Neutral Citation Number: [2008] IEHC 426

THE HIGH COURT

2006 4652 P

BETWEEN

J.P.

PLAINTIFF

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr Justice Roderick Murphy delivered on the 19th day of December, 2008

1. Background to the proceedings

1. The plaintiff pleaded guilty to two charges of buggery of a person under the age of 17 contrary to s. 3 of the Criminal Law (Sexual Offences) Act, 1993. That provision has been repealed by the Criminal Law (Sexual Offences) Act, 2006, but remained in force at the time the plaintiff was charged.

2. On 5th October 2006 he instituted these proceedings by way of plenary summons seeking a declaration that s. 3 was repugnant to the Constitution. His sentencing was adjourned pending the outcome of these proceedings and he was remanded on continuing bail.

3. The defence of 14th January, 2008 challenged the plaintiff's *locus standi* and denied that s. 3 did not permit a defence of reasonable defence as to age. The legislation was not unconstitutional. Even if the plaintiff did not know that his actions were against the law, the same was irrelevant as a matter of law. In the circumstances where the plaintiff knew the age of the complainant and had pleaded to two counts of breaching s. 3, in neither case was there any basis for restraining the sentence of the plaintiff. Moreover, s. 3 of the 1993 Act, being a post-1937 Act and one with a different legislative history, falls to be interpreted in a different way to the Act of 1935. The section was not incompatible with the European Convention on Human Rights Act, 2003 in circumstances where the plaintiff knew the age of the complainant at all material times.

4. The complainant was 16 at the time of the alleged offences and was in a relationship with the plaintiff, who was then 19. Although he admits having committed the acts complained of he asserts that, at the time, he believed the complainant to have attained the age of 17. He submits that that belief is immaterial in relation to the s. 3 offence and that, to secure a conviction under that section, the prosecution need not establish any element of knowledge on the part of the accused as to the complainant's age, nor can the accused invoke any defence of mistake as to age. Indeed, he was advised to precisely that effect and pleaded guilty on foot of that advice. He relied on the decision of the Supreme Court in *C.C. v. Ireland* [2006] 4 I.R. 1 as establishing that the section was unconstitutional if that interpretation of the provision was correct. The defendants properly conceded that if the offence were indeed one of strict liability on its proper construction, s. 3 would be repugnant to the Constitution (for convenience, in this judgment I will use the term 'strict liability' to denote an offence in respect of which there is neither a requirement that knowledge as to age be proved as an element of the offence nor a defence of mistake as to age). The issues to be resolved by this court were therefore confined to the plaintiff's standing to pursue this challenge and the correct construction of section 3.

2. *Locus standi*

5. The leading authority on this issue is the decision of the Supreme Court in *Cahill v. Sutton* [1980] I.R. 269. In that case the plaintiff alleged she had suffered injury as a result of her doctor's breach of contract. Her action was statute-barred, but she challenged the constitutionality of the statutory time limit on the basis that it contained no exception for the benefit of persons who were unaware of the existence of their cause of action until after the expiry of that period. On her own admission, however, she was not such a person, having been aware of the existence of her cause of action against the defendant at all times. For that reason the Court held that she could not pursue her challenge. Henchy J. stated (at 286):

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."

6. This rule was reiterated in *Norris v. Attorney General* [1984] I.R. 36. In that case the plaintiff sought to challenge ss. 61 and 62 of the Offences Against the Person Act, 1861, which provisions criminalised buggery between males. O'Higgins C.J. (with whose judgment Finlay P. and Griffin J. agreed) recognised that the plaintiff had the requisite standing to challenge those provisions. Although he had not been prosecuted under them, their presence on the statute book represented a threat to a constitutional right, whose existence he asserted, to engage in the proscribed conduct. However, he was not permitted to rely on the affect of the provisions on the right to marital privacy, because his evidence was that marriage was not an option that could be considered open to him. O'Higgins C.J. noted (at 58):

> "This being so, it is *nihil ad rem* for the plaintiff to suggest, as a reason for alleviating his own predicament, a possible impact of the impugned legislation on a situation which is not his, and to point to a possible injury or prejudice which he has neither suffered nor is in imminent danger of suffering within the principles laid down by this Court in *Cahill v. Sutton*."

7. The judgment of Hardiman J. in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 is to similar effect. In that case the applicant was serving a three year sentence following his conviction under s. 1 of the 1935 Act. He argued that, in light of the decision of the Supreme Court in *C.C.*, s. 1 had not survived the entry into force of the 1937 Constitution and his detention pursuant to that provision was consequently unlawful. The Supreme Court rejected this argument on the basis that the declaration of unconstitutionality in *C.C.* did not apply retrospectively in the manner contended for by the applicant. Hardiman J. noted that, in contrast to the applicant in *C.C.*, the applicant in A. had raised his constitutional challenge before trial. The fact the applicant had not done so was a major obstacle in the way of his attempt to "piggyback" on the decision in *C.C.*, particularly where he had pleaded guilty at trial. Hardiman J. observed (at paras. 196-197):

> "The applicant in this case…positively knew the age of the victim and did not deny this. He could never himself have impugned the subsection on the basis that the applicant did in *C.C.*…because of the operation of the *jus tertii* rule: a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see *Cahill v. Sutton* [1980] I.R. 269. In other words, he is confined to the actual facts of his case and cannot make up others which would suit him better. Because of this rule, the applicant could not have

> attacked the section on the basis that it excluded a defence of reasonable mistake as to age since that defence would not have been open to him on the admitted facts, even if it had been available in law. He had, accordingly, no *locus standi* on which to challenge the subsection. The applicant in *C.C.*…had this standing."

8. The rule, however, is not an absolute one. In *Cahill*, Henchy J. observed (at 284-285) that, although in general a plaintiff would be required "to show that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either suffered or is in imminent danger of suffering", nevertheless:

> "This rule, however, being but a rule of practice must, like all such rules, be subject to expansion, exception or qualification when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal *locus standi*…may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked….the stated rule of personal standing may be waived or relaxed if, in the particular circumstances of a case, the court finds that there are weighty countervailing considerations justifying a departure from the rule."

9. The plaintiff also relied on *King v. Attorney General* [1981] I.R. 233 as authority for the proposition that a person has *locus standi* to challenge the constitutionality of a provision under which he has been convicted. There O'Higgins C.J., who dissented on a different ground, observed (at 249):

> "Having been convicted, the plaintiff had an interest and a *locus standi* to complain in relation to the statutory provisions under which he had been convicted."

10. In that case the plaintiff had been convicted of loitering in a public place with intent to commit a felony (being a 'suspected person'), contrary to s. 4 of the Vagrancy Act 1824. He successfully challenged the validity of that part of the provision under which he had been convicted.

11. The other members of the Court in *King* did not expressly hold that the plaintiff had locus standi stemming necessarily from the fact of his conviction. However, they did not question his standing, save insofar as it related to parts of the provision that had not been applied to him. It seems logical to assume that a convicted person has standing to challenge the provisions under which he has been convicted, subject to the general qualification, flowing from the *jus tertii* rule, that he can assert that the manner in which the provision has operated against him has infringed his constitutional rights and not merely those of another. It might be suggested that this standing should not arise so easily where, as here, the plaintiff has pleaded guilty. However, this argument overlooks the fact that such a person still faces sentencing on the strength of a potentially unconstitutional provision. It hardly seems just to deny a plaintiff's standing due to his plea of guilty if he can assert that that provision's application to him has infringed his constitutional rights. This is particularly so in the present case because if s. 3 did not allow for a defence that would have availed him, then his plea of guilty may have been an appropriate one from the perspective of the provision as formulated.

12. The court therefore considers that the plaintiff has the requisite standing to challenge s. 3 of the 1993 Act. However, it follows from the above authorities that, absent any weighty countervailing considerations to justify a departure from the primary rule, he must ground that challenge on an alleged violation of his own constitutional rights.

13. A difficulty emerges in this connection from para. 7 of the plaintiff's statement of claim. Leave to amend the document was sought and obtained in August 2008, but not in respect of para. 7. That paragraph states that the plaintiff knew the complainant's age at the time of the acts complained of but that he did not realise it was an offence to engage in such acts with her when she had attained the age of 16. Paragraph 7 also makes clear that the plaintiff accepts that ignorance of the law is no excuse.

14. Counsel for the plaintiff put forward a number of responses to the difficulty posed by para. 7. He contended that it was inappropriate to apply the established *jus tertii* rules in a case where the proceedings underlying the constitutional challenge were criminal in nature. He noted that the situation in *Cahill* was very different in that the statutory provision complained of merely barred Mrs. Cahill's right of action; the failure of her challenge did not leave her facing a potentially lengthy prison sentence.

15. However, this submission appears unsustainable. In addition to its inconsistency with the passage quoted above from the judgment of Hardiman J. in *A.*, there is a fundamental difficulty with it. If it can truly be said that the plaintiff is invoking a *jus tertii*, then by definition the operation of the provision against him has not violated his rights. Even if it infringes the constitutional rights of another the plaintiff has no cause for complaint. This may seem an unpalatable conclusion, in that a person can thus be convicted and sentenced under a provision that lacks the requisite constitutional safeguards and would be held unconstitutional if challenged by a plaintiff whose rights were infringed by the absence of such safeguards. If, however, their presence would have made no difference to the plaintiff, their absence cannot have prejudiced him and no violation of his constitutional rights can have occurred.

16. It was argued however that the plaintiff may have enjoyed a constitutional right to require the prosecution to prove knowledge as to the age of the complainant. Accordingly, even if the plaintiff had been aware of her age at the time, he was entitled to insist that the prosecution prove this.

17. In principle this argument has much to commend it, in that there is a general requirement, in the context of a serious offence, that *mens rea* should be proved against the defendant as an ingredient of the offence. However, the argument that there is a constitutional right to this effect seems unsustainable in the context of the s. 3 offence. It appears clear from the judgment of the Supreme Court in *C.C.* on the issue of the constitutionality of s. 1 of the Criminal Law Amendment Act, 1935 ('the 1935 Act') that there is no constitutional right to have the prosecution prove knowledge of age as a constituent element of the offence in a prosecution for statutory rape of a girl under the age of 15.

18. The Court rejected the suggestion of the Attorney General that the section could be declared unconstitutional only to the extent that it excluded a defence of reasonable mistake as to age. However, it rejected that argument because to accept it would have involved the Court "in a process akin to legislation", not because such a defence would have been inadequate to vindicate constitutional rights. Indeed, it indicated (at para. 69) that such a defence would be sufficient to accord with the Constitution, and that a statutory rape provision so formulated would be one of a number of such provisions "which would pass constitutional muster". I cannot see any reason for holding that, in respect of the very similar offence of buggery of a person under the age of 17, there is nonetheless a constitutional right to have knowledge of age proved by the prosecution as an element of the offence, rather than rebutted by the prosecution if raised as a defence.

19. Counsel sought to distinguish this case from *Cahill* and from *A.* on the basis that, in both cases, the plaintiff had admitted knowledge of the relevant facts and there had never been any dispute as to that knowledge. Here there were inconsistent statements made in Garda custody, some of which indicated that the plaintiff had been mistaken as to the complainant's age. There had been no clear admission of knowledge. In his interview with the Gardai the plaintiff was asked what age the complainant was when they met. He replied that she was 16, which if true would have made her 17 at the time of the acts complained of. On being asked what age she was when they met for her birthday party he said she was 16, though the plaintiff's counsel suggested this was open to the interpretation that she was 16 at the time of the party but it was a celebration of her 17th birthday. The next inquiry was a leading question, suggesting to the plaintiff that she was 15 when they met. He answered 'yes'. However, counsel emphasised that this was a response to a leading question, and should not be regarded as very significant, since the advice at the time was to the effect that the plaintiff's belief as to the complainant's age was irrelevant. Later the plaintiff was asked about the complainant's age during their relationship and indicated she had been aged 16 to 17 and a half, on which basis she would have been 17 at the time of the alleged offences.

20. Accordingly, there is no definitive admission on the plaintiff's part that he was aware of the complainant's true age at the time, and there are positive assertions which support a defence of mistake as to age. Ultimately however, the plaintiff is relying on the absence of a mistake as to age which his own pleadings suggest he should not be entitled to avail of. The court is satisfied that for this reason, together with those noted above, the plaintiff has not shown that he satisfies the test laid down in Cahill.

21. That being the case it is necessary to determine whether there are "weighty countervailing considerations" which would justify the court in overlooking the failure to satisfy the normal rule as to standing. In my view, looking at the totality of the circumstances, such considerations are present in this case.

22. As noted above, the plaintiff has made assertions indicative of a mistake as to age and has not contradicted them definitively, save in his statement of claim in the present case. That may, his counsel suggested, be the result of an error, but he remains bound by his pleadings insofar as these proceedings are concerned. However, a statement of claim is not evidence and is not akin to an affidavit of the plaintiff. Nothing contained in it would be a material consideration in the underlying criminal trial. Indeed, no such statement of claim would have come into being at all had it been clear that the plaintiff was entitled to rely on a defence of mistake as to age at trial. Therefore, although in these proceedings the plaintiff has not pursued his assertion of mistake as to age, nevertheless it would be open to him to advance such a defence. Having regard to some of what was said to the Gardai in interview it may be that he genuinely would have wished to invoke it at the trial. On the authority of the decision in C.C. he would have had a constitutional right to plead such a defence. Nevertheless, he was advised, based on the understanding of the law which prevailed prior to that decision, that any belief he might have had as to the complainant's age was immaterial. On this basis he pleaded guilty and the trial court never had the opportunity of considering the parameters of the s. 3 offence, in particular the relevance of such a belief. The plaintiff therefore pleaded guilty and left himself open to a possible deprivation of liberty on a fundamentally flawed basis.

23. The defendants seek to minimise the significance of this, asserting that he was at all times legally advised, and that he fully understood the nature of the charge. However, either the advice was incorrect in its interpretation of s. 3 or the advice was correct, in which case s. 3 is, on the defendants' own admission, unconstitutional by virtue of the decision in C.C. There is no indication that the possible constitutional infirmity of the section was brought to the attention of the plaintiff before his decision to plead guilty. Since that plea was tendered before judgment was delivered in C.C. his advisors may not have appreciated that infirmity. The fact that the plaintiff received legal advice in relation to this aspect of the charge cannot therefore have much significance. In addition, it cannot be said that he fully understood the nature of the charge. He understood the *actus reus* of the offence but his understanding of the mental element was fatally flawed, for the reasons just canvassed.

24. In my view this is not inconsistent with the finding that the plaintiff cannot meet the normal *locus standi* rule. That is because his statement of claim debars him from showing that he satisfies that rule in these proceedings. However, it is not determinative because the court cannot say with certainty based on para. 7 that the plaintiff was aware of the relevant facts. That document does not represent his evidence or indeed any evidence of knowledge as to age. It does call in question his earlier assertions of mistake as to age but, for the purpose of determining whether "weighty countervailing considerations" apply so as to justify a departure from the normal rule, it does not exclude those assertions from consideration because they are the plaintiff's own words. Consequently they may be a more reliable indicator of his belief, which in a case such as the present is crucial. The question of whether there exist "weighty countervailing considerations" justifying a departure from the normal rule must be determined on the basis of a broader consideration of all the circumstances of the case and of the demands of justice than the inquiry as to whether the normal rule is satisfied. The assertions consistent with a mistake as to age are therefore relevant in determining whether such "weighty countervailing considerations" apply, though they might not in themselves be sufficient in light of the statement of claim which, as noted above, undermines those assertions without overriding them. Here there are additional circumstances in the plaintiff's favour. Following C.C., there are strong grounds for suspecting the s. 3 offence is unconstitutional in the terms in which it is defined, and due to its recent repeal it is unlikely any third party will come forward who will be in a better position than the plaintiff to challenge s. 3 (see in this connection *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321). Both the correct construction of that provision in light of the decision in *C.C.* and its constitutionality would thus be left undetermined. Accordingly, the court may have no further opportunity to examine its constitutionality. The plaintiff has been convicted under that provision and has not yet been sentenced, but is awaiting the imposition of a sentence.

25. In all the circumstances of this case therefore, in my view the plaintiff's lack *of locus standi* assessed according to the normal rule may be overlooked by reason of the "weighty countervailing considerations" that exist in this case.

3. *C.C. v. Ireland*

26. Since the submissions of both parties naturally addressed the decision of the Supreme Court in *C.C.* in considerable detail, and as it may have a substantial bearing on the interpretation of s. 3, it seems appropriate to preface the interpretation of that provision with a discussion of that decision.

27. It was urged on behalf of the plaintiff that, on the basis of the principles laid down in *C.C.*, the knowledge or belief of an accused as to the age of the complainant in a s. 3 prosecution was immaterial, and that accordingly s. 3 was repugnant to the Constitution. In *C.C.*, Geoghegan J. (with whose judgment Hardiman and McCracken JJ. agreed) outlined (at para. 97) the legislative antecedents of s. 1 of the 1935 Act. He noted that ss. 1, 2 and 4 of that Act were intended to replace ss. 4 and 5 of the Criminal Law Amendment Act 1885 ('the 1885 Act'). Section 5 of the 1885 Act provided for a defence of mistake as to age in relation to the older girl offence. Since no such defence was provided for in relation to the young girl offence, Geoghegan J. considered it proper to infer that by necessary implication the UK Parliament had intended to exclude that defence in relation to younger girls (para. 98). He also noted that under the 1885 Act carnal knowledge of a woman of unsound mind was an offence only if the perpetrator knew of the mental impairment at the time. Ultimately, he concluded (at para. 99) that the 1935 Act must be regarded as having excluded any mental element as to the age of the complainant:

> "However, the *proviso* permitting the defence of mistake of age in the case of "the older girl offence" was not inserted into the Act of 1935 and by necessary implication this must have been deliberate particularly when regard is had to the fact that the *mens rea* element inserted into s. 5 of the Act of 1885 in relation to carnal knowledge with women of unsound mind was effectively repeated in the Act of 1935. To hold otherwise would be an unjustifiable distortion of what was clearly the intention of the Oireachtas of Saorstát Éireann."

28. However, Geoghegan J. had noted at para. 96 of his judgment that it was standard legislative practice to omit any reference to the mental element of an offence from a penal provision, and that had it not been for the special circumstances of the case (outlined in the passage quoted above) he would have taken the view that the suggested defence would have been available in some form. Indeed, he stated (at para. 108):

> "*mens rea* must be presumed to be a necessary ingredient of all serious offences, whether they be common law or statutory unless there is a statutory provision from which it is clear that *mens rea* is excluded either expressly or by necessary implication."

29. Having noted this general presumption, he added (at para. 119):

> "Given our own constitutional requirements of a fair criminal system, I see no reason to take a more restricted view of the *mens rea* requirements than that taken in modern cases in the House of Lords."

30. Fennelly J. (with whose judgment Hardiman and McCracken JJ. also agreed) took the same view. He outlined (at paras. 143-144) the established rule that where a serious criminal provision was silent as to the *mens rea* required for the commission of an offence, it was to be read as requiring some form of *mens rea* unless it excluded such a requirement expressly or by necessary implication. He went on (at para. 145) to quote the following passage from the judgment of Lord Nicholls in *Re B. (A Minor) v. D.P.P.* [2000] 2 A.C. 428 at 464:

> "The question, therefore, is whether, although not expressly negatived, the need for a mental element is negatived by necessary implication. Necessary implication connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence."

31. Fennelly J. continued (at para. 146):

> "These *dicta* are clear authority for the proposition that, insofar as s. 1(1) of the Act of 1935 is concerned, in the absence of compellingly clear exclusion of its necessity, the prosecution should have to prove not only that the accused had sexual intercourse with a girl under fifteen, but that he knew that she was under that age. The alternative formulation is that there should be a defence of mistaken belief (on reasonable grounds) as to the age of the girl."

32. To determine whether the normal presumption of *mens rea* had been rebutted, Fennelly J. found it "necessary…to consider the legislation and its history" (at para. 151). He said (at para. 159):

> "It is most important to keep in mind the fact that there has never been statutory provision for a defence of mistake as to age on a charge of the felony offence: neither when the age was under ten from 1861, thirteen from 1885 or fifteen from 1935. The Act of 1935 quite deliberately contains no *proviso* for a defence based on reasonable belief in respect of any offence, except that of defilement of mentally incapacitated persons (s. 5). Section 1 corresponds with s. 4 of the Act of 1885, which, of course, while dealing with offences against girls under the age of thirteen had never contained any such *proviso*. Insofar as it extended the age of the girls covered, it was natural that the Oireachtas, in enacting s. 1(1), should follow suit. Furthermore, s. 2, which corresponds with s. 5 of the Act of 1885, with the exception that the age range…was changed…excluded the *proviso* which had been contained in the section it was replacing."

33. Referring to the defence of reasonable mistake as to age in relation to the 'older girl offence' under the 1885 Act, a misdemeanour, he continued:

> "The presence of this defence to the misdemeanour charge coupled with its absence in the case of the felony seems to me *necessarily to imply* that the enacting legislature did not intend such a defence to be available in the latter case. This is an obvious case of the application of the principle of construction *expressio unius est exclusio alterius*, applied, for example by the majority of this court in *Browne v. Ireland* [2003] 3 I.R. 205, *per* Keane C.J. at p. 221. That is but the first step in the reasoning. When the Oireachtas of Saorstát Éireann came to amend that statute in 1935, it took the further step of removing any possibility of raising such a defence of mistake in the two cases where it could previously have been raised under the Act of 1885. How can the legislature, at the same time, be taken to have intended that it should be available in defence of a charge to which it had never previously been a defence? The intention of the Oireachtas is further clarified by the exclusion of the defence also in the case of a charge of abducting an unmarried girl under the age of eighteen contrary to s. 7 of the Act of 1885, while effectively retaining it in the case of mentally impaired victims (s. 4). It is, to my mind, compellingly clear that the Oireachtas, as a matter of deliberate policy, deprived accused persons of the defence of mistake as to age made on reasonable grounds in all cases, but one, in which it had previously been expressly available. It is, therefore, also compellingly clear that the Oireachtas did not intend that such a defence should be available in the case of a charge of the newly enacted offence of unlawful carnal knowledge of a girl under the age of fifteen. A contrary view would make nonsense of the legislation and would, furthermore, run counter to the commonly accepted interpretation of the section which has prevailed for the seventy years since its enactment."

34. These passages indicate the strength both of the presumption that *mens rea* was intended and of the reasons for the Court's conclusion in C.C. that the intention of the Oireachtas was at variance with that presumption. As the judgments indicate, this conclusion arose from a combination of circumstances. Section 1 was silent as to any mental element, but this fact was not nearly sufficient to displace the presumption. The 'young man's defence' contained in the 1885 Act in respect of the 'older girl offence' had been excluded when the 1935 Act repealed and replaced the corresponding provisions of the 1885 Act. That defence had never been available in respect of the 'younger girl offence'. By means of the 1935 Act the Oireachtas had removed that defence in two cases where it had previously been available, and could not have intended at the same time to enable that defence to be raised on a charge in respect of which it had never been available. Its intention to exclude the defence in relation to s. 1 of the 1935 Act was made clearer still by its exclusion in the case of abduction of an unmarried girl and its retention in the case of mentally impaired persons.

4. Construction of s. 3
Submissions on behalf of the plaintiff
35. The plaintiff suggested there was no difference in principle between s. 1 of the 1935 Act and s. 3 of the 1993 Act. The fact they concerned different forms of intercourse was said to be immaterial. The Criminal Law (Sexual Offences) Act 2006, brought together all statutory rape offences under the same provisions, making no distinction between vaginal and anal intercourse.

36. The s. 3 offence was couched in the same terms in the 1993 Act as the s. 1 offence in the 1935 Act. At that time s. 1 had not been challenged. It was therefore extremely illogical to suggest that the intention of the Oireachtas in relation to s. 3 was any different from that underlying s. 1. If the Oireachtas in enacting the 1935 Act had intended to exclude the defence, the position must have been the same with the 1993 Act. That Act shared the legislative antecedents of the 1935 Act because it formed part of a continuum of provisions governing this area, together with the 1885 Act. The legislative history that was so influential in *C.C.* should therefore be regarded as being applicable also to the 1993 Act. Furthermore, in the wake of *C.C.* the 2006 Act had expressly provided for a defence of honest mistake as to age, which tended to support the conclusion that that defence had not been intended to be available previously.

37. It was also argued that the terms of the 1993 Act mandated an inference that the s. 3 offence was one of strict liability. Section 3 itself allowed an accused a full defence where he could show that he was married, or reasonably believed he was married, to the complainant. The presence of that defence indicated no other was meant to be available. Further, s. 5 of the 1993 Act provided for a defence in respect of intercourse with mentally impaired persons.

38. For these reasons it had to be concluded that the defence of mistake as to age had been excluded by necessary implication, and to read in a requirement of some particular level of *mens rea* would be speculative. Indeed, if the defendants were correct in their interpretation of s. 3, from 1993 to the date of judgment in C.C. a mental element would arise in a prosecution for buggery but not in a prosecution for statutory rape under s. 1 of the 1935 Act. Such a result would mean the Oireachtas had engaged in deliberate irrationality, since the universal understanding at the time was that no such mental element arose in a statutory rape prosecution.

39. Had the 1993 Act stood alone, absent the legislative history referred to, there would be no doubt, owing to the common law presumption of *mens rea* and the double construction rule applicable to the 1993 Act, that some mental element should be inferred. However, that legislative history was present and indicated the clear intention of the Oireachtas, which neither the presumption of *mens rea* nor the double construction rule could overcome.

Submissions on behalf of the defendant
40. The defendants argued that the legislative history which was so crucial to the conclusion reached in *C.C.* that the presumption of *mens rea* had been displaced was absent insofar as s. 3 was concerned. Section 3 also dealt with an entirely different category of case. Buggery, in contrast to vaginal intercourse, was not a *prima facie* lawful activity but an activity which was criminalised for every person in all circumstances prior to the 1993 Act. Accordingly, there had never been any provision for a mistake of age defence. The fact the two forms of intercourse had later been coupled together in the 2006 Act was irrelevant to the proper interpretation of s. 3.

41. It could not be inferred from the presence of a defence of lack of knowledge in relation to mentally impaired persons that the Oireachtas intended that there should be no defence of mistake as to age on a s. 3 charge. Mentally impaired persons formed a special category in respect of whom a particular defence in the nature of a *lex specialis* had been prescribed for the avoidance of doubt.

42. The situation in this regard was more akin to that in *P.G. v. Ireland* [2006] 4 I.R. 1 than the circumstances of its companion case, *C.C.* Because the 1993 Act enjoyed the presumption of constitutionality, the court was obliged to interpret it in such a manner as to render it constitutional unless compelled by the statutory language to adopt another construction. The present case was thus a *fortiori P.G.*

Decision of the Court
43. Section 3 of the 1993 Act is an enactment of the Oireachtas established by the present Constitution. It therefore enjoys a presumption of constitutionality, in contrast to s. 1 of the 1935 Act *(The State (Sheerin) v. Kennedy* [1966] I.R. 379; *Haughey v. Moriarty* [1999] 3 I.R. 1). It follows from this that, where the court is faced with a provision whose meaning is open to doubt, it must endeavour to construe it in line with the Constitution. This principle is known as the double construction rule.

44. In *McDonald v. Bord na gCon* [1965] I.R. 217 Walsh J., delivering the judgment of the Supreme Court, noted (at 239):

> "One practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. *It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant.*" (emphasis added)

45. In that case the Court noted that ss. 43 and 44 of the Greyhound Industry Act 1958, provided for an investigation to be carried out in certain cases. There was nothing in the wording of either provision to exclude the requirements of constitutional justice from such an investigation. Accordingly, the requirements of constitutional justice were read into those provisions. Section 47, which provided for the making of an exclusion order, was construed as requiring an investigation conducted in accordance with the principles of constitutional justice prior to the making of such an order. Walsh J. said (at 243):

> "While the Board may determine the manner in which the investigation shall be carried out the clear words or necessary implication which would be required to exclude the principles of natural justice from such investigation are not present in the sections."

46. The rule finds strong expression in the authorities. In *Croke v. Smith (No. 2)* [1998] 1 I.R. 101 the Supreme Court had to consider the constitutionality of s. 172 of the Mental Treatment Act 1945. Delivering the judgment of the Supreme Court, Hamilton C.J. explored the question of how the provision should be interpreted. He held (at 112) that the Court must:

> "(1) grant to the impugned provision the presumption of constitutionality unless and until the contrary is clearly established;

(2) not declare the impugned provision to be invalid where it is possible to construe it in accordance with the Constitution;

(3) favour the validity of the provision in cases of doubt; and

(4) must have regard to the fact that the presumption of constitutionality carries with it…the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas…."

47. The judgment of Henchy J. in *McMahon v. Leahy* [1984] I.R. 525 is also instructive. While that case concerned the validity of a statutory discretion, Henchy J. (with whose judgment Griffin and Hederman JJ. agreed) made a significant point in relation to rebutting the presumption of constitutionality. He said (at 541):

"The presumption of constitutionality extends to both the substance and the operation of a statute: *it is a presumption that admits of rebuttal only by a contrary intention appearing in the terms of the statute itself*." (emphasis added)."

48. The decision of the Supreme Court in In *re Haughey* [1971] I.R. 217 casts a helpful light on the relationship between the double construction rule and the ordinary rules of statutory interpretation. There the Court had to assess the constitutionality of s. 3(4) of the Committee of Public Accounts of Dáil Éireann (Privileges and Procedures) Act 1970. Giving the judgment of the Court, O Dálaigh C.J. said (at 251):

"If the Court is to apply the ordinary canons of construction of statute law, the Court would affirm the construction of the subsection first contended for on behalf of Mr. Haughey and in such case, as has already been stated, the sub-section thus construed would offend against the Constitution and the order of the High Court would be set aside in consequence. But, in this instance, the ordinary canons of construction are not applicable. Here the constitutionality of an Act of the Oireachtas established by the Constitution is questioned; in such case the Court must apply different canons of construction."

49. After quoting from the judgment of Walsh J. in *East Donegal Co-operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317 he continued (at 252):

"Applying this doctrine in the present case, the Court is of opinion that it is its duty to reject the construction which the ordinary canons of construction recommend and to treat the Committee's certificate, not as a certificate of conviction, but as "merely a step preliminary to the commencement of the trial of a criminal offence in the High Court" as Mr. Justice Henchy expressed it in his judgment in the High Court. This construction saves the sub-section from the constitutional infirmity from which, in the first instance, Mr. Haughey's counsel has urged the sub-section suffers."

50. The Court was also prepared to conclude that the words 'after such inquiry as it [the High Court] thinks proper to make' could be interpreted as contemplating a trial in the High Court in order to avoid a conflict with the Constitution. However, the Court would only take the presumption so far, noting (at 254):

"In the opinion of this Court the formula "after such inquiry as it [the High Court] thinks proper to make" can be stretched, by presumption of constitutionality, to contemplate a trial in the High Court by a High Court judge or judges but, as has been pointed out, the presumption of constitutionality is not to be applied where it would do violence to the plain meaning of the words. It is, in the opinion of this Court, beyond the reach of the presumption of constitutionality to read into the simple inquiry formula of the sub-section an intention to authorise trial by jury. The statute in this case created an offence which was not prohibited by the common law. It indicated a particular manner of proceeding against the alleged offender by express reference to contempt of court in terms which clearly indicated a summary manner of disposal of the trial and of the offender, if convicted; and the procedure thus indicated clearly excludes that of indictment. This interpretation is reinforced by the express provision that the charge is laid by the certificate of the chairman of the Committee."

51. In addition to the boundary laid down in that passage, there are further limits to the application of the rule. As already observed, it applies only in cases of doubt. In *Re Employment Equality Bill, 1996* [1997] 2 I.R. 321 Hamilton C.J., speaking for the Supreme Court, noted (at 369):

"In the opinion of the Court the "double construction" rule can have no application to this section. The so called rule can only apply where there is an ambiguity or a choice between two constructions. If on a reading of the section the plain words are apparent, then the duty of the court is to give effect to a literal reading of the section. The section refers to "proceedings brought under this Act" which must include all forms of proceedings and that, in turn, includes criminal proceedings."

52. In addition, the rule cannot be applied so as to override the intention of the Oireachtas. As Walsh J. for the Supreme Court, observed in *East Donegal Co-operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317 at 341:

"It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning."

53. Section 3 leaves room for doubt as to its correct interpretation, since it is silent as to what mental element, either by way of an ingredient of the offence or a defence to the s. 3 charge, is applicable, if indeed any mental element can be read into it. The double construction rule therefore applies. It is clear particularly from the decision of the Supreme Court in In *re Haughey* that it takes precedence over the ordinary rules of statutory interpretation where the court is determining the constitutionality of a provision.

54. The court must next ascertain whether anything in the wording of s. 3, or of the 1993 Act, excludes a constitutional interpretation, that is to say whether there is anything in the statute to preclude the court from inferring some mental element in s. 3.

55. It is true that s. 3 is couched in the same terms as s. 1 of the 1935 Act, and that to construe s. 3 as creating an offence that is not of a strict liability nature would produce the strange result referred to in the plaintiff's submissions. However, this argument is

founded on speculation about the intentions of the Oireachtas that lacks the kind of concrete support necessary to rebut the presumption of constitutionality. Unfounded speculation as to the alleged unlikelihood of the Oireachtas having intended a different regime in the context of the 1993 Act from that which originally prevailed under the 1935 Act cannot avail the plaintiff. As Keane C.J. noted in *Re Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 at 372:

> "Even it can be assumed that the speeches of the minister and other members of the Oireachtas are a safe guide as to what the purpose of the Oireachtas collectively was in enacting the provisions in question, this court is solely concerned with the meaning of the legislation as actually passed by the two Houses of the Oireachtas. Irrespective of what may have been in the mind of the minister in piloting the legislation through the Oireachtas or in the minds of those individual deputies and senators who voted for the legislation, the two provisions as passed by them are to be construed in accordance with normal canons of construction: if, as so construed, they are repugnant to the Constitution, the President must be so advised. If they are not, the President must be similarly so advised. Whatever may be the position in other cases, this is not a case in which the court can derive any assistance as to the constitutionality of the two sections from anything that was said concerning them in the course of the debates in the Oireachtas."

56. Although in that case the meaning of the provisions in question was clear, it seems evident from this passage that unfounded speculation as to what the members of the Oireachtas may have had in mind cannot be of assistance in any event.

57. The court must presume that the Oireachtas did not intend, in enacting s. 3, to infringe the Constitution. Without something in the 1993 Act to displace this presumption, conjecture based on what it is said the Oireachtas must have intended simply by virtue of what the Oireachtas of Saorstát Eireann intended many years previously will not suffice.

58. I am fortified in this conclusion by the remarks of Lord Hutton in *B. (A Minor) v. D.P.P.* [2000] 2 A.C. 428 at 481, referring to the common law presumption in favour of *mens rea*:

> "Therefore the Crown can argue with considerable force that when Parliament intends that there should be a defence of mistake it makes express provision for this defence so that where there is no express provision for such a defence the statute by implication intends that the defence will not be available. This point is well stated by Tucker J., at p. 442:
>
> > 'I deduce from all these statutory provisions that it is the clear intention of Parliament to protect young children and to make it an offence to commit offences against children under a certain age whether or not the defendant knows of the age of the victim, and that it was intended that, save where, expressly provided, a mistaken or honest belief in the victims age should not afford a defence.'
>
> Therefore, I consider that it would be reasonable to infer that it was the intention of Parliament that liability under s. 1(1) of the Act of 1960 should be strict so that an honest belief as to the age of the child would not be a defence. But the test is not whether it is a reasonable implication that the statute rules out *mens rea* as a constituent part of the crime - the test is whether it is a *necessary* implication." (emphasis in original).

59. Denham J., dissenting in C.C., quoted that passage at para. 50. Geoghegan J. also referred with apparent approval to that viewpoint at para. 126.

60. Therefore, while it might be reasonable to assume the Oireachtas intended s. 3 to be an offence having the same strict liability nature as s. 1 of the 1935 Act, it cannot be inferred by necessary implication on the basis that similar words were chosen. Necessary implication cannot be grounded simply on the similarity of the offences and the strangeness of having different principles apply to them. Nor can the presumption be rebutted simply by attributing to the Oireachtas of 1993 the intentions of its predecessor of 58 years previously, prior to the entry into force of the present Constitution, merely because it used the same form of words.

61. Reliance was also placed on the status of the 1993 Act as part of a continuum of legislation on statutory rape, having the same legislative antecedents as s. 1 of the 1935 Act. The passage already quoted from the judgment of Henchy J. in *McMahon* seems to indicate that only the terms of the statute itself (in the present case the 1993 Act) can rebut the presumption of constitutionality. It may therefore be inappropriate to consider the legislative antecedents of the Act, save insofar as they may be referred to therein. However, even assuming it is legitimate for the court to have regard to such antecedent provisions, the fundamental flaw in the plaintiff's argument on this point has been highlighted on behalf of the defendants. It was not the mere fact that the 1935 Act had legislative antecedents that tipped the balance in *C.C.*, but rather a comparison between those antecedents and their modern counterparts: a question of what had been changed and what had remained the same. In one context the defence had been retained, in others it had been excluded where it had previously applied and, in the case of the 'younger girl offence' covered by s. 1 it had never applied. Accordingly, to suggest that it had suddenly been made to apply in defence to the more serious charge, relating to younger girls, when it had been deliberately excluded in relation to older girls, was an unsustainable fallacy.

62. Those considerations are inapplicable in the present case. Until the 1993 Act buggery was unlawful in all circumstances and for all persons. There could therefore be no question of s. 3 retaining a previously existing defence, maintaining the traditional exclusion of a defence or excluding a defence that could formerly be availed of. Legislative antecedents therefore offer no assistance in the resolution of this question.

63. The other provisions of the 1993 Act, however, may do so. Section 3 itself provides for a defence based on marriage, while s. 5 allows an accused person a full defence where he can show that he did not know and had no reason to suspect the complainant was mentally impaired.

64. It should be recalled that the Supreme Court warned against stretching the presumption so far as to bring about "the substitution of the legislative provision by another provision with a different context". Accordingly, it is appropriate to consider the context of the provision, which in my view extends to the 1993 Act as a whole. It follows that the fact those defences are expressed in the Act is a relevant consideration in determining whether the presumption of constitutionality has been rebutted. In this regard I believe assistance can be derived from the judgments in *C.C.* Although the Court in that case applied common law rules of interpretation, these included a strong presumption in favour of *mens rea* which, as with the presumption of constitutionality, tends toward a conclusion that the offence in question is not of a strict liability nature.

65. It is true that both Geoghegan and Fennelly JJ. held that where the 1885 Act had created a 'younger girl offence' and an 'older girl offence', and provided for a defence only in relation to the latter, it could be inferred by necessary implication that Parliament had intended to exclude that defence in relation to younger girls.

66. That inference was inevitable. The two offences were of exactly the same nature. They were both based on the age of the complainant, and only the age differed as between the offences. The fact the defence was expressed to be available specifically in respect of older girls meant it could not be stretched to the younger girl offence, since that was an offence of the same nature, it covered a category of persons in need of even greater protection, and provision had been made for the defence in relation to older girls.

67. The situation in the present case is very different. Both categories of persons require protection, but the provision of a defence in respect of one cannot necessitate the conclusion that it is excluded in relation to the other. The offences are criminalised on different bases relating to different considerations of the status of the persons affected. Unlike in the context of the 'older and younger girl offences', it would not have been possible to apply the same defence to both. In the present case, one would have been a defence based on lack of knowledge of mental impairment, the other based on lack of knowledge of age.

68. In addition, it should be noted that a similar argument might have been advanced in *C.C.*, since s. 4 of the 1935 Act required that the circumstances should be such as to prove knowledge as to the mental impairment of the complainant as an element of the offence created by that section. However, in *C.C.*, as appears from the passages quoted in part 3 of this judgment, this fact formed only part of the reasoning. The principal ground for the decision in that case was the legislative history underlying the provision, and the inferences that history necessitated. It does not appear that the terms of s. 4 of the 1935 Act could have displaced the presumption in relation to s. 1 without the accompanying considerations tending to negative it.

69. In this regard the judgment of Lord Reid in *Sweet v. Parsley* [1970] A.C. 132 at 150 should be recalled:

> "It is also firmly established that the fact that other sections of the Act expressly require *mens rea* , for example because they contain the word 'knowingly' is not in itself sufficient to justify a decision that a section which is silent as to *mens rea* creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted."

70. Geoghegan J. quoted that passage in *C.C.* and went on to say (at para. 120):

> "The appeal of *C.C.* is a good illustration of an instance where the relevant statutory provision did not allow for the defence of mistake as to age, *not merely because of wording but because of the combination of wording with other relevant circumstances concerning the antecedents to the legislation.*" (emphasis added).

71. The judgment of Lord Hutton in *B.* is also instructive in this regard. He noted (at 481) that the fact that a 'young man's defence' was expressed in relation to s. 6 of the Sexual Offences Act 1956 (the 'older girl offence') but not in relation to s. 5 (the 'younger girl offence') necessitated the conclusion that the s. 5 offence was one of strict liability. It could be argued on this basis that gross indecency with children had been intended as an offence of strict liability. Secondly, a number of provisions of the 1956 Act provided for a defence that a man did not know or have reason to suspect that a complainant was mentally impaired, where he was charged with intercourse or indecent assault against a mentally impaired woman. As appears from the passage already quoted from Lord Hutton's judgment, it would be reasonable to assume from this that Parliament had not intended a defence of mistake as to age to be available where it was not expressed. However, the presumption could be displaced only by necessary implication: the fact that it was reasonable to draw a conclusion at variance with the presumption was insufficient.

72. It appears from these authorities that such a strong presumption cannot be rebutted by the mere presence of a defence of mistake as to a different matter to a charge in respect of a different category of persons. The presumption of constitutionality tends as strongly toward the conclusion that the offence is not one of strict liability, since that presumption requires the court to construe a statutory provision in line with the Constitution wherever it is possible so to do, even to the extent in some cases of adopting an interpretation contrary to that which the common law rules of statutory interpretation dictate (In *re Haughey*). Accordingly, if the presumption applicable at common law leads to the conclusion that the Oireachtas did not intend an offence in respect of which knowledge or belief as to age would be irrelevant, in my view the presumption of constitutionality necessitates the same conclusion. While the presence of the s. 5 defence militates against both the constitutional and common law presumptions, it is not in itself sufficient to displace either.

73. For similar reasons the argument based on the marital defence does not appear well-founded. Section 3 allows an accused person to plead that he either was married to the complainant or had reasonable grounds for believing he was. That defence could not have been inferred in the statute had it not been expressed, because the marital status of the parties could not be regarded as relevant to the offence without words to that effect. Consequently that defence had to be expressed if it was intended that it should be available. Its expression cannot therefore be intended to exhaustively state the available defences. A defence of mistake as to age stands in marked contrast, since the complainant's age is an essential aspect of the offence. Accordingly, just as in many cases the Oireachtas does not specify the requisite *mens rea* but is taken to intend that such an element should apply, so here it would not have been necessary to express any mental element as to age because age was an element of the offence and some accompanying mental element could be presumed without having to be expressed. As I have indicated, the marital defence could not have been so presumed without having been provided for specifically.

74. Finally, the plaintiff notes that the 2006 Act merges the offences of underage vaginal and anal intercourse and deals with them in the same manner, providing for a defence of honest mistake. The 2006 Act, however, cannot be relied on to determine the intention underlying the 1993 Act. To do so would import an unacceptable level of uncertainty and complexity into statutory interpretation. It would probably also produce results the Oireachtas could not possibly have foreseen as effects of the 2006 Act, either at that time or, of course, in 1993. The court is invited to attribute an intention to the Oireachtas in 1993 based on the 2006 Act that runs contrary to the presumed intention of that institution not to violate the Constitution. There is nothing in the 1993 Act to indicate a contrary intention, and nothing in the 2006 Act could be relevant to establishing such an intention. The presumption cannot be detracted from simply because the Oireachtas chose to make express in the 2006 Act a mental element that might previously have been inferred.

75. For these reasons the court concludes that the offence under s. 3 is not a strict liability offence and thus incorporates some mental element as to the age of the complainant.

5. Result

76. The mental element as to age in s. 3 may take the form of an obligation on the prosecution to prove, for example, knowledge or

recklessness as to the age of the complainant. It may alternatively take the form of a defence which the plaintiff is entitled to raise. This court has not inquired into the matter because, for the purposes of determining the constitutionality of s. 3, it is sufficient to say that the section does not create an offence of strict liability. It is appropriate for the trial court to determine the form of the mental element as to the age of the complainant according to the ordinary principles applicable in determining the requisite mental element applicable to a serious statutory offence which is silent on the matter.

77. The plaintiff has, of course, pleaded guilty. However, for the reasons outlined above in relation to his *locus standi*, he did not fully appreciate the nature of the offence charged against him since, depending on how s. 3 is construed he was unaware either of the *mens rea* required as an element of the offence or as to the existence of a defence which on the facts might have been available to him. Since he has yet to be sentenced, the trial judge still has a discretion to permit him to change his plea (*Byrne v. Judge McDonnell* [1997] 1 I.R. 392). While English authorities indicate the discretion should be exercised sparingly (*R v. South Tameside Magistrates' Court, ex parte Rowland* [1983] 3 All E.R. 689), Walsh on *Criminal Procedure* suggests (at para. 16-56) that, stemming from the constitutional right to a fair trial, the Irish courts are unlikely to feel similarly constrained. He refers to the decision in *Byrne*, where it was held that the District Judge should have permitted a change of plea to not guilty because he had the benefit of legal advice and representation only at sentencing stage and not at trial. Keane J. observed (at 402-403):

> "The District Judge in the present case might very well have been entitled to take the view that the evidence of the juvenile liaison officer was relevant only to the question of mitigation and could not affect the guilt or innocence of the defendant. I am satisfied, however, that as soon as the possibility arose of a custodial sentence being imposed, the applicant should have been permitted to change his plea to one of "not guilty" so as to ensure that he was properly represented from the beginning of his trial and not merely when it came to the question of sentence. It may be said that the possibility of the applicant's being acquitted was remote. That is not, however, a relevant consideration. It may be that, as emerged during the hearing of the present application, difficulty could have arisen as to the proof, not of the bye-laws, but of the ministerial order which purported to confirm them. Whatever the position may be, a defendant in the position of this applicant who was facing a possible custodial sentence was entitled, as a matter of right, to legal assistance in his defence."

78. In the present case of course the plaintiff had the benefit of legal assistance at all times, but the advice he received left him with a materially flawed understanding of the charge against him, so that he pleaded guilty on a flawed basis. Through no fault of his legal advisors, but due to the prevailing understanding of the law at the time, he was given a fundamentally mistaken impression of the nature of the case he would face if he were to be tried.

79. The decision in *R v. McNally* [1954] 1 W.L.R. 933 is also of assistance in this regard. There the English Court of Criminal Appeal suggested a mistake or misunderstanding as to the nature of the charges against him would lead a trial court to allow a change of plea. I would again emphasise that this is the case here.

80. This court cannot determine in these proceedings whether the plaintiff is to be permitted to change his plea. However, based on the above authorities, the circumstances of this case and the overarching right to trial in due course of law, in the view of this court it would be appropriate to permit a change of plea, and to determine the mental element as to age which is to be inferred as part of s. 3.