Neutral Citation Number: [2010] IEHC 101

THE HIGH COURT

2008 1990 P

BETWEEN

M. D. (A MINOR)

PLAINTIFF

AND

IRELAND, ATTORNEY GENERAL AND DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT by Ms. Justice Dunne delivered on the 26th day of March, 2010

The plaintiff herein is a minor and he commenced these proceedings by plenary summons on the 10th March, 2008 in which he has challenged the constitutionality of provisions of the Criminal Law (Sexual Offences) Act 2006 (hereinafter referred to as "the Act").

The plaintiff seeks, *inter alia* the following reliefs:

> 1. A declaration that s. 5 of the Criminal Law (Sexual Offences) Act 2006 is in breach of the Constitution in that it discriminates against the plaintiff on the basis of gender, contrary to Article 40. 1 of the Constitution.
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> 2. A declaration that s. 3(1) of the Criminal Law (Sexual Offences) Act 2006 discriminates against the plaintiff and is in breach of the Constitution in that on conviction the child plaintiff would be liable to receive a term of imprisonment of up to five years where no penalty would be imposed on a female child under the age of seventeen.
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> 3. A declaration that s. 5 of the Criminal Law (Sexual Offences) Act 2006 is in breach of Article 38.1 of the Constitution in that the plaintiff is liable to a disproportionate penalty on the basis of his gender.

A number of reliefs were also sought to the effect that the same provisions of the Act are in breach of Article 8 of the European Convention on Human Rights in that it denied the plaintiff his right to respect for private life and a declaration that s. 3(l) of the Act is in breach of Article 6 and Article 14 of the European Convention on Human Rights (ECHR) in that it denies the plaintiff the right to a fair trial on grounds of gender. Further and ancillary relief is sought.

Undisputed facts
It is not in dispute that in September 2007, criminal proceedings against the plaintiff were instituted in respect of criminal offences alleged to have been committed on 5th August, 2006, in Co. Donegal. The plaintiff was charged as follows:

> • That he did on 5th August 2006 at..., Co. Donegal .... have sexual intercourse with a female person under seventeen years, contrary to s. 3 (1) of the Act.
>
> • That he did on 5th August, 2006, in Co. Donegal ... commit a sexual act of buggery on the aforesaid female person under seventeen years, contrary to s. 3 (1) of the Criminal Law (Sexual Offences) Act 2006.

The plaintiff was returned for trial in respect of those charges and presently, he awaits trial before the Circuit Court. An order has been made by this Court (Clarke J.) placing a stay on the conduct of the criminal trial before the Circuit Court in Donegal for the purpose of enabling the plaintiff to make this challenge. *(MD. (A Minor Suing by His Mother and next friend S.D.) v. Ireland, Attorney General and the Director of Public Prosecutions* [2009] I.E.H.C. 206).

The plaintiff herein was born in 1990 and at the time of the alleged offence he was fifteen years old. The female person referred to in the charges (hereinafter referred to as "the complainant") was born in 1991 and she was fourteen years old at the time of the alleged offences.

The legislation
Section 3 (1) of the Act provides as follows:

> "Any person who engages in a sexual act with a child who is under the age of seventeen years shall be guilty of an offence and shall, subject to subsection (3), be liable on conviction on indictment –
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> (a) to imprisonment for a term not exceeding five years, or
>
> (b) if he or she is a person in authority, to imprisonment for a term not exceeding ten years."

Section 3 (7):

> "It shall not be a defence to proceedings for 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."

Section 3 (9):

> "No proceedings for an offence under this section against a child under the age of seventeen years shall be brought except by, or with the consent of, the Director of Public Prosecutions."

Section 3 (10):

> "A person who -
>
> (a) has been convicted of an offence under this section, and
>
> (b) is not more than 24 months older than the child under the age of seventeen years with whom he or she engaged or attempted to engage in a sexual act,
>
> shall not be subject to the provisions of the Sex Offenders Act 2001.

Section 5:

> "A female child under the age of seventeen years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse."

Section 1 ...

> "Sexual act" means:
>
> (a) an act consisting of –
>
> i) sexual intercourse, or
>
> (ii) buggery,
>
> between persons who are not married to each other, or,
>
> (b) an act described in s. 3 subs. 1 or s. 4 subs. 1 of the Act of 1990;
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> "sexual intercourse" shall be construed in accordance with s. 1 (2) of the Act of 1981.

The plaintiff's submissions
The plaintiff's case is focussed principally on the provisions of s. 5 of the Act. It is contended that s. 5 is gender based and discriminatory and exposes an under age male to a risk of criminal sanction in circumstances in which an under age female is not so exposed. This was said to be an approach based on a crude, traditional sexual stereotype where it is assumed that the male is "the guilty sexual predator" and the female is an "innocent comely maiden".

It was pointed out that a male convicted of an offence under s. 3 (1) of the Act would face a maximum penalty of five years imprisonment in circumstances such as this whereas there is no sanction for females, save for that referred to in the defendants' submissions as the deterrent of the risk of pregnancy.

Mr. Hogan, S.C., on behalf of the plaintiff asked the question what would happen if a girl had been the "predator" and the boy the "victim" of an offence under s. 3 (1) of the Act. He pointed out that the boy could be prosecuted for the offence but the girl could not. He disputed the defendants' contention that there is an objective justification for the gender based discrimination to be found in s. 5 of the Act. There was no objective justification or equalisation by reason of the respective deterrents for boys and girls that is, the possibility of imprisonment for the boy and the possibility of pregnancy to the girl.

Article 40.1 of Bunreacht na hÉireann provides that:

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

Counsel described the kernel of the plaintiff's case as being that the Act in providing that a female under the age of seventeen cannot be convicted for having sexual intercourse whereas a male under the age of seventeen can be convicted is discriminatory and in breach of Article 40.1. The effect of this provision is that where an under age male has "consensual" sexual intercourse with an under age female, it is the male alone who commits an offence. He pointed out that even if it had been the girl who initiated the act of sexual intercourse, the boy could be charged with an offence under s. 3 (1) while the girl was immune from prosecution.

Counsel for the plaintiff referred to the Defence filed herein and the Replies to a Notice for Particulars furnished by the defendants. Paragraph 8 of the Defence is as follows:

> "In respect of paragraph 11 of the statement of claim, it is denied that 'only one participant is liable to prosecution' arising out of 'consensual sexual relationships'. In this regard the defendants rely on the true meaning of s. 5 of the Act and the fact that the only exemption it provides is limited to a situation where the following three criteria arise:
>
> (i) a female child;
>
> (ii) under seventeen years; and
>
> (iii) the prosecution is by reason solely of her engaging in an act of sexual intercourse.
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> Even in respect of female children under seventeen years of age the said s. 5 does not exempt them from all criminal liability for consensual sexual relationships but only from criminal liability for an act of sexual intercourse."

Counsel accepted that para. 8 of the Defence was factually correct but contended that the reality of the situation was that the girl would not be prosecuted, for example, for an offence of sexual assault in circumstances where it was part of the events leading up to

an act of sexual intercourse. He accepted that s. 3 on its face was gender neutral. However he contended that if s. 5 is found to be unconstitutional, then s. 3 must also be unconstitutional as it is inextricably linked with the provisions of section 5 given that a prosecution takes place under section 3.

Para. 9 of the defence in which it is denied that criminalising consensual sexual relationships involving persons under the age of seventeen and in providing that only one participant is liable to prosecution and conviction is in breach of the constitutional guarantee of equal treatment was also referred to as was para. 10 in which the defendants relied on the provisions within Article 40.1 of Bunreacht na hÉireann "in its enactments [to] have due regard to differences of capacity, physical and moral and of social function". In that context, the plaintiff had raised particulars in which it sought to have full and detailed particulars of the differences of capacity, physical and moral, and of social function upon which the defendants sought to rely. The defendants replied as follows:

> "1. This is a matter for evidence. Without prejudice to that the differences of capacity, physical and moral, and of social function that the defendants will rely on will include the following:
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> (i) the physical differences between male and female children under seventeen years of age;
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> (ii) the fact that a female child under seventeen years of age may become pregnant whereas a male child under seventeen years of age may not;
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> (iii) the different medical and psychological effects and consequences that sexual intercourse has on male and female children under seventeen years of age;
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> (iv) the different risks that sexual intercourse exposes male and female children under seventeen years of age to;
>
> (v) the different issues and problems that the Irish criminal justice system faces by reason of sexual intercourse between male and female children under seventeen years of age."

Counsel for the plaintiff characterised those particulars as an example of what he described as good old fashioned discrimination against young boys. He contended that the unspoken purpose of the provisions of s. 5 is to permit the girl/her parents to be able to report to the authorities that an act of sexual activity or intercourse has taken place because the view encapsulated by s. 5 is that she is the victim of such an act. He argued that this implies that the law enforcement authorities are not concerned about the risks involved in such activity for boys under the age of seventeen years of age. For example, if the justification was said to be a fear that girls would not seek medical treatment because of a fear of prosecution then what happens to an inexperienced boy having sexual intercourse with a sexually experienced girl - would he not be put in fear of seeking treatment for a sexually transmitted disease if that was the result of such activity?

The evidence

Before I look at the authorities referred to by Counsel for the plaintiff and the submissions made by him thereon in support of his arguments and the submissions made on behalf of the defendants, I want to refer to the evidence heard in the course of this action. This case took place in what could be described as something of an evidential/factual vacuum as to the circumstances giving rise to the prosecution of the plaintiff. Counsel for the plaintiff referred on a number of occasions during the course of the proceedings to the circumstances as one which involved "consensual" sexual intercourse involving a male and female under the age of seventeen. Not surprisingly and for understandable reasons, no evidence was given by the plaintiff herein as to the circumstances or indeed by the complainant. Unlike the case of *S.M. v. Ireland (No. 2)* [2007] 4 I.R. 369 to which I will be referring subsequently, there were no agreed facts. (See para. 47 of that judgment.) I was concerned that the case should not be considered in a factual vacuum as to the circumstances that precipitated the criminal proceedings; the parties having considered the matter agreed that a number of statements which form part of the book of evidence should be made available to the Court for the purpose of informing the Court as to the background to this matter. Accordingly, I have had the advantage of reading those statements. They include the statements of the complainant and memoranda of interviews with the plaintiff herein, together with statements of a number of individuals who were in the company of the plaintiff and the complainant at the time of the alleged offences and from a number of Garda and other witnesses.

It is clear from those statements that prior to the events giving rise to the criminal proceedings the plaintiff and the complainant were not known to one another. They first encountered one another the previous day. It appears from the account of the complainant that there was some sexual activity which could be described as "consensual", that is, oral sex between the plaintiff and the complainant. She alleges that an act of buggery and an act of sexual intercourse, the offences with which the plaintiff has been charged, took place as a result of the use of force and fear. The account of the plaintiff is different. He accepts that the sexual activity described above took place but he makes the case that the act of sexual intercourse was "consensual" as was the act of buggery.

It is not possible to reconcile the different accounts of the plaintiff and the complainant in these proceedings. Nor is it necessary to do so. It is clear that there is an issue as to the question of consent. When using that term, it is to be used in the ordinary meaning of the word and not the legal meaning. It is important to have regard to the provisions of s. 3 (7) of the 2006 Act which is set out above and which provide that consent is not a defence proceedings brought under s. 3 (1) of the Act. However, I think it is important to bear in mind that on the complainant's view of the circumstances, this is not a case about "consensual" sexual activity as it was sometimes described in the course of these proceedings by counsel on behalf of the plaintiff. I accept that the plaintiff's view of the circumstances may be different.

The plaintiff called evidence from Professor Sheila Greene, a clinical psychologist, who is the Director of the Children's Research Centre in Trinity College and Professor of Childhood Research. She described research carried out in the State in relation to the sexual practices of young people including the Irish Study of Sexual Health and Relationships conducted by Richard Layte and others, ("the Layte study") which questioned young people in the age range 18 - 24 about the age of first full sexual intercourse. The study showed a pattern that there is a significant and increasing number of people having sexual intercourse under the legal age of consent. She also referred to a study of young people in Galway, aged between 14 and 18 which suggested that the average age of young people having first full sexual intercourse was around fifteen and a half years of age.

She considered maturity and whether gender had a part to play in the maturity of young people. She noted that girls in term of achievement are generally more settled and mature than boys at equivalent ages during the teenage years. She noted that boys are more sexually active at an earlier age than girls but the age gap is narrowing. She also indicated that in the vast majority of cases of underage sexual intercourse there was willingness on both sides.

Professor Greene pointed out that having regard to the results of the studies to which she had referred it was clear that there were

thousands of young people under the age of consent who were engaging in sexual intercourse and therefore, thousands of boys who were liable as a result to prosecution.

Professor Greene discussed the question of pregnancy and noted that it was a deterrent for girls but she also highlighted the need for young women to be responsible for avoiding pregnancy and indeed commented that this was a responsibility also for young men. Nevertheless it was primarily something girls had to take into account.

She mentioned an as yet unpublished study of the Crisis Pregnancy Agency on young fathers. That study found that where young fathers were aware of the threat of prosecution it was a matter of concern for them and it inhibited them from taking responsibility for the child and having a relationship with the child. She also discussed briefly the adverse consequences of pregnancy for young girls, for example, the damage done to their schooling and educational prospects and indeed the general prospects in life for young girls who have an early pregnancy and she also considered the impact of prison sentences, even a short prison sentence, for an offence of this kind on young men. She could not see any basis for unequal treatment of boys and girls.

Professor Greene expressed her personal view that if sexual relations took place below the age of consent, the participants should not be criminalised if the sexual relations were consensual. Nonetheless, she agreed that there should be an age of consent to protect younger children against older individuals. As she put it when being cross-examined on her view:

> "Where there is consensual sex between two children of more or less the same age, it may be extremely unwelcome if that happens at age twelve, but I don't think it is something that maybe the law needs to get involved in. Somebody needs to get involved but it doesn't necessarily have to be seen in the light of a crime as such."

She went on to say that while she did not think it was appropriate that sexual activity between children of roughly the same age should be criminalised she accepted that it was something that should not be encouraged because of the risks and consequences that may be attached to early sexualisation of young children.

She was then asked about two specific provisions of the 2006 Act namely the provisions of s. 3(9) and s. 3(10) which provide respectively that only the Director of Public Prosecutions (DPP) can prosecute in cases such as this and that the Sex Offenders Act 2001 does not apply to a person convicted of an offence under the section who is not more than 24 months older than the child under the age of 17 to whom the offence relates. As to whether this was not a sensible approach to a complex issue, namely, the use of the discretion not to prosecute, she was of the view that it would be better if the law was clearer rather than having to rely on a discretion not to prosecute. Reference had been made in that context to a UK Home Office working paper on how a similar discretion was exercised in that jurisdiction.

Professor Greene was asked about a number of issues arising from the Layte study. In that study it was noted that "among respondents who report that both were not equally willing, it was more often the male partner who was more anxious to have sex." She agreed that that was the case but said that there were studies showing that there are girls who are willing to initiate sex. She agreed with the report's finding that early sexual initiation was associated with "a higher risk of negative outcomes such as early childbearing and S.T.I's. It has also been associated with more risky behaviour in later life.

She was also referred to an article in the Irish Times edition of the 15th December 2009 entitled "Teenagers feel under pressure to have sex" in which it was noted "almost one third of teenage girls and 8% of boys have come under pressure to start having sex, according to research presented yesterday by the Crisis Pregnancy Agency". The article went on to state "research carried out by the Agency has found that young people will engage in sex before the age of consent - seventeen years - are more likely to experience crisis pregnancy, to have an abortion and to contract a sexually transmitted disease." She did not disagree with those findings but added that the incidence of crisis pregnancy amongst young people is not as high in this country as it is in the U.K. or the United States of America.

The only other evidence given in this case was that of Mr. Henry Matthews, a professional officer in the Office of the DPP, who was called on behalf of the defendants. He referred to the Guidelines for Prosecutors, a publication of the Office of the DPP and to certain passages in the Guidelines under the heading "The decision whether to prosecute" and under the heading "The public interest". He explained the basis on which a decision to prosecute is taken. Having explained that, he went on to refer to para. 4.16 of the Guidelines which deal with the question "Is there a public interest reason not to prosecute?" He pointed out that it is stated therein: "It is not the rule that all offences for which there is sufficient evidence must automatically be prosecuted". Statistics from the 2008 Annual Report of the DPP indicated that some 7% of cases would not be prosecuted on the basis that there is no public interest in proceeding with them. Factors that could be taken into consideration in deciding not to prosecute are set out in paras. 4.19 and 4.20 of the Guidelines. Paragraph 4.20 includes issues such as the availability and efficacy of any alternatives to prosecution, whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender.

Mr. Matthews was then asked about prosecutions under the Act taken in respect of the year 2007. There were some 24 prosecutions in total that year for offences under either s. 2 or s. 3 of the 2006 Act or a combination of both. A table of those prosecutions was produced and that table showed the age difference between the age of the suspect and the age of the alleged injured party. For the purpose of the exercise carried out in relation to the prosecutions in 2007, the ages of the parties were rounded up or down as the case may be. Of the 24 cases only one case indicated or disclosed that there was no age difference between the age of the suspect and the age of the injured party. That was the case in which the plaintiff in these proceedings is the accused. In the other cases the age difference varies from three years in one case, four years in another case, five years, six years and in one case the age difference was 39 years. There were two perpetrators involved in one case. From those figures, it is clear that in 2007 there was only one prosecution of an under-age male and that was the plaintiff in this case. One of the other accused was aged 17 and was six days short of his 18th birthday. The alleged injured party in that case was 14 years of age. There were no formal figures available for the years 2008 or 2009 but Mr. Matthews indicated that there was no significant difference for those years.

Mr. Matthews went on to describe the steps that have to be taken by the Office of the DPP when considering the prosecution of an alleged child offender. The Juvenile Liaison Scheme must be considered and that if that is an option that can be taken, the matter is dealt with by way of formal or informal caution. There is no prosecution. That step was considered in the case of the plaintiff but it was decided that it was not a suitable case for diversion to the National Juvenile Liaison Office. Asked about sexual assault cases involving older women assaulting young males, Mr. Matthews indicated that having dealt with 400 to 500 sexual cases he has personally never known or dealt with a female offender. It was a very rare occurrence and he personally was aware of only one conviction of a female offender.

He was asked to describe what options would be considered if looking at a file where it was alleged that a male under 17 has defiled a

young girl and he explained that there was a consideration as to whether there was an exploitative element involved. He stated that the Office would be inclined to the view that age could be an exploitative factor. The legislation seeks to protect young children. He indicated that it was unlikely that there would be a prosecution in circumstances where two persons under age, a girl and boy appeared to be in a consensual relationship and it was brought to the attention of the DPP that there had been sexual contact. He gave other examples where the public interest would not require a prosecution. He indicated that age difference alone was not a definitive factor. In essence, before deciding to prosecute the Office would consider whether there was an element of exploitation in the situation.

In cross examination, Mr. Matthews explained in more detail how the JLO scheme is operated. He confirmed that the plaintiff in this case, if he were convicted of an offence under s. 3(1) of the Act would not be registered as a sex offender under the Sex Offenders Act 2001 because the age difference between the plaintiff and the complainant is not greater than 24 months. He agreed that a conviction whether on a summary trial or on indictment is a serious matter with serious consequences. He pointed out that the implications for the educational prospects of a young man were not likely to be serious if no sentence was imposed and he dealt with the issue of employment prospects having regard to the provisions of the Children's Act 2001 in relation to the recording of criminal convictions against children.

He was then asked about the reasons proffered for the fact that the Act is not gender neutral. He agreed that one of the reasons put forward is that females would be unlikely to come forward if they knew they could be prosecuted. Another reason for the gender bias would be the question of pregnancy. The evidence of Professor Greene to the effect that consensual sexual relations between under 17s was extremely common and that it would follow that where that was occurring boys are engaging in criminal acts and potentially serious acts yet prosecutions were very rare was put to him and he agreed with that proposition. He stated that it was not a matter of policy that two 15 year olds or people of the same age would not be prosecuted. There was a multi-faceted consideration; each case depends very much on its own facts. He agreed that as a general proposition that whilst girls who engage in certain sorts of sexual activity with boys under the age of 17 are also committing offences that in general they have not experienced male complainants complaining about such circumstances. He accepted that in some cases one of the reasons for a complaint being made is that parents find out about sexual activity between under age girls and boys and the parents of girls originate the complaint.

He was then asked about the nature of exploitation and in particular exploitation by a person in authority. He went on to describe a myriad of situations in which there could be an element of exploitation, for example, the use of force, peer pressure, drink and drugs. He was also asked about the situation in which a decision is made to prosecute a defilement charge as opposed to a rape charge. Again, he explained that it is a decision made having regard to a myriad of factors. He was then asked if the effect of s. 5 in reality is that an underage female will never be prosecuted for consensual sexual activity and he stated that it has never happened. But he would not go so far as to say that it could never happen.

Finally, Mr. Matthews referred to s. 258 of the Children's Act 2001, which deals with the non-disclosure of criminal convictions in respect of children.

The Authorities
Counsel for the Plaintiff referred to the US Supreme Court decision, *Michael M. v. Superior Court of Sonoma County* 450 U.S. 464 (1981), a case relied on by the defendants and referred to in the defendant's written submissions. The legislative provisions in that jurisdiction were similar to those contained in the 2006 Act. It was pointed out that a feature of the US Federal System is that the finding of the State's courts as to the purpose of a State law was binding on the US Supreme Court. The Californian Supreme Court purported to find that the sole purpose of the law at issue in that case was to deter teenage pregnancy. In this case, the purpose of the Act as set out in the particulars furnished herein by the defendants indicates that the case being made is not exclusively based on the concept of deterring pregnancy. In the case of Michael M, a 171/2 year old male, was charged with violating California's "statutory rape" law, which defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years". Prior to trial, the petitioner sought to set aside the information on both State and Federal constitutional grounds, asserting that the statute unlawfully discriminated on the basis of gender since men alone were criminally liable thereunder. The trial court and the California Court of Appeal denied relief and on review, the California Supreme Court upheld the statute. The U.S. Supreme Court affirmed the judgment. It was held in that case, *inter alia*,:

> "The statute is not unconstitutional as applied to petitioner who, like the girl involved, was under eighteen at the time of sexual intercourse, on the asserted ground that the statute presumes in such circumstances that the male is a culpable aggressor. The statute does not rest on such an assumption, but instead is an attempt to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented."

The majority judgment in that case was given by Rehnquist J. The judgment was opened *in extenso*. At p. 467 Rehnquist J. stated:

> "The Supreme Court held that `section 261.5 discriminates on the basis of sex because only females may be victims and only males may violate the section.... The court then subject the classification to "strict scrutiny", stating that it must be justified by a compelling State interest. It found that the classification was "supported not by mere social convention but by the immutable physiological fact that it is the female exclusively who can become pregnant...." Canvassing "the tragic human costs of illegitimate teenage pregnancies," including the large number of teenage abortions, the increased medical risk associated with teenage pregnancies, and the social consequences of teenage childbearing, the court concluded that the State has a compelling interest in preventing such pregnancies. Because males alone can "physiologically cause the result which the law properly seeks to avoid", the court further held that the gender classification was readily justified as a means of identifying offender and victim. For the reasons stated below, we affirm the judgment of the California Supreme Court."

Looking at the principles applicable in general terms he went on to note at p. 469:

> "This Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the facts that the sexes are not similarly situated in certain circumstances."

He went on to add:

> "Applying those principles to this case, the fact that the California legislature criminalised the act of illicit sexual intercourse with a minor female is a sure indication of its intent or purpose to discourage that conduct."

Rehnquist J. continued in the course of his judgment to accept that the prevention of illegitimate pregnancy is at least one of the

purposes of the statute but also that the State has a strong interest in preventing such pregnancy. (See p. 470 of the judgment). He outlined the nature of the risks inherent in teenage pregnancy. A particular concern in California was the fact that approximately half of all teenage pregnancies ended in abortion. There were other social consequences described in the judgment. Having set those out, he continued at p. 473:

> "Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrent to young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly 'equalise' the deterrents on the sexes.

We are unable to accept petitioner's contention that the statute is impermissibly under inclusive and must, in order to pass judicial scrutiny, be broadened so as to hold the female as criminally liable as the male. It is argued that this statute is not necessary to deter teenage pregnancy because a gender neutral statute, where both male and female would be subject to prosecution would serve that goal equally well. The relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the California legislature is within constitutional limitations."

The rough equalisation referred to in the course of the judgment of Rehnquist J. was described by counsel as a form of rough justice. An echo of the plaintiff s arguments in this case was to be found at p. 475 of the judgment of Rehnquist J. where he stated:

> "There remains only petitioner's contention that the statute is unconstitutional as it is applied to him because he, like Sharon, was under eighteen at the time of sexual intercourse. Petitioner argues that the statute is flawed because it presumes that as between two persons under eighteen, the male is the culpable aggressor. We find petitioners contentions unpersuasive. Contrary to his assertions, the statute does not rest on the assumption that males are generally the aggressors. It is instead an attempt by a legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men. The age of the man is irrelevant since young men are as capable as older men of inflicting the harm sought to be prevented."

Rehnquist J. went on in that case to say that the legislation did not rest on "the baggage of sexual stereotypes". However, counsel for the plaintiff contended that the Act did indeed rest on such sexual stereotyping.

Counsel rejected the idea that the Act rests on the same premise as the decision in the *Michael M.* case. In this regard he referred again to the particulars furnished by the defendants herein. His contention was that the consequences for a boy convicted of an offence under the Act are as bad if not worse than the consequences for a girl who becomes pregnant as a result of under age sexual intercourse. On that basis he argued that the attempt by the Act to equalise the deterrent by the imposition of a criminal sanction on the male only was a disproportionate response having regard to the competing interests.

Counsel on behalf of the defendants, Donal O'Donnell, SC also referred to *Michael M. v. Superior Court of Sonoma County*. He pointed out that the decision in that case did not turn on the sole determination that the object of the legislation at issue in that case was to protect girls from becoming pregnant. Nonetheless he noted that Rehnquist J. in the course of his judgment did indeed place great emphasis on the legitimate interests of the State in preventing teenage pregnancies, referring in this context to the passage referred to above from the judgement of Rehnquist J. at p.473.

Counsel therefore emphasised the fact that the purpose of the Act was to discourage the conduct at issue. On that basis argued that it was not correct to say that the purpose of the Act was to prevent sexual intercourse. It had a variety of purposes. He also referred to the passage at p. 475 which is set out above and which was said to contain similar arguments to those of the plaintiff in this case in which Rehnquist J. rejected the argument that the Californian statute was unconstitutional because it rested on the assumption that males are generally the aggressors. Counsel urged on the court the views of Rehnquist J. to the effect that the 2006 Act is "an attempt by the legislature to prevent illegitimate teenage pregnancy by providing an additional deterrent for men" as was found to be the case in the Californian statute.

He noted that Mr. Justice Stewart in the same case who delivered a concurring opinion also emphasised the issue of pregnancy. Stewart J. observed in the course of his judgment that females were not entirely excluded from criminal liability. He said at p. 476 that:

> "At the outset, it should be noted that the statutory discrimination, when viewed as part of the wider scheme of California law, is not as clear cut as might at first appear. Females are not freed from criminal liability in California for engaging in sexual activity that may be harmful. It is unlawful, for example, for any person, of either sex, to molest, annoy, or contribute to the delinquency of anyone under 18 years of age. All persons are prohibited from committing `any lewd or lascivious act' including consensual intercourse, with a child under 14. And members of both sexes may be convicted for engaging in deviant sexual acts with anyone under 18. Finally, females may be brought within the proscription of 261.5 itself, since a female may be charged with aiding and abetting its violation.
>
> Section 261.5 is thus but one part of a broad statutory scheme that protects all minors from the problems and risks attendant upon adolescent sexual activity. To be sure, 261.5 creates an additional measure of punishment for males who engage in sexual intercourse with females between the ages of 14 and 17. The question then is whether the Constitution prohibits a state legislature from imposing this additional sanction on a gender-specific basis."

The conclusion was that S. 261.5 as a punishment for males for intercourse with prepubescent females was justifiable because of the substantial physical risks for prepubescent females that are not shared by their male counterparts. Counsel for the defendants submitted that this approach was similar to the approach seen in this jurisdiction. The legislation is broad enough to encompass an infinitely varied set of situations which include the possibility of criminal liability for underage girls in for engaging in any form of sexual activity apart from sexual intercourse.

Counsel for the plaintiff referred to the decision in the case of *The State (DPP) v. Walsh* [1981] 1 I.R. 412 in which it was found by the Supreme Court that the presumption of law that the act of a wife committed in the presence of her husband was caused by his coercion, was incompatible with Article 40 (1). Having stated that the doctrine was no longer extant Henchy J. at p. 449 of his judgment continued:

> "The idea that, where a wife performs a criminal act, there should be a *prima facie* presumption that the mere physical

presence of her husband when she did it overbore her will, stultified her volitional powers, and drove her into criminal conduct which she would have avoided but for his presence, presupposes a disparity in status and capacity between husband and wife which runs counter to the normal relations between a married couple in modern times. The conditions of legal inferiority which attached at common law to the status of a married woman and which gave rise to this presumption have been swept away by legislation and by judicial decisions. Nowadays, to exculpate a wife for an *actus reus* because it was done when her husband was present is no more justifiable than if she were granted immunity from guilt because the act was done in the presence of her father, her brother or any other relative or friend. Any other conclusion would be repugnant to the degree of freedom and equality to which a wife is entitled in modern society and which has been extensively recognised in the statute and judicial decisions of this State."

Counsel submitted that the thinking behind s. 5 is that the girl's volitional powers are somehow overborne by the male and that such thinking presupposes a disparity in capacity and that the boy will be the instigator and that the girl will be unwilling.

Counsel for the defendants contrasted the facts of this case with those in the case of *The State DPP v. Walsh*, referred to above and *DeBurca v. Attorney General* [1976] I.R. 38. Those cases were in one way an example of the history of discrimination against women and raised an obvious area for enquiry into the issue of invidious discrimination. However one would not be surprised to find gender distinctions made in the area of sexual relations. It was pointed out that the predecessor to the provisions of s. 3(1) of the Act was an offence which only a man could commit.

Counsel for the plaintiff then referred to the decision in the case of *S.M. v. Ireland* [2007] 4 I.R. 369. In that case, Laffoy J. found that s. 62 of the Offences Against the Person Act 1861 was unconstitutional as it imposed a maximum sentence of ten years imprisonment for indecent assault on a male person whereas the maximum sentence for indecent assault on a female person was two years. In the course of her judgment, Laffoy J. referred to the judgment of Walsh J. in *De Búrca v. Attorney General* [1976] I.R. 38 at p. 71 where it was stated:

> "However, the provision made in the Act of 1927, is undisguisedly discriminatory on the ground of sex only. It would not be competent for the Oireachtás to legislate on the basis that women, by reason of their sex, are physically or morally incapable of serving and acting as jurors. The statutory provision does not seek to make any distinction between the different functions that women may fulfil and it does not seek to justify the discrimination on the basis of any social function. It simply lumps together half of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only."

Counsel emphasised that the passage underlined above encapsulates the essence of this case. He argues that the 2006 Act discriminates between persons solely upon the grounds of the sex of those persons.

He went on then to refer to para. 53 of the judgment in which Laffoy J. said as follows:

> "The formulation of the proportionality test which counsel for the plaintiff commended to the court was that of Costello P. in Heaney v. Ireland [1994] 3 I.R. 593, which is in the following terms at p. 607:
>
> > 'The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
> >
> > (a) Be rationally connected to the objectives and not be arbitrary, unfair or based on irrational considerations;
> >
> > (b) Impair the right as little as possible; and
> >
> > (c) Be such that their effects on rights are proportional to the objective.'"

Ultimately in that case, Laffoy J. came to the view that there was nothing in the Act of 1861 or in an objective consideration of the differences of physical capacity, moral capacity and social function of men and women which pointed to a legitimate legislative purpose for imposing a more severe maximum penalty for indecent assault on a male person than for the same offence against a female person and accordingly she concluded that the relevant provision was inconsistent with Article 40.1.

Having regard to the proportionality test outlined by Laffoy J. in that case, it was contended that the objective justification advanced in this case does not meet the proportionality test.

I want to refer to one further passage from the judgment which was particularly emphasised. At para. 73 Laffoy J. stated:

> "Section 62 of the Act of 1861, in mandating a maximum penalty for the offence of indecent assault when committed against a male person which is substantially different from the maximum penalty mandated by law when the same offence is committed against a female, is *prima facie* discriminatory on the ground of gender in contravention of Article 40.1. It is inconsistent with the Constitution unless the differentiation it creates is legitimated by reason of being founded on difference of capacity, whether physical or moral, or difference of social function of men and women in a manner which is not invidious, arbitrary or capricious."

Counsel for the plaintiff relied on that passage to say that this case clearly showed that gender based discrimination is *prima facie* presumptively unconstitutional. Counsel for the defendants accepted that gender based discrimination may be unconstitutional but disagreed strongly with the notion that it is presumptively unconstitutional. In this context it is interesting to look closely at the words used by Laffoy J. What she stated was that s. 62 of the Act was *prima facie* discriminatory on the ground of gender in contravention of Article 40.1. Discrimination on grounds of gender per se is not unconstitutional because the discrimination may be legitimated as noted by Laffoy J. by reason of being founded on difference of capacity, physical or moral, or difference of social function of men and women in a manner which is not invidious, arbitrary or capricious. In other words, a statutory provision may amount to discrimination on grounds of gender but that does not necessarily mean that the discrimination renders the statute unconstitutional. There may be good reasons for the particular discrimination. In the course of the defendants' written and oral submission reference was made to the offence of infanticide in which women who are involved in the killing of their child in certain circumstances are not subject to a conviction of murder but may be tried and punished as if for manslaughter. S. 1(3) of the

Infanticide Act 1949 provides as follows:

> "A woman shall be guilty of felony, namely, infanticide if
>
> > (a) by any wilful act or omission she causes the death of her child, being a child under the age of twelve months, and
> >
> > (b) the circumstances are such that, but for this section, the act or omission would have amounted to murder, and
> >
> > (c) at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child
>
> and may for that offence be tried and punished as for manslaughter."

That particular provision clearly does not apply to men. However it is a provision which on the face of it could be said to discriminate in favour of women but it is a discrimination which is clearly founded on the physical differences between men and women and the effect of childbirth on women.

Counsel for the defendants also referred to the provisions of s. 2(1) of the Criminal Law (Rape) Act 1981, which provides that:

> "A man commits rape if
>
> > (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
> >
> > (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it,
>
> and references to rape in this Act and any other enactment shall be construed accordingly."

Counsel for the defendants also referred to ss. 1 and 2 of the Criminal Law Amendment Act 1935, which the 2006 Act replaced. That Act contained a gender differentiation but while s. 1 of the Act was declared unconstitutional, that was on the basis that the 1935 Act did not make provision for a defence of mistake. No issue arose in relation to the issue of gender discrimination. Relying on those matters, it was argued that it was necessary to make such distinctions in certain circumstances. In the circumstances of the present case, counsel commented that there is a fundamental difference in terms of the consequences of sexual intercourse for boys and girls.

Thus, Counsel for the defendants argued that in looking at the provisions of the 2006 Act and in particular those of s. 5 the correct approach to take was not that posited on behalf of the plaintiff to the effect that once a differentiation on grounds of gender is shown, the onus should shift to the State to justify the discrimination. He pointed out that that approach was advanced but not accepted in the case of S.M. v. Ireland referred to above; such an approach would create a presumption of unconstitutionality which would be difficult to reconcile with the existing presumption of constitutionality which the Act enjoys. I agree with the position of the defendants that gender based discrimination may be unconstitutional but could not be said to be presumptively unconstitutional. I do not think it could be said that Laffoy J. in the passage referred to above went as far as contended for by counsel for the plaintiff. Accordingly, it is not appropriate to approach the issues in this case on the basis that the provisions of s. 5 of the Act are presumptively unconstitutional.

In the course of the judgement in *S.M. v. Ireland,* Laffoy J referred to the decision in *Kansas v. Limon,* unrep., Kansas Supreme Court, 21 October 2005, and counsel for the plaintiff also relied on that decision. The Kansas statute being challenged in those proceedings, commonly referred to as the Romeo and Juliet statute, applied to voluntary sexual intercourse, sodomy, or lewd touching when, at the time of the incident, (1) the victim is a child of 14 or 15; (2) the offender is less than 19 years of age and less than 4 years older than the victim; (3) the victim and offender are the only ones involved; and (4) the victim and offender are members of the opposite sex. K.S.A. 2004 Supp. 21-3522. Mr. Limon met all of the elements of the Romeo and Juliet statute except the one limiting application to acts between members of the opposite sex.

When the Romeo and Juliet statute applies, prison terms are shorter and other consequences, such as post release supervision periods and sex offender registration requirements, are less harsh than when general rape, sodomy, and lewd touching statutes apply. Because the difference in treatment was based upon the homosexual nature of Limon's conduct, he argued that the statute created a classification which violates the equal protection principles announced by the United States Supreme Court. Mr. Limon suggested that a strict level of scrutiny when reviewing his claim should be applied, but asserted that even if the rational basis test applies, (Lawrence v. Texas 2003 539 U. S. 558, the classification bears no rational relationship to legitimate State interests. The court came to the view that the statute created a discriminatory classification based on sexual orientation. The conclusion of the court was that the statute did not pass the rational basis scrutiny under the equal protection clause. The whole statute was not nullified but the offending words "and are members of the opposite sex" were severed. I cannot see how the decision in that case advances the case being made by the plaintiff given that it was concerned with discrimination by reason of sexual orientation.

Counsel for the plaintiff then referred to the decision of the Supreme Court, *C. C. v. Ireland* [2004] I.R. l. S. 1 of the Criminal Law (Amendment) Act 1935 was found to be unconstitutional in that it exposed a person without mental guilt to a maximum sentence of life imprisonment in that case. The 1935 Act was the precursor to the provisions of the Act. Following the decision of the Supreme Court in that case, the 2006 Act was enacted. Counsel referred to a number of passages from the judgments of the Court. At p. 75 of the judgment of Hardiman J. it was stated as follows:

> "Secondly, I would reject the respondents' submission that in characterising the offence one should take no account, or little account, of the maximum sentence but should instead act on the belief that those who are truly blameless will suffer only a conviction and a light penalty."

Counsel relied on that passage to demur from the proposition put to Professor Greene in cross-examination that the Act contained a number of provisions in ease of a potential accused, namely, the provision that only the DPP could prosecute the possibility of the use

of caution by way of penalty and so on. He made the point that it was fatuous to say that it does not matter if the legislation is discriminatory because "you will be dealt with leniently".

He then cited a further passage in support of this point from the judgment at p. 78 where it was stated by Hardiman J. as follows:

> "It appears to us that to criminalise in a serious way a person who is mentally innocent is indeed 'to inflict a grave injury on that person's dignity and sense of worth' and to treat him as 'little more than a means to an end', in the words of Wilson J. quoted at para. 20 in this judgment. It appears to us that this, in turn, constitutes a failure by the State in its law to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State's obligations under Article 40 of the Constitution. These rights seem fundamental in the sense of that word as used in *State of Wisconsin v. Jadowski* [2004] W.I. 68. The ends to which so severe a sanction (imposed without regard to mental guilt) is presumably the protection of young girls from engaging in consensual sexual intercourse. I pause to say that this is of course a legitimate end to be pursued by appropriate means."

It was noted that the Supreme Court rejected the utilitarian defence put forward in that case. It was contended by counsel for the plaintiff that the defendants in the present proceedings are also putting forward a utilitarian defence, namely that girls are deterred from engaging in under age sexual intercourse by the risk of pregnancy and therefore boys have to be deterred by a penal sanction. At p. 84 of the judgment Hardiman J. made the following comment in relation to the utilitarian defence of strict liability:

> "This, it seems, is a classic utilitarian argument. It permits the imposition of an admitted injustice on a discreet class of person on the sole justification of effectiveness. The measure, or its predecessors, is thought to be effective because it's *in terrorrem* effect has been so successful that it has entered 'the substratum' of consciousness with which young men grow up.
>
> The psychology of this is debatable. Certainly it is also wholly unsupported by evidence, as far as one can tell in the Canadian case and certainly in this case. One should be under no illusion as to what McLachlin J. is supporting: the complete objectification of a whole group of a community - young men - and a disregard for their human and constitutional rights, on the basis of an unevidenced speculation about the contents of the 'substratum' of their consciousness."

This court was invited to conclude that the defence put forward in this case is predicated on the utilitarian justification defence. It was conceded that the provisions of the Act may well have a deterrent effect but did not have regard to human dignity and resulted in the objectification of a group of people. He added that the evidence of Professor Greene to the effect that many young people engaged in sexual activity, oblivious of legal requirements and ignorant of the age of consent, could not be ignored. In those circumstances he argued that the utilitarian justification put forward for the legislation is not working. Despite the fact that thousands of people have engaged in under age sexual intercourse, it is now known as a matter of fact that thousands of people have not been prosecuted.

He argued that what is happening in the present case is by analogy a similar approach on the part of the State to that utilised in the Michael M case. Such an approach might well have a deterrent effect but it failed to have regard to the human dignity of young men.

The Plaintiffs Submissions on the European Convention on Human Rights
Counsel for the plaintiff also pointed out that the court could grant a declaration of incompatibility under the provisions of the European Convention on Human Rights Act 2003. Article 14 of the ECHR mirrors Article 40.1 of the Constitution. He referred to the European Court of Human Rights (ECHR) case law which provides that a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". He acknowledged that the contracting states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. Nonetheless differences based on sex or sexual orientation requires particularly serious reasons by way of justification. Reference was made to the case of *Smith and Grady v. United Kingdom* in which the ECHR found that the exclusion of homosexuals from the armed forces was in accordance with law and could be said to be in the interests of national security and for the prevention of disorder, but concluded that the exclusions were not necessary in a democratic society.

Counsel argued that the effect of the Act is to allow females under the age of seventeen to engage in sexual intercourse without fear of conviction and to criminalise the same behaviour for males of the same age whether they are engaged in vaginal intercourse or anal sex. He argued that the benefit of s. 5 which is given to a female must be given to a male if the legislation is not to violate Article 8 of the European Convention on Human Rights when read with Article 14 thereof prohibiting discrimination on grounds of gender.

Finally he argued that the consequences of the declaration of unconstitutionality of s. 5 or indeed a declaration of incompatibility had an inevitable effect on the provisions of s. 3. The removal of s. 5 would allow both girls and boys under the age of seventeen to be prosecuted for engaging in sexual intercourse and would be a form of "equalising up". On the other hand if one "equalised down", the provisions of s. 5 and s. 3 must fall. He argued that as it was clear that the Oireachtás had already made a judgment that girls under the age of seventeen should not be criminalised by reference to its enactment of s. 5 and therefore it was not appropriate to equalise up.

Finally, he reiterated that it was necessary in looking at the legislation to consider whether the response of the Oireachtás set out in s. 5 was proportionate having regard to the justification sought to be relied upon. In looking at the overall situation, he argued that the welfare of young boys also had to be considered in the equation. Finally he argued that the philosophy disclosed in the case of Michael M. could not satisfy our proportionality test.

The Defendants Submissions
Mr. O'Donnell SC opened his submissions by emphasising the importance of the facts of this case. He said that the facts of the case are complex as indeed is the law dealing with this area of offending. As he pointed out, the plaintiff is before the court and has *locus standi* because he has been charged with an offence under s. 3 of the 2006 Act. His case is essentially that because of the reference to a female in s. 5 of the Act, s. 3 must inevitably fall because that is the only benefit that can accrue to the plaintiff by bringing these proceedings. The consequence of that would be that s. 3 would disappear and no one could be charged with an offence under s. 3. He disagreed with that contention and stated that if s. 5 was removed on the basis that it was found to be unconstitutional that s. 3 would remain.

Analysis of the Provisions of the 2006 Act.
Counsel proceeded to examine the structure of the Act. Sections 2 and 3 create the new offences of defilement of a child under the

age of fifteen and under the age of seventeen respectively. These offences replace the provisions of the Criminal Law (Amendment) Act 1935. There are a number of differences between the provisions of the 1935 Act and the 2006 Act, not least the inclusion of a defence of genuine mistake, the lack of which in the 1935 Act led to the finding of unconstitutionality.

The main points made by counsel were that the Act, far from reflecting Victorian *mores* and sexual stereotyping was a careful response to a complex situation. S. 3 of the Act cannot be examined on the basis of a hypothetical situation, namely, that of two young people under the age of seventeen engaged in a consensual relationship. He emphasised that this was not the situation in the circumstances of this case. This case could not be determined on the basis that what occurred was consensual sex.

Counsel looked at the detailed provisions of s. 3 and the range of situations it was designed to deal with such as defilement, rape, sexual assaults, situations where there was an age disparity and those involving persons in authority in respect of the child. He noted that even in the case where both parties were under seventeen there was a range of possibilities. In other words, s. 3 has to and does deal with a wide range of situations. Part of its function was to act as a deterrent to under-age sexual activity. He commented on the views of Professor Greene who, though she accepted that she had liberal views when it came to the issue of consensual under-age sex nonetheless accepted that this was not a good thing. Even if consensual, sexual intercourse between young children is something to be discouraged and deterred.

Looking at the use of the different phrases in sections 3 and 5, counsel said that the Act carefully and deliberately set out a scheme to deal with the issue of under age sexual activity. Section 3 refers to a sexual act which is defined in s. 1 as an act consisting of sexual intercourse or buggery between persons who are not married to each other or an act described in s. 3(l) or 4(1) of the Criminal Law (Rape) (Amendment) Act 1990. By contrast s. 5 refers only to an act of sexual intercourse. He contended that it was not possible to ignore the clear statutory language used and to view s. 5 as referring to the same acts as s. 3. There is a significant difference between the terms "sexual act" and "sexual intercourse" as used in the Act and that difference cannot be ignored.

He referred to s. 3(9) and pointed out that given the vast range of culpability possible in relation to offences under s. 3, there was a significant role for prosecutorial discretion provided by the provisions of section 3(9). He also referred to the provisions of s. 3(10) of the Act which excludes those convicted of an offence under s. 3 from registration as a sex offender under the Sex Offenders Act 2001, if they are not more than 24 months older than the child under the age of 17. He also referred to the provisions of the Children's Act 2001 and in particular to the provisions of s. 96 of that Act which enjoin the courts to use imprisonment as a last resort in relation to children charged with offences. Accordingly he submitted that the Act is more sophisticated than suggested by the arguments on behalf of the plaintiff. It was emphasised that s. 3 of the 2006 Act is gender neutral. Finally the point was made that s. 5 does not confer immunity in respect of women from prosecution. Only girls under the age of seventeen receive immunity and such immunity is limited to cases of sexual intercourse. As was pointed out, that is the only activity that can give rise to a risk of pregnancy. Early pregnancy gives rise to many problems as was accepted by Professor Greene in her evidence. Counsel expressed the view that if the Act was paternalistic as claimed, the section would refer to women as well as young girls under the age of seventeen. In other words, s. 5 provides for a limited exception only. He contended that s. 5 was not a unique or unusual innovation. Under the 1935 Act referred to above, the offence of unlawful carnal knowledge was an offence that could only be committed by a man. Although the comment had been made that the Act reflected outdated social thinking by counsel for the plaintiff, he suggested that the legislation reflects the accumulated wisdom of legislators down through the years.

He observed that the challenge in these proceedings was to the provisions of s. 5 but ended by an attack on section 3. Clearly the plaintiff in these proceedings can obtain no benefit from attacking the provisions of s. 5 unless the provisions of s. 3 are also challenged. He submitted that it was difficult to get from the point of attacking s. 5 to mounting an attack on section 3. While counsel for the plaintiff had speculated on the intentions of the Oireachtás in passing the legislation, he emphasised that the court cannot speculate on what was intended by the Oireachtás nor consider whether the intention of the Oireachtás was to reflect a belief that boys are perpetrators and girls are victims. The plaintiff is charged with an offence that has always been an offence and in essence the plaintiff's argument is that more people should be at risk of prosecution. S. 5 benefits a narrow class of women and even if its removal took place there would be no benefit to the plaintiff. In support of this contention, reference was made to the decision in the case of *Somjee v. Minister for Justice and the Attorney General* [1981] I.L.R.M. 324. That case concerned the different provisions for the conferment of citizenship upon alien men and alien women who marry Irish citizens. In the course of his judgment in that case, Keane J. (as he then was) commented at p. 326:

> "It is only in the case of aliens becoming married to Irish citizens (who are citizens otherwise and by naturalisation) that a distinction is drawn, and, in my view, the distinction is more properly regarded as conferring a form of privilege on female aliens rather than as being invidiously discriminatory against male aliens. I am entitled to presume that, in conferring this privilege, which does not necessarily involve any invidious discrimination, the legislature with having regard to the social, economic and political condition which might prevail in the various jurisdictions from which alien aspirants for citizenship might come."

He went on to say at p. 327:-

> "There is, in my opinion another and fatal obstacle to the claim of both plaintiffs. It was conceded on their behalf that, if s. 8 of the Act of 1956 was declared to be invalid having regard to the provisions of the Constitution, the section in its entirety would fall. Mr. O'Flaherty submitted that in such circumstances, the court would be entitled to declare that the plaintiff's rights had not been vindicated by the Oireachtás in the expectation that the Oireachtás would take whatever steps were necessary to ensure that their rights were in fact reflected. No authority were cited in support of this proposition and I am satisfied that it is not well founded. The jurisdiction of this court in a case where the validity of an Act of the Oireachtás is questioned because of its alleged invalidity having regard to the provisions of the Constitution is limited to declaring the act in question to be invalid, if that indeed be the case. The court has no jurisdiction to a substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtás the appropriate form of enactment which should be substituted for the impugned enactment... it is not the function of the court, in my view, to indulge in an academic exercise which would be utterly futile so far as the plaintiffs are concerned; and, apart from the other considerations to which I have referred, this seems to me to be a fatal obstacle to the granting of the relief which they have sought in the present proceedings."

Counsel also referred to a passage from the decision of the High Court in the well known case of *Norris v. The Attorney General* [1984] I.R. 36 at p. 50 where it was stated:-

> "In the present case it seems to be relevant to ask the following question. If no other constitutional right is infringed, can a statutory provision creating an offence by one class of persons be unconstitutional on the grounds of invidious discrimination merely because all other persons and classes of persons are not made amenable to punishment for similar

> offences? It seems to me to be perfectly constitutional to say that certain activities shall be lawful and subject to penalties when committed by groups of people who, by reason if trade, profession or otherwise, have special opportunities for engaging in such activities. I have already expressed the opinion of the plaintiff s right to privacy, to free expression of opinion, to form associations and to bodily integrity are not, of themselves, such as to render s. 11 of the Act of 1885 unconstitutional. The class of persons affected by this section is that of men, all men, and gross indecency may obviously take quite different forms when committed by men than when committed by women. This is one of the matters which in my opinion the legislature may reasonably take into account in deciding what activities should be declared to be unlawful for the preservation of public order and morality and the attainment of true social order. Furthermore, on this branch of the argument, the plaintiff is saying, in effect, that there would be no complaint if the law were amended by making it an offence for women to commit acts of gross indecency. If this were done, he would not get any benefit and, by analogy to the decision in *Cahill v. Sutton*, this is not an argument in which he is entitled to rely."

Counsel placed considerable emphasis on the last paragraph referred to in the passage quoted above. In other words, if s. 5 were found to be unconstitutional as contended for, there would be no benefit to the plaintiff because that would simply have the effect of removing the immunity for females under the age of seventeen in respect of acts of sexual intercourse. Counsel pointed out that that finding was expressly upheld by the Supreme Court and in that regard he referred to a passage from the judgment of O'Higgins C.J. at p. 59 where it was stated:-

> "As the gross indecency, however, the prohibition only applies to such conduct between males. Does the fact that it does not apply to gross indecency between females involve a discrimination which would be prohibited by article 40, section 1? I do not think so. The legislature would be perfectly entitled to have regard to the differences between the sexes and to treat sexual conduct or gores indecency between males as requiring prohibition because of the social problem which it creates„ while at the same time looking at sexual conduct between females as being not only different but as posing no such social problem. Furthermore, in alleging discrimination because of the prohibition on the conduct to which he claims he is entitled to engage in is not extended to similar conduct by females, the plaintiff is complaining of a situation which, if it did not exist or were remedied, would confer on him no benefit or vindicate no right of his which he claims to be breached."

The issue of "no benefit" was considered by Laffoy J. in the case of *S.M. v. Ireland (No. 2)* in the judgement referred to above. In the paragraphs 33 to 42 inclusive. She considered the passage from O'Higgins J. referred to above and commented at para. 41 as follows:

> "The observations of O'Higgins J. in *Norris v. The Attorney General* [1984] 1.R. 36, that, if the alleged discrimination did not exist or were remedied, that would confer no benefit on the plaintiff, were made in the context of the finding that there was no discrimination and that there was a justification for the difference of treatment of the sexes, as the passage from his judgment which I have quoted illustrates. As counsel for the plaintiff pointed out, in a context where there is a finding of discrimination contrary to Article 40.1, the approach adopted in Norris v. the Attorney General does not address the mischief. Accordingly, it seems to me that the proper course for the court to adopt is to consider whether the plaintiff has made out his substantive case."

Counsel for the defendant submitted that this was not the correct approach. He pointed out that there was no reference by Laffoy J. to the decision in the case of *Somjee v. the Minister for Justice* referred to above. Whilst Laffoy J. commented in the course of that passage that Norris could be distinguished on the grounds that it was made "in the context of the finding that there was no discrimination", it was submitted that this in itself was not a valid ground for distinguishing what was a binding decision. The Supreme Court in the *Norris* case found that there was no discrimination in part because it held that the plaintiff was not entitled to make any argument based on the absence of a similar offence of gross indecency by a female. The court could not have criminalised similar female activity. That argument did not arise in *S.M.* but the court in that case likewise could not have raised the penalty for breach of s. 6 of the 1935 Act that is, indecent assault of a female. Equally, the plaintiff s claim in *S.M.* could not have been met by striking down s. 6 as this would simply have compounded the inequality. Whilst it was accepted by counsel that the result in *S.M.* was correct, it was argued that the reasoning should not be followed and that the approach in *Somjee* and *Norris* in this regard remains good law in cases such as this where it can be said to apply.

In any event it was emphasised that even if the plaintiff's claims were correct, then only s. 5 of the Act could be found to be unconstitutional. Accordingly the removal of s. 5 would not in any way affect the plaintiff's position since it only confers a benefit on the underage girl who had engaged in sexual intercourse. Striking down s. 5 cannot avail the plaintiff.

Strict Scrutiny
I have referred previously to the arguments on behalf of the plaintiff as to the presumptive unconstitutionality of the legislation. On the basis of presumptive constitutionality, counsel for the plaintiff had argued that "strict scrutiny" of the differentiation effected by s. 5 required it to be justified. Counsel for the defendants traced the language of strict scrutiny from the jurisprudence of the U.S. Supreme Court in the context of the 14th Amendment to the American constitution. The plaintiff in his submissions had referred to a passage from in *Re. Article 26 and the Employment Equality Bill* [1997] 2 I.R. 321 at p. 348 where Hamilton C.J. stated:-

> "The forms of discrimination which are, presumptively at least, prescribed by Article 40, s. 1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions."

This was answered by counsel for the defendants by referring to *Brennan v. The Attorney General* [1983] I.L.R.M. 449, in which Barrington J. noted:-

> "The classification must be for a legitimate legislative purpose.... It must be relevant to that purpose and ... each class must be treated fairly."

I have already indicated that I do not think that the reliance by the plaintiff on the concept of presumptive unconstitutionality is supported by the authority relied on and that being so, it follows that the question of whether it is necessary for the defendants to justify the discrimination on grounds of gender that is apparent in s. 5 as contended by the plaintiff does not arise. Equally, it seems to me to be unnecessary to consider the question of strict scrutiny. Such an approach was ruled out by Laffoy J. in *S.M. v. Ireland (No. 2)* referred to above and I have already quoted from the passage of Laffoy J. dealing with this issue. I do not think it is necessary to go beyond that point. It is interesting to note in passing that whilst the concept of strict scrutiny derives from U.S. jurisprudence, gender differentiation has never been subject to strict scrutiny in that jurisdiction.

Distinction on grounds of gender
Can a distinction be made based on gender? Counsel for the defendants submitted that the approach to be taken by the court is to

ask whether a distinction on grounds of gender can be made when dealing with cases of sexual offences. Counsel referred to a Law Reform Commission consultation paper on Child Sexual Abuse (CP 2-1989) and a subsequent Report (LRC 32-1990). In the Report referred to, the Law Reform Commission stated:

> "Under the law of rape, as it stands, with its subjective approach to the guilt of the accused, a jury can acquit an accused of rape and convict him of a lesser offence while still being satisfied that the girl did not consent to sexual intercourse. If the law is altered as now suggested, a jury finding the accused guilty of the lesser offence could be perceived, in effect, as finding the complainant guilty of the same offence. The Commission is concerned by the possible consequences of such an alteration in the law: fear of being disbelieved is a very real element in discouraging some bona fide victims of rape from coming forward. If a fear of being exposed or of being perceived exposed the criminal liability were added to existing fears, one could for the best possible motives, create a highly unwelcome deterrent."

Counsel also referred to a passage from Mr. Thomas O'Malley's book on sexual offences which was quoted in the *C. C. v. Ireland* case referred to above at p. 76 in the judgment of Hardiman J. and it would helpful to refer to the passage in full:-

> "In Mr. Thomas O'Malley's book on Sexual Offences, the author emphasises the legally unusual nature of this offence and indeed the offence created by the following section of the Act of 1935. At p. 97 he has this to say:
>
> > 'Despite being apparently discriminatory against males, sections 1 and 2 of the Act of 1935 have never been challenged as being inconsistent with the Constitution. The male is guilty even if the female clearly consented and there is no defence of genuine mistake as to age, a rule that may seem at variance with the generally subjective nature of criminal liability in Ireland as exemplified by decisions on provocation and self defence. Although there have been many prosecutions in recent years, most of the important litigation on these sections took place between the 1940s and the early 1960s when there was little awareness of the rights-creating potential of the Constitution.'
>
> The author then goes on to examine the legal arguments for and against the constitutionality and desirability of the offence as statutorily constituted.
>
> Mr. O'Malley also draws attention to the U.S. Supreme Court case of *Michael M. v. Superior Court of Sonoma County* [1981] 450 U.S. 464. This case concerned the constitutionality of a section of the California Code broadly similar in effect to s. l of the Irish Act of 1935, though the age of consent was set at eighteen years. By a majority of five to four the court upheld the constitutionality of the section. The opinion of the majority was delivered by Rehnquist J. who emphasised the legitimate interest of the State in preventing teenage pregnancies as justifying the element of discrimination involved in the offence. Dissenting opinions were delivered by Brennan J. (with whom White and Marshall J.J. agreed) and Stephens J. Brennan J. said that statutory rapes laws were enacted 'on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse'. Accordingly he viewed the challenged law as 'initially designed to further these outmoded sexual stereotypes, rather than to reduce the incidence of teenage pregnancies'. The narrowness of the majority tells its own tale of how fraught the issue has become from a constitutional point of view. This seems a case of higher authority than that of *Wisconsin v. Jadowsky* [2004] Wi. 68 cited above. The section in question here does not attempt to balance two rights, one against the other. The section contains no balance: it wholly removes the mental element and expressly criminalises the mentally innocent. It need not necessarily have done so. As counsel for the applicant pointed out in argument it might have proceeded in quite another way, for example by presumptions which, however strong afforded scope for rebuttal. It might, indeed, have decided to proceed along the lines recommended by the Law Reform Commission in their 1990 Report on Child Sexual Abuse, discussed below, but the prohibition remains in the stark form in which it has been for the last 71 years."

Counsel pointed out that Mr. O'Malley in his text went on to say at pp. 97 to 98:-

> "There may also be a belief, probably justified, among lawyers that the wording of Article 40.1 of the Constitution which legitimates discrimination on the basis of capacity and social functions would be fatal to any challenge to the section in question. The immunity from prosecution granted to young women seems to be based on a paternalistic philosophy which is also reflected to some extent in the so called proviso to Article 40.1 of the Constitution. As with other gender based concessions, such as the special verdict of infanticide, this immunity may be viewed benevolently as a form of positive discrimination which acknowledges the power differential within heterosexual relations and the fact that it is the female that will have to bear the consequences of a teenage pregnancy. A less sanguine approach would view the immunity as reflecting and perpetuating a perception of gender roles according to which the female is seen as helpless and submissive, and the male as decisive and dominating. According to this view, the law is denying young women the opportunity to take responsibility for their own decisions and actions, thereby impeding the quest for equality with sexual relationships."

Mr. O'Malley went on to conclude at p. 99, as follows:-

> "It is difficult to identify a viable alternative. To make both parties criminally liable would be counterproductive as it would greatly impede the enforcement of the law. If the person who may naturally be expected to report the offence, risks prosecution herself, the level of reporting is likely to sink well beneath its present low level. The total abolition of the offence of unlawful carnal knowledge would leave an unconscionable void in the legal regime for protecting very young girls from sexual exploitation. The better option would appear to be a reassessment of the age of consent and the circumstances in which sexual relations with a teenage girl (or boy) should be a concern of the criminal law."

Counsel on behalf of the defendants added that ss. 2 and 3 of the Act are gender neutral and the provisions of s. 5 give a narrow exemption for young girls under the age of seventeen in the case of acts of sexual intercourse only. Accordingly he argued that the State is entitled to criminalise the conduct complained of which has always been regarded as morally wrong and culpable. He contended that in other jurisdictions there was a similar unanimity on the desirability of gender discrimination in relation to sexual offences.

The Approach in other Jurisdictions

Counsel also referred to the decision in the case of *R. v. Hess* [1990] 2 S.C.R. 906, a decision of the Supreme Court of Canada which struck down a statutory rape law dealing with females under the age of fourteen on the basis that it did not provide for a defence of reasonable belief as to age. This case was referred to at length in the course of the decision of the Supreme Court in the case of CC. referred to above. The challenge in that case was based on s. 7 of the Canadian Charter of Rights and Freedoms which protected the right to liberty and it was also argued that the relevant provision infringed s. 15 of the Charter which guarantees the right to equality.

The challenge based on s 15 was unanimously rejected by the Supreme Court of Canada. Wilson J. delivered the majority judgment. In the course of his judgment he noted:-

> "But if the impugned provision creates an offence that involves acts which, as a matter of fact, can only be committed by one sex, then it is not obvious that s. 15(1) of the Charter is infringed. In such a case there may well be a reason related to sex for creating an offence that can only be committed by one sex. I am, of course, fully aware of the dangers inherent in arguments that seek to justify particular distinctions on the basis of alleged sex related factors. All too often arguments of this kind have been used to justify subtle and sometimes not so subtle forms of discrimination. They are tied up with popular yet ill conceived notions about a given sexes strength and weaknesses or abilities and disabilities.
>
> Nevertheless there are certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences. In my view, the fact that the legislature has defined an offence in relation to these realities will not necessarily trigger s. 15(1) of the Charter. I think few would venture to suggest that a provision proscribing self induced abortion could be characterised as discriminatory because it did not apply to men. Such an argument would be absurd. In my view, s. 15(1) does not prevent the creation of an offence which, as a matter of biological fact can only be committed by one of the sexes because of the unique nature of the acts that are proscribed."

He went on to note:

> "This is not to say that some older women do not on occasion seek to have sex with males under fourteen years of age, for they clearly do. But it seems to me that once one accepts that a female does not commit a physical act that can be readily equated with the one that a male commits under s. 146(1), then whether or not a female should be punished for the act she can and does commit is a policy matter best left to the legislature. In my view, it is not this Court's role under s. 15(1) of the Charter to decide whether a female who chooses to have intercourse with a boy under fourteen merits the same societal disapprobation as a male who has intercourse with a girl under fourteen. These issues go to the heart of a society's code of sexual morality and are, in my view, properly left for resolution to Parliament."

Counsel on behalf of the defendants commented that it was somewhat surprising in this case that the court was being asked to substitute its judgment for that of the legislature on the basis that the view expressed by the legislature as recently as 2006 was somehow illegitimate.

Reference was also made to the judgment of McLachlin J. who was in the minority in relation to the issue of the strict liability nature of the offence under s. 146(1). She took the view that s. 15(1) of the Charter was engaged but was also of the view that the provisions of s. 146(1) were justified. Her views in that case were strongly criticised in the judgment in C.C. by Hardiman J. but, having said that, some of her comments in the course of her judgment are of relevance. She referred to the decision in *Michael M*. and it was argued by counsel on behalf of the defendants that it was unfair to characterise *Hess* as an endorsement of *Michael M.* as was contended by counsel for the plaintiff. It was noted that the gender differentiation in Canada was upheld in circumstances where the criminalisation under the Canadian Criminal Code was broader than that contained in the Act. It would be helpful to refer very briefly to a number of the comments of McLachlin J. in the course of that decision. She stated at p. 52:-

> "Section 146(1) represents the Canadian equivalent of a provision which is known throughout the western democratic world. The offence has long been part of the criminal law of England which we in Canada inherited. It has survived innumerable constitutional challenges in the United States: (see *Michael M. v. Superior Court of Sonoma County*), and the offence 'statutory rape' as it is commonly referred to, is embedded in our social consciousness.
>
> These facts attest to the importance of the objective served by the offence. It has long been acknowledged that the imposition of absolute liability and the inequality inherent in the offence render it problematic. Yet the crime of statutory rape has been maintained. Legislatures have reaffirmed it, and courts have repeatedly upheld it. One would not expect this to be so if the objectives of the section were not of great importance.
>
> What then is the objective of s. 146(1)? It has two aspects. The first is the protection of female children from the harm which may result from premature sexual intercourse and pregnancy. The second is the protection of society from the impact of social problems which sexual intercourse with children may produce.
>
> I adhere to the view that I expressed in *R. v. Ferguson* that the protection of children from the evils of intercourse is multi- faceted and so obvious as not to require formal demonstration. Children merit this protection for three primary reasons. The first is the need to protect them from the consequences of pregnancy with which they are ill equipped to deal from the physical, emotional and economic point of view. The second is the need to protect them from the grave physical and emotional harm which may result from sexual intercourse at such an early stage. The third is the need to protect them from exploitation by those who might seek to use them for prostitution or related and nefarious purposes. . . ."

It was in those circumstances that McLachlin J. was of the view that while s. 15 of the Canadian Charter was engaged the objective of s. 146(1) was such that it did not infringe the provisions of the Charter.

Counsel then referred to two further decisions from the neighbouring jurisdiction of the United Kingdom. The first of those was the case of *R. v. Kirk* [2002] E.W.Ca.Crim. 1580. In that case the Court of Criminal Appeal rejected an argument that the absence of an offence of unlawful sexual intercourse by a woman with a boy was in breach of Article 14 of the Convention in conjunction with Article 6 of the Convention. Judge L.J. noted in that case at para. 25 - 26:-

> "As a matter of judicial experience, we know that although allegations made from time to time, and it is proved that an older woman has seduced a boy or boys aged under sixteen, the vast majority of cases of this type involve men having sexual intercourse with girls. Perhaps boys should be identically protected. But one potential consequence of sexual intercourse, which boys do not run, is an unwanted pregnancy. In summary therefore, fewer boys are at risk than girls and they do not become pregnant . . .
>
> We therefore do not accept that the absence of such an offence is discriminatory against men, or provides the slightest justification for holding that such conduct by a man should no longer be proscribed."

On the basis of that authority, it was argued that the European Convention on Human Rights did not advance the matter beyond the position set out in Article 40.1 of the constitution.

The second case referred to from that jurisdiction was the decision in the case of *E. v. Director of Public Prosecutions* [2005] E.W.H.C. 147. In that case it was argued the existence of an offence in relation to girls was a breach of Article 14 in conjunction with Article 8, the words similar to the claim made in the present case. The Divisional Court rejected the claim and relied on the decision in *R. v. Kirk*. It was noted in that case at para. 15 - 16:-

> "In my judgment the appellant does not cross the threshold in the present case. To proscribe sexual intercourse between fifteen year olds, though by consent, does not in my judgment constitute a breach of Article 8(l) as an interference with private life . . .
>
> Even if there is *prima facie* a breach of Article 8 and a justification for the different treatment of male and female youths as required in relation to s. 6(1) of the 1956 Act, it is in my view found in the need to deter boys and protect girls even if they are willing: they may become pregnant, the boys will not."

Reference was also made to the decision in the case of *R. v. G.* [2008 UKHL 37]. That case concerned the provisions of s. 5 of the Sexual Offences Act 2003 to which the appellant had pleaded guilty, namely, rape of a child under the age of 13. The appellant was 15 at the time of the offence and complained of being treated harshly by being prosecuted under section 5 rather than under s. 13 which deals with offences committed by those under 18 years of age. He argued that the charge under s. 5 was disproportionate and a breach of his rights under Article 8 of the ECHR. Lord Hope of Craighead stated at para 36:-

> "I would not go so far as to say that it was disproportionate for a child under 15 to be prosecuted for committing a sexual act with a child under 13 because it was consensual. The offences which the 2003 Act has created are expressed in very broad terms. They recognise that the circumstances in which mutual sexual activity may take place between children of the same or the opposite sex, and the acts that they may perform on one another as fashions change, will inevitably vary greatly from case to case. But there is great force in the point that McLachlin J. made in *R v. Hess; R v. Nguyen* [1990] 2 SCR 906 about the need for children to be protected. Their need to be protected against themselves is as obvious as is their need to be protected from each other. There is much to be said for the view that where acts are perpetrated on children under 13 by children of a similar age intervention of some kind is necessary for the protection of their physical and moral health. My noble and learned friend Baroness Hale of Richmond offers a unique insight into these issues, and I agree with all she says about the dangers of under age sexual activity. The fact that there was consent is to this extent simply irrelevant."

Lord Hope went on to discuss the Children's Hearing system provided for in Scotland. Ultimately, it was found in that case that the prosecution under s. 5 was disproportionate as the offence fell within the ambit of s. 13. Baroness Hale in her opinion in that case observed at para. 48 - 49:-

> "Both prosecutors and sentencers will have to make careful judgements about who should be prosecuted and what punishment, if any, is appropriate. In many cases, there will be no reason to take any official action at all. In others, protective action by the children's services, whether in respect of the perpetrator or the victim or both, may be more appropriate. But the message of sections 9 and 13 is that any sort of sexual activity with a child under 16 is an offence, unless in the case of a child who has reached 13 the perpetrator reasonably believed that the child was aged 16 or over. There are many good policy reasons for the law to convey that message, not only to adults but also to the children themselves.
>
> Section 5 reinforces that message. Penetrative sex is the most serious form of sexual activity, from which children under 13 (who may well not yet have reached puberty) deserve to be protected whether they like it or not. There are still some people perform the loss of virginity is an important step, not to be lightly undertaken, or for whom it's premature loss may eventually prove more harmful than they understand at the time. More importantly, anyone who has practised in the family courts is only too well aware of the long-term and serious harm, both physical and psychological, which premature sexual activity can do. And the harm which may be done by premature and sexual penetration is not necessarily lessened by the age of the person penetrating. That will depend upon all the circumstances of the case, of which his age is only one."

Relying on those authorities, reference was then made once again to the facts of this case. It was pointed out that this is not a case about persons in a relationship. The individuals concerned i.e. the plaintiff and the complainant did not know one another. The plaintiff did not even know the name of the girl concerned. Although reference was made in the course of the evidence of Professor Greene to the almost normative behaviour of young boys and girls, it was submitted what is alleged to have occurred in this case, namely, an act of sexual intercourse and an act of buggery was not shown by the evidence to be normative behaviour. It was pointed out that whilst it may be true to say that some of the figures from the studies referred to in the evidence of Professor Greene indicate that men under the age of 24 may have had sexual intercourse prior to the age of 17 that of itself falls short of being normative behaviour. Certainly, it could not be said that such behaviour was normative for 14 to 15 year old children. The figures showed at the ages of 13 to 16 only 10% of children claimed to have engaged in sexual activity. Counsel went on to point out that even if such behaviour was normative, society was entitled to say it should not be normative behaviour. Accordingly it was submitted that the facts of the present case present a far more complicated position than that presented by and on behalf of the plaintiff herein.

It was pointed out that the plaintiff and the complainant in this case at their ages at the time of the alleged offending could not drive, vote, consent to medical treatment, buy alcohol or purchase cigarettes. Equally it was not beyond the power of society to say that they should not engage in sexual intercourse. It was contended therefore that what had been done in the statutory provisions contained in the Act was done sensitively. The legislation could not be reduced to a single formula and the approach taken was to provide for a mixture of legislative provisions together with prosecutorial discretion. It was contended that this is an area in which a judgment has be made from time to time as to the way in which society seeks to order such issues and that the appropriate way in which this is done is by the elected representatives of the people. This was one of the areas where there are differences between the sexes and that the difference of approach in relation to boys and girls was justified. Counsel urged that this was not an appropriate situation in which the court should intervene. Finally it was submitted that s. 5 is more tailored and narrower in its scope than the corresponding provisions of the 1935 Act, which it replaced. S. 3 captures far more circumstances than the idealised circumstances presented on behalf of the plaintiff. The discrimination in this case is rational on justifiable grounds. The provisions of s. 5 have a rational basis supported by decisions in many other countries. There is no single or indeed, simple answer for what is a very delicate and difficult area. Accordingly it was submitted that the provisions were constitutional.

Counsel on behalf of the plaintiff accepted that it was perfectly open to the legislature to pass legislation to protect children. It was also accepted that the issues involved in this area are delicate and are fraught with difficulty. Nonetheless it was reiterated that the legislation is plainly gender based and therefore required to be objectively justified. Sections 3 and 5 taken together expose the boy

only to criminal prosecution. That was the fundamental point. It was contended that it is not open to single out one group, that is young boys and say that they alone must pay a penalty in respect of such activity.

It was added that insofar as it might be contended by the defendant that the legislation was drafted in such a way as to provide for a mixture of legislative deterrents combined with prosecutorial discretion that if the legislation is unconstitutional then no amount of prosecutorial discretion can overcome any unconstitutionality.

He took issue with the form of justification expressed by McLachlin J. in the case of R. v. Hess, referred to above. Finally, he re-iterated the point that both parties are engaged in the same activity and why in those circumstances should one be guilty and the other not.

Decision
There is no doubt that society has to protect children from under age sexual activity. Mr. Matthews spoke of exploitative sexual activity. Child sexual abuse as that term is usually understood is nothing if not exploitative. It is not surprising therefore that the legislature in a variety of countries have sought to enact legislation to protect children from under age sexual activity. There is one area of under age sexual activity which causes special difficulty and which does not readily fall into the easily understood classification of child sexual abuse. It is the area of sexual activity of children where the participants in the sexual activity are both under age, as in the present case. Under age sexual activity poses particular difficulties for society, the Oireachtás and last but not least, the children involved in such activity. The studies described in the evidence of Professor Greene and the commentary in the authorities referred to above amply illustrate these difficulties.

It is not necessary to labour the points made in the various studies to which I was referred, in great detail. There is no doubt that whatever the law may provide, many young people are not aware of the age of consent or alternatively, choose to ignore it and engage in sexual activity. The Layte study and the Galway study make that clear. It is also clear that there is some divergence between males and females as to willingness to engage in sexual activity. (See Layte, Para. 6.6.2). It is also beyond doubt that under age sexual activity tends to bring about negative consequences. In the Layte study at Para 6. 1, it was noted:-

> "The timing of a person's first sexual intercourse is a key variable influencing the probability of a negative outcome: younger age at first coitus is associated with an increased risk of unintended pregnancy. This is mostly due to lower use of contraception at younger ages. Early parenthood has itself been associated with lower educational and occupational attainment and an increased risk of poverty."

A study carried out in Dunedin, New Zealand, (BMJ No. 7124, Volume 316), concluded:-

> "Most women regretted having sexual intercourse before age 16. First intercourse at younger ages is associated with risks that are shared unequally between men and women. This information is important to young people themselves."

There can be little doubt that one of the most serious consequences of under age sexual activity for girls is the risk of pregnancy. Early motherhood carries with it many negative consequences as has been widely observed. A common feature of the many authorities cited above is the experience in other jurisdictions as to the negative impact that flows from under age sexual activity and in particular the negative consequences of early pregnancy and motherhood on young girls. Society is entitled to discourage such activity.

Given the fact that it is clear from the evidence in this case, the various studies referred to above and our own general knowledge as to the extent of under age sexual activity, it is not surprising that the legislature has sought to deter and discourage such behaviour in under age children. It is also beyond doubt that apart from the specific area of under age sexual activity where both participants are under age, society as a whole demands that children must be protected from the evil that is child sexual abuse. The question in this case is whether or not the Oireachtás in enacting the 2006 Act has done so within constitutional and ECHR limits.

The Act came into being following the Supreme Court decision in the case of *CC v Ireland* referred to above. The provisions of the Act replaced ss. 1 and 2 of the Criminal Law Act 1935 which found that s. 1 (1) of that Act was inconsistent with the Constitution as the offence created thereby was an offence of strict liability and the provisions of that Act did not allow for a defence of reasonable mistake. The 2006 Act was enacted by 2 June 2006, demonstrating, if that was necessary, the importance of having legislation in place for the protection of children. It goes without saying that the Act, as a post-1937 act, enjoys the presumption of constitutionality.

These proceedings are concerned with the provisions of section 3 and section 5 of the Act. Section 3 creates the offence of defilement of a child under the age of 17 years. (S. 2 creates the offence of defilement of a child under the age of 15 years. It is interesting to note in passing that the plaintiff was charged with an offence under s. 3 (1) which carries a maximum sentence of five years for someone not in a position of authority even though the complainant was under the age of 15 years. S. 2 (1) carries a maximum penalty of life imprisonment.)

Counsel, particularly Counsel for the defendants, referred at length to the provisions of s. 3. 1 do not wish to reiterate everything that was said about the provisions of s. 3 but some observations on those provisions are appropriate. The first thing to note about the provisions of s. 3 (1) is that it creates the offence of defilement of a child under the age of 17 years. As can be seen, s. 3 (1) is gender neutral. It is also noteworthy that s.3 (1) does not make any qualification as to the age of the perpetrator-the perpetrator could be older than the child, the same age as the child, or younger than the child. Further, the perpetrator could be the same sex as the child could be a member of the opposite sex.

Another important provision of s. 3 is that it provides for a defence of honest belief that the child had attained the age of 17 years, the feature that was lacking in the 1935 Act. The section goes on to provide that consent is not a defence. This section goes on to provide that proceedings can only be brought by or with the consent of the DPP. Finally, the provisions of the Sex Offenders Act 2001 are disapplied to those convicted of an offence under section 3 (1) where the person convicted is not more than 24 months older than the child under 17 years of age. It is also important in considering section 3 (1) to bear in mind the definition of "sexual act" contained in the act and set out at the beginning of this judgment. It can be seen that the provisions of the Act cover a wide range of sexual offences and offenders arising from any number of possible circumstances.

On the face of it, there is no apparent constitutional or Convention frailty in the provisions of s. 3. The plaintiff has mounted his challenge to the provisions of s. 3 by seeking to link it in to the provisions of s 5. It is therefore necessary to look again at the provisions of s. 5. It provides:-

> "A female child under the age of 17 years shall not be guilty of an offence under this act by reason only of her engaging in an act of sexual intercourse."

There are a number of points to note about s. 5. It applies only to a female child; the child must be under each of 17 years and it applies only to acts of sexual intercourse.

It has to be remembered that the plaintiff in the present case has been charged with two offences; one is that he had sexual intercourse with a person under 17 years and the second is that he committed an act of buggery. On the facts alleged in this case, the complainant has no immunity in relation to the act of buggery. The immunity from conviction conferred by s. 5 is limited to acts of sexual intercourse.

The statutory provision at issue in this case provides for different treatment of female and male children under l7 years of age and as such it has to be viewed as being discriminatory on grounds of gender. It is then necessary to consider whether, given the lack of equality of treatment, the defendants can rely on the provisions of Article 40 .1 to show that in the words of Laffoy J in *SM v. Ireland* referred to above, "the differentiation is legitimated by reason of being founded on difference of capacity, whether physical or moral, or difference of social function of men and women in a manner which is not invidious, arbitrary and capricious."

I have already referred to the replies to particulars furnished by the defendants when asked to give particulars of the differences of capacity, physical and moral and of social function. I have set out those replies above and it is not necessary to do so again. There was a further notice for particulars and amended replies to further and better particulars were furnished on 10th November 2009. Those replies to further and better particulars dealt with physical differences between male and female children and the different medical and psychological effects and consequences that sexual intercourse has on male and female children. The emphasis in those particulars was on the fact that only female children can become pregnant and that the consequences of pregnancy can include serious medical and psychological consequences in addition to the birth of a child. The issue of the reporting of offences was also raised. The replies furnished to both sets of particulars encapsulate the response to these proceedings by the defendants in relation to the proviso in Article 40.1. Thus it is necessary to consider whether those matters legitimate the differentiation in treatment of male and female children under 17 years of age as contended by the defendants.

It is clear that under age sexual activity is something that ought to be discouraged because of the undoubted harmful effects on children and on society as a whole; the studies referred to in the course of the evidence provide ample confirmation of this. Professor Greene supports this view although she does not agree with the approach of the Oireachtás as set out in the Act which covers a broad range of sexual offences against young people and of which s. 5 is but one part of the wider statutory framework designed to protect young people. S. 5 is framed in very narrow terms. It does provide for a gender specific immunity from criminal sanction but in a very limited set of circumstances. A similar approach has been taken by law makers in other jurisdictions as has been seen in the case of *Michael M* referred to above, in *R. v Hess* and in the UK cases to which reference was made. It is instructive to observe that where the legislative immunity given to young girls in other jurisdictions has been examined through the prism of equality provisions, the legislative immunity has generally withstood the test.

The defendants' argument in this case is not based solely on the fact that only girls can become pregnant as a result of sexual intercourse but it is undoubtedly the most significant fact relied on.

The objective of the Act as a whole is to protect children, boys and girls, from sexual abuse. As pointed out above, the Act deals with a complex and wide range of sexual activities, circumstances and levels of culpability. Difficult issues such as the issue of consent are dealt with in the Act. Careful consideration has been given to the sentencing regime for offenders - for example, those within a specified age range are not subject to the provisions of the Sexual Offenders Act 2001 while those in a position of authority over a child are liable to longer sentences of imprisonment. This is the legislative framework in which one must view the limited immunity conferred by s. 5. Girls and boys are equally liable to prosecution in respect of sexual activity falling short of sexual intercourse. S. 5 applies only to acts of sexual intercourse. Thus the immunity only applies to the one area of sexual activity that can result in pregnancy. It is the one consequence of sexual activity that carries no risk for boys or men. The risk of pregnancy is only borne by girls.

As is clear from the Layte study, the younger the age at which first sexual intercourse takes place, the greater the probability of a negative outcome, such as the increased risk of unintended pregnancy and STIs; early parenthood is associated with lower educational and occupational attainment and a greater risk of poverty. The adverse consequences that flow from under age sexual activity fall to a greater extent on girls than on boys. Far from being an example of good old fashioned discrimination against young boys as contended by counsel for the plaintiff or a form of "rough equalisation", the Act provides a limited immunity to girls in the one area of sexual activity that can result in pregnancy. Society is entitled to deter such activity and to place the burden of criminal sanction on those who bear the least adverse consequences of such activity. The Act goes no further than is necessary to achieve this object. If it were the case that the adverse effects of underage sexual activity (which are not just confined to the risk of pregnancy as is clear from the studies referred to in the course of this case) were borne equally by boys and girls, there would be no rational basis for the difference in treatment of boys and girls. However, that is not the case. That being so, I have come to the conclusion that the discrimination identified in s. 5 is legitimated by reason of being founded on difference of capacity, physical or moral, or difference of social function of men and women in a manner which is not invidious, arbitrary or capricious.

I want to deal briefly with the arguments based on the ECHR. I agree with the submissions on behalf of the defendants that the provisions of that ECHR do not bring the matter any further than Article 40.1 of the Constitution. The United Kingdom decisions cited above, *R v. Kirk, E v. Director of Public Prosecutions* and *R v. G* are persuasive authorities to that effect. Accordingly, I am satisfied that the provisions of the Act at issue in these proceedings are not incompatible with the ECHR.

Finally, I should add that the helpful submissions in relation to the issue as to whether the plaintiff, if successful in his arguments, was entitled to the reliefs claimed herein given that striking down s.5 alone could not avail the plaintiff, need not be considered in the light of the outcome of these proceedings.

In the circumstances, I am refusing the plaintiff s claims herein.