “at the commencement of the proceedings, attained the age of 17 years”; s. 23C(b) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. There is no express statutory provision extending the applicability of the special measures to complainants aged 17 years or more after the commencement of the proceedings, where such complainant is not suffering from a mental handicap.

It was held in *R v L* (1990) 6 CRNZ 383, *per* Eichelbaum C.J. that the protection afforded to those under 17 years could be extended inherently or impliedly to those over 17 years where that was warranted. See also: *R v C* (1990) 6 CRNZ 315. Writing extra-judicially in an article entitled, “Was Eve Merely Framed; or Was She Forsaken?” (Part II) [1994] NZLJ 426, at p. 427, Justice Thomas argued that adult victims of sexual offences should be permitted to give evidence via closed circuit television or from behind a screen: “It is not suggested that a screen or television equipment should be
4.4.10 Each of the jurisdictions examined herein also makes provision for the extension of eligibility to avail of the special measures examined herein to persons exceeding the age limit whose mental capacity is compromised by a mental handicap\textsuperscript{1067} or mental disorder;\textsuperscript{1068} Canada also extends eligibility to persons – aged eighteen years or more – who may have difficulty communicating their evidence by reason of a mental or physical disability\textsuperscript{1069} and England regards as eligible witnesses suffering from a

\textsuperscript{1067} Section 19 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001. There is no definition of “mental handicap” provided. It is arguable that it does not cover mental illnesses or disorders such as manic depression or schizophrenia but is confined to mental handicap in the sense of conditions or diseases causing retardation of development, which should extend to include degenerative conditions such as Alzheimer’s Disease where the patient suffers a reduction or loss of their mental faculties. It is also debatable whether “mental handicap” could be used to describe disorders which may hinder or even render impossible the giving of evidence in a conventional manner such as Attention Deficit Disorder which, although common in children, can often extend into adulthood. It is to be regretted that the Criminal Evidence Act 1992 did not expressly include the mentally ill among its witnesses eligible for assistance under Part III as recommended by the Law Reform Commission since the law should be concerned with “the degree and effect, rather than the cause, of mental impairment or handicap”: Law Reform Commission of Ireland, Report on Sexual Offences Against the Mentally Handicapped (LRC 33-1990) at p. 2. Similarly, the availability of the special measures under Part III of the Children Act 1997 is extended by s. 20(b) to persons of full age with a mental disability “to such an extent that it is not reasonably possible for the person to live independently”; it is not clear whether this expression equates with the term “mental handicap” used in s. 19 of the Criminal Evidence Act 1992, or whether the former is wider or narrower in scope than the latter. See also: s. 23C(b) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989, in New Zealand which extends availability of special measures to complainants beyond the age limit of 17 years – judged as of the commencement of the proceedings – who are “mentally handicapped”.

\textsuperscript{1068} Section 271(1)(b) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 includes within the definition of ‘vulnerable witness’ a person who is not a child witness – that is, he / she is aged sixteen years or more – where there is a significant risk that the quality of the evidence to be given by that person will be diminished by reason of mental disorder within the meaning of s. 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13). Equally, in determining whether a person is ‘vulnerable’ by operation of s. 271(1)(b), the court is obliged to take into account, inter alia “any physical disability or other physical impairment which the person has, as appear to the court to be relevant.”

\textsuperscript{1069} See: s. 486.1 and s. 486.2 of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15. While the prohibition on cross-examination of a witness by the accused in person in s. 486.3(1) is restricted to witnesses aged less than eighteen years only, s. 486.3(2) provides that in any proceedings against an accused, on application to the court, the accused “shall not personally cross-examine [a] witness if the judge or justice is of the opinion that, in order to obtain a full and candid account from the witness of the acts complained of, the accused should not personally cross-examine the witness” and that counsel must be appointed by the court to conduct such cross-examination; in making this determination, the court shall take into account “the age of the witness,
mental disorder, a "significant impairment of intelligence and social functioning" or physical disability or disorder where the court is of the opinion that the quality of evidence given by the witness is likely to be diminished by reason of such disorder or disability. 1070

4.4.11 The Canadian courts have expressly considered the 'constitutionality' of prescribing an age limit of less than eighteen years – also applied in this jurisdiction – regarding eligibility to avail of special measures in circumstances where a range of lower age thresholds are stipulated by other jurisdictions. 1071 The Supreme Court of Canada has held that the age limit of eighteen years is not arbitrary but rather is consistent with laws which define the age of majority to be eighteen years and with the special vulnerability of young victims of sexual abuse. 1072 L'Heureux-Dubé J. noted that young children or adult women complainants of sexual offences alike suffer a traumatic experience as witnesses and asserted that special measures 1073 constituted a "legislative attempt to partly shield the most
vulnerable" from the requirement that they "relive, through detailed testimony, the horrendous events through which they have suffered" and thereby "experience doubly what is already significant pain"; it was held that the United Nations Convention on the Rights of the Child,\textsuperscript{1074} to which Canada is a signatory, demanded that Canadian children under the age of eighteen years be protected as a class.\textsuperscript{1075} Moreover, while it was conceded that "at the extreme end of the age qualification, the [special measure] may have minimum probative value" in that it would not significantly add to the evidence of the 'child' witness, it was asserted that in such circumstances a "corresponding low level of prejudice would warrant the exclusion of the evidence"\textsuperscript{1076} thereby affording adequate protection for the rights of the accused.

4.4.12 It is submitted that a similarly permissive approach would be adopted by the judiciary in this jurisdiction and the generous definition of 'child witness' approved notwithstanding the lower age limits employed in other jurisdiction, having regard in particular to the increased acceptance of the use of special measures to facilitate the receipt of evidence from witnesses as illustrated by recent statutory reforms both in this jurisdiction\textsuperscript{1077} and in

\textsuperscript{1074} It was noted that Article 1 of the United Nations Convention on the Rights of the Child defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier": \textit{R v L(D.O.)} 18 C.R.R. (2d) 257, at p. 284, per L'Heureux-Dubé J. (S.C.C.).

\textsuperscript{1075} \textit{R v L(D.O.)} 18 C.R.R. (2d) 257, at p. 285, per L'Heureux-Dubé J. (S.C.C.): "I find that the inclusion of all children up the age of 18 under the protections afforded by s. 715.1 of the Code is required by the continued need for such protection and is in conformity with international and domestic instruments. As such, it is in no way arbitrary and, accordingly, it was perfectly legitimate for Parliament to draw the line where it did. A claim of unconstitutionality of s. 715.1 on such a basis must be rejected." She concluded that: "If the criminal justice system is to effectively perform its role in deterring and punishing child sexual abuse, it is vital that the law provide a workable, decent and dignified means for the victim to tell her or his story to the court. In my opinion, s. 715.1 is a modest legislative initiative working toward this end. For the reasons outlined above, I find that s. 715.1 does not infringe either s. 7 or s. 11(d) of the Charter."

\textsuperscript{1076} \textit{R v Toten} 83 C.C.C. (3d) 5, 16 C.R.R. (2d) 49, at p. 81, per Doherty J.A. (Ont. C.A.).

\textsuperscript{1077} Pursuant to s. 13 of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001, a person other than the accused may give evidence, whether from within or without the State, via a live television link in any proceedings involving an applicable offence where: (i) he / she is under 18 years of age "unless the court sees good reason to the contrary"; (ii) he / she is aged 18 years or more but has a mental handicap unless the court sees good reason to the contrary; or (iii) "in any other case", or all other persons (with the exception of the accused) "with the leave of the court". Section 39 of the Criminal Justice Act 1999, provides that the live television link facility is available with the leave of the court in "any proceedings..."
on indictment for an offence, including proceedings under Part IA of the Criminal Procedure Act, 1967,” where the court is satisfied that the person is likely to be in fear or subject to intimidation in giving evidence otherwise than via live television link. This provision is stated to be without prejudice to any other enactment – such as the Criminal Evidence Act 1992 – providing for the giving of evidence through a live television link: s. 39(3) of the Criminal Justice Act 1999. See also: s. 21 of the Children Act 1997; s. 29 of the Criminal Evidence Act 1992, as inserted by s. 24 of the Extradition (European Union Conventions) Act 2001; and Or. 63A of the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No. 2 of 2004).

1078 Section 17 of the Youth Justice and Criminal Evidence Act 1999 in England provides that a witness (other than the accused) is eligible for assistance where the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings, taking into account: (a) the nature and alleged circumstances of the offence to which the proceedings relate; (b) the age of the witness; (c) such of the following matters as appear to the court to be relevant, namely – (i) the social and cultural background and ethnic origins of the witness, (ii) the domestic and employment circumstances of the witness, and (iii) any religious beliefs or political opinions of the witness; (d) any behaviour towards the witness on the part of – (i) the accused, (ii) members of the family or associates of the accused, or (iii) any other person who is likely to be an accused or a witness in the proceedings; and (e) any views expressed by the witness. In relation to complainants of sexual offences, s. 17(4) provides that where a complainant is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is automatically eligible for assistance under s. 17 unless the witness has informed the court of his or her wish not to be so eligible. This automatic eligibility extends to complainants of sexual offences where the alleged perpetrator is also charged, in the same proceedings, with other non-sexual offences. See also: s. 51 of the Criminal Justice Act 2003.

1079 See: s. 486.1(2) and s. 486.2(2) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15 which extend the availability of a support person, a screen or other device and the live television link facility to all witnesses, upon application to the court, where the “judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of”, having regard to the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance that the judge or justice considers relevant. Equally, having regard to the same factors, the court is empowered, upon application pursuant to s. 486.3(2), to order that the accused shall not personally cross-examine a witness if the “judge or justice is of the opinion that, in order to obtain a full and candid account of the acts complained of, the accused should not personally cross-examine the witness”.

1080 Section 271(1)(b) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 defines as ‘vulnerable’ – and therefore eligible for special measures – a person other than a child witness where there is a “significant risk that the quality of the evidence to be given by the person will be diminished by reason of...fear or distress in connection with giving evidence at the trial”. In determining vulnerability, the court is required to take into account: (a) the nature and circumstances of the alleged offence to which the proceedings relate; (b) the nature of the evidence which the person is likely to give; (c) the relationship (if any) between the person and the accused; (d) the person’s age and maturity; (e) any behaviour towards the person on the part of the accused, members of the family or associates of the accused, any other person who is likely to be an accused or a witness in the proceedings; and (f) such other matters including the social and cultural background and ethnic origins of the person, the person’s sexual orientation, the domestic and employment circumstances of the person, any religious beliefs or political opinions of the person, and any physical disability or other physical impairment which the person has, as appear to the court to be relevant. In addition to the foregoing, when determining whether to make an order authorising the use of a special measure, the court, pursuant to s. 271C(8), shall have regard to: (i) the possible effect on the witness if required to give evidence without the benefit of any special measure, and (ii) whether it is likely that the witness would be better able to give evidence with the benefit of a special measure.
to suffer fear or distress if required to give evidence in the absence of the assistance provided by a special measures and such fear or distress is likely to compromise the quality of the witness’s evidence.\footnote{1081} Accordingly it is submitted that, in light of the foregoing – and, in particular, the presence of other safeguards for the rights of the accused in the operation of these special measures analysed in the following sections\footnote{1082} – the adoption of a definition of ‘child witness’ which includes all persons aged less than eighteen years should not upset the balance required between the protection of child witnesses, the proper administration of justice and the vindication of the rights of the accused.

4.5.0 Availability of Special Measures – Exclusion of the Accused from Eligibility:

4.5.1 In the context of the parameters of special measures, the tension between the protection of child witnesses from undue trauma while testifying, the proper administration of justice and the constitutional duty to safeguard the rights of the accused is most clearly illustrated by the exclusion – either express or implied – of the accused from eligibility to avail of special measures; such exclusion is evident in the statutory schemes adopted in Ireland,\footnote{1083} England\footnote{1084} and New Zealand.\footnote{1085}

\footnote{1081} The Law Commission in New Zealand recommended the extension of the alternative modes of giving evidence to a greater number of witnesses in para. 124 of its Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) on the grounds that there was “widespread acceptance of the alternative ways of giving evidence, no major problems [had] arisen, the disadvantages [were] minimal and the benefits for people to whom the provisions presently apply [were] clear”; the Commission advocated, in para. 131, including people with communication disabilities, people from linguistic and cultural minorities, elderly people and victims of traumatic offences such as sexual offending and violence whether in the civil or criminal context.

\footnote{1082} See, in particular: sections 4.9.0-4.9.6, 4.10.0-4.10.14, 4.11.0-4.11.37, 4.12.0-4.12.19 and 4.18.0-4.18.28.

\footnote{1083} Section 13 of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001 expressly excludes the accused from availing of the live television link facility when testifying. Equally, s. 39(1) of the Criminal Justice Act 1999 provides for the giving of evidence in any proceedings on indictment by way of live television link, with the leave of the court, by persons “other than the accused” likely to be in fear or subject to intimidation in giving evidence otherwise. Section 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001, does not expressly exclude the accused person from eligibility to avail of the use of an intermediary through which questions could be put, and, moreover, the application to the
4.5.2 The exclusion of the accused from eligibility to avail of special measures, takes effect notwithstanding the fact that the accused may fall within the definition of 'child witness' or otherwise qualify as vulnerable under the definition of vulnerability. Although the position of the accused is unique among witnesses in that he/she cannot be compelled to give evidence at trial, such exclusion appears indefensible; if the purpose of these statutory schemes is the protection of vulnerable and intimidated witnesses and the proper administration of justice through the creation of optimum conditions for the production and reception of the best evidence from all witnesses, then there can be no logical reason\textsuperscript{1086} to exclude from the ambit of these

court for the appointment of an intermediary may be made by either the prosecution or the accused. However, since the provision states that the person under 18 years of age (or a person, having attained that age, with a mental handicap) is only eligible where he or she is giving, or is to give, evidence through a live television link and the accused cannot qualify for such assistance under either s. 13 of the Criminal Evidence Act 1992, as amended, or s. 39 of the Criminal Justice Act 1999, it would appear that the accused is also excluded from benefiting from the use of an intermediary pursuant to s. 14 of the Criminal Evidence Act 1992, as amended.

\textsuperscript{1084}The accused is also expressly excluded from eligibility in relation to any of the special measures outlined in the Youth Justice and Criminal Evidence Act 1999 in England; section 16(1) (where eligibility depends upon personal characteristics such as age or incapacity), s. 17(1) (where the quality of the witness's evidence is likely to be diminished as a result of the fear and distress of the witness in connection with testifying) and s. 22(1) (which extends the protection afforded to witnesses "in need of special protection" in s. 21 to other "qualifying witnesses") all regard as eligible vulnerable witnesses "other than the accused".

\textsuperscript{1085}As indicated above, special measures in New Zealand are only available to child complainants aged less than seventeen years at the commencement of the proceedings – of sexual offences pursuant to s. 23C of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989; although extended by the exercise of the court’s inherent discretion to include non-sexual offences, the courts have been reluctant to include child witnesses amongst eligible witnesses. In these circumstances, it is submitted that the accused is excluded by necessary implication from the ambit of special measures in New Zealand. See: \textit{R v M} [1997] NZFLR 920 (H.C.).

\textsuperscript{1086}See: Keane, A., \textit{The Modern Law of Evidence} (5\textsuperscript{th} ed., 2000) at p. 134 wherein he asserts that "[t]here is no obvious or compelling reason for excluding the accused from eligibility for assistance under either s. 16 or s. 17 [of the Youth Justice and Criminal Evidence Act 1999]." In the Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, \textit{Speaking Up For Justice} (London: Home Office, June 1998) para. 3.28, the Interdepartmental Working Group again recommended the exclusion of the accused from eligibility to avail of these special measures. In justifying this exclusion, the Group relied upon, \textit{inter alia}: (i) the existing provision for special procedures to be adopted when interviewing vulnerable suspects; (ii) the "considerable safeguards in the proceedings as a whole" which ensure that the accused receives a fair trial, citing as an example the fact that the accused has a right to legal representation whereas a witness does not and the fact that the accused has a right to choose whether to give evidence since he or she cannot be compelled to testify; and (iii) the fact that many of the special measures are designed to shield a vulnerable or intimidated witness from the accused – such as live television links, screens and the use of video-recorded evidence-in-chief and pre-trial cross-examination – and, accordingly would not be applicable to the accused. Birch criticized these reasons for the exclusion of the accused from eligibility asserting that there were "as muddled as they are unconvincing": Birch D., "A Better Deal for Vulnerable Witnesses?" [2000] Crim LR 223, at p. 242. Birch pointed out that, although the
special measures directions an accused person who – apart from his / her status as the accused – would qualify for eligibility as a ‘vulnerable witness’ and accordingly, would benefit, in terms of the reduction of the trauma associated with the witness experience and the resulting improved quality of his / her evidence, if permitted to give evidence with the assistance of such measures.

4.5.3 However, the courts in England have expressly considered and upheld as compatible with the requirements of Article 6 of the European Convention on Human Rights, the exclusion of the accused from eligibility to avail of special measures pursuant to the English statutory scheme. In R(S) v Waltham Forest Youth Court the Queen’s Bench upheld the refusal of the trial judge to make a ‘special measures direction’ in favour of a child accused who wished to testify on her own behalf but was afraid to do so in the physical presence of her co-accused, finding that the court had no power to make a direction in favour of an accused person authorizing the use of a live television link, either under Part II of the Youth Justice and Criminal Evidence Act 1999 or otherwise in the exercise of its inherent jurisdiction. The Court discerned a clear legislative intent to confine the regime of ‘special measures’ to vulnerable witnesses other than the accused and asserted that “however much it may be regretted by experts in the field, it is not for the courts to go behind that choice or to attempt to remedy
perceived deficiencies in the legislation". Furthermore, it observed that the statutory scheme was concerned not to restrict the rights of the accused but to augment the protection available for other witnesses.

4.5.4 The Court further held that the absence of any power to authorize the use of special measures in favour of an accused did not render the statutory scheme incompatible with Article 6 since it did not in any way derogate from the powers and safeguards already in place under the provisions of domestic law and, in particular, the obligation of the trial judge to ensure a fair trial and to see that an accused person did not suffer injustice through inequality of arms; Eady J. noted that "there are available to the court a range of steps which can be taken where appropriate and necessary for facilitating a fair trial process" and that s. 19(6) of the Youth Justice and Criminal Evidence Act 1999 expressly preserved such pre-existing powers. Accordingly, the Court concluded that the refusal to order a 'special measures direction' in respect of the evidence of an accused could not be said to amount to a breach of the accused's right to a fair trial and that the exclusion of the accused from eligibility to avail of

1089 R(S) v Waltham Forest Youth Court [2004] 2 Cr App R 21, at para. 22, per Eady J. (Q.B. Div.). The Court concluded in para. 88: "What seems to me to be conclusive is that Parliament from 1988 onwards, in the statutes to which I have referred above, up to and including the 1999 Act, has sought to provide exclusively for the circumstances in which live link evidence may be utilised in the course of a criminal trial. That statutory regime seems to me to be incompatible with any inherent or common law jurisdiction existing in parallel."

1090 R(S) v Waltham Forest Youth Court [2004] 2 Cr App R 21, at para. 82, per Eady J. (Q.B. Div.).

1091 The Court relied upon the decision of the Court of Appeal in R v Brown (Milton) [1998] 2 Cr App R 364, at p. 371 (C.A.), wherein it was held that the trial judge has a clear duty to do everything possible, consistent with giving the defendant a fair trial, to minimise the trauma suffered by "other participants" of the trial.

1092 "Insofar as it is necessary, for the purposes of ensuring a fair trial, for the court to redress the balance between 'sides' in criminal proceedings in order to achieve 'equality of arms', one factor that may have to be taken into account in striking the balance is that an accused person is confronted by a witness or witnesses with the benefit of special measures. There is no reason to suppose that this consideration must be put 'out of bounds' when addressing the question whether any imbalance has arisen which requires to be redressed": R(S) v Waltham Forest Youth Court [2004] 2 Cr App R 21, at para. 30, per Eady J. (Q.B. Div.).

1093 R(S) v Waltham Forest Youth Court [2004] 2 Cr App R 21, at para. 31, per Eady J. (Q.B. Div.).

1094 Section 19(6) of the Youth Justice and Criminal Evidence Act 1999 provides that: "Nothing in this Chapter is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise) - (a) in relation to a witness who is not an eligible witness, or (b) in relation to an eligible witness where (as, for example, in a case where a foreign language interpreter is to be provided) the order is made or the leave is given otherwise than by reason of the fact that the witness is not an eligible witness."
statutory special measures was not incompatible with Article 6 of the
Convention.

4.5.5 The House of Lords revisited this issue in \textit{R(D) v Camberwell Green Youth Court}\textsuperscript{1095} where the legislative exclusion of accused persons—two children accused of robbery—from eligibility to utilize special measures was again upheld. The Court reiterated that trial judges had wide and flexible inherent powers to ensure that the defendant received a fair trial—including a fair opportunity of giving the best evidence possible—and that the statutory scheme did not prevent the court from taking such steps. While noting the difficulties faced by child accused, Baroness Hale asserted that “the answer to them cannot be to deprive the court of the best evidence available from other child witnesses merely because the 1999 Act scheme does not apply to the accused” since that would be to have “the worst of all possible worlds”\textsuperscript{1096} rather the Court advocated the exercise of the trial court’s inherent powers to ensure that an accused received a fair trial. In this regard, the Court noted with approval the decision of the Court of Appeal in \textit{R v H (Special Measures)}\textsuperscript{1097} wherein it was held that the trial judge had the inherent power to ensure the fair trial of a defendant with learning

\textsuperscript{1095} \textit{R(D) v Camberwell Green Youth Court} [2005] 1 WLR 393, [2005] 1 All ER 999, [2005] 2 Cr App R 1 (H.L.).

\textsuperscript{1096} \textit{R(D) v Camberwell Green Youth Court} [2005] 1 WLR 393, para. 57, \textit{per} Baroness Hale (H.L.).

\textsuperscript{1097} \textit{R v H (Special Measures)} Times, 15\textsuperscript{th} April, 2003, \textit{per} Kay L.J. (C.A.): “The trial judge was prepared to allow the defendant to have the support of an interpreter during the proceedings and their Lordships could see no reason why a person with an understanding of the defendant’s language difficulties should not be allowed to interpret questions for the defendant in the witness box, just as such questions might be interpreted for a foreign defendant who did not speak English. Their Lordships could see no difficulty, either, with the judge’s suggestion that a detailed defence statement could be read to the jury. They added that, if the defendant had difficulty in recalling certain facts, leading questions, based on his defence statement could be asked. Those were all matters within the trial judge’s discretion and inherent powers to ensure a fair trial and their Lordships’ suggestions were merely designed to assist.” See also: \textit{Practice Direction (Crown Court: Trial of Children and Young Persons)} [2000] 1 WLR 659 which was issued in the wake of the decision of the European Court of Human Rights in \textit{T and V v United Kingdom} (2000) 30 EHRR 121 (E.Ct.H.R.) and which provides in para. 3 that: “The trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress. All possible steps should be taken to assist the young defendant to understand and participate in the proceedings. The ordinary trial process should so far as necessary be adapted to meet those ends”. This Practice Direction advocates, \textit{inter alia}, the use of supporters throughout the trial, dispensing with wigs and gowns, permitting all participants to sit on the same level and allowing child accused to sit with their family where possible, increasing the number of breaks to take into account the child’s shorter attention span, explaining the proceedings to the child and arranging pre-trial visits to the courtroom and restricting both attendance by the public and media reporting of proceedings involving child accused.
difficulties by allowing him to be accompanied during his evidence by a support person, who could also act as an interpreter, and permitting reliance on his defence statement while in the witness box.

4.5.6 Lord Rodger asserted that, as a general rule, a provision that is "designed to allow truthful witnesses for both sides to give their evidence to the best of their ability" \(^{1098}\) cannot make a trial unfair, simply because there is no corresponding provision designed to allow a truthful accused person to give his evidence to the best of his ability in circumstances where the accused does not need to give evidence and has a legal representative to assist him / her if he / she chooses to do so. The Court also noted that there were obvious difficulties in applying the whole scheme to child accused in criminal proceedings, \(^{1099}\) although it conceded that there are no "insuperable difficulties in the way of taking some such step" \(^{1100}\) in light of the extension of availability of some special measures to accused persons under the new Scottish statutory scheme. \(^{1101}\) Accordingly, although it was acknowledged that a child accused – unlike a child witness – is denied the opportunity to give evidence with the assistance of special measures such as live television link, it was held that this does not result in an inequality of arms as between the prosecution and the defence. \(^{1102}\)

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1098 \(R(D)\) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 16, per Lord Rodger (H.L.).

1099 \(R(D)\) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 58, per Baroness Hale: "The defendant is excluded from the statutory scheme because it is clearly inappropriate to apply the whole scheme to him. There are obvious difficulties about admitting a video recorded interview as his evidence in chief, referred to by the Court of Appeal in \(R\) v \(H\) [2003] EWCA Crim 1208, paras. 23 and 24. Who would conduct it and how? What safeguards against repeated interviews could there be given, that it would not be made available to the other side before the trial? There are also obvious difficulties about applying binding advance presumptions about how his evidence is to be given, if indeed it is to be given at all, when the defence is ordinarily free to make such decisions in the light of events as they unfold. Further, the special measures designed to shield a vulnerable or intimidated witness from the accused would not normally be applicable to a defendant witness."

1100 \(R(D)\) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 16, per Lord Rodger (H.L.).

1101 See: s. 271 of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3) analysed in sections 4.5.14-4.5.17 below.

1102 In this regard, it is interesting to note the obiter dicta of Baroness Hale in \(R(D)\) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 63, to the effect that, contrary to the finding of the Queen's Bench in \(R(S)\) v Waltham Forest Youth Court [2004] 2 Cr App R 21, the live television link facility may be available to child accused in the exercise of the court's inherent jurisdiction in appropriate circumstances: "Clearly, therefore, if there are steps which the court can take in the exercise of its inherent powers to assist the defendant to give his best quality evidence, the 1999 Act does not exclude this. However, in \(R(S)\) v Waltham Forest Youth Court [2004] 2 Cr App R 335, the
4.5.7 Notwithstanding both the reasoning and the results of these decisions, it is submitted that the exclusion of the accused from the benefit of statutory schemes providing for ‘special measures’ is not only illogical, it contravenes the guarantee of the right to a fair trial and fair procedures contained in Article 38.1 and 40.3 of the Constitution of Ireland and Article 6 of the European Convention on Human Rights.  

4.5.8 Where the accused in a criminal trial is not eligible under the statutory scheme for assistance in the form of special measures when giving evidence, in circumstances where another witness in the proceedings with the same personal characteristics or other qualifying circumstances as the accused would be so eligible – such as where both the accused and the witness are children within the meaning of statute – and in light of the fact that the use of special measures is intended to improve the quality of evidence given by a witness, it is submitted that to make such measure available to all witnesses save for the accused, so that the evidence of the former is potentially improved while the latter is denied this potential benefit, amounts to a violation of the principle of “equality of arms” embodied in Articles 6(1) and 6(3)(d) of the Convention; the accused

Administrative Court held that there was no inherent power to allow a defendant to give evidence by live link, on the ground that Parliament had sought since 1988 to provide exclusively for the circumstances in which live link might be used in a criminal trial. With respect, while it is true that section 32 of the [Criminal Justice Act 1988] did not contain an express saving for any inherent power the court might have to assist the accused, section 19(6) makes it clear that the 1999 Act does not purport to make exclusive provision for any of the special measures it prescribes. The point does not arise for decision in this case, and so it would be unwise to express an opinion upon it. It is in any event better taken on an appeal against conviction in which the defendant argues that he was not given a proper opportunity to defend himself. For the reasons given earlier, the situations of defendants and other witnesses are so different that it would only very rarely be necessary for a defendant to give evidence by live link, but the case of a younger child defendant who was too scared to give evidence in the presence of her co-accused might be an example. I would therefore prefer to reserve my position on whether the Waltham Forest case was correctly decided. It cannot in any event affect the result of this case. The fact that the accused may need assistance to give his best evidence cannot justify excluding the best evidence of others.”

1103 Birch D., “A Better Deal for Vulnerable Witnesses?” [2000] Crim LR 223, at p. 242: “If special measures may help to keep us the right side of Strasbourg with fearful witnesses, there is surely a risk that the exclusion of the accused from the statutory scheme will entail a breach.”

1104 Lester, Lord and Pannick, David Human Rights Law and Practice (1999) note in para. 4.6.32, at p. 144 that while there is some overlap between the principle of ‘equality of arms’ and the specific guarantees of Article 6(3), the principle is not confined to those aspects of the proceedings, citing:
must have “a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-
à-vis his opponent”.1106

4.5.9 The principle of ‘equality of arms’ also forms one of the bundle of rights encompassed within the constitutional guarantee of the right to a fair trial and fair procedures in this jurisdiction; the Supreme Court has rejected suggestions that “the Convention in this instance supplies rights lacking in the constitutional regime of trial in due course of law” and expressed itself satisfied that “the same rights are afforded by domestic law”.1107

Jespers v Belgium (1981) 27 DR 61, para. 54; Edwards v United Kingdom (1992) 15 EHRR 417; and Foucher v France (1997) 25 EHRR 234. In Rowe and Davis v United Kingdom (2000) 20 EHRR 1, at para. 60 it was held that: “It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence”. Grösz, Stephen, Beaton, Jack and Duffy, Peter Human Rights: The 1998 Act and the European Convention (2000) asserted in para. C6-62, at p. 244, citing Barbera, Messeque and Jabardo v Spain (1988) 11 EHRR 360 that: “The Court will not engage in a detailed examination of the Article 6(3) guarantees if it can safely conclude that overall the accused has had a fair or unfair hearing”.1106


Kaufman v Belgium 50 D.R. 98, at p. 115. See also: T and V v United Kingdom (2000) 30 EHRR 121; SC v United Kingdom (2005) 40 EHRR 10; Neumeister v Austria (1979-80) 1 EHRR 91, at para. 22; Delcourt v Belgium 1 EHRR 355; Borgers v Belgium 15 EHRR 92, at paras. 26-28; Jespers v Belgium 27 D.R. 61, at paras. 51-56; and De Haes and Gijssels v Belgium (1998) 25 EHRR 1. Hoyano, Laura “Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?” [2001] Crim LR 948, at pp. 961-962: “The principle of equality of arms requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-a-vis its opponent. Measures which signal to the trier of fact that a witness must be protected from the defendant might fall foul of this principle.” However, it should be noted that Hoyano concluded at p. 969 that “the special measures for child witnesses should be impregnable under the Convention”.1107

Accordingly, it has been held, in reliance upon the decisions in *In re Haughey*[^108] and *O'Callaghan v Mahon[^109]*, that “égalité des armes is not a new concept but rather a new and striking expression of a value which has long been rooted in Irish procedural law”.[^110] Thus, for example, where a complainant of alleged sexual offences sought to justify the delay in bringing proceedings against the accused by reference to the evidence of his clinical psychologist as to the effects of such offences on him, yet refused to submit to an examination by an expert psychologist nominated on behalf of the accused, the Supreme Court held that: (i) the prosecution must suffer the loss of an unfair advantage which would otherwise accrue to them; (ii) there was a positive requirement that an expert called as a witness on behalf of the complainant and an expert who might be called on behalf of the applicant be treated equally so that the placing of the complainant’s witness in a position superior to that of the applicant’s was inconsistent with the right to fair

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[^108]: *In re Haughey* [1971] IR 217, at p. 263, *per* O’Dalaigh C.J. (S.C.), wherein the Chief Justice identified the ‘minimum protection’ – in terms of fair procedures – to which a person is entitled, including: “(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; (d) that he should be permitted to address, again by counsel, the committee in his own defence”. O’Dalaigh C.J. continued, at p. 264, to assert that, without these rights “[n]o accused...could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of clocha ceangailte agus madrai scaoilte, 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”.

[^109]: *O'Callaghan v Mahon* (Unreported, Supreme Court, 9th March, 2005) [2005] IESC 9, wherein Hardiman J. held that: “A major issue in civil and criminal procedural law is the extent to which either side must make disclosure to the other. This has led to the development of an impressive body of jurisprudence both in the United Kingdom and in Strasbourg. The latter has significantly influenced the former and will no doubt influence our jurisprudence too, in particular, through the concept of ‘égalité des armes’, which might be regarded as the opposite of that state of imbalance and disadvantage described by O’Dalaigh C.J. as clocha ceangailte agus madrai scoailte”.

[^110]: *J.F. v Director of Public Prosecutions* [2005] 2 IR 174, at p. 182, *per* Hardiman J. (S.C.). In so holding, Hardiman J. relied upon the decision of the European Court of Human Rights in *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, wherein it was stated, in para. 50 that “[i]f the adversarial system...is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent’s evidence in circumstances of reasonable equality” and, later, in para. 59, that “[i]t is central to the concept of fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side”. 324
procedures; and (iii) that the disadvantage to a professional witness in not having personally assessed an individual whom the other side’s expert had assessed previously, deprived the applicant of an opportunity to present his case through an expert and to provide properly formulated rebuttal evidence and subverted his right to cross-examination. Equally, it is submitted that the failure to treat equally vulnerable child accused and vulnerable child witnesses for the purposes of eligibility to avail of special measures offends against the constitutional guarantee of a fair trial and fair procedures in this jurisdiction, in particular, by denying ‘equality of arms’. It is simply no answer to assert that an accused is not required to

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112. J.F. v Director of Public Prosecutions [2005] 2 IR 174, at p. 183, per Hardiman J. (S.C.): “In my view, the disadvantage to a professional witness in not having personally assessed an individual whom the other side’s expert has assessed six times over six months is so great that it deprives him of the opportunity ‘effectively’ to present his case through an expert, to use the language of para. 59 of Steel and Morris v United Kingdom [(2005) 41 EHRR 22]. It also deprives him of the third of the Re Haughey [1971] I.R. 217 rights – to be allowed to give rebutting evidence – since it is undisputed that no such evidence can properly be formulated without an assessment of the complainant.” Bonisch v Austria (1985) 9 EHRR 191 approved; In re Haughey [1971] IR 271 and Steel and Morris v United Kingdom (2005) 41 EHRR 22 followed.
113. In Whelan v Judge Kirby [2004] 2 ILRM 1, the Supreme Court held that the respondent should have entertained the application for inspection of the intoximeter in the interests of ensuring that the appellant was not unfairly handicapped in the conduct of his defence; the print-out from the intoximeter gives rise only to a rebuttable presumption of guilt and, by refusing to entertain the application the respondent was cutting the appellant off from any opportunity of rebutting the statutory presumption. See also: Murphy v British Broadcasting Corporation (Unreported, High Court, McKechnie J., 21st December 2004); Braddish v Director of Public Prosecutions [2001] 3 IR 127, (2002) 1 ILRM 151; and Dunne v Director of Public Prosecutions [2002] 2 IR 305, (2002) 2 ILRM 241.
114. J.F. v Director of Public Prosecutions [2005] 2 IR 174, at p. 183, per Hardiman J. (S.C.): “I also consider that a refusal of access to the complainant for the applicant’s expert subverts the right to cross-examination. Oral contradiction in a public forum is the culmination of the work of the cross-examiner but it is by no means the whole of it. All effective cross-examinations, not least of expert witnesses, are the result of intensive preparation. It is of the essence of the right to cross-examine that the cross-examiner, the advocate selected by the person impugned, should have access to the materials for cross-examination. Study and assessment of these materials is a vital part of the process of cross-examination. It is also a vital factor in the formulation of the advice an advocate gives to his client. In a case with a significant issue of expert evidence this process of preparation will take place in consultation with the party’s own expert. If this expert is at a disadvantage vis-a-vis the other side’s expert, counsel will be at a disadvantage in conducting the cross-examination.”
115. Moreover, it is submitted that, in light of the unequivocal wording employed in Part III of the Criminal Evidence Act, as amended – person “other than the accused” – it is difficult to see how the ‘double construction rule’ or presumption of constitutionality can operate to save this statutory scheme from unconstitutionality. See: McDonald v Bord na gCon (No. 2) [1965] IR 217, at p. 239, per Walsh J. (S.C.): “It is only where there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant”. Similarly, in The State (Quinn v Ryan [1965] IR 70, at p. 105, (1966) 100 ILTR 105, (S.C.) Walsh J. asserted that: “In the exercise of powers conferred by an Act of the Oireachtas any act inconsistent with the provisions of the Constitution is probably ultra vires the statute unless expressly authorised by the statute or authorised by necessary
give evidence or that the availability of such special measures to other
defence witnesses somehow evens the balance between the prosecution and
the defence; clearly there can be no more valuable witness for the defence
than the accused.

4.5.10 Article 6(3)(d) of the Convention provides that everyone charged with a
criminal offence has a minimum right to, *inter alia*, examine or have
examined witnesses against him and “to obtain attendance and examination
of witnesses on his behalf under the same conditions as witnesses against
him”; this requires striking a fair balance between the parties to the
proceedings. In this regard, the European Court of Human Rights has
highlighted the importance of the *appearance* of equality – echoing the
fundamental principle in Irish law that justice not only be done but be seen
to be done – and “the increased sensitivity of the public to the fair
administration of justice”. Moreover, an accused is not required to prove
“quantifiable unfairness flowing from a procedural inequality” in order

implication, because it may be presumed until the contrary be clearly shown that the Oireachtas did
not intend to give legislative authority for acts inconsistent with the Constitution to which the
Oireachtas itself is subject”. Finally, in *East Donegal Co-Operative Ltd v Attorney General* [1970] IR
any provision thereof, will not be declared to be invalid where it is possible to construe it in
accordance with the Constitution; and it is not only a question of preferring a constitutional
construction to one which would be unconstitutional where they both may appear to be open, but it
also means that an interpretation favouring the validity of an Act should be given in cases of doubt”.

Emphasis added. A similar guarantee is provided by Article 40(iv) of the United Nations
Convention on the Rights of the Child and the European Court of Human Rights has indicated a
willingness to consider the terms of this convention when considering claims under the European
para. 22; *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112, at para. 27; *V v United Kingdom*

See: *Neumeister v Austria* (1968) 1 EHRR 91, para. 22; *Delcourt v Belgium* (1970) 1 EHRR 355,
para. 28; *Dombo Beheer v Netherlands* (1993) 18 EHRR 213, para. 33; *De Haes and Gijsels v Belgium*
*Unterpertinger v Austria* 13 EHRR 175: “The procedures for the summoning and hearing of
witnesses must however be the same for the prosecution as the defence and equality of treatment is
required”.

*Irish Times Ltd v Ireland* [1998] 1 IR 359, at p. 382, *per* Keane J. in relation to Article 34.1 of the
Constitution: “In a democratic society, justice must not only be done, but be seen to be done. Only in
this way, can respect for the rule of law and public confidence in the administration of justice, so
essential to the workings of a democratic state, be maintained”. See also: *Re R Ltd* [1989] IR 126, at p.
134, *per* Walsh J.; *Sutter v Switzerland* (1984) 6 EHRR 272; *Pretto v Italy* (1984) 6 EHRR 182; and


*Neumeister v Austria* (1979-80) 1 EHRR 91, at para. 49.
to demonstrate a violation of this principle. It is also arguable that the effect of the exclusion of the accused from eligibility for a scheme designed to improve the quality of a witness’s evidence is at odds with one of the fundamental rationales of the law of evidence, namely, the rational ascertainment of facts; although the European Court of Human Rights has repeatedly asserted that it does not lay down any rules regarding the admissibility of evidence, it nonetheless remains the task of the Court “to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair”.

Moreover, the exclusion of the child accused from eligibility for special measures – such as live television link – for the duration of his/her evidence may also infringe the accused’s right of effective participation in the trial, contrary to Article 6 of the Convention; the courts are required to ensure that “a child charged with an offence is dealt with in a manner which takes full account of his (or her) age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote

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1121 Hoyano, Laura “Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?” [2001] Crim LR 948, at p. 968: “If we value the presumption of innocence and the premise that the search for truth demands that witnesses give their best evidence and are fairly tested in cross-examination, then the case for withholding special measures from children accused of crimes must be made, not assumed.” Perhaps the most significant of the New Zealand Law Commission’s proposals in relation to the availability of special measures was that defendants should be included among witnesses eligible to apply to give evidence by alternative means on the same need-based criteria as other witnesses: New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) para. 140. However, in light of opposition in relation to the recommended eligibility of defendants in criminal cases to avail of the alternative ways of giving evidence, the Commission agreed in its subsequent report on Evidence: Reform of the Law (Report 55, Vol. 1, 1999) paras. 455-456 that the eligibility should be restricted to exceptional circumstances only; where, for example, the safety of the defendant or other trial participants required it or where the defendant himself/herself is a child. This more restrictive proposal was based upon concerns that a more permissive approach could invite abuse or was simply not appropriate in circumstances where the defendant – unlike any other witness – is present in court throughout the entire proceedings. However, it was argued in para. 454 that if the purpose of the law of evidence is to ensure the ‘rational ascertainment of facts’, this must necessarily include the evidence of the defendant, so that vulnerable defendants should be permitted to avail of the alternative ways of giving evidence.


his ability to understand and participate in the proceedings."\textsuperscript{1124} Accordingly the Court in \textit{T and V v United Kingdom}\textsuperscript{1125} found a violation of Article 6 in the conduct of the trial of two child accused – aged eleven years – for the murder of a two year old boy \textit{notwithstanding} the fact that a number of modifications to the standard court procedure had been implemented in the interests of the young accused.\textsuperscript{1126} The Court noted that there was evidence that one of the modifications to the design of the courtroom – the raised dock from which the children gave evidence – although intended to enable the children to have a clear view of the courtroom, had the effect of \textit{increasing} the discomfort experienced by the child accused by reason of their sense of exposure to the scrutiny of press and public alike; it was held that the formality and ritual of the trial must at times have seemed \textit{“incomprehensible and intimidating”} for a child of eleven years.\textsuperscript{1127} In addition, expert evidence was admitted to the effect that the children had been terrified by the court proceedings – they passed the time counting numbers in their heads and making shapes with their shoes – rendering them unable to participate in any meaningful way in their defence.

The Court asserted that it was not sufficient, for the purposes of Article 6(1),

\textsuperscript{1124} \textit{T and V v United Kingdom} (2000) 30 EHRR 121, para. 84. Equally, in \textit{SC v United Kingdom} (2005) 40 EHRR 226, the European Court of Human Rights held in para. 35 that: \textit{“The Court considers that when the decision is taken to deal with a child, such as the applicant, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child’s best interests and those of the community, it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly”}. (Emphasis added).

\textsuperscript{1125} \textit{T and V v United Kingdom} (2000) 30 EHRR 121. The Court noted in paras. 83 that \textit{“Article 6, read as a whole, guarantees the right of an accused to participate effectively in his criminal trial. It has not until now been called upon to consider how this Article 6(1) guarantee applies to criminal proceedings against children, and in particular whether procedures which are generally considered to safeguard the rights of adults on trial, such as publicity, should be abrogated in respect of children in order to promote their understanding and participation…”}.

\textsuperscript{1126} Although the trial retained many of the formal trappings of a conventional trial – judge and counsel wore wigs and gowns, there was no restriction on public or press access or press reporting – a number of important modifications were made to the trial procedure: (i) the trial procedure was explained to them and they were taken to see the courtroom in advance of the trial; (ii) the children were permitted to sit next to social workers in a specially raised dock with their parents and lawyers sitting nearly; (iii) the hearing time of each day of the trial was contracted in order to reflect the school day and a ten minute break permitted in each hour; (iv) during the intervals, the children were permitted to spend time with their parents and social workers in a special play area; and (v) the trial judge directed that he would adjourn upon request if informed that either child accused was showing signs of tiredness or stress (which occurred on one occasion).

\textsuperscript{1127} \textit{T and V v United Kingdom} (2000) 30 EHRR 121, para. 86 (E.Ct.H.R.).
that the children were represented by skilled and experienced lawyers positioned within “whispering distance” from them since, in the circumstances of the trial and in light of their immaturity and disturbed emotional states, it was unlikely that the children would have felt sufficiently uninhibited to consult with their legal representatives during trial or even to co-operate with them outside of the courtroom by giving them information for the purposes of the conduct of their defence. In concluding that a violation of Article 6(1) had occurred, the Court held that “it follows that in respect of a child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition”.

4.5.12 The European Court of Human Rights has recently extended the reach of this decision in SC v United Kingdom, wherein it was held that a violation of Article 6 had occurred where an eleven year old child defendant with learning difficulties had been denied the right to participate effectively in his trial for attempted robbery. Unlike T and V v United Kingdom, the trial did not attract publicity or public anger, nor was there any evidence that the child was traumatized by the trial, or that “at the time of the hearing, his psychological condition prevented him from understanding the nature of

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1128 T and V v United Kingdom (2000) 30 EHRR 121, para. 88 (E.Ct.H.R.). In this regard, the Court distinguished this case from Stanford v the United Kingdom 23.02.1994, Series A No. 282-A, pp. 10-11, para. 26 where the Court found no violation of Article 6(1) in respect of a deaf accused arising from the fact that the accused could not hear some of the evidence given at trial, in view of the fact that his counsel, who could hear all that was said and was able to take his client’s instructions at all times, chose for tactical reasons not to request that the accused be seated closer to the witnesses.

1129 T and V v United Kingdom (2005) 40 EHRR 10 (E.Ct.H.R.). It should be noted that the Court held by 5 votes to two that a violation of Article 6 had occurred. Judge Pellonpää and Judge Sir Nicolas Bratza delivered a joint dissenting opinion in which they asserted in para. O-112 that: “[P]recautions were taken before the trial and during the trial to accommodate the proceedings to the specific needs arising from the applicant’s young age and the stage of his mental development. During the trial the applicant’s representatives seem to have believed that he was capable of defending himself and explaining his own version of events, because, in contrast to the T and V cases, he was called to give evidence. There is no solid basis for suggesting that the jury would have been affected by what may have been a lack of understanding on the applicant’s part of the importance of making a good impression on them. In these circumstances, I cannot agree with the majority’s conclusion that Art. 6 has been violated.”

the wrongdoing of which he was accused or from instructing and consulting with his legal representatives." While the Court accepted that Article 6 does not require that a child on trial for a criminal offence should understand or be capable of understanding every point of law or evidential detail, it noted that 'effective participation' presupposed that the accused had a "broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed", the child should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence. Notwithstanding the measures taken to make the trial informal, it was held that, having regard to the expert evidence before the Court, the child accused had been unable to understand the proceedings, the fact that he faced a custodial sentence or the importance of making a good impression on the jury and, accordingly, the Court concluded that the child accused was incapable of participating effectively in his trial. The Court cautioned that, where the decision is taken to deal with a child accused, who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some other form of disposal directed primarily at determining the child’s best interests and those of the community, it is essential that the child be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours and “adapt its procedure accordingly”.

1133 SC v United Kingdom (2005) 40 EHRR 10, para. 25 (E.Ct.H.R.). The Court noted in para. 33 that the expert evidence established that: “[T]he applicant seems to have had little comprehension of the role of the jury in the proceedings, or of the importance of making a good impression on them. Even more strikingly, he does not seem to have grasped the fact that he risked a custodial sentence and, even once sentence had been passed and he had been taken down to the holding cells, he appeared confused and expected to be able to go home with his foster father.”


1135 The child was accompanied at all times by a social worker, legal apparel was not worn, the timetable of the court was adjusted to accommodate the child’s shorter attention span and frequent breaks were permitted.

4.5.13 Having regard to the foregoing, it is submitted that to exclude the accused from eligibility to avail of special measures in circumstances where he/she otherwise as ‘vulnerable’ within the meaning of the statutory schemes is to violate the accused’s right to a fair trial and fair procedures; in particular, the requirements of the principle of equality of arms and his/her right to effective participation in the trial. It should also be noted that the European Convention on Human Rights is not the only international agreement which appears to favour the extension of eligibility to the accused; it is submitted that the United Nations Convention on the Rights of the Child, 1989 and the International Covenant on Civil and Political Rights, 1966 also provide support for such extension.\(^{1137}\)

4.5.14 Scotland alone amongst the jurisdictions examined herein adopts a more enlightened approach to this issue, expressly extending eligibility to the accused to avail of special measures when giving evidence where he/she can be considered a ‘vulnerable witness’ within the meaning of the statutory scheme.\(^{1138}\)

4.5.15 In order to be considered ‘vulnerable’: (i) an accused person must be aged less than sixteen years at the date of commencement of the proceedings\(^{1139}\) (child witness); or (ii) where the accused is not a child witness, there is a

\(^{1137}\) Article 3(i) of the United Nations Convention on the Rights of the Child 1989 provides that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative, authoritative, or legislative bodies, the best interests of the child shall be a primary consideration”. Furthermore, Article 40(1) provides that: “State Parties recognize the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the reintegation and the child’s assuming a constructive role in society”. Similarly, Article 14(4) of the International Covenant on Civil and Political Rights, 1966 provides that: “In the case of juvenile persons, the procedure shall be such as will take account of their age, and the desirability of promoting their rehabilitation”.\(^{1138}\) However, in the wake of the decision of the European Court of Human Rights in \textit{T and V v United Kingdom} (2000) 30 EHRR 121, the Lord Chief Justice in England issued the Practice Direction (Crown Court: Young Defendants) [2000] 1 WLR 659 which aims to ensure that the trial does not expose the young accused to avoidable intimidation, humiliation or distress and is conducted with regard to his/her welfare and includes directions in relation to the use of special measures.\(^{1139}\) Section 271(3) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 provides that for the purposes of subsection (1)(a) and section 271B(1)(b), proceedings shall be taken to have commenced when the indictment or, as the case may be, complaint is served on the accused.
“significant risk that the quality of the evidence to be given by the person will be diminished”\textsuperscript{1140} either by reason of a mental disorder\textsuperscript{1141} or “fear or distress in connection with giving evidence at the trial”.\textsuperscript{1142} However, the statutory scheme modifies the factors to be taken into account in determining the vulnerability of an accused person as distinct from other witnesses to include: (a) the nature and circumstances of the alleged offence to which the proceedings relate; (b) the nature of the evidence which the accused is likely to give; (c) whether the accused is to be legally represented at the trial and, if not, the accused’s entitlement to be so legally represented; (d) the accused’s age and maturity; and (e) any behaviour towards the accused on the part of either any co-accused, any witness, any person likely to be either a co-accused or a witness in the proceedings, or members of the family or associates of any of the foregoing.\textsuperscript{1143}

4.5.16 In determining whether to authorize the use of a special measure to facilitate the reception of evidence from the accused, the court shall have regard to the possible effect on the accused if required to give evidence without the benefit of any special measure and whether it is likely that the accused would be better able to give evidence with the benefit of a special measure.\textsuperscript{1144} The accused is not entitled to use screens as a special measure for the giving of his / her evidence, nor is he / she entitled to give evidence by commission.\textsuperscript{1145} Since, in most cases, it will not be known whether the

\textsuperscript{1140} Section 271(4) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 provides that the reference to the quality of evidence in subsection (1)(b) is to its quality in terms of completeness, coherence and accuracy.

\textsuperscript{1141} ‘Mental disorder’ has the meaning given by s. 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp. 13).

\textsuperscript{1142} Section 271(1)(b) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3).

\textsuperscript{1143} Section 271(2), as modified by s. 271F(1) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004. The court shall also have regard to such other matters as appear to the court to be relevant including: (i) the social and cultural background and ethnic origins of the accused; (ii) the accused’s sexual orientation; (iii) the domestic and employment circumstances of the accused; (iv) any religious beliefs or political opinions of the accused; and (v) any physical disability or other physical impairment which the accused has.

\textsuperscript{1144} Section 271C(8) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004

\textsuperscript{1145} Section 271F(8) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 excluding the use of screens (s. 271H) and the giving of evidence by commission (s. 271I) by the accused. McEwan, Jenny “In Defence of Vulnerable
accused is to give evidence until the last minute, the modifications made by this statutory scheme ensure that special measures are considered for the accused in advance of the trial but on a contingent basis only; in addition, such arrangements as are made in respect of the accused are subject to the same powers of judicial review\textsuperscript{1146} as apply in relation to other vulnerable witnesses.\textsuperscript{1147}

4.5.17 It is submitted that the measured and practical approach adopted in the Scottish statutory scheme towards the difficulties presented by extending the availability of special measures to accused persons reflects a considered balance between the protection of children (whether witness or accused), the rights of the accused – including the right to equality of arms and effective participation in proceedings to determine his / her guilt or innocence of the offences alleged – and the proper administration of justice. Furthermore, it is submitted that, provided there are sufficient safeguards against abuse, permitting all participants to avail equally of measures designed to elicit the best evidence and thereby to uncover the truth can only serve the interests of justice.\textsuperscript{1148}

Witnesses: The Youth Justice and Criminal Evidence Act 1999 (2000) EvProv 4(1): “Obviously measures similar to those designed to shield the witness from the defendant would be entirely inappropriate. But one might sympathise with the inarticulate defendant who is afraid of giving evidence and risks adverse inferences being drawn from any failure to testify. Where the defendant is a child, as in Thompson, the experience is so overwhelming that the decision to allow adverse inferences to be drawn in the case of a defendant as young as ten seems indefensible. Yet there is no possibility of live link... for the defendant.”

\textsuperscript{1146} Section 271D of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004.

\textsuperscript{1147} Section 271F(5) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004. In addition, s. 271G of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 expressly provides that nothing in sections 271A to 271F of the Act “affects any power or duty which a court has otherwise than by virtue of those sections to make or authorize any special arrangements for taking the evidence of any person”.

\textsuperscript{1148} Burton, Evans and Sanders have also noted a reluctance on the part of the Crown Prosecution Service to make applications for special measures in respect of some prosecution witnesses in circumstances where the defendants also qualified as vulnerable or intimidated witnesses and they sought parity of treatment. The authors argued that if special measures were available to vulnerable or intimidated defendants, this problem would not arise. They further contended that not only is this discrimination unfair, but “the belief among many lawyers and judges that it is unfair impacts adversely on the use of special measures for prosecution witnesses when the defendant is vulnerable and not able to secure similar protection”. See: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) at pp. vii, 52 and 69.
4.6.0 SCREENS AND LIVE TELEVISION LINK

4.6.1 Principal among the sources of distress for the child witness when required to give evidence in the conventional manner – sometimes referred to as “secondary victimization”\(^{1149}\) – was the requirement that he / she physically confront the accused when testifying and submit to rigorous cross-examination;\(^{1150}\) the associated trauma for the child witness was exacerbated where the child had been threatened by the accused with violence or removal from his / her parents in the event of disclosure, or due to the power imbalance between the child and the accused\(^{1151}\) where the accused was an adult or a ‘figure of authority’ – such as a teacher or priest – or, where the accused was a relative or ‘loved one’, there may have been “a moral and emotional dilemma if the consequences of denouncing [the accused] [were] understood”.\(^{1152}\)

\(^{1149}\) Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.001, at p. 120. Bal, “Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System” in Tarnopolsky, W.S., Whitman, J. and Ouellette, M. (eds.) Discrimination in the Law and the Administration of Justice (1993) at p. 233: “The traditional response of the Canadian criminal justice system to child sexual abuse has contributed to the ‘double victimisation’ of children. Because of their social, psychological, economic and intellectual positions, children are the most frequent victims of unwanted sexual acts. Our legal and social systems failed our children, initially by allowing them to become victims. And when cases of sexual abuse have been dealt with by the legal system, children have too often been victims of ‘secondary trauma’ produced by their mistreatment in that system”.

\(^{1150}\) Scottish Law Commission, Discussion Paper: The Evidence of Children and Other Potentially Vulnerable Witnesses (Discussion Paper No. 75, June 1988) para. 4.10, at p. 34: “It has often been said that the most disturbing thing for a child giving evidence in court is having to come face to face with the accused. In order to circumvent this there have been various attempts to alter the layout or design of courtrooms so that the child can give evidence without seeing the accused.” The Commission described it as one of the “most anxiety-provoking aspect of the trial from the child’s point of view”: Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.045, at p. 150 citing, inter alia, Goodman et al, “The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims: A Preliminary Report”, in Davis, G. and Drinkwater, J. (eds.) The Child Witness, Do the Courts Abuse Children? (Issues in Criminological and Legal Psychology, vol. 13, British Psychological Society for the Division of Criminological and Legal Psychology 1988) at p. 50.

\(^{1151}\) Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences against Children, A Private or Public Nightmare? (Wellington, 1988)(“Geddis Report”) at p. 3: “Child sexual abuse occurs in part because of the inequalities between child and adult in size, knowledge and power. We believe the legal system should not perpetuate these same inequalities by failing to take such differences into account. A criminal justice system fails if it does not protect its most vulnerable and innocent members at least as well as the more powerful.”

\(^{1152}\) McEwan, Jenny Evidence and the Adversarial Process (2\(^{\text{nd}}\) ed., 1998) at p. 135. Goodman and Helgeson, “Child Sex Assault: Children’s Memory and the Law” 40 University of Miami L. Rev. (1985) at 70: “When the setting involves a relative accused of sexual abuse, the child becomes guilty, anxious and traumatised. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the
Both of the special measures considered in this section – namely, the provision of one-way screens and the facility of live television link\textsuperscript{153} – represented a radical rethinking of this traditional characteristic of the adversarial trial in pursuit of a legitimate public policy consideration, namely, the protection of vulnerable witnesses.\textsuperscript{154} It was intended that by concealing the accused from the view of the child witness while he / she gave evidence – either by mechanical or technological means – and permitting the child to give his / her evidence outside the immediate presence of the accused and in less formal surroundings, these special measures would reduce the stress and trauma suffered by the child witness,\textsuperscript{1155} thereby improving the quality of the child's evidence since “intimidation and stress can decrease a person's willingness and ability to release information from memory”.\textsuperscript{1156}

relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.”\textsuperscript{1153} Live television link or closed circuit television is often referred to as 'video link', since the evidence given via live television link is simultaneously video-recorded, however, in light of the fact that alternative and distinct statutory provisions allow videotapes of pre-trial interviews with child witnesses to be admitted into evidence as the child’s evidence-in-chief, it is considered preferable to use the term ‘live television link’ in relation to the former special measure and ‘video evidence’ in relation to the latter in order to avoid confusion.\textsuperscript{1154} It was argued that since such protective measures could be employed in aid of other legitimate policy considerations such as national security, they should also be available for use in the protection of vulnerable witnesses. Spencer, J.R., “Child Witnesses: A Case for Legal Reform”, in Davies, G. and Drinkwater J. (eds.) The Child Witness – Do the Courts Abuse Children? (Issues in Criminological and Legal Psychology, vol. 13, British Psychological Society for the Division of Criminological and Legal Psychology, 1988) asserted at p. 12 that: “When the terrorist Nezar Hindawi was tried at the Old Bailey for attempting to blow-up the El Al jumbo jet, two El Al security officers were allowed to give evidence against him from behind a thick oak screen. If the traditions of British justice permit that sort of thing to protect a witness who is an Israeli security man, than they should permit it to be done for a terrified little child.”\textsuperscript{1155} See: Law Reform Commission, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.051, at p. 155 (wherein it was concluded that the use of live television link would “ameliorate the trauma caused by confrontation”; and its subsequent Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.08, at p. 71.\textsuperscript{1156} Law Reform Commission, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.051, at p. 155, relying on Myers, J., Child Witness, Law and Practice, (1987) at p. 386. The Pigot Report asserted that the live television link facility had “improved matters” for child witnesses in that “direct confrontation with the accused can be avoided and the pressures of speaking in public about embarrassing matters reduced”: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989). The findings of Davies, G. and Noon, E. An Evaluation of the Live Link for Child Witnesses (London: Home Office, 1991)
4.6.3 Apart from the concessions made by these special measures, the proceedings in which the child witness gives evidence otherwise retain the principal characteristics of a conventional adversarial trial and the attendant safeguards for the rights of the accused; the child witness gives his / her evidence-in-chief – sworn or unsworn – by way of continuous narrative, ‘live’ on the day of the trial and is subject to cross-examination in the usual way, albeit in a modified form by reason of the interposition of a physical (screen) or technological (live television link) barrier between the individual conducting the questioning and the child witness. Moreover, the child witness is visible at all times during his / her evidence to the trial judge, jury, legal representatives for both sides and the accused, permitting effective assessment of his / her demeanour and credibility; it is only the child’s view of the accused which is obscured by operation of the special measure. Although the resulting balance achieved with the rights of the accused has often been questioned, the constitutionality of these special measures has been upheld in Ireland, Canada, New Zealand and the United States.


The child may, however, have the benefit of one or more of the other special measures examined herein; for example, the court may approve the presence of a ‘support person’ to accompany the child witness for the duration of his / her evidence, direct that questions be put to the child witness be put through an intermediary or even prohibit the accused from cross-examining the child witness in person. See: sections 4.13.0-4.18.28. White v Ireland [1995] 2 IR 268 (H.C.); Donnelly v Ireland [1998] 1 IR 321 (H.C.); [1998] 1 IR 338 (S.C.).  


While the live television link facility comfortably takes its place among the ‘type two’ special measures, the classification of the ‘screen’ as a special measure is more difficult. It may be argued that the ‘screen’ belongs to the ‘type one’ class of special measures as defined in this thesis; namely, those measures which adjust standard courtroom layout, design or procedure in order to facilitate the reception of evidence from the child witness by reducing the formality of the courtroom or by dispensing with some of the conventional features of an adversarial trial. Further support is gained for this categorisation by reason of the absence of a statutory footing for this special measure – at present in this jurisdiction and previously in both New Zealand and England. However, it is submitted that the absence of legislation in this jurisdiction governing the availability of screens is not conclusive of its classification; while there is merit in the view that the ‘screen’ involves a radical restructuring of the traditional adversarial model of criminal justice and a treatment of child witnesses more akin to ‘type two’ special measures, it is submitted that ‘screens’ may constitute a third category, spanning both classes of special measures.

4.7.0 Availability of Screens – Inherent Jurisdiction of the Court

4.7.1 While many of the jurisdictions examined herein – with the exception of Ireland – now include ‘screens’ within the statutory schemes governing the availability of special measures to child witnesses in criminal

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1162 See: sections 4.1.0-4.1.5: Types of Special Measures.
1163 Reliance is – and was, respectively – placed upon the authority of the court to authorise the use of such special measure in the exercise of its inherent jurisdiction to conduct proceedings “in the manner most conducive to the administration of justice”: Tapper, Colin Cross and Tapper on Evidence (9th ed., 1999) at p. 214.
1165 The Law Reform Commission of Ireland opined that the use of screens to assist child witnesses in giving their evidence “falls midway between proposals to alter traditional courtroom lay-out and the use of closed-circuit or video-taped testimony”: Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.045, at pp. 149-150.
Of the exercise of their inherent jurisdiction to conduct proceedings – including varying procedures for the reception of evidence – in a manner conducive to the proper administration of justice.  

4.7.2 In the absence of statutory guidance, there were two principal formulations of the test to be applied in determining the availability of the screen to facilitate the reception of evidence from a child witness, namely: (i) the ‘balancing test’ favoured in England; 1168 and (ii) the ‘necessity’, ‘reasonable necessity’ or ‘interests of justice’ test employed in New Zealand. 1169

4.7.3 The ‘balancing test’ authorised the courts in England to permit the use of a screen to obscure the child witness’s view of the accused when giving his/her evidence where it was considered appropriate having regard to the balance of fairness and the court’s duty to do justice in an individual case. 1170 The court was required to weigh the public interest in the protection of child witnesses – and the community’s right to have crimes prosecuted effectively – against any prejudice which might be suffered by the accused by reason of the use of this special measure; only where the balance lay in favour of protecting the child witness was the court entitled to

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1166 See: (i) England: s. 23 of the Youth Justice and Criminal Evidence Act 1999; (ii) Scotland: s. 271K of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004; (iii) New Zealand: s. 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989; and (iv) Canada: s. 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.
1167 In relation to the law in England, Dennis, I.H., The Law of Evidence (2nd ed., 2002) asserted at p. 517: “It was clear before the Youth Justice and Criminal Evidence Act 1999, that a judge has inherent power at common law to vary the physical arrangement of the court. This includes a power to allow witnesses to give their evidence from behind a screen. The screen shields the witness from the accused, while still permitting the witness to be observed by the judge, jury and counsel.”
1169 R v Accused (T 4/88) [1988] 1 NZLR 569 (H.C.), [1989] 1 NZLR 660 (C.A.); and R v K [1988] DCR 187 (D.C). It is interesting to note that it was at this time suggested that television techniques involving the witness being out of court might be less easy to introduce as an exercise of the courts’ inherent jurisdiction to control their own procedure than the use of screens in any case when that was shown to be reasonably necessary in the interests of justice.
authorise the use of a screen.\textsuperscript{1171} In order to maintain the balance, a further safeguard against prejudice to the accused was required in the form of a judicial direction to the jury; such direction informed the jury that the provision of the screen represented modern practice with regard to the reception of evidence from child witnesses – its purpose being to protect the child witness from intimidation resulting from his / her surroundings – and cautioned the jury against drawing inferences adverse to the accused arising out of its use.\textsuperscript{1172}

4.7.4 The leading English case in relation to the use of screens to facilitate the reception of evidence from child witnesses, \textit{R v X, Y and Z},\textsuperscript{1173} clearly illustrates this ‘balancing test’ in operation. The applicants applied to the Court of Appeal for leave to appeal their convictions and sentences for sexual offences committed against two young boys on the ground, \textit{inter alia}, that it was an unfair and prejudicial act to erect a screen to shield the child complainants, since the jury could have been unduly influenced and unfairly prejudiced against the applicants by the use of the screen; it was submitted that presence of the screen carried with it the unfair and prejudicial

\textsuperscript{1171} See: Dennis, I.H. \textit{The Law of Evidence} (2\textsuperscript{nd} ed., 2002) at p. 517.

\textsuperscript{1172} The trial judge in \textit{R v X, Y and Z} (1990) 91 Cr App Rep 36, at p. 40 [1990] Crim LR 515 (C.A.) directed the jury in the following terms (subsequently approved by the Court of Appeal): “Do not allow the mere presence of the screen in any way to prejudice you against any of the defendants. The purpose of the provision of those screens is in an endeavour to prevent children from being intimidated by their surroundings. I think you can understand yourselves, those of you who have young children, to have to come in front of a court of this sort is bound to be a matter which is somewhat frightening perhaps and certainly not an experience they enjoy. Do not hold that fact against any of the defendants. You will decide the case on the evidence, that is to say, that which is said before you and the documents which are placed before you.” See also: May, Richard \textit{Criminal Evidence} (4\textsuperscript{th} ed., 1999) para. 21-21, at p. 485.

\textsuperscript{1173} \textit{R v X, Y and Z} (1990) 91 Cr App Rep 36, [1990] Crim LR 515 (C.A.). The applicants challenged both their convictions and sentences in relation to sample counts of sexual offences concerning two boys – aged 9 and 10 – and three girls – aged 8, 8½ and 12 years respectively – as part of a history of systematic sexual abuse; the three applicants and the child complainants were all related to each other. The trial judge, having been informed of the conclusions of the social workers involved to the effect that some of the child complainants were likely to be unwilling or unable to give evidence at the trial, sought the views of counsel as to the propriety or otherwise of the erection of a screen in the courtroom, the purpose of which was “to obscure the children from seeing or being seen from the dock”. The proposed screen was in place at the time of the hearing to enable counsel to see precisely what was involved in its use; counsel, the trial judge and the jury all retained a clear and unobstructed view of the child complainant. Counsel for the defence objected to the use of the screen as proposed on the ground that it was an improper procedure, however, the trial judge, in the exercise of his discretion, permitted the screen to remain \textit{in situ} for the duration of the evidence of the child complainants.
suggestion that the person accused had already in some way intimidated the
child who was to give evidence.

4.7.5 The Court of Appeal rejected these submissions holding that the trial judge
had not erred in permitting the child complainants to give their evidence
from behind a screen and, moreover, that the trial judge would have been
entitled to so act – even in the absence of previous authority – in the
exercise of the inherent jurisdiction of the court to conduct proceedings in a
manner conducive to the proper administration of justice.1174 The Court
noted that it is the duty of the court to ensure fairness to all in the
administration of justice and, in so doing, the court is required on occasion
to determine where the balance of fairness lies. In this regard, Lord Lane
C.J. asserted that:

“The learned judge has the duty on this and on all other occasions of
endeavouring to see that justice is done. Those are high sounding
words. What it really means is, he has got to see that the system
operates fairly: fairly not only to the defendants but also to the
prosecution and also to the witnesses.”1175

4.7.6 In the circumstances of the instant case, the trial judge concluded – and the
Court of Appeal agreed – that the necessity of ensuring that the child
complainants would be able to give evidence outweighed any possible
prejudice to the accused in the erection of the screen. The Court of Appeal
also rejected the submission on behalf of only one of the accused, Z, to the
effect that the use of the screen and the presence of support persons

1174 The Court of Appeal referred to the English decision of R v Smellie (1919) 14 Cr App R 128 (C.A.)
wherein the decision of the Court to compel the appellant to sit on the stairs leading out of the dock
and therefore out of the line of vision of the child complainant – the appellant’s daughter – when she
gave evidence against him was upheld as a proper procedure. However, the Court of Appeal in the
that: “[W]e do not need authority to confirm us in the view that what the learned judge here did in his
discretion was a perfectly proper, and indeed laudable attempt to see that this was a fair trial: fair to
all, the defendants, the Crown and indeed the witnesses.”
combined with the inaudibility of the child unduly prejudiced the accused; the Court held that the trial judge “was doing his best to ensure fairness on one hand and on the other” and, accordingly, rejected any criticism of the steps taken by the trial judge.

4.7.7 The decision in *R v X, Y and Z* is, however, open to criticism. The screen utilized by the trial judge and approved by the Court of Appeal in this case was, in fact, two-way in its constitution; that is, it not only obscured the child complainant’s view of the accused but, equally, the accused’s view of the child complainant, thus preventing the accused from monitoring the demeanour of the child complainants while they gave evidence with a resulting adverse impact on the accused’s right of effective cross-examination. Furthermore, the emphasis placed by the Court of Appeal upon the trial judge “doing his best to ensure fairness” to all involved seems to disregard the fact that there is, in fact, a means of achieving the purpose for which the screen is sought – namely, to protect a vulnerable or intimidated witness – while interfering to a lesser extent with the accused’s right to a fair trial; a one-way screen. Aside from these legitimate criticisms, the statements of principle contained in this decision are illuminating both with regard to the nature of the court’s inherent jurisdiction and to the process in which the court must engage before authorizing the use of a screen in respect of the evidence of a child witness.

4.7.8 The courts in England were also prepared to allow adult witnesses to avail of the protection afforded by a one-way screen when giving evidence in certain cases. The purpose of the provision of a screen to assist an adult

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1176 See: *R v Greenwood* [1993] Crim LR 770 (C.A.) where the Court of Appeal emphasised the importance of the defendant being able to hear the witness while he / she testifies from behind a screen.


witness when giving his / her evidence was held to be three-fold: (i) “to protect the witness from being in any form of eye contact, or having any sense of the presence of the person who is on trial”; (ii) to protect the witness from others in court; and (iii) to protect the witness from intimidation or embarrassment as a result of the personal details that have to be explored.\textsuperscript{1180}

4.7.9 Although it was initially suggested that this was an ‘exceptional jurisdiction’\textsuperscript{1181} and that the test which required to be satisfied before the court would direct the use of this special measure was higher in respect of adult witnesses than that applicable to child witnesses – the use of screens was permitted where it was otherwise impossible to do justice\textsuperscript{1182} – the

\textsuperscript{1180} In R v Foster [1995] Crim LR 333 (C.A.) the Court of Appeal rejected the assertion of the Court of Appeal in R v Schaub; R v Cooper [1994] Crim LR 531 that, generally speaking, the provision of screens was confined to cases where children have to give evidence, since it was noted that: “In the experience of this court the provision of screens is wider than that about the country these days. They are used both in sexual cases and in cases where there is a danger of intimidation from places other than the dock, such as the public gallery.” Similarly, in R v Schaub; R v Cooper [1994] Crim LR 531 (C.A.) the Court asserted that the purpose of the screen is “to protect the witness from being in any form of eye contact, or having any sense of presence of the person who is on trial” and acknowledged that this was probably the basis of the application for the provision of a screen in the instant case, involving a complainant of multiple rape allegedly perpetrated by the accused. The Court of Appeal noted that the use of screens had become more frequent in criminal trials, although it conceded that they were usually confined to cases involving child witnesses; it asserted that the risk to justice which might arise in relation to children who were inhibited or overawed at the prospect of giving evidence in court was not as obvious in relation to adult witnesses.

\textsuperscript{1181} May, Richard Criminal Evidence (4\textsuperscript{th} ed., 1999) para. 21-22, at pp. 485-486: “[I]t is submitted that for adults, screens should be very much the exception rather than the rule because of the prejudice which may be occasioned to a defendant.” McEwan, Jenny “In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999 (2000) EvProv 4(1): “Although in recent years screens have become familiar in cases involving child witnesses, courts have shown less enthusiasm for their use as far as adult witnesses are concerned.”

\textsuperscript{1182} In R v Schaub; R v Cooper [1994] Crim LR 531 (C.A.) the appellants appealed their conviction for the multiple rape of a 21 year old girl on the ground, inter alia, that the trial judge erred in permitting the complainant to give her evidence from behind a screen and, furthermore, in allowing the complainant to continue to give her evidence in this manner after an adjournment in the middle of her evidence, having regard to her “robustness” and her ability to deal with the questions put to her. The Court of Appeal accepted that there had been occasions when, as in the instant case, screens had been used to shield an adult complainant of a sexual offence. It was conceded that the decision as to whether a screen should be employed in any given case was a matter within the discretion of the trial judge, in the pursuit of his / her duty to ensure that justice is done and that, accordingly, where the trial judge is of the opinion that justice could not be achieved in the absence of such a protective measure, the Court considered the use of a screen to be appropriate: R v X, Y and Z, (1990) 91 Cr App Rep 36, [1990] Crim LR 515 applied. However, the Court held that the use of screens placed the defendant to some extent at a disadvantage and that accordingly they should only be used in relation to adult witnesses in “the most exceptional cases”. The Court stated that: “It is by no means the case that every rape complaint, or prosecution for a sexual offence, would involve the use of such screens.” On the facts of the instant case, which involved the 21 year old complainant giving evidence of multiple rape in
courts appear to have resiled from this view and now favour the application of the ‘balancing’ test irrespective of the age of the witness, although it should be noted that the ‘weighting’ may differ as between adult and child witnesses.

4.7.10 While the use of screens was more commonly authorised in respect of adult complainants of sexual offences, the courts were also prepared to permit child and adult witnesses who were otherwise reluctant or even

circumstances where the trial judge had given the jury the requisite warning, the Court refused to interfere with the decision of the trial judge, in the exercise of his discretion. It should be noted that, unlike many of the other cases involving the use of screens to shield the witness from the accused person or persons, the appellants were not related to the complainant of the sexual offences and, in fact, were unknown to her prior to the incident, the subject-matter of the trial. Accordingly, it would appear that screens are available in both situations at common law, upon the satisfaction of the ‘balance of justice’ test. In R v Foster [1995] Crim LR 333 (C.A.) the Court of Appeal upheld the use of a screen in the case of an adult complainant – aged 20 years – of indecent assault and four courts of rape by the accused, her step-father. In determining whether to grant the application of the prosecution for the provision of a screen, the trial judge held that, in balancing the interests of justice and the interests of the defendant, the complainant should give evidence with the benefit of a screen and asserted that there would be no prejudicial effect upon the defendant, in light of the direction given to the jury to the effect that the reason underlying the use of the screens was the fact that young women of any age, but particularly of the ages of the complainants, could be intimidated and embarrassed by the thought of giving evidence of this nature, that the use of a screen was a common practice and that the jury should not draw any adverse inferences therefrom. The Court rejected the assertion of the Court of Appeal in R v Schaub; R v Cooper [1994] Crim LR 531 (C.A.) that, generally speaking, the provision of screens was confined to cases where children have to give evidence and reiterated that it is within the discretion of a trial judge to authorize the use of screens in relation to adult witnesses, in the performance of the duty of the trial judge to ensure that justice is done. While the Court agreed that not every adult rape complainant or victim of a sexual offence will require the benefit of a screen, it rejected the contention that screens should only be used in the most exceptional cases; it held that the test to be satisfied was that set out in R v X, Y and Z (1990) 91 Cr App Rep 36, [1990] Crim LR 515 (C.A.) namely, that it was the duty of the trial judge to endeavour to see that justice was done and that the decision in Schaub did not put any gloss on this test to limit it in any way but only held that screens would not be available in every rape case.

See, however, Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) wherein it was noted at p. 52 that the results of the case tracking exercise revealed that screens are most commonly considered in England as a special measure for adult (not child) vulnerable and intimidated witnesses, although it was also observed that it is rare for an application for screens to be made in advance of trial.


The Court of Appeal in R v Watford Magistrates’ Court, ex parte Lenman [1993] Crim LR 388 (C.A.) approved the use of screens – along with voice-distortion equipment and pseudonyms to preserve the witnesses’ identity – where the basis for the application was the witnesses’ fear of further violence, in circumstances where the witnesses, who had been the victims of unprovoked violence, were testifying in relation to charges of violent disorder against the appellants. The Court held that the test advanced in R v X, Y and Z (1990) 91 Cr App Rep 36, [1990] Crim LR 515 (C.A.) was not confined to special measures to facilitate the evidence of children but constituted a statement of general principle, applicable to the circumstances of this case.
unable to testify for fear of violent reprisals to avail of the benefit of this facility while giving evidence. In respect of the former, a number of factors were held to inform the court’s decision whether to permit the child witness to give evidence, anonymously, from behind a screen, in the exercise of the ‘balancing test’, namely: (i) whether there were real grounds for fearing the consequences if the witness’s identity was revealed; (ii) whether the evidence was sufficiently relevant and important to make it unfair to the prosecution to proceed without it; (iii) whether the prosecution was able to satisfy the court about the creditworthiness of the witness; (iv) whether there was undue prejudice to the defendant; and (v) whether the court could balance the need for anonymity and protection of the witness against unfairness or the appearance of unfairness to the accused.\textsuperscript{1187}

4.7.11 However, there remained confusion – arising from the inconsistency in the judgments – regarding the prejudicial effect of this special measure on the accused; in particular, it was unclear whether the use of a screen was prejudicial \textit{per se},\textsuperscript{1188} whether any such prejudice was remedied by a judicial direction in the requisite form,\textsuperscript{1189} or whether such prejudice

\textsuperscript{1187} R v Taylor [1995] Crim LR 253 (C.A.), approving the decision in \textit{R v Watford Magistrates’ Court, ex p. Lenman} [1993] Crim LR 388 (C.A.). In the application of these factors, the Court of Appeal upheld the decision to permit a schoolgirl witness in a murder trial to give evidence anonymously and with the benefit of a screen, where fear was expressed in relation to the risk of violent reprisals. Having examined these considerations, May submitted that the courts “should be prepared to take a robust attitude and allow witnesses protection in appropriate cases in order to counter what appears to be a growing trend towards intimidation of witnesses”: May, Richard Criminal Evidence (4th ed., 1999) para. 21-23, at p. 487.\textsuperscript{1188} See: \textit{R v Lynch} [1993] Crim LR 868 (C.A.) where the trial judge permitted a complainant of indecent assault – aged 18 years – to testify from behind a screen and with a support person, a representative of Victim Support, with her in the witness box. The Court of Appeal rejected the appellant’s submission that the use of the screen \textit{per se} would have prejudiced the defendant in the eyes of the jury, although it conceded that the trial judge should warn the jury not to attach undue significance to its use. By way of contrast, while the trial judge in \textit{R v X, Y and Z} (1990) 91 Cr App Rep 36, [1990] Crim LR 515 (C.A.) had directed the jury that the purpose of the screens was to prevent the children from being intimidated by their surroundings and cautioned the jury not to allow the mere presence of the screen in any way to prejudice them against the accused, the Court of Appeal opined that, even in the absence of such a warning no sensible jury could have been prejudiced against the defendant by the existence of “this barrier between the witnesses and the dock”.\textsuperscript{1189} See: Home Office, \textit{Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children} (London: Home Office Communication Directorate, January 2002) para. 5.47: “Where the trial involves a jury, the judge may warn them not to be prejudiced against the defendant as a consequence. This is done as part of the judge’s duty to protect the accused from the unfairness which would ensue if, for instance, the jury were to assume that the defendant must have done something wrong to merit the erection of a screen.”
persisted after a judicial direction and was simply outweighed by the need for the protection of the child witness in the interests of the receipt of his / her best evidence and the proper administration of justice.\textsuperscript{1190} This issue – and more particularly, the constitutionality of this special measure – is considered in greater detail below.\textsuperscript{1191}

4.7.12 The leading case in New Zealand in relation to the inherent jurisdiction of the court to order the provision of a screen for the benefit of a child witness during his / her evidence, \textit{R v Accused (T 4/88)}\textsuperscript{1192} contains echoes of the foregoing – including the ‘balancing test’\textsuperscript{1193} – although it ultimately advances a different test in relation to the availability of screens; namely, that the provision of a screen was necessary\textsuperscript{1194} or reasonably necessary in

\textsuperscript{1190} In \textit{R v Schaub; R v Cooper} [1994] Crim LR 531 (C.A.) – which concerned the use of a screen by an adult complainant of multiple rape – the Court of Appeal considered that the use of screens is prejudicial to an accused person, even where the jury are properly warned not to draw any adverse inferences from their use; “\textit{[f]he very fact that they are being employed at all suggests to a jury that there is a need for the witness to be protected in some way from any contact, even if it is only visual, with the defendant}”. The Court concluded that the use of screens placed the defendant, to some extent, at a disadvantage and that, accordingly they should only be used in relation to adult witnesses in “\textit{the most exceptional cases}”. The Court stated that: “\textit{It is by no means the case that every rape complaint, or prosecution for a sexual offence, would involve the use of such screens}.” However, in the subsequent decision, \textit{R v Foster} [1995] Crim LR 333 (C.A.) the Court of Appeal upheld the use of a screen in the case of an adult complainant – aged 20 years – of indecent assault and four courts of rape by the accused, her step-father and expressed doubt in relation to the assertion in \textit{R v Schaub}, \textit{R v Cooper} [1994] Crim LR 531 (C.A.) that the use of screens is prejudicial to an accused even where the jury are properly directed since their very use indicates to the jury that the complainant requires protection from the accused.

\textsuperscript{1191} See, in particular, sections 4.9.0-4.12.19 below.

\textsuperscript{1192} \textit{R v Accused (T 4/88)} [1988] 1 NZLR 569 (H.C.), [1989] 1 NZLR 660 (C.A.). The accused was indicted on five charges of sexual violation of his daughter, aged 13 years at the date of the trial. The child complainant told the social worker involved in the proceedings that she was scared of the accused and that he had hit her with a bottle and threatened her. The social worker opined that the child would become completely mute if she were required to give her evidence in the presence of the accused and that she would be better able to give evidence if her view of the accused was obscured by a screen. Counsel for the prosecution applied to the court for permission to place one-way glass screens on the front and side of the dock, thus preventing the child from seeing the accused during her evidence but enabling the accused to see – albeit a diminished view of the child – and to hear her. The trial judge authorised the use of the screen after speaking to the child complainant in chambers and hearing expert evidence from the social worker involved.

\textsuperscript{1193} In the High Court it was held that although the use of the screens would raise a question in the mind of the jury, the court was required to balance this possible prejudice against any possible prejudice to the prosecution representing the public and the child if the screens were not made available. In this regard, the High Court in \textit{R v Accused (T 4/88)} [1988] 1 NZLR 569, at p. 570, per Hillyer J. asserted that: “\textit{In the constant search for truth and fairness, courts must balance the rights of the accused against the rights of victims, and the rights of the public}”.

\textsuperscript{1194} In \textit{R v K} [1988] DCR 187 (D.C.) Rabone D.C.J. held that the Court had the inherent jurisdiction to direct that a screen be used to shield the child complainants of indecent assault from seeing the accused during their evidence in the District Court, although it found that the screen was not necessary on the
the interests of justice. The Court of Appeal held that the inherent jurisdiction of the courts could be used to enable protection of child witnesses by way of one-way screens “in any case where that is shown to be reasonably necessary” since the inherent jurisdiction of the court was founded upon an understanding that “justice may require a departure from ordinary rules”. Since no legislation existed regulating the use of screens as of the date of the judgment, the Court of Appeal declared it the public duty of the courts to “modify their procedure so as to protect child witnesses when necessary”, that is, when the interests of justice demanded it. Accordingly, the Court authorized a change in New Zealand practice permitting the use of such protection – screens – where they were reasonably needed on the facts of the individual case. In the instant case, the screen was considered reasonably necessary in the interests of justice in the face of evidence suggesting that the child complainant would be unable to testify at all if required to give evidence without the benefit of this special measure but the Court also accepted that other reasons, such as the trauma likely to be caused to the child by seeing the accused at trial, would be sufficient to justify making such an order.
Although the Court concluded that the use of the screens did not in fact prejudice the accused in this case or have “the slightest influence on the jury’s verdict” since it was a case of “very strong evidence” against the accused,\(^{1199}\) the Court stressed that, having regard to the balance to be achieved in relation to the rights of the accused, it was necessary in every case where a determination was made that the use of screens was reasonably necessary, to emphasise to the jury in the summing up\(^ {1200}\) that “this procedure has nothing at all to do with whether the accused is innocent or guilty”, that this procedure may be permitted in relation to child witnesses and “should not in any way influence them against the particular accused”.\(^{1201}\)

While it is accepted that screens have been used in practice in this jurisdiction, there is, nonetheless, no reported case outlining the basis upon which such order has been granted by the courts\(^ {1202}\) and, accordingly, there is little guidance as to the grounds upon which the use of a screen may be authorized by the Irish courts. In this regard, it is submitted that the English ‘balance of fairness’ test outlined above provides a more useful model for adoption in this jurisdiction than the New Zealand test of ‘reasonable

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\(^{1199}\) *R v Accused (T 4/88)* [1989] 1 NZLR 660, at p. 663, *per* Cooke P. (C.A.). The Court of Appeal held that the trial judge had the power to make the orders relating to the use of screens and that such power was correctly exercised in the present case, without prejudice to the accused.

\(^{1200}\) Such a warning may also be made, at the request of counsel for the defence, at an earlier point in the trial but must then be repeated by the trial judge in his summing up of the case to the jury.

\(^{1201}\) *R v Accused (T 4/88)* [1989] 1 NZLR 660, at p. 667, *per* Cooke P. (C.A.). Equally, the High Court noted that the risk of prejudice to the accused could be reduced by a “firm and careful direction” to the jury: [1988] 1 NZLR 569, at p. 572 *per* Hillyer J. (H.C.). The direction in fact given by the trial judge to the jury during his summing up – quoted by the Court of Appeal in [1989] 1 NZLR 660 at pp. 661-662 *per* Cooke P. – was as follows: “One other matter I should mention to you. It could not have escaped your notice that there was a screen erected around the dock, and that while [the complainant] was giving her evidence, the accused went behind the screen. He could see and hear her because it was one-way glass, but she could not see him. No attempt was made by him, very properly, to draw attention to his presence. I say this to you as clearly as I possibly can. You are to draw no inference at all from the fact that there was that screen around the dock. That is not a matter you need concern yourselves with. You must not say ‘Look, he had to be screened so that she could not see him’, you must not say ‘She did not say it to his face’ or ‘She was afraid of him’. I simply say this to you as clearly and bluntly as I can as a matter of law, and you must take my directions on it. You are to take no inference at all from the fact that there was a screen there. As far as you are concerned, it is as though there was not a screen there at all. You make up your minds on what you heard, saw and the evidence that was given. It is not a matter you will take into consideration in whether you believe [the complainant] or not, or whether you find the accused guilty or not.”

necessity’ since it would be easier to apply in practice and, more importantly – by specifically requiring the courts to balance the probative value of the use of this measure against its prejudicial effect with regard to the rights of the accused – appears to be sympathetic to our constitutional concerns, as analysed below. 1203

4.7.15 The recent movement in the development of the law of evidence in many of the jurisdictions considered herein has been to provide statutory jurisdiction – by their inclusion in the modern statutory schemes – for those special measures traditionally understood to come within the scope of the inherent jurisdiction of the courts. Accordingly, the provision of screens to facilitate the reception of evidence from child witnesses is now governed by legislation in England, 1204 Scotland, 1205 New Zealand 1206 and Canada. 1207

1203 See, in particular: sections 4.9.0-4.12.19 below in relation to the constitutionality (and compatibility with the European Convention on Human Rights) of special measures providing for the use of a one-way screen or live television link.
1204 Section 23 of the Youth Justice and Criminal Evidence Act 1999. It should be noted that s. 19(6) of the Youth Justice and Criminal Evidence Act 1999 expressly preserves the power of a court to make an order or give leave of any description (whether in the exercise of its inherent jurisdiction or otherwise) either in relation to a witness who is not an eligible witness within the meaning of the statutory scheme or in relation to an eligible witness where the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness, citing as an example in the latter respect, where a foreign interpreter is appointed.
1205 Section 271K of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004.
1206 Section 271K of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 3 of the Vulnerable Witnesses (Scotland) Act 2004.
1207 See: s. 486.2(1) of the Criminal Code in Canada, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, in relation to child witnesses – witnesses aged less than eighteen years – or witnesses with a mental or physical disability. See also: s. 486.2(2) which empowers the court, in any proceedings against an accused, to order that a witness testify outside the courtroom or behind a screen or other device that would allow the witness not to see the accused “if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of”; in making this determination, the court is obliged to take into account the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance that the judge or justice considers relevant. Furthermore, pursuant to s. 486.2(4) and (5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, if an accused is charged with one of a number of specified offences – including a serious offence committed for the benefit of, at the direction of or in association with, a criminal organisation, or a terrorism offence – the court may order that any witness testify: (i) outside the courtroom “if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness”; and (ii) outside the courtroom or behind a screen or other device that would allow the witness not to see the accused “if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of".
In an attempt to minimize the impact of this special measure upon the rights of the accused while achieving the objective of reducing the trauma experienced by a child witness and improving the quality of the evidence received from the child witness, each of these statutory schemes expressly envisage the provision of a screen which is one-way in its constitution; moreover, these statutory provisions are not restricted in their application to screens but include “a wall or partition”, “other device” or “other arrangement” which prevent the child witness or complainant from

1208 Section 23 of the Youth Justice and Criminal Evidence Act 1999 in England provides that the court may, by special measures direction, enable a child witness, while giving testimony or being sworn in court, “to be prevented by means of a screen or other arrangement from seeing the accused”; moreover, s. 23(2) specifically stipulates that the screen or other arrangement “must not prevent the witness from being able to see, and to be seen by – (a) the judge or justices (or both) and the jury (if there is one); (b) legal representatives acting in the proceedings; and (c) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness”. Where two or more legal representatives are acting for a party to the proceedings, this stipulation is regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them: section 23(3). Likewise, in Scotland, s. 271K of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 provides that where the special measure to be used in relation to a child witness is a screen, the screen “shall be used to conceal the accused from the sight of the [child witness] in respect of whom the special measure is to be used”; the court is required to make arrangements to ensure that the accused “is able to watch and hear the [child witness] giving evidence”. The screen is variously described in s. 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 as “one-way glass”, or “a wall or partition, constructed in such a manner and of such materials as to enable those in the courtroom to see the complainant while preventing the complainant from seeing them, the evidence of the complainant being given through an appropriate audio link”. Section 23E(5) further empowered the courts to direct that such screens be erected where the complainant was to give his or her evidence at a location outside the court precincts. In Canada, s. 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, empowers the court to authorise a child complainant or witness to testify “behind a screen or other device that would allow the complainant or witness not to see the accused”. Mewett A., Witnesses (1995) commented in relation to this provision, at p. 4-17: “[I]t is not that the accused is not present to observe the witness, only that the witness is not obliged to observe the accused while testifying.”

1209 Section 23E(d) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 in New Zealand.

1210 Section 486.2(1) of the Criminal Code in Canada, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.

1211 Section 23(1) of the Youth Justice and Criminal Evidence Act 1999 in England. Home Office, Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children (London: Home Office Communication Directorate, January 2002) para. 5.46, at p. 117: “An arrangement used in some older cases was to require defendants to move from the dock to a position in court where they could not be seen by the witness. Such an arrangement might have the undesirable effect of making it more difficult for the defendant to communicate with his legal representatives, which could become a factor in determining whether he or she was accorded a ‘fair trial’ within the meaning of Article 6 of the European Convention on Human Rights. If such an arrangement is adopted, therefore, careful consideration requires to be given to ensuring that the rights of the defendant are properly preserved, for example by ensuring that a break in the witness’s evidence is taken in order to afford the defendant an opportunity to consult with his legal representative about any further questions which require to be put in the light of what the witness has said.” See: R v Smellie (1919) 14 Cr App R 128 (C.A.).
seeing the accused while he/she testifies. Accordingly, the screen itself has a very limited function, namely, to obscure only the child witness’s view of the accused while preserving the view of all persons present in court of the child witness during his/her evidence in order to facilitate the assessment of the child’s demeanour and credibility.1212

4.7.17 This focus is also reflected – albeit to a lesser degree – in the statutory tests adopted in relation to the availability of the screen. In Canada, the court will authorize the use of a screen by a child complainant or witness “unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice”.1213 A voir dire will be conducted to ascertain whether the procedure is necessary within the meaning of section 486(2.1); the Supreme Court of Canada has held that the exact evidence to be adduced “need not take any particular form” and that the trial judge enjoys a wide discretion and can use “substantial latitude” in determining whether to authorise the use of a screen or similar device.1214

4.7.18 While the legislation in England provides for the application of ‘primary rule’ to child witnesses – enabling the child to give evidence by way of the admission into evidence of a pre-trial video recording as his/her evidence-in-chief and otherwise by way of live television link – this primary rule may

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1212 Scottish Law Commission, Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (Scot. Law Com., Report No. 125, 1990) para. 4.23, at p. 20: “We consider that it is important that, when a witness is giving evidence in court, an accused should be able not only to hear but also to see the witness. On the basis that a witness’s demeanour while giving evidence may be a helpful guide for the assessment of truthfulness and reliability, it is, we believe, as important for an accused to be able to detect any tell-tale signs as it is for the judge or jury.” See also: Australian Law Reform Commission, Issue Paper: Speaking for Ourselves: Children and the Legal Process (ALRC IP No. 18, 1996) paras. 10.29-10.32.

1213 Section 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15. Section 486.2(6) provides that in order to determine whether an order under subsection (2) should be made in respect of that witness, “the judge or justice shall order that the witness testify in accordance with that subsection”. This is an usual and somewhat circular provision; in order for the court to reach an opinion as to whether the use of a one-way screen or similar device would interfere with the proper administration of justice, the court may permit the witness to testify, but such testimony must be received with the benefit of the very protection sought by the witness.

1214 R v Levogianiis (1993) 25 C.R. (4th) 325, at p. 338; 18 C.R.R. (2d) 242, at p. 254 (S.C.C.). L’Heureux-Dubé J. further stated that: “In exercising her or his discretion the trial judge may consider the evidence brought forward with regard to, but not limited to, the capabilities and demeanour of the child, the nature of the allegations and the circumstances of the case.”
be displaced and another special measure authorised to facilitate the reception of the child’s evidence where: (i) either or both of the special measures stipulated in the ‘primary rule’ are unavailable; (ii) the court is of the opinion, having regard to all the circumstances, that in the interests of justice the video recording, or part of it, should not be admitted into evidence; or (iii) the court is satisfied that compliance with the ‘primary rule’ would not be likely to maximise the quality of the child witness’s evidence so far as practicable “whether because of the application to that evidence of one or more other special measures available in relation to the witness would have that rules or for any other reason”.1215 It is only when determining whether any special measure or measures would be likely to improve or to maximize so far as practicable the quality of evidence given by the witness – after the application of the statutory ‘primary rule’ – that the court must consider: (i) any views expressed by the witness; and (ii) whether the measure or measures “might tend to inhibit such evidence being effectively tested by a party to the proceedings”.1216

4.7.19 Similarly, the new statutory scheme in Scotland specifically provides for a balancing of the benefit to the child witness against the prejudice to the accused, the fairness of the trial or the interests of justice only by way of default in the operation of the complex presumptive rules in relation to the

1215 Section 21(4) of the Youth Justice and Criminal Evidence Act 1999.
1216 Section 19(3)(b) of the Youth Justice and Criminal Evidence Act 1999. In this regard, it is important to note that, with regard to child witnesses in need of special protection, as outlined in section 4.4.0-4.4.12: Availability of Special Measures – Eligible Witnesses, s. 21(2) of the Youth Justice and Criminal Evidence Act 1999 provides that where the court, in making a determination for the purposes of s. 19(2) – as to whether any special measure would be likely to improve the quality of the witness’s evidence and, if so, which special measure or measures would be likely to maximize so far as practicable the quality of that evidence – must first have regard to s. 21(3) (which provides for the admission of video recorded evidence-in-chief and the reception of any other evidence by live television link) and s. 21(7) (allowing video recorded evidence-in-chief, cross-examination and re-examination for a child “in special need of protection” unless the witness has informed the court that he / she does not want video recorded cross-examination and re-examination) and only then have regard to the provisions of section 19(2). Furthermore, any special measures required to be applied in relation to the child witness by virtue of s. 21 (i.e. the special measures directions under s.24, s. 27 and/or s. 28) shall be treated as if they were measures determined by the court, pursuant to section 19(2)(a) and (b)(i), to be ones that (whether on their own or with any other special measures) would be likely to maximize, so far as practicable, the quality of his evidence.
availability of special measures to child witnesses; similar provision is made in respect of the review of arrangements previously made by the court with regard to the special measures afforded to a vulnerable witness at any time after the commencement of the trial or before or after the witness has begun to give evidence, either upon the application of the party citing or intending to cite the witness or of its own motion.

4.7.20 In concentrating on the quality of evidence to be received from the child witness, when determining the availability of screens, these statutory tests are faithful to the rationale underlying these evidential reforms; namely, the

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1217 Section 271A of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 provides that, subject to compliance with the notification requirements, where a child witness is to give evidence at or for the purposes of a trial, the child witness is entitled to the benefit of one or more of the special measures for the purpose of giving evidence. Unless the child is a child ‘in need of special protection’, the court shall make an order authorizing the use of this special measure. The court will make an order authorizing the giving of evidence by a child witness without the benefit of any special measure if it is asserted in the notice that the child witness should give evidence without the benefit of any special measure, the summary of views accompanying the notice indicates that the child witness has expressed a wish to give evidence without the benefit of any special measure and the court is satisfied on the basis of the notice or the summary of views accompanying the notice indicates that the child witness has not expressed a wish to give evidence without the benefit of any special measure, the court will make an order that, before the trial diet, there shall be a diet pursuant to s. 271A(9) and it shall ordain the parties to attend. At such diet, having given the parties an opportunity to be heard and where the court has already authorised by order the use of ‘standard’ special measures – including screens – pursuant to s. 271A(5)(i)(a), the court may make an order authorizing the use of such further special measure or measures as it considers appropriate for the purpose of taking the child witness’s evidence. In any other case, the court shall make an order at such diet authorizing the use of “such special measure or measures as the court considers to be the most appropriate for the purpose of taking the child witness’s evidence”: section 271A(9)(b). Alternatively, the court may – pursuant to s. 271A(10) – direct that the child witness is to give evidence without the benefit of any special measure, however, the court is empowered to make such order only where the following conditions are satisfied: (i) where the child witness has expressed a wish to give evidence without the benefit of any special measure and it is appropriate for the child witness so to give evidence; or (ii) in any other case, where the use of any special measure for the purpose of taking the evidence of a child witness “would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice” and “that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made”.

1218 Section 271D of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 provides that the court, having given the parties an opportunity to be heard, may by order: (i) authorize the use of such special measure or measures at it considers most appropriate for the purpose of taking the witness’s evidence, where no such measures have previously been authorised; (ii) vary an order made by adding, deleting or substituting for any special measure authorised such other special measure as the court considers most appropriate. The court may only revoke an earlier order authorizing the use of a special measure if it is satisfied: (i) where the witness has expressed a wish to give or continue to give evidence without the benefit of any special measure, that it is appropriate for that witness so to give evidence; or (ii) in any other case, that the use or continued use of the special measure(s) authorised would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice and that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.
reception of the best evidence from child witnesses through the reduction of the trauma associated with the witness experience.\textsuperscript{1219} However, to the extent that the tests do not mandate consideration of the impact upon the accused of the use of this special measure, on an \textit{equal footing} to assessment of the quality of the child’s evidence with or without the benefit of this special measure,\textsuperscript{1220} it is submitted that none of these tests, by themselves, would be sufficient to discharge the Irish courts’ obligation to protect and vindicate the accused’s constitutional rights to a fair trial and fair procedures.

\textbf{4.8.0 Availability of Live Television Link – Statutory Jurisdiction:}

\textbf{4.8.1} In contrast to the provision of screens in this jurisdiction, the availability of live television link to facilitate the reception of evidence from child witnesses has, since its introduction in each of the jurisdictions considered herein, been governed by legislation.\textsuperscript{1221}

\textsuperscript{1219} Equally, pursuant to s. 23D(1) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 in New Zealand, the court may take the following factors into account in determining whether to permit a child witness to give evidence with the assistance of this special measure: the age of the complainant; the personality of the complainant; his or her assessed ability to relate the evidence; the relationship between the complainant and the defendant; the nature of the charge; the importance of the evidence; and any other matters impacting on the complainant when giving evidence and on the ability of the jury to assess the complainant and his or her evidence. List of relevant factors contained in: \textit{R v W} (1990) 6 CRNZ 157, at p. 158; and \textit{R v Hauiti} (1990) 6 CRNZ 599, at p. 602. The judge may also call for and consider the reports of any persons whom the court considers to be qualified to advise on the effect on the complainant of giving evidence in person in the ordinary way or in any particular mode set out in s. 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989: section 23D(3).

\textsuperscript{1220} See, however, s. 23D(4) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 in New Zealand which provides that: “\textit{In considering what directions (if any) to give under section 23E of this Act [including screens], the Judge shall have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused.”

\textsuperscript{1221} See: (i) Ireland: s. 13 of the Criminal Evidence Act 1992, (No. 12 of 1992) as amended by s. 18(3) of the Criminal Justice Act 1999 (No. 10 of 1999) and s. 257(3) of the Children Act 2001 (No. 24 of 2001) in relation to applicable \textit{criminal} proceedings and s. 21(2) of the Children Act 1997 (No. 40 of 1997) in relation to \textit{civil} proceedings concerning the welfare of a child; (ii) England: s. 24 of the Youth Justice and Criminal Evidence Act 1999 (previously, s. 32 of the Criminal Justice Act 1988, as amended by ss. 54 and 55 of the Criminal Justice Act 1991, now repealed and replaced by s. 24 save for s. 32(1)(a) of the Criminal Justice Act 1988, which remains in force) and s. 51 of the Criminal Justice Act 2003; (iii) Scotland: s. 271J of the Criminal Procedure (Scotland) Act 1995 (c. 46), as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3) (previously: ss. 56-59, Law Reform (Miscellaneous Provisions) (Scotland) Act, 1990; ss. 33-35, Prisoners and Criminal Proceedings (Scotland) Act, 1993 (c. 9); and s. 271, Criminal Procedure (Scotland) Act 1995 (c. 46),
There are a number of different statutory approaches which may be taken to the issue of availability of the live television link facility including: (i) the legislation may *presume* that an eligible witness in applicable proceedings may give evidence via live television link, unless good reason to the contrary is established; or (ii) the statute may state that the *leave of the court* must be sought but remain silent as to the factors to be taken into account by the court in determining whether to grant leave; or (iii) use of the procedure may be authorised by the court upon *application* being made by either of the parties and upon the satisfaction of certain *specified criteria*. The choice of approach reveals a legislative policy determination regarding the appropriate balance to be struck between the competing interests of the protection of child witnesses, the proper administration of justice and the right of the accused to a fair trial and fair procedures.

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as substituted by s. 29, Crime and Punishment (Scotland) Act, 1997 (c. 48)); (iv) Canada: s. 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15; (v) New Zealand: s. 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.

1222 See: (i) s. 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001 (Ireland); (ii) ss. 19, 21, 22 and 23 of the Youth Justice and Criminal Evidence Act 1999 providing for the ‘primary rule’ in respect of child witnesses and child witnesses ‘in need of special protection’ (England); (iii) ss. 271, 271A and 271J of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004, containing the presumptive rules regarding the reception of the evidence of child witnesses with the benefit of special measures, including live television link; and (iv) s. 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.

1223 See: s. 13(1)(b) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001; s. 21 of the Children Act 1997 in relation to child witnesses in applicable *civil* proceedings; and Or. 63A, r. 23(1) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No. 2 of 2004) in Ireland. See also: s. 32 of the Criminal Justice Act 1988, as amended by ss. 54 and 55 of the Criminal Justice Act 1991 (now repealed and replaced by s. 24 of the Youth Justice and Criminal Evidence Act 1999 in England).

1224 See: (i) Ireland: s. 39 of the Criminal Justice Act 1999; and s. 29 of the Criminal Evidence Act 1992, as inserted by s. 24 of the Extradition (European Union Conventions) Act 2001 (No. 49 of 2001); (ii) Canada: s. 486.2(2) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15; and (iii) New Zealand: s. 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. See also the previous Scottish statutory scheme: s. 56 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s. 35 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, s. 271(8) of the Criminal Procedure (Scotland) Act 1995, as substituted by s. 29 of the Crime and Punishment (Scotland) Act 1997 (now repealed and replaced by ss. 271, 271A and 271J of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004).
The first approach—which involves a presumption that an eligible witness in applicable proceedings will suffer trauma if required to give evidence by conventional means—is favoured in this jurisdiction. The entitlement of a child witness in proceedings involving applicable offences to avail of the benefit of the live television link facility when giving evidence is automatic, that is: (i) it does not depend upon an individualised finding of trauma; and (ii) the ‘presumption of trauma’ can only be displaced where “the court sees good reason to the contrary”.

The emphasis of this approach is unmistakably on the child witness; indeed, it is arguable that the interests of the accused are almost invisible in such an approach. However, a number of points may be made in this regard. First, the ambit of this statutory reform is restricted to eligible witnesses giving evidence in proceedings involving one or more applicable offences. Secondly, although this provision is generally thought to embody a presumption in favour of the use of live television link by reason of the fact that the court is empowered to authorize its use in relation to child witnesses “unless the court sees good reason to the contrary”, it is submitted that the term ‘presumption’ is slightly misleading in this context since the language of the provision also indicates that a residual judicial discretion remains with the trial judge; the statutory scheme expressly provides that child

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1225 Section 13(1) of the Criminal Evidence Act 1992 was amended by s. 18(3) of the Criminal Justice Act 1999, which provided that: “Section 13(1) of the Act of 1992 is hereby amended by the insertion, after ‘proceedings’, of ‘(including proceedings under section 4E or 4F of the Criminal Procedure Act 1967)’.”

1226 Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.

1227 It should be noted, however—as outlined in para. 4.4.12 above—that the availability of the facility of live television link to assist witnesses in giving evidence in criminal proceedings in this jurisdiction has been extended by subsequent statutory reforms including: s. 39 of the Criminal Justice Act 1999, s. 29 of the Criminal Evidence Act 1992, as inserted by s. 24 of the Extradition (European Union Conventions) Act 2001 and Or. 63A, r. 23(1) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No. 2 of 2004). See also: Report of the Working Group on the Jurisdiction of the Courts (2003) at p. 129, para. 739; Final Report of the Committee on Video Conferencing in the Courts (Chairperson: Ms. Justice Denham) (Dublin, Courts Service, 2005) paras. 3.10.5-3.10.7; and McGrath, Declan Evidence (2005) para. 3-128, at p. 113. Equally, s. 51 of the Criminal Justice Act 2003 in England empowers the court to authorise any witness in criminal proceedings to give evidence via live television link where it is satisfied that it is in the interests of the efficient or effective administration of justice. See also: Criminal Procedure Rules 2005, Pt. 30 in England; and Keane, Adrian The Modern Law of Evidence (6th ed., 2006) at pp. 142-143.
witnesses "may" – as opposed to "shall" – give evidence via live television link.\textsuperscript{1228} Accordingly, while on one reading this scheme envisages the giving of evidence by child witnesses with the assistance of this special measure as the norm rather than as the exception, there is a competing contrary interpretation of this provision which would empower the courts, in response to a challenge, to make an individual assessment of the benefit to be gained by use of this special measure – both to the child witness and to the administration of justice – which benefit could then be balanced against any possible prejudice to the accused.\textsuperscript{1229} However, the absence of any guidance in relation to the resolution of this difficulty in statutory interpretation leaves open the possibility that witnesses, who do not require the assistance provided by this special measure, will be permitted to enjoy its benefits when giving evidence in criminal proceedings.\textsuperscript{1230}

4.8.5 No guidance is given in the statute in relation to what may constitute "good reason to the contrary" for the purposes of the judicial denial of this measure to a child witness.\textsuperscript{1231} It is submitted that evidence to the effect that the child is capable of giving evidence in the absence of live television link – whether with or without one of the other special measures – without

\textsuperscript{1228} See: Donnelly v Ireland [1998] 1 IR 338, at p. 357, per Hamilton C.J. (S.C.) where the Chief Justice regarded this residual judicial discretion as a further protection for the accused person’s right to a fair trial and fair procedures. See also: sections 4.9.0-4.12.19 below in relation to the constitutionality (and compatibility with the Convention) of screens and the live television link facility in facilitating the reception of evidence from child witnesses, having regard to the rights of the accused to a fair trial and fair procedures.

\textsuperscript{1229} It is respectfully submitted that each element of s. 13 cannot be considered in isolation; therefore the stipulation that child witnesses give evidence via live television link unless the court sees good reason to the contrary must be considered in the context of the overall provision that a person other than the accused may give evidence via live television link. When read together, these provisions direct that a child witness “may” give evidence via live television link “unless the court sees good reason to the contrary”.

\textsuperscript{1230} See Duffy, Gordon "Televised testimony and constitutional justice" 4 (1994) Irish Criminal Law Journal 178, at p. 184: "Prima facie [s. 13(1)(a) of the Criminal Evidence Act 1992] would seem to permit children to give evidence under the subsection where they might not be suffering any trauma or distress at all or, where such trauma or distress as they might be suffering would not relate to any fear of the accused but merely to a fear of the atmosphere of the court in general."

\textsuperscript{1231} Equally, there is no guidance provided in the legislation as to the standard of proof to be met by the defence in showing ‘good reason to the contrary’. To require the defence to meet the criminal standard of proof would, it is submitted, be unduly onerous, accordingly, it is suggested that the Oireachtas intended that ‘good reason’ within the meaning of s. 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001, should be demonstrated to the civil standard of proof, that is, on the balance of probabilities.
suffering undue trauma or stress would represent such ‘good reason’;\textsuperscript{1232} to allow the use of this facility in the face of such evidence would, it is submitted, subvert the rationale underlying these statutory reforms.\textsuperscript{1233} The practical difficulty with such an understanding of ‘good reason’ from the point of view of the defence is that the prosecution will be in a better position – having access to the child – to assess the capability of the child to give evidence in the absence of such special measure; the defence must either rely on the general developmental characteristics of children of the same age as the child in question or require the child to submit to independent expert examination with necessary attendant stress for the child, contrary to the clear legislative intent to protect child witnesses from such trauma.\textsuperscript{1234}

4.8.6 More importantly, however, from the point of view of the accused, the Supreme Court has held that – notwithstanding the absence of any express

\textsuperscript{1232} Similarly, in \textit{R(Director of Public Prosecutions) v Redbridge Youth Court} [2001] 4 All ER 411, at p. 421 (Q.B. Div.) Latham L.J. asserted in relation to ss. 32 and 32A of the Criminal Justice Act 1988, as amended, in England, that material should be furnished to the court which established that “the witness could be upset, intimidated or traumatized by appearing in court as a result of which there was a real risk that the quality of the child’s evidence would be affected or that no evidence would be forthcoming”. It is submitted that in determining whether there is ‘good reason to the contrary’, the court may also have regard to the wishes of the child, where the child does not wish to give evidence in this manner although such views could not be conclusive of the issue of availability. See: ss. 271A and 271B of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004; and s. 19(3)(a) of the Youth Justice and Criminal Evidence Act 1999 in England. \textsuperscript{1233} In its \textit{Report on Child Sexual Abuse} (LRC 32-1990) (September, 1990), the Law Reform Commission of Ireland considered in para. 7.11, at p. 72 that while an argument could be made for mandatory use of the live television link procedure, “there may be cases in which the interests of justice will not be served by its use”. The Commission opined that it would be undesirable that the court should not even have a discretion to dispense with the use of this facility where, for example, the legal and psychological advice available to the Director of Public Prosecutions indicated that the presentation of the case would be enhanced by dispensing with it. While the Commission had originally favoured leaving the decision to the Director of Public Prosecutions whether or not to employ the live television link facility, it recommended in para. 7.11, at p. 72 of its Report that “the 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 reason, decides otherwise”. The Commission concluded, in para. 7.09, at p. 71, that: “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.”

\textsuperscript{1234} See: Canon Ruth, and Neligan Niall, \textit{Evidence} (2002) para. 6.3.1, at p. 71 wherein the authors conclude that a “fairer solution would have been to place the onus on the prosecution, in every case, to show good reason why the child should testify in this way”. This, in essence, is the ‘case-specific finding of trauma’ utilised in the legislation in many of the States in America and in the civil legislation in this jurisdiction: s. 21 of the Children Act 1997.
legislative provision to this effect – the trial judge will be “obliged to have regard to the accused’s right to a fair trial” in determining 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”.\footnote{Donnelly v Ireland [1998] 1 IR 321, at p. 357, per Hamilton C.J. (S.C.): “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.” (Emphasis added). However, it is equally arguable that the ‘presumption of trauma’ itself raises questions of fairness in relation to the accused; these arguments are discussed below in sections 4.11.18-4.11.37.} Accordingly, judicial interpretation has attempted to redress the apparent imbalance in the statutory provisions providing for the availability of the live television link facility to child witnesses in this jurisdiction; the success of this judicial creativity is considered below.\footnote{See, in particular: sections 4.9.0-4.12.19 below.}

4.8.7 A form of the ‘presumption of trauma’ approach is also evident in the modern statutory schemes in England,\footnote{See: ss. 19, 21, 22 and 24 of the Youth Justice and Criminal Evidence Act 1999 in England.} Scotland\footnote{See: ss. 271A, 271B and 271J of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004. See section 4.7.19 above which analyses the operation of analogous presumptive rules in the new Scottish statutory scheme and highlights its apparent imbalance.} and Canada.\footnote{See: s. 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15 which provides that, in any proceedings against an accused, the judge or justice shall, upon application to the court, order that the witness testify outside the courtroom “unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice”.} As indicated above, the statutory ‘primary rule’ applicable to the evidence of child witness in England dictates that the evidence of child witnesses\footnote{As indicated above, this ‘primary rule’ is modified with regard to the evidence of child witnesses in need of special protection; that is, child witnesses giving evidence in proceedings involving one or more of a list of specified offences, such as sexual offences. The entirety of the evidence of child witnesses of sexual offences is received by way of the admission into evidence of pre-trial video recordings subject only to the availability of such special measure and the opinion of the court, having regard to all the circumstances of the case, that in the interests of justice the recording, or part thereof, should not be so admitted: s. 21(5) and (6) of the Youth Justice and Criminal Evidence Act 1999. See Roberts, Paul and Zuckerman Adrian Criminal Evidence (2004) at p. 282: “In other words, full-Pigot presumptively applies to child witnesses in need of special protection in prosecutions of sexual offences; half-Pigot to child witnesses in need of special protection in non-sexual assault proceedings”.} will be received through a combination of the admission into evidence of
pre-trial video recordings and the use of the live television link facility.\textsuperscript{1241} This ‘primary rule’ imports into English law a presumption that a child witness will give evidence otherwise than in open court and in the immediate presence of the accused subject only to: (i) the availability of the special measure(s); (ii) the opinion of the court, having regard to all the circumstances of the case, that in the interests of justice the recording, or part thereof, should not be so admitted; and (iii) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise so far as practicable, whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason.\textsuperscript{1242} It is notable that the application of this ‘primary rule’ in relation to the evidence of child witnesses is not expressly subjected to consideration of the impact upon the accused of such special measures;\textsuperscript{1243} moreover, unlike the legislation in this

\textsuperscript{1241} Section 21(3) of the Youth Justice and Criminal Evidence Act 1999 provides that: “The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements – (a) it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and (b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24”.

\textsuperscript{1242} Section 21(4) of the Youth Justice and Criminal Evidence Act 1999. While s. 19(3) provides that, in determining “for the purposes of this Chapter” whether any special measure(s) would or would not be likely to improve, or maximise so far as practicable, the quality of evidence given by the witness, the court must consider all of the circumstances of the case, including in particular – (a) any views expressed by the witness; and (b) whether the measure(s) might tend to inhibit such evidence being effectively tested by a party to the proceedings. However, s. 21(2) provides that, “for the purposes of section 19(2)” any special measures “required to be applied in relation to [a child witness] by virtue of this section shall be treated as if they were measures determined by the court, pursuant to section 19(2)(a) and (b)(i), to be ones that (whether on their own or with any other special measures) would be likely to maximise, so far as practicable, the quality of this evidence”. It is not clear whether the latter section excludes consideration of the former section – and, in particular consideration of the tendency to inhibit the effective testing of the child’s evidence – or whether the latter is restricted in its ambit to s. 19(2) – consideration of whether any of the special measures / which special measure(s) would be likely to improve / maximise so far as practicable the quality of the child’s evidence – while the former expressly encompasses the entire Chapter. If the first interpretation is to be preferred, there appears to be no statutory basis for considering the impact upon the accused of the special measures directions made by the court pursuant to this ‘primary rule’.

\textsuperscript{1243} By way of contrast, the provisions of s. 51(7)(f) of the Criminal Justice Act 2003 in England require the court, in determining whether to grant a direction authorising the use of live television link by a witness in criminal proceedings, to consider all of the circumstances including “whether a direction might tend to inhibit any party to the proceedings from effectively testing the witness’s evidence”. The only indication contained in Part 8 of the Criminal Justice Act 2003 as to its relationship with Part II of the Youth Justice and Criminal Evidence Act 1999 is the statement in s. 56(5)(a) to the effect that Part 8 takes effect without prejudice to “any power of a court...to give
jurisdiction, the mandatory language of these statutory provisions would appear to negate the possibility of any residual judicial discretion which, in turn, could admit of such consideration.\textsuperscript{1244}

4.8.8 Notwithstanding the apparent imbalance in the ‘presumption of trauma’ approach, it should be noted that its adoption in Ireland has been upheld by the Supreme Court as constitutional;\textsuperscript{1245} similarly – and for reasons examined below – the English courts have refused to find that the ‘primary rule’ contained in the English legislation infringes the guarantees contained in Article 6 of the European Convention on Human Rights.\textsuperscript{1246}

4.8.9 The second legislative approach to the availability of the live television link facility involves permitting the use of this special measure by witnesses in criminal proceedings with the leave of the court – that is, upon cause shown – but remains silent as to the criteria to be applied by the courts in determining whether to grant such leave;\textsuperscript{1247} all that can be said with certainty is that the entitlement of the witness is not automatic.

\begin{footnotesize}
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  \item \textsuperscript{1244} See: \textcite{R(Director of Public Prosecutions) v Redbridge Youth Court [2001] 1 WLR 2403 (Q.B. Div.); R(D) v Camberwell Green Youth Court [2003] Crim LR 659, [2003] 2 Cr App R 16 (Q.B. Div.); and R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, [2005] 1 All ER 999, [2005] 2 Cr App R 1 (H.L.). See also: sections 4.11.18-4.11.37 below. Burton, Mandy, Evans, Roger and Sanders, Andrew \textit{Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies} (Home Office Online Report 01/2006) note at p. 51 that: “Most applications for the [live television link] in cases of child witnesses are made in advance of trial. This is perhaps due to the relative ease with which child witnesses can be identified as [vulnerable or intimidated witnesses] and the legislative framework being predisposed towards the use of some special measures for child witnesses. Some [Crown Prosecution Service] lawyers and caseworkers questioned the need for applications for live television links to be made, given that eligibility is virtually automatic in many instances. The perception that the [live television link] will almost always be granted for child witnesses may perhaps explain the cursory nature of the special measures applications in the case files.”
  \item \textsuperscript{1245} Donnelly \textit{v Ireland} [1998] 1IR 321 (H.C.), [1998] 1 IR 338 (S.C.).
  \item \textsuperscript{1247} See: s. 13(1)(b) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001; s. 21 of the Children Act 1997 in relation to child witnesses in applicable civil proceedings; and Or. 63A, r. 23(1) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No. 2 of 2004) in
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\end{footnotesize}
This approach is evident in this jurisdiction, although only in relation to witnesses in applicable criminal proceedings other than child witnesses or witnesses with a mental handicap aged eighteen years or more. While it would appear that in order to qualify for eligibility to avail of the ‘automatic’ entitlement to live television link pursuant to s. 13(1)(a) of the Criminal Evidence Act 1992, as amended, a witness must satisfy one of two preconditions – namely, be aged less than eighteen years or being aged eighteen years or more, have a mental handicap – it was held in O’Sullivan v Ireland. See also: s. 24 of the Youth Justice and Criminal Evidence Act 1999 in England (previously: s. 32 of the Criminal Justice Act 1988, as amended by ss. 54 and 55 of the Criminal Justice Act 1991).

This approach is also adopted in this jurisdiction – and these questions left unanswered – in relation to child witnesses in civil proceedings concerning the welfare of the child (such as guardianship, custody, care or wardship proceedings) in s. 21 of the Children Act 1997. The meaning of ‘child’ in s. 21 was originally wider than its criminal counterpart – which specified an age maximum of 17 years – in that it refers to a “person who is not of full age”; while “full age” is not defined, it usually refers to a person of 18 years or more, therefore the qualifying age maximum for child witnesses in civil proceedings was originally one year more than its criminal equivalent. This was a distinction without a difference, however, since all ‘child’ witnesses in civil proceedings must apply to the court for leave to give evidence via live television link, therefore – despite the more inclusive meaning attributed to the term ‘child’ in the Children Act 1997 – an eighteen year old ‘child’ witness in a civil case would have had no advantage over the same witness in a criminal case, since both had to satisfy the court that leave should be granted in his / her favour. However, s. 257(3) of the Children Act 2001 amended Part III of the Criminal Evidence Act 1992 by replacing the age limit of 17 years in relation to eligibility for special measures with an age limit of 18 years. Accordingly, s. 13 of the Criminal Evidence Act 1992, as amended, now provides for a presumption of trauma for all child witnesses aged less than eighteen years, while the Children Act 1997 provides that all such child witness can avail of the live television link facility only with the leave of the court. Section 20(b) of the Children Act 1997 extends availability of this measure to persons “of full age” who have “a mental disability to such an extent that it is not reasonably possible for the person to live independently”. Finally, as noted above, in relation to civil proceedings, Or. 63A, r. 23(1) of the Rules of the Superior Courts, as inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No. 2 of 2004) in Ireland provides for the use of the live television link facility with the leave of the High Court judge hearing the Commercial List; the judge may allow a witness to give evidence, whether from within or outside the State, through a live television link or by other means, and order such evidence to be recorded either by video or otherwise as the judge directs. See also: s. 32 of the Criminal Justice Act 1988, in England, the statutory predecessor of s. 24 of the Youth Justice and Criminal Evidence Act 1999.

Section 13(1) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001 provides that: “In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act 1967) 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 18 years of age, unless the court sees good reason to the contrary, (b) in any other case, with the leave of the court.” (Emphasis added). Section 19 of the Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001 provides that “[f]he references in section 13(1)(a)...to a person under 18 years of age...shall include references to a person with mental handicap who has reached the age concerned”.

Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.
District Judge Hamill\textsuperscript{1251} that it is not necessary for the court to ascertain by prior inquiry whether such a handicap exists before directing that such witness's evidence be given via live television link under the statutory scheme. The High Court held that child witnesses and persons exceeding the age limit for child witnesses but possessing a mental handicap may give evidence with the benefit of this special measure pursuant to s. 13(1)(a) unless the court sees good reason to the contrary and that it was clear from the provisions of s. 13(1)(b) that “in any other case to which Part III of the Act applies” this facility was available with the leave of the court;\textsuperscript{1252} it was held that Part III of the Criminal Evidence Act 1992 conferred jurisdiction on the court to hear evidence via live television link in all cases to which it applied and, since it applied to the instant case, it followed that the court had jurisdiction to direct that a television link should be used.

Contrary to the foregoing, it may be argued that since Part III contains statutory exceptions to two principles of fundamental importance in the adversarial trial in criminal proceedings – namely, the principle that all evidence be given \textit{viva voce} upon oath or affirmation\textsuperscript{1253} and the principle that any examination of witnesses must likewise be \textit{viva voce} and in open

\textsuperscript{1251} \textit{O'Sullivan v District Judge Hamill} [1999] 2 IR 9, per O'Higgins J. (H.C.). The applicant was charged with having sexual intercourse with a person who was mentally impaired, contrary to s. 5(1) of the Criminal Law (Sexual Offences) Act 1933, an offence to which the provisions of Part III of the Criminal Evidence Act 1992 applied. Upon application by the applicant to have the alleged victim of the offence deposed, the respondent District Judge ordered that she should be permitted to give her deposition via live television link, in accordance with s. 13 of the Criminal Evidence Act 1992. This order was made in the absence of any prior inquiry – or any request by the applicant that such inquiry be held – into the mental capacity of the alleged victim. The applicant subsequently sought: (i) an order of certiorari by way of judicial review quashing the order of the respondent on the ground that he had acted without or in excess of jurisdiction in that he had heard no evidence that the alleged victim was a person with a mental handicap; and (ii) an order of prohibition precluding the respondent from taking the deposition. It was argued on behalf of the applicant that: (i) before permitting a witness to give evidence by way of a live television link, it must first be proved that he or she was mentally handicapped; and (ii) since a person with a mental handicap can give an unsworn statement in such circumstances and that evidence can be used at trial, there must be an inquiry to establish whether that person has a mental handicap before permitting that person to give evidence in this manner.

\textsuperscript{1252} \textit{O'Sullivan v District Judge Hamill} [1999] 2 IR 9, at p. 14, per O'Higgins J. (H.C.) Although O'Higgins J. accepted that the trial judge had conducted no inquiry and made no finding as to the mental handicap of the witness before directing that her evidence be given by way of live television link, he nonetheless rejected the argument that it necessarily followed from this that the court did not have jurisdiction to make the order in question.

\textsuperscript{1253} In \textit{Mapp v Gilhooley} [1991] 2 IR 253, at p. 262, [1991] ILRM 695, at p. 700 (S.C.) Finlay C.J. held that it “is a fundamental principle of the common law that for the purpose of trials in either criminal or civil cases \textit{viva voce} evidence must be given on oath or affirmation".
court\textsuperscript{1254} – an inquiry ought to be held to ensure that any conditions precedent to the application of those exceptions – such as mental handicap – to either\textsuperscript{1255} of those two general principles was satisfied.\textsuperscript{1256} Equally, it is submitted that the wording of s. 13(1)(a) and s. 13(1)(b) of the Criminal Evidence Act 1992 clearly demonstrates a legislative intention to exclude from the second paragraph witnesses already provided for in the first paragraph, that is, child witnesses and witnesses with mental handicap; this provision does not provide that live television link may be available in all applicable proceedings with the leave of the court, rather s. 13(1)(a) permits the court to authorize the use of the live television link by persons aged less than eighteen years or a person aged eighteen years or more with a mental handicap unless the court sees good reason to the contrary, while s. 13(1)(b) renders this facility available “in any other case, with the leave of the court”.

4.8.12 Another aspect of this decision which appears problematic is the Court’s interpretation of the relationship between s. 13(1)(a) and s. 13(1)(b) of the Criminal Evidence Act 1992; O’Higgins J. opined that, since the issue of the mental handicap of the witness might be a “vital issue” before the jury at the trial – being one element of the offence with which the accused was charged – it “might be possible to argue that...it would be preferable to rely on the provisions of s. 13(1)(b) rather than s. 13(1)(a) at the preliminary examination”.\textsuperscript{1257} To the extent that this judgment may be interpreted as implying that there is a choice as to which provision may be utilized and that, a witness whose mental handicap has not been established in

\textsuperscript{1254} In Phonographic Performance Ltd v Codf\textsuperscript{[1998]} 2 ILRM 21, at p. 26, Murphy J. emphasised that “the examination of witnesses viva voce and in open court is of central importance in our system and... it is a rule not to be departed from lightly.”

\textsuperscript{1255} In his judgment, O’Higgins J. had accepted that an inquiry had to be held to establish the mental handicap of the witness in relation to the first principle, that is, the court had to investigate the competence of the witness. However, O’Higgins J. dismissed suggestions that a similar inquiry was required in order to establish mental handicap in answer to the question whether the witness was permitted to give her evidence via live television link. It was this inconsistency in approach which was rejected in Byrne, R. and Binchy W., Annual Review of Irish Law 1998 (1999) at p. 372.


\textsuperscript{1257} O’Sullivan v District Judge Hamill\textsuperscript{[1999]} 2 IR 9, at p. 14, per O’Higgins J. (H.C.).
accordance with s. 13(1)(a), may nonetheless qualify under s. 13(1)(b), it is respectfully submitted that this approach is incorrect.\textsuperscript{1258}

However, it should be noted in relation to the determination of the court whether to grant leave and to permit a witness to give evidence via live television link pursuant to s. 13(1)(b) of the Criminal Evidence Act 1992, as amended, that – in common with the court’s obligations pursuant to s. 13(1)(a) – the court is obliged, even in the absence of statutory authority, to have regard to the accused’s right to a fair trial.\textsuperscript{1259} The accused enjoys the protection afforded by the residual judicial discretion contained in this provision. Furthermore, since the focus of these legislative reforms is the protection of vulnerable witnesses and, in particular, the desire to minimize the stress and trauma suffered by child witnesses when required to give evidence in the conventional manner, it is submitted that it would be consistent with the rationale of the provision of live television link to require an applicant to demonstrate that the witness would suffer trauma if he / she was required to give evidence otherwise than via live television link.

\textsuperscript{1258} However, O’Higgins J. raised an important issue when he determined that, since the mental handicap of the witness could be a key issue in the trial, it might be preferable to rely on the provisions of s. 13(1)(b) rather than section 13(1)(a) at the preliminary examination stage. In the trial of an offence contrary to s. 5 of the Criminal Law (Sexual Offences) Act 1993, the question of whether the complainant was mentally impaired at the time of the alleged sexual conduct is to be determined by the jury. Thus, the argument runs, it is better in these circumstances for the court to allow a complainant to give evidence via live television link in the exercise of its broad discretion to grant leave under s. 13(1)(b), than for the court to usurp the role of the jury and to determine at the preliminary examination stage that the witness has a mental handicap which qualifies the witness for assistance under the terms of section 13(1)(a). However it is submitted that the determination of the trial judge for the purpose of s. 13(1)(a) of the Criminal Evidence Act 1992, that a witness suffered with a mental handicap would not preclude a subsequent contrary decision by the jury with regard to s. 5 of the Criminal Law (Sexual Offences) Act 1993. Furthermore, it should be noted that, if the modern English authorities to this effect are accepted in this jurisdiction – as advocated in sections – the \textit{voir dire} to determine the presence or absence of mental handicap in the witness will be held in the absence of the jury, thus reducing the risk of prejudice to the accused person. See: sections 2.11.12-2.11.23 and \textit{R v Norbury} (1992) 95 Cr App R 256 (C.A.); \textit{R v Robinson} (1993) \textit{The Times}, 25\textsuperscript{th} November; \textit{R v Deakin} (1994) 4 All ER 769, [1995] 1 Cr App Rep 471, [1995] Crim LR 411 (C.A.); and \textit{R v Hampshire} (1995) 3 WLR 260, [1996] QB 1, [1995] 2 All ER 1019, [1995] 2 Cr App R 315 (C.A.). See also: \textit{People (Attorney General) v O’Brien} (1968) 1 Frewen 343 (C.C.A); and \textit{Attorney General v Lannigan} [1958] Ir.Jur.Rep. 59 (Cir. C.C).

or even that the use of the live television link would be likely to result in an improvement in the evidence received from the witness.\textsuperscript{1260}

4.8.14 The third statutory approach – employed in legislation in Ireland,\textsuperscript{1261} Canada,\textsuperscript{1262} and New Zealand\textsuperscript{1263} – permits the use of the live television link where the court grants leave upon the satisfaction of certain named criteria. As indicated above, while the requirement that leave of the court be sought before a witness is permitted to give evidence in this manner indicates that a greater emphasis is being placed upon the rights of the accused than a legislative approach which provides for an \textit{automatic} entitlement on the part of child witnesses to such special measure, nonetheless it is the factors to be taken into account by the court which provide the clearest illustration of the balance deemed appropriate by the legislature between, \textit{inter alia}, the rights of the accused and the protection of vulnerable witnesses. Accordingly, this ‘approach’ consists of a \textit{spectrum} of approaches, each affording varying degrees of protection to the accused depending on the enumerated factors to which the court must have regard in determining the availability of the live television link.\textsuperscript{1264} Furthermore, the approaches demonstrate a movement away from a position where special measures are regarded as an exception to the norm – requiring evidence of trauma to the witness if required to give

\begin{itemize}
  \item \textsuperscript{1260} Binchy, W. and Byrne R., \textit{Annual Review of Irish Law 1997} (1998) suggest at p. 395 that “at a minimum, some evidential basis that a child would suffer trauma if required to testify, will have to be presented”.
  \item \textsuperscript{1261} Section 39 of the Criminal Justice Act 1999 (No. 10 of 1999) and s. 29(1) of the Criminal Evidence Act, 1992, as amended and inserted by s. 24 of the Extradition (European Union Conventions) Act, 2001 (No. 49 of 2001).
  \item \textsuperscript{1262} Section 486.2(2) of the Criminal Code in Canada, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.
  \item \textsuperscript{1263} Section 23E(1)(b) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 in New Zealand.
  \item \textsuperscript{1264} Those factors – taking into account all of the relevant legislation considered herein – include, \textit{inter alia}: (i) the likelihood that the applicant witness will be in fear or subject to intimidation in giving evidence otherwise than via live television link or the possible effect on the child witness if required to give evidence without live television link and the likelihood that the child would be better able to give evidence if such application were granted; (ii) the necessity to obtain a full and candid account of the acts complained of from the complainant or witness; (iii) the necessity for the accused, judge and jury to be able to freely observe the testimony of the witness and for the accused to be able to communicate with his / her legal representatives at all times; (iv) the age, personality and assessed ability of the complainant to relate the evidence; (v) the relationship between the complainant and the defendant; (vi) the nature of the charge; (vi) the importance of the evidence to be given; (vii) the ability of the jury to assess the complainant and his / her evidence; and (viii) the views of the child as to how his / her evidence should be taken.
\end{itemize}
evidence in the absence of such special measure in order to counterbalance any possible prejudice to the accused – to a ‘normalization’ of special measures as a means of vulnerable witnesses giving evidence.1265

4.8.15 By adopting this third ‘approach’, s. 39 of the Criminal Justice Act 1999 in this jurisdiction greatly expanded both the circumstances in which live television link is available and the classes of witnesses eligible for such assistance when giving their evidence. This provision permits “any person other than the accused” to apply for leave to give evidence via a television link “in any proceedings on indictment for an offence”1266 including proceedings under Part IA of the Criminal Procedure Act, 1967.1267

1265 Fennell argues that the “exceptional provision” authorizing the giving of evidence by child witnesses or witness with a mental handicap via live television link embodied in s. 13 and “sanctioned” by the decision of the Supreme Court in Donnelly v Ireland [1998] 1 IR 338 “became normalised” with the extension of this facility by operation of the provisions of s. 39 of the Criminal Evidence Act 1999 to persons, other than the accused, ‘likely to be in fear or subject to intimidation’: Fennell, Caroline The Law of Evidence in Ireland (2nd ed., 2003) para. 5.28, at p. 137. See also Roberts, Paul, Cooper, Debbie and Judge, Sheelagh “Monitoring success, accounting for failure: The outcome of prosecutors’ applications for special measures directions under the Youth Justice and Criminal Evidence Act 1999” (2005) EvPro 9.4(269): “Special measures must cease to be ‘special’, in the hitherto accepted sense of being extraordinary, when they graduate to become the norm. It remains to be seen whether we are witnessing the beginning of the end for the tradition of oral testimony in English criminal proceedings, the vaunted ‘demise of orality’, or only the latest phase in a continuous historical process of procedural adaptation and evolution in response to contemporary requirements.” See: Burton, Mandy, Evans, Roger and Sanders, Andrew “Implementing Special Measures for Vulnerable and Intimidated Witnesses: The Problem of Identification” [2006] Crim. L.Rev. 299, wherein it was asserted that while policy, legislation and resources developed in England to enable vulnerable or intimidated witnesses to give best evidence in court are based on official estimates that suggest that they are a small proportion of all witnesses and can therefore be clearly distinguished from ‘normal’ witnesses, their empirical research suggests that the majority of witnesses are potentially vulnerable and that the criminal justice agencies continue to have difficulty in identifying them. The authors conclude at p. 240 that: “[T]he designation of [vulnerable or intimidated witnesses] as not ‘normal’ witnesses is questionable. It would perhaps be more accurate to state that normal witnesses are [vulnerable or intimidated witnesses] as [vulnerable or intimidated witnesses] are certainly not atypical. However because the criminal justice agencies are looking for the atypical they seemingly fail to identify many witnesses whom they routinely encounter as having the characteristics of a [vulnerable or intimidated witness]”. See also: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) at p. 69.


1267 Thus this provision renders live television link available, upon obtaining the leave of the court: (i) to all witnesses, not just child witnesses or child complainants, aged less than 18 years, with the sole exclusion of the accused; and (ii) in all criminal proceedings on indictment. Byrne R. and Binchy W., Annual Review of Irish Law 1999 (2000) at p. 144: “The new provisions [s. 39 of the Criminal Justice Act, 1999] apply to any appearance by a witness under the new procedures which replace the preliminary examination.” See also: Section 29 of the Criminal Evidence Act, 1992, as amended and
Accordingly, it is submitted that child witnesses to criminal offences other than sexual offences, offences involving violence or the threat of violence or offences of child trafficking or sexual exploitation may give evidence via live television link with the leave of the court pursuant to this section. The sole statutory criterion to guide the court in determining whether to grant leave is expressed in negative terms; the court "shall not grant leave" for a witness to give evidence in this manner "unless it is satisfied that the person is likely to be in fear or subject to intimidation in giving evidence otherwise."  

The structure of this statutory provision is interesting. Although it would appear to favour the accused person in that its starting point is that leave shall not be granted unless this condition precedent is satisfied – and, to this end, the provision employs mandatory language in conjunction with permissive or discretionary language once that condition is satisfied – nonetheless it is submitted that the focus of this legislation remains on the vulnerable witness rather than on the accused both by reason of the breadth of its application and in the criteria governing leave. By requiring merely a likelihood of fear or intimidation the legislation appears to set a very low threshold, although the section is silent as to the standard of proof to which this likelihood must be demonstrated. Equally, by employing the word "otherwise", the section also appears to envisage a very broad assessment by the trial judge of the likelihood of fear or intimidation including

inserted by s. 24 of the Extradition (European Union Conventions) Act 2001, which permits a person other than the accused who is outside the State or a person whose extradition is being sought, to give evidence through a live television link, with the leave of the court, in any criminal proceedings or in proceedings under the Extradition Acts 1965 to 2001.

This provision is expressly stated to apply subject to the provisions of s. 13 of the Criminal Evidence Act 1992: s. 39(6) of the Criminal Justice Act 1999.

Section 39(2) of the Criminal Justice Act 1999.

Having demonstrated the requisite likelihood of fear or intimidation the witness "may" give evidence in this way: s. 39(1) of the Criminal Justice Act 1999.

This section does not specify how the court is to be satisfied in this regard and, in particular, whether expert evidence is admissible in relation to the likelihood that a particular witness will suffer fear or intimidation if he / she is to give evidence otherwise than by live television link; it is submitted that expert evidence would greatly assist the court in the proper exercise of its discretion. In relation to child witnesses outside of the ambit of s. 13 of the Criminal Evidence Act 1992, as amended, it is submitted that the youth of a child in itself could be taken to indicate a likelihood of fear or intimidation in relation to giving evidence otherwise than via live television link.
considering whether the witness is likely to be in fear or subject to intimidation in giving evidence in any manner other than via live television link; this may even encompass a situation where the witness is giving evidence with the assistance of one or more special measures other than the live television link, such as a one-way screen or support person.

4.8.17 An example of an approach within this spectrum less heavily weighted in favour of the child witness is provided by s. 486.2(2) of the Criminal Code in Canada\textsuperscript{1272} which provides that, despite the accused’s right to be present during his / her trial, the court may order that the complainant or witness testify outside of the courtroom if the judge or justice is of the opinion that it is “necessary to obtain a full and candid account of the acts complained of from the complainant or witness of the acts complained of” which issue is determined by way of \textit{voir dire}. The permissive language of this provision indicates that a wide judicial discretion is enjoyed in relation to determining whether an eligible witness should be permitted to give evidence from outside the confines of the courtroom,\textsuperscript{1273} subject only to the obligation to take into account the following factors: the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused and “any other circumstance that the judge or justice considers relevant”.\textsuperscript{1274} Moreover, by predicing the grant of leave upon proof of necessity to obtain the best evidence rather than likelihood of fear or intimidation, the legislature remains closer to the fundamental objective underlying these statutory special measures; that is, not merely the reduction of stress on the part of a vulnerable witness \textit{per se} but the reduction of stress \textit{with a view to obtaining the best evidence}.

\textsuperscript{1272} Section 486.2(2) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.

\textsuperscript{1273} The Supreme Court of Canada in \textit{R v Levogiannis} (1993) 25 C.R. (4th) 325, at p. 328; 18 C.R.R. (2d) 242 (S.C.C.) asserted in this regard that the precise evidence to be adduced “need not take any particular form” and that trial judges are to use “substantial latitude” in determining whether to employ the procedure.

\textsuperscript{1274} Section 486.2(3), read together with s. 486.1(3) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.
4.8.18 The superior balance achieved by this legislative provision between the protection of vulnerable witnesses and the rights of the accused is further demonstrated by the express safeguards contained in s. 486.2(7) which stipulates that a complainant or witness shall not testify outside the court room pursuant to this statutory scheme unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the complainant or witness by means of closed-circuit television "or otherwise" and the accused is permitted to communicate with counsel while watching the testimony.

4.8.19 More detailed guidance as to the possible criteria – albeit 'child-centric' criteria – to be taken into consideration by the court in the exercise of its discretion to grant leave is provided by s. 23E(1)(b) of the Evidence Act 1908, as amended, in New Zealand. An application for leave, pursuant to s. 23D(1) of the Evidence Act 1908, as amended, is heard and determined in chambers with each party having the opportunity to be heard. In

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1275 It is important to note that, like in s. 39 of the Criminal Justice Act 1999 in this jurisdiction, by the use of the word "otherwise", this Canadian provision does not limit the procedure by which the evidence of the witness is to be received to the use of the medium of live television link. Accordingly, it is arguable that this procedure could also encompass the admission of pre-trial video-recordings of interviews with child witnesses outside the courtroom, where the court is of the opinion that it is necessary to obtain a full and candid account of the events the subject-matter of the proceedings. However, such procedure is already governed by s. 715.1 of the Criminal Code in Canada, R.S.C. 1985, c. 19 (3rd Supp.), s.16; 1997, c. 16, s. 7; 2005, c. 32, s. 23 and it can only be presumed that the legislature did not intend to legislate twice in relation to the same procedure; it is more likely that the word "otherwise" was intended to refer to the use of a one-way mirror or other such device.

1276 Wilson, Jeffrey, "A perspective on the Canadian position" in Spencer J.R., Nicholson, G., Flin R., and Bull R., Children's Evidence in Legal Proceedings: An International Perspective (1990) 147, asserted at p. 149 that the use of the live television link in Canada was subject to the following: "(i) judge, jury and accused are always together when it is shown; (ii) a big screen, or monitors are available throughout the courtroom; (iii) there exists a separate room where the child and lawyers are present; (iv) the camera is always on the child being examined and cross-examined; (v) the examination by counsel are simultaneously displayed to the judge, jury and spectators; and (vi) there remains easy and ready opportunity for communication between the counsel and his accused."

1277 Section 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 in New Zealand. This provision allows for the use of closed circuit television by child complainants while testifying in proceedings involving sexual offences and envisages the child complainant – upon application in accordance with s. 23D – giving his or her evidence from outside the courtroom but "within the Court precincts"; the evidence is then transmitted to the courtroom via closed circuit television.

1278 Section 23D(2) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. R v Paikea (Unreported, High Court, Whangarei, 18 July 1991, T 23/91) at pp. 2-3, per Wylie J.: "Section 23D(2) of the Evidence Act 1908 entitles the prosecutor (and of course defence counsel) to call any relevant evidence as part of the exercise of the opportunity to be heard in respect of the application."
determining whether to grant the application the court is empowered to take into account the following factors, including: (i) the age of the complainant; (ii) the personality of the complainant; (iii) his / her assessed ability to relate the evidence; (iv) the relationship between the complainant and the defendant; (v) the nature of the charge; (vi) the importance of the evidence; (vii) and any other matters impacting on the complainant when giving evidence and on the ability of the jury to assess the complainant and his / her evidence. Such factors provide useful guidance as to the criteria which ought to influence a trial judge in determining whether to grant leave, however, it is submitted that they ought not to dictate the court’s determination. In this regard, the approach of the Scottish courts to the requirement that cause be shown before a child was permitted to give evidence by way of live television link – under the statutory predecessors to the modern statutory scheme – is instructive. Aside from the child-centric factors – similar to those employed in New Zealand – which the

1279 List of relevant factors contained in: R v W (1990) 6 CRNZ 157, at p. 158; and R v Hauiti (1990) 6 CRNZ 599, at p. 602. The court may also consider expert evidence in this regard: s. 23D(3) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. In Scotland the report complied by Murray, Live Television Link: An Evaluation of its use by Child Witnesses in Scottish Criminal Trials (Scottish Office Central Research Unit, 1995) demonstrated that the matters which increased the likelihood of one of the parties deciding to lodge an application for the live link were: where the child witness was a victim; where the charges were sexual in nature; and where the child or children in question were closely related to the accused. A typical applicant therefore was aged, on average, 10 years, was the child of the accused and the victim of a sexual offence. With regard to the factors taken into account by the court in determining whether or not to grant an application to permit the use of live television link, the research indicated that the most important criteria were: the child’s age; the type of witness in question (whether a victim or a bystander); the nature of the charge; the relationship between the witness and the accused; geographical origin; and whether the application was supported by an expert’s report.

1280 Section 56 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40); s. 35 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c. 9); s. 271(8) of the Criminal Procedure (Scotland) Act 1995 (c. 46) as substituted by s. 29 of the Crime and Punishment (Scotland) Act 1997 (c. 48).

1281 Sections 271 and 271A-271M – in particular s. 271J – of the Criminal Procedure (Scotland) Act 1995 (c. 46), as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3).

1282 Section 56 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40) provided for the admission of the evidence of child witnesses via live television link in criminal proceedings upon the satisfaction of specified criteria, where cause was shown why the application should be granted. These criteria included: (i) the possible effect on the child if required to give evidence, no such application having been granted; and (ii) the likelihood that the child would be better able to give evidence if such an application were granted. Identical provision was made by s. 271(5) of the Criminal Procedure (Scotland) Act 1995 save for the addition of a third factor to be taken into consideration by the court in determining whether cause had been shown, namely, the views of the child as to how he / she would prefer to give evidence and his / her fear in relation to giving evidence in the conventional manner. See also: s. 29 of the Crime and Punishment (Scotland) Act 1997. The
court was required to take into account,\textsuperscript{1283} it was held\textsuperscript{1284} that the age of a child alone was not a sufficient basis for the court to permit the use of live television link nor was the fact that the evidence which the prospective child witnesses could be expected to give was of a traumatic or frightening nature; rather it had to be demonstrated, \textit{inter alia}, that the children \textit{themselves} would be traumatized by having to give evidence in the ordinary way, in open court and in the presence of the accused.\textsuperscript{1285}

\textsuperscript{1283} In \textit{Brotherston v H.M. Advocate} 1996 SLT 1154, 1995 SCCR 613 (H.C. Justiciary) the High Court of Justiciary examined the relevant statutory provisions – then s. 56 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 – and observed that: (i) the court enjoyed a discretion whether or not to grant the application, taking into account the matters outlined above; (ii) when granting an application, the court was authorizing the child witness to give “evidence” by means of a live television link – what this involved was not defined, however, one of the factors which the court could take into account was the nature of the evidence which the child was likely to be called upon to give; and (iii) when granting such an application, a court “authorize[d]” the use of a live television link, that is, a party remained free to dispense with the live link and call the child witness to give evidence in the conventional manner.

\textsuperscript{1284} \textit{H.M. Advocate v Birkett} 1993 SLT 395, 1992 SCCR 850 (H.C. Justiciary). The accused was charged on indictment with the attempted murder of his three-year-old child, AGB, and with assaulting and permanently disfiguring the child’s mother. The prosecution wished to call several child witnesses aged between three and eight years – including AGB – to give evidence at the trial and requested that these children be permitted to give their evidence by live television link. It was averred in the case of AGB, that he was frightened of the accused, however, in relation to the other children, it was only asserted that they were quiet and hesitant witnesses and/or that their evidence would be of a “traumatic nature” which, it was believed, they would be better able to give outside of the immediate presence of the accused – by way of live television link – having regard in particular to the divided loyalty which the children felt towards their father, the accused, and their mother, the complainant in respect of the offence of assault. Counsel for the accused did not challenge the petition insofar as it related to AGB, however it was argued that cause had not been shown in accordance with s. 56(2) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, with regard to the other child witnesses; the Court agreed and refused to permit all but AGB to give evidence via live television link.

\textsuperscript{1285} Sheldon, David \textit{Evidence} (2\textsuperscript{nd} ed., 2002) at p. 76: “It suggests that it is not enough merely to narrate that the evidence is of a traumatic or frightening nature; the child must have some reason to fear giving evidence in open court, such as a well-founded fear of the accused.” See also: \textit{Maryland v Craig} 497 US 836, at p. 855, per O’Connor J. (1990) (U.S. S.C.). However, it is important to note that once a child witness had begun to give evidence by means of a live television link, fairness required that the whole of her evidence be given in that way and that it was not competent to call the child into court during the course of her evidence via live television link and require her to give evidence by conventional means since “[f]or the child then to be cross-examined in the courtroom would defeat the purpose for which authority had been given under s. 56”: \textit{H.M. Advocate v Birkett} 1992 SCCR 850, at
More importantly, it is submitted that such list of criteria is unbalanced in that it fails to require the court to have regard to the impact upon the accused of such special measure; accordingly, it is submitted that a child witness should not be prevented from giving evidence in this manner where he / she fails to satisfy one or more of the above criteria and, equally, even where all of the above criteria are satisfied, regard should still be had to the requirements of the rights of the accused person and the balance to be struck between these rights and the protection of the witness.¹²⁸⁶

The English decision, R (Director of Public Prosecutions) v Redbridge Youth Court,¹²⁸⁷ is illustrative of this approach. The Queen’s Bench Division noted that the general legislative purpose of s. 32 of the Criminal Justice Act 1988, as amended – providing for the use of live television link

¹²⁸⁶ The New Zealand Court of Appeal has asserted a very wide jurisdiction to facilitate the reception of the evidence of child witnesses by means of special measures beyond the terms of the legislation. In R v Lewis [1991] 1 NZLR 409 (C.A.), the Crown sought to have the evidence of five child complainants of abuse against their step-grandfather given by way of live television link and by the playing of videotapes of interviews with the children recorded months prior to the trial, in accordance with the terms of s. 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. In commenting upon the effect of s. 3 of the Evidence Amendment Act 1989 – which inserted ss. 23C – 23I into the Evidence Act 1908 – the Court of Appeal asserted that the “general spirit of the changes” introduced by the legislation with reference to child complainants of sexual offences pointed towards allowing the use of the videotapes. Cooke P. asserted at p. 411 that: “This is a new field of law and we can well understand the learned Judge being somewhat hesitant to go further than he did, but his decision, as he would well have realised, is open to review in this Court and we are satisfied that this Court should take the responsibility of saying that it is in accordance with the spirit of the new legislation in this particular case that the videotapes should be admitted.”

¹²⁸⁷ R (Director of Public Prosecutions) v Redbridge Youth Court [2001] 4 All ER 411, [2001] 1 WLR 2403, [2001] 3 FCR 615, [2001] 2 Cr App Rep 458, para. 3 (Q.B. Div.). The prosecution applied to have the evidence of the two complainants given by way of pre-trial video recordings and via live television link, in accordance with ss. 32 and 32A of the Criminal Justice Act 1988, as amended, on the ground that the complainants would be caused embarrassment if required to give live evidence in court; there was in fact no evidence before the court of intimidation or any suggestion that the complainants would refuse to give evidence if directed to testify in court. Accordingly, the court refused the application stating that, in exercising its discretion, it had balanced the “nature of the allegation, the proximity in age of the parties, the characteristics of the witnesses, the potential risk of embarrassment or intimidation...which may have been occasioned by the witness giving evidence in camera supported by an appropriate adult” against “the risk of prejudice to the defendant, the detraction of the immediacy of the live testimony in the courtroom which would provide the court with the best opportunity to test the credibility of the witnesses prior to cross-examination and the desire for equality of arms to be preserved and a fair trial to be secured”. The Director of Public Prosecutions applied for judicial review of this decision.
- was to provide, in relation to a child, conditions which were most conducive to ensuring that a child was able to give as full an account as possible of the events in question by providing a mechanism whereby a child witness who might otherwise be upset, intimidated or traumatised by appearing in court was not, as a result, inhibited from giving a full account of the events which he/she witnessed. The Court asserted that it followed that orders under section 32 were appropriate where there was a real risk that the quality of evidence given by a child would be so affected or that it might even be impossible to obtain any evidence from that child.

4.8.22 The Court held that, unlike s. 32A of the Criminal Justice Act 1988, as amended – which evidenced a parliamentary intention that the primary method by which a child witness’s evidence should be given to the court was by way of the pre-trial video recorded interview, leaving to the accused to establish that any prejudice to him “displaces this parliamentary intention” – the same considerations did not apply to s. 32 of the

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1288 The Court relied upon the decision in *R v McAndrew-Bingham* [1999] 1 WLR 1897 (C.A.).

1289 Dennis argues that the approach advocated by Latham L.J. in para. 15 of *R (Director of Public Prosecutions) v Redbridge Youth Court* [2001] 4 All ER 411, [2001] 1 WLR 2403 (Q.B. Div.) in relation to child witnesses – requiring material which establishes that “the witness could be upset, intimidated or traumatized by appearing in court as a result of which there was a real risk that the quality of the...evidence would be affected or that no evidence would be forthcoming” before authorizing the admission of pre-trial video-recordings into evidence – would not now applicable either to the evidence of a vulnerable adults under the new legislative scheme; he further opined that such material would be “unnecessary to tip the balance in favour of the live link” where the choice for a vulnerable adult witness is between testimony in the courtroom and via live television link: Dennis, I.H., *The Law of Evidence* (2nd ed., 2002) at p. 519.

1290 The Court observed that there was a further purpose in s. 32A of the Criminal Justice Act 1988, as amended – providing for the admission into evidence of pre-trial video recordings of the child witness – that is, that the evidence of a child should be the child’s account given as contemporaneously as possible, so that evidence-in-chief was not a memory test. It was asserted that the wording of s. 32A(3) indicated that leave must be granted by the court to permit the evidence of a child to be given by way of pre-trial video recordings unless any of the exceptions outlined in the subsection were established, in which case, the court was required to refuse leave. The Court held that where the question was raised pursuant to s. 32A(3)(c) as to whether the recording should be excluded in the interests of justice, the court was required to carry out a balancing exercising, bearing in mind the legislative purposes of the section. The court had to consider the extent to which the witness’s evidence would be affected if the video recording was not admitted in evidence and to balance this against the prejudice to the accused if the recording were admitted. The Court observed that, in carrying out that exercise, the court had to bear in mind that Parliament had determined that the primary method by which a child witness’s evidence should be given to the court was by way of the pre-trial video recorded interview, and it seemed to follow that it was for the accused to establish that any prejudice to him “displaces this parliamentary intention”: *R (Director of Public Prosecutions) v Redbridge Youth Court* [2001] 4 All ER 411, [2001] 1 WLR 2403, [2001] 3 FCR 615, [2001] 2 Cr App Rep 458 (Q.B. Div.) at para. 16, per Latham L.J. (with whom Astill J. concurred).
Criminal Justice Act 1988, as amended, since parliament had provided no presumption one way or the other as to the way in which the evidence should be given. Accordingly, it was necessary to consider in every case the extent to which justice was best achieved by granting or refusing the order sought, bearing in mind that "the paradigm or norm in our courts is that a witness should give evidence in court in the presence of the defendant";\(^{1291}\) the Court observed that it followed that "some good reason must be shown in accordance with the legislative purpose" if an order was to be made permitting the use of the live television link facility pursuant to s. 32 of the Criminal Justice Act 1988, as amended.

4.8.23 It is submitted that the conclusion of the Court in this case succinctly summarises the approach – both legislative and judicial – in relation to the availability to child witnesses of special measures such as the live television link facility which most successfully navigates the tight-rope between protection of the child witness from undue trauma, the elicitation of the best evidence, the proper administration of justice and the rights of the accused to a fair trial and fair procedures:

"Again the court is required to strike a balance, on this occasion between the right of the defendant to have a hearing in accordance with the norm and the need to provide protection in accordance with the legislative purpose, in the interests not only of the child witness but also of justice, to ensure that the witness will be able to give evidence and give evidence unaffected by the stress of appearing in court itself."\(^{1292}\)

\(^{1291}\) It should be noted, however, that what Latham L.J. termed the 'paradigm or norm' in that case, namely, that a witness should give evidence in court in the presence of the defendant and that good reason be required to justify an order pursuant to s. 32 of the Criminal Justice Act, 1988, is no longer applicable in light of the reforms enacted in England with the coming into force of the provisions of the Youth Justice and Criminal Evidence Act 1999.

\(^{1292}\) *R (Director of Public Prosecutions) v Redbridge Youth Court* [2001] 4 All ER 411, [2001] 1 WLR 2403, [2001] 3 FCR 615, [2001] 2 Cr App Rep 458 (Q.B. Div.) at para. 17, *per* Latham L.J. (with whom Astill J. concurred). See, further: sections 4.9.0-4.12.19 below in relation to the constitutionality of the use of live television link to facilitate the reception of evidence from child witnesses and the legislative approaches regarding the availability of this special measure examined in this section, in
4.9.0 CONSTITUTIONALITY OF SCREENS AND LIVE TELEVISION LINK

4.9.1 Both the provision of screens and the use of live television link to facilitate the reception of evidence from child witnesses have generated lively debate and controversy with regard to their impact upon the constitutional rights of the accused; in particular, the principal identifying characteristic common to both special measures – namely, the removal of the requirement that child witnesses give evidence in the immediate physical presence of the accused1293 – has provoked allegations of a resulting imbalance between the protection of child witnesses from unnecessary trauma, the proper administration of justice and the right of the accused to a fair trial and fair procedures.1294

4.9.2 The following arguments are most commonly advanced on behalf of the accused in relation to the alleged unconstitutionality of these special measures – and incompatibility – with the requirements of a fair trial and fair procedures guaranteed to an accused person by the Constitution of particular, the ‘presumption of trauma’ approach embodied in s. 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 337(3) of the Children Act 2001. The Scottish Law Commission also considered these two special measures together on account of their perceived similarities. In its Discussion Paper: The Evidence of Children and Other Potentially Vulnerable Witnesses (Discussion Paper No. 75, June 1988) it stated in para. 5.60, at p. 105: “First they [screens and closed circuit television] both presuppose that the child is required to give his evidence in the course of an actual trial; and second, they are both devices which are intended to screen the child from an accused, and possibly others, the main difference being that one achieves that purpose by purely physical means while the other does so by use of more sophisticated technology.”

Ireland 1937 and the European Convention on Human Rights. First, it is argued that by permitting the child witness to give evidence from behind a screen or from outside the confines of the courtroom – and therefore outside the direct physical presence of the accused – the accused’s right of confrontation *vis-à-vis* his / her accusers is thereby infringed. Secondly, it is contended that these special measures contravene the accused’s right to a fair trial and fair procedures. In this regard, it is asserted, in particular, that by so distancing the child witness from the accused – either by physical or technological means – the accused’s right of full and effective cross-examination is denied its efficacy or emptied of content, in particular by preventing legal representatives on behalf of the accused from establishing a ‘rapport’ with the child witness through fluent and uninterrupted questioning.

Thirdly, it is argued that both the provision of screens and the use of the live television link constitute unfair and prejudicial procedures, contrary to the accused’s right to a fair trial and fair procedures. In particular, it is asserted that the use of these special measures is highly prejudicial to the accused since “a jury might well conclude in those circumstances that the screen had been erected [or the use of live television link authorised] simply because the child was, with good reason, afraid of the accused”\(^\text{1295}\) and, accordingly, that the accused is guilty of the offence(s) with which he / she is charged; furthermore, it is alleged that the televised testimony of the child witness has a far greater impact upon the jury than if given in the conventional manner. Finally, it is contended that the statutory ‘presumption of trauma’ in favour of the use of the live television link facility – which provides that this special measure will be available to child witnesses in proceedings involving applicable offences save where the accused demonstrates ‘good reason’ to the contrary – places an unfair and unconstitutional burden on the

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accused person and amounts to an infringement of his / her constitutional right to a fair trial and fair procedures.\textsuperscript{1296}

4.9.4 Equally, even among advocates of reform of the law of evidence as it applies to child witnesses, voices of opposition to the provision of screens or the use of live television link can be heard. First, it is asserted that the protective barrier imposed by these special measures between the child witness and the accused can operate to "prevent the jury from observing the demeanour of the complainant"\textsuperscript{1297} – essential for an adequate assessment of the credibility of the child witness – and in this way impair the exercise of the jury’s fact-finding function and the proper administration of justice;\textsuperscript{1298} by way of counter-argument, it is contended that even such risks of distortion or exclusion of evidence are preferable to the total loss of crucial


\textsuperscript{1297} Law Reform Commission, Consultation Paper on Child Sexual Abuse (August, 1989), para. 7.050, at p. 153. See also: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) at p. 56 wherein it was noted that: “A common problem with – or, in some circumstances, advantage of – the live link in practice that emerges from the interviews and observations is that it gives only a very partial view of the witness over the link makes it very difficult for the body language of the witness to be observed – something that counsel noted may be used by the jury as a guide to credibility. Sometimes this can work in favour of the prosecution; on other occasions, it appears that it works in favour of the defence”.

\textsuperscript{1298} It may be argued that the use of live television link, in particular, has the potential – through lighting, shading, lens angle or setting, etc. – to distort or even exclude evidence. In this regard, it was stated as follows in Hochheiser v Supreme Court, 161 Cal App 3d, at p. 786, 208 Cal Rptr., at pp. 278-279, cited in Graham, “Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions”, 40 University of Miami L. Rev., (1985) at pp. 74-75: “There are serious questions about the effects on the jury of using closed circuit television to present the testimony of an absent witness since the camera becomes the juror’s eyes, selecting and commentating on what is seen. There may be significant differences between testimony by closed circuit television and testimony face-to-face with the jury because of distortion and exclusion of evidence ... for example, ‘the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanour in a number of ways ... variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanour ... and off-camera evidence is necessarily excluded while the focus is on another part of the body ... thus, such use of closed circuit television may affect the juror’s impressions of the witness’ demeanour and credibility ... also it is quite conceivable that the credibility of a witness whose testimony is presented via closed circuit television may be enhanced by the phenomenon called status-conferral; it is recognised that the media bestows prestige and enhances the authority of an individual by legitimising his status ... such considerations are of particular importance when, as here, the demeanour and credibility of the witness are crucial to the state’s case.’ Equally, Blowers, Grant “Should a Two-Year-Old Take the Stand?” (1987) 52 Missouri Law Review 207, asserted at p. 219: “Camera angle, lighting, use of makeup, and other techniques may present a problem of misleading the jury. The visual cues which a jury uses to ascertain whether a witness is telling the truth are subtle. If the camera does not faithfully reproduce the demeanour of the witness, these subtle clues may be unavailable to the jury.”
prosecution evidence which, it is submitted, may result in the absence of the
provision of the live television link procedure and that, far from distorting
the child’s evidence, the live television link contributes to an improvement
in the evidence received in terms of its coherence, accuracy and
completeness.1299

4.9.5 Secondly, it is submitted that the use of such special measures may weaken
the impact of the child’s evidence and prevent the jury from establishing a
rapport with the child witness1300 who, unlike the accused, is not constantly
(and physically) in its presence.1301 In response to this contention, it is
asserted that the use of live television link in particular facilitates the jury in
relating to the child witness and assessing his / her credibility since it
enables the jury to focus on an enlarged televised image of the child which
“would give them a much more concentrated and enhanced picture of the
witness’ demeanour and expressions than if the witness were testifying from

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1299 McEwan, Jenny Evidence and the Adversarial Process (2nd ed., 1998) argues at p. 137 that “[t]he
loss of rapport and eye contact, frequently presented as an objection to the live television link by
prosecution lawyers, is hardly a serious disadvantage in those cases where otherwise the child could
not proceed at all”.

1300 Davis, G., Hoyano, L., Keenan, C., Maitland, L., and Morgan, R., An Assessment of the
Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions (London: Home Office, 1999)
(“Bristol study”) suggested at pp. 58-60 that many prosecutors still prefer the child to give evidence in
the courtroom in order to maximize the impact of the child’s testimony on the jury. See also, Tapper,
Colin Cross and Tapper on Evidence (9th ed., 1999) at p. 214: “Opinions vary as to whether this is
more conducive to convictions on the basis that the witnesses are more willing to testify under such
conditions, or less conducive on the basis that the emotional impact of such testimony is diluted.” See
also: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and
Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online
Report 01/2006) at p. 71 wherein it was observed that: “Many judges believe that video recorded
evidence and live television link are less effective than the giving of evidence ‘live and in the flesh’.
This is probably due to a belief that these methods of giving evidence reduce its impact on juries,
although this is not supported by the research evidence.” The authors also note at p. vii that there is no
research evidence to indicate that acquittals are more likely using these special measures.

1301 See: Smith, “The Child Witness” in Representing Children: Current Issues in Law, Medicine and
Mental Health, (National Association of Counsel for Children, 1987) at p. 3 in support of this concern:
“An experienced trial attorney would know that in any kind of an assault case it is imperative that the
trier of fact be able to see and relate to the victim. Keep in mind that the jury sits for a period of time
in the same room with the defendant who looks like anyone else. Molesters do not have a large ‘M’
tattooed on their foreheads — they look like members of the jury, the jury members’ mothers, father,
little brothers. Further, they do not molest children in the presence of the jury. Consequently, over the
period of time that it takes to try a case, the jury gets to ‘know’ a defendant. In this case familiarity
does not breed contempt. Familiarity breeds pity and concern. If this pity and concern are not
tempered in the jury’s collective mind by the victim and the victim’s pain, then human nature will
favour the person [defendant] who has become real to them.”

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the witness-box as part of the overall ‘furniture’ of the court”°°" and can even afford a clear picture of the child’s non-verbal communication, such as his / her ‘body language’ when testifying.°°° Thirdly, it is suggested that, contrary to the presumed benefits of special measures for child witnesses,°°°° neither the provision of screens nor the use of the live television link facility is effective in reducing the trauma associated with the witness experience°°°°° since these procedures for the reception of evidence – particularly the live television link since it involves the removal of the child from the courtroom°°°°° – are more isolating and intimidating for the child

°°°°° Duffy, Gordon “Televised testimony and constitutional justice” 4 (1994) Irish Criminal Law Journal 178, at p. 183. A small scale pilot study conducted in New Zealand prior to the enactment of the statutory reforms there indicated a positive attitude on the part of professionals to the use of live television link: Whitney and Cook, The Use of Closed-Circuit Television in New Zealand Courts: The First Six Trials (Wellington: Department of Justice, December 1990) at p. 9. The study indicated that professionals were of the view that the perceived advantages outweighed the perceived disadvantages. The study concluded that the use of live television link was fair to both the defence and prosecution, that it rendered the evidence of child witnesses more comprehensive and that its use allowed the prosecution to bring cases that might otherwise not have come to trial.

°°°°° However, see: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) at p. 56.

°°°°° The New Zealand Law Commission ventured the opinion in para. 101 of its Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) that “significant use is now made of the provisions and no major problems have arisen”. The Commission bemoaned the dearth of research in New Zealand concerning the impact or effect of the new statutory scheme but noted the results of the more comprehensive study conducted by Pipe, Henaghan et al. which concluded that the new provisions were frequently used and were the norm rather than the exception and that they significantly reduced the trauma of testifying for the child witness without compromising the quality or truthfulness of the evidence: Pipe, Henaghan, Bidrose and Egerton, “Perceptions of the Legal Provisions for Child Witnesses in New Zealand” [1996] NZLJ 18, at p. 23. The Commission was dismissive of the modest pilot programme conducted by Whitney and Cook before the statutory reforms were enacted: Whitney and Cook, The Use of Closed-Circuit Television in New Zealand Courts: The First Six Trials (Wellington: Department of Justice, 1990). The Commission described as “impressionistic” the opinions expressed in the Report to the Courts Consultative Committee from the Working Party on Child Witnesses, Child Witnesses in the Court Process: A Review of the Practice and Recommendations for Change: Appendices to the Main Report (Wellington: Department for Courts, 1996) Appendices 4 – 6.

°°°°° Burton, Evans and Sanders have noted that the live television link does not prevent the defendant from seeing the vulnerable or intimidated witness which is something which surprises and worries many vulnerable and intimidated witnesses who “when they realize this, sometimes opt for screens instead”. See: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) at p. 56.

°°°°° The Law Reform Commission observed that the child “is removed from the room where everything is going on, may be intimidated by the presence of the camera and other equipment and may have difficulty in concentrating on a face and voice coming from a TV monitor over a prolonged time”: Law Reform Commission, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.050, at p. 154. Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) para. 2.13, at p. 16: “It may place a greater burden upon the child witness, who must cope with intrusive technology and a sense of remoteness from
witness than giving evidence by conventional means. However, this argument runs counter to the findings of recent empirical or survey research regarding the use and value of special measures — including the live television link facility — in practice.

1307 The use of the live television link to facilitate the reception of evidence from child witnesses in Scotland was evaluated and monitored over the first 27 months of operation, culminating in a report by Murray, *Live Television Link: An Evaluation of its use by Child Witnesses in Scottish Criminal Trials* (Scottish Office Central Research Unit, 1995). In relation to the quality of the resulting evidence given by the child witnesses, while the evidence of all of the children who gave evidence — both with or without the live television link — was praised for its responsiveness, consistency, credibility, resistance to leading questions and effectiveness, it was determined that those who availed of the live television link: (i) were less likely to give detailed accounts or convincing evidence of the events in question and were less resistant to leading questions regarding peripheral matters than child witnesses who gave evidence in the conventional manner; but (ii) were found to be less likely to cry during cross-examination, less likely to report experiencing fear while testifying and more likely to describe the proceedings as fair; and more importantly (iii) were more likely to answer the prosecutor’s questions concerning the main actions of the accused than those children who gave evidence without the assistance of the live link. It was further conceded that some of the children who utilized the live link facility could not otherwise have given evidence. However, the child witnesses’ perception of the live television link was, overall, somewhat negative; more than half of the children found the arrangement strange, six described it as “scary” and three were reported to have “strongly disliked” the device, with one of the three even asking to complete her evidence in the conventional manner. Many of the lawyers interviewed were also critical of the live link on the grounds that it interfered with witness rapport, increased the difficulty of cross-examination, distorted the impact and import of the evidence, and could detract from the jury’s ability to grasp a complete and accurate picture of the witness’s demeanour. However, it is interesting to note that none of the accused reported feeling that the use of the live link was unfair.

1308 See: Burton, Mandy, Evans, Roger and Sanders, Andrew *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (Home Office Online Report 01/2006) at pp. 65-66. See also the recent report of the Home Office Research, Development and Statistics Directorate, *Key findings from the Surveys of Vulnerable and Intimidated Witnesses 2000/01 and 2003* (London: Home Office, 2004) wherein it is stated that: “Witnesses using special measures in phase 2 rated them very highly. For example, nine in ten witnesses using the live TV link found this helpful and a similar proportion found using video-recorded evidence-in-chief useful. The importance of special measures is further evidenced by the finding that 33% of witnesses using any special measure said that they would not have been willing and able to give evidence without this. This suggests that an increased proportion of cases involving [vulnerable or intimidated witnesses] are now resulting in offenders being brought to justice which would not have occurred before the special measures.” See also: Roberts, Paul, Cooper, Debbie and Judge, Sheelagh “Monitoring success, accounting for failure: The outcome of prosecutors’ applications for special measures directions under the Youth Justice and Criminal Evidence Act 1999” (2005) EvPro 9.4(269); Hamlyn, Becky, Phelps, Andrew, Turtle, Jenny and Sattar, Ghazala *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses* (London: Home Office, Research Study No. 283, 2004); and Report of Inter-Agency Working Group on Witnesses *No Witness, No Justice* (London: Home Office, May 2003) Chapter 5.
The concern of the courts in the face of such arguments is to ascertain whether the statutory schemes or judicial practice providing for the use of these special measures by child witnesses achieve an appropriate balance between the competing interests involved. The following analysis of the judicial response to these arguments illustrates the movement away from the initial judicial caution in the face of statutory reforms regarding the manner in which child witnesses may give evidence in criminal proceedings, through an increased acceptance of such measures, to a position where the necessity and even desirability of such measures is taken for granted.

4.10.0 Accused’s Right of Confrontation with his / her Accusers:

4.10.1 The argument that an accused has a constitutional right to confront his / her accusers – including child witnesses for the prosecution and that such right was infringed by the use of live television link to facilitate the reception of evidence from a child witness pursuant to s. 13 of the Criminal Evidence Act 1992 was first considered in this jurisdiction by the High Court in White v Ireland. In asserting a breach of such right, the applicant in White relied upon the decision of the majority of the United States Supreme Court in Coy v

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1310 Such right was asserted to exist either as an independent constitutional right of an accused person in a criminal trial or, alternatively, as an aspect of the accused’s constitutional right to a fair trial.

1311 White v Ireland [1995] 2 IR 268 (H.C.), approved by the High Court in Donnelly v Ireland [1998] 1 IR 312, per Costello P. (H.C.). The applicant in White was charged with offences against a child which offences were applicable offences governed by the provisions of Part III of the Criminal Evidence Act 1992. The prosecution proposed that the child complainant would give evidence via live television link from a room which was in a separate building to the courtroom. The applicant applied to the High Court by way of judicial review for, inter alia a declaration that ss. 12 and 13 of the Criminal Evidence Act 1992 were invalid having regard to the provisions of Article 38.1, 38.5 and 40.3 of the Constitution. It was submitted, inter alia, that the giving of evidence by a child complainant who was not physically present in the court where the trial was being conducted constituted an infringement of the accused’s right to confront his / her accuser, and/or a violation of the right of the accused to be tried in due course of law and to cross-examine and confront his / her accuser in open court.
which declared unconstitutional an Iowa statutory scheme under which two thirteen-year-old child complainants of alleged sexual assault had been permitted to give evidence from behind a one-way screen.

Delivering the judgment for the majority of the Court, Scalia J. emphasised the historical origins of the right of confrontation and noted that the core guarantee of confrontation served the general perception that confrontation is essential to fairness and helps to ensure the dignity of the fact-finding process by making it more difficult for witnesses to lie. Scalia J. held that the statute infringed the accused’s right to a face-to-face meeting with the two child witnesses appearing before the trier of fact, guaranteed by the Sixth Amendment to the United States Constitution, in that the screen was specifically designed to enable the witnesses to avoid viewing the accused as they gave their testimony and the screen was successful in its objective; “it is difficult to imagine a more obvious or damaging violation of the defendant’s right to a face-to-face encounter.”

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1312 Coy v Iowa 487 US 1012 (1987) (U.S. S.C.). The Court was split 6-2 with Scalia J. delivering the judgment on behalf of the majority (consisting of Scalia, Brennan White Marshall, Stevens and O’Connor JJ.); O’Connor J. (with whom White J. agreed) concurring in the result but delivering a separate judgment and Blackmun J (with whom Rhenquist C.J. agreed) delivering the dissenting opinion. Kennedy J. did not participate.

The screen prevented the children from seeing the accused while they testified but allowed the accused to see them dimly and to hear them. The trial court authorised the use of such screen pursuant to the Act of May 23, 1985, § 6, 1985 Iowa Acts 338, codified at Iowa Code § 910A.14 (1987) which provided in part as follows: “The court may require a party be confined [sic] to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child’s testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to ensure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.”

1314 Coy v Iowa 487 US 1012, at pp. 1015-1016, per Scalia J. (1987) (U.S. S.C.): “The Sixth Amendment gives a criminal defendant the right ‘to be confronted with the witnesses against him.’ This language ‘comes to us on faded parchment,’ California v Green, 399 US. 149, 174 (1970) (Harlan, J., concurring), with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: ‘It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.’ Acts 25:16. It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 384-387 (1959).”

1315 Coy v Iowa 487 US 1012, at p. 1017, per Scalia J. (1987) (U.S. S.C.): “The Sixth Amendment’s guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’ Pointer v Texas, 380 US. 400, 404 (1965). What was true of old is no less true in modern times.”

4.10.3 The majority decision also rejected the submission to the effect that the accused’s right of confrontation was outweighed by the public policy necessity of protecting child complainants of sexual abuse since it was held that this submission could not be sustained by any conceivable exception to the express right to face-to-face confrontation; the recently passed Iowa statute, which created a generalised, legislatively imposed presumption of trauma – not unlike s. 13 of the Criminal Evidence Act 1992, as amended,1317 in this jurisdiction – was not firmly rooted in the nation’s jurisprudence and there had been no individualised findings that the particular witnesses needed special protection.1318 Accordingly, Scalia J. refused to depart from what he termed the “irreducible literal meaning” of the ‘Confrontation Clause’ and noted that “something more than the type of generalized finding”1319 of trauma underlying the Iowa statute was required to found an exception to this right.

4.10.4 It is interesting to note that, while concurring in the result of the majority decision and, in particular, the finding that the accused’s rights under the Confrontation Clause had been violated, O’Connor J. – with whom White J. agreed – delivered a separate decision in which she cautioned that such rights are not absolute and may give way, in an appropriate case, to other

1317 Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001, permitting the use of live television link (as opposed to the provision of a screen) for child witnesses in proceedings involving applicable offences.1318 Although Scalia J. conceded that the Court had, in the past, indicated that rights conferred by the Confrontation Clause “are not absolute, and may give way to other important interests”, it was asserted that the rights referred to in those cases were not “the right narrowly and explicitly set forth in the Clause” but rather were rights that are, or were asserted to be, “reasonably implicit” therein, such as the right to cross-examine: Chambers v Mississippi 410 US 284, at p. 295 (1973). While the majority judgment expressly left to another day the question whether any exceptions exist to the literal meaning of the Confrontation Clause, it asserted that such exceptions: (i) would only be allowed when necessary to further an important public policy; and (ii) something more than the type of generalized finding underlying such a statute would be needed when the exception was not firmly rooted in the Court’s jurisprudence. Coy v Iowa 487 US 1012, at p. 1020, per Scalia J. (1987) (U.S. S.C.).

1319 Coy v Iowa 487 US 1012, at p. 1021, per Scalia J. (1987) (U.S. S.C.). The majority judgment had earlier noted at p. 1020 that: “The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential trauma that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.”
competing interests, so as to permit the use of certain procedural devices designed to shield child witnesses from the trauma of courtroom testimony. O'Connor J. concluded that “if a court makes a case-specific finding of necessity, as is required by a number of state statutes...our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses”.

4.10.5 However, it was the approach adopted by Blackmun J. in his dissenting decision in *Coy v Iowa* which won the approval of Kinlen J. in *White v Ireland*. Blackmun J. noted that the procedure used to protect the child witnesses did not interfere with what the United States jurisprudence termed the “purposes of confrontation”, namely: (i) the girls’ testimony was given under oath; (ii) it was subjected to unrestricted cross-examination; (iii) the jury were able to observe the demeanour of the witnesses while testifying, thus aiding the jury in determining their credibility; (iv) the screen did not prevent the appellant from seeing and hearing the girls and conferring with counsel during their testimony; (v) the screen did not prevent the girls from seeing and being seen by the judge, counsel and the jury; (vi) the jury were also able to see the demeanour of the appellant while the girls were testifying; and (vii) the girls were informed that the appellant could see and hear them while they were on the stand. Thus, Blackmun J. pointed out that the “appellant's sole complaint is the very narrow objection that the girls could not see him while they testified about the sexual assault they endured".

The minority decision also emphasized that the minimal extent of the infringement of the appellant’s “Confrontation Clause interests” was relevant in determining whether competing public policies...
justified the procedures employed in the instant case to facilitate the reception of evidence from child witnesses. The minority of the Court concluded that the ability of a witness to see the defendant while he / she is testifying did not constitute an essential part of the protections afforded by the Confrontation Clause.1326

4.10.6 Having examined the leading authorities in the United States, Kinlen J. noted that the right of an accused to confront accusers face-to-face had not been found to be either a common law right1327 nor an implied part of due process; it was asserted that there was “no support for 'eyeball to eyeball' confrontation in the American Constitution save in the Sixth
Amendment”.\textsuperscript{1328} Moreover, Kinlen J. expressly approved the dissenting judgment of Blackmun J. as a “\textit{proper statement of the appropriate law if there be a confrontation clause}”.\textsuperscript{1329} In response to the assertion that the right to confront an accuser is a core value and a fundamental right of an accused person, Kinlen J. noted the absence of any \textit{specific} guarantee of confrontation in the Constitution of Ireland 1937 – unlike in the United States – and, accordingly, concluded that if such a right were to be found in our Constitution, it would constitute an aspect of the “\textit{due process}” guarantee. The Court cited with approval the following rights identified in the judgment of Gannon J. in \textit{The State (Healy) v Donoghue}\textsuperscript{1330} which represent some of the natural rights of an accused person in a criminal trial “\textit{whose conduct is impugned and whose freedom is put in jeopardy}”: (i) the right to be adequately informed of the nature and substance of the accusation; (ii) the right to have the matter tried in his presence by an impartial and independent court or arbitrator; (iii) the right to hear and test by examination the evidence offered by or on behalf of his accuser; (iv) the right to be allowed to give or call evidence in his defence; and (v) the right to be heard in argument or submission before judgment be given. Kinlen J. held that he did not consider ‘confrontation’ to be a part of ‘\textit{due process}’ in the Irish legal system but that if he was wrong in that assumption, nonetheless, he was satisfied that “\textit{modern technology suitably used is a form of confrontation}”.\textsuperscript{1331} In so holding, Kinlen J. had regard to the safeguards inherent in the operation of the live television link facility in this jurisdiction, including the degree of judicial control over the equipment and the judicial obligation to act in accordance with constitutional and natural justice to ensure that fair procedures are observed.\textsuperscript{1332} Thus, the Court concluded that:

\textsuperscript{1328} \textit{White v Ireland} \citeyear{1995} 2 IR 268, at p. 276, \textit{per} Kinlen J.
\textsuperscript{1329} \textit{White v Ireland} \citeyear{1995} 2 IR 268, at p. 281, \textit{per} Kinlen J.
\textsuperscript{1330} \textit{The State (Healy) v Donoghue} \citeyear{1976} IR 325, at p. 335 \textit{per} Gannon J. approved by the Chief Justice at p. 349 and, subsequently, in \textit{O’Callaghan v Judge Clifford} \citeyear{1993} 3 IR 603.
\textsuperscript{1331} \textit{White v Ireland} \citeyear{1995} 2 IR 268, at p. 281, \textit{per} Kinlen J. (H.C.).
\textsuperscript{1332} “In the latter end of the 20\textsuperscript{th} century the court should, subject to close scrutiny, avail itself of modern technology. The trial judge is in complete control of all the equipment. He will act in accordance with constitutional and natural justice and will ensure that there are fair
“The applicant has not established a constitutional right to an ‘eyeball to eyeball’. None should be imported. If there is a right to confrontation it is for the courts to decide the balance of hierarchy which one right yields to another.”

4.10.7 Notwithstanding the strength of this judgment, this issue was revisited in this jurisdiction in Donnelly v Ireland wherein the applicant urged the High Court not to follow Kinlen J.’s decision; it was submitted, inter alia, that the right to have witnesses physically present in court whilst giving evidence constituted an essential part of the applicant’s right to due process because it represented the means by which an accused person could effectively test the veracity of the evidence and the credibility of his / her accuser. 

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procedures....This is because there are two rights here, that of the accused and that of the child witness or accuser.” White v Ireland [1995] 2 IR 268, at p. 281, per Kinlen J. (H.C.).

1333 White v Ireland [1995] 2 IR 268, at p. 282, per Kinlen J. (H.C.). See also Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) paras. 7.027-7.031, at pp. 136-140. The Commission concluded in para. 7.030, at p. 139: “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. A right to cross-examine, or indeed to be present when evidence is given during or before a trial, does not ipso facto include a right to physical confrontation.” In its subsequent Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) the Law Reform Commission of Ireland asserted in para. 7.03, at p. 68: “It can safely be said that confrontation and unrestricted cross-examination are not a sine qua non of trial in due course of law. We were satisfied that in Ireland while, as a general rule and despite the existence of exceptions to the rule against hearsay, the right to cross-examine was an essential feature of trial in due course of law. We were satisfied that in Ireland while, as a general rule and despite the existence of exceptions to the rule against hearsay, the right to cross-examine was an essential feature of trial in due course of law. A right to confront one’s accuser did not enjoy the same status.”


1335 The respondents rejected any suggestion that the Constitution of Ireland included a right to face-to-face or physical confrontation, and asserted that this had been determined by the High Court in White v Ireland [1995] 2 IR 268 (H.C.). The respondents cited the decision of the Supreme Court in In re Haughey [1971] IR 217 (S.C.) in support of this argument which listed the following basic requirements to be afforded to every person accused of a serious offence including: (i) that the accused person be furnished with a copy of the evidence to be tendered against him; (ii) that an accused person be allowed to cross-examine by counsel his accuser; (iii) that the accused be allowed to give rebutting evidence; and (iv) that the accused be permitted to address the court by counsel in his own defence. Neither in that case nor in any other was it suggested by the Supreme Court that there was an implied right to face-to-face confrontation between an accused and his or her accuser; thus, it was argued that the right to confrontation was not an essential part of an accused’s right to due process or fair procedures. It was further asserted that this right was not recognized at common law.

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4.10.8 However, since the decision in *Coy v Iowa*, the United States Supreme Court in *Maryland v Craig* had upheld the constitutionality of a statute providing for the use, by child witnesses, of the live television link facility—thereby permitting child witnesses to give evidence from outside the immediate physical presence of the accused—following a case-specific finding of necessity.

4.10.9 O’Connor J., delivering the judgment of the majority—from which Scalia J. dissented—held that although the Sixth Amendment reflected a “preference” for face-to-face confrontation—the importance of which was reaffirmed by the majority—such preference had to give way on occasion to considerations of public policy and the necessities of the case; the right of confrontation was not absolute. It was stated that the purpose of Confrontation Clause was to place limits on the type of evidence that could

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1337 *Maryland v Craig* 497 US 836 (1990) (U.S. S.C.). The accused in this case, the operator of a preschool centre was charged with several counts of sexual abuse of a six year old child who had attended the centre. A Maryland statute permitted a trial judge to receive, by one-way closed-circuit television—live television link—the testimony of a child witness who was alleged to be a victim of child abuse, if the judge determined that testimony by the child in the courtroom would result in the child suffering serious emotional distress such that the child could not reasonably communicate. Under the statute: (1) the witness, prosecutor, and defense counsel withdrew to a separate room, while the judge, jury, and defendant remained in the courtroom; (2) the witness was then examined and cross-examined in the separate room, while a video monitor recorded and displayed the witness’ testimony to those in the courtroom; and (3) during this time, the witness could not see the defendant, but the defendant remained in electronic communication with defense counsel, and objections could be made and ruled on as if the witness were testifying in the courtroom. Expert evidence in relation to each of the children suggested that they would have some or considerable difficulty in testifying in the presence of the accused, “wouldn’t be able to communicate effectively” or “would probably stop talking and [she] would curl up”. After the trial court found the alleged victim and three other children competent to testify and permitted them to testify using the statutory procedure, the jury convicted the accused on all counts.

1338 The majority of the Court comprised O’Connor J., joined by Rehnquist, C.J., and White, Blackmun, and Kennedy, JJ. Brennan, Marshall, and Stevens, JJ., joined in the minority judgment—which was delivered by Scalia J. —holding that the confrontation clause of the Sixth Amendment guarantees, in a criminal prosecution, a defendant’s right to meet face-to-face all those who appear and give evidence at trial, because ‘to confront’ plainly means to encounter face-to-face, whatever else ‘to confront’ may mean in addition.

1339 *Maryland v Craig* 497 US 836, at p. 844, per O’Connor J. (1990) (U.S. S.C.): “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. Indeed, in *Coy v Iowa* we expressly ‘left for another day . . . the question whether any exceptions exist’ to the ‘irreducible literal meaning of the Clause: a right to meet face to face all those who appear and give evidence at trial.’” 487 U.S. at 1021 (quoting *California v Green*, 399 U.S. 149) at 175 (Harlan, J., concurring))…Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy*."

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be received against a defendant and that such purpose ought to be harmonized with a "societal interest in accurate fact finding, which may require consideration of out of court statements". Accordingly, O'Connor J. concluded that face-to-face confrontation was not an "indispensable element" of the Sixth Amendment's guarantee of the right of an accused to confront his or her accusers and that it was permissible to deny the right where it was necessary to further an important public policy, where the reliability of witness testimony was otherwise assured by the presence of the 'elements of confrontation' including (i) approximate physical presence; (ii) the oath; (iii) contemporaneous cross-examination; (iv) notification of the case to be made against the accused; and (v) observation of the demeanour of the witness by the triers of fact, the jury. Thus, the Court concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court".

1341 Maryland v Craig 497 US 836, at pp. 849-850, per O'Connor J. (1990): "In sum, our precedents establish 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,' [Mattox v United States, 156 U.S. 237, at p. 243 (1895)]. 'We have attempted to harmonize the goal of the Clause - placing limits on the kind of evidence that may be received against a defendant - with a societal interest in accurate factfinding, which may require consideration of out-of-court statements.' [Bourjaily v United States, 483 U.S. 171, at p. 182 (1987)]. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process....Thus, though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers."
1342 Maryland v Craig 497 US 836, at pp. 851-852, per O'Connor J. (1990) (U.S. S.C.): "Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation - oath, cross-examination, and observation of the witness' demeanor - adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.... We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." Hoyano, Laura "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" [2001] Crim LR 948, at p. 952: "The following indicia of reliability...satisfy constitutional confrontation requirements: the hearing is held under circumstances closely approximating those of a typical trial; the witness is under oath; defence counsel is present and has every opportunity to cross-examine; and the proceedings are conducted before a judicial tribunal equipped to provide an accurate record of the hearings."
4.10.10 Having regard to this decision and as a corollary to the finding—outlined below—to the effect that the effectiveness of cross-examination of an accuser was not diluted where it took place by way of live television link rather than in the conventional manner—the High Court in this jurisdiction in *Donnelly v Ireland*\(^{1344}\) approved the earlier decision in *White v Ireland*\(^{1345}\) and held that the right to physical confrontation by an accused of his/her accusers is not a constitutionally protected right in this jurisdiction.

4.10.11 On appeal,\(^{1346}\) although the Supreme Court conceded that the right to cross-examine an accuser is an essential ingredient in the concept of fair procedures,\(^{1347}\) it noted that the applicant had not cited any Irish or other common law authorities which established a right to confrontation and surmised that no such authority existed, relying on the statement of Wigmore\(^{1348}\) to the effect that "[t]here never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination". Although the Court accepted that the decisions of the United States Supreme Court in *Coy v Iowa*\(^{1349}\) and

regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant."

\(^{1344}\) *Donnelly v Ireland* [1998] 1 IR 321 (H.C.).

\(^{1345}\) *White v Ireland* [1995] 2 IR 268 (H.C.).

\(^{1346}\) *Donnelly v Ireland* [1998] 1 IR 338 (S.C.).

\(^{1347}\) The applicant had argued before the Supreme Court as before the High Court that in order for the right to cross-examine accusers to be effective and give him the opportunity to adequately defend himself, it necessarily implied that the witness should give evidence in his presence and that the witness, when giving evidence, should physically confront him. The Supreme Court identified the following three issues as the fundamental issues for determination by the Court: (i) whether the applicant or any accused person charged with an offence to which s. 12 of the Criminal Evidence Act 1992 applied, had a 'right of confrontation', guaranteed by the Constitution, and in particular by Articles 38.1 and 40.3, that is, the right to confront his/her accuser in open court when he/she was giving evidence at the trial of such offences; (ii) whether such right, if it existed, was a right which was separate and distinct from the established right of an accused person to cross-examine witnesses giving evidence for the prosecution at his or her trial; or (iii) whether such alleged right was an essential ingredient in the well-established right of cross-examination since it was claimed that the effectiveness of cross-examination required a physical presence in court of an accuser and the physical confrontation between the accuser and the accused.


Maryland v Craig were grounded upon differently worded constitutional and statutory provisions to those under scrutiny in the instant case, nevertheless, Hamilton C.J. asserted that these decisions contained discussions of principle which were useful in determining this case. Having examined both decisions carefully, the Chief Justice noted that although the Confrontation Clause in the United States is clear and specific, it does not give to criminal defendants the absolute right to a face-to-face meeting with witnesses against them. While the Court conceded that the Constitution of Ireland 1937, did not include any specific right such as that guaranteed by the confrontation clause in the United States, Hamilton C.J. opined that the central concern of the requirements of due process and fair procedures is the same in both jurisdictions, that is, to ensure the fairness of the trial of an accused person “through rigorous testing by cross-examination”. The Court declared itself satisfied that the requirements of fair procedures were adequately fulfilled by requiring the child witness to give evidence on oath, subject to cross-examination and by affording the judge and jury ample opportunity to observe the demeanour of the child witness while giving evidence and when subject to cross-examination. Accordingly, Hamilton

1351 See also the New Zealand decision, R v Accused (7/4/88) [1988] 1 NZLR 569 (H.C.), in relation to the use of a screen by a child complainant of sexual offences, wherein the High Court in Whangerei asserted that the right of an accused to confront, to be brought “face to face with his accusers” while of ancient origin and well established, had never been an absolute right; the High Court surmised that the right to confront dated back to the middle of the 13th century, where the Assizes of Clarendon and Northampton established the principle that the accusers took the accused before the King’s Courts and confronted him with his crime, however, the Court noted that the principle of confrontation was abandoned at the time of the Star Chamber. In particular, the Court cited with approval the English decision R v Smellie (1919) 14 Cr App R 128 wherein Lord Coleridge stated that: “If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter”. On appeal, the Court of Appeal drew from the decision of the United States Supreme Court in Coy v Iowa 487 US 1012 (1987) (U.S. S.C.) and asserted that even the majority decision of Scalia J. left open the possibility that “a special need by witnesses for protection may justify an exception to the right of confrontation”: R v Accused (T 4/88) [1989] 1 NZLR 660, at p. 667, per Cooke P. Moreover, the Court of Appeal noted that in her judgment in Maryland v Craig 497 US 836 (1990) (U.S. S.C.), O’Connor J. specifically stated at p. 870, that she would permit the use of a particular trial procedure that “called for something other than face-to-face confrontation” if that procedure was necessary to further an important public policy, such as the protection of child witnesses, and if the legislation required a case-specific finding of necessity.
C.J. concluded that the right of an accused person to a fair trial does not include “the right in all circumstances to require that the evidence be given in his physical presence” and, consequently, that there was no such constitutional right.1353

4.10.12 A similar emphasis is evident in the New Zealand decision, *R v L*,1354 where the Court of Appeal permitted a sworn statement of a rape complainant to be admitted at trial in circumstances where the complainant had committed suicide in the time between the preliminary hearing and the trial. The Court acknowledged that the accused had a fundamental right to test by cross-examination any evidence given against him, however, it rejected any suggestion that the right to present a defence and the right to examine witnesses for the prosecution – which together comprised the right to confrontation – included a right to face-to-face confrontation or even that the accused had an absolute right to question the witness at the trial itself.1355 Moreover, it was asserted that, to the extent that the proposed special measures did not impinge on the right to cross-examine, but only suggested changing – in terms of time and place – the way cross-examination was conducted, they did not breach the New Zealand Bill of Rights Act 1990 nor erode fairness to the defendant since it was still...

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1355 The New Zealand Bill of Rights Act, 1990 includes the right of a defendant to be present at the trial and to examine witnesses and, more importantly, the right to confrontation. Section 25 provides that: “Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights... (e) The right to be present at the trial and to present a defence; (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution...” In interpreting these rights, the Court of Appeal held that: “[N] either the specific legislation nor the Bill of Rights guarantee elevates the opportunity to cross-examine into an absolute right to confront and question the witness at the trial itself. On the contrary both s 184 [of the Summary Proceedings Act 1957] and s 3 [of the Evidence Amendment Act (No 2) 1980] proceed on the premise that testimony may be admitted at the trial even though the witness is not available for cross-examination. And in terms of s. 25 of the Bill of Rights the right to examine the witnesses for the prosecution applies ‘in relation to the determination of the charge’. It is directed to the overall process and is not tied to the actual trial itself. It is of some significance in this regard that the right of a defendant under the Sixth Amendment to the American Constitution ‘to be confronted with the witnesses against him’ is satisfied by the opportunity of cross-examination at the time the previous evidence was given (State of Ohio v Roberts 448 US 56 65 L Ed 2d 597 (1908)).”
possible to ascertain the witness’s demeanour and to test the credibility and reliability of the witness when evidence was given in this alternative way.

4.10.13 As illustrated by the foregoing analysis of the leading decisions regarding the permissibility of the use of a one-way screen or the live television link facility, which permit the child witness to give evidence outside the direct physical presence of the accused, the accused’s asserted right of confrontation – which, it was contended was infringed by these measures – is very narrowly drawn. Since the aim of the special measures in question is merely to obscure the child witness’s view of the accused, while preserving to all (including the accused) a clear view of the child witness during his/her evidence and cross-examination, and otherwise requiring the child witness to give evidence in the conventional manner with all the attendant safeguards for the rights of the accused, the asserted right in question may be characterised as follows: the right – whether by common law, constitutional guarantee, statutory provision,1356 natural justice or fundamental concepts of adversarial criminal procedure – “that the [child] witness testifying orally should be able to see the accused”.1357

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1356 In R v Accused (T 4/88) [1988] 1 NZLR 569 (H.C.), [1989] 1 NZLR 660 (C.A.) it was that the use of the one-way screen by the child complainant while giving evidence infringed the accused’s statutory right pursuant to s. 376 of the Crimes Act 1961 which provided that “[e]very accused person shall be entitled to be present in Court during the whole of his trial, unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable”. The High Court rejected this argument holding that the court was obliged to interpret the word “present” in the way that “best fits its meaning” in accordance with the spirit of the legislation. [1988] 1 NZLR 569, at p. 571 per Hillyer J. (H.C.). On appeal, the Court of Appeal restricted itself to consideration of the arguments based upon the accused’s right of confrontation and was of the view that: “Section 376 appears to us to have nothing to do with the present question” [1989] 1 NZLR 660, at p. 664, per Cooke P. (CA). However, McMullin J. stated in this regard that: “The notion that a witness may be less inclined to lie about an accused person when faced with that person is not without substance. It is probably more difficult to lie about a person ‘to his face’ than ‘behind his back’. But that does not mean to say that the word ‘present’ where used in s. 376, is to be construed in a confrontational sense. And, where a case for the use of screens in Court is made out then, so long as it recognises the accused’s right to remain in Court throughout his trial in a position where he can hear the proceedings and understand what is going on and communicate with his counsel, there will not be a breach of s. 376. For these reasons I think that the order made by the trial Judge was not in breach of that section.” See also Mewett, Alan, Witnesses (1995) at para 4.4, 4-17: “[I]t is not that the accused is not present to observe the witness – only that the witness is not obliged to observe the accused while testifying.”

1357 R v Accused (T 4/88) [1989] 1 NZLR 660, at p. 664, per Cooke P. (C.A.). The Court of Appeal recognized that a witness could not be compelled to look at the accused and may even be unable to do so where the witness was blind or of defective vision and concluded that special considerations applied in relation to child witnesses in sexual abuse cases which justified a departure from the general
analysed in this manner, it is not difficult to understand the refusal of the courts to recognize the existence of such a right; or, where it was acknowledged to exist, a refusal to find that such right is absolute.\textsuperscript{1358} It is submitted that such a right can serve no protectionist purpose above and beyond the ‘elements of confrontation’ otherwise guaranteed by the oath, rigorous cross-examination and ensuring that the jury’s view of the child witness – and his / her demeanour while giving evidence – is unimpaired; while “[c]onfrontation in the sense of being in the presence of one’s accusers is one thing...confrontation merely to afford the opportunity to glower at and thereby intimidate witnesses is another”.\textsuperscript{1359}

4.10.14 In summary, it would appear that where there is no express constitutional guarantee of confrontation – as in this jurisdiction – such right may be found

\textsuperscript{1358} In \textit{R v Levogiannis} (1990), 1 O.R. (3d) 351, 62 C.C.C. (3d) 59, 2 C.R. (4th) 355, 43 O.A.C. 161 (Ont. C.A.) the Court considered the constitutional validity of s. 486(2.1) of the Criminal Code R.S.C., 1985, c. C-46, as amended, which empowered a judge or justice to authorize the use of a one-way screen to obscure the view of a complainant or witness aged less than eighteen of the accused person, while the witness testified. Morden A.C.J.O., delivering judgment for the Court, observed that the restriction imposed by s. 486(2.1) was very limited; the complainant’s view of the accused was obscured but the screen did not prevent the accused, the defence counsel, the prosecutor, the trial judge or the jury (if there was one) from seeing the complainant. Having reviewed the English, Canadian and American authorities, he concluded that if there was a right to confrontation in Canada, it was not absolute and is “subject to qualification in the interests of justice”: (1990), 1 O.R. (3d) 351, at p. 367, per Morden A.C.J.O. (Ont. C.A.). Furthermore, the Court asserted that, even where the use of a screen was authorized by a court pursuant to s. 486(2.1), the requisite “elements of confrontation” were still present and, accordingly, that the accused’s right to fundamental justice under s. 7 of the Charter was not infringed. In relation to the alleged right of confrontation, the Supreme Court of Canada on appeal examined leading authorities in other common law jurisdictions, which upheld statutory or judicial limitations on or compulsory absence of physical confrontation between the accused and his or her accuser, in the interest of protecting child witnesses, even, as in America, in the face of an express constitutional protection of the accused’s right of confrontation rather than the Canadian “all-encompassing concept of ‘principles of fundamental justice’”: R v Levogiannis (1993) 18 C.R.R. (2d) 242, at p. 252, per L’Heureux-Dubé J. (S.C.C.). The Court noted that Parliament was free to enact or amend legislation in order to reflect its policies and priorities – such as the protection of child witnesses – the only limit on such power being the obligation to respect the Charter rights of those affected by such legislation. The Court held that any such right of confrontation could not be said to be an absolute right which, in itself, reflected a basic tenet of the Canadian legal system, rather it was a right which was subject to qualification in the interests of justice. L’Heureux-Dubé J. concluded that no principle of fundamental justice had been infringed by reason of the absence of face-to-face confrontation.

\textsuperscript{1359} R v Accused (T 4/88) [1989] 1 NZLR 660, at p. 672, per McMillan J. (C.A.). The Court continued: “The sight of an accused person from whose actions a child has lived in terror in the past is very likely to intimidate that child in the giving of evidence about that accused, particularly when the evidence involves him in incidents of the most intimate and degrading kind. The evidence which the complainant gave in this case was within that category.”
within the constitutional guarantee of a fair trial and fair procedures. The right – even where expressly protected – is not absolute; it is permissible in the interests of facilitating the reception of the best evidence from children and the proper administration of justice, to allow child witnesses to give evidence in circumstances which deny face-to-face confrontation with the accused, where the accused’s right of full and effective cross-examination is preserved and the reliability of the child’s evidence is otherwise assured. The constitutionality of the suspension of the requirement for a case-specific finding of necessity in this jurisdiction is considered below.

4.11.0 Accused’s Right to a Fair Trial and Fair Procedures:

4.11.1 The constitutionality of statutory measures regulating the use of screens or live television link by child witnesses in applicable proceedings was challenged not merely on the basis that it infringed an asserted right of confrontation, but also on the ground that it violated the accused’s fundamental right to a fair trial and fair procedures, in particular the accused’s right to cross-examine his / her accusers; it was submitted that in

\[^{1360}\text{In } R \text{ v } \text{Levogiannis}(1993) 18 \text{C.R.R. (2d) 242, at p. 249 (S.C.C.), L'Heureux-Dubé J. asserted that the issue for determination was "whether the purpose and effect reflected in the provisions of s. 486(2.1) render the trial procedure fundamentally unfair to the accused". In order to determine whether the section violated the accused's constitutional rights, the Court examined the real scope of the provision and noted that the screen provided pursuant to s. 486(2.1) merely blocked the complainant's view of the accused and not vice versa; the screen permitted the accused, counsel for the defence and prosecution, the judge and the jury to see the complainant, who gave evidence in the usual manner and was subject to cross-examination in the usual way. Therefore, the Court concluded that the question to be answered was whether obstructing the witness’s view of an accused person through the use of the screen infringed the rights of an accused person under s. 7 or 11(d) of the Charter. See also: Sopinka J., Lederman, S. and Bryant A., } \text{The Law of Evidence of Canada} (2^{\text{nd}} \text{ed., 1999) at p. 679; and } \text{Coy v Iowa} 487 \text{US 1012, at p. 1027, per Blackmun J. (1987) (U.S. S.C.). Young, Professor Alison Harvison } \text{"Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues" (1992) 11 Canadian Journal of Family Law} 11, asserts at p. 30 in relation to this decision that: "The approach taken in } \text{Levogiannis} \text{ is to be applauded. It undertakes a principled, contextualised and functional analysis of the issue and the rights of the accused rather than a narrow and mechanical one. Rather than focussing on the narrow formulation of the common law rule that the accused has a literal right to face his accuser, the Court's more principled and contextualised approach revealed that a narrow and formalistic application of the rule would have undermined the larger truth-seeking rationale which it was designed to serve." }^{1361}\text{ See, in particular: sections 4.11.18-4.11.37 below.}\]
order for such right to be vindicated – for the cross-examination to be
effective and to ensure the veracity of the evidence given – it required the
physical presence in court, before the accused, of the accuser.\textsuperscript{1362} However, this formulation of the right of the accused met with no greater success than
the first.

4.11.2 Cross-examination has famously been described as “the greatest legal
gine ever invented for the discovery of truth”,\textsuperscript{1363} and “an essential
safeguard of the accuracy and completeness of testimony”.\textsuperscript{1364} Moreover, it
has been asserted that “no safeguard for testing the value of human
statements is comparable to that furnished by cross-examination”\textsuperscript{1365} which
is itself described as playing a “pivotal role in all adversarial
proceedings”.\textsuperscript{1366} The Supreme Court in this jurisdiction has recently
described the ‘truth-seeking’ capabilities of cross-examination in the
following succinct terms:

“Where a person is accused on the basis of false statements of fact, or
denied his civil or constitutional rights on the same basis, cross-

\textsuperscript{1362} As indicated above, it was contended that these special measures, by distancing the child witness
from the accused – either by physical or technological means – denied the accused’s right of full cross-
examination its efficacy or emptied it of content, in particular by preventing legal representatives on
behalf of the accused from establishing a ‘rapport’ with the child witness through fluent and
uninterrupted questioning.
\textsuperscript{1363} 5 Wigmore Evidence (Chad. Rev., 1967) § 1367.
\textsuperscript{1364} McCormick, \textit{Handbook of the Law of Evidence}, (2\textsuperscript{nd} ed., 1972) at p. 43.
\textsuperscript{1365} 5 Wigmore Evidence (Chad. Rev., 1967) § 1367, cited with approval by Warren C.J. of the United
States Supreme Court in \textit{Greene v McElroy} 360 U.S. 474 (1959) (U.S. S.C.); “For two centuries past,
the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by
cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of
human statements is comparable to that furnished by cross-examination, and the conviction that no
statement (unless by special exception) should be used as testimony until it has been probed and
sublimated by that test, has found increasing strength in lengthening experience. Not even the abuses,
the mishandlings, and the puerilities which are so often found associated with cross-examination have
availed to nullify its value. It may be that in more than one sense it takes the place in our system which
torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the
greatest legal engine ever invented for the discovery of truth. However difficult it may be for the
layman, the scientist, or the foreign jurist to appreciate its wonderful power, there has probably never
been a moment’s doubt upon this point in the mind of a lawyer of experience....The fact of this unique
and irresistible power remains, and is the reason for our faith in its merits. If we omit political
considerations of broader range, then cross-examination, not trial by jury, is the great and permanent
contribution of the Anglo-American system of law to improved methods of trial procedure.”
\textsuperscript{1366} \textit{People (Director of Public Prosecutions) v Kelly} (Unreported, Supreme Court, 4\textsuperscript{th} April, 2006),
per Fennelly J. at p. 13.
examination of the perpetrators of these falsehoods is the great weapon available to him for his own vindication. Falsehoods may arise through deliberate calculated perjury...through misapprehension, through incomplete knowledge, through bias or prejudice, through failure of memory or delusion. In some cases a witness may not be aware that his evidence is false. A witness may be telling the literal truth but refrain, or be compelled to refrain, from giving a context which puts it in a completely different light. And a witness called to prove a fact favourable to one side may have a great deal of information which he is not invited to give in evidence, favourable to the other party.

...Accordingly, the right to cross-examine one’s accusers is a constitutional right and not a concession....It is an essential, constitutionally guaranteed, aspect of fair procedures.”

4.11.3 Accordingly, the right – in an adversarial trial – of an accused to hear and test by cross-examination the evidence of an accuser has long been regarded as one of the most fundamental rights guaranteed protection and vindication by the Constitution; an “essential ingredient in the concept of fair procedures” and the accused’s constitutional right to a fair trial. The

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1368 See: In re Haughey [1971] IR 217, at pp. 261-262, per O’Dálaigh C.J. (S.C.); The State (Healy) v Donoghue [1976] IR 325, at p. 335, per Gannon J. (H.C.); Murray v The Commission to Inquire into Child Abuse [2004] 2 IR 222, per Abbott J. (H.C.); O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005) per Hardiman J.; and J.F. v Director of Public Prosecutions [2005] 2 IR 174, para. 25 per Hardiman J. (S.C.). See also: Pointer v Texas 380 U.S. 400, per Black J. (1965) (U.S. S.C.): “There are few subjects...upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.”
1369 Donnelly v Ireland [1998] 1 IR 321, at p. 348, per Hamilton C.J. (S.C.): “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....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., [in The State (Healy) v Donoghue [1976] IR 325, at p. 335] ‘hear and test by examination the evidence offered by or on behalf of the accuser’.”
1370 Murray v The Commission to Inquire into Child Abuse [2004] 2 IR 222, per Abbott J. (H.C.) (the right of the representatives of the deceased and incapacitated members of the congregation to cross-examine witnesses was necessary to ensure the operation of fair procedures and constitutional justice
fundamental importance of this right to our criminal procedures and to the proper administration of justice is considered a “proposition so obvious as scarcely to need...authority”; it is “axiomatic that every witness must submit himself to the rigours of cross-examination, to having his evidence questioned, tested, challenged and contradicted and his credit impeached”.1371

4.11.4 In the context of the evidence of child witnesses in particular, cross-examination is understood to be extremely important in highlighting frailties in the child’s perception or recollection of the events the subject-matter of the proceedings1372 or in exposing the false or ‘coached’1373 child

in the context of inquiries by the committee). “In view of the importance of cross-examination for the purpose of ensuring fair procedures and constitutional justice set out in Maguire v Ardagh [2002] 1 IR 385, I consider that the submissions on behalf of the plaintiffs that the representatives of the deceased and the plaintiffs’ congregation seeking to defend their derivative interest under the deceased and the incapacitated and untraceable, were under a serious disadvantage in relation to the procedures suggested by the final ruling and procedures of the committee by requiring a statement from the respondent as a precondition for the right to cross-examine...I consider that the right of the representative of the deceased and incapacitated to cross-examine (notwithstanding difficulties in obtaining the fullest instructions for such cross-examination) is vitally important for ensuring the operation of fair procedures and constitutional justice in the context of inquiries by the committee”. (Emphasis added). See also: O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005) per Hardiman J.

1371 People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006) per Fennelly J. at p. 13, See also Maguire v Ardagh [2002] 1 IR 385 (H.C.), [2002] 1 IR 447, at p. 707, per Hardiman J. (S.C.): “A person cannot be put on risk of a grave finding of fact against him without a full opportunity of defending himself or herself, including by cross-examination.”

1372 Sopinka, J., Lederman S., and Bryant A., The Law of Evidence in Canada (2nd ed., 1999) § 16. 125, at p. 945: “Apart from the subconscious errors attributable to the human condition, an effective cross-examination may also expose bias, detect falsehood, and generally reveal the witness’ mental and moral condition and whether his or her evidence is tainted by enmity towards a party to the litigation.” Sopinka also cited the following passage from Morgan, E.M., “The Relation Between Hearsay and Preserved Memory” (1927) 40 Harv. L. Rev. 712 in § 16.124, at p. 945: “The judicial device for exposing these weaknesses is cross-examination. Its most dramatic quality is its power to detect wilfully false testimony, but more valuable is its capacity for bringing to light errors of perception, defects of memory and deficiencies of narration. It requires no extended trial experience to demonstrate that for every perjurer there are scores of honest witnesses whose direct examination produces the effect of falsehood because its subject-matter was incorrectly or incompletely observed or inaccurately remembered or inadequately narrated. It might, then, be argued that in a judicial investigation no testimony should be received which is not tested in the fire of cross-examination.”

witness. It is the duty and function of the courts to ensure that the trial of an accused is conducted in accordance with fair procedures and, accordingly, that the accused is afforded his / her right to full and effective cross-examination of his / her accusers; the courts’ obligation is to ensure “the due process of law, which includes the concepts of justice, the dignity of a person, and the public interest in the integrity of the justice system”.

4.11.5 Having regard to the foregoing, it was argued on behalf of the accused in Donnelly v Ireland that, in order to give content to the constitutional right of an accused to cross-examine his / her accuser, the accuser must be physically present in the courtroom and physically confronted by the accused; by way of alternative to the first submission – which regarded the

1374 In O'Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005) Hardiman J. observed at p. 54 that it “was not necessary to turn to 19th century causes ... to illustrate the importance of cross-examination and, therefore, of the provision of the means for it”, opining that he knew “no better contemporary example than that which occurred in a neighbouring jurisdiction in 2002 on the trial of three youths for the murder of a young boy, Damilola Taylor”; Hardiman J. did not cite the formal title of the case – since the names of the defendants were not revealed at the time on account of their youth – but simply referred to the judgment of Mr. Justice Hooper given in the course of finding the evidence of a particular witness inadmissible at the Old Bailey on the 27th February, 2002, bearing the (English) Central Criminal Court number T 2001 03 88. The evidence of the child witness was excluded from the consideration of the jury by the trial judge, having heard her evidence and the cross-examination as to gross inconsistencies in her earlier statements; in so doing, the trial judge referred to the “lies”, “embellished lies” and “contradictions” in the child’s evidence, the pressure placed on the child during police interviews and the sum of money offered to the child by way of ‘reward’. Hardiman J. observed that “to read the transcript of the learned trial judge's ruling is to be made to marvel at just how easily a witness can be manipulated, sometimes even unconsciously, by experienced interviewers and got to falsify her own position even though it appears, she started out without any malice towards the person she impugned”. More importantly, Hardiman J. stresses the importance of cross-examination in revealing these frailties in the child’s evidence in avoiding a grave miscarriage of justice, a “chilling prospect”.

1375 The Irish Times Limited v Ireland [1998] 1 IR 375, at p. 385, [1998] 2 ILRM 161, at p. 173, per Hamilton C.J. (S.C.): “It is the function and role of a trial judge in the conduct of criminal proceedings to ensure that the trial of an accused person is conducted in accordance with fair procedures and to ensure, so far as practicable, that the jury should reach its verdict by reference only to evidence lawfully admitted at the trial...” See also In re Haughey [1971] IR 217, at p. 264, per O’Dálaigh C.J. (S.C.): “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.”

1376 People (Director of Public Prosecutions) v Redmond (Unreported, Supreme Court, 6th April, 2006) per Denham J. The majority of the Supreme Court held that a judge should not intervene to set aside a guilty plea unless there were quite exceptional circumstances arising in the particular case. However, Denham J. dissented, holding that, in the circumstances, the trial judge was entitled to decline to accept the plea of guilty offered by the accused, enter a plea of not guilty on behalf of the accused and seek to ensure that the issue of his sanity was fully investigated in the course of his trial.

right to confront as a distinct constitutional right – the right to confront was here presented as an aspect of the right to cross-examine.

4.11.6 While the High Court (Costello P.) conceded that the duty of the court in a criminal trial was to ensure a fair trial for the accused and fair procedures throughout the trial, the Court noted that the applicant had enjoyed the benefit of each of the rights necessary in order to constitute a fair trial in the Dublin Circuit Criminal Court – referred to above as the ‘purposes of confrontation’ – in that (i) he had notice of the evidence to be given against him; (ii) he was represented by counsel; (iii) the child witnesses were examined and cross-examined by means of live television link and were visible at all times to the jury, judge and counsel. The Court held that the effectiveness of the right of an accused to cross-examine witnesses was not adversely affected where the cross-examination took place through the medium of live television link, allowing the witness to give evidence from outside the physical confines of the courtroom and the immediate presence of the accused. Furthermore, Costello P. pointed out that, where a child witness is permitted to give evidence via live television link, the jury will be able to see the witness at all times and assess his / her demeanour, credibility and reliability – including assessing whether the child was lying or had been the subject of manipulation – as required by fair procedures. Thus, the High Court concluded that the procedures authorised under s. 13 of the Criminal Evidence Act 1992, which denied physical confrontation between an accused and his / her accusers, did not infringe the accused’s right of cross-examination or render the trial unfair.

4.11.7 On appeal, the Supreme Court applied similar reasoning to uphold the constitutionality of this statutory scheme; the preservation of the characteristics of the adversarial trial – with the sole exception of the

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1378 In relation to the operation of the live television link in the instant case, Costello P. noted that: (i) the witness was seen at all times by judge, jury and counsel on monitors; (ii) the witness had a monitor and while 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.

traditional face-to-face confrontation between the accused and his/her accusers during their evidence – safeguarded the accused’s right to a fair trial, including his/her right to full and effective cross-examination. Although the Court noted that a fair trial “undoubtedly involves the rigorous testing by cross-examination” of the evidence against the accused, it nonetheless held that the assessment of the credibility of a witness and the requirements of fair procedures did not require the witness to give evidence in the physical presence of the accused, reiterating that a witness giving evidence via live television link is required: (i) to give evidence on oath and in accordance with the statement of evidence previously made available to the accused person; (ii) the witness is subject to cross-examination by counsel for the accused person; and (iii) the witness’s demeanour while giving evidence and while subject to cross-examination is clearly visible to

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1381 Donnelly v Ireland [1998] 1 IR 338, at p. 357, per Hamilton C.J. (S.C): “The Court is satisfied...that the assessment of...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.” Equally, in relation to the alleged constitutional invalidity of any proposal providing for the use of screens in the manner outlined, the Commission asserted that it was satisfied that “once the right to cross-examine State witnesses is preserved, the guarantee of fair procedures is not necessarily violated by the absence of any physical confrontation with the witness”: Law Reform Commission, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.093, at p. 179.
1382 As noted in section 2.15.0-2.15.16 above, unsworn evidence is admissible from child witnesses aged less than fourteen years, pursuant to s. 27 of the Criminal Evidence Act 1992, as amended, upon the satisfaction of an 'intelligibility' test of competence. However, it is submitted that the absence of the oat alone cannot compromise the balance achieved between the competing interests and render the use of the live television link in respect of the evidence of child witnesses unconstitutional as an infringement of the accused’s right to a fair trial and fair procedures; there are sufficient safeguards, even in the absence of the oath to protect and vindicate the constitutional rights of the accused.
1383 Section 4B(1) of the Criminal Procedure Act 1967, as inserted by s. 9 of the Criminal Justice Act 1999 makes provision in relation to the requirement to furnish to the accused, in advance of the trial, the ‘Book of Evidence’: “Where the prosecutor consents to the accused being sent forward for trial, the prosecutor shall, within 42 days after the accused first appears in the District Court charged with the indictable offence or within any extension of that period granted under subsection (3), cause the following documents to be served on the accused or his solicitor, if any: (a) a statement of the charges against the accused; (b) a copy of any sworn information in writing upon which the proceedings were initiated; (c) a list of the witnesses the prosecutor proposes to call at the trial; (d) a statement of the evidence that is expected to be given by each of them; (e) a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act, 1992; (f) where appropriate, a copy of a certificate under section 6(1) of that Act; (g) a list of the exhibits (if any).”
the judge and jury, who can then assess the credibility of the witness and the reliability of his / her testimony. The Supreme Court recently revisited this decision and, observing that the features cited above in support of the constitutionality of this statutory provision indicated “how the balance is maintained”, offered the following interpretation of the reasoning employed by the Court:

“In effect, the Court accepted that the notion of fair procedures at a criminal trial guaranteed by Article 38 of the Constitution encompasses a right for the accused to confront his or her accusers. It merely says that such a right does not require that the witness and the accused be present in the same courtroom while the evidence is being given.”

This interpretation contains echoes of the assertion of Kinlen J. in *White v Ireland* to the effect that “modern technology suitably used is a form of confrontation”.

4.11.8 Although the logic of the reasoning employed by the Supreme Court has been criticised for proceeding from “what the impugned provisions do not do” – that is, “restrict in any way the rights of an accused person as established by the constitutional jurisprudence of the Supreme Court” – in order to insulate them, it should be noted that, in light of recent...
developments in the jurisprudence in this area, it may be argued that even if the Supreme Court had found that the use of live television link technology to facilitate the reception of evidence from child witnesses infringed the accused’s right of cross-examination, the legislation could nevertheless have survived a finding of unconstitutionality. The Supreme Court has recognised that the right of cross-examination is not absolute; it simply “cannot be impinged upon without a firm basis in law, which itself must be consistent with the Constitution,” but that “is not to say that restrictions may not be imposed in the interests of overall balance and the efficiency of the criminal justice system”.

4.11.9 Accordingly, the Supreme Court has upheld as constitutional a limitation on the accused’s right of cross-examination – as to the source of belief of a garda witness that the accused was a member of an illegal organisation, in respect of which the Chief Superintendent claimed privilege – inherent in the terms of a legislative provision, in circumstances where the legislative provision providing that such belief “shall be evidence” of such illegal organisation.

1389 See: Maguire v Ardagh [2002] 1 IR 447 (S.C.); O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005); and People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006).

1390 O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005), per Hardiman J. Equally in Maguire v Ardagh [2002] 1 IR 447, at p. 705 (S.C.), Hardiman J. asserted that: “It follows from the foregoing that the right of cross-examination may not be unreasonably confined or hampered in terms of the time allowed or otherwise. A person is, of course, entitled to cross-examine himself but equally entitled to do so by counsel....”

1391 People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006), per Fennelly J. at p. 84.

1392 People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006).
membership: (i) enjoyed the presumption of constitutionality;\(^{1393}\) (ii) was enacted in the context of a legitimate public policy – namely, preserving the security of the State – and “in light of the legitimate concern that it will not in practice be possible in many, if not most cases, to adduce direct evidence from lay witnesses”\(^{1394}\) establishing the accused’s illegal membership; and (iii) the limitation on the accused’s ‘normal’ right of cross-examination was “kept to a minimum”;\(^{1395}\) that is, limited to the extent strictly necessary to achieve the clear legislative objectives.\(^{1396}\)

4.11.10 The Court concluded that the claim of privilege made by the Chief Superintendent constituted an “undoubted infringement of the normal right of the accused” to have access to the material which underlay the belief expressed and, to that extent, it constituted a restriction on the effectiveness of the right of the appellant to cross-examine his true accusers; “it had, for that reason the potential for unfairness”.\(^{1397}\) In this regard, Fennelly J. noted that “[w]hile there may be derogations for overriding reasons of public interests from procedural rights of the defence, these must not go beyond what is strictly necessary and must, in no circumstances... imperil the

\(^{1393}\) People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006) per Geoghegan J. at p. 3: “The first point to be made is that the presumption of constitutionality applies to each of the Acts relevant to this case. That is important because a limitation on cross-examination is inherent in the very terms of section 3(2) of the Offences Against the State (Amendment) Act 1972.”

\(^{1394}\) People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006), per Geoghegan J. at p. 4: “It is a reasonable inference to draw that the subsection was enacted out of bitter experience. It is carefully crafted ensuring that the belief must come from an officer of An Garda Síochána not below the rank of Chief Superintendent. This is with a view to establishing trust and credibility as far as possible.... I have no doubt that in so far as Mr. Finlay was limited in his cross-examination of Chief Superintendent Kelly, permission for this limitation was inherent in the subsection itself which enjoys the presumption of constitutionality.”

\(^{1395}\) People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006), per Geoghegan J. at p. 5: “As the normal rights of an accused are being infringed, it would seem to me that there must be a constitutional requirement that such limitation be kept to a minimum.”

\(^{1396}\) People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006), per Fennelly J. at p. 22: “I also agree with Geoghegan J. that it is relevant that the section enjoys a presumption of constitutionality. Any restriction on the right to cross-examine, which it implies, must be limited to the extent that is strictly necessary to achieve its clear objectives. I believe that the circumstances I have mentioned constitute sufficient justification for its introduction while, at the same time, demonstrating a concern to respect such necessary limitations.... I am satisfied that, in the particular circumstances of this appeal, there was no unfairness in the trial of the appellant.”

\(^{1397}\) People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006) per Fennelly J. at p. 21.
overall fairness of the trial". However, in light of the “compelling circumstances” which justified the course of action adopted and the presumption of constitutionality which attached to the legislative provision, the Court concluded that there was no unfairness in the trial of the accused.

In light of this recent judgment, it now may be argued that even if the use of the live television link facility to receive the evidence of a child witness could be regarded as a restriction on the accused’s ‘normal’ right of cross-examination, such restriction may not result in unfairness in the trial of the accused since: (i) s. 13 of the Criminal Evidence Act 1992, as amended, enjoys the presumption of constitutionality; (ii) it was enacted in order to give effect to a legitimate public policy – namely, the reduction of the trauma associated with the witness experience for child witnesses with a resulting improvement in the quality of the evidence received from child witnesses in the interests of the proper administration of justice; and (iii) the restriction on the right of the accused to cross-examine the child witness – that the child be permitted to give evidence outside the immediate physical presence of the accused – is the minimum necessary to achieve the objectives of the legislation; and (iv) the reliability of the evidence of the child is otherwise assured by preserving the obligation to satisfy a test of competency and enabling the child to be seen at all times by the accused, the judge and the jury, thereby facilitating assessment of the child’s credibility as a witness. In this regard, it should be noted that the

1398 People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006) per Fennelly J. at p. 21.

1399 See also: Final Report of the Committee on Video Conferencing in the Courts (Dublin: Courts Service, Chairperson, Ms. Justice Denham, 2005) paras. 5.1-5.18, at pp. 36-40.

1400 Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.

1401 White v Ireland [1995] 2 IR 268, at p. 282, per Kinlen J. (H.C.): “In fact the judge may well have a better view of the witness because of the nature of the close up televised appearance of the face of the witness than they would have across a courtroom.”

1402 By way of contrast, the equivalent English provision – s. 24 of the Youth Justice and Criminal Evidence Act 1999 – does not expressly require the equipment to be set up so that the accused himself or herself can see the child witness while he or she testifies; it appears to be regarded as sufficient if the legal representative of the accused has a clear view of the child witness while giving evidence. This constitutes a greater impairment of the accused’s ‘right’ of confrontation than that which results from the use of a one-way screen, for example, where only the child’s view of the accused is affected; the accused maintains a clear view of the child at all times during his or her testimony. The decision of the
restriction on the accused’s right of cross-examination in *The People (Director of Public Prosecutions) v Kelly*,1403 upheld as constitutional by the Supreme Court, was a restriction as to the very content of cross-examination – namely, the source of the belief of the Chief Superintendent that the accused was a member of an illegal organisation – whereas the restriction (if any) of the right of the accused to cross-examination which is imposed by permitting a child witness for the prosecution to give evidence via live television link is only a restriction as to the mode of cross-examination; rather than conducting the cross-examination of the child in the courtroom and in the immediate presence of the accused, counsel for the accused or the accused himself / herself must conduct such cross-examination via live television link.

4.11.12 The courts have also rejected arguments to the effect that both the provision of one-way screens and the use of the live television link constitute unfair and prejudicial procedures, contrary to the accused’s right to a fair trial and fair procedures. It is asserted on behalf of the accused that the use of these special measures is highly prejudicial to the accused in that their use signifies to the jury that the child has good reason to fear the accused, that the court has recognised and ‘legitimised’ this fear by permitting the child to give evidence in this manner and, accordingly, the accused is guilty of the offence(s) with which he / she is charged; that “the necessity to screen the

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1403 *People (Director of Public Prosecutions) v Kelly* (Unreported, Supreme Court, 4th April, 2006).
accused must say something about the man"\textsuperscript{1404} in the eyes of the jury. In this regard, it should be noted that the use of a screen to elicit evidence from a child witness is considered more prejudicial to an accused than the live television link facility;\textsuperscript{1405} while a jury may accept that the primary purpose of the use of the live television link facility is to reduce the trauma experienced by a child witness by removing him / her from the intimidating formal surroundings of the courtroom – rather than from the immediate physical presence of the accused – it is more difficult to persuade the jury of this distinction in relation to the use of one-way screens since, in respect of the latter special measure, the child remains in the courtroom for the duration of his / her evidence, the only modification of the conventional method of giving evidence being that the child’s view of the accused is obscured while he / she testifies.\textsuperscript{1406} For this reason, it is submitted that it is preferable where practicable to permit child witnesses to give evidence via live television link\textsuperscript{1407} rather than with the assistance of a one-way screen.\textsuperscript{1408}

\textsuperscript{1404}R v Accused (T 4/88) [1988] 1 NZLR 569, at p. 571 per Hillyer J. (H.C.).

\textsuperscript{1405}R v M [1997] NZFLR 920 (H.C.). In this case, a child witness was to give evidence against her mother – the accused – of her mother’s ill-treatment and murder of her infant son. Neazor J. accepted as “entirely understandable” the submission of counsel for the defence that live television link was preferable from the defence point of view to the use of screens on the basis that: “It [live television link] removes the appearance in the face of the jury of the witness being screened off from her mother, which could more easily than a video link give rise to a visual impression of present and past fear of her mother, with the prejudice that is likely to give rise to.”

\textsuperscript{1406}However see: Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) at p. 57 wherein it is asserted that: “[S]creens were thought by prosecutors and police officers in interviews and in survey responses to give confidence to witnesses and often to be unobtrusive. This was thought sometimes to give screens an advantage over live television link so far as the witness is concerned....[Crown Prosecution Service] respondents also commented that judges preferred screens to the live television link for adult witnesses. The police and the [Crown Prosecution Service] noted the difficulty many judges had in letting go of the idea of immediacy provided by witnesses giving evidence in person in the courtroom.”

\textsuperscript{1407}It is submitted that, in any event, the legislative ‘presumption of trauma’ contained in s. 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999, as amended by s. 257(3) of the Children Act 2001 will ensure that the special measure most frequently authorised by the courts for use in facilitating the reception of the evidence of child witnesses will be the live television link.

\textsuperscript{1408}See: Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.045, at p. 150 wherein it was acknowledged that the use of screens “might prejudice the jury against the accused” since the jury “might conclude that the screen was necessary because the child had good reason to be afraid of the accused and needed protection from him or her”. However, the Commission observed in para. 7.093, at p. 178 that “[t]he possible prejudicial effect on the jury could be minimised by a requirement that the judge instruct the jury that the procedure is designed as a way of reducing the stress for child witnesses and should not under any circumstances be taken as evidence of the guilt of the accused.” In its subsequent report, Report on Child Sexual Abuse (LRC 32-
and, where the live television link facility is unavailable in the court in which proceedings are to take place, to transfer such proceedings to a court in which the relevant equipment is installed and operational.\textsuperscript{1409}

4.11.13 However, in response to arguments asserting the prejudicial effects of this special measure, the courts have held that the use of a one-way screen to facilitate the reception of evidence from child witnesses is not inherently prejudicial to the accused since unlike clothing the accused in prison attire\textsuperscript{1410} or having the accused shackled and gagged,\textsuperscript{1411} using the screening device does not "brand [the accused]... 'with an unmistakable mark of guilt'";\textsuperscript{1412} the one-way screen is not "the sort of trapping that generally is associated with those who have been convicted" and is therefore unlikely to have a subconscious effect on the jury’s attitude towards the accused.\textsuperscript{1413}

\textsuperscript{1409} Section 17 of the Criminal Evidence Act 1992 provides that a court "may, if in its opinion it is desirable that evidence be given in the proceedings through a live television link...by order transfer the proceedings to a circuit or district court district in relation to which those provisions [s. 13] are in operation and, where such an order is made, the jurisdiction of the court to which the proceedings have been transferred may be exercised: (a) in the case of the Circuit Court, by the judge of the circuit concerned, and (b) in the case of the District Court, by the judge of that court for the time being assigned to the district court district concerned". See also: Law Reform Commission, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.083, at p. 179; and Law Reform Commission, Report on Child Sexual Abuse (LRC 32-1990) para. 7.11, at p. 72.


\textsuperscript{1413} \textit{Coy v Iowa} 487 US 1012, at pp. 1034-1035 (1987) (U.S.S.C.). Blackmun J. – with whom White J. agreed – made this finding in response to the observations on behalf of the accused that in order for the screening device – placed in front of the defendant during the testimony of the two girls – to function properly, it was necessary to dim the normal courtroom lights and to focus a panel of bright lights directly on the screen, creating, in the trial judge’s words, “sort of a dramatic emphasis” and a potentially “eerie” effect: 487 US 1012, at p. 1034 (1987). Having determined that the use of a one-way screen contravened the accused’s right to confront his / her accusers pursuant to the Confrontation Clause in the Sixth Amendment, the majority did not find it necessary to also determine whether the use of this special measure violated the accused’s right to a fair trial and fair procedures. Blackmun J. noted, at p. 1034, that: “Questions of inherent prejudice arise when it is contended that ‘a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.’ \textit{Estes v Texas}, 381 US 532, 542-543 (1965). When a courtroom arrangement is challenged as inherently prejudicial, the first question is whether ‘an unacceptable risk is presented of impermissible factors coming into play,’ which might erode the presumption of innocence. \textit{Estelle v Williams}, 425 US 501, 505 (1976). If a procedure is found to be inherently prejudicial, a guilty verdict will not be upheld if the procedure was not necessary to further an essential state interest. \textit{Holbrook v Flynn}, 475 U.S. 560, 568-569 (1986).”
Secondly, it has been asserted that “every practice tending to single out the accused from everyone else in the courtroom [need not] be struck down”.\textsuperscript{1414} Thirdly, in holding that a jury, properly instructed, would not have been swayed by the use of a screen to prevent the child witness from seeing the accused while testifying,\textsuperscript{1415} the Supreme Court of Canada noted that the use of a screen could very well be held against a child complainant – who might be judged to be an unreliable witness – or his / her testimony have less impact, because he / she is unable to look the accused in the eye.\textsuperscript{1416} Equally, while the High Court in New Zealand\textsuperscript{1417} expressly conceded that the use of one-way screens would raise a question in the mind of the jury, it nonetheless noted that it was necessary to balance this possible prejudice to the accused against any possible prejudice to the prosecution representing the public and the child, if the screens were not

\textsuperscript{1414} \textit{Coy v Iowa} 487 US 1012, at p. 1035, \textit{per} Blackmun J. (U.S. S.C.), quoting with approval from the decision in \textit{Holbrook v Flynn} 475 US 560, at p. 567 (1986) (U.S. S.C.) wherein it was held that the placement throughout trial of four uniformed state troopers in first row of spectators’ section, behind the defendant, was not inherently prejudicial.

\textsuperscript{1415} \textit{R v Levogiannis} (1993) 25 C.R. (4th) 325, 18 C.R.R. (2d) 242 (S.C.C.). The Ontario Court of Appeal had also held that s. 486(2.1) did not infringe the appellant’s right to be presumed innocent or to a fair hearing pursuant to s. 11(d) of the Charter; alternatively, it was held that any such infringement would be justified under s. 1 of the Charter: \textit{R v Levogiannis} (1990) 1 O.R. (3d) 351, 62 C.C.C. (3d) 59, 2 C.R. (4th) 355, 43 O.A.C. 161, \textit{per} Morden A.C.J.O. (Ont. C.A.). The Ontario Court of Appeal examined the nature of the rights protected by s. 11(d) of the Charter in \textit{R v Totten} 16 C.R.R. (2d) 49, at p. 79, \textit{per} Doherty J.A. (Ont. C.A.): “The right is obviously concerned with the effect of any particular rule on the overall treatment of the accused in the trial process. Where the particular rule in issue is directed to the admission of evidence which may be used against an accused, unfairness to the accused may flow from the potential for misuse of the evidence by the trier of fact, or from the negative impact of admitting the evidence on some other protected interest of the accused’s (e.g., privacy), or from the absence of an adequate opportunity to effectively prepare to challenge and contradict the evidence admitted under the rule in issue: \textit{R v Albright}, [1987] 2 S.C.R. 383 at pp. 395-96, 37 C.C.C. (3d) 105 at p. 114.” The Court further noted that the “interests of the accused are not, however the only vantage point from which fairness must be assessed” and opined that fairness also demands consideration of the interests of the public.

\textsuperscript{1416} Equally in \textit{R (Director of Public Prosecutions) v Redbridge Youth Court} [2001] 4 All ER 411, [2001] 1 WLR 2403, [2001] 3 FCR 615, [2001] 2 Cr App Rep 458 (Q.B. Div.) while the court acknowledged that the advantage of a child witness giving evidence in court was that it enabled the defendant and the court to see directly the demeanour of the witness and the way in which his or her evidence was given, it noted that the presentation of the child’s evidence by way live television link preserves the opportunity for the court and defendant to observe the child witness while he or she gives evidence, albeit indirectly. It further observed that the indirect method of giving evidence may disadvantage not only the defendant but also the prosecution since the impact of the evidence of a child witness is likely to be greater where it is given directly to the court.

\textsuperscript{1417} \textit{R v Accused (T 4/88)} [1988] 1 NZLR 569 (H.C.).
made available;\textsuperscript{1418} in upholding the constitutionality of s. 486(2.1) of the Criminal Code,\textsuperscript{1419} the Supreme Court of Canada concluded that the legislature had achieved a proper balance between "the goal of ascertaining the truth and the protection of children as well as the rights of the accused to a fair trial by allowing cross-examination and by tailoring the use of screens to the complainants' age and confining their use to limited and specific types of crimes".\textsuperscript{1420}

4.11.14 Finally, in refusing to accede to suggestions that the use of these special measures is inherently prejudicial to the accused, the courts have relied upon the power of a "firm and careful direction"\textsuperscript{1421} from the trial judge to the jury to minimise or even neutralise any possible prejudice to the accused arising from the use of a one-way screen or the live television link for the duration of the child's evidence.\textsuperscript{1422} Such direction would caution the jury not to attach undue significance to or to draw any adverse inferences from the use of a screen and, in particular, not to infer from its use guilt on the part of the accused in relation to the offence charged.\textsuperscript{1423} In addition, the

\textsuperscript{1418} The High Court had earlier asserted that: "In the constant search for truth and fairness, courts must balance the rights of the accused against the rights of victims, and the rights of the public": \textit{R v Accused (T 4/88)} [1988] 1 NZLR 569, at p. 570 per Hillyer J. (H.C.).

\textsuperscript{1419} Now s. 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.


\textsuperscript{1421} \textit{R v Accused (T 4/88)} [1988] 1 NZLR 569, at p. 572 \textit{per} Hillyer J. (H.C.). Equally, on appeal, in relation to the balance to be achieved with regard to the rights of the accused, the Court of Appeal stressed that, it was necessary in every case where a determination was made that the use of screens was reasonably necessary, to "make it plain to the jury in the summing up that this procedure has nothing at all to do with whether the accused is innocent or guilty", that this procedure may be permitted in relation to child witnesses and "should not in any way influence them against the particular accused". Such a warning may also be made, at the request of counsel for the defence, at an earlier point in the trial but must then be repeated by the trial judge in his summing up of the case to the jury: [1989] 1 NZLR 660, at p. 667, \textit{per} Cooke P. (C.A.). Thus the Court of Appeal held that the trial judge had the power to make the orders relating to the use of screens and that such power was correctly exercised in the present case, without prejudice to the accused.

\textsuperscript{1422} See: \textit{R v X, Y and Z} (1990) 91 Cr App Rep 36, [1990] Crim LR 515 (C.A.); and \textit{R v Accused (T 4/88)} [1989] 1 NZLR 660, at pp. 661-662 (C.A.) wherein Cooke P. approved the direction given by the trial judge to the jury in order to avoid the risk of prejudicial perception arising out of the use of this special measure.

\textsuperscript{1423} Accordingly, in his dissenting judgment in \textit{Coy v Iowa} 487 US 1012 (1987) (U.S. S.C.), Blackmun J. concluded that, having regard to the terms of the unequivocal warning given by the trial judge to the jury – which cautioned that such devices were used in cases involving child witnesses and that no inference of any kind adverse to the accused should be drawn from the use of a screen in the instant case – the use of the screen was not inherently prejudicial. Similarly, the Law Reform Commission of
direction included a warning from the trial judge to the jury that the purpose for which the screen was authorised was to prevent the child witness from being intimidated by his / her surroundings - as opposed to intimidation by the accused - and that the provision of special measures such as screens in relation to child witnesses was the modern practice in courts in this jurisdiction aimed at assisting the court in obtaining the child’s evidence in light of the stress and trauma which may be suffered by a child if required to give evidence by conventional means.  

Ireland opined that the potential prejudicial effect of the use of the screen on the jury could be minimized by a requirement that the judge instruct the jury that “the procedure is designed as a way of reducing stress for child witnesses and cannot be taken as evidence of the guilt of the accused”: Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.046, at p. 151.

The Supreme Court of Canada in R v Levogiannis (1993) 18 C.R.R. (2d) 242, at p. 254, per L’Heureux-Dubé J. (S.C.C.) approved the cautionary jury instruction suggested by the Ontario Court of Appeal to the effect that the use of a screen is a procedure permitted in cases by reason of the youth of the witness and that, since it had nothing to do with the guilt or innocence of the accused, the jury should not draw an inference of any kind - specifically, no adverse inference against the accused - by reason of its use. The Supreme Court concluded that s. 486(2.1) did not contravene the appellant’s rights under s. 11(d) of the Charter. The Ontario Court of Appeal had also held that s. 486(2.1) did not infringe the appellant’s right to be presumed innocent or to a fair hearing pursuant to s. 11(d) of the Charter; alternatively, it was held that any such infringement would be justified under s. 1 of the Charter: R v Levogiannis (1990) 1 O.R. (3d) 351, 62 C.C.C. (3d) 59, 2 C.R. (4th) 355, 43 O.A.C. 161, per Morden A.C.J.O. (Ont. C.A.). The Ontario Court of Appeal examined the nature of the rights protected by s. 11(d) of the Charter in R v Toten 16 C.R.R. (2d) 49, at p. 79, per Doherty J.A. (Ont. C.A.): “The right is obviously concerned with the effect of any particular rule on the overall treatment of the accused in the trial process. Where the particular rule in issue is directed to the admission of evidence which may be used against an accused, unfairness to the accused may flow from the potential for misuse of the evidence by the trier of fact, or from the negative impact of admitting the evidence on some other protected interest of the accused’s (e.g., privacy), or from the absence of an adequate opportunity to effectively prepare to challenge and contradict the evidence admitted under the rule in issue: R v Albright, [1987] 2 S.C.R. 383 at pp. 395-96, 37 C.C.C. (3d) 105 at p. 114.” The Court further noted that the “interests of the accused are not, however the only vantage point from which fairness must be assessed” and opined that fairness also demands consideration of the interests of the public.

Section 32 of the Youth Justice and Criminal Evidence Act 1999 in England provides that, where, on a trial on indictment, evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused. See also: R v Brown [2004] Crim LR 1034 (C.A.); and s. 54 of the Criminal Justice Act 2003 in England.
appropriate balance between the rights of the accused, the protection of the child witness and the proper administration of justice, the trial judge must give such warning (if any) as the court considers necessary to ensure that the fact that a special measures direction is given in relation to a child witness does not prejudice the accused.

4.11.16 While there is no such statutory provision in force in this jurisdiction, it is submitted that, having regard to the court’s obligation to ensure the fairness of procedures, it is incumbent upon the trial judge to issue a direction in these terms to the jury wherever a child witness is giving evidence with the benefit of a special measure, such as a one-way screen or the live television link facility, in order to avoid – or at least minimise – the risk of prejudice to the accused and to his / her right to a fair trial and fair procedures. The importance of judicial directions in safeguarding the rights of the accused has been repeatedly stated in this jurisdiction; indeed, as noted above, the definition of an unfair trial refers to an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge and, in this regard, the trial judge is required to have confidence in the jury’s ability to follow the directions and to discharge its truth-finding function in accordance with the oath.¹⁴²⁷

¹⁴²⁶ The need to achieve and maintain a balance between the interests of child witnesses and the rights of the accused is also a central concern of the statutory scheme enacted in New Zealand; section 23D(4) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989, expressly provides that, in considering what directions (if any) should be given, the court shall have regard to “the need to minimize stress on the complainant while at the same time ensuring a fair trial for the accused.” Similarly, in a case where one or more child complainants gives evidence with the benefit of one of the special measures outlined in s. 23E, the judge is obliged by the terms of s. 23H(a) to direct the jury “that the law makes special provision for the giving of evidence by child complainants in such cases, and that the jury is not to draw any adverse inference against the accused from the mode in which the complainant’s evidence is given”. However, these safeguards against prejudice to the rights of the defendant are balanced against the statutory provisions preventing a re-introduction of the stereotypical view of the testimonial abilities of child witnesses, which dictate that the trial judge shall not instruct the jury on “the need to scrutinise the evidence of young children generally with special care” nor shall the judge “suggest to the jury that young children generally have tendencies to invention or distortion”: s. 23H(c) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.

4.11.17 A further ground advanced in support of the alleged unconstitutionality of statutory schemes – such as those applying in Ireland,\textsuperscript{1428} England\textsuperscript{1429} and Scotland\textsuperscript{1430} – with regard to the accused’s right to a fair trial, is the alleged ‘unfairness’ caused by the operation of presumptive rules regarding the availability of such special measures to child witnesses.

4.11.18 It was contended by counsel for the applicant both before the High Court and the Supreme Court in \textit{Donnelly v Ireland}\textsuperscript{1431} that the ‘general presumption of trauma’ created by s. 13 of the Criminal Evidence Act 1992 in relation to child witnesses testifying with regard to applicable offences via live television link was unconstitutional and constituted a disproportionate interference with the accused’s right to a fair trial, confrontation and fair procedures in that it did not require the trial judge to examine each individual child witness to determine whether that child would suffer trauma if required to give evidence in the conventional manner, and further, in that it placed an unconstitutional and unfair burden of proof on an accused person who would have to prove that the child witness was capable of testifying in open court.\textsuperscript{1432}

\textsuperscript{1428} Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.
\textsuperscript{1429} Sections 19, 21, 22 and 24 of the Youth Justice and Criminal Evidence Act 1999.
\textsuperscript{1430} Sections 271, 271A, 271B and 271J of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004.
\textsuperscript{1432} It was accepted by both sides that the reason for the enactment of s. 13(1)(a) of the Criminal Evidence Act 1992 was that it was generally understood that persons under the age of 17 years – or persons with mental handicap who have attained that age – were likely to be traumatized by the experience of giving evidence in court and the purpose of s. 13 was to minimize this trauma by providing for the giving of evidence via live television link. However, the applicant asserted that the section was unconstitutional in that: (i) it did not require the trial judge to examine each young witness and ascertain whether he / she would be traumatized by giving evidence in the conventional manner, rather the judge was required to assume that the child would be so traumatized and, only where there was good reason to refuse permission, would the court refuse to allow a child witness to give evidence via live television link; (ii) the principle of proportionality should apply and any restriction on the right of an accused to confront his / her accusers should be subject to the minimum restriction necessary to achieve the objectives of the legislation, namely, the reduction of the stress and trauma suffered by child witnesses; and (iii) s. 13 went beyond what was necessary to achieve the objectives of the Criminal Evidence Act 1992 and interfered with an accused’s constitutional right to fair procedures since it provided a general presumption of trauma in relation to every child witness aged less than 17 years in proceedings involving sexual offences or offences involving violence, rather than a case-specific finding of trauma.
4.11.19 Both courts rejected the submissions of the applicant. Having held that the right of an accused person to a fair trial does not include an absolute right to physical confrontation, it was held that it followed that the circumstances in which such physical confrontation was denied to an accused person was a matter for the Oireachtas. The Supreme Court noted that the impugned sections of the Criminal Evidence Act 1992, the procedures outlined therein and the circumstances in which they may be invoked, enjoyed a presumption of constitutionality and that the onus was on the applicant to clearly establish that they were repugnant to the Constitution. The Court held that the applicant had failed to discharge this onus and that the procedures were not unfair and did not amount to an interference with an accused person’s constitutional right to a fair trial. Accordingly, it was held that the Constitution of Ireland – and, in particular, fair procedures – did not require a case-specific assessment of trauma.

4.11.20 A similarly ringing endorsement was given to the English statutory ‘primary rule’ in respect of the availability of special measures to child witnesses giving evidence in criminal proceedings. The effect of this primary rule

1433 Donnelly v Ireland [1998] 1 IR 321, at p. 337, per Costello P. (H.C.): “[O]nce 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.” See also: Donnelly v Ireland [1998] 1 IR 338, at p. 358, per Hamilton C.J. (S.C.): “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.”

1434 Donnelly v Ireland [1998] 1 IR 338, at p. 358, per Hamilton C.J. (S.C.): “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.”

1435 The ‘primary rule’ – outlined in more detail above – mandates the admission into evidence, pursuant to s. 27 of the Youth Justice and Criminal Evidence Act 1999, of a pre-trial video recording of an interview with the child made with a view to its admission into evidence as the child’s evidence-in-chief and provides that any evidence given by the child in the proceedings which is not given by means of a video recording (whether in chief or otherwise) should be given via live television link, pursuant to s. 24 of the Youth Justice and Criminal Evidence Act 1999 subject to the pre-conditions analysed above. This rule is modified in respect of the evidence of child witnesses ‘in need of special protection’ and, with regard to child witnesses and complainants of sexual offences, provides for the application of the ‘full Pigot’ to his / her evidence subject to the two pre-conditions outlined above;
in relation to child witnesses and child witnesses ‘in need of special protection’ and its compatibility with Article 6 of the European Convention on Human Rights was considered in England in *R(D) v Camberwell Green Youth Court*.  

4.1.1.21 In a brief judgment, Rose L.J. held that s. 21(5) of the Youth Justice and Criminal Evidence Act 1999 did not breach Article 6 “or any part of it”. It was held that the primary rule contained in s. 21(5) enabled appropriate arrangements to be made in relation to child witnesses in need of special protection and gave such witnesses “the comfort of an assurance from an early stage in the proceedings as to how they will be giving evidence” which assurance, in turn, assisted such witnesses to maximize the quality of their evidence. The Court noted that if, subsequent to the granting of special measures pursuant to this primary rule, unanticipated difficulties arose or the fairness of the trial was impaired by virtue of the operation of the special measures, the rights of the accused were safeguarded by the “safety valves” contained in ss. 20(2) and 24(3) of the Youth Justice

that is, his / her entire evidence – including cross-examination – is to be given by way of pre-trial video recordings. See, further: sections 4.3.6–4.3.7, 4.7.18–4.7.19, 4.8.6–4.8.8 above.

1436 *R(D) v Camberwell Green Youth Court* [2003] Crim LR 659, [2003] 2 Cr App R 16 (Q.B. Div.). D and G, the defendants in two separate cases and both aged less than 16 years, were charged with robbery. The victims in both cases were under the age of 17 years. The District Judges ruled in relation to three of the child witnesses that there was no justification for a direction requiring the children’s evidence to be given by way of live television link and that, further, such direction “would give rise to substantial inequality between prosecution and defence, contrary to the fair provisions of Art. 6(1) and the right under Art. 6(3)(d) to examine witnesses under the same conditions as witnesses against the defendant”.


1438 It had been argued by counsel for the defendants that the mandatory operation of s. 21(5) of the Youth Justice and Criminal Evidence Act 1999, required the court to grant the prescribed special measures direction in relation to a child witness in need of special protection and, accordingly, deprived the court of any power to consider whether the resulting restriction on the rights of the accused in order to safeguard the rights of witnesses was necessary or in the interests of justice.

1439 Section 20(2) of the Youth Justice and Criminal Evidence Act 1999 provides that: “The court may discharge or vary (or further vary) a special measures direction if it appears to the court to be in the interests of justice to do so, and may do so either – (a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or (b) of its own motion.”

1440 Section 24(3) of the Youth Justice and Criminal Evidence Act 1999 provides that: “The court may give permission [for the witness to give evidence otherwise than by live television link] if it appears to the court to be in the interests of justice to do so, and may do so either – (a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time or (b) of its own motion.”
and Criminal Evidence Act 1999 – permitting the court to vary the original special measures direction requiring the child to give his or her evidence via live television link in the interests of justice – and in the “uninhibited common law powers of judges...to prevent unfairness”.\(^{1441}\) In relation to the rights of the accused, as guaranteed by Article 6 of the European Convention on Human Rights, the Court held that:

“There is nothing in the fair trial provisions of Art. 6, or the entitlement to examine witnesses in Art. 6(3)(d), or in the Strasbourg jurisprudence on Art. 6, which prohibits a vulnerable witness from giving evidence in a room apart from the defendant. On the contrary, the jurisprudence recognizes that vulnerable witnesses, as well as defendants, have rights and may need protection. The nature of the protection is essentially a matter for the domestic courts, but it must not, usually, infringe the Art. 6(3)(d) right to examine witnesses.”\(^{1442}\)

\(^{1441}\) *R(D) v Camberwell Green Youth Court* [2003] Crim LR 659, [2003] 2 Cr App R 16, para. 47, per Rose L.J. (Q.B. Div.). It had been argued by counsel on behalf of the Secretary for the State that the operation of the primary rule in relation to child witnesses in need of special protection did not, of itself, lead to unfairness, since there were safeguards in place to protect the rights of the accused, including the fact that: (i) s. 19(3) and (6) of the Youth Justice and Criminal Evidence Act 1999 preserved the court’s common law powers in relation to non-eligible witnesses under the statutory scheme, such as the accused; and (ii) both s. 24(3) and s. 27(2) contained ‘interest of justice’ tests, here described as “safety valves” for the rights of the accused. Accordingly, it was argued that a defendant’s right to test and challenge the evidence of a witness “remains intact” and that any minimal infringement was “substantially outweighed by the benefits to a witness who, by age and the nature of the offence, is bound to be affected by the prospect of giving evidence” but from whom the best evidence ought to be obtained.

\(^{1442}\) *R(D) v Camberwell Green Youth Court* [2003] Crim LR 659, [2003] 2 Cr App R 16, para. 48, per Rose L.J. (Q.B. Div.). It had been asserted by counsel for the accused that a ‘case specific’ approach to the granting of special measures for child witnesses had been adopted both by the European Court of Human Rights and in the United States, that is, individualized findings that particular child witnesses required special protection and that the restrictions on the rights of the accused were strictly necessary. It was argued that – although there was no absolute right to confrontation under the Convention – the principles applicable to Article 6(3)(d) of the Convention included “production of evidence in the presence of the defendant; adversarial hearing of witnesses; adequate and proper opportunity to challenge testimony; and dealing with prosecution and defence evidence on the same basis” and, accordingly, it was submitted that this “required a witness to appear in the presence of a defendant with the opportunity to challenge effectively by direct questioning”: citing *Coy v Iowa* 487 US 1012 (1987) (U.S. S.C.); and *Maryland v Craig* 497 US 836 (1990) (U.S. S.C.); *Van Mechelen v Netherlands* [1998] 25 EHRR 647 (E.Ct.H.R.); *Doorson v Netherlands* [1996] 22 EHRR 330 (E.Ct.H.R.); and *Triveldi v United Kingdom* [1997] EHLRR 174 (E.Ct.H.R.); and *Barber v Spain* [1989] 11 EHRR 360 (E.Ct.H.R.).
4.11.22 The Court concluded that neither the live television link nor the admission into evidence of the pre-trial video-recording of evidence-in-chief infringed the right contained in Article 6(3)(d) of the Convention, "provided, as here, the defendant's lawyers can see as well as hear the witness and can cross-examine"; it was held that "the fact that a witness will give evidence from another room does not infringe a defendant's Art. 6(3)(d) rights".\textsuperscript{1443} The Court accepted the argument of counsel for the Director of Public Prosecutions that s. 24(3) of the Youth Justice and Criminal Evidence Act 1999 does not empower the court to consider whether the interests of justice required the court to avoid the deeming provisions of section 19; rather it enables the court, usually at the trial, to resile from the special measures direction authorizing the use of live television link, where unforeseen difficulties arise after the 'special measures direction' is made. It was argued that such an approach is consistent with the purpose of the Act, that is, to provide vulnerable witnesses with a high degree of certainty, in advance of the trial of the accused, as to the manner in which their evidence would be received by the court; it is only where the use of the link may cause unfairness at trial, that there may be variation. Accordingly, the Court concluded that the statutory scheme was not properly described as 'mandatory' in nature.

4.11.23 Thus, the Court did not consider the statutory presumption of trauma – which resulted in the issuing of special measures directions to child witnesses in need of special protection without consideration of whether the effect of such measures would be to restrict the rights of the accused or

\textsuperscript{1443} \textit{R(D) v Camberwell Green Youth Court} [2003] Crim LR 659, [2003] 2 Cr App R 16, paras. 48-49, \textit{per} Rose L.J. (Q.B. Div.). It had been contended by counsel on behalf of the Secretary of State that there is "a profound public interest in evidence being given in a way most favourable to eliciting truth" and that this objective of the Youth Justice and Criminal Evidence Act 1999 was given effect by s. 21 "while leaving intact, and without any impediment on, the accused's ability to challenge the evidence". It was asserted that the foregoing arguments on behalf of the defendants were based on "unsustainable assumptions that, because a live-linked witness is in a different room, this is a violation of the accused's fair trial rights; that face-to-face confrontation is essential and in its absence there is unfairness"; [2003] Crim LR 659, [2003] 2 Cr App R 16, para. 27, \textit{per} Rose L.J. (Q.B. Div.). Furthermore, the Court noted in para. 49 that the conclusions of the District Judges were premature since the fairness of proceedings challenged by reference to Article 6 "can only be judged retrospectively by reference to the trial and any appeal, not prospectively before the trial has taken place".
whether such restriction was necessary or in the interests of justice – to be incompatible with Article 6 of the European Convention on Human Rights.

4.11.24 The House of Lords upheld this decision, finding that s. 21(5) of the Youth Justice and Criminal Evidence Act 1999 was not incompatible with Article 6 insofar as it prevented individualized consideration of the necessity for a special measures direction at the stage at which the direction was made; the limitations on disapplying the statutory presumption in favour of special measures directions for child witnesses did not give rise to a risk of injustice. While the Court conceded that the powers contained in s. 20(2) and s. 24(3) of the Youth Justice and Criminal Evidence Act 1999 – to permit a witness to give evidence otherwise than by live television link – could not be exercised by the court at the time when the direction was made in pursuance of the ‘primary rule’, it was held that there was nothing in either provision to prevent the trial court from taking whatever action was necessary to secure a fair trial on the day; the object of requiring a change of circumstances before a party could apply to vary or discharge a direction was simply to avoid repeated attempts to revisit the issue. The House of Lords opined that the court always had to start from the statutory presumption that there was nothing intrinsically unfair in children giving evidence by live television link or by video recording, since: (i) all the evidence was produced in the presence of the defendant; (ii) the defendant could see and hear the witnesses against him; (iii) the defendant had every opportunity to challenge and question his / her accusers; and (iv) since Article 6 did not guarantee the defendant the right to a face-to-face

1445 R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 69, per Lord Brown (H.L.): “If in a particular category three case the mandatory special measures direction for live link evidence were to be regarded at the trial as having created a real risk of injustice to the defendant, the court has ample power under section 20(2) to discharge the direction, alternatively, under section 24(3), notwithstanding the direction, to allow the witness to give evidence in open court. (If the risk of injustice were perceived in a video recording case, of course, the court would probably not have made the direction in the first place: such an order would not in those circumstances be mandatory: see sections 21(4)(b) and 27(2)). The number of cases, however, in which the court will conclude that a live link order, mandatorily made at the initial direction stage, would create injustice for the defendant, will be exceedingly small....”
1446 R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 46, per Baroness Hale (H.L.).
confrontation with witnesses, the special measures directions did not violate the defendant’s right to a fair trial.\textsuperscript{1447}

4.11.25 Lord Rodger examined the differences between the requirements pursuant to the Sixth Amendment and Article 6 of the European Convention on Human Rights and opined that: (i) the critical element for the European Court of Human Rights is that the defence should have an adequate and proper opportunity to challenge and question a witness on his statement at some stage, and the requirements of Article 6 are satisfied even if that opportunity is afforded before trial;\textsuperscript{1448} (ii) the Sixth Amendment is “somewhat stricter” requiring that the witness be available for cross-examination at the trial, as occurs under the Youth Justice and Criminal Evidence Act 1999 (and s. 13 of the Criminal Evidence Act 1992, as amended,\textsuperscript{1449} in this jurisdiction).

While Lord Rodger acknowledged, that the Sixth Amendment overlapped to some extent with Article 6(3)(d) of the Convention, it was held that “as interpreted by the Supreme Court, the Sixth Amendment appears to go much further towards requiring, as a check on accuracy that a witness must give his evidence under the very gaze of the accused”.\textsuperscript{1450} It was further noted that this line of thought never gave rise to a corresponding requirement in English law and, moreover, that Article 6(3)(d) of the Convention has not been interpreted as guaranteeing the accused a right to be in the same room as the witness giving evidence, rather the authorities confirm that these requirements can be satisfied “even where, for good reason, the accused is not physically present at the questioning”;\textsuperscript{1451} here, the “good reason” was

\textsuperscript{1447} \textit{R(D) v Camberwell Green Youth Court} [2005] 1 WLR 393, paras. 49 and 51, \textit{per} Baroness Hale (H.L.).


\textsuperscript{1449} Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.

\textsuperscript{1450} \textit{R(D) v Camberwell Green Youth Court} [2005] 1 WLR 393, para. 14, \textit{per} Lord Rodger (H.L.).


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to "further the interests of justice by adopting a system that will assist truthful child witnesses to give their evidence to the best of their ability." 1452

4.11.26 The House of Lords held that Parliament was entitled to modify or adapt the domestic legal system to meet modern conditions provided the adaptations complied with Article 6, 1453 and once it had decided that there was justification for using modern equipment to put the best evidence before the court while preserving the essential rights of the accused to know and to challenge all the evidence against him / her, that general practice could be adopted without the need to show special justification in every case. 1454 Baroness Hale concluded that:

"In this case, the modification is simply the use of modern equipment to put the best evidence before the court while preserving the essential rights of the accused to know and to challenge all the evidence against him. There are excellent policy reasons for doing this. Parliament having decided that this is justified, the domestic legal system is entitled to adopt the general practice without the need to show special justification in every case." 1455

4.11.27 It is also interesting to note that in the United States, while the finding of constitutionality – in relation to legislation providing for the use of special

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1452 R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 15, per Lord Rodger (H.L.).
1453 R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 53, per Baroness Hale (H.L.): "However, this cannot mean that the Strasbourg court would regard our domestic legal system as so set in stone that Parliament is not entitled to modify or adapt it to meet modern conditions, provided that those adaptations comply with the essential requirements of article 6."
1454 R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 70, per Lord Brown (H.L.): "Nor am I in the least persuaded that this statutory scheme is in any way inconsistent with the requirements of article 6. The hearing does not cease to be 'public' merely because a witness's evidence may be given by live link and/or in part by video recording. Nor is it necessary to justify such measures in each individual case. Parliament was perfectly entitled to conclude that the interests of justice generally would be better served by introducing an almost invariable rule such as will not merely in the vast majority of cases maximise the quality of child witnesses' evidence but will also encourage their full cooperation with the criminal justice system, than by retaining the maximum opportunity for face to face confrontation with child witnesses at trial."
1455 R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 53, per Baroness Hale (H.L.): "However, this cannot mean that the Strasbourg court would regard our domestic legal system as so set in stone that Parliament is not entitled to modify or adapt it to meet modern conditions, provided that those adaptations comply with the essential requirements of article 6."
measures by child witnesses – in the early caselaw of the Supreme Court was dependent, at least in part, on the fact that the availability of such measures was restricted to a case-specific finding of necessity for such assistance on the part of individual child witnesses, it would appear that – in line with other jurisdictions – the Supreme Court has more recently moved away from insistence on this pre-condition.  

4.11.28 In considering whether an exception from the "normal implications of the Confrontation Clause" could be drawn in favour of the Iowa statute providing for the use of one-way screens by child witnesses – which contained a 'general presumption of trauma in favour of child witnesses – Scalia J. opined that "something more than the type of generalised finding underlying such a statute is needed when the exception is not firmly...rooted in our jurisprudence". Equally, the decision of the majority of the United States Supreme Court in Maryland v Craig – upholding the constitutionality of a statute providing for the evidence of child witnesses to be given via live link in certain circumstances – was dependent upon a case-specific finding of necessity.
In this regard, O'Connor J. proposed a tripartite approach to determining whether it was permissible in any given case to authorize the use of the live television link facility in order to assist a child witness in giving his/her evidence. First, the trial judge was required to conduct an inquiry to determine whether it was necessary to protect the individual child witness from testifying in the immediate presence of the accused. Secondly, the trial court was required to find that the child would be traumatized "not by the courtroom generally, but by the presence of the defendant"; there must be a causal connection between the trauma suffered by the child witness and the presence of the accused. Thirdly, the trial judge had to be satisfied that "the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e. more than 'mere nervousness or excitement or some reluctance to testify'".

Notwithstanding the fact that the guidelines provided in this decision in relation to the requirement of a case-specific finding of necessity would appear to limit the availability of special measures to child witnesses, the United States Supreme Court appears to have silently resiled from this position – and the pre-conditions contained therein – in two recent decisions, *Danner v Kentucky,* and *Marx v Texas.* However, it should be noted that the value of these decisions is limited in that they involve a denial of certiorari only.

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1461 The Court concluded that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child’s ability to communicate, "the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Maryland v Craig* 497 US 836, at p. 857, per O’Connor J. (1990) (U.S. S.C.).


1463 *Maryland v Craig* 497 US 836, at p. 855, per O’Connor J. (1990) (U.S. S.C.), citing *Wildermuth v State,* 310 Md. 496, at p. 524, 530 A.2d 275, at p. 289 (1987) and *State v Mannion,* 19 Utah 505, 511-512, 57 P. 542, 543-544 (1899). The Court concluded that: "We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer ‘serious emotional distress such that the child cannot reasonably communicate,’ § 9-102(a)(1)(ii), clearly suffices to meet constitutional standards."


1466 See, for example, the opinion of Frankfurter J. in *Maryland v Baltimore Radio Show, Inc.* 338 US 912, 70 S.Ct. 252, 94 L.Ed. 562 (1950): "A variety of considerations underlie denials of the writ [of
4.11.31 The first case concerned a child complainant of sexual abuse at the hands of her father – aged fifteen years old at the time of the trial – who was permitted to give evidence with the benefit of a live television link in circumstances where she expressly disclaimed fear of her father and simply asserted, without more, that she ‘couldn’t be near him’. The petition for a writ of certiorari was denied by the majority, however, Scalia J. (with whom Thomas J. joined) dissented in vehement terms. Scalia J. asserted that the case came “nowhere close” to falling within the exception to the right of confrontation carved out in Maryland v Craig;1467 far from being “rendered mute with fear” at the prospect of facing her father, the child complainant in this case “did not even rule out the possibility of testifying if she could take breaks from the witness stand”.1468 Scalia J. further asserted that the Craig exception “hardly contemplates that the child witness exception is available to 15-year-olds”.1468 Scalia J. concluded by cautioning that it was a “dangerous business to water down the confrontation right so dramatically merely because society finds the charged crime particularly reprehensible”.

4.11.32 The latter case, Marx v Texas,1470 also involved a decision by the majority of the United States Supreme Court to deny a petition for writ of certiorari. The accused was charged in separate indictments with sexually abusing two children, B.J., a thirteen year old girl, and J.M., a six year old girl. Before the trial of the accused in relation to the sexual offences allegedly

1467 Maryland v Craig 497 US 836 (1990) (U.S.S.C.). Reasserting his view that Craig was wrongly decided, Scalia J. opined that: “But for the precedent of Craig, the present case would be such an obvious and blatant violation of the Sixth Amendment that it would warrant summary reversal. Given Craig, however, it should be reviewed on certiorari and reversed to make clear that the exception we have created to the text of the Sixth Amendment is a narrow one.”

committed in respect of B.J., the court held a preliminary hearing to determine whether to permit the other child, J.M., to give evidence via live television link as to what she had seen, since J.M. claimed to have witnessed the abuse of B.J. At the preliminary hearing, J.M.'s mother indicated in response to questioning that the child would be able to testify in the presence of the accused - she would be ‘ready for that’ – and the court also received expert evidence to the effect that J.M. would suffer no additional trauma as a result of testifying in the absence of the live television link facility. Notwithstanding this evidence, the trial court permitted the child to give evidence with the benefit of this special measure.

Dissenting from the decision of the majority, Scalia J. – with whom Thomas J. again joined – asserted that the Court was forgoing the opportunity to prevent an expansion of the exception created to the Sixth Amendment in Craig in two important respects: (i) the category of witness covered by the exception; and (ii) as to the finding required. First, Scalia J. opined that this decision extended the Craig exception to a child witness whose abuse is neither the subject of the prosecution nor the subject of her testimony; the only basis for “excusing her from real confrontation with the defendant” was the allegation that she too was the subject of sexual abuse, on another occasion, by the same accused. Scalia J. asserted that this extension alone of what he termed “our novel confrontation-via-TV jurisprudence” warranted accepting the case for review. As to the second ground of expansion, Scalia J. noted that while the decision of the majority in Maryland v Craig expressly left open the question of the “minimum showing of trauma constitutionally required”, if the threshold in this case was to be taken as the “ballpark” the minimum showing required was “no showing at all”; Scalia J. concluded that in “abused-child-witness cases

1473 Marx v Texas 528 US 1034, at p. 1038, per Scalia J. (1999) (U.S. S.C.). In this regard, Scalia J. asserted that: “Quite unlike the child witnesses in Craig, who ‘wouldn't be able to communicate effectively,’ or who ‘would probably stop talking and... would withdraw and curl up,’ 497 U.S. at 842 (quoting Craig v State, 316 Md. 551, 568-569, 560 A.2d 1120, 1128-1129 (1989)), the witness exempted by the court below affirmatively ‘wanted to’ testify, and by all accounts was ‘ready for that.’
this Court’s exception has swallowed the constitutional rule” and the right to confrontation had not simply been watered down, but “washed away”.  

4.11.34 The foregoing Irish, English and American cases are instructive in a number of respects in assessing the permissibility of statutory presumptions in relation to the availability of special measures to assist child witnesses in giving their evidence. First, in response to arguments asserting that the ‘presumption of trauma’ contained in s. 13 of the Criminal Evidence Act 1992, as amended, infringes the accused’s constitutional right to a fair trial and fair procedures, there is an attractive logic in the proposition that if the provision of live television link itself does not infringe the accused’s right to a fair trial and fair procedures – whether under Article 6 of the Convention or Articles 38.1 and 40.3 of the Constitution – then presumptive rules entitling children to give evidence with the benefit of this special measure “unless the court sees good reason to the contrary” should not give rise to unfairness, in particular, given the preservation of the essential elements of a fair trial or the ‘purposes of confrontation’. In this regard, it is reiterated that this legislation enjoys a presumption of constitutionality, which specifically includes a presumption that the Oireachtas intended that “proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of

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If the decision here is correct, the right to confrontation of allegedly abused child witnesses has not simply been, as I suggested in Danner, ‘watered down,’ 525 U.S. at 1012; it has been washed away.”

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R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 26, per Baroness Hale (H.L.): “[T]he only difference between giving evidence by live link and giving evidence in the normal way is that the witness is not physically present in the court room. She can still be seen and heard, often at closer range than in many courtrooms.”

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and it has been expressly held that the court is obliged in its consideration of whether a ‘good reason’ exists ‘to the contrary’ for the purposes of s. 13(1)(a) of the Criminal Evidence Act 1992, as amended – that is, ‘good reason’ why the child witness may not give evidence via live television link – to have regard to the rights of the accused.\footnote{East Donegal Co-Operative Ltd v Attorney General [1970] IR 317, at p. 243, (1970) 104 ILTR 81, at p. 103 (S.C.). See also: The State (Quinn) v Ryan [1965] IR 70, (1966) ILTR 105 (S.C.); and In re Article 26 and the Criminal Law (Jurisdiction) Bill 1975 [1977] IR 129, (1976) 110 ILTR 69 (S.C.).}

Secondly, while it may be argued that these statutory schemes in legislating for a departure from the conventional manner of giving evidence – in circumstances where the normative manner of giving evidence is regarded as containing a number of safeguards for the protection of the rights of the accused person and, indeed, as representing a balance considered fair to the accused in an adversarial trial – ought to place a corresponding onus on the prosecution to show cause why a witness should be entitled to the benefit of this “statutory privilege”\footnote{Donnelly v Ireland [1998] 1 IR 338, at p. 357, per Hamilton C.J. (S.C.).} to give evidence via live television link, it is submitted that what is considered the normative manner of giving evidence is itself subject to change\footnote{Duffy, Gordon “Television testimony and constitutional justice” 4 (1994) Irish Criminal Law Journal 178, at p. 186.} and that the modern normative manner for child witnesses in criminal proceedings involving applicable offences is via live television link.\footnote{See, in particular sections 4.12.15-4.12.19 below in relation to the changing meaning of fair trial, fairness and fair procedures.}

\footnote{R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 45, per Baroness Hale (H.L.): “It is clear that, by enacting the primary rule and limiting the circumstances in which it may be disapplied, Parliament did not mean to allow defendants to challenge the use of a video recording or live link simply because it is a departure from the normal procedure in criminal trials. There is no question, as there was for live link applications under the old law, of the court striking a balance between the ‘right of the defendant to have a hearing in accordance with the norm’ and ‘the interests not only of the child witness but also of justice, to ensure that the witness will be able to give evidence and give evidence unaffected by the stress of appearing in court itself’: see [R(Director of Public Prosecutions) v Redbridge Youth Court [2001] 1 WLR 2403, para 17]. Parliament has decided what is to be the norm when child witnesses give evidence. Hence there will have to be a special reason for departing from it. The fact that there is no particular reason to think that this particular child will be upset, traumatised or intimidated by giving evidence in court does not make it unjust for her to give it by live link and video if there is one: [R(Director of Public Prosecutions) v Redbridge Youth Court [2001] 1 WLR 2403, para 16].”}
Thirdly, in relation to arguments to the effect that the terms of s. 13(1)(a) impose an unfair burden of proof on the defence to rebut the presumption that all child witnesses in respect of the applicable offences will be traumatized and distressed by giving evidence otherwise than by way of live television link,\(^{1483}\) it should be noted that the ‘burden’ involved is not a legal burden\(^{1484}\) but rather a ‘mandatory’\(^{1485}\) evidential burden. The Irish courts have held on a number of occasions in relation to the shifting of the evidential burden that “if a statute is to be construed as merely shifting the evidential burden [on to the accused] no constitutional infringement occurs”,\(^{1486}\) as these decisions referred to the shifting of an evidential burden in respect of substantive law, it is submitted that it applies a fortiori to such a shift in adjectival law. It is accepted – as indicated above – that it may be difficult for the defence to establish ‘good reason’, with regard to the capabilities of an individual child witness, to displace the presumption that the child witness may give evidence via live television link, without

\(^{1483}\) Duffy, Gordon “Televised testimony and constitutional justice” 4 (1994) Irish Criminal Law Journal 178, at p. 184: “[Section 13(1)(a)] as it presently stands is at best an example of bad draftsman and at worst a constitutionally impermissible transfer of an onus of proof to the accused by requiring him to show why the proposed child witness should not testify under the subsection.” It is arguable that the likelihood of trauma to the child if required to give evidence otherwise than via live television link is a matter within the ‘peculiar knowledge’ of the prosecution, which is best placed to assess the child witness, and that, accordingly, it is unfair to shift the evidential burden to the defence to disprove this proposition in relation to an individual child witness. However, it should be noted that this principle developed at common law in relation to the shifting of the ‘legal burden’ in relation to substantive criminal law, upon the satisfaction of a prima facie case and it is arguable that it was never intended that this principle would apply to a provision such as s. 13(1)(a) of the Criminal Evidence Act 1992, as amended. See: Minister for Industry and Commerce v Steele [1952] IR 301; McGowan v Carville [1960] IR 330; Attorney General (Comer) v Shorten [1961] IR 304; and R v Edwards [1975] QB 27 (C.A.).\(^{1484}\) See: Minister for Industry and Commerce v Steele [1952] IR 301; McGowan v Carville [1960] IR 330; Attorney General (Comer) v Shorten [1961] IR 304; and R v Edwards [1975] QB 27 (C.A.).\(^{1485}\) As noted earlier, the language of s. 13 of the Criminal Evidence Act, 1992 appears to reserve to the trial judge a measure of discretion as to whether to authorise the use of the live television link, therefore, although the presumption of trauma is mandatory, it is not then mandatory for the court to direct that the evidence of the child be given with the benefit of this special measure.\(^{1486}\) O’Leary v Attorney General [1993] 1 IR 102, [1991] ILM 454, at pp. 459-460, per Costello J. (H.C.); [1995] 1 IR 254, [1995] 2 ILMR 259 (S.C.) See also: Hardy v Ireland [1994] 2 IR 550; Rock v Ireland [1998] 2 ILMR 35; Attorney General v Duff [1941] IR 406; R (Sheahan) v The Justices of Cork [1907] 2 IR 5; McGowan v Carville [1960] IR 330; Bridgett v Dowd [1961] IR 313; McCarthy v Murphy [1981] ILMR 213; and People (Attorney General) v Shribman [1946] IR 431. Hogan, Gerard and Whyte, Gerry (eds.) J.M. Kelly: The Irish Constitution (4th ed., 2003) para. 6.5.65, at p. 1072: “There are, however, definite limits to any attempt to transfer the evidential burden. While it may be permissible to permit evidence to be given by certificate as having prima facie status in respect of technical matters, the Oireachtas cannot normally dispense with the requirement that the prosecution prove every ingredient of the offence by oral evidence”. It is submitted that s. 13 of the Criminal Evidence Act 1992, as amended, does not fall within this limitation.
regard to general characteristics of children of a like age or requiring a child witness to submit to an independent expert evaluation as to his / her capabilities and the likelihood that he / she would be traumatized if required to give evidence in the conventional manner. However, it is reiterated that if there is no constitutional infirmity in enabling child witness to give evidence with the benefit of this special measure, then the ‘presumption of trauma’ should not unduly handicap the defence.

4.11.37 Fourthly, it is conceded that the balance required – between the rights of the accused, the protection of the child witness, the elicitation of the best evidence and the proper administration of justice – is delicate and that an individualized finding of necessity would represent a further safeguard for the rights of the accused which is undoubtedly desirable, but, it is submitted, not necessary to save s. 13 of the Criminal Evidence Act 1992, as amended, from unconstitutionality. The statutory ‘presumption’ in s. 13 is tempered by a residual judicial discretion which, it is submitted, would be triggered by an objection on the part of the accused to the vulnerability of an individual child witness, and would itself require consideration of the impact upon the rights of the accused of an order authorizing the use of the live television link facility. Moreover, to the extent that reliance is placed on the possible prejudicial effect of the live television link upon the jury’s perception of the accused, it should be noted that the presumption of trauma minimises and even removes this risk by mandating the manner in which all eligible child witnesses give evidence; the rule operates independently of the accused and therefore “carries no implicit disparagement of the accused”.

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1487 Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.


1490 R(D) v Camberwell Green Youth Court [2005] 1 WLR 393, para. 39, per Baroness Hale (H.L.): “Whether the direction is for a video recording or only for live link, the child and everyone else knows
Accordingly, it is submitted that, given the presence of the safeguards for the rights of the accused outlined above and the finding that the accused has no right to require a child witness to give evidence in his / her immediate presence, the form of ‘presumption’ applicable to the availability of the live television link in this jurisdiction does not violate the accused’s right to a fair trial or fair procedures.

4.12.0 Meaning of Fair Trial, Fairness and Fair Procedures:

4.12.1 More interesting still, however, is the judicial movement towards reframing the right to a fair trial itself to better accommodate the different needs of child witnesses. Notwithstanding the absence of any express constitutional provision to such effect, the courts have embraced an understanding of fairness and the right to a fair trial and fair procedures which includes other actors in the criminal proceedings in addition to the accused; it is understood that the courts, in exercising their obligation to ensure the fairness of the trial and the procedures and in endeavouring to see that

the position from an early stage. The child can be reassured that she will not have to go into the court room. This is not only reassuring for the witness, but may encourage other child witnesses to come forward or reduce their parents’ reluctance to allow them to do so. It is also carries no implicit disparagement of the accused. If all child witnesses give their evidence in this way, there is no suggestion that this is an exceptional case in which the child requires special protection from the accused.”

It is submitted that the constitutionality of the absence of an individualized finding of trauma in relation to the availability of the live television link facility is confined to the form of ‘presumption’ of trauma contained in s. 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999, and s. 257(3) of the Children Act 2001 and does not extend to encompass the mandatory presumptive rules contained in the modern statutory schemes in England and Scotland; in particular, it is submitted that many of the safeguards present in the ‘presumption of trauma’ contained in s. 13(1)(a) of the Criminal Evidence Act 1992, as amended, are absent from the mandatory presumptive rules contained in the latter statutory schemes, including: the residual judicial discretion; and the clear obligation upon the trial judge to consider the rights of the accused when determining whether ‘good reason’ has been shown why such special measures direction should not be made. See: s. 19, 21, 22 and 24 of the Youth Justice and Criminal Evidence Act 1999 in England; and ss. 271, 271A, 27B and 271J of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004.
justice is done, must ensure that the “system operates fairly: fairly not only to the defendant but also to the prosecution and also to the witnesses”.

4.12.2 The European Court of Human Rights has itself adopted this approach; while it recognised that Article 6 does not explicitly require “the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration”, it has nonetheless asserted that the life, liberty or security of such persons might be at stake, as might interests falling within the ambit of Article 8 of the Convention. Since such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, the Court asserted that this implied that “Contracting States should organise their criminal procedure in such a way that those interests are not unjustifiably imperiled.” While the Court has consistently held that the admissibility of evidence is primarily a matter for regulation by the national courts, the Court will nonetheless assess whether the proceedings as a whole – including the way in which evidence was taken – were fair. In this regard, while it has been asserted that all the evidence must normally be produced at a public hearing in the presence of the accused, with a view to adversarial argument, the

1492 R v X, Y and Z (1990) 91 Cr App Rep 36, at p. 40, [1990] Crim LR 515, per Lord Lane C.J. (C.A.) (Emphasis added). Equally, in this jurisdiction, the courts have emphasised that the constitutional right to a fair trial and fair procedures is not the exclusive purview of the accused. In Kelly v O’Neill [2000] 1 IR 354, at p. 375 (S.C.), Keane J. asserted that: “[T]he right to a fair trial in due course of law guaranteed under the Constitution is not simply a right vested in those who happened to be accused of particular crimes; it is in the interest of the community as a whole that the right should be protected and vindicated by the State and its organs.” Similarly, in The People (Director of Public Prosecutions) v Quilligan (No. 2) [1989] IR 46, at p. 60 (S.C.), Walsh J. held that: “[T]he accused are entitled as of right to a fair trial, but the People, who in the Director of Public Prosecutions have brought this prosecution, are also entitled to have the matter tried and fairly tried in accordance with law. So far this has not been afforded to them.” See also: People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006), per Fennelly J. at p. 21.


Court has conceded that there are exceptions to this principle where the rights of the defence are not infringed; the accused must be given an adequate opportunity to challenge and question a witness against him, either when the witness makes his / her statement or at a later stage. In particular, it is important to note that the Court has accepted that organizing criminal proceedings “in such a way as to protect the interests of juvenile witnesses”, in particular in trial proceedings involving sexual offences, is “a relevant consideration to be taken into account for the purposes of Art. 6”. Thus, it has been held that since child witnesses fall into a category of witnesses which is entitled to such protection, provided that a decision of a court is based on the purpose for which such protection is provided, “steps taken to provide that protection cannot result in unfairness to a defendant, provided always that the defendant is given a fair opportunity both to test that evidence and to answer it”. 

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1496 PS v Germany (2003) 36 EHRR 61, para. 21 (E.Ct.H.R.), citing: Van Mechelen v Netherlands (1998) 25 EHRR 647, para. 51 (E.Ct.H.R.); Ludi v Switzerland (1993) 15 EHRR 173, para. 49 (E.Ct.H.R.). The applicant was convicted of sexually abusing an eight-year-old girl. The trial court relied on statements made by the girl’s mother concerning her daughter’s account of events and on evidence given by the police officer who had questioned the girl, but decided not to hear the girl herself because her mother was concerned that she would suffer if reminded of the events in question. Considering that the absence of the girl’s testimony constituted a serious shortcoming in the taking of evidence, the appeal court ordered an expert opinion on her credibility which was prepared some 18 months after the alleged abuse. Again, however, the girl herself was not heard in court and the applicant’s appeal against his conviction was dismissed. Relying on Art.6(3)(d) of the Convention, he alleged that he had been convicted on the basis of statements made by a witness whom he had never been given an opportunity to examine or to have examined. The Court held — unanimously — that a violation of Article 6(3)(d), taken together with Article 6(1) had occurred.

1497 SN v Sweden (2004) 39 EHRR 13, para. 47 (E.Ct.H.R.): “The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours.” Applying: Doorson v Netherlands (1996) 22 EHRR 330, para. 72; Baegen v Netherlands (A/327-B), October 27, 1995, para. 77; and PS v Germany (2003) 36 EHRR 61, para. 23. Equally, see: X v United Kingdom (1992) 15 EHRR CD113 (App. No. 10657/92) wherein the Commission refused to find that the use of screens in order to protect intimidated witnesses from seeing the accused person violated Article 6 of the Convention. See also: Dennis, I.H. The Law of Evidence (2nd ed., 2002) at p. 518; and Hoyano, Laura “Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" [2001] Crim LR 948, at p. 964.

1498 R (Director of Public Prosecutions) v Redbridge Youth Court [2001] 1 WLR 2403, at p. 2413, per Latham L.J. (Q.B. Div.). The Court concluded that s. 32 of the Criminal Justice Act 1988, as amended,
4.12.3 Similarly, the European Council has, in a Framework Decision delivered in 2001,\(^{1499}\) obligated Member States, in approximating their laws and regulations, to draw up minimum standards for the protection of victims of crimes and victims’ access to justice, stating that the needs of victims should be considered and addressed in a “comprehensive, coordinated manner, avoiding partial or inconsistent solutions which may give rise to secondary victimisation”\(^{1500}\). In particular, Member States are required to ensure that victims who are particularly vulnerable “can benefit from specific treatment best suited to their circumstances”.\(^{1501}\) Member States are further obligated:

(i) to ensure that where there is a need to protect victims – particularly those most vulnerable – from “the effects of giving evidence in court”, victims may, by decision taken by the court, be entitled to “testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles”;\(^{1502}\) and

(ii) in respect both of proceedings in general and more particularly in venues where criminal proceedings may be initiated, to “support the progressive creation...of the necessary conditions for attempting to prevent secondary victimisation and avoiding placing victims under unnecessary pressure”.\(^{1503}\) The European Court of Justice has recently held that these articles are to be interpreted as meaning that the national court must be able to authorise young children which provided for the reception of a child witness’s evidence by way of live television link in proceedings involving applicable offences, provided that opportunity.


\(^{1500}\) 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 22/03/2001, OJ 2001 L82/1 (Celex No. 301F0220), recital no. 5. Article 2 provides that: “1. Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognize the rights and legitimate interests of victims with particular reference to criminal proceedings.”

\(^{1501}\) 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 22/03/2001, OJ 2001 L82/1 (Celex No. 301F0220), Article 2.2. Article 3 provides that each Member State shall “safeguard the possibility for victims to be heard during proceedings and to supply evidence”.


who – as in the instant case\textsuperscript{1504} – claimed to have been the victims of maltreatment, to give their testimony in accordance with arrangements which allow those children to be guaranteed an appropriate level of protection; for example, prior to and outside the trial.\textsuperscript{1505} The Court further cautioned that it was for the national court to ensure that the application of such measures was not likely to make the criminal proceedings unfair to the accused within the meaning of Article 6 of the European Convention on Human Rights.\textsuperscript{1506} In so holding the European Court of Justice noted that the extent to which a procedure of recording evidence before trial is admissible can be established "only by striking a balance in each individual

\textsuperscript{1504} Criminal Proceedings Against Pupino (C 105/03) [2005] ECR I-5285, [2005] 2 CMLR 63, [2005] 3 WLR 1102, [2006] All ER (EC) 142, [2006] QB 83 (E.C.J.). The Italian court referred to the European Court of Justice a question concerning the interpretation of Articles 2, 3 and 8 of this Framework Decision. The reference arose in the context of criminal proceedings brought against a nursery school teacher (P) charged with inflicting injuries on pupils aged less than five years. The Public Prosecutor’s Office had asked the judge in charge of preliminary inquiries to take the testimony of the pupils pursuant to a special procedure for taking early evidence under national law. P opposed that application arguing that the derogation allowing for early evidence to be taken applied only to cases where sexual abuse was alleged and did not apply to the offences in question. However, the Framework Decision required Member States to ensure that vulnerable victims benefited from specific treatment best suited to their circumstances and, if necessary, they should be protected from the effects of giving evidence in open court.

\textsuperscript{1505} Criminal Proceedings Against Pupino (C 105/03) [2005] ECR I-5285, [2005] 2 CMLR 63, para. 61 (E.C.J.): "[A]rticle 2(2) of the Framework Decision requires treatment best suited to the circumstances of victims who are particularly vulnerable. The Framework Decision thus goes beyond the Portuguese Proposal, which required only appropriate measures. A choice between two types of procedure is therefore permissible under article 2(2) only where they are equally suited to the circumstances of the victim. Moreover, it follows from the first paragraph of article 3 that victims must be given the opportunity to testify effectively. Here too, whichever procedure is conducive to effective participation merits priority." The Court continued in para. 62: "The referring court and probably also the Portuguese Government assume that in this case it would be less stressful for the victims to record their evidence beforehand than to testify subsequently at the trial. At the same time, the referring court is of the opinion that the victims would be better able in that way to contribute to establishing the facts, since they might no longer be able to recollect the sequence of events so well at the trial. If those assumptions are in fact justified, which only the trial court can assess after taking into account the child concerned in each case and consulting experts where appropriate, application of the procedure of recording evidence beforehand would in fact be, in this case, the best treatment for the victims, enabling them to participate in the criminal proceedings as witnesses effectively while affording them protection."

\textsuperscript{1506} Criminal Proceedings Against Pupino (C 105/03) [2005] ECR I-5285, [2005] 2 CMLR 63, para. 65 (E.C.J.): "[E]ach member state must ensure that, where there is a need to protect victims – particularly those most vulnerable – from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable that objective to be achieved, by any appropriate means compatible with its basic legal principles. In relation to article 2(2) of the Framework Decision, that provision is the lex specialis in so far as it makes the obligation to protect victims subject to special conditions where the normal practice of giving evidence in open court is to be dispensed with. Forms of oral evidence which are in breach of the requirement of a public hearing must only be allowed to the extent that they are compatible with the member state’s basic legal principles."
case, taking into account the interests of the witnesses, the rights of the defence and also, where appropriate, the importance attached to the imposition of punishment” but that in general, having regard to Article 6 of the Convention, it must be assumed – at least in the context of offences involving physical injury to children “special protective measures, such as those proposed in this case, should apply”.

4.12.4 Equally, in this jurisdiction, it has been held that the phrase ‘due course of law’ in the constitutional guarantee of the right to a fair trial contained in Article 38.1 of the Constitution “requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society”. Accordingly, it is submitted that, in considering whether the statutory schemes authorising the use of screens or live television link by child witnesses violate the accused’s right to a fair trial and fair procedures and are thereby unconstitutional, the court must consider whether such schemes can be said to be necessitated by the requirements of an ordered society.

4.12.5 The statutory schemes regulating the use of these two special measures represent adjectival rather than substantive law; they form part of a body of law which is dynamic and responsive to the needs of society. When

\[1507\] Criminal Proceedings Against Pupino (C 105/03) [2005] ECR I-5285, [2005] 2 CMLR 63, para. 68 (E.C.J.). The Court concluded in para. 69: “In summary, articles 2(2), 3 and 8(4) of the Framework Decision may, in the light of the circumstances of the particular case, create an obligation for the national courts to carry out a special procedure, appropriate for children, of recording evidence beforehand, provided that such a procedure is compatible with the member state’s basic legal principles, including the fundamental rights recognised by the Union.”


Moreover, it has been held that the constitutional guarantee of a fair trial and fair procedures – contained in Articles 38.1 and 40.3 respectively – encompasses concepts of justice, the dignity of the individual and the public interest in the integrity of the criminal justice system in the conduct of criminal proceedings: The State (Healy) v Donoghue [1976] IR 325, at p. 335, (1976) 110 ILTR 9, at p. 13 (S.C.); D v Director of Public Prosecutions [1994] 2 IR 465, at p. 473, per Denham J. (S.C.); People (Director of Public Prosecutions) v Redmond (Unreported, Supreme Court, 6th April 2006), [2006] IESC 25 (S.C.) para. 20; and Heaney v Ireland [1994] 3 IR 593, at p. 605, [1994] 2 ILRM 420, at p. 430, per Costello J. (H.C.).

assessing the constitutionality of s. 13(1)(a) of the Criminal Evidence Act 1992 – providing for the use of live television link by witnesses aged less than seventeen years\textsuperscript{1511} in proceedings involving applicable offences unless the court saw good reason to the contrary – in the exercise of their jurisdiction to protect and vindicate the constitutional rights of the accused, the courts in this jurisdiction have expressly rejected any suggestion that the concept of what is ‘fair’ for the purposes of the constitutional guarantee of the right to a fair trial and fair procedures is static:

“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.... The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him.”\textsuperscript{1512}

4.12.6 Accordingly, it cannot be said that the accused’s right to a fair trial and fair procedures is frozen in time so that any departure from the form of adversarial trial adopted at the time of ‘freezing’ renders the trial unfair; “the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice”, nor should they be interpreted in a restrictive manner which “may essentially defeat their purpose of seeking

\textsuperscript{1511}As indicated above, the age limit of less than 17 years applicable to ‘child witnesses’ for the purpose of availing of the live television link when giving evidence was increased to less than 18 years by operation of s. 257(3) of the Children Act 2001.

\textsuperscript{1512}See: \textit{The State (Healy) v Donoghue} [1976] IR 325, at p. 350 (1976) 110 ILTR 9, \textit{per} O’Higgins C.J. (S.C.) cited with approval by Costello P. in \textit{Donnelly v Ireland} [1998] 1 IR 321, at p. 333 (H.C.). See also the New Zealand case, \textit{R v Accused (T 4/88)} [1989] 1 NZLR 660, at p. 667, \textit{per} Cooke P. (C.A.) where the Court of Appeal noted that “justice may require a departure from ordinary rules”; the Court held, at p. 668, that it was the public duty of the courts to “modify their procedure so as to protect child witnesses when necessary”, that is, when the interests of justice demanded it.
The High Court (Costello P.) expressly accepted this principle in its decision in *Donnelly v Ireland* wherein it rejected the arguments on behalf of the accused to the effect that the trial was unfair because the child witness gave evidence against the accused outside the physical presence of the accused and concluded that the procedures authorised pursuant to s. 13 did not render a criminal trial unfair:

"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....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."  

4.12.7 This approach is also evident in the decision of the Supreme Court of Canada in *R v Levogiannis* where the Court upheld the constitutional

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validity of s. 486(2.1) of the Criminal Code,\textsuperscript{1517} which empowered a judge to authorise the use of a one-way screen to obscure the child witness’s view of the accused while he / she testified. The Court adopted a “contextual approach” to the question of the constitutionality of the provision\textsuperscript{1518} and opined that the examination of whether the rights of an accused person are infringed by s. 486(2.1) involved “multifaceted considerations”, encompassing the rights of child witnesses, the rights of the accused – including the right to a full defence – the court’s role in ascertaining the truth and the interests of society.\textsuperscript{1519} In this regard, the Court stated that:

“The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth. In ascertaining the constitutionality of s. 486(2.1) of the Criminal Code, one cannot ignore the fact that, in many instances, the court process is failing children, especially those who have been victims of abuse, who are then subjected to further trauma as participants in the judicial process.”\textsuperscript{1520}

\textsuperscript{1517} Section 486(2.1) of the Criminal Code, R.S.C., 1985, c. C-46 [en. R.S.C. 1985, c. 19 (3rd Supp.), s. 14; subsequently rep. & sub. 1992, c. 21, s. 9]. See now: s. 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.

\textsuperscript{1518} The Court cited the following passage from \textit{Edmonton Journal v Alberta (Attorney General)} (1989), 45 C.R.R. 1 at p. 26, [1989] 2 S.C.R. 1326 at p. 1355, 71 Alta. L.R. (2d) 273, per Wilson J. (S.C.C.): “One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context.” See also \textit{R v Seaboyer} (1991), 6 C.R.R. (2d) 35 at pp. 80-81, [1991] 2 S.C.R. 577 at p. 647 (S.C.C.).


4.12.8 The Court noted that, in order to minimize the trauma suffered by child witnesses as a result of the ordeal of testifying, children “may require different treatment than adults in the courtroom setting”; section 486(2.1) provided for special procedures to be adopted in order to avoid the negative reaction of a child witness to face-to-face confrontation with the accused and to obtain the best evidence from the child. Having regard to the foregoing and, in particular, the fact that the availability of this measure in s. 486(2.1) was premised upon the necessity to obtain a “full and candid account of the acts complained of”, the Court concluded that the main objective of this provision was to enable the courts to “better ‘get at the truth’”, which, undoubtedly, was a valid purpose.

4.12.9 The Court asserted that the issue for determination was “whether the purpose and effect reflected in the provisions of s. 486(2.1) render the trial procedure fundamentally unfair to the accused”; that is, whether obstructing the witness’s view of an accused person through the use of the screen infringed the rights of an accused person under ss. 7 or 11(d) of the Charter. In response to the arguments advanced on behalf of the accused—that s. 486(2.1) offended the principles of fundamental justice by preventing the accused from having a face-to-face confrontation with his accuser and further, that the screen undermined the integrity of the fact-finding process by effectively disallowing full cross-examination—the Court pointed out

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1523 R v Levogiannis (1993) 18 C.R.R. (2d) 242, at p. 249, per L’Heureux-Dubé J. (S.C.C.). In determining whether the section violated the accused’s constitutional rights, the Court noted the real scope of s. 486(2.1) and, in particular, the fact that the screen provided thereunder merely blocked the complainant’s view of the accused and not vice versa; the screen permitted the accused, counsel for the defence and prosecution, the judge and the jury to see the complainant, who gave evidence in the usual manner and was subject to cross-examination in the usual way.
that the rules of evidence were subject to change\textsuperscript{1524} and noted that the
“recent trend in courts has been to remove barriers to the truth-seeking
process by relaxing certain rules of evidence, such as the hearsay rules, the
use of videotaped evidence and out-of-court statements,\textsuperscript{1525} have been a
genuine attempt to bring the relevant and probative evidence before the
trier of fact in order to foster the search for truth”\textsuperscript{1526} while at the same time
ensuring the fairness of the trial.

4.12.10 Moreover the Supreme Court held that, when an order was made pursuant to
s. 486(2.1) of the Criminal Code, the requisite elements of confrontation
remained, albeit in a limited form, as the accused’s right to cross-examine
remained intact. L’Heureux-Dubé J. noted that s. 7 of the Charter “entitles
the appellant to a fair hearing; it does not entitle him to the most favourable
procedures that could possibly be imagined”\textsuperscript{1527} and concluded that:

“The slight alteration provided for by Parliament by the impugned
section is aimed, simply, at enabling the young complainant to be able
to recount the evidence, fully and candidly, in a more appropriate
setting, given the circumstances, while facilitating the elicitation of the
truth. However, young complainants, shielded by the screen, remain
predominantly subject to the rigours of the courtroom and cross-
examination. The fact that the complainant’s giving of evidence may

\textsuperscript{1524} \textit{R v Levogiannis} (1993) 18 C.R.R. (2d) 242, at p. 250, \textit{per} L’Heureux-Dubé J. (S.C.C.): “One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with
time.”


285, 85 C.C.C. (3d) 289, 18 C.R.R. (2d) 257, para. 50, \textit{per} Lamer C.J.C. (La Forest, Sopinka, Cory,
McLachlin and Iacobucci JJ. concurring) (S.C.C.) wherein the Court concluded that: “Children may
have to be treated differently by the criminal justice system in order that it may provide them with the
protections to which they are rightly entitled and which they deserve.”
be facilitated by the use of a screening device in no way restricts or
impairs an accused's ability to cross-examine the complainant.”  

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One of the principal effects of reframing the right to a fair trial to
encompass considerations other than the rights of the accused has been the
emphasis placed upon the balance to be achieved between the competing
interests comprised in this extended notion of the fairness of the trial and,
indeed, the circumstances in which “a State’s interest in the physical and
psychological well-being of child abuse victims may be sufficiently
important to outweigh, at least in some cases, a defendant’s right to face his
or her accusers in court”. In the context of special measures, the
adoption of this approach by an Irish court is exemplified by the following
passage from the decision of Kinlen J. in White v Ireland: 

“If despite my finding the accused has a constitutional right to the
physical presence in the same room rather than a physical

Court further noted that s. 486(2.1) was strictly limited; a screen could only be utilized in proceedings
in which the complainant was aged less than eighteen years and where the accused was charged with
one or more of the offences outlined in the section. In addition, the provision specifically provided for
a residual judicial discretion permitting the trial judge to make such an order if, in his or her opinion,
“the exclusion is necessary to obtain a full and candid account of the acts complained of from the
complainant”, which discretion “in itself goes a long way towards guaranteeing an accused a fair
(1993), 13 C.R.R. (2d) 65, [1993] 1 S.C.R. 416 (S.C.C.), the Supreme Court of Canada held that
residual judicial discretion may be constitutionally required in order to provide a mechanism for
balancing the rights of an accused and those of the state. However, the Court in Levogiannis stressed
that the circumstances in which a judge could resort to an order under s. 486(2.1) of the Criminal Code
did not require that “exceptional and inordinate stress” be caused to the child complainant and that the
trial judge had substantial latitude in determining whether the use of the screen should be permitted
and the procedure or device which was best suited to preventing the infringement of an unrepresented
accused’s rights under the Charter: approving the judgment of the Ontario Court of Appeal in R v
M.(P.) (1990) 1 O.R. (3d) 341 (Ont. C.A.). Accordingly, the Court held that s. 486(2.1) did not violate
the accused’s rights under s. 7 of the Charter of Rights and Freedoms.

45, per Lamer C.J.C. (La Forest, Sopinka, Cory, McLachlin and Iacobucci JJ. concurring) (S.C.C.).
Furthermore, the Pigot Report, one of the most influential publications in relation to the reform of
the law of evidence as it relates to child witnesses, asserted with regard to the effect of the proposed
special measures on the right of the accused to confront his or her accusers that the limitation which
the measures placed upon the defence was “far less significant than the damage which can be inflicted
upon the child and the interests of justice if, in certain circumstances, such an exercise is allowed to
take place”: Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge

1530 White v Ireland [1995] 2 IR 268, at pp. 281-282, per Kinlen J. (H.C.). See also: Law Reform
Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) para. 8, at p. 5.
manifestation by television, that ‘right’ must yield to the ‘rights’ of a young child. Alleged diminution of the accused’s ‘right’ is so small in consideration of all the other rights he has that it must yield to the court’s concern for the well-being of the child. This is shown, for example, by the legislator’s direction in the Act that lawyers and judge must not wear a wig or gown.... The applicant has not established a constitutional right to an ‘eyeball to eyeball’. None should be imported. If there is a right to confrontation it is for the courts to decide the balance of hierarchy which one right yields to another.”

4.12.12 In stark contrast to this decision, the High Court (Costello P.) in Donnelly v Ireland expressly rejected the suggestion that a ‘balancing’ approach should be adopted in assessing the constitutionality of legislation providing for the use of live television link by child witnesses; that “the victims of crime have ‘rights’ and that an accused has ‘rights’ and 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”. Costello P. held that if the constitutional guarantee of fair procedures was breached by operation of s. 13 of the Criminal Evidence Act 1992, then the court would declare the statute unconstitutional; “[i]f it does so then there can be no question of balancing constitutional rights – if the procedures are unfair this section must be condemned”.

See also The Irish Times Limited v Ireland [1998] 1 IR 375, at p. 399, [1998] 2 ILRM 161, at p. 185, per Denham J. (S.C.): “There were several rights for consideration at the trial before the Circuit Court. The accused had a right to trial in due course of law (Article 38.1) and to a trial with fair procedures (Article 40.3). The trial judge had a duty to uphold the Constitution and the law and to defend the rights of the accused. Balanced against that was the community’s right to access to the court, to information of the hearing, to the administration of justice in public (Article 34.1). That right is clearly circumscribed by the terms of Article 34.1. However, also in the balance was the freedom of expression of the community, a freedom of expression central to democratic government, to enable democracy to function. There was also the freedom of expression of the press.... The right to communicate (Article 40.3) was also part of the panoply of rights in the bundle of rights for consideration.” See also: People (Director of Public Prosecutions) v Redmond (Unreported, Supreme Court, 6th April, 2006), para. 20, per Denham J. (dissenting in the result): “[T]here is a balance of rights to be achieved – the right to enter a plea does not cap the right to a fair trial, the right to due process, the community’s right to fair administration of justice, and the people’s right to the protection of the integrity of the judicial system.”
In upholding the constitutionality of the legislation, the Supreme Court in *Donnelly v Ireland*\(^{1535}\) did not avail of the opportunity to clarify this issue; the Court held that no infringement of the accused’s right to a fair trial had occurred and, accordingly, no question arose as to the propriety or desirability of balancing the rights of the accused against the rights of child witnesses in criminal proceedings.\(^{1536}\) However, it is reiterated that – in common with the judicial and legislative reforms relaxing the corroboration requirements in respect of the evidence of child witnesses – the judicial practice or statutory schemes providing for the use of one-way screens or the live television link facility to facilitate the reception of evidence from child witnesses may be upheld as constitutional in this jurisdiction even where such measures can be said to amount to an infringement of the accused’s constitutional right to a fair trial and fair procedures, where both the ‘balancing’\(^{1537}\) test and the ‘proportionality’ tests are satisfied.\(^{1538}\) An abridgement of such rights is permissible in upholding the constitutional rights of others – such as the child’s constitutional rights, *inter alia*, to bodily integrity and access to the courts\(^{1539}\) – and the community’s right to

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\(^{1535}\) *Donnelly v Ireland* [1998] 1 IR 338 (S.C.).

\(^{1536}\) Therefore, arguably it is not clear whether the courts in this jurisdiction would uphold the use of a special measure where it appeared to infringe the right of the accused to a fair trial but where such measure was necessary in order to obtain the evidence of the child witness and where the procedures to be adopted following the authorizing of the special measure included safeguards protecting the rights of the accused.

\(^{1537}\) See: *Tuohy v Courtney* [1994] 3 IR 1, at p. 47, [1994] 2 ILRM 503, at p. 514, *per* Finlay C.J. (S.C.). Applying this ‘balancing test’ it is submitted that the balance contained in the legislation – s. 13 of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001 – is not so contrary to reason and fairness as to constitute an unjust attack on the plaintiff’s right to fair procedures.

\(^{1538}\) Equally, it is submitted that the presumption of constitutionality would attach thereto and it would be presumed that the Oireachtas intended any proceedings, procedures, discretions or adjudications permitted, provided for, or prescribed by any such enactment would be conducted in accordance with the principles of constitutional justice and that any departure from those principles would be restrained or corrected by the courts: *East Donegal Co-operative Livestock Mart Ltd. v Attorney General* [1970] IR 317 (S.C.).

\(^{1539}\) Aside from the rights enjoyed by child witnesses, it is argued that “children should receive greater protection than other witnesses on account of their increased vulnerability and limited understanding” and that, therefore, special measures are required to facilitate the reception of the child’s evidence: Emson, Raymond, *Evidence* (1999) para. 16.4.4, at p. 408. This apparently paternalistic attitude towards child witnesses is founded not merely upon the protection of child witnesses from trauma and distress when giving evidence but also upon the object of obtaining the best evidence possible from child witnesses, in the interests of dispensing justice in any individual case, while ensuring that the
everyone’s evidence save in exceptional circumstances,¹⁵⁴⁰ where the extent of such abridgement is proportionate and no more than is reasonably required in order to ensure that the other constitutional rights in question are vindicated¹⁵⁴¹ and – in ensuring that crucial prosecution evidence is not lost¹⁵⁴² – the proper administration of justice.

4.12.14 In this regard, the following observations may be made. First, the statutory scheme providing for the use of the live television link facility by child witnesses in respect of proceedings involving applicable offences ‘unless the court sees good reason to the contrary’ has a clear and legitimate social policy – the reduction of the trauma experienced by child witnesses when giving evidence in criminal proceedings with a resulting improvement in the quality of evidence obtained from child witnesses in the interests of the proper administration of justice. Secondly, the means of achieving this objective – the use of live television link, thereby removing the child from the formal surroundings of the courtroom and the immediate presence of the accused – are rationally connected to and necessary to achieve the objective.¹⁵⁴³ Finally, the rights of the accused are limited (if at all) to the

accused receives a fair trial. Furthermore, it is recognized that children’s difference should be accommodated by the law in order to redress the inequality of power between children and adults.


¹⁵⁴² Dennis, I.H., The Law of Evidence (2nd ed., 2002) at p. 46: “There are powerful arguments for special techniques of protection. The proper enforcement of the criminal law partly depends on these types of witness. Their evidence may be crucial for the conviction of dangerous and violent offences, and for ensuring the future safety of the witnesses themselves and other potential victims.”

¹⁵⁴³ McEwan, Jenny “In the Box or on the Box? The Pigot Report and Child Witnesses” [1990] Crim LR 363, at p. 364; “[T]he desirability of constructing a system of trial where the accused cannot profit, in terms of deterrent effect, from the ordeal facing his victim in court, is beyond argument.” See also: Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.02, at p. 67.

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minimum extent possible to realize these objectives;\textsuperscript{1544} the effects on the accused’s constitutional rights are proportionate to the objectives sought to be achieved by Part III of the Criminal Evidence Act 1992.

4.12.15 Equally, it is submitted that the judicial authorisation of the use of a one-way screen to obscure the child witness’s view of the accused does not amount to an infringement of the accused’s constitutional right to a fair trial and fair procedures for the following principal reasons. First, this special measure is available in this jurisdiction in the exercise of the court’s inherent jurisdiction to arrange its procedures in a manner conducive to the proper administration of justice; it follows both from the nature of this jurisdiction and from the court’s constitutional duty to ensure fairness of procedures and a fair trial for all that this special measure will not be authorised in circumstances which deprive the accused of his / her right to a fair trial and fair procedures. Secondly, if the courts in this jurisdiction were to adopt the ‘balancing test’ previously employed by the English courts in relation to the availability of this special measure in the absence of statutory guidance, it is submitted that this would provide a further safeguard for the rights of the accused.\textsuperscript{1545} The operation of the one-way screen itself does not infringe the rights of the accused by reason of the preservation of the

\textsuperscript{1544} In \textit{In re Article 26 and the Employment Equality Bill, 1996} [1997] 2 IR 321, at p. 382 (S.C.), the Supreme Court struck down as inconsistent with the right to trial in due course of law the procedure of trial by certificate for certain minor offences contained in s. 63 of the Bill. The following passage from the judgment of Hamilton C.J., at p. 383, contains a useful exposition of the proportionality test as applied to criminal legislation: “It is a question of whether the constitutionally guaranteed right to trial in due course of law has been interfered with and if so whether it has been limited in a reasonable and justifiable manner appropriate to the circumstances. It is clear that in s. 63(3) there is an interference with the right to a trial in due course of law. The issue is whether the intrusion is constitutional. The objective of the legislation is a laudable social policy. However, nothing inherent in that policy or in the nature of the legal rights granted by the legislation renders it necessary to have the remedy in the form proposed. It is neither rational nor necessary to so limit the right of due process to achieve the objective of the legislation...Applying [the standard proportionality] test to s. 63(3) it is clear that s. 63(3) is not specifically designed to meet the objectives of the Bill. The process is not rationally connected to the objective. The process of certification is an intrusion into the constitutional rights of an accused, yet there is no rational reason why trial by certification process is necessary in this type of case. Thus, there is no proportionality between the process of trial by certification and the objective of the Bill and the limitations on the right to trial in due course of law.” See also: \textit{Meagher v O’Leary} [1998] 4 IR 33 (H.C. and S.C.) [1998] 1 ILRM 211 (S.C.); \textit{Gilligan v Criminal Assets Bureau} [1998] 3 IR 185; \textit{Enright v Ireland} (Unreported, High Court, 18th December, 2002); and \textit{People (Director of Public Prosecutions) v Kelly} (Unreported, Supreme Court, 4th April, 2006).

\textsuperscript{1545} See, in particular, the discussion contained in sections 4.7.2-4.7.20 above.
'elements of confrontation' outlined above; in particular, the child continues to give evidence following a test of competence, is subjected to full cross-examination and is visible for the purposes of the assessment of his / her demeanour throughout his / her evidence by the judge, jury legal representatives and the accused. It is conceded that there is a greater risk of prejudicial perception on the part of the jury adverse to the accused arising from the use of a one-way screen than from the live television link facility since the protection afforded to the child via the use of the screen is specific to the accused and does not appear to extend to his / her surroundings; the child continues to give evidence from the body of the courtroom. However, it is submitted that such prejudice may be minimised or even dissipated entirely through the use of strong judicial directions to the jury in similar terms to that employed in *R v X, Y and Z*1546 and to that approved in *R v Accused (T 4/88)*.1547 Moreover, it is submitted that the statutory provision for the transfer of proceedings to courts in which the live television link facility is available1548 ensures that child witnesses will give evidence with the benefit of a one-way screen in exceptional circumstances only, following a judicial weighing of the competing interests involved.

4.12.16 Finally, it is submitted that it is only where there is a "real risk that the accused would not receive a fair trial"1549 that the strict approach advocated by Costello P. in *Donnelly v Ireland*1550 should be adopted; neither the 'balancing' nor the 'proportionality' tests may be applied "so as to dilute the very essence of core constitutional rights"1551 such as the fundamental right

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to a fair trial and fair procedures. However, having regard to the foregoing, it is submitted that no such dilution arises in respect of the use of the live television link or one-way screens to facilitate the reception of evidence from child witnesses.

4.12.17 Equally, the European Court of Human Rights will uphold proportionate restrictions of the right to a fair trial under Article 6; that is, the least restriction possible, which is both strictly necessary to achieve the objective and rationally connected to the objective. More particularly, the Court has held that no violation of Article 6(1), taken together with Article 6(3)(d) of the Convention can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities. In determining the fairness, as a whole, of proceedings pursuant to Article 6, the Court is entitled to take into account the organisation of criminal proceedings – particularly proceedings involving sexual offences – in such a way as to protect the interests of juvenile witnesses and the right to respect for the private life of the perceived victim.

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1552 Van Mechelen v Netherlands (1997) 25 EHRR 647, at paras. 58-60 (E.Ct.H.R.). PS v Germany (2003) 36 EHRR 61, para. 23 (E.Ct.H.R.): “However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Art. 6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.”

1553 Doorson v The Netherlands (1996) 22 EHRR 330, para. 72 (E.Ct.H.R.). In SN v Sweden (2004) 39 EHRR 13 (E.Ct.H.R.), in the concurring opinion of Judge Thomassen (joined by Judge Casadevall), having noted that the defence in this case was handicapped in its possibilities of questioning or having questioned the child complainant of sexual offences and that the child’s statement was the decisive evidence, asserted in para. 117 that: “In cases of sexual abuse the testimony of a victim will often be the decisive evidence for a conviction. Where the defence in such cases cannot, even for very good reasons, question the victim, in my view following the line of reasoning adopted by the Court in the case law cited above, the defence is handicapped in such a way that sufficient measures should be taken in the proceedings to counterbalance this handicap.”

1554 PS v Germany (2003) 36 EHRR 61, para. 28 (E.Ct.H.R.). In SN v Sweden (2004) 39 EHRR 13, in the concurring opinion of Judge Thomassen (joined by Judge Casadevall), para. O-12, it was asserted that: “I certainly agree with the majority that proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant, and that these features are even more prominent in a case involving a minor. In the present case it was therefore, in my view, fully justified that the Swedish judicial authorities took measures to protect the child.”

1555 SN v Sweden (2004) 39 EHRR 13, para. 47 (E.Ct.H.R.): “The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question
4.12.18 However, even where such ‘counterbalancing’ procedures are found to compensate sufficiently the handicaps under which the defence labours, the Court has cautioned that a conviction should not be based “either solely or to a decisive extent” on the evidence so obtained. Specifically, the Court has held that evidence obtained from witnesses “under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention” should be treated with “extreme care”. Thus, it has been held that where a conviction is based solely or to a decisive degree on depositions that have been made by a child witness whom the accused

whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. In securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours.”

1556 Doorson v The Netherlands (1996) 22 EHRR 330, para. 76 (E.Ct.H.R.). In SN v Sweden (2004) 39 EHRR 13 (E.Ct.H.R.), in the dissenting opinion of Judges Türmen and Maruste, it was asserted in para. O-I13 that “every possible step should be taken to support the interests of diligence and a fair trial” and in O-I15 that: “We understand that the interests of minors must be duly taken into account and that even the principle of cross-examination can be left aside for that reason, but this should be possible only in cases where there is other neutral corroborating evidence. Otherwise, the protection of the rights of one person (the victim) will disproportionately jeopardise the accused’s right to a fair trial. As was stated in Doorson v The Netherlands (1996) 22 EHRR 330, para. 70: ‘... Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake...[I]nterests of...victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.’”


1558 PS v Germany (2003) 36 E.H.R.R. 61, para. 24 (E.Ct.H.R.). The applicant was convicted of sexually abusing an eight-year-old girl. The trial court relied on statements made by the girl’s mother concerning her daughter’s account of events and on evidence given by the police officer who had questioned the girl, but decided not to hear the girl herself because her mother was concerned that she would suffer if reminded of the events in question. Considering that the absence of the girl’s testimony constituted a serious shortcoming in the taking of evidence, the appeal court ordered an expert opinion on her credibility which was prepared some 18 months after the alleged abuse. Again, however, the girl herself was not heard in court and the applicant’s appeal against his conviction was dismissed. Relying on Art. 6(3)(d) of the Convention, he alleged that he had been convicted on the basis of statements made by a witness whom he had never been given an opportunity to examine or to have examined; at no stage of the proceedings has the child been questioned by a judge, nor did the applicant have any opportunity of observing the demeanour of this witness under direct questioning, and thus of testing her reliability. The Court unanimously held that there had been a violation of Art. 6(3)(d) taken in conjunction with Art. 6(1) of the Convention.
has had no opportunity to examine or have examined – whether during the investigation or at the trial – the rights of the defence were restricted to an extent that was incompatible with the guarantees provided by Article 6.1559

4.12.19 Examples of such ‘counterbalancing measures’ or safeguards for the rights of the accused are found in the judicial practice and statutory schemes governing the use of one-way screens and the live television link facility – some of which have been considered in more detail above – including: (i) the cautionary instruction issued by the trial judge to the jury, inter alia, warning the jury against drawing inferences of any kind – more particularly, inferences adverse to the accused – from the use of these special measures; (ii) ensuring by the positioning either of the one-way screen or the television monitors that the judge, jury, legal representatives and the accused all enjoy an uninterrupted, clear view of the child witness while he / she gives his / her evidence, in order to facilitate their assessment of the child’s credibility and the reliability of his / her evidence;1560 (iii) placing the operation of the

1559 See, however, the decision of the Court in SN v Sweden (2004) 39 EHRR 13 (E.Ct.H.R.). The applicant (S) complained that criminal proceedings against him for the sexual abuse of a child (M) breached Article 6(1) and (3)(d) of the European Convention on Human Rights 1950. M’s evidence consisted of pre-trial video recordings of an interview with the police. After S had been notified of the suspicions against him, his defence counsel requested that M be interviewed again. M’s counsel was unable to attend and S’s counsel, having agreed a list of questions with the interviewing officer, agreed that the interview should take place in the absence of both counsel. Having heard the audio tape recording of the interview, S’s counsel was satisfied that the issues raised in his request had been covered. At trial, the court was shown the video tape of the first interview and the record of the second interview was read out. No request had been made for M to give evidence at trial or at S’s subsequent appeal against conviction. S maintained that the fact that domestic law prevented him from cross examining M in circumstances where there was no other evidence supporting M’s statements breached Art. 6(1) and Art. 6(3)(d). It was held by the European Court of Human Rights (Judges Turmen and Maruste dissenting), that, having regard to the foregoing principles, there had been no breach of Article 6(1) of Article 6(3)(d) of the Convention. In particular the Court noted that the second police interview had been held at the request of S’s counsel. He had consented not to be present and had accepted the manner in which the interview had been conducted; S’s counsel had been able to have questions put to M through the interviewing police officer.

1560 In White v Ireland [1995] 2 IR 268, at p. 282 (H.C.), Kinlen J. observed that the view of those present in the court – the judge, jury, legal representatives and the accused – of the child witness may even be better where he / she testifies via live television link than if he / she gave evidence in the conventional manner from the body of the courtroom, since the close-up televised image of the child is sufficiently clear to capture even the child’s ‘body language’ when testifying, thus facilitating a determination as to the child’s credibility and whether he / she is a “congenital liar, capable of confabulation”: “The jury probably has a better ability to judge the child by concentrating on its face, it is close to them, they see the entire body of the witness particularly as it is removed from the jury box.”
live television link facility under the exclusive control of the trial judge and taking practical measures to ensure the integrity of the evidence thereby received; (iv) leaving to the trial judge a residual judicial discretion with regard to the use of either of these special measures – such as employed in s. 13 of the Criminal Evidence Act 1992, as amended, where the live television link is available to child witnesses “unless the court sees good reason to the contrary” – or providing for the application of an ‘interests

1561 White v Ireland [1995] 2 IR 268, at p. 281, per Kinlen J. (H.C.): “In the latter end of the 20th century the court should, subject to close scrutiny, avail itself of modern technology. The trial judge is in complete control of all the equipment. He will act in accordance with constitutional and natural justice and will ensure that there are fair procedures. If the accused is defending himself the judge can decide whether or not to make his image available to the accuser. In those circumstances his voice must personally be transmitted but not necessarily his image. This is because there are two rights here, that of the accused and that of the child witness or accuser.”

1562 See White v Ireland [1995] 2 IR 268, at pp. 272-275, per Kinlen J. (H.C.). Before the live television or video link is activated, the judge calls to the usher, informs the jury of the role of the usher, and then cautions the usher. The principal function of the usher – his or her “neutral role” – is to ensure the integrity of the procedure by: (i) preventing interruptions or intimidation of the child while he or she gives evidence; (ii) alerting the court to any possible breach of procedure; (iii) refraining from prompting or guiding the child and restraining any other person present during the child’s testimony from so doing; (iv) remaining with the child at all times, even where the transmission is interrupted; (v) refraining from speaking to the child about the case, or his or her evidence. However, the usher also has a secondary function which is to facilitate the reception of the child’s evidence by providing emotional support to the child during his or her evidence, thus reducing the stress suffered by the child and improving the quality of the child’s evidence. Kinlen J. stressed the importance of testing the system before the trial commenced on a number of occasions in his judgment. Kinlen J. conceded that there was a “small portion of the room” directly below the camera which, due to the static nature of the camera, “is not available to a viewer”, so that, if a person were to stand directly under the camera he or she would not be visible to the court. Thus, the design of the live television link procedure in this jurisdiction is, in theory at any rate, open to abuse, in that the evidence of the child witness could be influenced by a person not visible to those present in the courtroom. In practice, however, the safeguard against this possibility is the continuous presence of the usher, whose role it is to, inter alia, ensure the integrity of the live television link procedure. The most significant characteristics of the Irish equipment for the giving of evidence via live television link were detailed by the High Court as follows: (i) the judge has a control panel in front of him or her which can switch on and off the entire system (although the audio version continues); and (ii) the judge alone has complete control of what can be seen by the witness, the jury and the barristers on both sides.

1563 In upholding the constitutionality of the legislative provision permitting the use of live television link by child witnesses in proceedings involving applicable offences, the Supreme Court of Canada in R v Legogiannis (1993) 18 C.R.R. (2d) 242, held at p. 256, per L’Heureux-Dubé J. (S.C.C.) that: Furthermore, s. 486(2.1) of the Criminal Code preserves the discretion of the trial judge to permit such use only when the ‘exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant’. Since there was no infringement of the principles of fundamental justice nor of the right to be presumed innocent or to a fair trial, s. 486(2.1) of the Criminal Code is constitutional.”

1564 In Donnelly v Ireland [1998] 1 IR 338, at p. 357 (S.C.) it was held by Hamilton C.J. that: “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”. Fennell criticized what she termed the “circular reasoning” of the Court evidenced by Hamilton C.J.’s reliance on the fact that the
of justice’ test to the issue of their availability;1565 and / or (v) predicated by the trial judge that such measures would be likely to improve and so far as practicable maximise the quality of the evidence received thereby from the child witness.1566

4.12.20 It is clear, therefore, that safeguards exist in this jurisdiction to protect the rights of the accused person against unjust attack where the use of a one-way screen or live television link is authorised in criminal proceedings involving child witnesses. These safeguards would, however, be significantly augmented in relation to the first special measure if, as suggested, the ‘balance of fairness’ test, outlined above, were to be adopted in this jurisdiction and, indeed, given statutory recognition, since the courts would be expressly obliged to have regard to the constitutional rights of the accused, as required in relation to the authorisation of live television link – provision would not be invoked or relied upon where it would not be in the interests of justice or fairness to an accused person, in order to uphold the constitutionality of the section, in particular, the trial judge would refuse to allow a child witness to give evidence via a live television link where there was “good reason to the contrary”, such as where there was an issue regarding an accused person’s right to a fair trial: Fennell, Caroline, The Law of Evidence in Ireland (2nd ed., 2003) para. 5.24, at pp. 135-136. She argued that: “Hamilton C.J.’s circular reasoning is resonant of that found to exist in the legislature’s enactments in this area, typified in the qualification (as here) that the provision be invoked ‘in the interests of justice’ or without detriment to ‘fairness to the accused’. This perspective gives the view that the existence of this provision quiescent in the legislation (arguably precisely because there is such a problem with the relevant change) is invoked and relied upon by the judiciary, thereby copperfastening the lack of a correlation or relationship between what was changed and what is now fair. There could hardly be a greater irony: the legislation is ‘saved’ because the judiciary need not invoke it where it would be unfair to do so – hence it is potentially unfair.”

1565 See: s. 24 of the Youth Justice and Criminal Evidence Act 1999 in England; and R (Director of Public Prosecutions) v Redbridge Youth Court [2001] 1 WLR 2403, [2001] 4 All ER 411 (Q.B. Div.) considered in more detail above. No such provision is expressly made by s. 13 of the Criminal Evidence Act 1992, as amended – unlike ss. 14 (intermediary) and 16(2)(b) (pre-trial video recordings) of the Act – in relation to the giving of evidence by a child witness via live television link, however, as noted above, the language of that provision is permissive rather than mandatory and, in these circumstances, it is submitted that the court may decline to authorize the use of this special measure where it would result in unfairness to the accused: Donnelly v Ireland [1998] 1 IR 338, at p. 357, per Hamilton C.J. (S.C.). Furthermore, the court is expressly empowered to refuse to permit a child witness to give evidence in this manner where it sees “good reason” to the contrary; it is submitted that a real risk of prejudice to the accused could constitute such ‘good reason’.

1566 See: s. 19 of the Youth Justice and Criminal Evidence Act 1999 in England. Munday asserted that the aims of the legislature, as illustrated by this provision, are “laudable” and interpreted the effect of this safeguard as follows: “The court is to do what it feels appropriate to enhance the quality of evidence given by prosecution and defence witnesses of proven or assumed susceptibility, while at the same time ensuring that the rights of the opposing party are protected, too.” Munday, Roderick Evidence (2nd ed., 2003) para. 4.43, at p. 166.
in particular, the right to a fair trial and to uninhibited cross-examination of a child witness for the prosecution – and to weigh any prejudice to the accused against the protection of child witnesses and the right of the community to see crimes prosecuted.

4.12.21 It is submitted that special measures represent the law's attempt to harness modern technology in order to facilitate the reception of evidence from children by reducing the trauma attendant on being a witness in criminal proceedings and thereby receiving evidence which would otherwise have been lost and improving the quality of the evidence received. Accordingly, it is submitted that the use of special measures facilitates the ascertainment of the truth and the proper administration of justice\textsuperscript{1567} which, ultimately, is in the interests of the child witness, the accused and public confidence in the integrity of the criminal justice system.

"The defendant's birthright under any rational criminal justice system is to a fair trial, that is, a public process whereby the probative value of all of the available admissible evidence can be fairly, thoroughly and effectively tested in the court's quest to ascertain the truth about past events. Enabling witnesses to give the best evidence of which they are capable not only does not collide with the defendant's rights, but, it is submitted, is entirely compatible with them.\textsuperscript{1568}"

\textsuperscript{1567} This movement is motivated in part by the crucial contribution which the evidence of a child witness or child complainant can make to the successful prosecution of a criminal offence. In particular, it is almost impossible to convict an accused person of the commission of sexual offences against children in the absence of the evidence of such children since such offences are usually committed in private with no other witnesses present and, moreover, may not be reported for some time, at which stage the medical evidence available may be inconclusive and cannot amount to corroboration of the allegations. Royal Commission on Criminal Justice: Report Cm. 2263 (1993) para. 5.44: "The evidence of victims and other witnesses is crucial to the criminal justice process because prosecutions will founder, and guilty people thus escape justice, if victims and other witnesses are not prepared to make statements to the police and thereafter to give evidence. It is important therefore that everything possible is done to support and, where necessary, protect witnesses in what is often an unenviable role." See also: Paciocco, David \textit{The Law of Evidence} (2\textsuperscript{nd} ed., 1999) para. 9.1, at p. 295.

4.13.0 SUPPORT PERSON AND INTERMEDIARY

4.13.1 The ‘evidential revolution’ also encompassed special measures which sought to reduce the trauma experienced by child witnesses when required to give evidence in the conventional manner through the introduction of additional actors into the criminal justice system – namely, support persons and intermediaries – thereby rendering the traditional model of adversarial trial more ‘child-friendly’.

4.13.2 A support person is a person whose presence in close proximity to the child witness during the child’s testimony is approved by the court on the understanding that the support person will facilitate the reception of the best evidence from the child by reducing the trauma experienced by the child witness since: (i) the mere presence of the support person is intended to encourage the child witness first to give evidence at all or to enable the child to give a more coherent, complete and credible account of the events witnessed; and (ii) the support person can provide solace or

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1569 See: Scotland: s. 271L of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004; Canada: s. 486.1(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15; and New Zealand: s. 375A(2) of the Crimes Act 1961, as amended.
1571 It should also be noted that the New Zealand Law Commission observed that complainants of sexual offences or any other witness in criminal trials may apply to the court to have more than one support person: New Zealand Law Commission, Evidence – Reform of the Law (Report No. 55, Vol. 1, 1999) Chapter 14, paras. 363 – 367. The possibility of the appointment of more than one support person has not been explored in any other jurisdiction, however, it is submitted that the difficulties raised by the appointment of a support person – examined below – would be further exacerbated by the appointment of two such persons and it is difficult to envisage circumstances in which such double / multiple appointment would be necessary or even desirable.
1572 The permissible degrees of proximity between child witness and support person envisaged and, indeed, permitted differs within the common law jurisdictions considered herein. See further: section 4.16.2 below.
1573 This special measure is premised upon the recognition, common to all of the special measures examined herein, that children suffer high levels of distress as a result of the experience of being a witness in criminal proceedings which can adversely affect the child’s ability to testify coherently and to give a complete and credible account of events witnessed and the understanding that by rethinking characteristics of the traditional adversarial model which contribute to such stress, the best evidence of the child witness may thereby be obtained.
comfort to the child witness should the child experience distress during the giving of evidence.\textsuperscript{1574}

4.13.3 This ‘facilitative function’ of the support person is not restricted to the child’s evidence-in-chief but also extends to evidence obtained by way of cross-examination. Common sense dictates that it is easier for the child to respond fully and freely to cross-examination when he / she feels that his / her account is validated or believed by an adult\textsuperscript{1575} – the support person – particularly in circumstances where the cross-examination attacks the child’s credibility by suggesting that the child’s account is untrue or fabricated; this form of cross-examination can have a devastating effect on child witnesses who fail to understand its purpose or role, since “for many children it signifies that the adult world, having so far supported and believed them, has now rejected their story and turned against them”.\textsuperscript{1576}

\textsuperscript{1574} Scottish Law Commission, Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (Scot. Law Com., Report No. 125, 1990) para. 2.12, at p. 7: “There seems to be little doubt that the presence, close at hand, of a parent or some other trusted adult can, in some cases, give a young child the reassurance that is required for evidence to be given clearly and confidently; and for that reason we consider that this practice should be encouraged as much as possible”. See also Lord Justice General Hope, Memorandum by the Lord Justice General on Child Witnesses (1990) para. 4(c): “A child who is giving evidence at the trial of a close relative may be especially exposed to apprehension or embarrassment, irrespective of the nature of the charge. The positioning of the child and the support of a person sitting alongside the child while giving evidence are likely to be of particular importance in these cases.” See also: Australian Law Reform Commission, Draft Recommendations Paper: A Matter of Priority: Children and the Legal Process (ALRC DRP No. 3, 1997) Draft recommendation 5.15; and Australian Law Reform Commission, Issue Paper: Speaking for Ourselves: Children and the Legal Process (ALRC IP No. 18, 1996) paras. 10.37-10.40.

\textsuperscript{1575} Put simply, the child has someone in his / her ‘corner’ and this in itself can embolden the child to recount his / her memory of events more freely or fully – which might otherwise be too humiliating or shameful for the child – and to withstand hostile cross-examination. Beresford, Stuart “Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?” (2005) Journal of International Criminal Justice 3.3(721): “As a rule, children understand very little about courts and the legal system. Because of their lack of knowledge, many fear various aspects of the judicial process, especially as having to testify may force children to relive traumatic experiences they are deeply ashamed of and wish to forget or ignore entirely. Recognising this may lead some children to refrain from giving evidence, several domestic legal systems allow children to have a supportive and trusted adult with them when they appear in the courtroom. Goodman and her colleagues have even discovered that the presence of a support person increases some children’s capacity to testify, resulting in more consistent and credible testimony. They observed that the ‘presence of a parent/loved one was associated with children answering more questions during direct examination’.”

4.13.4 The provision of an ‘intermediary’ is intended to address one of the key difficulties facing the court – the legal representatives and the judge – when a child witness is involved in criminal proceedings; the necessity to establish effective communication in circumstances where the language used by the court is incomprehensible, intimidating or confusing for the child witness\textsuperscript{1577} or, equally, where the child cannot make himself / herself understood to the legal representatives, either because of the child’s unsophisticated linguistic skills, his / her immature cognitive development or his / her use of idiosyncrasies, non-verbal communication, symbolic representation or even inappropriate use of words. An ‘intermediary’ is defined as “a person acting as a conduit” between the interrogator or the court and a witness, to encourage communication “in a manner that facilitates optimum understanding”\textsuperscript{1578} and to ensure that the evidence received is as complete, coherent and accurate as practicable.

4.13.5 Accordingly, an ‘intermediary’ is intended to be an examiner skilled in the ‘language of children’ who mediates between the court and the child witness in order to ensure, in the first place, that the child’s evidence can be received by the court and also to facilitate effective communication between the court and the witness\textsuperscript{1579}. The function of the ‘intermediary’ in this regard is threefold: (i) to avoid the loss of relevant admissible evidence, for


\textsuperscript{1578} Home Office, Consultation Draft Guidance for the use of an Intermediary under s. 29 of the Youth Justice and Criminal Evidence Act, 1999 (London: Home Office, March 2001) para. 2.3.3 at p. 5.

\textsuperscript{1579} Ellison, Louise “Cross-Examination and the Intermediary: Bridging the Language Divide?” [2002] Crim LR 114, at p. 119: “Vulnerable witnesses will thus no doubt benefit from the assistance of an intermediary trained to accommodate their linguistic and cognitive needs. Complex vocabulary can be decoded and convoluted sentence structure simplified as the intermediary rephrases difficult questions. In some cases the intermediary procedure will doubtless allow witnesses with severe communication problems to testify in criminal proceedings who would otherwise be denied the opportunity.” While the ‘intermediary’ appointed pursuant to s. 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001 is only empowered to facilitate communication between the court and the child witness – whether by way of repetition of the questions posed or rephrasing the question posed in order to convey the meaning of such question to the witness in a developmentally manner – the equivalent English provision, s. 29 of the Youth Justice and Criminal Evidence Act 1999 permits the intermediary to also facilitate communication between the witness and the court by explaining the answers given by the child witness to the court. See, in particular: sections 4.18.18-4.18.21 below.
example, where a child witness is so overwhelmed by the austere and alien courtroom environment, language and procedures that he / she is unable to give evidence at all or unable to give evidence that may be received by the court; (ii) to reduce the risk of distortion of the child’s evidence, which may be crucial to the rational ascertainment of facts in the proceedings, by minimizing the use of language which is confusing, misleading or suggestive for the child witness, such as the use of ‘double negatives’, leading questions or compound questions; and (iii) to improve the quality of the evidence – in terms of its completeness, coherence and accuracy – actually received from a child witness.

4.13.6 Although the availability and operation of both special measures raise questions as to the appropriateness of the balance thereby achieved between the protection of child witnesses from undue trauma, the proper administration of justice and the right of the accused to a fair trial and fair procedures, it is the provision of an ‘intermediary’ – through whom questions to be asked of the child witness are to be put – which involves the most dramatic re-configuration of the traditional adversarial trial and its attendant safeguards for the constitutional rights of the accused.

4.14.0 Availability of Support Persons and Intermediaries

4.14.1 In common with other ‘type one’ special measures such as one-way screens – the provision of a support person to accompany a child witness

1580 See, in particular: sections 4.14.0-4.14.13, 4.15.0-4.15.9, 4.16.0-4.16.11, and 4.17.1 in relation to the availability of support persons and intermediaries, the eligibility of persons to act as support persons or intermediaries and the function of these actors, including the use of an intermediary as a solution to the difficulties posed by the unrepresented accused in the context of criminal proceedings involving child witnesses or complainants of sexual offences.

1581 See, in particular, sections 4.18.0-4.18.28 in relation to the impact upon the accused of the use of a support person or an intermediary.

1582 The provision of a support person is regarded as falling within the first category of special measures since it involves simple adjustment of the standard courtroom layout, design or procedure, in order to facilitate the reception of evidence from a child witness, while preserving many of the key features of the adversarial trial; the child continues to give his / her evidence – and is subject to cross-examination – in the conventional manner.
while he / she gives evidence is not subject to statutory authority or regulation in either this jurisdiction or in England; its availability is governed by the inherent jurisdiction of the court to conduct proceedings in a manner conducive to justice in any individual case.

4.14.2 This inherent jurisdiction to authorize the presence of a support person in proximity to a child witness throughout his / her evidence appears to have been assumed by the courts in the exercise of their discretion, without any meaningful discussion of the test to be satisfied before such special measure will be permitted;1583 those cases in which the use of a support person was sanctioned by the courts were usually preceded by an application by the prosecution but there is nothing on the face of the ultimate judgments of the court to indicate what standard or threshold was applied in determining these preliminary applications.1584 In the absence of clear judicial guidelines, it is submitted that it may be appropriate to apply to the availability of ‘support persons’ the ‘balancing test’ favoured by the English courts with regard to the use of one-way screens to obscure the child witness’ view of the accused while giving evidence;1585 in the exercise of the court’s duty to ensure fairness to all, the court may weigh the benefit to the child witness against any possible prejudice to the accused arising from the use of this special measures and may determine that the balance of fairness lies in favour of permitting a support person to accompany the child witness during his / her evidence.1586

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1583 The Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) opined in para. 7.098, at p. 179 (Recommendation No. 50) that it remains “entirely within the discretion of the trial judge to allow witnesses, whose age or physical condition may so require, to give evidence in a particular location [such as in the body of the court, as opposed to in the witness box] and to permit a so-called ‘support person’ to sit in close proximity or, in the case of very young children, to take the child on his or her lap.” See also: Law Reform Commission of Ireland, Report on Child Sexual Abuse (LRC 32-1990) para. 7.34, at p. 80 (Recommendation No. 60).


1586 See the decision of the New Zealand High Court in R v Ellis (No. 2) [1993] 3 NZLR 325 (H.C.) wherein – in the context of assessing the propriety of allowing a social worker who had become very
More recently, this special measure has been included within the statutory schemes governing the availability of special measures to child witnesses in Canada,\textsuperscript{1587} New Zealand\textsuperscript{1588} and, most recently, Scotland.\textsuperscript{1589} The Canadian provisions establish a rebuttable presumption in favour of the availability of a support person in respect of witnesses aged less than eighteen years or witnesses with a "mental or physical disability"; upon application to the trial judge, a support person of the witness' choice "shall" be permitted to be present and to be close to such witness while he/she testifies "unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice."\textsuperscript{1590} In making such an order, the court is obliged to take into account the age of the witness, any mental or physical disability of the witness, the nature of the offence, the nature of the relationship between the witness and the accused and "any other
circumstance that the judge or justice considers relevant". These presumptive rules reveal a fine balance between the competing interests, both on their face and in their application; while suggesting that the presence of a support person will, as a rule, be directed by the court in respect of a child witness, the court retains the discretion to refuse such a direction upon the application of an ‘interests of justice’ test.

4.14.4 By way of contrast, the Scottish statutory scheme sets the lowly threshold of ‘appropriateness’ for the making of such an order; where the use of a “supporter” is specified as the desired special measure in the child witness notice – required to be lodged with the court within the specified time limit in advance of trial – the statutory scheme simply provides that the court “shall...make an order authorizing the use of that measure for the purpose of taking the child witness’s evidence”. Moreover, it appears that it is not possible for the court to so authorize the use of a supporter simpliciter; this special measure is only available in conjunction with either the use of a screen or the use of a live television link, where the place from which the child witness is to give evidence by means of the link is another part of the court building in which the courtroom is located. The permissive attitude
towards the provision of a support person evidenced in this statute reflects
the prevailing judicial attitude towards this special measure in Scotland
which holds that it gives rise to "no material difficulty" with regard to the
rights of the accused.1596

4.14.5 The availability of an ‘intermediary’ through whom the examination and
cross-examination of child witnesses is conducted appears to be restricted to
jurisdictions – such as Ireland,1597 England1598 and New Zealand1599 – which
provide statutory authority for this special measure; it is understood that this
special measure – like other ‘type two’ special measures, such as live
television link – should be placed on a statutory footing since it involves a
more radical rethinking of the traditional adversarial model of criminal
justice, with a view to accommodating the special needs of child witnesses.

4.14.6 Pursuant to s. 14 of the Criminal Justice Act 1992,1600 as amended, an Irish
court may direct that questions to be put to a child witness be put through an
intermediary upon the satisfaction of three conditions.1601 First, the

order which has the effect of requiring the child witness to be present in the courtroom or any part of
the court building in which the courtroom is located for the purpose of giving evidence unless satisfied: (i) where the child has expressed a wish to be so present for that purpose; or (ii) in any other
case that the taking of the evidence of the child witness without the child witness being so present
would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests
of justice, and (ii) that risk significantly outweighs any risk of prejudice to the interests of the child
witness if the order is made.

1596 See: McGinley (Michael) v HM Advocate 2001 S.L.R. 198 (H.C. Justiciary) para. 5, per Lord
Justice General Rodger: "[i]n recent years the courts have indeed been prepared to entertain this kind
of motion on behalf of the Crown, even in cases where the witness is an adult. The presence of persons
in court to support witnesses has been found to give rise to no material difficulty. We therefore reject
the appellant’s argument that the mere presence of an adult acting as a support to the witness would
have been a reason for an impartial observer to conclude that justice had not been seen to be done in
this case."

1597 See: s. 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001
and s. 22 of the Children Act 1997.

1598 See: s. 29 of the Youth Justice and Criminal Evidence Act 1999.

1599 See: s. 23E(4) and s. 23F(3) of the Criminal Evidence Act 1908, as inserted by s. 3 of the Evidence
Amendment Act 1989.

Section 19 of the Criminal Evidence Act 1992 provides that the reference in s. 14(1)(b) to a person
under 18 years of age includes a person with a mental handicap who has reached that age. Both s. 14
and s. 19 (insofar as it relates to s. 14) were brought into operation with effect from 3rd March, 1997 by
the Criminal Evidence Act 1992 (Sections 14 and 19)(Commencement) Order 1997 (S.I. No. 66 of
1997).

1601 In common with all special measures provided for under the Irish statutory scheme, the provision
of an ‘intermediary’ is available only: (i) to witnesses aged less than eighteen years (child witnesses);
provision of an ‘intermediary’ is only permissible under s. 14 where the child is giving, or is to give, evidence via live television link; there is no provision in the Irish statutory scheme for the appointment of an intermediary in cases where, for example, the child witness is giving evidence in the conventional manner in open court with the benefit of a support person or from behind a screen, as in the equivalent New Zealand legislation.\textsuperscript{1602} Nor is there any provision allowing any examination of a child witness “\textit{howsoever and wherever conducted}” to be conducted through an interpreter or intermediary, as in the English statutory scheme,\textsuperscript{1603} which appears to render the ‘intermediary’ available to an eligible witness: (i) regardless of the form in which his / her evidence is to be or is being received, or the location of the witness at the time of the giving of such evidence; and (ii) even envisages the use of an intermediary, with the court’s approval, not merely at the trial of the accused person but also during an interview with a child witness, the video-recording of which can, at the direction of the court, be submitted in evidence as the child’s examination-in-chief in accordance with s. 27 of the Youth Justice and Criminal Evidence Act 1999.\textsuperscript{1604}
4.14.7 There appears to be no logical reason why the provision of an ‘intermediary’ should be inter-linked with the giving of evidence by way of the live television link facility so that the former is not available in the absence of the latter and therefore is not available where the child witness is giving evidence in a conventional manner or with the benefit of another special measure. It may be that the answer lies in the general ‘presumption of trauma’ contained in s. 13(1)(a) of the Criminal Evidence Act 1992, as amended, which indicates that the giving of evidence by child witnesses via live television link will be the rule rather than the exception; accordingly, it would appear to be open to the court in all applicable criminal proceedings to approve the appointment of an intermediary to assist child witnesses subject only to the second and third statutory pre-conditions.

4.14.8 This twinning of the ‘live television link’ facility with the ‘intermediary’ facility results in a situation where a child witness is twice removed from the courtroom environment, including the jury, the accused and his / her legal representatives. Equally, the ‘structure’ of the statutory scheme, by presuming trauma on the part of the child and providing that evidence may be given by a child witness in applicable proceedings by way of live television link “unless the court sees good reason to the contrary” ensures that the ‘intermediary’ facility – and, accordingly, this ‘dual barrier’ – will be widely available in practice, subject only to the second and third above-mentioned pre-conditions. By way of contrast, the equivalent pre-condition to the judicial authorization of the use of an intermediary through

with the child witness may be admitted into evidence, namely, that, prior to the commencement of the interview, the intermediary must have made a declaration, in such form as may be provided by the rules of court, that he / she would faithfully perform his / her function as an intermediary and that the court’s approval is given.

1605 Section 13(1) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.
1606 In effect, the ‘intermediary’ facility cannot stand alone but rather ‘piggy-backs’ on the live television link facility; the general ‘presumption of trauma’ is thus extended to enable the child witness to avail of two powerful special measures when giving evidence in criminal proceedings.
1607 Section 13(1) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.
whom questions are channeled to child witnesses in applicable civil proceedings — namely that the evidence of the child witness is being given or is to be given via live television link pursuant to s. 21 of the Children Act 1997 — operates to limit rather than expand the number of child witnesses who are eligible to avail of the intermediary facility since the live television link is only available to child witnesses in applicable civil proceedings with the leave of the court. There is no general presumption of trauma in favour of child witnesses which encompasses both the live television link and the intermediary facilities; rather a case-specific finding of trauma must be made by the court in the applicable civil proceedings both in determining whether to permit a child witness to give his / her evidence via live television link and, if so ordered, in determining that the appointment of an intermediary is appropriate or desirable “having regard to the age or mental condition of the child”. 

4.14.9 Secondly, the ‘intermediary’ facility is available only upon application to the court by either the prosecution or the accused; unlike its civil counterpart, there is no provision in s. 14 or elsewhere in the Criminal Evidence Act 1992, as amended, expressly enabling the court of its own motion to direct that questions to be put to a child witness be put through an intermediary. While it may be argued that the court enjoys an inherent

1608 This provision applies equally in relation to civil proceedings before any court concerning the welfare of a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently: s. 20(b) of the Children Act 1997.
1609 Section 19(1) of the Children Act 1997.
1610 In this regard, the provisions of s. 14(1) of the Criminal Evidence Act 1992 can be contrasted with the provisions of its civil counterpart, s. 22(1) of the Children Act 1997, which expressly provide that the court may, “of its own motion or on the application of a party to the proceedings” direct that questions to be put to the child be put through an intermediary, however, this difference is perhaps best explained by reference to the more inquisitorial nature of the applicable civil proceedings: Re K (Infants), Re M, S and W. Infants [1996] 1 ILRM 370, per Costello P. (H.C.). As indicated above, as in the applicable criminal proceedings, the ‘intermediary’ facility is only available in civil proceedings where a child is giving or is to give evidence via live television link. However, the fact that the court is expressly empowered under s. 22(1) to direct that an intermediary be appointed of its own motion means that the court is free, at the time of granting leave for the child witness to give evidence by way of live television link, to further direct that the questions to be put to the child witness be put through an intermediary, appointed by the court, if it is satisfied that, “having regard to the age or mental condition of the child, any questions to be put to the child should be put through an intermediary”; no further application by one of the parties is required.
1611 By way of contrast, s. 19(1) of the Youth Justice and Criminal Evidence Act 1999 in England — which governs the availability of the provision of an intermediary pursuant to s. 29 — provides that the
jurisdiction to appoint an intermediary in a like manner and in like circumstances as those outlined in s. 14, upon a literal interpretation, the discretion enjoyed by the court under this statutory provision operates in one direction only; the court may refuse an application to appoint an intermediary made by the prosecution or the accused where the legislative conditions are satisfied, but may not direct the appointment of an intermediary in the absence of such an application.

4.14.10 Thirdly and in addition to the foregoing, the court can only direct the appointment of an intermediary pursuant to s. 14, where it has first found that such measure is required in the interests of justice, having regard to the age or mental condition of the witness. There is no guidance in this provision to indicate whether these two factors – expressed as alternatives – are to be regarded as an exhaustive list of the factors to be taken into account by the court in determining whether the interests of justice demand the appointment of an intermediary. However, it should be noted that s. 14 is expressed in permissive rather than peremptory language, indicating that the court retains a residual discretion to refuse to appoint an

court may “of its own motion” raise the issue of whether such a special measures direction should be given.

While s. 22 of the Children Act 1997 cites the same two factors to be taken into consideration by the court in determining whether to direct the appointment of an intermediary, it does not state as a pre-condition to such a direction that the appointment be required in the interests of justice. In fact there is no mention of the ‘interests of justice’ in s. 22; it simply authorizes the appointment of an intermediary by the court if the court is satisfied that, having regard to the age or mental condition of the child, any questions to be put to the child should be put through an intermediary. It is arguable that, unlike its criminal counterpart, this latter provision restricts the civil court to considering the enumerated factors when determining whether to appoint an intermediary with the result that the civil court may not take into account considerations which fall under the broader remit of what is required in the interests of justice.

More specifically, there is no reference to ‘fairness to the accused’ in s. 14, unlike s. 16(2)(a) of the Criminal Evidence Act 1992, as amended by s. 20 of the Criminal Justice Act 1999, which provides, in relation to video-recorded evidence that, “in considering whether in the interests of justice such video-recording or any part thereof ought not to be admitted in evidence, the court shall have regard to all the circumstances, including any risk that its admission will result in unfairness to the accused or, if there is more than one, to any of them”. (Emphasis added).

Section 14(1) of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001, provides that: “Where – (a) a person is accused of an offence to which this Part applies, and (b) a person under 18 years of age is giving, or is to give, evidence through a 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.” (Emphasis added).
intermediary, which discretion in turn augers in favour of a broad interpretation of the requirements of the interests of justice.

4.14.11 In considering what factors may be encompassed within the ‘requirements of the interests of justice’ in s. 14, it is instructive to note the following considerations to which the courts in New Zealand have regard in reaching their determination whether to appoint an intermediary; the age of the complainant; the personality of the complainant; his / her assessed ability to relate the evidence; the relationship between the complainant and the defendant; the nature of the charge; the importance of the evidence; and any other matters impacting on the complainant when giving evidence and on the ability of the jury to assess the complainant and his / her evidence.1615 Save for the nature of the charge, the importance of the evidence and the ability of the jury to assess the complainant and his / her evidence, the focus of these considerations is at all times on the child complainant rather than the accused. It is respectfully submitted that, to focus on the child witness to the exclusion of the accused when determining whether to appoint an intermediary to dilute the accused’s access to the child witness—who may be his / her accuser—and so to inhibit cross-examination is to fail to respect the balance required by the Constitution in this jurisdiction in criminal trials between the protection of vulnerable witnesses and the rights of the accused person.1616 Accordingly, while these enumerated factors may inform the ‘interests of justice’ test stipulated in the Irish statutory scheme for the

1615 List of relevant factors contained in: R v W (1990) 6 CRNZ 157, at p. 158; and R v Hauiti (1990) 6 CRNZ 599, at p. 602. The judge may also take into account the reports of any persons whom the court considers qualified to advise on the effect on the complainant of giving evidence in person in the ordinary way or in the particular mode set out in s. 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989: s. 23D(3) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. Expert evidence—from medical practitioners and psychologists—is admissible in New Zealand pursuant to this statute, as to: (a) the intellectual attainment, mental capability, and emotional maturity of the complainant; (b) the general development level of children of the same age group as the complainant; (c) whether any evidence given by other witnesses during the proceedings relating to the complainant’s behaviour is, from the expert witness’s professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

1616 See, however, s. 23D(4) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 which provides that, in considering what directions (if any) to give under section 23E, the trial judge “shall have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused".
appointment of intermediaries, they cannot constitute a comprehensive list of such factors since they cannot adequately address the requirements of the rights of the accused.

4.14.12 The modern statutory scheme in England employs a two-part ‘child-centric’ test to the availability of this special measure, enabling the court to authorize the use of an intermediary in respect of the evidence of a child witness – subject to the operation of the statutory ‘primary rule’ with regard to the mode of examination of child witnesses 1617 – following a judicial determination to the effect that: (i) this special measure would, in the opinion of the court, be likely to improve the quality of evidence given by the witness; and (ii) this special measure, either alone or in combination with other special measures – such as those mandated under the ‘primary rule’ – would, in its opinion, be likely to maximize so far as practicable the quality of such evidence. 1618 In assessing whether any special measure or measures – such as the appointment of an intermediary – would be likely to improve or maximize so far as practicable, the quality of the evidence given by the witness, the court is obliged to consider all the circumstances of the case, including in particular: (i) any views expressed by the witness; and (ii)

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1617 As analysed above, the ‘primary rule’ applicable to child witnesses under s. 21 of the Youth Justice and Criminal Evidence Act 1999 provides that the court must direct the admission into evidence of any pre-trial video recording of an interview with a child witness made with a view to admission as the child’s evidence-in-chief and, in addition, direct that any evidence given by the witness which is not given by means of a video recording (whether in chief or otherwise) be given via live television link; these measures are to be treated as if they were measures determined by the court – either alone or in combination with other special measures – to be likely to maximise so far as practicable, the quality of the child’s evidence. However, this ‘primary rule’ is subject to: (i) the availability of these special measures; (ii) the exclusionary power of the court ‘in the interests of justice’ with regard to part or all of the video recording; and (iii) the opinion of the court that compliance with the ‘primary rule’ would not be likely to maximise the quality of the witness’s evidence so far as practicable, “whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason”. Accordingly, it is submitted that the court may depart from the ‘primary rule’ and authorise the use of an intermediary where it is of the opinion that this special measure – rather than either the admission of the video recording or the use of the live television link facility – would be likely to maximise, so far as practicable, the quality of the child’s evidence. Equally, the court may direct the use of an intermediary in addition to the special measures provided for in the ‘primary rule’ although in relation to the video recorded interview admitted pursuant to s. 27 of the Youth Justice and Criminal Evidence Act 1999, the intermediary must have sworn a declaration in the terms provided in s. 29(5) prior to conducting the interview and obtained the court’s approval pursuant to s. 29 of the Youth Justice and Criminal Evidence Act 1999.

1618 Section 19(2) of the Youth Justice and Criminal Evidence Act 1999 in England.
whether the measure or measures “might tend to inhibit such evidence being effectively tested by a party to the proceedings”.1619

4.14.13 The English assessment of the ‘possible tendency to inhibit the effective testing of the evidence of child witnesses’ is a far more specific and focused test of the permissibility and desirability of appointing an intermediary than the ‘interests of justice’ test and, arguably, cuts directly to the most problematic aspect of this special measure; namely, the barrier erected between a child witness and the court – including the judge, jury and legal representatives – with the concomitant loss of immediacy in questioning and even the distortion of the questions themselves. Alongside a test of this specificity, the ‘interests of justice’ test appears a blunt instrument, however, it is respectfully submitted that the latter test may afford greater protection to the accused since it empowers the court to consider matters beyond any possible inhibition of effective cross-examination to include consideration of each or all of the foregoing factors. Furthermore, a test which envisages the appointment of an intermediary only in circumstances where the interests of justice require it must afford greater protection to the accused than a test which restricts such appointment only where a court is satisfied that the measure might tend to inhibit the effective testing of the evidence of a child witness by a party to the proceedings, since the former starts from the standpoint of non-appointment, while the latter leans in favour of appointment save where the test is satisfied.1620 Finally, as indicated above, even in the absence of express provision to this effect, it is submitted that an Irish court would be obliged, in light of the demands of our Constitution, to have regard to the requirements of fairness to the accused when determining whether the ‘interests of justice’ require the

1619 Section 19(3) of the Youth Justice and Criminal Evidence Act 1999.
1620 The recommendations of the majority of the Advisory Group on Video Evidence in the Pigot Report afforded even greater protection to the accused; the intervention of the intermediary was permitted only in exceptional circumstances where it proved “absolutely impossible for counsel to communicate with a child” witness and, accordingly, where the crucial evidence of the child might be lost without the assistance of an intermediary, with the resulting detrimental impact on the court’s ability to do justice: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot QC) (London: Home Office, December 1989) para. 2.33, at p. 24.
appointment of an intermediary;\textsuperscript{1621} of the court is required to have regard to the rights of the accused when applying s. 13(1)(a) of the Criminal Evidence Act 1992, as amended\textsuperscript{1622}—which refers only to “good reason to the contrary”—\textit{a fortiori} it is submitted that the court must have regard to the rights of the accused when exercising its jurisdiction to determine whether the ‘interests of justice’ require the appointment of an intermediary pursuant to s. 14 of the Criminal Evidence Act 1992, as amended.\textsuperscript{1623}

4.15.0 \textit{Eligibility of Persons to Act as Support Persons or Intermediaries}

4.15.1 The choice of persons eligible to act either as support persons or intermediaries to facilitate the reception of evidence from child witnesses informs the underlying balance struck by these special measures between the protection of child witnesses, the proper administration of justice—including the appearance of justice—and the vindication of the rights of the accused.

4.15.2 While the person most often nominated to act as a ‘support person’ for a child witness in criminal proceedings is a ‘trusted adult’—such as a relative or friend of the child witness, or a social worker\textsuperscript{1624}—in the absence of clear statutory or judicial guidelines regarding the eligibility and ineligibility of persons to so act, it is submitted that—subject to the following—effect may be given to the wishes of the child witness with regard to the selection of a ‘support person’\textsuperscript{1625} since this is consistent with the rationale underlying this

\textsuperscript{1622} Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.
\textsuperscript{1623} Section 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001.
\textsuperscript{1624} The Law Reform Commission of Ireland did not expressly consider the eligibility of social workers as support persons—only friends and relatives—in its Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.085, at p. 175, however, it is submitted that the Irish courts would have no objection to their eligibility; certainly it would appear that no objection was raised to the appointment of a social worker as a support person to the complainant of sexual offences in \textit{The People (Director of Public Prosecutions) v J.T.} (1984-9) 3 Frewen 141 (C.C.A.).
\textsuperscript{1625} New Zealand Law Commission, Preliminary Paper: \textit{The Evidence of Children and Other Vulnerable Witnesses} (Preliminary Paper No. 26, October 1996), para. 362. In addition to the
special measure; logically, the child is in the best position to determine from whose presence, while giving evidence, he / she would derive the greatest support and reassurance. However, the child's preference must be subject to the overriding obligation of the court to obtain a balance between the pursuit of the legitimate public policy involved in the protection of child witnesses and the constitutional requirements of fairness to the accused.

4.15.3 Difficulties arise, for example, where the person nominated to act as a 'support person' for the child witness is himself / herself a witness in the proceedings. A number of possible solutions present themselves. First, the court could allow the witness to act as a 'support person' but require him / her to give his / her evidence first, that is, in advance of the child witness in respect of whom he / she is acting as a support person and the absence of such child witness. Such stipulation would, in any event, be consistent with criminal practice which requires witnesses to absent themselves during the evidence of other witnesses "lest they trim their own evidence by hearing the evidence of others". It must be questioned, however, whether such a step would be sufficient to quell any disquiet or suspicion of collusion harboured by members of the jury, having heard the evidence of

foregoing, the New Zealand Law Commission cautioned, in paras. 363 – 367, that "a respected public figure acting as a support person may operate to bolster the credibility of the witness unfairly so that regard needs to be given to the genuineness of the request". It recommended that: (i) the name of the proposed support person should be disclosed to all other parties to the proceedings unless the court ruled to the contrary, for example, where there is a possibility of intimidation; and (ii) the child's wishes and best interests should be taken into account when choosing a support person, although it emphasized that a child complainant had no absolute right to a specific 'support person', since the decision as to whether a particular person could act as a 'support person' was within the discretion of the court.

1626 In relation to the question of who should be permitted to act as a 'support person', s. 486.1(2) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, provides that a "support person of the witness' choice" should be permitted to provide support, however, this provision is subject to s. 486.1(4) which emphasises the undesirability of a witness acting as a support person.

1627 Section 271L(2) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004, provides that the witness / 'support person' "may not act as the supporter at any time before giving evidence"; while it is not expressed within this provision, it appears therefrom that it is permissible for a witness to act as a supporter after giving his / her evidence in the trial. Similarly, in its Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.085, at p. 176, the Law Reform Commission in Ireland advocated that the evidence of a 'support person' who was also a witness in the proceedings should be taken before the evidence of the child witness and while the child was absent from the court.

1628 Scott v Scott [1913] AC 417, at p. 446, per Lord Loreburn (H.L.).
one prosecution witness and subsequently seeing that witness support
another prosecution witness while giving his / her evidence, or, indeed, to
satisfy the requirement that justice would not only be done but be seen to be
done. 1629 Secondly, the court could require that another suitable person be
found to act as a ‘support person’ for the child witness, thus circumventing
the attendant difficulties of jury perception and the possibility of prejudice
to the accused. 1630 Thirdly, where the trial judge is satisfied that “it is
necessary for the proper administration of justice”1631 it may then be
permissible for a witness – who is otherwise prohibited from acting as a
support person – to so act.

4.15.4 Equally, where the proposed ‘support person’ is perceived to be ‘too close’
to the subject child witness due to the support person’s assumed influence
over the child witness, it may be undesirable for such person to act as a
‘support person’. 1632 In this regard, the child-centric approach of the New

1629 See: Irish Times Ltd v Ireland [1998] 1 IR 375, at p. 382, per Hamilton C.J. (S.C). In asserting that
justice must not only be done but be seen to be done, Hamilton C.J. asserted the rationale for this
fundamental principle as follows: “Only in this way, can respect for the rule of law and public
confidence in the administration of justice, so essential to the workings of a democratic state, be
maintained.”

1630 The Scottish Law Commission considered that where the proposed support person was also a
witness in the case it “would be improper for the adult to be present in the court with the child prior to
giving evidence himself or herself”. It further contended that: “In some instances it might also be
inappropriate for that adult to be alongside the child even after he or she had given evidence.
Sometimes such problems can be resolved simply by rearranging the order in which witnesses are
called but, where that is impracticable, the answer would appear to be to try to find another trusted
adult, who is not a witness in the case, to accompany the child.” Scottish Law Commission, Report on
the Evidence of Children and Other Potentially Vulnerable Witnesses (Scot. Law Com., Report No.

1631 Section 486.1(4) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005,
c. 32, s. 15, states that the court shall not permit a witness in the proceedings to be a support person
unless the judge or justice is of the opinion “that doing so is necessary for the proper administration
of justice”.

1632 Similarly, while not nominated as a ‘support person’ in R v Ellis (No. 2) [1993] 3 NZLR 325
(H.C.), counsel for the accused argued that the presence of a parent in the courtroom during the
testimony of the child complainant was objectionable due to the emotional impact of the parent on the
members of the jury and due to a fear that the parent could pass on information to the parents of other
child complainants in the proceedings. The Crown contended that the parents ought to be allowed to
remain in court during the evidence of their children since they were not future witnesses in the
proceedings. The High Court held that: (i) the parent should be permitted to be present on the grounds
that he / she has a genuine interest in ensuring the welfare of his / her child and a continuing
responsibility in relation to the child’s emotional security; (ii) speculations by the jury as to the
relationship of persons in court with the child complainants would not influence the verdict of the jury;
and (iii) there was no evidence that any of the parents would be likely to influence other witnesses in
the proceedings.
Zealand judiciary is instructive. In *R v Ellis (No. 2)*\(^{1633}\) it was queried whether a social worker who had become particularly close to the child complainants of sexual abuse by a worker in a child centre should be permitted to be present when the child gave evidence.\(^{1634}\) The High Court noted that the relevant statutory scheme\(^{1635}\) did not indicate that a trial judge had any discretion in relation to the identity of the person whom the complainant wished to be his / her support person. The Court held that the purpose of this statutory provision was to enable the complainant to have some support, comfort and reassurance during a time of stress; unless there were good reasons to the contrary, the person nominated by the complainant must be permitted to be present, even if that person was not one approved of by the accused or his counsel.\(^{1636}\)

4.15.5 While it is accepted that this case was primarily concerned with issues of statutory interpretation, it is nonetheless a useful illustration of the fine balance which must be achieved between permitting a person to act as a support person whose presence in close proximity to the child during his /


\(^{1634}\) Counsel for the accused argued that the social worker was too close to the families of the complainants as a result of her continuing contact with them and contended that refusing her permission to be present as a ‘support person’ with complainants while they were giving evidence would protect her from any allegations of misconduct by way of passing information to other witnesses.

\(^{1635}\) See: s. 375A(2) of the Crimes Act 1961, as amended.

\(^{1636}\) The Court noted that where, for example, an order excluding witnesses had been made and the proposed support person was a witness, that particular person would be excluded. See also the decision of the High Court of Justiciary in *McGinley (Michael) v HM Advocate* 2001 SLR 198 (H.C. Justiciary) upholding the direction of the trial judge authorizing the use of a support person for a complainant of sexual offences who, while aged 28 years at the date of the trial, was aged between 12 and 14 years at the time of the offences. The support person requested by the complainant, D, was D’s current boyfriend, who had no first-hand knowledge of the matters about which she was to give evidence. The High Court held that the mere presence of persons in court to support adult witnesses did not give rise to material difficulties and noted that a “volunteer” or a “social worker” who were not “in any sense emotionally involved with the witness” usually accompanied the witness and that it was “unusual for the Crown to ask for a relative or someone emotionally attached to the adult witness to be present in this role”: *McGinley (Michael) v HM Advocate* 2001 SLT 198, at p. 199. Although the Court characterized as “unfortunate” the fact that D’s support came from her boyfriend “before whom she might have hesitated to speak frankly” in relation to a sexual incident occurring years before, it held that the mere fact that he was present did not create a miscarriage of justice, especially as D was subjected to vigorous cross-examination and the jury had been given clear direction that the matters of credibility and reliability were for them alone to decide. Thus, the Court concluded, at p. 200, that “we are satisfied that the mere fact that [D’s boyfriend] rather than an entirely independent person, was present in the court at the time when D gave evidence did not give rise to any miscarriage of justice”.

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her evidence is meaningful for the child\textsuperscript{1637} and preventing persons from so acting whose presence in court would unduly influence the jury in a manner adverse to the accused\textsuperscript{1638} or even adversely affect the quality of the evidence given by the child witness in terms of its coherence, completeness and accuracy.\textsuperscript{1639}

4.15.6 With regard to eligibility to act as an ‘intermediary’ in respect of child witnesses in criminal proceedings, there is very little guidance given in s. 14 of the Criminal Evidence Act 1992, as amended\textsuperscript{1640} – or, indeed, in the equivalent statutory provisions in New Zealand\textsuperscript{1641} or England\textsuperscript{1642} – as to the qualifications necessary for such appointment; section 14(3) simply provides that the intermediary shall be appointed by the court and “shall be a person who, in [the opinion of the court] is competent to act as such”. Thus, the court enjoys a very wide discretion in determining whether a

\textsuperscript{1637} It is submitted that where the presence of a support person is meaningful to the child witness – that is, the child derives support from his / her presence – this ought to assist in reducing the trauma experienced by the child when giving evidence with the attendant benefits in terms of the improved quality of the child’s testimony.

\textsuperscript{1638} In R v V (1988) 3 CRNZ 423, at p. 424 (H.C.) counsel for the defendant objected to the presence of a psychologist, at the complainant’s request, on the ground that it would lend credibility to the complainant. Hillier J. held that the psychologist could be present, as complainants in sexual cases have “a right to say who should be in court, and that a Judge should not exclude such a person unless there were compelling reasons for doing so... If for example the person requested was to be disruptive of the proceedings, or was menacing the accused, a Judge could decide he should not be allowed in Court.” See also: New Zealand Law Commission, Evidence – Reform of the Law (Report No. 55, Vol. 1, 1999) (NZLC R55 – Volume 1) Chapter 14, para. 362.

\textsuperscript{1639} McEwan, Jenny “In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999 (2000) EvProv 4(1): “[E]ven in silence emotional pressure may be applied. If the support person is someone with whom the child has previously discussed allegations to be repeated at the trial, the child may feel constrained about any changes to the account that ought to be made. Clearly, informed guidance is necessary here.” See also: McGinley (Michael) v HM Advocate 2001 SLT 198, at p. 199 (H.C. Justiciary) in which the Court criticized the appointment of the complainant’s boyfriend as a ‘support person’ to accompany her during the trial, observing that the presence of her boyfriend may have inhibited the complainant in her description of the sexual incident alleged to have occurred when she was a child.

\textsuperscript{1640} Section 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001.

\textsuperscript{1641} The statutory provision governing the use of an intermediary in New Zealand – s. 23E(4) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 – is silent as to the requisite characteristics of an intermediary, who is simply described as “a person, approved by the Judge, placed next to the complainant.” Identical language is employed in s. 23F(3) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.

\textsuperscript{1642} No further guidance can be gained from an examination of the provisions of s. 29 of the Youth Justice and Criminal Evidence Act 1999 in England; it simply refers to “an interpreter or other person approved by the court for the purposes of this section (‘an intermediary’)”.

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person is suitably qualified to act as an intermediary pursuant to section 14.\footnote{In relation to the appointment of an intermediary in civil proceedings, s. 22(3) of the Children Act 1997 replicates exactly the provisions of s. 14(3) of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001. Section 22(3) of the Children Act 1997 provides that: "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." Section 20 provides that this facility is available in civil proceedings before any court, concerning either the welfare of a child or the welfare of a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently.}

4.15.7 Given the unique function performed by an ‘intermediary’ – in particular, his / her duty to transmit, by way of indirect cross-examination, the questions of the legal representatives – and in light of the requirement that justice not only be done but be seen to be done,\footnote{Irish Times Ltd v Ireland [1998] 1 IR 359, at p. 382, per Hamilton C.J. (S.C.). It is interesting to note, however, that one of the principal documents credited with starting the ‘evidential revolution’, the Pigot Report in England approved – albeit by a majority – of the appointment of a “person who enjoys the child’s confidence” as an intermediary: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot Q.C.) (London: Home Office, December 1989) para. 2.32., at p. 24. The difficulty with this proposition is that, in order to gain the child’s confidence, a person will have to disavow independence and develop a rapport with the child or relate sympathetically to the child. Such a relationship, while probably helpful in eliciting evidence from the child witness – since the child feels that the questioner is receptive to his / her needs or that he / she is believed by the examiner – runs contrary to the requirements of fairness or, at least, the appearance of fairness.} it seems reasonable that the person appointed as an intermediary should be impartial and independent of the cause of action and of the parties involved in the proceedings.\footnote{Home Office, Consultation Draft Guidelines for the use of an Intermediary under s. 29 of the Youth Justice and Criminal Evidence Act, 1999 (London: Home Office, March 2001) para. 2.3.1, at p. 5: “The intermediary is impartial and neutral and acts as a broker in order that best evidence may be obtained; however, ultimately his or her duties to the Court are paramount.”} If it is undesirable for a witness in the proceedings to act as a ‘support person’ to a child witness or complainant, then a fortiori it is undesirable for a witness\footnote{The difficulty presented by witnesses acting as intermediaries is premised upon their present involvement in the trial. Equally, with regard to the issue of eligibility of a person to act as an intermediary – considered below – s. 29 of the Youth Justice and Criminal Evidence Act 1999 raises a further difficulty which is not applicable in the context of the current Irish statutory scheme; namely, the extent to which a person who has a previous involvement as an intermediary in the collection of evidence which now forms part of the trial – in conducting a pre-trial interview with a child witness, the video recording of which is admitted into evidence – may also act as an intermediary at the trial. Given the need for the ‘trial intermediary’ to be independent and impartial in the performance of his / her functions and the possibility that, of the video recording admitted into evidence, parts thereof may have been deemed inadmissible by the trial judge and the ‘interviewing’ intermediary will be familiar with the entirety of the child’s evidence, it is submitted that it would be preferable, in the interests of the protection of the rights of the accused and the administration of justice, that there should be no identity of persons acting as intermediary at the two stages. See also: Consultation Draft Guidelines} – or potential witness\footnote{Consultation Draft Guidelines} – in the proceedings.
or even a close relative of the child witness\textsuperscript{1648} to act as an ‘intermediary’ pursuant to section 14.\textsuperscript{1649} Equally, it is submitted that it is desirable, as expressly provided for in England,\textsuperscript{1650} that an intermediary, prior to acting pursuant to his / her appointment in a criminal trial, should make a solemn declaration – in such form as may be prescribed by the rules of court – to faithfully perform his / her function as an intermediary\textsuperscript{1651} and, moreover, that an intermediary should be liable to prosecution for perjury in a like manner as an interpreter properly sworn in judicial proceedings.\textsuperscript{1652}

4.15.8 The related question as to whether it is also desirable for an ‘intermediary’ to possess any formal qualifications only really arises in relation to the second of the two functions expressly attributed to the intermediary

\textsuperscript{1647} See, for example, \textit{R v Mitchell} (1970) 114 S.J. 86 (C.A.) wherein the accused was charged with offences alleged to have been committed at a Chinese restaurant; the Court allowed his appeal against conviction, finding that the employment of an interpreter who was a waiter at the restaurant was irregular, since it was necessary to employ an interpreter who could have no bias.

\textsuperscript{1648} Parry, Gwynedd, R. “The Languages of Evidence” (2004) Crim LR 1015, at p. 1032: “A brother or other relative, or even a friend or acquaintance should always be ineligible, not only for the defendant, but for any witness.”

\textsuperscript{1649} McEwan, Jenny “In the Box or on the Box? The Pigot Report and Child Witnesses” [1990] Crim LR 363, at p. 367: “It would appear, also to flout the principles of natural justice if that individual was identified in any way with the prosecution of the case, directly or indirectly, and a defendant was nevertheless forced to conduct his defence through him or her”. See, however, the decision of the High Court of Justiciary in Scotland in \textit{Ucak v HM Advocate} 1998 SLT 392, 1998 JC 283 (H.C. Justiciary) wherein the applicant, a Turkish Kurd who did not speak English, alleged, \textit{inter alia}, that the \textit{interpreter} – as opposed to an intermediary – used by both the prosecution and the defence at his trial was connected with the authorities of which he was suspicious following his experiences in Turkey. The Court held that the accused’s detention, arrest and interview were not unfair since there was nothing to indicate that the accused had in any way suffered prejudice, let alone acted in any different way from that in which he would have acted if he had received appropriate legal advice translated into Turkish; the accused at all times maintained his innocence and made exculpatory statements in relation to the heroin found in his room. Furthermore, the Court held that the accused’s challenge to the interpreter’s involvement was devoid of merit because the accused never stated it prior to or during the trial and, in any event, he never suffered any actual prejudice as a result of the way in which the interpreter’s services were engaged.

\textsuperscript{1650} There is no equivalent provision in s. 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001 or in its civil counterpart, s. 22 of the Children Act 1997 in Ireland.

\textsuperscript{1651} Section 29(5) of the Youth Justice and Criminal Evidence Act 1999 in England.

\textsuperscript{1652} Section 29(7) of the Youth Justice and Criminal Evidence Act 1999. For the purposes of this section, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of s. 1 of the Perjury Act 1911, that proceeding shall be taken to be part of the judicial proceeding in which the witness’s evidence is given. See also the recommendation of the New Zealand Law Commission in its Preliminary Paper: \textit{The Evidence of Children and Other Vulnerable Witnesses} (Preliminary Paper No. 26, October 1996) para. 173 to the effect that an intermediary should be required to swear an oath prior to performing his / her function and, accordingly, would be subject to criminal sanction for any false or wilfully misleading statements.

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pursuant to s. 14 of the Criminal Evidence Act 1992, as amended. Where an intermediary is simply relaying the questions *as asked* to the child witness, using the same words employed by the questioner, it is difficult to determine a rationale for a requirement that the intermediary possess formal qualifications such as those described below.\(^{1653}\) However, where the intermediary is empowered to *alter* the wording used and to *substitute* for that wording, wording deemed more conducive to comprehension by a child witness, while *maintaining the meaning* of the questions originally put, it is submitted that the intermediary is performing a highly skilled task and that, in so doing, the intermediary would benefit from qualifications or training in ‘child psychology / linguistics’ – to aid the intermediary in establishing effective communication with the child witness and in determining what form of questions would be developmentally appropriate for the child\(^ {1654}\) – and law, since the intermediary must strive to preserve the meaning of the questions posed, including their legal significance in the context of a criminal trial.\(^ {1655}\) Such qualifications – while in keeping with the rationale

\(^{1653}\) It should be noted that, in the Pigot Report, the majority did not appear to envisage the second function attributed to the intermediary under subsequent legislation both in this jurisdiction and in England – s. 14 of the Criminal Evidence Act 1992 in Ireland and s. 29 of the Youth Justice and Criminal Evidence Act 1999 in England – namely, that the intermediary would not be confined to repeating verbatim the words used by the questioner (or child) but could rephrase the questions (or answers) in order to explain them. Thus, although the majority expressed no difficulty with the appointment, as intermediary, of a “person who enjoys the child’s confidence”, that is, without the necessity of formal qualifications, it should be remembered that such recommendation was made in the context of a proposed reform which would only permit such an intermediary to *relay* the questions posed by counsel to the child witness; it did not encompass the *explanation* of such questions, nor the communication or explanation of the child’s answers. See: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot Q.C.) (London: Home Office December 1989) Recommendation No. 6 in the Summary of Recommendations.

\(^{1654}\) As noted above, the earlier Pigot Report in England regarded the following persons as suitable intermediaries: a “paediatrician, child psychiatrist, social worker or person who enjoys the child’s confidence”. Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot Q.C.) (London: Home Office, December 1989) para. 2.32, at p. 24. See also Home Office, *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children* (London: Home Office Communication Directorate, January 2002) para. 5.80, at p. 122: “They will normally be a specialist, through training or unique knowledge of the witness, or have skills to overcome specific communication problems, such as those caused by deafness.”

underlying these reforms – are also desirable in providing a safeguard for the rights of the accused in light of the fundamental role performed by the intermediary in a criminal trial.

4.15.9 However, it is important to recognize that, in “a few very special cases” it may only be possible for a close relative, carer or friend of the child witness to establish effective communication with the child such as where the child utilises a distinctive form of language; such persons may be permitted to act as an intermediary if, following the evaluation of the child witness by a registered intermediary in relation to his / her capacity to communicate with others, the intermediary concludes that the relative, carer or friend alone can perform the function of an intermediary. However, in order not to misrepresent counsel and to avoid any question of bias, the observation that this person will have to be very skilled seems an understatement.


1657 Hoyano notes that difficulties arise in relation the use of intermediaries in respect of very young children who may have their own “argot”, since: “[I]t is unlikely that anyone other than a parent can be confident that he or she fully understands the child’s meaning, and most parents will concede that inference plays a large part in their understanding of what their very small children say. Yet it will be a rare case where the parent can be considered wholly disinterested in the outcome of the trial.” Hoyano, Laura “Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses” [2000] Crim LR 250, at p. 272. Hoyano concludes that it is much easier to make a case for an intermediary for a physically or mentally disabled witness than it is for a child of normal development”. See also: R v Duffy (Paula)(No. 1) [1998] 3 WLR 1060, [1999] QB 919 (C.A.) in relation to the use of an interpreter where the Court permitted a social worker to act as interpreter in relation to a witness with severe physical disabilities where the extent of the witness’s physical disability meant that the social worker was the only person who could communicate with him.

1658 A clear illustration of this solution to the communication difficulties presented by some witnesses – particularly child witnesses or witnesses with mental disabilities – is provided by the old authority, R v Whitehead (1866) L.R. 1 C.C.R. 33 (Court for Crown Cases Reserved). The prisoner was charged with assault with intent to ravish and rape a girl of seventeen years who was deaf and dumb. At the trial, it was proposed by counsel for the prosecution to examine the child through the medium of her father, who asserted that both he and her sister could communicate with the prosecutrix by means of arbitrary signs and motions, since she had never received instruction in the deaf and dumb alphabet. The father was duly sworn and asked to explain to the child the obligation of an oath, however, he contended that he believed his daughter was unaware of the nature and obligation of an oath, although she had attended Sunday school, and he was not prepared to say she believed in a future state or future rewards and punishments. The trial judge called an expert witness, who attempted to communicate with the prosecutrix, and, more particularly, to ascertain the extent of her understanding of the nature and consequences of an oath. The expert declared himself satisfied that he could understand her signs and gestures, and make himself understood by her, and, accordingly, she was deemed competent by the court to give sworn evidence. Thus, the girl proceeded to give evidence, with the expert acting as an interpreter. However, in the course of her evidence, it transpired that, contrary to his initial belief, the expert was not able to communicate with the girl and make himself understood to her; she answered every question posed in the affirmative, thereby asserting, inter alia, that she had consented to the prisoner’s actions and that she knew the expert. The evidence of the prosecutrix was, accordingly, withdrawn from the jury. The Court (Pollack C.B.) affirmed the conviction and held that it was
the interests of safeguarding the rights of the accused, it is submitted that such person must not have any direct or indirect involvement in the events the subject matter of the proceedings and there must be no possibility that such person might himself/herself be a potential witness.

4.16.0 *Function of a Support Person and an Intermediary*

4.16.1 If a support person is intended as part of his/her ‘facilitative function’ to provide ‘support’ to a child witness while he/she gives evidence,\(^{1659}\) the key question becomes: how supportive may a ‘support person’ be?

4.16.2 In terms of *physical* support or contact, the jurisdictions vary with regard to the degree of proximity permitted between the support person and the child witness while the child is giving his/her evidence from permitting the support person to “be close to the witness while the witness testifies”\(^{1660}\) or permissible for the trial judge to withdraw the evidence of the prosecutrix from the consideration of the jury and to leave the case to the jury upon the evidence of the other witnesses: “A witness was sworn to interpret, who thought that he had got into communication with the prosecutrix’s mind. Of that notion he was soon disabused; and the judge, when he found her incompetent, did what he had a perfect right to do - he withdrew her evidence, and directed the attention of the jury merely to the testimony of the other witnesses. That would not prevent the jury from taking notice of anything in the conduct of the prosecutrix which might seem to be favorable to the prisoner.”

\(^{1659}\) The Law Reform Commission of Ireland stated that the role of the support person is “to guide the child through the criminal justice process, including familiarizing the child with courtroom practice and courtroom personnel”: Law Reform Commission, *Consultation Paper on Child Sexual Abuse* (August, 1989) para. 7.085, at p. 176. Similarly, the New Zealand Law Commission saw the role of the support person as a provider of emotional support rather than a “McKenzie friend” or lay advisor: New Zealand Law Commission, Preliminary Paper: *The Evidence of Children and Other Vulnerable Witnesses* (Preliminary Paper No. 26, October 1996) Chapter 6, para. 164. In *McKenzie v McKenzie* [1970] 3 All ER 1034, it was held that an unrepresented litigant was entitled “to have a lay friend in Court to assist by giving advice and taking notes; but the friend may not act as an advocate”. See also: *Mihaka v Police* [1981] 1 NZLR 54 (C.A.).

\(^{1660}\) Section 486.1(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, provides that: “In any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who has a mental or physical disability, order that a support person of the witness’ choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.” See: *R v Peterson* (1996) 106 CCC (3d) 64, in which the child’s father was permitted to sit near a six-year-old child in the room from which video-linked testimony was being transmitted. See also: *R v Forster* [2006] BCJ No. 1262 (B.C. Prov.Ct.) (adult complainant of sexual assault with mental and physical disabilities; Court allowed a support person to accompany the witness but ordered that the support person not stand next to the witness in the witness box during her evidence but sit in counsel’s row of seats near where the witness box was located);
to be “present alongside the witness to support the witness while the witness is giving evidence”\textsuperscript{1661} – that is, either in or near the witness box – to allowing the support person to take the child witness onto his / her lap for the duration of the child’s evidence where the child witness is very young.\textsuperscript{1662} While the proximity of the support person to the child witness is important in ensuring the efficacy of this special measure, it may also operate to heighten any prejudicial perception of the accused by the jury\textsuperscript{1663} – examined below – since the degree of proximity may be thought to reflect the level of the child’s fear of and need for protection from the accused.

4.16.3 More interesting still is the divergence of approach taken in relation to the difficulties inherent in – and the prejudicial effect of – emotional support in the form of verbal communication between the support person and the child witness. It is arguable that permitting the support person to utter words of reassurance or support is entirely consistent with his / her ‘facilitative function’ and that, where a child witness is experiencing difficulty in giving evidence – either at all or coherently and completely – such words of comfort are more advantageous than disadvantageous; the desirability of obtaining the best evidence outweighs any possible prejudice to the

\textsuperscript{1661} See: s. 271L(1) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004.

\textsuperscript{1662} Law Reform Commission, \textit{Consultation Paper on Child Sexual Abuse} (August, 1989) paras. 7.085, at p. 176 and 7.098, at p. 180, and Recommendation No. 50, at p. 207. Law Reform Commission, \textit{Report on Child Sexual Abuse} (LRC 32-1990) (September, 1990) para. 7.34, at p. 81 and Recommendation No. 60, at p. 96. Equally, the New Zealand Law Commission determined that, in appropriate cases, physical contact would be appropriate, including taking a young child witness into his or her lap: New Zealand Law Commission, Preliminary Paper: \textit{The Evidence of Children and Other Vulnerable Witnesses} (Preliminary Paper No. 26, October 1996) (NZLC PP 26) Chapter 6, para. 164. Beresford, Stuart “Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?” (2005) \textit{Journal of International Criminal Justice} 3.3(721): “To provide emotional support, such persons are permitted to be close to the child while they are giving evidence and, in certain cases, physical contact may be appropriate. Although to ensure procedural fairness, support persons are not permitted to speak to or otherwise prompt the child while giving evidence, except to provide encouragement. More importantly, they are prohibited from coaching a child in the witness box or during any breaks in cross-examination.”


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accused. However, permitting such communication risks creating an uneven balance between the rights of the accused, the protection of the child witness and the proper administration of justice, by according insufficient weight to the rights of the accused.

4.16.4 The support person appears to enjoy a somewhat narrower ambit of influence in this jurisdiction than in some of the other jurisdictions examined herein, particularly with regard to the level of communication considered acceptable. While the provision of a support person is considered a "perfectly legitimate procedure" in this jurisdiction, this acceptance is conditional upon an absence of communication "of any sort" between the witness and the support person. This would appear to prohibit even words of comfort or reassurance by the support person while the child witness is giving his/her evidence.

4.16.5 The approach in England, on the other hand, is more permissive and a limited form of communication between the support person and the child

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1664 The argument runs that, without the words of encouragement, some child complainants might be unable to give evidence at all or to give coherent or comprehensive evidence, therefore such encouraging or comforting words should not be prohibited in circumstances where the possible prejudice to the accused is arguably minimal. In line with the English approach, the New Zealand Law Commission was of the view that support persons should not normally speak to the witness while giving evidence, "except perhaps to give encouragement": New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, October 1996) Chapter 6, para. 160. In its subsequent Report on Evidence, the New Zealand Law Commission stated - somewhat ambiguously - that it was "not expected" that the support person would speak to the witness while he or she was giving evidence: New Zealand Law Commission, Evidence – Reform of the Law (Report No. 55, Vol. 1, 1999) Chapter 14, paras. 363-367.

1665 The approach of the Irish courts towards this special measure is illustrated by The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141 (C.C.A.), wherein the Court of Criminal Appeal considered the use of a support person as an unobjectionable means of facilitating the reception of evidence of sexual abuse at the hands of her father, from the complainant, a twenty year old woman with Downs Syndrome; the complainant experienced some difficulty and embarrassment in giving her evidence and, accordingly, the trial judge, at the request of the complainant, permitted her to have to her mother sit beside her near the witness box during her evidence, as a support person. Walsh J. stated at p. 147 that: "It appears from the transcript of the evidence that the daughter had some difficulty, and indeed embarrassment, in giving her evidence. At one stage she asked, and was permitted, to have her mother sit beside her near the witness box." The trial judge, with the agreement of both parties, also excluded from the courtroom all persons except the witnesses in the case, pursuant to s. 20 of the Criminal Justice Act 1951.

1666 Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.098, at p. 179: "This is a perfectly legitimate procedure, provided there is no communication of any sort between the witnesses and the 'support person'". (Emphasis added).
witness will not necessarily render the trial unfair.\textsuperscript{1667} Indeed, the English Court of Appeal in the leading case, \textit{R v Smith},\textsuperscript{1668} approved an arrangement whereby, with the leave of the court, a social worker,\textsuperscript{1669} acting as a support person, was permitted to sit close enough to a child complainant of sexual offences to enable the social worker to speak to the child in a way inaudible to the jury while consoling the child when she cried during her evidence.\textsuperscript{1670} While the Court recognised that it was “only human” that the social worker, or any person fulfilling the role of a support person, would want “to utter some words of comfort when a child becomes distressed while being questioned”, it warned that it was important that a support person should not speak or whisper to a child witness during his / her testimony since such words would be inaudible to the court and the jury and – contrary to the appearance of justice – could give rise to the suspicion that something was being said about the evidence; the support person should “discipline himself or herself and say as little as possible, and preferably nothing in these circumstances”. It is worth noting, however, that the Court, in giving this guidance, appeared to admit of “a consoling word or two” being uttered by the social worker to the distressed child witness, without arousing the suspicion of those present or prejudicing the accused.

\textsuperscript{1667} In the English case, \textit{R v X, Y and Z} (1990) 91 Cr App R 36, [1990] Crim LR 515 (C.A.), counsel on behalf of Z argued that the presence of social workers sitting alongside the child witnesses – in order to comfort and console the children where necessary – when they gave evidence of sexual abuse at the hands of the appellants, was an unfair disadvantage to Z. The Court of Appeal acknowledged at p. 42 that the provision of a support person during the giving of evidence by a child witness was a course of conduct which should be undertaken with considerable care and that the court “must be astute to see nothing improper passes or no undue encouragement is given to the child witnesses which might make them say something other than the truth”. However, it was held that, having regard to the facts of the case, there was no suggestion that the social workers had done “anything other than that which was perfectly proper” when sitting in close proximity to the witness.\textsuperscript{1668} \textit{R v Smith} [1994] Crim LR 458 (C.A.).

\textsuperscript{1669} The trial judge – on the application of the prosecution – had permitted the social worker, who was well known to the child complainant, to sit near the child while she gave her evidence, on the condition that she, the social worker, would play no part in the giving of evidence by the complainant.\textsuperscript{1670} The first ground of appeal – from the appellant’s convictions for rape and gross indecency with a child, aged twelve years – involved criticism of the part played in the case by a social worker who sat beside the girl when she gave evidence, consoling and talking quietly to the witness when she broke down in tears during her evidence, however, this ground of appeal was, in fact, abandoned during the appeal itself. Nonetheless, the court dealt with the matter “in order to provide a measure of guidance in cases of this kind”.

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4.16.6 While it is submitted that the result achieved in this case was incorrect and contrary to the rights of the accused in light of the real or serious risk of unfairness to the accused, nonetheless the guidance provided by the Court of Appeal as to the proper procedure to be adopted in similar cases is instructive. It recommended that the trial judge should make clear publicly the necessity for no communication – or, at the very most, only a word of comfort – to take place between the support person and the child witness when the support person joins the child in or near the witness-box.\textsuperscript{1671} Furthermore, if defence counsel had reason to believe that there had been some such irregular communication – particularly where, as was suggested in this case, the trial judge could not see what was happening – the proper course was for counsel to ask the trial judge to direct the jury to withdraw so that the matter could be investigated and appropriate warnings could be given.\textsuperscript{1672} The jury should then be reassured that nothing improper had taken place.

4.16.7 These procedures represent important safeguards for the rights of the accused and are instrumental in preserving the delicate balance which the trial judge must seek to achieve in order to avoid the risk of prejudice to the accused arising from the child witness’s reliance on a support person during his / her evidence.\textsuperscript{1673}

\textsuperscript{1671} See s. 486.1(5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15 in Canada, which provides that the judge or justice “may order that the support person and the witness not communicate with each other while the witness testifies”. See also: Mian, Marcellina, Haka-Ikse, Katerina, Lefkowitz, Myra and McGoey, Christine “The Child as Witness” (1991) 4 C.R. (4th) 359: “The support person should be instructed ahead of time to make no motion or sound and not to interfere with the questioning of the child in any way.”

\textsuperscript{1672} Section 486.1(6) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15 provides that: “No adverse inference may be drawn from the fact that an order is, or is not, made under this section”. See also: Mcginley (Michael) v HM Advocate 2001 SLT 198 (H.C. Justiciary).

\textsuperscript{1673} \textit{R v Smith} [1994] Crim LR 458 (C.A.). It is interesting to note that the test applied by the Court of Appeal was whether there was or may have been “a real danger that the jury may have been prejudiced or affected against the appellant by what they may have seen”, a test which, undoubtedly, has application far beyond the facts of this case and may also apply in relation to the new statutory special measures in England since it appears to be an expression of the court’s inherent jurisdiction with regard to the balancing of the rights and interests of the parties involved in the proceedings. In commenting on this case, Uglow, Steve \textit{Evidence: Text and Materials} (1997) noted at pp. 401-402 that the assistance provided by a support person is “not a material irregularity”, however, he warned that “[i]f the judge should reduce the strain on child witnesses without prejudicing the interests of the defendant”. He concluded that: “Unfortunately children are often called upon to give evidence in
Contrary to the function performed by a support person, an intermediary is not intended to be supportive of or sympathetic to the child witness; rather, as indicated above, the intermediary is required to avoid even the perception of bias throughout the questioning of the child and to act simply as the ‘interpretative channel’ through which questions are directed and – in some instances considered below – answers are given. An intermediary is intended to overcome the difficulties presented by applying adult standards and techniques of cross-examination to child witnesses by rephrasing the questions posed in a developmentally appropriate manner which takes into account children’s ‘different ways of knowing’ and enables the legal representatives to speak to the child in a language he / she can understand and to which he / she can respond effectively.

Some of the common features of cross-examination which children are particularly ill-equipped to comprehend and in the face of which they experience serious difficulties sustaining their narrative – regardless of the sexual cases when they have been victims. The courts have devised a number of ways in which the strain upon the child can to some extent be alleviated. In the final analysis it is the task of the learned judge to order a procedure, if possible of course with the agreement of parties, which, so far as possible, can give support and comfort to the child on the one hand without prejudicing the interests of the accused on the other. The task is not always easy because a form of protection to the child may in an accused person’s mind seem to cause some prejudice to him.” See also: Choo, Andrew, Evidence: Text and Materials (1998) at p. 121.

Law Reform Commission, Consultation Paper on Child Sexual Abuse (August, 1989) para. 7.092, at p. 178 and Recommendation No. 44, at p. 201, envisaged that the role of the child examiner – as a disinterested examiner skilled in child psychology and language – would be to “establish and maintain rapport and ease of communication with the child witness while remaining detached from the issues”. See also: Law Reform Commission, Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.21, at p. 76.

As noted above, the rationale underlying the appointment of an ‘intermediary’ through whom the questioning of a child witness is conducted is that the complex terminology, structure and phrasing of questions, and the techniques employed in cross-examination are often too sophisticated for child witnesses, who can be easily confused or persuaded to abandon their account and/or accept an alternative account – even where the child’s account is the truth – or even cease giving evidence altogether.

See also: 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ 2001 L82/1 (Celex No. 201F0220), article 5 which provides that: “Each Member State shall, in respect of victims having the status of witnesses or parties to the proceedings, take the necessary measures to minimise as far as possible communication difficulties as regards their understanding of, or involvement in, the relevant steps of the criminal proceedings in question, to an extent comparable with the measures of this type which it takes in respect of defendants”. 481
veracity of such account — include: (i) the use of negatives, double negatives or nominalization; (ii) the use of “advanced vocabulary and legal terminology” such as “allegation, minor, competent, hearsay, charges, defendant and jury”; (iii) the use of compound or multi-part questions containing a number of propositions, since children fail to understand that by responding to part of the question posed, they may be taken as responding to the whole; (iv) the use of leading questions, suggestion, or dominance by the questioner through “pre-emptive interruption, reminders, objection and insistence on proper answers”; (v) the use of the ‘agreement technique’, which involves the questioner asking a number of questions of the witness in rapid succession, each designed to elicit agreement, followed immediately by a controversial question which addresses a fact in issue in the proceedings, with a view to obtaining a favourable response from the witness, who is, by now, ‘in the habit’ of

Australian Law Reform Commission, Report: Seen and Heard: Priority for Children in the Legal Process (ALRC Report No. 84) (1997) para. 14.110: “These techniques can have the effect not only of preventing a child witness from describing events in the order in which the child remembers them but also of maximising the possibility of confusing the child and of contaminating the child’s memory. Indeed, these questioning techniques are used for this very purpose.”

Myers J., Saywitz K., and Goodman G. found in their study, “Psychological research on children as witnesses: practical implications for forensic interviews and courtroom testimony” (1996) 28 Pacific Law Journal 3, at p. 54 that the child witnesses examined did not comprehend these key terms used in criminal proceedings. Saywitz, Karen, “Developmental Underpinnings of Children’s Testimony” in Westcott, Helen, Davies, Graham and Bull, Ray (eds.) Children’s Testimony: A Handbook of Psychological Research and Forensic Practice (2002) 1, at p. 4: “[C]hildren have difficulty understanding the meaning of adults’ words. Even the most common legal terms can be unfamiliar to children under 10 years of age. To a young child, a hearing is something you do with your ears, a court is a place to play basketball, and charges are something you do with your credit card. They are unaware that adults use alternative meanings in the forensic context. With adults, we assume a common vocabulary and need not choose our words so carefully.” See also: Saywitz, K., “Children’s Conceptions of the Legal System: ‘Court is a Place to Play Basketball’” in (eds.) Ceci, S.J., Ross, D.F., Toglia, M.P. Perspectives on Children’s Testimony (1989).


Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, A Private or Public Nightmare? (Wellington: October, 1988) (the “Geddis Report”) at p. 20: “During cross-examination child victims are especially likely to have their credibility attacked. This attack may not be as overt as that levied on an adult, but tactics used by lawyers to discredit children can include: inappropriate language in relation to the child’s age e.g. the use of double negatives, ‘big’ words and difficult sentence constructions; use of leading questions to confuse the child and to demonstrate suggestibility; questions about irrelevant, peripheral details, or about the specific order of events that occurred many months ago; highlighting their inability to provide some types of objective information, e.g. judgments concerning standard units of measurement.”

agreeing with the questioner or acceding to his / her suggestion; (vi) repetition of questions, in an attempt to elicit differing responses from the child witness and thereby attack the child’s credibility as a witness; and/or (vii) rapid movement between unrelated topics, which technique is designed to confuse even an honest child witness. Indeed, it is asserted that “[c]ross-examination is that part of the proceedings where the interests and rights of the child are most likely to be ignored and sacrificed.”

4.16.10 While the use of these techniques is consistent with the obligations of defence counsel towards the accused, it is submitted that, aside from the

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1682 Parry, Gwynedd R. “The Languages of Evidence” (2004) Crim LR 1015, at p. 1015: “Research has suggested that one of the common methods utilised by cross-examiners is the use of inappropriate language. Through the use of various devices, including advanced vocabulary, complex grammatical constructions and multifaceted questions, advocates can gain advantage over immature and unsophisticated language users, thereby manipulating their evidence and creating the desired result of undermining their credibility. Moreover, these techniques and their effect on a witness can be quite critical in cases where the witness is vulnerable because, for example, of their age, intelligence or other disability.” See also: Ellison, Louise “The Mosaic Art?: Cross-examination and the Vulnerable Witness” (2001) 21 L.S. 353, at pp.354-358; and McEwan, Jenny “Special Measures for Witnesses and Victims” in McConville, Mike and Wilson, Geoffrey (eds.), The Handbook of the Criminal Justice Process (2002), at p. 237.

1683 Brennan, M. and Brennan, R Strange Language: Child Victims Under Cross-Examination (3rd ed., 1988) at p. 3. Australian Law Reform Commission, Report: Seen and Heard: Priority for Children in the Legal Process (ALRC Report No. 84) (1997) para. 14.111: “The contest between lawyer and child is an inherently unequal one. Child witnesses are often taken advantage of because they can be easily confused and intimidated, because they are unable to match the linguistic skills of experienced lawyers or because, unlike the lawyer, they are in a hostile, alien environment....They are clear examples of the legal abuse of children.”

1684 Counsel acting on behalf of an accused person is obligated to use every legitimate means to secure the acquittal of the accused which may result in a form of cross-examination – involving any or all of the above techniques – which is designed to upset the child and disturb his / her narrative in order to undermine the child’s credibility as a witness. Although the Bar Council Code of Conduct provides that a barrister has an overriding duty to the court to ensure, in the public interest, that the proper and efficient administration of justice is achieved and further requires the barrister to assist the court in the administration of justice – in particular, counsel is prohibited in para. 2.2, from deceiving or knowingly misleading the court – the Code also clearly states that a barrister must “promote and protect fearlessly and by all proper and lawful means his client’s interests and do so without regard to his own interest or to any consequence for himself or to any other person”: Bar Council of Ireland, Code of Conduct, para. 2.3. (In relation to the barrister’s duty not to deceive or knowingly mislead the court and the corresponding duty to take appropriate steps to correct any misleading statement made as soon as possible after he / she becomes aware that the statement made was misleading, see: para. 5.3.) It is further emphasized that, subject to the provisions of the Code, “a barrister should defend the interests of his client in a way which he considers to be to the client’s best advantage and within the limits of the law”: para. 5.7. See also para. 9.14 which provides that a barrister “is under a duty to defend any accused person on whose behalf he is instructed regardless of any belief or opinion he may have formed as to the guilt or innocence of that person”. Moreover, it is important to note that an order of certiorari may be granted in respect of any conviction obtained in proceedings in which the interventions of the Court and the attitude of the Court to the valid objections of counsel amounted to

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harm which may result to the child witness, such conduct – although permissible – is not necessarily productive of justice and may even undermine the administration of justice; the confusion, distortion or even loss of prosecution evidence resulting from the use of any or all of the above techniques is inconsistent with one of the fundamental rationales of the law of evidence, namely, the pursuit of the truth through the rational ascertainment of facts. In this regard it is reiterated that this form of cross-examination, like many other key characteristics of the adversarial trial as traditionally formulated, while intended to ascertain the true account of events by revealing and exploring inconsistencies, fabrications and falsehoods within the evidence of the witness, when applied to child witnesses, are truth-defeating; they are more often productive of confusion or uncertainty – even in a truthful witness – than of a coherent account, or, ultimately of justice.


1685 It was this concern which prompted the Law Reform Commission in this jurisdiction to assert, in advocating this reform, that “too high a price is being paid for the right to conduct a wholly uninhibited and ‘direct’ cross-examination of a child witness”: Law Reform Commission, Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.23, at p. 77.

1686 Eilison, Louise “Cross-Examination and the Intermediary: Bridging the Language Divide?” [2002] Crim LR 114, at p. 118: “The...gulf between the linguistic capacity of the witness and the demands of cross-examination questions has been shown to have a significant adverse effect on the ability of witnesses to provide accurate and coherent testimony.” See also: Roberts, Paul and Zuckerman, Adrian, Criminal Evidence (2004) at p. 215: “[I]n recent times cross-examination has attracted a barrage of criticism, to the point where it is now widely regarded as an obstacle rather than the royal road, to effective forensic fact-finding”.

1687 It is accepted however, that the flaws in the traditional methods of cross-examination when applied to child witnesses, while representing a persuasive argument for reform of such methods, do not necessarily require that cross-examination of child witnesses be conducted by an independent third party – such as an intermediary – skilled in the questioning of children; rather legal representatives and trial judges ought to receive specialist training in the examination and cross-examination of child witnesses in a developmentally-appropriate manner which, while not making undue concessions to the child witness, recognises the different needs of child witnesses and, ultimately, is more productive of justice in individual cases. It is also worth noting the observation of the minority of the Advisory Group on Video Evidence to the effect that the use of an intermediary would “hinder rather than assist counsel in conducting the case” and, more importantly, that the difficulties presented by the non-communicative child witness “should be overcome by allowing greater opportunities for counsel to establish a rapport with a child witness before the hearing takes place” thus dispensing with the need to interpose a “person who enjoys the child’s confidence” between the legal representatives and the child witness during questioning: Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot Q.C.) (London: Home Office, December 1989) para. 2.33, at p. 24. (Emphasis added). See also Beresford, Stuart “Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?” (2005) Journal of International Criminal Justice 3.3(721) who asserts that “an intermediary should only be appointed where the judges lack the appropriate skills and training to rephrase the questions of the parties. In
4.16.11 Once the court has authorised the appointment of an intermediary pursuant to s. 14, questions to be put to the child witness are channeled through the intermediary who is expressly empowered to either put the questions to the child witness: (i) using "the words used by the questioner"; or (ii) "so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions asked". Thus, s. 14 contemplates a far greater role to be played by the intermediary than merely acting as a conduit for the questions posed to the child witness or a friendly face interposed between the questioner and the child witness; the intermediary is expressly empowered to depart from the language used by the questioner in order to phrase the questions in an age-appropriate or developmentally suitable manner. Moreover, it would appear that, in performing this second function, the intermediary is not confined to substituting for the words used by the questioner, words of his / her own choosing – unlike an intermediary appointed in applicable civil proceedings under the equivalent statutory provisions – but is arguably also entitled to use gestures, diagrams or even anatomically correct dolls in order to convey the meaning of the questions posed to the child witness by the questioner. The constitutionality of these ‘dual functions’ of the intermediary in this jurisdiction is examined below.

any case, it is not proposed that an intermediary interprets the child’s response to the court. It is envisaged the intermediary merely rephrases the party’s questions in order to elicit a clear and unambiguous response from the child.”

Section 14(2) of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001.

Almost identical provision is made by s. 22(2) of the Children Act 1997 with regard to civil proceedings, before any court, concerning the welfare of a child or a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently: s. 20(a) and (b) of the Children Act 1997. Section 22(2) of the Children Act 1997 provides that: “Questions put to a child through an intermediary under this section shall be either in the words used by the questioner or in words that convey to the child, in a way that it appropriate to his or her age or mental condition, the meaning of the questions being asked”. Accordingly, both provisions share the same understanding of the function of an intermediary, however, it would appear that the ‘interpretative’ function accorded to an intermediary in applicable civil proceedings is narrower than that enjoyed by an intermediary appointed under s. 14 of the Criminal Evidence Act 1992, as amended, since the former is restricted to using “words” to convey the questioner’s meaning to the child witness, while the latter provision contains no such express restriction.

See sections 4.18.0-4.18.28 below in relation to the impact upon the accused of the use of a support person or an intermediary.
4.17.0 The Unrepresented Accused

4.17.1 The appointment of an intermediary also circumvents the difficulties raised by the unrepresented accused person and the resulting additional trauma which may be suffered by the child witness / complainant in the face of cross-examination by the accused in person: (i) where the offence or offences with which the accused is charged — such as sexual offences or offences of neglect — require evidence of an intimate nature; or (ii) where the accused person stands in a position of power, authority or even dominion over the child; or (iii) where, for any other reason connected with the nature of the offence or the nature of the relationship between the accused and the child, the cross-examination of the child witness / complainant by the accused in person may result in the distortion or even total loss of the child’s evidence\(^{1691}\) which, in turn, may adversely impact upon or even frustrate the proper administration of justice.\(^{1692}\) In particular, it is noted that:

“When child complainants in abuse cases are cross-examined by an unrepresented accused, they have to cope with additional stresses. They must make eye contact with, and respond to questions from the accused when they can still be responsive to the cues the accused employs. They can be frightened and intimidated by prior threats, or retain a sense of loyalty to the accused. Under these conditions, children are unlikely to provide the court with the best evidence of

\(^{1691}\) The Law Reform Commission noted in its Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) in para. 7.21, at p. 76 that: “Despite every effort to shield the complainant by screens or the use of closed-circuit television, where an accused represented himself, as happened, for example in the case of DPP v T (1984-9) 3 Frewen 141 the complainant would hear his voice and would have to answer his questions which would undoubtedly be couched in intimate and upsettingly familiar terminology”. See also Charleton, P., McDermott, P.A., and Bolger, M., Criminal Law (1999) wherein it is suggested in para. 8.82, at p. 600 that a ‘child examiner’ — herein referred to as an intermediary — might be interposed on both sides where there is a danger that domination is the object of the proposed cross-examination.

\(^{1692}\) The Law Reform Commission cautioned that, in cases where the accused was representing himself, the child witness should not be placed “at so serious a disadvantage as to create the possibility of real injustice”: Report on Child Sexual Abuse (LRC 32-1990) (September, 1990), para. 7.22, at p. 77.
which they are capable and are likely to experience an unacceptable level of stress.\textsuperscript{1693}

4.17.2 It would appear that, in recognition of these difficulties, an intermediary may be employed in New Zealand where the accused is unrepresented in order to prevent the cross-examination of the child witness by the accused in person, although the function of such intermediary is limited to mere repetition of the questions as framed by the accused person – or his / her legal representatives – to the child.\textsuperscript{1694}

4.17.3 There are, however, a number of alternative solutions to the problem of the ‘unrepresented accused’.\textsuperscript{1695} First, the courts enjoy a broad discretionary power at common law to control the questioning of a witness during cross-examination by an accused in person and to prohibit questioning designed merely to intimidate or distress\textsuperscript{1696} and to intervene to prevent unnecessary


\textsuperscript{1694} A person accused of sexual offences is restricted from cross-examining a child complainant in person, however, he / she may put questions to the complainant by stating the questions to “a person approved by the Judge” – whether by means of an appropriate audio link or otherwise – who must then repeat the questions to the complainant: s. 23F(3) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989. See also: Law Reform Commission of Western Australia, Report on Evidence of Children and Other Vulnerable Witnesses (Project No 87, 1991 ) at para 6.44 and 6.47.

\textsuperscript{1695} See also White v Ireland [1995] 2 IR 268, at p. 281, per Kinlen J. (H.C.) wherein Kinlen J. advocated judicial modification of the live television link in circumstances where the accused was unrepresented and was conducting the cross-examination of the child witness in person: “The trial judge is in complete control of all the equipment. He will act in accordance with constitutional and natural justice and will ensure that there are fair procedures. If the accused is defending himself the judge can decide whether or not to make his image available to his accuser. In those circumstances his voice must personally be transmitted but not necessarily his image. This is because there are two rights here, that of the accused, and that of the child witness or accuser. If despite my finding the accused has a constitutional right to the physical presence in the same room rather than a physical manifestation by television, that ‘right’ must yield to the ‘rights’ of a young child.”

\textsuperscript{1696} However, the power of the court to intervene in questioning or cross-examination of a witness is not unlimited but rather is subject to the accused’s right 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”: The State (Healy) v Donoghue [1976] IR 325, at pp. 348-349, per O’Higgins C.J. (S.C.), quoting from the decision of Gannon J. in the High Court. See also: Gill v District Judge Connellan [1987] IR 541 (H.C.); Dineen v District Judge Delap [1994] 2 IR 228 (H.C.); O’Brien v Ruane [1989] IR 214, at p. 216; The People (Director of Public Prosecutions) v
repetition or vexatious cross-examination. Accordingly, in *R v Brown (Milton)* the Court of Appeal in England held that it was the duty of trial judges to do all they could, consistent with the accused’s right to a fair trial, to minimize the trauma suffered by other parties to the proceedings and, in particular, to intervene to protect a witness or complainant of sexual offences where the accused employed humiliating, intimidating or abusive questioning.

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1697 Richardson P.J., (ed.) *Archbold, Criminal Pleading, Evidence and Practice,* (2003) para. 4.313, at p. 443: “It is the duty of a judge to stop irrelevant evidence. In deciding whether evidence is irrelevant a judge may have a difficult decision to make; but, in considering the interests of justice, the interests of the prosecution have to be taken into account as well as those of the defence.” See also: s. 23F(5) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 in New Zealand which provides that: “Where the complainant is being cross-examined by counsel for the accused, or any questions are being put to the complainant by the accused, the Judge may disallow any question put to the complainant that the Judge considers is, having regard to the age of the complainant, intimidating or overbearing”.

1698 *R v Brown (Milton)* [1998] 2 Cr App R 364 (C.A.). The accused in this case, in the conduct of his defence and cross-examination in person, subjected the two complainants of rape to “repetitious and irrelevant questions designed to intimidate and humiliate them”. The Court of Appeal cautioned that a defendant should not be permitted to gain an advantage – through acting contrary to the rules in relation to relevance or repetition – which he / she would not otherwise have enjoyed, had the cross-examination of the witness been conducted via a legal representative; to this end, the trial judge should, prior to the cross-examination, discuss the course of questioning with the defendant in the absence of the jury and make it clear that repetition, unnecessary or vexatious cross-examination was not permitted and that, where it occurred, the judge would intervene and, if necessary, conduct the questioning personally. Lord Bingham held at p. 371 that: “It is the clear duty of the trial judge to do everything he can, consistently with giving the defendant a fair trial, to minimize the trauma suffered by other participants...[T]he judge should, if necessary in order to save the complainant from avoidable distress, stop further questioning by the defendant or take over the questioning of the complainant himself: If the defendant seeks by his dress, bearing, manner or questions to dominate, intimidate or humiliate the complainant, or if it is reasonably apprehended that he will seek to do so, the judge should not hesitate to order the ejection of a screen, in addition to controlling the questioning in the way we have indicated”.

1699 *R v Brown (Milton)* [1998] 2 Cr App R 364 (C.A.) In addition, the trial judge was entitled to authorize the use of a screen to protect the witness where the accused sought by his dress, bearing, manner or questions to dominate, intimidate or humiliate the witness, or if it was reasonably apprehended that he / she would seek to do so; where such steps were taken by the trial judge having due regard to the interests of all parties, Bingham C.J. stated at p. 372 that the Court of Appeal would be slow to interfere with the trial judge’s exercise of discretion or to overturn any resulting conviction unless there was clear evidence of injustice. Birch D., “A Better Deal for Vulnerable Witnesses?” [2000] Crim LR 223, at p. 247 was so impressed with this decision and the guidelines which it espouses for the judicial exercise of this common law to prevent oppressive cross-examinations that
4.17.4 In addition to protecting a vulnerable or intimidated witness, such power may equally be employed to protect the interests of an accused person where his / her cross-examination of a witness in person reveals matters prejudicial to his / her defence. As indicated in the decision of the Court of Criminal Appeal in The People (Director of Public Prosecutions) v J.T., the trial judge has a duty to protect the interests of the accused where he / she represents himself / herself; such duty is not, however, absolute and can be satisfied – as in this case – by the advice of the trial judge to obtain legal representation and a warning to the accused to the effect that he should confine himself, in cross-examination of the complainant of sexual offences, to that which had been said by the witness in examination-in-chief.

she opined that the statutory provisions contained in the Youth Justice and Criminal Evidence Act, 1999 in England were, perhaps unnecessary, or, at the very least, less necessary than other reforms of the law of evidence in the interests of vulnerable witnesses. Accordingly, it appears that this power strikes an appropriate balance between competing interests; the trial judge’s powers of intervention can benefit both the child witness and the accused through active judicial supervision of the conduct of the trial.

1701 The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141 (C.C.A.).

1702 See the English decision, R v Smith (Brian George) [2004] EWCA Crim 2414 (C.A.), determined before the entry into force of ss. 34 and 35 of the Youth Justice and Criminal Evidence Act 1999, wherein the trial judge personally conducted the cross-examination of the two child complainants on behalf of the unrepresented accused. The Court of Appeal rejected suggestions made on appeal that the cross-examination so conducted was insufficient and that, the trial judge ought to have conducted a more extensive cross-examination. The Court held that there had been a reason for the great caution adopted in the manner in which the cross-examination of the child complainant and his brother had been conducted by the trial judge, namely the risk of putting before the jury the accused’s prior record of convictions as a paedophile. While the Court accepted that there were many questions that could have been asked of the children, it noted that every question increased the risk of something damaging emerging and concluded that there was no unfairness in the trial judge proceeding as he did; he complied with the law as it was at the time and there was nothing inadequate about his cross-examination of the complainant and his brother. See also: R v Cameron [2001] Crim LR 587 (C.A.).

1703 The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141, at p. 148, per Walsh J. (C.C.A.): “At one stage the judge warned the accused that it was in his own interest to confine his cross-examination to what the witness had said in the witness box and not to introduce a lot of other prejudicial material. The Court is of the opinion that the applicant, in refusing to heed the judge’s warning, undoubtedly damaged his case in the eyes of the jury.” Contrary to the advice of the trial judge, the cross-examination by the accused of the prosecution witnesses, including the child complainant, both contained and elicited information prejudicial to his own case on matters which had not been referred to by the prosecution, “the total effect of which must have been quite damaging to the applicant in the eyes of the jury”: The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141, at p. 148, per Walsh J. (C.C.A.). When cross-examining the complainant’s mother, the applicant elicited highly prejudicial information inter alia pertaining to complaints by the daughter (the complainant) of incidents of abuse, previous complaint by the complainant’s mother to the applicant to the effect that he had interfered with the daughter sexually and to the effect that the only pornographic books she had ever seen were those belonging to the applicant. Equally, the lengthy
4.17.5 The protection afforded by this judicial power is, however, limited; the unrepresented accused is still permitted to question the vulnerable witness in person which of itself may occasion sufficient trauma in the child witness to adversely affect the quality of the child’s evidence. Equally, the power – albeit broad – is discretionary; it follows that there may be no identity between what the court and what the vulnerable witness perceive as ‘intimidating or abusive’ questioning. Accordingly, there may be situations where the safeguard represented by this judicial power affords insufficient protection to the interests of the child witness. Furthermore, it is important to note that an order of certiorari may be granted in respect of any conviction of an accused obtained in proceedings in which the interventions and attitude of the court to the valid objections of counsel – particularly in cross-examination of a witness – amount to an unwarranted interference with counsel in the performance of his / her duty; such interference –

cross-examination of the complainant’s sister resulted in the repetition by the witness to the Court of the “somewhat detailed complaints which had been made to her by the girl [complainant] of what she claimed to have suffered at the hands of her father”: (1984-9) 3 Frewen 141, at p. 149, per Walsh J. (C.C.A.). On appeal to the Court of Criminal Appeal it was held that the trial judge had discharged his duty to protect the interests of the applicant having regard to the difficulties he encountered in giving good advice to him. (1984-9) 3 Frewen 141, at p. 151, per Walsh J. (C.C.A.): “The learned trial judge did his best in the circumstances, having regard to the difficulties encountered by him in trying to give good advice to the applicant, to do his duty and protect the interests of the applicant and the Court is satisfied that the judge cannot be faulted under this heading”. 1704 See: Wakeley v R (1990) 93 ALR 79, at p. 86, per Mason C.J. (H.C. Austr.): “It is the duty of counsel to ensure that the discretion to cross-examine is not misused. That duty is the more onerous because counsel’s discretion cannot be fully supervised by the presiding judge. Of course, there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached – and it is for the judge to ensure that the stage is not passed – the court is, to an extent, in the hands of cross-examining counsel.”

1705 Law Commission of New South Wales, Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials (Report No. 101, 2003) para. 3.71: “Judicial control of cross-examination cannot provide systematic protection because of the inherent nature of the proceedings and the need for judges to remain neutral. And, even where judicial discretion is exercised to prevent abusive or improper questioning, it cannot protect the complainant from the effects of direct confrontation with the alleged offender who wishes to cross-examine personally.” See also: Mechanical and General Inventions Company, Limited, and Lehwess v Austin and the Austin Motor Company, Limited [1935] AC 346, at p. 359, per Viscount Sankey L.C.

1706 In CG v United Kingdom (2002) 34 EHRR 31 (E.Ct.H.R.) it was asserted that the disruption by the trial judge of C’s trial for charges of theft from her employer on a regular basis throughout the trial – by interrupting her defence counsel, particularly during cross-examination of the chief prosecution witness – precluded her from giving her evidence in a convincing manner by interrupting her examination-in-chief and amounted to a breach of her right to a fair trial pursuant to Article 6.
even in the interests of the protection of a witness from perceived unnecessary questioning – may amount to a breach of the fundamental rule that not only should justice be done but it should “seem to be done”.1707

4.17.6 Secondly, a number of common law jurisdictions1708 – with the notable exception of Ireland – have adopted statutory provisions to expressly restrict or prohibit the cross-examination of child witnesses by the accused in person on the understanding that “[t]he limitation which this places upon the defence is...far less significant than the damage which can be inflicted upon the child and the interests of justice if, in certain circumstances, such an exercise is allowed to take place”.1709 Such statutory provisions vary in terms of their ambit – both the applicable offences and eligible witnesses – and also in terms of the test to be satisfied (if any) before such restriction or prohibition takes effect; these differences reflect an underlying emphasis with regard to the balance to be struck between – in particular – the

However, the Court refused the application, holding (by six votes to one) that although the judge had intervened in an excessive and undesirable manner, that had not amounted to a breach of C’s right to a fair trial under the European Convention on Human Rights 1950 Art. 6. It was significant that the trial judge had not, at any point, stopped the applicant’s counsel from pursuing any line of defence, that C’s defence counsel had been able to make an uninterrupted closing speech lasting 45 minutes, and that the essence of the defence had been restated by the judge. See: Case Comment, “Crime and Sentencing: Fairness of Trial – Interruptions by Judge” (2002) 4 E.H.R.L.R. 525-527; and Case Comment, “Article 6: Right to a Fair Trial” (2002) 27 E.L.Rev. (Human Rights Supplement) 169-170. See also: Gill v District Judge Connellan [1987] IR 541 (H.C.); Dineen v District Judge Delap [1994] 2 IR 228 (H.C.); O’Brien v Ruane [1989] IR 214, at p. 216; The People (Director of Public Prosecutions) v R [1998] 2 IR 106, at p. 110; and R v Kalia [1975] Crim LR 181 (C.A.).1707 In Dineen v District Judge Delap [1994] 2 IR 228, at p. 234, per Morris J. (H.C.) citing: The State (Cole) v The Labour Court (Unreported, High Court, Barron J., 29 July, 1983); The State (Collins) v Ruane [1984] IR 105; and The State (Hegarty) v Winters [1956] IR 320. Morris J. asserted that: “I am left in no doubt that this conduct would, in the words of Maguire C.J., ‘reasonably give rise in the mind of an unprejudiced observer to the suspicion that justice was not being done’ and, accordingly, there was a breach of the fundamental rule that not only should justice be done but it should seem to be done”.

1708 See, for example: (i) England: ss. 34, 35 and 36 of the Youth Justice and Criminal Evidence Act 1999 (previously: s. 34A of the Criminal Justice Act 1988, as inserted by s. 55(7) of the Criminal Justice Act 1991); (ii) Canada: s. 486.3(1)-(5) of the Criminal Code, as amended by An Act to Amend the Civil Code, 2005, c. 32, s. 15; (iii) New Zealand: s. 23F of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989; and (iv) Scotland: s. 288E and s. 288F of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 6 of the Vulnerable Witnesses (Scotland) Act 2004.

1709 Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot, QC) (London: Home Office, December 1989) para. 2.30, at p. 22. The Pigot Report recommended that defendants charged with sexual offences, violent offences and offences of cruelty or neglect in criminal proceedings should be prohibited by statute from carrying out in person the cross-examination of witnesses who were under the age of 14 years or, in the case of sexual offences, under 17 years, whether at a preliminary hearing or at a trial on indictment in open court.
protection of vulnerable witnesses on the one hand and the interests of the accused on the other.

4.17.7 Both the relevant English\textsuperscript{1710} and New Zealand\textsuperscript{1711} statutory schemes contain provisions which expressly prohibit the accused from cross-examining in person a child complainant of sexual offences; in fact, the English provision is wider than its New Zealand counterpart in that it prohibits cross-examination either in connection with that offence or in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.\textsuperscript{1712} Moreover the English provision extends eligibility to a "protected witness", that is a person who is both: (i) a witness to the commission of the applicable offence, (including a witness who is charged with an offence in the proceedings) and; (ii) a child witness or a witness who falls to be cross-examined after giving evidence-in-chief, whether in whole or in part, by means of a video recording\textsuperscript{1713} made "at a time when the witness was a child" or "in any other way at any such

\textsuperscript{1710} Sections 34, 35 and 36 of the Youth Justice and Criminal Evidence Act 1999. Separate legislative provision is made for witnesses of sexual offences (s. 34) and for child witnesses of scheduled offences including sexual offences and offences involving violence (s. 35). Furthermore, there is a catch-all provision to embrace individual witnesses, at the direction of the court, in criminal proceedings to which neither of the two foregoing protections apply (s. 36).

\textsuperscript{1711} Section 23F(1) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989: "Notwithstanding section 354 of the Crimes Act 1961, but subject to the succeeding provisions of this section, the accused shall not be entitled in any case to which this section applies to cross-examine the complainant". As indicated above, this statutory prohibition extends to child complainants of sexual offences only.

\textsuperscript{1712} Section 34 of the Youth Justice and Criminal Evidence Act 1999, replaced and extended to all complainants of sexual offences the provisions of s. 34A of the Criminal Justice Act 1988 (as inserted by s. 55(7) of the Criminal Justice Act 1991), which provided that no person who is charged with an offence to which s. 32(2) of the Criminal Justice Act 1988 applied, could cross-examine in person any witness who: (i) is alleged to be a person against whom the offence was committed or to have witnessed the commission of the offence; or (ii) is a child, or is to be cross-examined following the admission into evidence under s. 32A of a video-recording of an interview with him / her. The applicable offences listed in s. 32(2) of the Criminal Justice Act 1988, as amended, included: (i) an offence involving an assault on, or injury to, or a threat of injury to, a person; (ii) an offence under s. 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16); (iii) a "sexual offence" as therein defined; or (iv) an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counseling, procuring, or inciting the commission of, any of the foregoing offences.

\textsuperscript{1713} Section 35(2)(b) requires that such video recording be a recording made for the purposes of s. 27 of the Youth Justice and Criminal Evidence Act 1999; that is, "a video recording of an interview of the witness" conducted and recorded pre-trial with a view to its admission into evidence as the evidence-in-chief of the witness.

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"time". The same prohibition extends, in English law, to "protected witnesses" in proceedings involving any one of a number of specified offences. It is important to note that the statutory prohibition is stated in both instances in absolute terms reminiscent of the statutory provisions containing the 'primary rule' with regard to the examination of child witnesses; there is no provision for its displacement where the interests of justice – or the accused – so require.

4.17.8 By way of contrast, the equivalent Canadian statutory provision does not stipulate a 'blanket prohibition' on cross-examination by the accused of the witness in person, following satisfaction of the criteria governing the eligibility of witnesses and the offences with which the accused is charged; rather it lays down a form of 'rebuttable presumption' which allows for the displacement of the prohibition in the interests of the proper administration of justice. Section 486.3(1) of the Criminal Code provides that, upon application to the court, the accused is prohibited from cross-examining a...
child witness in person in any proceedings against the accused "unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination". However, it is expressly provided that the 'proper administration of justice' includes "ensuring that the interests of witnesses under the age of eighteen years are safeguarded"; thus, it seems reasonable to suppose that in spite of the more 'pro-accused' appearance of this legislation, the statutory prohibition will constitute the rule rather than the exception.

4.17.9 Further removed again from the 'blanket prohibition' on cross-examination by the accused in person, is the protection afforded by s. 36 of the Youth Justice and Criminal Evidence Act 1999 in England which operates to prohibit the accused, at the direction of the court, from cross-examining in person a particular individual witness – not including any other person who is charged with an offence in the proceedings – in criminal proceedings to which the 'blanket prohibition' of s. 34 or s. 35 does not apply; for example, in relation to child witnesses in proceedings concerning offences not governed by section 35. Such direction may be issued by the court, either of its own motion or upon application by the prosecution, only where

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1718 Equally, s. 288F of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 6 of the Vulnerable Witnesses (Scotland) Act 2004 provides that, in respect of proceedings involving sexual offences, where a vulnerable witness is to give evidence at, or for the purposes of, the trial, the court may, upon application or of its own motion, make an order prohibiting the accused from conducting his defence in person at the trial and in any victims statement proof relating to any offence to which the trial relates, if the court is "satisfied that it is in the interests of the vulnerable witness to do so". The court is expressly prevented from making such an order – pursuant to s. 288F(3) – if it considers that: (i) the order would give rise to a "significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice", and (ii) that risk "significantly outweighs" any risk of prejudice to the interests of the vulnerable witness if the order is not made.

1719 Section 486(2) of the Criminal Code, R.S.C., 1985, c. C-46, as amended provides that: "For the purposes of subsection (1), the 'proper administration of justice' includes ensuring that (a) the interests of witnesses under the age of eighteen years are safeguarded in all proceedings, and (b) justice system participants who are involved in the proceedings are protected". (Emphasis added). While this subsection – and the definition contained therein – does not expressly apply to the statutory prohibition on cross-examination of a child witness in person by an accused pursuant to s. 486.3(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, it is submitted that the legislative understanding of the meaning of 'the proper administration of justice' in the context of a special measure authorising the exclusion of the public from the courtroom for all or part of the proceedings applies equally to all of the special measures provided for in Part XV of the Canadian Criminal Code, as amended.

1720 Section 36(4) of the Youth Justice and Criminal Evidence Act 1999.

it appears to the court that the following three pre-conditions have been met: (i) that the quality of evidence – in terms of “completeness, coherence and accuracy”\textsuperscript{1722} – given by the witness on cross-examination is likely to be diminished if the cross-examination is conducted by the accused in person; (ii) that the quality of such evidence would be likely to be improved if a direction were given prohibiting direct cross-examination by the accused; and (iii) that it would not be contrary to the interests of justice to give such a direction.\textsuperscript{1723}

4.17.10 While this provision clearly provides greater protection for the accused by starting from a position where the accused’s right of full and uninhibited cross-examination is preserved save where the three statutory pre-conditions are satisfied and denying such right only where it would not be contrary to the interests of justice, it is nonetheless evident that the emphasis of the first two pre-conditions is placed upon the protection of the child witness. However, the factors to which the court must have regard in determining whether the first and second pre-conditions have been met\textsuperscript{1724} – and it is apparent that the list is not intended to be exhaustive – are also consistent with an investigation into the necessity (and, indeed, the continued necessity)\textsuperscript{1725} of prohibiting cross-examination by the accused in person of

\textsuperscript{1722} “Coherence” meaning the witness’s ability in giving evidence to give answers which address the questions put to him or her and which can be understood both individually and collectively: s. 16(5) of the Youth Justice and Criminal Evidence Act 1999, applied to s. 36 by s. 36(4)(b) of the Youth Justice and Criminal Evidence Act 1999.

\textsuperscript{1723} Section 36(2) of the Youth Justice and Criminal Evidence Act 1999.

\textsuperscript{1724} In determining whether the quality of evidence given by the witness on cross-examination is likely to be so diminished or improved, the court is obliged pursuant to s. 36(3) of the Youth Justice and Criminal Evidence Act 1999 to have regard, “in particular”, to the following factors: (i) any views expressed by the witness as to whether the witness is content to be cross-examined by the accused in person; (ii) the nature of the questions likely to be asked, having regard to the issues in the proceedings and the defence case advanced so far (if any); (iii) any behaviour on the part of the accused at any stage of the proceedings, both generally and in relation to the witness; (iv) any relationship (of whatever nature) between the witness and the accused; (v) whether any person (other than the accused) is or has at any time been charged in the proceedings with a sexual offence or an offence to which s. 35 applies, and (if so) whether s. 34 or 35 operates or would have operated – by way of the blanket prohibition outlined above – to prevent that person from cross-examining the witness in person; and (vii) any special measures direction under s. 19 which the court has given, or proposes to give, in relation to the witness.

\textsuperscript{1725} The court is empowered pursuant to s. 37(2) of the Youth Justice and Criminal Evidence Act 1999 to discharge such direction, once made: (i) on application by the prosecution where there has been a material change of circumstances since the direction was given or since the last application to
the individual witness, not unlike the ‘case specific finding of trauma’ discussed earlier, which attempts to balance more finely than the ‘blanket prohibition’ the competing interests involved.\textsuperscript{1726}

4.17.11 It is important to note that while the accused is prohibited, by operation of each of these statutory provisions, from cross-examining the child witness \textit{in person}, a number of safeguards remain. First, his / her legal representatives (if any) remain free to cross-examine the witness on behalf of the accused.\textsuperscript{1727} Both the English\textsuperscript{1728} and Canadian\textsuperscript{1729} legislation specifically provide for the appointment by the court of counsel for this purpose.\textsuperscript{1730}

\begin{footnotesize}

\textsuperscript{1726} See also: \textit{Hillman v Richmond Magistrates’ Court} [2003] EWHC 133 (Q.B. Div.) where Lord Justice Scott Baker emphasized the importance of giving the accused a proper opportunity to present arguments as why an order should not be made against him / her pursuant to s. 36 of the Youth Justice and Criminal Evidence Act 1999, prohibiting him / her from cross-examining a witness \textit{in person}.

\textsuperscript{1727} See: (i) England: s. 38 of the Youth Justice and Criminal Evidence Act 1999; (ii) New Zealand: s. 23F(2) of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989; (iii) Scotland: s. 288E(6) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 6 of the Vulnerable Witnesses (Scotland) Act 2004; and (iv) Canada: s. 486.3(1) and (2) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.

\textsuperscript{1728} Section 38 of the Youth Justice and Criminal Evidence Act 1999 gives the court power to appoint a legal representative for the purpose of conducting any cross-examination of a witness – protected by either ss. 34, 35 or 36 – on behalf of the accused. The court must first invite the accused to arrange for a legal representative to act for him or her for the purpose of cross-examining the witness and the court must require the accused to notify the court, by the end of such period as it may specify, whether a legal representative is to act for him for that purpose: section 38(1) and (2). If the accused does appoint a legal representative for the purpose of cross-examination pursuant to this section, legal aid must be granted, subject to means, in accordance with s. 40(1) of the Youth Justice and Criminal Evidence Act 1999, inserting s. 21(3)(e) into the Legal Aid Act 1988. Where, upon the expiry of this specified period, the accused has either notified the court that no legal representative is to act for him for the purpose of cross-examining the witness or no notification has been received by the court and it appears to the court that no legal representative is to so act, the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a legal representative appointed to represent the interests of the accused: section 38(3). Where the court considers it is necessary in the interests of justice for the witness to be so cross-examined, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the accused: section 38(4). A ‘qualified legal representative’ is defined in s. 38(3)(b) of the Youth Justice and Criminal Evidence Act 1999 as a legal representative who has a right of audience (within the meaning of the Courts and Legal Services Act 1990) in relation to the proceedings before the court.

\textsuperscript{1729} Section 486.3(1) and (2) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, provides that where the accused is not permitted to personally conduct the cross-examination of a child witness, the court must appoint counsel for this purpose.

\textsuperscript{1730} In \textit{R v Goncalves (John)} [2002] EWCA Crim 2896 (C.A.) the accused argued that, following the dismissal of his legal team during his trial on charges of rape of a 15 year old girl, he should have been afforded the opportunity of instructing new counsel and solicitors. The trial judge refused his request.

\end{footnotesize}
Under the English provisions, such legal representative “shall not be responsible to the accused”; he/she is not charged with the conduct of the accused’s defence, rather his/her task is confined to conducting the cross-examination of the vulnerable witness on behalf of the accused in order to safeguard the interests of the accused. Secondly, the English legislation specifically provides that where an accused is prevented from conducting – or from continuing – to cross-examine in person a witness to whom this protection applies, the trial judge is obliged to give the jury “such warning (if any) as the judge considers necessary to ensure that the accused is not prejudiced”: (i) by any inferences that might be drawn from the fact that he/she has been prevented from cross-examining the witness in person; and (ii) where relevant, by the fact that the cross-examination was carried out by a legal representative appointed for that purpose and not by a person acting as the accused’s own legal representative.

and, had the accused wished to continue with his defence, he would have been obliged to represent himself, presenting the very difficulties in relation to the cross-examination of the child complainant which ss. 34-38 of the Youth Justice and Criminal Evidence Act 1999 (not yet in force) had been designed to avoid. The Court of Appeal held that the trial judge had been wrong to infer that the accused’s purpose in dismissing his legal team had been to abort the trial and that he had erred in not giving the accused the opportunity of finding further representation. Alternative legal advisors could have briefed themselves with little interruption to the trial since the essence of the accused’s defence was alleged consent to intercourse. However, the Court stressed that its decision was based on the unusual facts present in the instant case and that an arbitrary dismissal of counsel and solicitors should not usually result in any expectation, as of right, to seek new legal representatives.

Section 38(5) of the Youth Justice and Criminal Evidence Act 1999. Moreover, the legal representative is centrally funded: s. 40 of the Youth Justice and Criminal Evidence Act 1999. Hannibal, Martin and Mountford, Lisa, The Law of Criminal and Civil Evidence: Principles and Practice (2002) at p. 324: “Under the ‘interests of justice’ test contained in Schedule 3 to the Access to Justice 1999, the accused may be granted a representation order where it is in the interests of a third party for the defendant to be legally represented. This ground will cover the situation where the accused has been prevented by the court from personally cross-examining the witness. Where the accused refuses to co-operate, the court may make the necessary arrangements on behalf of the accused to appoint a legal representative.” However, see McEwan, Jenny “In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999 (2000) EvProv 4(1) where it is asserted that: “The court-appointed barrister would seem to be in an impossible situation: not acting for the defendant, who may in fact refuse to speak to him or her; not entitled to see the defendant’s proof, if there is one. What will this advocate know of the defendant’s case, which might not be the version presented in interview? There will be access to transcripts, prosecution case papers, statements made by the defence, and any medical or forensic evidence.”

Section 39(2) of the Youth Justice and Criminal Evidence Act 1999.

Similarly, s. 486.3(5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15 provides that: “No adverse inference may be drawn from the fact that counsel is, or is not appointed under this section”.

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4.17.12 A provision which restricts or even prohibits the accused from cross-examining in person a child witness in proceedings involving applicable offences while at the same time preserving in full the entitlement of counsel to cross-examine the said witness on behalf of the accused—and further, providing for the court appointment of such counsel where the accused is unrepresented—would appear not to infringe the accused’s right of cross-examination under Articles 38.1 and 40.3 of the Constitution of Ireland 1937. To hold otherwise would be to imply into the Constitution an absolute constitutional right on the part of the unrepresented accused to conduct his own cross-examination of a prosecution witness which cannot be satisfied by a legal representative—either chosen by the accused himself or appointed by the court for this purpose—cross-examining such witness on his/her behalf and pursuant to his/her instructions. The existence of such a right is not supported either by the text of the Constitution or by any authority. However, were such a right to exist, it is submitted that it could not be an absolute right; in appropriate cases, the requirement that cross-examination be conducted through counsel appointed for this purpose constitutes the minimum interference with the ‘right’ of the accused—if such a right exists—necessary in order to give effect to the legitimate public policy consideration involved in the protection of child witnesses.\footnote{See: Maguire v Ardagh [2002] 1 IR 447 (S.C.); O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005); People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006); Phonographic Performance (Ireland) v Cody [1998] 4 IR 517 (H.C. and S.C.); and Gallagher v Revenue Commissioners [1995] 1 IR 55 (H.C. & S.C.). See also the decision of the Supreme Court in Donnelly v Ireland [1998] 1 IR 338, at pp. 356-357, per Hamilton C.J. (S.C.) wherein the Court cited as one of the factors in favour of the constitutionality of s. 13 of the Criminal Evidence Act 1992, the fact that the witness was subject to cross-examination by counsel for the accused person. See also: Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot, QC) (London: Home Office, December 1989) para. 2.30, at p. 22.}

Furthermore, just as the Court of Appeal in New Zealand in \textit{R v Accused (T 4/88)}\footnote{R v Accused (T 4/88) [1989] 1 NZLR 660 (C.A.).} held that an accused’s right of confrontation did not imply a right to “glower at and thereby intimidate witnesses”,\footnote{R v Accused (T 4/88) [1989] 1 NZLR 660, at p. 672, per McMillan J. (C.A.). It was further noted that: “The sight of an accused person from whose actions a child has lived in terror in the past is very likely to intimidate that child in the giving of evidence about that accused, particularly when the evidence involves him in incidents of the most intimate and degrading kind.”} likewise it is submitted that an accused’s right of cross-examination does not embody a right to
abuse, intimidate or unduly distress a child witness through his / her dress, demeanour, questioning or conduct.

4.17.13 Equally such provisions would not appear to contravene the rights contained in Article 6(3)(c) and (d) of the European Convention on Human Rights, which guarantee the accused, as “minimum rights”, the right “to defend himself in person or through legal assistance of his own choosing” and the right to “examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him” respectively. Although it is accepted that many questions remain to be answered with regard to the operation in practice of such provisions, it is submitted that even if it is

1737 See Poitrimol v France (1994) 18 EHRR 139 (E.Ct.H.R): “Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. A person charged with a criminal offences does not lose the benefit of this right merely on account of not being present at the trial”.
1738 See: Croissant v Germany (1992) 16 EHRR 135, para. 29 (E.Cm.H.R.) wherein the European Commission on Human Rights held that there was no breach of applicant’s rights under Article 6 where he was provided with a court-appointed lawyer; the Court held in para. 29 that Article 6(3)(c) is “necessarily subject to certain limitations where...it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant’s wishes...However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.” See also Beresford, Stuart “Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?” (2005) Journal of International Criminal Justice 3.3(721): “[S]uch a measure will not limit the fair trial rights of the accused, as the European Court of Human Rights has ruled that mandatory legal representation is permitted if the interests of justice so warrant. The Court has also made it clear that the interests of witnesses are to be balanced against the accused’s fair trial rights. Consequently, the right of child witnesses to be protected from trauma and re-victimisation must be weighed against the detriment of an unco-operative accused having counsel conduct questioning on their behalf.”
1739 The unique nature of the appointment and function of this legal representative raises a number of issues which put into question the ability of such structure to fully protect the interests of the accused, including the following. First, by whom is the legal representative instructed, and to what extent (if at all) is he / she obliged to conduct the cross-examination in accordance with the wishes of the accused? Secondly, to what extent (if at all) do the ordinary incidents of the relationship of a legal representative with an accused person – such as legal professional privilege – apply? Thirdly, is the legal representative appointed by the court obliged to attend the trial from its commencement in order that he / she is familiar not merely with the evidence-in-chief of the witness to be cross-examined but also with the nature of both the prosecution’s case and the defence of the accused? Stockdale asserts that the compatibility with Article 6 of the following situations occurring by reason of the operation of the provisions under the English legislation, the Youth Justice and Criminal Evidence Act 1999, remains to be ascertained: (i) where the accused fails or refuses to appoint his own legal representative and the court-appointed legal representative cross-examines the witness in his interests; (ii) where the court-appointed legal representative acts “in what the accused does not regard as his best interests”; and (iii) where the accused fails or refuses to appoint a legal representative and the court does not appoint a ‘qualified legal representative’. Stockdale submits that the compatibility of the first scenario depended upon “factors such as whether communications between the accused and the ‘qualified legal
considered that these provisions intrude upon these rights to some degree, there is a legitimate countervailing consideration – such as here, the protection of child witnesses from trauma – which outweighs the accused’s right of fair trial; furthermore, the counterbalancing measures outlined above – should be sufficient to ensure that the accused can effectively challenge the evidence of such child witnesses.

4.17.14 Finally, it is submitted that there are important public policy considerations – in addition to the protection of child witnesses from undue trauma – which support the use of these special measures and the attendant restriction (if any) of the accused’s right of cross-examination; namely, ensuring public confidence in the criminal justice system and the proper administration of
justice. It is understood that both judicial control of the questioning of child witnesses – in particular, the prohibition on oppressive or humiliating questioning – and statutory schemes preventing the cross-examination of child witnesses by the accused in person ensure not only that “potential witnesses are not discouraged from coming forward and that actual witnesses are not bullied into giving untrue or inaccurate evidence”\textsuperscript{1743} – contrary to the proper administration of justice – but also that public confidence in the integrity of the criminal justice system and the administration of justice is maintained. Moreover, it is arguable that such measures are consistent with the requirements of a fair trial in that they ensure fairness to \textit{all} and assist the court in the exercise of its truth-seeking function by removing obstacles to the truth:\textsuperscript{1744}

“[E]nsuring that an accused person has a fair trial is about more than the rights of the accused. The role of the courts in ensuring that justice is done, and seen to be done, is a vital element in the public interest in the fair and impartial administration of justice. Similarly, limiting the distress caused to a child witness by giving evidence involves public interest factors as well as the welfare of the individual child...The effective administration of the criminal justice system is therefore likely to be adversely affected if the worth of the evidence of a child witness is significantly compromised or if the child is so intimidated that he or she is unable to give any evidence at all. Further, the community has an interest in ensuring that some of its most vulnerable members are not disadvantaged or even exploited because of their inexperience and immaturity, and courts have a responsibility to


\textsuperscript{1744} “Without these protections for witnesses, the court would be an instrument of injustice rather than an instrument of justice. The crucial question therefore is not whether the interests of the accused might be prejudiced but whether the fairness of the trial might be called into question if an unrepresented accused is prohibited from cross-examining a complainant in person”: Law Commission of New South Wales, \textit{Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials} (Report No. 101, 2003) para. 3.66.
ensure that witnesses are treated appropriately, and that their own processes are not abused."  

4.18.0 Impact upon the Accused of the Use of a Support Person or an Intermediary:

4.18.1 It is arguable that the provision of a support person to accompany a child witness with the specific purpose of *inter alia*, comforting that witness where the witness is upset and so facilitating the reception of his / her evidence, upsets the delicate balance inherent in the criminal justice system in favour of the child witness to the extent that a prosecution witness, during his / her testimony, is joined by an individual whose function – indeed his / her *raison d'être* – is to *eschew impartiality* and to provide support for the witness.

4.18.2 In particular, it is contended that the presence of a support person in close proximity to the child witness for the duration of his / her testimony may unfairly prejudice the jury against the accused by suggesting: (i) that the child has reason to fear the accused – *a fortiori* where the support person comforts or soothes the child during his / her evidence; (ii) that the court has recognised or even *acknowledged* the basis for this fear; and, (iii) ultimately, that the accused is *guilty* of those offences laid against him / her and that it is for this reason that the child requires the support of a third party in order to give his / her evidence.\textsuperscript{1746}


\textsuperscript{1746} See, however, the decision of the High Court of Justiciary in *McGinley (Michael) v HM Advocate* 2001 SLT 198 (H.C. Justiciary), wherein it was held in para. 5 that the “presence of persons in court to support witnesses has been found to give rise to no material difficulty” and, the Court specifically rejected the suggestion that “the mere presence of an adult acting as a support to the witness would have been a reason for an impartial observer to conclude that justice had not been seen to be done in this case”. See also; In *R v Billy* [2006] B.C.J. No. 1 139 (B.C. Prov.Ct.) wherein the Court authorised the use of a support person in respect of an adult complainant of sexual offences with a borderline personality disorder, a history of self-harm and suicidal ideation in anticipation of testifying holding, in para. 11 that: “In a case where credibility is a key factor, I am also of the view that the accused will not be prejudiced by affording the witness the opportunity to give her evidence in a separate room with a
Furthermore, any form of verbal – or non-verbal – communication between the support person and the child witness during the course of the child’s testimony carries with it the risk that the child’s evidence will not be perceived as independent of the support person but rather as the product of coaching; even where the words expressed by the support person are merely intended as words of encouragement in the exercise of his / her ‘facilitative function’. Such an impression is heightened where, for example, the child is a victim or witness of abuse, the support person is the child’s mother and a witness to the abuse alleged, and the defendant is the father of the child and the partner or husband of the support person. Equally, it is arguable that for a support person to comfort a child complainant during the course of his / her testimony with phrases such as “You’re alright” or “You’re doing really well” or even “Good girl/boy” could be seen by the jury as an approbation of the evidence given by the child complainant or even an indication of the reliability or veracity of the child’s account.
4.18.4 A number of safeguards have been suggested in response to these concerns. First, judicial supervision of this procedure is intended to safeguard the accused’s interests; once the court has determined in exercise of its discretion – and pursuant to statutory guidelines (if any) – that a particular person may act as a support person, thereafter both the support person and the witness in question are subject to the control of the court. Secondly, the trial judge may expressly direct the support person to refrain from any coaching or prohibit verbal assistance by the support person of the child witness during or prior to his / her testimony. Recent Scottish legislation appears to reflect a distinction between coaching and coaxing, providing that the support person “shall not prompt or otherwise seek to influence the witness in the course of giving evidence”; it does not expressly prohibit coaxing save to the extent that such words of comfort or reassurance could fall within the ambit of ‘seeking to influence’ the child witness. Section 486.1(5) of the Criminal Code in Canada embodies a form of compromise between total prohibition and the permissive attitude of the English courts; it provides that the court “may order that the support person and the witness not communicate with each other while the witness testifies”. This provision does not expressly prohibit any form of communication between the support person and the witness, it merely provides that the court “may”, by order, outlaw any such communication. Thus, it is arguable that, in an appropriate case and having carefully

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1753 The Scottish Law Commission has asserted that while it is plainly wrong for a parent or other supporting person to “coach a child in the sense of trying to tell the child what to say” it could see “nothing wrong in a parent simply trying to coax a reluctant child into saying something” where, for example, a child was over-awed by coming to court; accordingly, the Commission concluded that the trial judge should warn a support person against coaching but should, in his / her discretion, “be prepared to permit, and even encourage, the adult to coax the child into giving evidence”. Scottish Law Commission, Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (Scot. Law Com., Report No. 125, 1990) para. 2.13, at p. 7: “Whether or not this will be desirable in any given case will, of course, be a matter for the discretion of the presiding judge”.
1754 Section 271L(3) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004, provides that the supporter “shall not prompt or otherwise seek to influence the witness in the course of giving evidence”.
1755 Section 486.1(5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15.
weighed the possible prejudice to the accused, a Canadian court might permit words of comfort or encouragement to be offered by the support person to the child witness, for example, where otherwise the child refuses to answer a question posed or give any further evidence in the proceedings.

4.18.5 Thirdly, the trial judge may instruct the jury not to accord any special significance to the presence of the support person; such judicial warning is a common method of seeking to dispel any prejudice to the accused from the use of special measures to assist child witnesses, however, it requires a pro-active stance to be adopted by counsel for the accused in seeking to safeguard the rights of the accused. Finally, the trial judge may retain a discretion to remove a support person in the interests of procedural fairness, for example, in response to an allegation that the support person coached the witness in the witness box or during breaks in cross-examination.

4.18.6 It is submitted that, having regard to the foregoing, where these safeguards are observed – and, in particular, where the support person is directed not to

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1756 Law Reform Commission of Ireland, Consultation Paper on Child Sexual Abuse (August, 1989) at p. 175, para. 7.085. See also: s. 486.1(6) of the Criminal Code in Canada, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15, which provides that no adverse inference may be drawn from the fact that an order is, or is not, made under that section.

1757 For example, the second ground of appeal in R v Smith [1994] Crim LR 458 (C.A.) concerned the assertion that, during the trial, before the judge returned to court after lunch and in the presence of the jury, the girl disappeared with the social worker and judge’s clerk, for a matter of minutes, through the entrance which the judge normally came into court, thus arguably creating the impression in the mind of the jury that the girl had been into the judge’s chambers to talk to the judge. The Court criticized counsel for the defence for not raising objection at the trial which it regarded as “reprehensible” since the trial judge was not asked to defuse any conceivable doubt there and then, “which he could and would plainly have been able to do at once”. It was expressly found that there was no contact between the child and the trial judge, nor any improper coaching or encouragement of the child witness during her absence from the courtroom. The Court observed that: “As to the departure of the witness and the others through the judge’s door, again, if counsel suspected any vice or irregularity in this it should plainly have been raised at once, either in the jury’s presence or perhaps, better still, in their absence. The usual course to take if anything seems to be going wrong in a trial is for counsel immediately to ask for the jury to retire and deal with the matter sensibly with the judge. What would then have happened would have been an explanation in the terms which are now before the Court and indeed before counsel.” The Court of Appeal found that the child had, in fact, been visiting the lavatory and, since there were relatives of the child at the entrance to the court, it was decided that she should be taken out the judge’s entrance. The Court acknowledged that it would be better to avoid such a route to the lavatory without any prior explanation being given publicly, but was unable in the circumstances to find any risk that justice was not done or was not seen to be done. Accordingly, the Court dismissed the appeal in this case.

communicate with the child witness during his / her testimony along the lines suggested by the Canadian legislature – the mere presence of such person next to the child witness while he / she gives evidence ought to provide emotional support to the child witness without adversely affecting the fairness of the trial or infringing the accused’s right to a fair trial and fair procedures.1759

4.18.7 By way of contrast, it is submitted that the Irish statutory provisions authorizing the use of an intermediary to facilitate communication between the court and the child witness fail to observe an appropriate balance between the protection of child witnesses, the proper administration of justice and the rights of the accused.

4.18.8 In relation to the first of the two options outlined in s. 14 of the Criminal Evidence Act 1992, as amended1760 – which empowers the intermediary to repeat to the child witness the question posed by the questioner in the words employed by the questioner – it is arguable that such repetition serves no legitimate function and, in light of the impairment of the right of cross-examination is an invalid procedure having regard to Articles 38.1 and 40.3 of the Constitution; in adopting verbatim the words used by the questioner, it is implicit that the intermediary has determined that the witness will understand the question as phrased and, accordingly, the only function to be performed by the intermediary is to act as a ‘human barrier’ between the questioner and the child witness. While it may be suggested that the imposition of a neutral body or a ‘friendly face’ between the questioner and the child witness could assist the child in minimizing the stress and trauma

1759 See also: 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ 2001 82L/1 (Celex No. 301F0220) article 13.2 which provides that: “Each Member State shall encourage action taken in proceedings by such personnel or by victim support organisations, particularly as regards: (a) providing victims with information; (b) assisting victims according to their immediate needs; (c) accompanying victims, if necessary and possible during criminal proceedings; (d) assisting victims, at their request, after criminal proceedings have ended”. (Emphasis added).

1760 Section 14(2) of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001.
that a child witness could experience while subject to cross-examination,\textsuperscript{1761} it is questionable whether this would be sufficient to justify the extent of the intrusion into or impairment of the accused’s right to cross-examine his / her accusers.\textsuperscript{1762}

4.18.9 Secondly, in light of the fact that the child witness is already the recipient of special assistance in giving his / her evidence by way of the live television link, pursuant to s. 13 of the Criminal Evidence Act 1992, as amended,\textsuperscript{1763} it is arguable that the objective of minimizing trauma to the child witness has already been achieved.\textsuperscript{1764} Thus, to the extent that the rights or interests of child witnesses are implicated, it is submitted that they are vindicated by the option of giving evidence via live television link and that, accordingly, the welfare of child witnesses does not constitute a sufficient justification for the ‘barrier function’ served by the channeling of questions through an

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\textsuperscript{1761} In this regard, it is interesting to note that while the terms of the equivalent provision in New Zealand – s. 23E of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989 – envisage only a ‘repetition’ function on the part of an intermediary and there is no express statutory power for the intermediary either to give the child’s answers to such questions (whether in the child’s words or the intermediary’s own) or, more importantly, to rephrase the questions posed to the child complainant in a manner which he / she deems more developmentally suitable, even this limited statutory provision has been generously interpreted by the New Zealand courts, as illustrated by the following passage from the decision in \textit{R v Accused} (Unreported, High Court, Wellington, 5 March 1993, T 91/92) at p. 5, \textit{per} Neazor J., in relation to the ambit of the role of the intermediary: “[The intermediary] is professionally experienced and has no therapeutic obligation to...bond with the child.... I think it would be going too far to say the intermediary must not ‘jolly along’ the child to answer...so long as the intermediary is responsibly and fairly putting the questions as asked, careful supplementary comments or requests to the child to attend or answer would not be objectionable. If it seems that the child does not understand the question the intermediary will understand that it will be for counsel to rephrase it or approach the matter from some other angle.” (Emphasis added).

\textsuperscript{1762} See: \textit{Maguire v Ardagh} [2002] 1 IR 447 (S.C.); \textit{O’Callaghan v Mahon} (Unreported, Supreme Court, 9\textsuperscript{th} March, 2005); and \textit{People (Director of Public Prosecutions) v Kelly} (Unreported, Supreme Court, 4\textsuperscript{th} April, 2006). See also: 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ 2001 82L/1 (Celex No. 301F0220) article 3 which provides – albeit in relation to state authorities – that: “Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings”.

\textsuperscript{1763} Section 13(1) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.

\textsuperscript{1764} \textit{Donnelly v Ireland} [1998] 1 IR 321, at p. 356, \textit{per} Hamilton C.J. (S.C.): “It is generally 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 [18] are likely to be traumatized by the experience of giving evidence in court and that its purpose is to minimize such trauma".
intermediary and the concomitant impairment of the capacity to conduct effective cross-examination.\textsuperscript{1765}

4.18.10 The second option contained in s. 14(2) of the Criminal Evidence Act 1992, as amended\textsuperscript{1766} – which permits the intermediary to use alternative means or language to convey the meaning of the questions asked, in a way that is appropriate to the age and mental condition of the witness – represents an even greater impairment of the right to cross-examine. This provision appears to leave to the discretion of the intermediary the decision whether to use the same words as the questioner or to substitute for those words, words of his / her own choosing in conveying the meaning of the questions originally posed; presumably, this decision is to be based upon the intermediary’s assessment that the question as formulated is not age-appropriate or developmentally suitable having regard to the individual child witness in question, however, the legislation is silent as to how or when such a determination can be made. Once the decision has been made by the intermediary that the child witness would not be able to understand the questions in the form in which they were posed by the questioner, he / she enjoys full discretion as to the language and / or \textit{means} in which to convey to the child witness the meaning of those questions.\textsuperscript{1767}

4.18.11 One of the principal dangers inherent in this procedure is that the ‘meaning’ of the questions posed by the questioner may be entirely different when

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\textsuperscript{1765}Equally, the effectiveness of the provision of an ‘intermediary’ in reducing the trauma experienced by the child witness has been queried since the child “remains cognisant of both the fact and implications of the accusations (otherwise why the concern) and aware of the accused’s eyes on her – whether or not present in the same room”. Fennell, Caroline, \textit{The Law of Evidence in Ireland} (1992) at p. 99. Accordingly, Fennell posed the pertinent question: “[\textit{W}]hat advantage, is ultimately gained here, and at what cost?”

\textsuperscript{1766}Section 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001.

\textsuperscript{1767}As indicated above, this could involve more than merely changing the wording of the questions, possibly even encompassing reliance on diagrams, gestures or even anatomically correct dolls in order to “convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions asked”; s. 14(2) of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001. See also the recommendations of the New Zealand Law Commission, Preliminary Paper: \textit{The Evidence of Children and Other Vulnerable Witnesses} (Preliminary Paper No. 26, 1996) para. 173.\end{flushright}
Language is, of its essence, ambiguous and capable of more than one interpretation based in part upon the intonation, the timing and the phraseology utilized. Where an intermediary takes it upon himself or herself to substitute for the words employed by the questioner, words of his or her own choosing, he or she risks altering the meaning of the question by changing not only the wording, but also the intonation and the timing of the question posed. This is particularly true of coded queries, where the subtleties or nuances may be ‘lost in translation’. In this regard, it is submitted that the exercise by an intermediary of this second function, rather than facilitating the reception of evidence and thereby assisting in the proper administration of justice, would in practice provide a fertile ground for appeals founded in alleged differences in the meaning of words used and those ultimately conveyed to the child witness.1769

4.18.12 Equally, the mere act of mediating may delay the questioning to such an extent that the momentum sought to be developed by the questioner is never achieved and the child witness is, by virtue of the intermediary’s assessment of his / her capacity or incapacity to understand the question posed, given

1768 In seeking to address concerns such as the lack of party control over the interpretation of questions put to a child witness by an intermediary, the New Zealand Law Commission in its Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) in para. 176 advanced an alternative proposal for assisting witnesses with communication difficulties, namely, the appointment of an expert witness to advise the court and counsel on the most appropriate way to question such a witness in order to achieve the most reliable evidence. The Commission opined that the expert witness would be available to explain that the witness, because of cultural differences or intellectual disability, might say ‘yes’ when he / she actually meant ‘no’. However, this proposal was subsequently abandoned in its later report on Evidence – Reform of the Law (Report No. 55, Vol. 1, 1999) Chapter 14, para. 374.

1769 Charleton, P., McDermott, P.A., and Bolger, M., Criminal Law (1999) para. 8.82, at pp. 600-601: “Were there to be a wholesale implementation of the ‘child examiner’ procedure one can foresee a plethora of appeals resulting which consist of complaints of mistranslation of the question of the cross-examiner by the child examiner. One could also see defence counsel arguing with the jury, in a closing address, for a reasonable doubt on the basis that if he or she had been allowed to conduct an examination in the way that he or she thought best that more of ‘the truth’ might have been uncovered. It will be for the ordinary people who make up juries to indicate whether or not these procedures can work.” The authors refer to a ‘child examiner’ rather than an ‘intermediary’ since this was the language employed in the recommendations of the Law Reform Commission: Law Reform Commission, Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.22, at p. 77. See also: Hoyano, Laura “Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses” [2000] Crim LR 250, at p. 272 wherein Hoyano notes that the potential for meaning or emphasis to be lost through the use of an intermediary is “very high” and described the task of the trial judge having to adjudicate disputes between the questioner and the intermediary as “unenviable”.

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additional time to formulate his / her answer. In this regard, it is worth
noting that the legislation does not provide any guidance as to whether the
child witness should be able to hear the original questions posed by the
questioner or merely the questions posed by the intermediary via the live
television link. It is submitted that if the purpose of the appointment of an
intermediary pursuant to s. 14 through whom questions can be channeled, is
to minimize the trauma suffered by the child witness, it follows that the
child witness should not be permitted to hear the questions posed by the
questioner but only those posed by the intermediary. However, it is
submitted that the judge, jury and legal representatives should be permitted
to observe and hear the original unedited examination of the witness and the
mediated version through the intermediary, since to permit only the
mediated version of the examination to be seen and heard would be to
seriously inhibit the accused’s right of effective cross-examination and his / her
right to a fair trial and could also result in the loss of vital evidence
contrary to the proper administration of justice.

4.18.13 It is submitted that the right of cross-examination encompasses not merely
the right to devise questions designed to test the evidence of the child
witness but also a right to express those questions in the manner of the
questioner’s preference; to hold otherwise is to empty the right to cross-
examine of content. The manner in which a question is asked may be as
important as the substance or content of the question itself in achieving the
desired object. The power conferred upon an intermediary by virtue of s.
14(2) to reformulate and rephrase questions as he / she deems appropriate or
requisite entails a substantial loss of control on the part of an accused person
over the phraseology of questions and the manner in which they are
expressed. As noted above, this loss of control may effectively inhibit the

1770 Section 29(3) of the Youth Justice and Criminal Evidence Act 1999, attempts to safeguard the right
of the accused person to a fair trial by providing that any examination of a witness conducted through
an intermediary approved by the court, must take place in the presence of such persons as rules of
court or the direction may provide and, furthermore, in circumstances in which: (i) the judge and legal
representatives acting in the proceedings are able to see and hear the examination of the witness and to
communicate with the intermediary; and (ii) the jury (if there is one) is able to see and hear the
examination of the witness.
natural development of or even disrupt altogether a planned line of cross-examination. While it has been held that an accused person cannot, in advance of cross-examination, be required to state the purpose of such cross-examination, such an entitlement is of little value if an accused can ultimately be frustrated in attempting to achieve that purpose; it is submitted that it is manifest that the powers conferred upon an intermediary by virtue of s. 14 can frustrate the capacity of an accused person to effectively pursue a particular line of enquiry.

4.18.14 Supporters of the ‘intermediary’, in seeking to justify this restriction on the accused’s right of cross-examination, draw an analogy between the position of an interpreter and the function performed by an intermediary; it is asserted that the “guarantees of trial ‘in due course of law’ do not necessarily preclude a restriction of some nature on an accused person’s general right to cross-examine his accuser without an intermediary” since in practice the right is restricted where the services of an interpreter are required. Such analogy is, however, imperfect. Unlike an intermediary, an interpreter has no express statutory power to reformulate the questions posed; the function of an interpreter is limited to translation verbatim and not, ironically, to interpretation of the questions in the sense

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1771 In this regard, it is instructive to note that the European Court of Human Rights in C.G. v United Kingdom (2002) 34 EHRR 31 (E.Ct.H.R.), in upholding the fairness of a trial in the face of excessive interruptions by the trial judge of the defence case, emphasized in para. 41, the fact that the applicant’s counsel was “never prevented from continuing with the line of defence that he was attempting to develop either in cross-examination or through his own witness” before finding that no violation of Article 6 had occurred.


1773 Notwithstanding the strength and significance of the concerns raised by the use of an intermediary, the majority of the Advisory Group on Video Evidence rejected these objections as inconclusive and drew an analogy between the use of an interpreter in circumstances where the witness could not communicate or communicate adequately in English and the situation where it proved “absolutely impossible” for counsel to communicate with a child witness – the Group considered there was “no great difference in principle” between these two situations – and concluded that, while neither technique was “entirely satisfactory”, both prevented a loss of crucial evidence “without which the court cannot do justice”. Report of the Advisory Group on Video Evidence (Chairman, His Honour Judge Thomas Pigot Q.C.) (London: Home Office, December 1989) para. 2.33, at p. 24.


of rephrasing the questions as asked while seeking to preserve their meaning. Furthermore, as noted above, the intermediary is only available in circumstances where the child witness is already giving, or is to give evidence via live television link, which serves to both distance the child witness from the accused person and to restrict or inhibit effective cross-examination of the child by or on behalf of the accused person; the statute effectively imposes a double filter on the accused’s right of cross-examination with the result that “not only is there physical non-confrontation through the medium of the television link – but the accused is further removed by the modification or muting of cross-examination by the imposition of this intermediary, posited between the witness and the accused”.  

4.18.15 Furthermore, to the extent that the Supreme Court in Donnelly v Ireland upheld the constitutionality of s. 13 of the Criminal Evidence Act 1992, as amended, the Court made this finding in the absence of any consideration of the effect of such provision when invoked in the context of the concomitant use of the intermediary facility in section 14. Moreover, in upholding the constitutionality of s. 13, the Supreme Court cited the preservation of the accused’s right of effective cross-examination as a key factor in maintaining an appropriate balance with the constitutional rights of the accused to a fair trial; once this safeguard has been removed – by the interposition of an intermediary pursuant to s. 14 – it is submitted that the procedure can no longer withstand constitutional scrutiny.

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1776 See: R v West London Youth Court, ex p. J [2000] 1 WLR 2368, [2000] 1 All ER 823 (Q.B. Div.) where a process of ‘double translation’ was employed in respect of a witness from English to Croat-Serb to Bosnian Romany and upheld by the Court as an acceptable process of interpretation upon the satisfaction of certain conditions; the Court held that there was no reason why ‘double translation’ could not meet the objective of achieving a fair and properly understood trial in which the defendant was able to do justice to his own cause.


1779 Section 13(1) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001.

4.18.16 It is important to note that it is arguable that a degree of court supervision can be implied into the provisions of s. 14, thereby affording some protection for the rights of the accused.1781 Section 14 provides that the court – upon application by either the prosecution or the defence – if satisfied that the interests of justice require that “any questions to be put to the witness be put through an intermediary” may “direct that any such questions be so put”. A possible interpretation of this provision requires the court to consider each question which it is proposed to put to the child witness and to direct that an intermediary be appointed to ask those of the proposed questions which the interests of justice require be posed by an intermediary rather than either the legal representatives or the accused in person. The difficulty with this interpretation is its impracticability. Cross-examination is a highly skilled endeavour, which involves a complex sequence of questioning, whereby the questioner builds upon the answers received and, inter alia, attempts to elicit from the interviewee information detrimental to his or her cause and/or to his or her credibility. It is simply not feasible for the legal representatives of the accused or the accused in person to submit to the trial judge a pre-prepared list of every question which may be asked of the child witness in advance of cross-examination since cross-examination is, by its very nature, organic and responsive;1782 every answer provided by the child witness – even where such answer is

1781 McEwan, Jenny “In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999 (2000) EvProv 4(1): “The Interdepartmental Working Group argued that any risk of distortion as far as translation of the witness’s answers is concerned is met by the presence of the trial judge, who would hear the original answers and could disregard an attempt by the intermediary to present the answer in a different way. However, this overlooks the fact that the most obvious examples of cases requiring intervention of this kind involve very young or learning disabled witnesses whose terminology or sign language may be inaccessible to people they do not know.”

1782 Wakeley v R (1990) 93 ALR 79, at p. 86, per Mason C.J. (H.C. Austr.): “The limits of cross-examination are not susceptible of precise definition, for a connection between a fact elicited by cross-examination and a fact in issue may appear, if at all, only after other pieces of evidence are forthcoming. Nor is there any general test of relevance which a trial judge is able to apply in deciding, at the start of a cross-examination, whether a particular question should be allowed. Some of the most effective cross-examinations have begun by securing a witness’ assent to a proposition of seeming irrelevance. Although it is important in the interests of the administration of justice that cross-examination be contained within reasonable limits, a judge should allow counsel some leeway in cross-examination in order that counsel may perform the duty, where counsel’s instructions warrant it, of testing the evidence given by an opposing witness.”
merely silence – potentially provides the basis for another question or ‘line of attack’, which may not with any certainty be predicted in advance.1783

4.18.17 Equally, although s. 14 only authorises the use of an intermediary where the court is satisfied – having regard to the age or mental condition of the witness – that the “interests of justice” require the appointment of an intermediary through which questions for the child witness would be channelled, it is submitted that this proviso is insufficient to save the provision from invalidity having regard to the provisions of the Constitution. It is submitted that the provision itself is contrary to the interests of justice since it operates to deny an accused person his / her constitutional right to a fair trial; therefore, by definition, it cannot be invoked “in the interests of justice”.1784 Thus, it is submitted that s. 14 of the Criminal Evidence Act 1992, as amended, operates to negate the right of an

1783 Regard should also be had to the decision of the High Court in MacCarthaigh v Minister for Justice (Unreported, High Court, Finnegan J., 14th May, 2002); summarized in (2003) 21 ILT 1 and [2002] 6 I.C.L.M.D. 70. The applicant applied, by way of judicial review, for reliefs in relation to his prosecution and trial in the Circuit Criminal Court for, inter alia, robbery under the Larceny Act 1916. The applicant’s case at trial was made through Irish; he contended that he had a right to have a transcript of the proceedings as spoken and that there should be provided a satisfactory recording system and / or an effective simultaneous translation system. In refusing the application, Finnegan J. held that while the system previously made available to the applicant, whereby the stenographer had proposed taking note of the evidence, speeches and submissions as translated into English, had been inadequate and a failure to recognize Article 8 of the Constitution, there had since become available for use in the Circuit Criminal Court a ‘Lanier System’, which would satisfy the applicant’s requirement of having a transcript of the proceedings as spoken. With regard to the contention that a simultaneous translation system should be provided, the Court was not satisfied that the interests of justice could better be served by the provision of such a system than by the sequential translation currently used. In this regard, the Court noted that in all of the reviews by the various international bodies, the accuracy of the interpretation rather than its method was emphasized. However, most importantly in the context of consideration of the statutory provisions governing the intermediary, the Court held that if an interpreter were to furnish accurate simultaneous translation of arguments and submissions, he should be furnished with the relevant papers or skeleton arguments in advance, and this would not be appropriate to a criminal trial where the defendant was entitled to reserve his position.

1784 Fennell, Caroline The Law of Evidence in Ireland (2nd ed., 2003) para. 5.24, at p. 135: “Hamilton C.J.’s circular reasoning [in Donnelly v Ireland [1998] 1 IR 338, at p. 357] is resonant of that found to exist in the legislature’s enactments in this area, typified in the qualification (as here) that the provision be invoked ‘in the interests of justice’ or without detriment to ‘fairness to the accused’. This perspective gives the view that the existence of this provision quiescent in the legislation (arguably precisely because there is such a problem with the relevant change) is invoked and relied upon by the judiciary, thereby coperfastening the lack of a correlation or relationship between what was changed and what is now fair. There could hardly be a greater irony: the legislation is ‘saved’ because the judiciary need not invoke it where it would be unfair to do so – hence it is potentially unfair”.

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accused person to cross-examine his / her accusers and amounts to a denial of his / her right to a fair trial in due course of law.

4.18.18 It is worth noting that the barrier between the child witness and the questioner provided by the intermediary only operates in one direction in this jurisdiction: from the questioner to the child witness. The intermediary has no powers under s. 14 to either repeat the answers given by the child or to substitute for the words used by the child, words of the intermediary’s preference. Such a provision would, in any event, be nonsensical, since the primary function of the intermediary is to reduce the stress suffered by the child witness in the giving of evidence — in particular, in cross-examination — by ensuring that the questions posed are framed in a manner suited to the child’s age and mental and emotional development; no such assistance is either required or desirable in relation to the questioner.

4.18.19 By way of contrast, the function of an intermediary appointed pursuant to s. 29 of the Youth Justice and Criminal Evidence Act 1999 is not expressly confined to relaying to the witness questions put to the witness and communicating to any person asking such questions the answers given by the witness in reply to them, but also includes explaining such questions or answers “so far as necessary to enable them to be understood by the witness or person in question”.

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1785 Section 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001, only empowers the intermediary, once appointed by the court, to put questions to the child witness either in the same 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; there is no equivalent power conferred on the intermediary in relation to the transmission of the answers received by the intermediary from the child witness.

1786 Section 29(2) of the Youth Justice and Criminal Evidence Act 1999. Similarly, the New Zealand Law Commission recommended in a preliminary paper that intermediaries should be made available to witnesses, subject to the discretion of the courts, “whenever their assistance is necessary to enable the witness to understand the questions put to them in court”, that is, whenever “the rational ascertainment of facts would be assisted by use of an intermediary”; this included situations where difficulties in communication occurred due to the youth, intellectual or physical disability or cultural background of the witness. The Commission advocated that intermediaries could usefully assist communication between the witness and the court, that is, by relaying the responses by the child complainant to those questions. See: New Zealand Law Commission, Preliminary Paper: The Evidence of Children and Other Vulnerable Witnesses (Preliminary Paper No. 26, 1996) Chapter 6, paras. 167 and 172. However, these proposals met with a very mixed response and in its later report on Evidence, the New Zealand Law Commission concluded that, in light of the divided views within the profession
4.18.20 This section is broader in its effect than s. 14 of the Criminal Evidence Act 1992, as amended, in two very important respects. First, the intermediary is empowered to act as a *conduit* through whom *both* questions and answers are channeled; the intermediary’s powers of repetition operate in *both* directions; he / she is entitled not only to explain the questioner’s questions to the child witness, but is also empowered to explain the child’s answers to the questioner, which power of explanation may go beyond paraphrasing to encompass interpretation of the words used both by the questioner and by the child. This two-way filter blurs the communication between *both* the questioner *and* the witness so that the phraseology, intonation, timing and form of expression preferred by the intermediary may be substituted for that used by the questioner or the child witness with the resulting loss of what may be crucial evidence; “*While paraphrasing an adult’s statement may be problematic, paraphrasing children’s statements leads to the loss of information whose value cannot be predicted*”.1787 The intermediary may only use this power of ‘explanation’ to the extent that it is *necessary* to enable either the questioner or the child witness to be understood by the other, however, no statutory guidance is provided as to what constitutes ‘necessity’ in this context. It is submitted that, even so qualified, the use of an intermediary to perform a process of ‘double translation’ not only offends against the accused’s right of cross-examination and his / her right and the existence of critical studies from the United States, it would not recommend the use of intermediaries. See: New Zealand Law Commission, *Evidence – Reform of the Law* (Report No. 55, Vol. 1, 1999) Chapter 14, para. 374 citing the following studies: Green, “Science, Reason, and Facilitated Communication” (1994) 19 (3) *Journal of the Severely Handicapped* 151; Jacobson, Mulick and Schwartz, “A History of Facilitated Communication: Science, Pseudoscience, and Antiscience” (1995) 50 (9) *American Psychologist* 750; Montee, Miltenerberger and Wittrock, “An Experimental Analysis of Facilitated Communication” (1995) 28 (2) *J of Applied Behaviour Analysis* 189.

1787 Saywitz, Karen, “Developmental Underpinnings of Children’s Testimony” in Westcott, Helen, Davies, Graham and Bull, Ray (eds.) *Children’s Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 1, at p. 15: “[T]he exact wording of questions asked and the responses given can be crucial to unravelling a child’s meaning. There are important implications for how one documents children’s statements... Paraphrasing ‘He touched my pee-pee’ as ‘the child said she was molested’ creates confusion and impairs the pursuit of alternative explanations for the complaint. At best, it wastes limited resources and at worst it potentiates what could be false allegations. Documenting the exact words used by the child demonstrates a child’s use of age-appropriate language, reasoning, and terminology that help evaluate credibility.”
to a fair trial and fair procedures, it also runs contrary to the proper administration of justice.

4.18.21 The Home Office in England has recently published guidelines\(^{1788}\) which contain sensible restrictions on the otherwise oppressive statutory powers conferred on an intermediary pursuant to s. 29 of the Youth Justice and Criminal Evidence Act 1999 by providing that an intermediary must refrain from engaging in the following activities: (i) interrupting legal representatives “unless there is an urgent need to seek clarification or to indicate that the witness has not understood something”; (ii) hypothesizing as to the intentions or motives of the witness; (iii) interpreting or ‘second-guessing’ the intention of the questioner; (iii) altering the question posed or answer given in the first instances, (rather they should “offer an alternative form of the question if required to facilitate understanding”); (iv) alter the “precise nature or thrust of questions put to the witness or the witness’s answers, for the purpose of shielding or protecting them”; or (v) “unnecessarily impede or obstruct the pace and flow of Court proceedings”\(^{1789}\). The clear objective of these guidelines is to “confine the intermediary to the narrowly defined role of translator during the actual examination of witnesses”\(^{1790}\) and to redress the legislatively created

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\(^{1789}\) Home Office, Consultation Draft Guidelines for the use of an Intermediary under s. 29 of the Youth Justice and Criminal Evidence Act, 1999 (London: Home Office, March 2001) para. 3.11.3, at pp. 24-25. The guidelines further provide that the intermediary should: (i) act as the conduit for questions put to the witness by the Court or legal representatives; (ii) relay the witness’s answers “as accurately as possible” to the Court; (iii) where the intermediary provides any explanation of a question to the witness, he or she must indicate to the Court what that explanation was and why it was employed; (iv) “communicate the witness’s reply to a question, as given, however irrelevant or illogical it appears” since it is for the Court to request clarification from the intermediary or the rephrasing of the question; and (v) seek clarification from the Court of any questions which he or she has not understood before relaying such question to the child witness “in the form the Court wishes”.

\(^{1790}\) Ellison, Louise “Cross-Examination and the Intermediary: Bridging the Language Divide?” [2002] Crim LR 114, at p. 116: “Scope for intervention is restricted and the intermediary is expected to alter questions and replies only to the extent necessary to facilitate understanding. It would appear that an intermediary may intervene or rephrase questions on no other ground. For the avoidance of any doubt the draft guidance explicitly states that the intermediary role does not comprise a protective function. Intermediaries may not alter the precise nature or thrust of questions put to the witness, or the witness’s answers, for the purpose of shielding or protecting the witness.”
imbalance between the competing interests of the protection of child witnesses, the proper administration of justice and the rights of the accused.

4.18.22 It is interesting to note that the use of an 'intermediary' may not be found to infringe the guarantees contained in Article 6 of the European Convention on Human Rights.\textsuperscript{1791} As indicated above, the Court has consistently held that, while all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument, the use in evidence of statements obtained at the investigation stage was not in itself inconsistent with Article 6(1) provided that the rights of the defence had been respected;\textsuperscript{1792} as a rule, this requires that the defendant be given adequate opportunity to challenge and question a witness against him / her either when he / she was making his / her statements or at a later stage of the proceedings.\textsuperscript{1793}

4.18.23 The Court has also expressly recognised that in sexual abuse cases, certain measures may be taken for the purpose of protecting the victim, provided

\textsuperscript{1791} See: Hoyano, Laura “Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?” [2001] Crim LR 948, at p. 964, wherein she asserts that “requiring the defence to use an intermediary to question indirectly a vulnerable witness may not contravene Article 6(3)(d), provided that the demeanour of the witness under questioning may be directly observed by the court”. In so asserting, Hoyano relies upon the decision of the Commission in \textit{Baegen v The Netherlands} (App No. 16696-90, ECmHR Report adopted October 20, 1994; application declared admissible but case struck by ECHR October 24, 1995) which involved, \textit{inter alia}, the preservation of anonymity for a rape complainant on the basis of a well-founded fear of reprisals. The European Commission of Human Rights held that the defendant could not complain of the lack of opportunity to question the witness directly when he had refused to give questions to the investigating judge to be posed to the witness. With respect, it is submitted that it does not follow as a matter of logic from this decision – although it is conceded that it may follow from the decision in \textit{SN v Sweden} (2004) 39 EHRR 13 (E.Ct.H.R.) – that it is permissible to require the defence to submit to the decision of an investigating judge to conduct the questioning of a vulnerable witness, that it is then permissible for a person appointed by the court to act as an intermediary, through whom all questions posed to the child witness will be channelled, and who is empowered to use alternative words and phrases to convey the meaning of the questioner in a manner which can be more easily understood by the child witness. \textit{Baegen} does not provide authority for this far-reaching proposition; in the former situation, the questioning benefits from direct judicial control while the latter scenario is only subject to judicial supervision, which, it is submitted, constitutes an insufficient safeguard for the rights of the accused. See also: Dennis, I.H. \textit{The Law of Evidence} (2\textsuperscript{nd} ed., 2002) at p. 524; and Tapper, Colin \textit{Cross and Tapper on Evidence} (10\textsuperscript{th} ed., 2004) at p. 258.


that such measures could be reconciled with an adequate and effective protection of the rights of the defence. In order to secure the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours; evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care. Accordingly, where a conviction was based solely or to a decisive extent on depositions that had been made by a person whom the accused had had no opportunity to examine, it was held that the rights of the defence had been restricted to an extent which was incompatible with the guarantees under Article 6.


1795 In Unterpertinger v Austria (1991) 13 EHRR 175 (E.Ct.H.R.) the applicant was convicted on the basis of the statements of witnesses whom he never had the chance to examine; the Court concluded that the applicant had not received a fair trial. The Court noted that, in itself, the reading out of statements in this case could not be regarded as being inconsistent with Article 6(1) and (3)(d) of the Convention but cautioned that the use made of them as evidence must nevertheless comply with the rights of the defence which it is the object and purpose of Article 6 to protect. The Court emphasized in para. 31 that this was "especially so where the person 'charged with a criminal offence', who has the right under Article 6(3)(d) to 'examine or have examined' witnesses against him, has not had an opportunity at any stage in the earlier proceedings to question the persons whose statements are read out at the hearing". The Court concluded in para. 33 that: "It is clear from the judgment of 4 June 1980 that the Court of Appeal based the applicant's conviction mainly on the statements made by Mrs. Unterpertinger and Miss Tappeiner to the police. It did not treat these simply as items of information but as proof of the truth of the accusations made by the women at the time. Admittedly, it was for the Court of Appeal to assess the material before it as well as the relevance of the evidence which the accused sought to adduce; but Mr. Unterpertinger was nevertheless convicted on the basis of 'testimony' in respect of which his defence rights were appreciably restricted." See also: R v Sellick (Santino) [2005] 1 WLR 3257, [2005] 2 Cr App R 15 (C.A.).

1796 Luca v Italy (2003) 36 EHRR 46, para. 40 (E.Ct.H.R.). The Court held, in paras. 43-44 that: "In the instant case, the Court notes that the domestic courts convicted the applicant solely on the basis of statements made by N before the trial and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him. In those circumstances, the Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based." Similarly, in Saidi v France (1994) 17 EHRR 251 (E.Ct.H.R.) wherein the applicant, S, was convicted of drug offences and involuntary homicide on the identification evidence of three people, in circumstances where his requests to confront these witnesses were denied, the Court held that a violation of Article 6(3)(d) had occurred, since the evidence of the witnesses whom S had been prevented from confronting constituted the sole basis for his conviction; this inability to challenge them deprived S of a fair trial, which could not be justified on account of difficulties in combating drug trafficking. The Court concluded in para. 44 that: "The Court is fully aware of the undeniable difficulties of the fight against drug-trafficking--in particular with regard to obtaining and producing evidence--and of the ravages caused to society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of 'everyone charged with a criminal offence'. In short, there has been a violation of Article 6(1) and (3)(d)." See also: Ludi v Switzerland (1993) 15 EHRR 173 (E.Ct.H.R.); Unterpertinger v Austria (1991) 13 EHRR 175 (E.Ct.H.R.); Kostovski v The Netherlands (1991) 12 EHRR 434 (E.Ct.H.R.); and Saidi v France (1994) 17 EHRR 251 (E.Ct.H.R.); Andrews, John “Article 6: Right to a Fair Trial” (2002) 27 E.L. Rev. 519
4.18.24 However, the European Court of Human Rights has expressly held in SN v Sweden\(^{1797}\) that, having regard to the special features of criminal proceedings concerning sexual offences, Article 6(3)(d) of the Convention\(^{1798}\) could not be interpreted as requiring in all cases that questions be put directly to the child complainant by the accused or his / her defence counsel, through cross-examination or by other means.\(^{1799}\) In response to the applicant’s complaints that he had been denied the opportunity to cross-examine the child complainant in respect of the child’s allegations of sexual abuse, in circumstances where two pre-recorded interviews between the child and an investigating officer were admitted into evidence at the trial, the Court noted that: (i) the second police interview had been held at the request of counsel on behalf of the applicant; (ii) that he had agreed not to be present and accepted the manner in which the interview had been conducted; and (iii) that counsel on behalf of the applicant had been able to have questions put to the child through the interviewing police

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\(^{1798}\) See Grösz, Stephen, Beatson, Jack and Duffy, Peter Human Rights: The 1998 Act and the European Convention (2000) para. C6-100, at p. 259: “The testimony of a witness whom the accused has had no opportunity to question at any stage of the proceedings cannot form the exclusive or principal basis of a conviction. A number of findings of violation on this ground involve anonymous witnesses, close relatives availing themselves of the right not to testify at court, high ranking officers of state subject to special rules for the taking of evidence, or witnesses who simply could not be located by the police. Recently the Court appears less inclined to reach a finding of violation on this last ground, at least in cases which do not involve anonymous witnesses”.

\(^{1799}\) SN v Sweden (2004) 39 EHRR 13 (E.Ct.H.R.). The applicant (S) asserted that the criminal proceedings against him in respect of alleged sexual abuse of a child (M) breached Articles 6(1) and 6(3)(d) of the Convention. M had been interviewed by the police, which interview had been recorded on video. After S had been notified of the child’s allegations, his defence counsel requested that M be interviewed again. M’s counsel was unable to attend and S’s counsel, having agreed a list of questions with the interviewing officer, agreed that the interview would take place in the absence of both counsel. Having heard the audio tape recording of the interview, S’s counsel was satisfied that the issues raised in his request had been covered. At trial, the court was shown the video tape of the first interview and the record of the second interview was read out. No request was made for M to give evidence at trial or at S’s subsequent appeal against conviction. S maintained that the fact that domestic law prevented him from cross-examining M in circumstances where there was no other evidence supporting M’s statements breached the guarantees of a fair trial. However, the majority of the Court held that there had been no breach of Articles 6(1) or 6(3)(d) of the Convention.
officer, having agreed a list of questions in advance. The Court found no breach of Articles 6(1) or 6(3)(d) in these circumstances. 1800

4.18.25 It is arguable that this factual scenario is not dissimilar to the use of an intermediary through whom questions are directed to a child complainant of sexual offences, at least in respect of the first function – repetition of the words used by the questioner – performed by the intermediary pursuant to s. 14(2) of the Criminal Evidence Act 1992, as amended, 1801 and that, accordingly, the finding of compatibility with Article 6 of the Convention may apply with like force to this special measure where it is so qualified. 1802

1800 In analysing the caselaw of the European Court of Human Rights in relation to Article 6(3)(d) of the Convention, Emmerson, Ben and Ashworth, Andrew Human Rights and Criminal Justice (2001) assert in paras. 15-114 and 15-115, at p. 465 that: “What appears from these and other decisions is a complex mixture of at least three major factors. First, the Court’s chief concern is the fairness of the trial as a whole: the defendant’s right to ‘confront’ or cross-examine every prosecution witness is important, but not absolute….reliance on pre-trial witness statements is not contrary to the Convention, so long as the rights of the defence are respected. Secondly, the Court’s judgment on the overall fairness is much affected by the significance of the written or reported statements for the prosecution case; it is fairly clear that a trial would be unfair if the conviction rested ‘solely or mainly’ on the disputed statement, but in some decisions the test is expressed in terms more favourable to the defence….However, this may be explained by a third factor; that the Court has regard to the practical possibility of according greater recognition to defence rights than was done at trial…there are some cases where the impracticality of producing the witness at the trial might lead the Court to adopt a more flexible approach to Article 6(3)(d)…But the national court should always look for alternative safeguards.”

1801 Section 14(2) of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001. 1802 Ashworth, Andrew and Ovey, Clare, “Human Rights: Right to Examine Witnesses For and Against” [2001] Crim LR 747, assert at pp. 747-748 that: “The right of confrontation of witnesses declared by Article 6(3)(d) of the Convention means that there must be the possibility of the defence questioning each significant witness for the prosecution. An implied exception to this right has been recognised in decisions such as Doorson v Netherlands (1996) 22 E.H.R.R. 330, in order to respect the rights of witnesses who justifiably fear for their safety if they give evidence in court. However, the court has always insisted on two safeguards whenever the implied exception is invoked. First, there must be some opportunity for the defence to examine the witness – not necessarily under the usual conditions in court, but perhaps at some earlier stage or in modified conditions in court. Both the defence and the judge must therefore have the opportunity to ‘make their own judgment as to the demeanour and reliability’ of the witness: Van Mechelen v Netherlands (1997) 25 E.H.R.R. 647, para. 62. This amounts to a dilution of the right, out of deference to the rights of the witness (rights, e.g. under Article 8). Secondly, even if there was some opportunity for the defence to question the witness, a conviction based ‘solely or mainly’ on the impugned statement violates the right to a fair trial under Article 6. This decision is an application of those principles.” See also: Hoyano, Laura “Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?” [2001] Crim LR 948, at p. 967: “[T]he question is…likely to be whether there has been substantial adherence to the stipulated procedures in the case at Bar. If so, they are unlikely to be found to have resulted in an unfair trial, at least in the absence of specific evidence of miscommunication – notwithstanding the potential difficulty of monitoring the quality of the mediated communication, particularly if the witness has severe communications difficulties”. 521
However, even if the use of an ‘intermediary’ cannot be said to infringe the fair trial guarantees contained in Article 6 of the European Convention on Human Rights – due in part, it is suggested, to the weaker emphasis placed on the adversarial principle of orality as a safeguard for the rights of the accused in continental legal systems\textsuperscript{1803} – it is submitted that to require an accused to submit to a procedure whereby neither the accused personally nor his / her legal representative may question the child witness directly and

\textsuperscript{1803} O’Donnell, Donal “A Comparison of Article 6 of the European Convention on Human Rights and the Due Process Requirements of the Constitution of Ireland” (2004) 4(2) Judicial Studies Institute Journal 37, which considers the “relatively lower status accorded to cross examination under the Convention” and concludes at pp. 46-47: “Cross examination has always been regarded as a central feature of the common law system of criminal (and indeed civil) justice which, together with trial by jury and proof beyond reasonable doubt has been seen as the most distinctive feature of that system. However, it is clear that while Article 6 does require that an accused person have a right to examine a witness against him, perhaps understandably it has not been held to require the type of confrontation cross examination which is the essence of the criminal justice system embodied in Article 38....While it is possible that the interpretation of the Convention will gradually advance to the point where cross examination is seen as a sine qua non, that point does not yet appear to have been reached. On the other hand, the Irish Courts have been enthusiastic on holding that cross examination is a fundamental aspect of any trial....” O’Donnell further asserts at p. 56 that: “[T]here are areas which are and will remain solely the province of the Irish Constitutional guarantees and that while there is a high degree of overlap between the guarantees [of Article 6 of the Convention and Articles 38.1 and 40.3 of the Constitution] the level of scrutiny and review required by the Irish Constitution is likely to be greater than that under the Convention. Accordingly, I would expect the constitutional provisions to be the first and decisive port of call for most challenges to procedures for civil, criminal or administrative matters....” In the decision of the House of Lords in \textit{R (D) v Camberwell Green Youth Court} [2005] 1 WLR 393, [2005] 1 All ER 999, [2005] 2 Cr App R 1 (H.L.), Lord Rodger asserted in para. 11 that: “An examination of the case law of the European Court of Human Rights tends to confirm that much of the impact of article 6(3)(d) has been on the procedures of continental systems which previously allowed an accused person to be convicted on the basis of evidence from witnesses whom he had not had an opportunity to challenge.” See also: McEwan, Jenny “In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999 (2000) EvProv 4(1): “Since adversarial proceedings rely heavily on orality and the effect of cross-examination, restrictions on those aspects of the trial may be seen to disadvantage an accused person from the UK more profoundly than they would defendants from France or Germany. It remains to be seen whether the special measures structure has the balance right.” Finally, see Jackson, John D., “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?” (2005) 68(5) Modern Law Review 737, at p. 749: “Taken at face value, the specific rights incorporated in Article 6, drafted as they were largely by the British, not unnaturally appeared to favour an approach which had greater resonance in the common law than in the civil law tradition....Any victory which the common law tradition was able to claim from the enumeration of defence rights in the Convention, however, was over time reined back by the interpretation that came to be given to these rights by the Commission and the Court in subsequent jurisprudence.” Most recently, Burton, Mandy, Evans, Roger and Sanders, Andrew Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies (Home Office Online Report 01/2006) observe at pp. 6-7 of their report that: “Under Article 6 ECHR, defendants have the right, in particular, to a fair trial. This includes the right to challenge evidence given against them. Some degree of adversarialism which adheres to a principle of ‘equality of arms’ is necessary, and civil law systems are therefore finding themselves obliged to move further towards common law systems just as arguments for moving the latter further towards civil law systems are gaining ground”. 522
the very words of the questions or ‘lines of defence’ intended to be posed by or on behalf of the accused to a child witness in cross-examination may be changed by the third party in order to facilitate communication with the child witness, represents a clear failure to protect or vindicate the accused’s rights as guaranteed by Article 38.1 and 40.3 of the Constitution of Ireland 1937; 1804 indeed, it is difficult to imagine a more fundamental breach of the accused’s constitutional right of cross-examination.

4.18.27 Furthermore, it is submitted that the breach of the accused’s right to a fair trial and fair procedures and, in particular, his / her right to uninhibited and effective cross-examination, is not saved by the application of the ‘balancing’ 1805 and ‘proportionality’ tests 1806 outlined above since the procedure envisaged by s. 14(2) of the Criminal Evidence Act 1992, as amended, and the functions assigned to the intermediary thereunder cannot be said to represent the minimum limitation of the accused’s right necessary to achieve the legislative objective of reducing the trauma of child witnesses and improving the quality of the evidence received; 1807 this objective may

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1804 See: The State (Healy) v Donoghue [1976] IR 325, at p. 335 (S.C.); In re Haughey [1971] IR 217, at p. 264 (S.C.); Donnelly v Ireland [1998] 1 IR 338, at p. 350, per Hamilton C.J. (S.C.); Maguire v Ardagh [2002] 1 IR 447 (S.C.); O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005); People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006); Phonographic Performance (Ireland) v Cody [1998] 4 IR 517 (H.C. and S.C.); and Gallagher v Revenue Commissioners [1995] 1 IR 55 (H.C. & S.C.). Wilson rejects this category of special measures – type two special measures – which go beyond equality of treatment of child witnesses since “[t]hey are promised upon the child having a handicap” and, accordingly, it is asserted that “the treatment of a child as having a handicap will make her more, not less, handicapped as a witness and as a participant in a process that should be perceived as fair, if not compassionate”; Wilson, Jeffrey, “A perspective on the Canadian position” in Spencer J.R., Nicholson, G., Flin, R., and Bull, R., Children’s Evidence in Legal Proceedings; An International Perspective (1990) 147, at p. 154. Fennell, Caroline, The Law of Evidence in Ireland (1992) at p. 99 was also highly critical of the proposal that questions be directed through an intermediary, which she regarded as representing “[f]urther interference with the traditional adjudicative or adversarial model”.


1807 See: The People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006), per Geoghegan J., at p. 5. Hoyano herself states that: “[f]...the prosecution relies on evidence which the defence has not had any opportunity to challenge, or has been hindered from doing so effectively, this in itself usually will suffice to establish denial of a fair trial. Exceptionally, however, it will not taint the verdict where the European Court is satisfied that the trial’s result nonetheless is fair,
be achieved by means of a procedure which is not inconsistent with the accused's right to a fair trial and fair procedures, namely, the live television link facility. Nor are the 'counterbalancing measures' – such as the 'interests of justice' test and the small measure of judicial discretion or supervision provided for in s. 14 – sufficient to redress this inherent imbalance. Equally, it is submitted that neither the 'balancing' nor the 'proportionality' tests may be applied so as to empty the fundamental constitutional right of cross-examination of its content and so create a "real risk that the accused would not receive a fair trial" which cannot be avoided by means of judicial directions to the jury not to draw any inferences – in particular, any inferences adverse to the accused – from the use of an intermediary.

4.18.28 Accordingly, while measures to remedy the communication difficulties encountered by child witnesses in criminal proceedings in both understanding and being understood are clearly welcome and desirable – both in the interests of protecting the child witness from undue trauma and in obtaining the best evidence from the child witness in the pursuit of the truth – it is submitted that the accused must not be required to pay too high a price in the achievement of this objective. If denying the accused direct physical confrontation with a child witness can be said to dilute the accused's right of cross-examination, denying the accused – either himself / herself or through his / her legal representatives – direct cross-examination of the child witness, dissolves such right altogether:

because of compelling corroborative evidence." Hoyano, Laura "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" [2001] Crim LR 948, at p. 969. (Emphasis added). See also Van Mechelen v The Netherlands (1998) 25 EHRR 647, para. 59 (E.Ct.H.R.): "[A]ny measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied'. See further: sections 4.11.0-4.11.13 in relation to the accused's constitutional right to full and effective cross-examination.


"Effective cross-examination almost invariably requires that the cross-examiner, in pursuing a line of questioning, mould the questions asked by reference to answers to previous questions and according to the way in which answers were given. A cross-examiner must be alert to nuances and be able to show flexibility in detecting and following up discrepancies, inconsistencies and lines of inquiry that have the potential to detract from the witness's evidence or otherwise assist the case the cross-examiner seeks to advance. Often questions which give rise to answers helpful to the case of the cross-examiner's client occur to the cross-examiner as a result of things said or left unsaid by the witness in the course of cross-examination. A right to 'cross-examine' in a way which does not enable the cross-examiner to have the benefit of considerations such as these is likely to prove illusory and thus be an effective denial of the right of an unrepresented party to confront witnesses for an opposing party."\(^\text{1810}\)

5.0.0 CONCLUSION

5.0.1 The development and reform of the law of evidence in relation to child witnesses reflects the law’s recognition that the established adversarial model of criminal justice was designed by adults, for adults, neither admitting of nor accommodating the special needs of child witnesses.\textsuperscript{1811} The traditional ‘exclusionary’ rules of competence, corroboration and examination of child witnesses characteristic of this model of criminal justice were premised upon misconceptions regarding the capabilities and reliability of children as witnesses\textsuperscript{1812} and the attendant need to ensure the highest level of protection therefrom for the rights of the accused, in particular, the right to a fair trial and fair procedures. The foregoing analysis measures the balance achieved by these developments and reforms between three principal interests: the protection of child witnesses from undue trauma, the proper administration of justice, and the right of the accused to a fair trial and fair procedures.

5.0.2 While it is undeniable that the accused is entitled to – and the courts are obligated to ensure – a fair trial and fair procedures, it is asserted that the rules of evidence as they apply to a criminal trial are not ‘frozen in time’ or incapable of modification; they are organic, dynamic and responsive to

\textsuperscript{1811} Paciocco, David The Law of Evidence (2nd ed., 1999) para. 9.1, at p. 295: “The courtroom is not a friendly place for children. It is an adult forum, run by adults and intended for adults.” Glaser, J.R. “Sentencing, Children’s Evidence and Children’s Trauma” [1990] Crim LR 371, at p. 371. See also: Jones, David “The Evidence of a Three-Year Old Child” [1987] Crim LR 677, at p. 677 in relation to the exclusionary effect of the traditional rules of evidence in relation to child witnesses, which the above reforms – both judicial and legislative – sought to reverse: “Children are remarkably adept at recalling and accurately relating events which they have witnessed or experienced. This quality is present even in the very young. At present criminal courts are rarely able to benefit from children’s memories of events because of restrictions on their competency, the weight which may be given to their accounts (especially in sexual matters) and through the fact that the process of giving evidence is a traumatizing experience for children. Added to this children are more likely to relate their experiences when relaxed, free from coercive pressure or anxiety – the opposite qualities to those found in a courtroom designed for ‘adult’ proceedings. For all these reasons young children rarely give evidence.”

\textsuperscript{1812} Birch D., “A Better Deal for Vulnerable Witnesses?” [2000] Crim LR 223, at p. 224: “Vulnerable witnesses may be the victims of negative ideologies and unhelpful assumptions, so that an effective strategy involves challenging the culture as well as the law.”
changes in society. The concept of ‘fairness’ as required in a fair trial or fair procedures is itself subject to change and, in recent times, has been informed by the development of various forms of technology, such as the live television link. The House of Lords addressed the evolving nature of evidential rules and the concomitant change in what is considered ‘fair’ in R(D) v Camberwell Green Youth Court, noting that:

“For centuries, in England the parties in a criminal trial usually had no professional representation. The prosecutor and his witnesses would put their side of the story and the accused would try to discredit it. In that world, cross-examination and formal rules of evidence were unknown; they are the products of the adversarial form of trial that emerged when, in the course of the 18th and early 19th centuries, it became common for counsel to be instructed. Since the forms of trial have evolved in this way over the centuries, there is no reason to suppose that today’s norm represents the ultimate state of perfection or that the procedures will not evolve further, as technology advances. The special measures in these cases are indeed examples of modifications which have been made possible by advances in technology.”

5.0.3

It is submitted that the accused can have no ‘right’ to demand a trial and trial procedures which conform to the trial process and procedures existing and available to an accused person prior to the introduction of the evidential reforms in the Criminal Evidence Act 1992; to hold otherwise would be to

1813 See: The People (Director of Public Prosecutions) v Ferris (Unreported, Court of Criminal Appeal, 10th June, 1992) where Fennelly J. stated at p. 15 in relation to s. 7 of the Criminal Law (Rape) (Amendment) Act 1990 that “the legislature is not only entitled to but has the function under the Constitution of evaluating changes in social and cultural circumstances, including sexual mores, and of giving them legislative form where warranted”.


‘constitutionalise’ such procedures. Equally, the fact that a higher level of protection may have been afforded to the rights of an accused person pursuant to the trial procedures previously adopted – including the exclusionary evidential rules and practices – does not per se render a modification of those procedures unconstitutional, in circumstances where the altered procedures provide adequate protection for the rights of the accused, an accused person’s entitlement is to a fair trial and procedures, not to the highest level of protection conceivable. Accordingly, it is submitted that the judicial and statutory reforms of the traditional corroboration requirements in relation to the evidence – both sworn and unsworn – of child witnesses withstand constitutional scrutiny. The mandatory corroboration requirements in respect of the unsworn evidence of children are not required in order to safeguard the rights of the accused, in circumstances where the accused never had a constitutional ‘right not to be convicted in the absence of corroboration’ and, moreover, where it is now accepted that the evidence of child witnesses is as reliable as their adult counterparts. Equally, it cannot be said that the adoption of the revised ‘common sense’ meaning of corroboration combined with the modifications to the ‘corroboration warning’ in respect of the evidence of child witnesses

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1820 These requirements include the mandatory requirement that the unsworn evidence of a child witness be corroborated – by independent evidence implicating or tending to implicate the accused in some material respect in the offence alleged – before such evidence could found a conviction and the prohibition on the mutual corroboration of the unsworn evidence of more than one child witness.

in terms of its form, content and the circumstances in which it must be given – amount to a breach of the accused’s right to a fair trial and fair procedures.\(^{1822}\) The accused’s right to require that the jury receive a judicial direction as to the need for caution when dealing with the evidence of an individual child witness – where there is an evidential basis for doubting the reliability of his/ her evidence – continues to be protected by the modern discretionary cautionary instruction contained in s. 28 of the Criminal Evidence Act 1992.\(^{1823}\)

Furthermore, even if such reforms could be regarded as interfering with the rights of the accused, it is submitted that they are spared a finding of unconstitutionality by application of the ‘balancing’ and ‘proportionality’ tests\(^{1824}\) and in light of the safeguard provided by the judicial duty to ensure compliance with the conditions necessary for a fair

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1822 See: *Director of Public Prosecutions v Hester* [1973] AC 296, [1972] 3 All ER 1056, [1972] 3 WLR 910 (H.L.); *Director of Public Prosecutions v Kilbourne* [1973] AC 729, [1973] 1 All ER 440, [1973] 2 WLR 254 (H.L.); *The People (Director of Public Prosecutions) v Reid* [1993] 2 IR 186, at p. 197, per Keane J. (C.C.A.); *The People v D* (Court of Criminal Appeal, *ex tempore*, 27\(^{th}\) July, 1993); *The People (Director of Public Prosecutions) v JC* (Unreported, Court of Criminal Appeal, 7th November, 1994); *The People (Director of Public Prosecutions) v MJM* (Unreported, Court of Criminal Appeal, 28\(^{th}\) July, 1995); *The People (Director of Public Prosecutions) v Mollov* (Unreported, Court of Criminal Appeal, 28\(^{th}\) July, 1995); *The People v Murphy* (Unreported, Court of Criminal Appeal, *ex tempore*, 3\(^{rd}\) November, 1997); *The People (Director of Public Prosecutions) v Morrissey* (Court of Criminal Appeal, 10\(^{th}\) July, 1998); *The People (Director of Public Prosecutions) v Kiernan* (Court of Criminal Appeal, *ex tempore*, 19\(^{th}\) October, 1998); *The People (Director of Public Prosecutions) v Donnelly* (Court of Criminal Appeal, 22\(^{nd}\) February, 1999); *The People (Director of Public Prosecutions) v Nolan* (Court of Criminal Appeal, 27\(^{th}\) November, 2001); *The People (Director of Public Prosecutions) v Wallace* (Unreported, Court of Criminal Appeal, 30\(^{th}\) April, 2001); *The People (Director of Public Prosecutions) v C* [2001] 3 IR 345 (C.C.A.); *The People (Director of Public Prosecutions) v O’Connor* (Unreported, Court of Criminal Appeal, 29\(^{th}\) July, 2002); *The People (Director of Public Prosecutions) v Acheampong* (Unreported, Court of Criminal Appeal, 11th July 2002); *The People (Director of Public Prosecutions) v Ferris* (Unreported, Court of Criminal Appeal, 11\(^{th}\) June, 2002); *The People (Director of Public Prosecutions) v PC* [2002] 2 IR 285; *The People (Director of Public Prosecutions) v Gentleman* [2003] 4 IR 22 (C.C.A.); *Vetrovec v The Queen* [1982] 1 S.C.R. 811 (S.C.C.); *Warkentin v R* [1977] 2 S.C.R. 355 (S.C.C.); *Murphy v R* [1977] 2 S.C.R. 603 (S.C.C.); and *R v B(CG)* [1990] 2 S.C.R. 3 (S.C.C.).

1823 See: *Z v Director of Public Prosecutions* [1994] 2 IR 476, at p. 507, per Finlay C.J. and [1994] 2 IR 476, at p. 493, per Hamilton C.J. (S.C.); *The Irish Times Limited v Ireland* [1998] 1 IR 375, at pp. 399-400, per Denham J. (S.C.); *The People (Director of Public Prosecutions) v Egan* [1990] I.LRM 780, at p. 790, per O’Flaherty J. (S.C.); *The People (Director of Public Prosecutions) v Gillane* (Unreported, Court of Criminal Appeal, 14\(^{th}\) December, 1998); and *The People (Director of Public Prosecutions) v Morrissey* (Unreported, Court of Criminal Appeal, 10\(^{th}\) July, 1998).

trial; in particular, to give such warning as may be necessary to avoid a real risk of an unfair trial.1825

5.0.4

Provided that the core elements of the right to a fair trial or fair procedures – often referred to as the ‘purposes of confrontation’ – are preserved,1826 it is submitted that it is not impermissible to alter the manner in which the trial is conducted or, by extension, the manner in which the rights of an accused person are protected;1827 the legislature is entitled “to harness technological progress to the interests of the child and of justice in a way which preserves the traditional fairness, if not the traditional forms, of the...trial”.1828 The challenge for the courts is to determine the point at which a permissible modification of trial procedure, court layout or even the rules of evidence


themselves, becomes an impermissible infringement of the rights of the accused, emptying those rights of content or meaning.  

5.0.5

In this regard and for the reasons more fully debated above, it is submitted that the provision of one-way screens or the use of live television link to facilitate the reception of evidence from child witnesses do not contravene the accused’s right to a fair trial and fair procedures, notwithstanding the fact that these special measures dispense with the direct physical confrontation between accused and accuser characteristic of the traditional adversarial trial. In the alternative, if, and to the extent that the use of a one-way screen or live television link facility does infringe the accused’s rights, it is submitted that a finding of unconstitutionality is avoided by operation of the ‘balancing’ and ‘proportionality’ tests, in light of the importance of the underlying social policy – the protection of child witnesses from undue trauma associated with the witness experience with a view to obtaining the best evidence – and the preservation of adequate safeguards for the rights of the accused. Such safeguards include, inter alia: judicial control or supervision of the use of the special measure; preserving an uninterrupted view of the child witness throughout his / her evidence for all present in court; a judicial direction to the jury prohibiting the drawing of any inferences adverse to the accused arising from the use of this measure; and obliging the trial judge to have regard to the rights of the accused before authorising the use of the live television link facility when determining the use of such measures.

1829 In its Report on Child Sexual Abuse (LRC 32-1990) (September, 1990) para. 7.02, at p. 67, the Law Reform Commission in Ireland asserted that it was necessary to modify “some of the usual attributes of a criminal trial” in order to accommodate the evidence of child witnesses, however, it cautioned that any such modifications must not constitute a denial of the accused’s right to trial in due course of law pursuant to Article 38.1, or indeed, the accused’s right to fairness of procedures under Article 40.3 of the Constitution.

1830 As noted above, in light of the fact that the use of a one-way screen carries with it a higher risk of prejudicial jury perception of the accused than the live television link – by reason of the fact that the child remains in the courtroom for the duration of his / her evidence with only his / her view of the accused obscured, indicating that it is the accused the child fears rather than giving evidence in court – it is submitted that a particularly strongly worded direction is required from the trial judge to the jury warning against drawing any adverse inferences against the accused arising out of the use of this special measure in order to combat this potential prejudice. Furthermore, it is submitted that, for this reason, the use of the live television link should always be preferred and that, where such facility is unavailable in the court which is due to hear the criminal proceedings, pursuant to s. 17 of the Criminal Evidence Act 1992, the trial should be transferred to a court where the live television link is available.
whether the accused has shown ‘good reason’ why the child witness should not give his / her evidence in this manner.\textsuperscript{1831} Equally, it is submitted that the presence of a support person near a child witness for the duration of his / her evidence\textsuperscript{1832} is permissible in the exercise of the court’s inherent jurisdiction and having regard to the rights of the accused,\textsuperscript{1833} provided that:

(i) no communication takes place between the child witness and the support person—other than that expressly approved by and subject to the control of the trial judge, such as where the child is overcome with emotion or ceases to communicate;

(ii) the jury is properly directed in relation to the use of this special measure; and

(iii) the support person is independent both of the parties and of the proceedings.\textsuperscript{1834}

5.0.6 However, it is conceded that there are rules of evidence or procedure which are so fundamental to the concept of a fair trial and fair procedures that to alter them would disrupt the balance of fairness in a criminal trial; in this regard, it is submitted that it would not be permissible to alter the established evidential rules regarding the burden and standard of proof in criminal proceedings. Equally, it is submitted that the interference with the accused’s right of full and effective cross-examination resulting from the appointment and use of an intermediary through whom questions must be

\textsuperscript{1831} See sections 4.9.0–4.12.19: Constitutionality of Screens and Live Television Link.


\textsuperscript{1833} It is submitted that the ‘balancing test’ governing the availability of a one-way screen in England (prior to the enactment of s. 23 of the Youth Justice and Criminal Evidence Act 1999) in the exercise of the court’s inherent jurisdiction to arrange its procedures in a manner conducive to the proper administration of justice should be applied by analogy—and in the absence of statutory guidance—to the provision of a support person in this jurisdiction; having weighed the prejudice to the accused and the benefit to the child witness in allowing such support person to accompany the child witness during his / her evidence, the court must determine where the balance of fairness lies. See: R v X, Y and Z (1990) 91 Cr App R 36, [1990] Crim LR 515 (C.A.); R v Smellie (1919) 14 Cr App R 128 (C.A.); R v Greenwood [1993] Crim LR 77 (C.A.); R v Taylor [1995] Crim LR 253 (C.A.); R v Ellis (No. 2) [1993] 3 NZLR 325 (H.C.); and R v Paparohi (1993) 10 CRNZ 293 (C.A.).

\textsuperscript{1834} See sections 4.13.0–4.18.28: Support Person and Intermediary.
put to the child witness – pursuant to s. 14 of the Criminal Evidence Act 1992, as amended – represents an impermissible modification of the manner in which the accused’s right of cross-examination may be conducted, which dilutes the very essence of the right of cross-examination and negates the right to a fair trial and fair procedures. The intermediary not only presents a ‘human barrier’ to direct cross-examination – with the necessary loss of immediacy, intonation and momentum in questioning – but is also empowered, pursuant to s. 14(2), to alter the very wording of the questions posed of the child witness in cross-examination. Such a clear and comprehensive breach of the right to a fair trial and fair procedures is not saved by the ‘interests of justice’ test contained in s. 14 or a judicial direction to the jury, nor, it is submitted, can the ‘balancing’ or ‘proportionality’ tests operate to rescue section 14 from unconstitutionality. Unlike those statutory schemes providing for the

1835 Section 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001. See also: s. 22 of the Children Act 1997 in respect of applicable civil proceedings in Ireland; and s. 29 of the Youth Justice and Criminal Evidence Act 1999 in England.


1837 See: Donnelly v Ireland [1998] 1 IR 321, at p. 324, per Costello P. (H.C.): “If, therefore, the constitutional guarantee of fair procedures is breached then the court will declare a statute which does so to be unconstitutional....If it does so then there can be no question of balancing conflicting rights – if the procedures are unfair this section must be condemned”. See also: The People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006); The Irish Times Limited v Ireland [1998] 1 IR 375, [1998] 2 ILMR 161 (S.C.); Z v Director of Public Prosecutions [1994] 2 IR 476, at p. 507, per Finlay C.J. (S.C.); D v Director of Public Prosecutions [1994] 2 IR 465, at p. 474, per Denham J. (S.C.); Heaney v Ireland [1996] 1 IR 580, [1997] 1 ILMR 117 (S.C.); Tuohy v Courtney [1994] 3 IR 1, at p. 47, [1994] 2 ILMR 503, at p. 514, per Finlay C.J. (S.C.); In re Article 26 and the Employment Equality Bill, 1996 [1997] 2 IR 321 (S.C.); In re Article 26 and the Planning and Development Bill, 1999 [2000] 2 IR 117 (S.C.).

1838 See: (i) England: ss. 34, 35 and 36 of the Youth Justice and Criminal Evidence Act 1999; (ii) Canada: s. 486.3(1)-(5) of the Criminal Code, as inserted by An Act to Amend the Criminal Code
restriction of or prohibition upon the accused’s right of cross-examination of a child witness in person – not yet adopted in this jurisdiction – s. 14 does not even preserve the accused’s right to cross-examine via his / her legal representatives, notwithstanding the fact that the child witness in question already enjoys the benefit of the live television link facility by reason of the twinning of these special measures under s. 14 of the Criminal Evidence Act 1992, as amended.

5.0.7 The reforms of the law of evidence relating to child witnesses are often characterised as representing the removal of obstacles or barriers to ascertaining the truth. In particular, it is submitted that the judicial and statutory changes altering – or even abolishing – the requisite threshold of competence required to be satisfied before a potential child witness is permitted to give evidence in criminal proceedings, increased both the quantity and quality of the evidence received by the courts, thereby assisting in the proper administration of justice. As noted above, the traditional tests of competence favoured in relation to both sworn and unsworn evidence were not effective indicators of competence and operated to exclude even the evidence of psychologically competent child witnesses. In particular, the benefit to the administration of justice in recognising the contribution to be made by child witnesses and complainants in the prosecution of offences, such as sexual offences – in respect of which, owing to the nature of the offence and the absence of other witnesses, the evidence of the child may be

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2005, c. 32, s. 15; (iii) New Zealand: s. 23F of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989; and (iv) Scotland: s. 288E and s. 288F of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 6 of the Vulnerable Witnesses (Scotland) Act 2004.

1839 See: The People (Director of Public Prosecutions) v Kelly (Unreported, Supreme Court, 4th April, 2006); Maguire v Ardagh [2002] 1 IR 447 (S.C.); O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005); Croissant v Germany (1992) 16 EHRR 135, para. 29 (E.Cm.H.R.); Kamasinki v Austria (1989) 13 EHRR 36; S v Switzerland (1991) 14 EHRR 670; and Artico v Italy (1980) 3 EHRR 1.


1841 See: s. 24, Part III of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3); and sections 2.16.0-2.16.19; Wigmore’s ‘Come What May’ Approach.
essential to found a conviction or even to initiate proceedings\textsuperscript{1842} – is reflected in the more inclusive approach adopted in the legislatures of each of the jurisdictions considered herein, including Ireland.\textsuperscript{1843} Moreover, a constitutional basis has been asserted for the reform of the restrictive rules traditionally governing the competence of child witnesses, namely, that the administration of justice itself requires that the public has \textit{“a right to every man’s evidence”} – except for that evidence which is excluded by law or the Constitution\textsuperscript{1844} – and that such exclusionary rules inhibit the court in the pursuit of truth.\textsuperscript{1845}

5.0.8 The four ‘special measures’ examined above are also regarded as assisting in the ascertainment of the truth. In recognition of the different needs of child witnesses and the truth-defeating effects of measures traditionally understood to elicit the truth from witnesses\textsuperscript{1846} – such as the requirement of direct physical confrontation with the accused for the duration of the witness’s evidence and the use of sophisticated techniques of cross-examination – it is understood that, by adapting or dispensing with such

\textsuperscript{1842} Spencer, J.R. “Children’s evidence in legal proceedings in England” in Spencer J.R., Nicholson, G., Flin R., and Bull R., Children’s Evidence in Legal Proceedings: An International Perspective (1990) 113, at p. 117: \textit{“All this is bad for the child: and it is bad for justice, too, because when the child is unable to utter it means the court is deprived of an important source of evidence.”}

\textsuperscript{1843} Dennis, I.H. (2nd ed., 2002) The Law of Evidence at p. 496: \textit{“There are powerful arguments for special techniques of protection. The proper enforcement of the criminal law partly depends on these types of witness. Their evidence may be crucial for the conviction of dangerous and violent offences, and for ensuring the future safety of the witnesses themselves and other potential victims”}. See also: Royal Commission on Criminal Justice: Report Cm. 2263 (1993) para. 5.44; and Paciocco, David The Law of Evidence (2nd ed., 1999) para. 9.1, at p. 295.

\textsuperscript{1844} The People (Director of Public Prosecutions) v J.T. (1984-9) 3 Frewen 141, at p. 160, per Walsh J. (C.C.A.), expressly approved by Denham J. in Director of Public Prosecutions v Gilligan (Unreported, Supreme Court, 23\textsuperscript{rd} November, 2005) [2005] IESC 78 at pp. 77-78 (S.C.).

\textsuperscript{1845} The People (Director of Public Prosecutions) v Kenny [1990] 2 IR 110, at p. 134, \textit{per} Finlay C.J. (S.C.).

\textsuperscript{1846} Spencer, J.R. “Child Witnesses, Video-Technology and the Law of Evidence” [1987] Crim LR 76, at p. 83: \textit{“[W]ith a small child such confrontation does not make it tell the truth, but makes it too frightened to say anything at all; which, whilst excellent for child-molesters and their defending lawyers, is bad for everybody else.”} He further argued that: \textit{“If the basic traditions of British justice really require the Colin James Evanses of the paedophile world to confront their four-year-old accusers face to face, even if this makes it impossible to get a word of evidence out of them it is the traditions of British justice which need re-examining, not the video-link proposal.”} McEwan, Jenny \textit{“In the Box or on the Box? The Pigot Report and Child Witnesses”} [1990] Crim LR 363, at p. 364: \textit{“[T]he desirability of constructing a system of trial where the accused cannot profit, in terms of deterrent effect, from the ordeal facing his victim in court, is beyond argument.”} See also: Report of the Advisory Group on Video Evidence (Chairperson, His Honour Judge Thomas Pigot QC) (London: Home Office, December, 1989) para. 2.15, at pp. 17-18.
characteristics of the adversarial trial, or by introducing additional actors into the criminal justice system to facilitate the reception of evidence from child witnesses, the trauma experienced by children in giving evidence is thereby reduced, with a resulting improvement in the quality of evidence received by the court. Furthermore, it is submitted that, provided sufficient safeguards remain to protect the rights of the accused, measures which elicit the best evidence from witnesses are not only consistent with the rational ascertainment of facts and the proper administration of justice, they are also consistent with the accused’s right to a fair trial and fair procedures.


5.0.9 In this regard, it should be noted that – notwithstanding English judicial dicta to the opposite effect – the exclusion of the accused from eligibility to avail of such measures runs contrary to the proper administration of

1848 See: Hoyano, Laura “Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?” [2001] Crim LR 948, at p. 969. See also: sections 4.0.0-4.18.28 examining the availability, operation and permissibility of special measures – one-way screens, live television link, support persons and intermediaries – in the examination of child witnesses in criminal trials.


1850 See: (i) Ireland: s. 13 of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001 and, by necessary extension, s. 14 of the Criminal Evidence Act 1992, as amended by s. 257(3) of the Children Act 2001; (ii) England: ss. 16, 17, 21 and 22 of the Youth Justice and Criminal Evidence Act 1999; and (iii) New Zealand: s. 23C of the Evidence Act 1908, as inserted by s. 3 of the Evidence Amendment Act 1989.
justice. While it may not be practicable—or even desirable—to extend to the accused person eligibility to avail of all of the special measures analysed above, it is submitted that excluding the accused from eligibility in respect of the use of any of these ‘special measures’, regardless of the accused’s vulnerability—or, more particularly, his / her status as a child—represents an infringement of the principle of ‘equality of arms’ and a failure to vindicate the accused’s right of full and effective participation in his / her trial, contrary to the guarantees contained both in the Constitution of Ireland 1937 and the European Convention on Human Rights.

5.0.10 The great irony uncovered by the foregoing comparative analysis of the judicial and statutory reforms of the law of evidence in relation to children both in this jurisdiction and in the legal systems of other common law jurisdictions is that, by neglecting to conduct a comprehensive evaluation and subsequent revision of the statutory reforms contained in the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004. See also: Final Report of the Committee on Video Conferencing in the Courts (Dublin: Courts Service, 2005) (Chairperson, Ms. Justice Denham) which recommends the use of videoconferencing technology in regard to the conduct of pre-trial criminal hearings involving prisoners, such as bail and remand hearings, and the facilitation of contact and consultation between lawyers and prisoners. See: In re Haughey [1971] IR 217, at p. 263, per O’Dálaigh C.J. (S.C.); O’Callaghan v Mahon (Unreported, Supreme Court, 9th March, 2005), [2005] IESC 9, per Hardiman J. (S.C.); J.F. v Director of Public Prosecutions [2005] 2 IR 274, at p. 182, per Hardiman J. (S.C.); and Carmody v Minister for Justice [2005] 2 ILRM 1 (H.C.). See also: MS v Finland (2006) 42 EHRR 5, paras. 30-31 (E.Ct.H.R.); Steel and Morris v United Kingdom (2005) 41 EHRR 35, paras. 41-42 (E.Ct.H.R.); Ocalan v Turkey (2005) 41 EHRR 45, para. 140 (E.Ct.H.R.);

1851 King, Michael and Piper, Christine How the Law Thinks About Children (2nd ed., 1995) at p. 70: “Children, it seems, are treated differently depending upon the role they play in legal proceedings. Child victims are seen as different people from child offenders. Whereas the former are considered highly vulnerable, and, therefore, in need of protection from the rigours of courtroom examination, the latter are seen in most jurisdictions as quite competent to give evidence in court and to be examined on that evidence.” See sections 4.5.0-4.5.17 in relation to the exclusion of the accused from eligibility to avail of special measures.

1852 For example, it is submitted that it would not be appropriate for the accused (even if a child) to give evidence from behind a one-way screen. See the practical compromise contained in s. 271 of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004. See also: In re T and V v United Kingdom (2000) 30 EHRR 121, para. 84 (E.Ct.H.R.); and SC v United Kingdom (2005) 40 EHRR 226, para. 35 (E.Ct.H.R.).

Evidence Act 1992\footnote{The combined effect of these statutory reforms mean that a child witness may give evidence, unsworn, in criminal proceedings where he / she satisfies the ‘intelligibility’ test contained in s. 27 of the Criminal Evidence Act 1992; his / her evidence may be the subject of a discretionary cautionary instruction delivered by the trial judge to the jury where there is an evidential basis for such direction in the frailties of the child’s evidence; and the court may – in the exercise of its inherent or statutory discretion and upon satisfaction of the relevant pre-conditions analysed above – authorise the child to give his / her evidence with the benefit of a support person, from behind a one-way screen in the body of the court which obscures the child’s view of the accused or from outside the courtroom via live television link with or without the assistance of an intermediary.} – and thereby to keep pace with the developments in other common law jurisdictions, including the adoption of ever more ‘progressive’ approaches towards the evidence of child witnesses and more radical ‘special measures’ to facilitate the reception of such evidence – we have maintained a more appropriate balance between the competing interests of the rights of the accused, the protection of child witnesses and the proper administration of justice than many of our common law neighbours.\footnote{Murphy, Peter \textit{Murphy on Evidence} (8th ed., 2003) para. 16.18, at p. 586 asserted in relation to the reforms wrought by Part II of the Youth Justice and Criminal Evidence Act 1999 that: “The new methods of presentation of evidence in criminal cases are, to say the least, draconian, and represent a significant shift in the balance of fairness against the accused. Given the relaxation of the rules governing the competence of children and the prevalence of unsworn evidence...and the abolition of the rules requiring corroboration warnings with respect to the evidence of children...the state of the law in the light of the rules to be discussed below raises a legitimate question as to whether it is any longer possible in English law for a person accused of an offence (especially a sexual offence) against a child to be afforded a full and fair defence. If this is to be possible, it would seem that the accused must rely on the vigilance of the courts, and their willingness to use their discretionary powers to prevent unfairness. The traditional methods of testing the evidence of children and other witnesses deemed to be vulnerable in a courtroom setting have largely been deprived of their efficacy”.}  

5.0.11 In particular, it is submitted that the mandatory presumptive rules regarding the manner in which a child witness is to give evidence contained in the statutory schemes recently adopted in England\footnote{See: Part II of the Youth Justice and Criminal Evidence Act 1999 and Part 8 of the Criminal Justice Act 2003.} and Scotland\footnote{See: s. 271 and ss. 271A-M of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 1 of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3). See also: ss. 288E and 288F of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 6 of the Vulnerable Witnesses (Scotland) Act 2004.} dramatically alter the normative manner in which child witnesses are to give evidence in criminal proceedings, to the extent that their presence may not even be required during the trial itself, and operate without reference – save in exceptional circumstances, or by way of default – to the individual...
circumstances of the case or, more importantly, the rights of the accused.\textsuperscript{1859} It is respectfully submitted that the confidence of the English courts in relation to the compatibility of such rules with the rights of the accused is misplaced.\textsuperscript{1860} While it is accepted that a form of generalised ‘presumption of trauma’ is provided for in s. 13(1)(a) of the Criminal Evidence Act 1992, as amended,\textsuperscript{1861} it is submitted that it is not haunted by the same spectre of imbalance as the English or Scottish presumptive rules for the following principal reasons. First, the Supreme Court has upheld as constitutional the use of live television link, pursuant to s. 13 of the Criminal Evidence Act 1992, as amended,\textsuperscript{1862} in view of the preservation of the essential elements of a fair trial and fair procedures contained therein; accordingly, it is submitted that permitting child witnesses to give evidence with the benefit of this special measure ‘unless the court sees good reason to the contrary’ should not give rise to unfairness. Secondly, the Supreme Court has expressly held that, in determining whether ‘good reason’ exists to exercise its discretion to refuse to allow a child witness to give evidence in this manner – evidenced by the permissive language employed in this provision – the trial judge must have regard to the rights of the accused.\textsuperscript{1863} Thirdly, since the Criminal Evidence Act 1992 enjoys the presumption of constitutionality, it is presumed that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed under s. 13 are to be conducted in accordance

\textsuperscript{1859} See: sections 4.11.8-4.11.37 and the analysis therein of the constitutionality and compatibility of these presumptive rules regarding the availability of these special measures to child witnesses in criminal proceedings.


\textsuperscript{1861} Section 13(1)(a) of the Criminal Evidence Act 1992, as amended by s. 18(3) of the Criminal Justice Act 1999 and s. 257(3) of the Children Act 2001. See also the provisions of s. 486.2(1) of the Criminal Code, as inserted by An Act to Amend the Criminal Code, 2005, c. 32, s. 15 in Canada which provides that the judge or justice shall, upon application, order that a child witness testify outside the court room by way of live television link in circumstances which allow the witness “\textit{not to see the accused}” unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

\textsuperscript{1862} See: \textit{Donnelly v Ireland} [1998] 1 IR 338 (S.C.); and the earlier High Court decisions in \textit{White v Ireland} [1995] 2 IR 268 (H.C.); and \textit{Donnelly v Ireland} [1998] 1 IR 321 (H.C.).

with the principles of constitutional justice.\textsuperscript{1864} Finally, to the extent that it may be argued that requiring the accused to show good reason why the child should not enjoy the benefit of this special measure involves the imposition of an unfair burden of proof on the defence, it is submitted that the shifting of an evidential burden in respect of adjectival law cannot be said to infringe the accused’s right to a fair trial and fair procedures.\textsuperscript{1865}

5.0.12 Equally, it is submitted that the modern approach adopted towards the competence of child witnesses, involving equalisation of the legal treatment extended to child and adult witnesses alike – either by providing for a ‘presumption of competence’ as in the English statutory scheme\textsuperscript{1866} or even prohibiting the conduct of a preliminary examination to assess the child’s competence, as stipulated in the Scottish legislation\textsuperscript{1867} – is not required by the principles of equality and, more importantly, does not afford sufficient weight to the rights of the accused to a fair trial and fair procedures. In recognition of the ‘difference’ inherent in child witnesses – in particular, the under-developed linguistic and cognitive skills of very young children – it is permissible to impose a basic competence requirement of ‘intelligibility’ prior to permitting children to give evidence as witnesses; such precondition does not resurrect the traditional suspicion with which the evidence of child witnesses was regarded at common law or require a comprehensive assessment of the capabilities of the child. It is submitted that the rights of the accused are not adequately safeguarded – against the interference attendant upon the erroneous admission into evidence of the


\textsuperscript{1866} Section 53 of the Youth Justice and Criminal Evidence Act 1999. Section 54 provides that a question whether a witness is competent, whether raised by either party or the court of its own motion, shall be determined on the balance of the probabilities, with the party calling the witness satisfying the court to this standard that the witness is competent to give evidence; in determining competence, the court is obliged to treat the witness as having the benefit of any special measures directions which the court proposes to give pursuant to section 19.

\textsuperscript{1867} Section 24 of Part III of the Vulnerable Witnesses (Scotland) Act 2004 (c. 3).
prejudicial evidence of an ‘incompetent’ child witness – by judicial
directions to the jury to disregard such evidence when determining the guilt
or innocence of the accused.\(^{1868}\) In particular, the accused has a right not to
have prejudicial matter of no probative value admitted in evidence against
him / her and placed before the jury\(^{1869}\) and the right to have the reliability
of potentially unreliable prejudicial evidence tested prior to its admission
into evidence against him / her. Accordingly, it is submitted that the
‘intelligibility’ test of competence contained in s. 27 of the Criminal
Evidence Act 1992 achieves a more appropriate balance between these
competing interests\(^{1870}\) – by requiring of child witnesses, prior to permitting
them to give evidence, that they demonstrate the capability to understand
questions posed and give answers which may reasonably be understood\(^{1871}\)
without also requiring that the child satisfy a ‘moral responsibility’ test\(^{1872}\) –
and operates to safeguard the rights of the accused\(^{1873}\) without either

\(^{1868}\) See section 2.17.0: Impact upon the Accused of the Relaxation of Competence Requirements. See also: \(Z v Director of Public Prosecutions\) [1994] 2 IR 476, at p. 507, per Finlay C.J. (S.C.); \(The Irish Times Limited v Ireland\) [1998] 1 IR 375, at pp. 399-400, per Denham J. (S.C.); and \(People (Director of Public Prosecutions) v Ezan\) [1990] ILRM 780, at p. 790, per O’Flaherty J. (S.C.).

\(^{1869}\) \(The Irish Times Limited v Ireland\) [1998] 1 IR 375, at p. 402, per Barrington J. (S.C.): “Among [the incidents of jury trial in a criminal case protected by Article 38.1] is the duty of a trial judge in a criminal case to ensure that prejudicial matter of no probative value is not admitted in evidence before the jury. Thus if a question is raised as to whether an alleged confession was or was not made by the accused voluntarily the judge will investigate the voluntariness of the confession in the absence of the jury before deciding whether or not to admit it in evidence. This is because a jury of laymen could hardly be expected to exclude from their minds damaging evidence such as an alleged confession of guilt even though the alleged confession might be of no probative value in law.”

\(^{1870}\) Bala, Nicholas “The Supreme Court Sends a Clear Message (Again): Children are not Adults” (1999) 27 C.R. (5th) 195, at p. 195: “Children have different strengths and capacities from adults; they do not perceive or communicate in the same way as adults. Children can be reliable witnesses offering important information to the justice system, provided that their stage of development and capacities are respected. While the evidence of all witnesses must be carefully assessed, children are to be treated differently from adults, and their evidence should be assessed taking account of the capacities of children, not adults.”


\(^{1872}\) See, in particular: sections 2.12.8-2.12.16, 2.13.0-2.13.6, 2.15.5, 2.15.8-2.15.10 and 2.15.13-2.15.14.

forming an obstacle to the exercise of the court’s truth-seeking function or excluding the evidence of psychologically competent child witnesses.\textsuperscript{1874}

5.0.13 The superior balance achieved by the more conservative Irish legislation reflects an underlying policy determination that, while the special needs of children must be accommodated in the interests of the proper administration of justice and special measures adopted to facilitate the reception of their evidence, nonetheless some of the limitations inherent in our criminal justice system and, more particularly, the adversarial trial, are “\textit{unavoidable so long as society wishes to preserve the existing balance within criminal process}”\textsuperscript{1875} and in order to protect and vindicate the constitutional right to a fair trial and fair procedures.\textsuperscript{1876}

5.0.14 However, it is submitted that the most radical reform of the law is, in fact, that which attended upon the interpretation and application of the ‘evidential revolution’ analysed above, namely, the change in the law’s discourse of ‘rights’ in the context of criminal proceedings.\textsuperscript{1877} By expanding the concept of ‘fairness’ in the right to a fair trial and fair procedures in Articles 38.1 and 40.3 to include the concept of fairness to all, the reformed discourse of rights both accommodated and legitimised the evidential reforms of the law of evidence in relation to children. The right to a fair trial and fair procedures is no longer the exclusive preserve of the accused person but encompasses consideration of fairness to other actors in the criminal justice

\textsuperscript{1874} See, in particular, sections 2.15.0-2.15.16, 2.16.0-2.16.19 and 2.17.0-2.17.14 examining the test of ‘intelligibility’, the abolition of all pre-conditions to competence for child witnesses and the impact upon the accused of the relaxation (and abolition) of the competence requirements for child witnesses.

\textsuperscript{1875} Law Reform Commission of Ireland, \textit{Consultation Paper on Child Sexual Abuse} (August, 1989) para. 8, at p. 5. See also: Law Reform Commission of Ireland, \textit{Consultation Paper on Rape} (October, 1987) para. 6, at p. 4: “Society has to make a choice about the balance it wants to draw, in doubtful cases, between ensuring the conviction of rapists and avoiding the conviction of the innocent. At present the criminal justice system operates on principles which assume that the need to avoid convicting an innocent person is, in a free society, important enough to justify the risk of allowing the occasional rapist to go free. This is a heavy price to pay for freedom, but it is generally felt that the price is worth paying.”

\textsuperscript{1876} Law Reform Commission of Western Australia, Discussion Paper: \textit{The Evidence of Children and Other Vulnerable Witnesses} (Project No. 87, 1990) at p. 11: “It is extremely important that any changes in procedures should not interfere with the fundamental rules about fairness to an accused person, who must be presumed innocent until the charge is proved against him or her.”

\textsuperscript{1877} See further: section 4.12.0-4.12.19 \textit{Meaning of Fair Trial, Fairness and Fair Procedures}.
system, such as child witnesses and victims, and the requirements of the proper administration of justice.\textsuperscript{1878}

5.0.15 The emphasis placed upon the protection of child witnesses – particularly in the context of the prosecution of sexual offences – is due, in part, to the influence of the jurisprudence of the European Court of Human Rights, which has permitted and upheld significant alterations of the traditional adversarial trial and trial procedures in the interests of protecting child witnesses and complainants of sexual offences.\textsuperscript{1879} However, the creative judicial interpretation of the constitutional guarantee of fair trial and fair procedures to include the requirement of fairness to all is also founded upon the interpretation of the Constitution of Ireland 1937 – and the rights protected thereunder – as a “living document” which “falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores”\textsuperscript{1880}, attributing a “dynamic quality” to constitutional provisions


\textsuperscript{1880} \textit{Sinnott v Minister for Education} [2001] 2 IR 599, at p. 680, \textit{per} Murray J. (S.C.), relying upon the following passage from the decision of Walsh J. in \textit{Mc Gee v Attorney General} [1974] IR 284, at p. 319 (S.C.): “It is but natural that from time to time the prevailing ideas of [prudence, justice and charity] may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time”. See also the judgment of O’Higgins C.J. in \textit{The State (Healy) v Donoghue} [1976] IR 325, at p. 347 (S.C.): “[R]ights given by the Constitution must be considered in accordance with the concepts of prudence, justice and charity which may gradually change or develop as society changes and develops and which fail to be interpreted from time to time in accordance with prevailing ideas”. However, in \textit{Sinnott v Minister for Education} [2001] 2 IR 599, at p. 680 (S.C.) Murray J. also considered the relationship between this ‘living document’ approach with the ‘historical’ approach to
involving standards and values such as "personal rights, the common good and social justice".\textsuperscript{1881} Equally, the doctrine of "harmonious interpretation" of the Constitution\textsuperscript{1882} lends support to the weighing and balancing of the competing interests involved in the reforms of the law of evidence relating to children\textsuperscript{1883} and permits a more sophisticated analysis of the resolution of these tensions than the "hierarchy of rights simpliciter" approach traditionally favoured by the courts with regard to the right of the accused to a fair trial and fair procedures, in which these rights of the accused enjoyed an elevated position.\textsuperscript{1884} As asserted by the Chief Justice in

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\textsuperscript{1881} A\textsuperscript{ }v\textsuperscript{ }The Governor of Arbour Hill Prison (Unreported, Supreme Court, 10\textsuperscript{th} July, 2006), per Murray C.J. See also: Jackson, John D., "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment" (2005) 68(5) Modern Law Review 737, at p. 762: "The emphasis given to the needs of particularly vulnerable witnesses in the light of modern day concerns surrounding effective sexual abuse prosecutions is an example of Article 6 being interpreted as a living instrument."


\textsuperscript{1883} See, in particular: The People (Director of Public Prosecutions) v J.T. (1988) 3 Frewen 141, per Walsh J. (C.C.A.); and Director of Public Prosecutions v Gilligan (Unreported, Supreme Court, 23\textsuperscript{rd} November 2005), [2005] IESC 78, per Denham J. (S.C.). See also the courts' interpretation of the personal right to bodily integrity pursuant to Article 40.3. of the Constitution: Ryan v Attorney General [1965] IR 294, at pp. 313-314, per Kenny J.; The People (Director of Public Prosecutions) v Tierman [1988] IR 250, [1989] ILRM 149; Re A Ward of Court (No. 2) [1996] 2 IR 79 (S.C.); AD v Ireland [1994] 1 IR 369; Heeney v Dublin Corporation (Unreported, Supreme Court, ex tempore, 17\textsuperscript{th} August, 1998); The State (C) v Frawley [1976] IR 365, at p. 374, per Finlay P.; The People (Attorney General) v O'Brien [1965] IR 142, at p. 150, per Kingsmill Moore J. (S.C.); The State (Richardson) v Governor of Mountjoy Prison [1980] ILRM 82, at p. 93, per Barrington J.; The State (McDonagh) v Frawley [1978] IR 131; and The State (Comerford) v Governor of Mountjoy Prison [1981] ILRM 86, at p. 90.

the recent judgment of the Supreme Court, *A v The Governor of Arbour Hill Prison*:

"The Constitution...is holistic and provides a full and complete framework for the functioning of a democratic State and an ordered society in accordance with the rule of law, the due administration of justice and the interests of the common good. In providing for the common good and seeking 'to attain true social order', in the words of the Preamble, the application of the Constitution cannot be distorted by focusing on one principle or tenet to the exclusion of all others."

5.0.16 It is a measure of the success and transformative nature of these reforms of the law of evidence in relation to children – and of the enthusiasm of legislatures for such law reform – that it is now unpopular to voice concern or hesitancy in relation to the balance achieved by these reforms and to argue against the adoption of the more radical or ‘progressive’ reforms proposed in order to facilitate the reception of evidence from child witnesses; the concomitant change in the discourse of rights illustrates the magnitude of the change in the law’s perception of children as witnesses. The small voices of children, silenced by the law for centuries, can now be heard in criminal courts across this jurisdiction and, more importantly, are listened to and valued by both the criminal justice...

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1886 See the caution issued by the Law Reform Commission of Tasmania, Discussion Paper: *Child Witnesses in Sexual Assault* (Discussion Paper No. 1, 1987) (Kate Warner) at p. 16: "Because child sexual abuse is an emotive subject there is a need to guard against over reaction and to maintain a balance between the protection for the victim and the rights of suspects."

system and its actors. The challenge facing the legislature – and the courts, in the interpretation and application of these statutory measures – is to adopt or retain only those reforms which “modify the traditional framework to take account of the special needs and realities of children in a manner which is consistent with the constitutionally entrenched rights of the accused”. In determining whether an appropriate balance has been struck between the rights of the accused and the protection of child witnesses, the legislature and judiciary alike should not allow concern for the child complainants or witnesses of serious offences to distort the balance of fairness; equally, objections raised on behalf of an accused person to any innovation in the law of evidence in relation to children on the ground that it is “contrary to basic principles of criminal justice, must be carefully scrutinised”.

“Traditionally, the criminal justice system has tended to focus on the rights of the accused to the exclusion of consideration of the victim. As well as the acquittal of the innocent and the conviction of the guilty, the trial and preliminary procedures must be humane and fair to both accused and victim.”

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188 Corrin, Chris, *Women in a Violent World* (1996) at pp. 58-59: “Silence is never broken all at once and of a piece. It breaks now and then, here and there, voice by voice, gradually making sound and sense where before there was none”.

188 Young, Professor Alison Harvison “Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues” (1992) 11 Canadian Journal of Family Law 11, at p. 11. Professor Young continued, at p. 17: “Accordingly, one of the most difficult challenges facing Canadians in the coming years will be the reconciliation of potentially conflicting goals: (i) that of providing an increased level of protection for children who are victims of abuse, which means, inter alia, rethinking many of the traditional rules which have operated to exclude or invalidate children’s stories; and (ii) that of protecting the now constitutionally entrenched rights of the accused in a society which has, in our Charter era, become more highly sensitized to the notion of individual rights.”

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