THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

169/14

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

V

ROBERT HARRISON

Respondent

Judgment of the Court delivered on the 7th day of July 2016 by Mr. Justice Edwards.

Introduction
1. In this case the respondent is charged with dangerous driving causing the death of Nicola Roberts and serious bodily injury to Vera Fannin at Corrahavan, Drung, Cootehill, Co. Cavan on the 3rd of November, 2009, contrary to s. 53(1) of the Road Traffic Act 1961 as amended, and has been returned for trial to Cavan Circuit Criminal Court.

2. An application was made on his behalf to the presiding judge at Cavan Circuit Criminal Court for a determination as to whether he was fit to be tried.

3. Following a trial of this issue before the Circuit Court judge, sitting alone, in accordance with s. 4(5)(b) of the Criminal Law (Insanity) Act 2006 (hereinafter "the Act of 2006"), the Circuit Court judge determined that the respondent was unfit to be tried.

4. The Director of Public Prosecutions now appeals to this Court, pursuant to s. 7(3) of the Act of 2006, against the Circuit Court judge's said determination.

Section 4 of the Act of 2006
5. Section 4 of the Act of 2006, to the extent relevant to this appeal, provides:-

> *"4. — (1) Where in the course of criminal proceedings against an accused person the question arises, at the instance of the defence, the prosecution or the court, as to whether or not the person is fit to be tried the following provisions shall have effect.*
>
> *(2) An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to—*
>
> > *(a) plead to the charge,*
> >
> > *(b) I nstruct a legal representative,*
> >
> > *(c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,*
> >
> > *(d) make a proper defence,*
> >
> > *(e) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or*
> >
> > *(f) understand the evidence.*
>
> *…*
>
> *(5) (a) Where an accused person is before a court other than the Court charged with an offence and the question arises as to whether that person is fit to be tried the provisions of this subsection shall apply.*
>
> *(b) The question of whether the accused person is fit to be tried shall be deter-mined by the judge concerned sitting alone.*
>
> *(bb) In a case to which paragraph (a) relates, the court may request evidence of an approved medical officer to be adduced before it in respect of the accused person for the purposes of—*
>
> > *(i) determining whether to adjourn the proceedings until further order to facilitate the accused person in accessing any care or treatment necessary for the welfare of the person,*
> >
> > *(ii) making a determination as to whether or not the accused person is fit to be tried, or*

(iii) exercising a power referred to in subsection (6)(a).

(c) Subject to… [not relevant], if the judge determines that the accused person is unfit to be tried, he or she shall adjourn the proceedings until further order, and may—

(i) if he or she is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6)(b) and any other evidence that may be adduced before him or her that the accused person is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, commit him or her to a specified designated centre until an order is made under section 13 or 13A, or

(ii) if he or she is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6)(b) and any other evidence that may be adduced before him or her that the accused person is suffering from a mental disorder or from a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre, make such order as he or she thinks proper in relation to the accused person for out-patient treatment in a designated centre.

(d) Where the court determines that the accused person is fit to be tried the proceedings shall continue.

(6) (a) For the purposes of determining whether or not to exercise a power under subsection (3)(b)(i) or (ii) or subsection (5)(c)(i) or (ii), the court, having considered the evidence of an approved medical officer adduced before it in respect of the accused person—

(i) may for that purpose—

(I) commit the accused person to a designated centre for a period of not more than 14 days, or

(II) by order direct that the accused person attend a designated centre as an outpatient on such day or days as the court may direct within a period of 14 days from the date of the making of the order,

and

(ii) shall direct that the accused person concerned be examined by an approved medical officer at the designated centre.

(b) Within the period authorised by the court under this subsection, the approved medical officer who examined the accused person pursuant to subparagraph (ii) of paragraph (a) shall report to the court on whether or not in his or her opinion the accused person is—

(i) suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, or

(ii) suffering from a mental disorder or a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre."

Relevant background

6. The respondent, who was also injured in the accident the subject matter of the proceedings, had previously been involved in another road traffic accident which had occurred on the 31st of January, 2009. He had suffered a very significant head injury, involving multiple facial fractures and intracranial bleeding, in that earlier accident following which he was in a coma for approximately two months.

7. Following the respondent's return for trial to Cavan Circuit Criminal Court, on the 5th of March, 2014, an application was made on his behalf to the presiding Circuit Court judge for a determination pursuant to s. 4(5)(b) of the Act of 2006 as to whether he was fit to be tried.

8. The Circuit Court judge agreed that in the first instance the respondent should adduce *prima facie* evidence that there was an issue to be determined in that regard. Evidence was then adduced from a Dr. Alan Byrne, Consultant Psychiatrist, who gave evidence of having assessed the respondent and who opined that the respondent had presented with a history of a very significant head injury with post traumatic amnesia, leaving him with certain neurological deficits both of a physical and mental (or cognitive) kind. The physical deficits observed comprised an ataxic gait and some slurring of his speech. The mental or cognitive deficits observed comprised an inability to recall important details and a lack of appreciation of what was going on in terms of the legal case. He was asked, and replied, as follows:-

"Q. So, your opinion then is to the effect that, as a consultant psychiatrist, that this young man is unfit to be tried?

A. I really feel he is. He has he doesn't know what he's being charged with. He can't when I even asked him what your role would be in terms of the case he had no idea, he couldn't describe it. So, he's a babe in the woods in terms of presenting his needs, wants or entitlements to anybody. I don't think he's capable of instructing counsel. He doesn't understand the processes that are in front of him and he is extremely limited from that point of view."

9. Counsel for the appellant indicated that she had *"no questions"* for Dr. Byrne.

10. In the light of Dr. Byrne's evidence, the Circuit Court judge deemed it appropriate to make an order pursuant to s. 4(6)(a)(ii) of the Act of 2006 directing that the respondent should be examined by an approved medical officer at a designated centre. The approved medical officer was Dr. Stephen Monks, Consultant Forensic Psychiatrist, and the designated centre was the Central Mental Hospital.

11. The respondent was duly assessed by Dr. Monks in accordance with the Circuit Court judge's direction, and Dr. Monks prepared

and furnished a report for the court pursuant to s. 4(6)(b) of the Act of 2006. In his report he opined (*inter alia*) that:-

> *"[23] In my opinion Mr Harrison, as the result of a traumatic brain, has a mental disability which is manifest as personality change and deficits in some aspects of cognitive functioning. His mental disability would qualify as a mental disorder as defined in section 1 of the Criminal Law (Insanity) Act 2006.*
>
> *[24] Notwithstanding Mr Harrison's mental disorder I found, during the course of my assessment, that Mr Harrison would be able to follow the nature and course of criminal proceedings so as to plead to the charge, instruct a legal representative, make a proper defence, challenge a juror and understand the evidence. In my opinion at the time of my assessment he was fit to be tried as per section 4 of the Criminal Law (Insanity) Act 2006/2010.*
>
> *[25] Given Mr Harrison (sic) cognitive difficulties it is possible that the courtroom environment could present a challenge to him at times. For example, memory difficulties may hamper his ability to recall some aspects of the proceedings. Mr Harrison could be assisted in this regard by allowing him the opportunity to be given summaries and recaps of the proceedings where appropriate. In my opinion any similar difficulties arising could be dealt with through making reasonable accommodations."*

12. In circumstances where there was disagreement between the experts concerning whether or not the respondent was fit to be tried, the Circuit Court judge decided that it was necessary to conduct a full plenary hearing on that issue before arriving at her determination for the purposes of s. 4(5)(b) of the Act of 2006. That hearing took place on the 14th of July, 2014.

The plenary hearing

13. At the hearing on the 14th of July, 2014, the Circuit Court judge heard evidence from Dr. Alan Byrne and Dr. Stephen Monks, respectively. Both doctors had had regard to, and had taken account of, a detailed report dated the 31st of October, 2012, from a Dr. Colin Wilson, Consultant Neuropsychologist of the Regional Acquired Brain Injury Unit based at Musgrave Park Hospital in Belfast, who had been asked by the respondent's legal team to assess and provide a medico-legal report on the respondent from a neuropsychological perspective in respect of his acquired brain injury. Dr. Wilson had not been specifically asked to address fitness to plead.

14. Dr. Wilson's said report was before the court and was admitted in evidence on an agreed basis, and it sets out a detailed picture of the injuries sustained by the respondent in the accident of the 30th of January, 2009; the physical and neuropsychological *sequellae* to those injuries as subsequently noted and observed by the treating team, whose records Dr. Wilson had reviewed; and the results of Dr. Wilson's assessment.

15. In the "*summary and opinion*" section of his report, Dr. Wilson had stated (*inter alia*):-

> *"Suffice to state, details of Mr Harrison's current cognitive function across a range of cognitive domains, is outlined earlier in this report. Of note, this assessment was conducted at some 3 years and 8 months following his involvement in his initial road traffic accident. On formal assessment, no evidence of suboptimal effort or lack of engagement in the assessment process was observed. On examination, Robert continues to demonstrate somewhat reduced speed of written information processing. He performed at somewhat less than expected levels on tasks of basic vocabulary/word understanding as well as abstract verbal reasoning. His speed of visuomotor coordination fell within the low average range (lower margin), which again is somewhat less than expected given his premorbid educational attainments. He continues to exhibit impairments in aspects of everyday memory functioning, although he performed relatively well on tasks of attention and concentration, as well as screening tasks of executive functioning. His performance on tasks of executive functioning is in marked contrast to those deficits observed in and around May 2009, and also following his assessment at NRH conducted in March 2010."*

16. Dr. Byrne was examined in chief by counsel for the respondent, and he was subsequently cross-examined at length by counsel for the appellant. Dr. Monks was then in turn examined in chief by counsel for the appellant. Counsel for the respondent elected not to cross-examine Dr. Monks.

17. In his evidence in chief Dr. Byrne repeated the concerns that he had articulated at the earlier hearing on the 5th of March, 2014.

> *"When put in concert with the fact that he has a neurological gait of truncal ataxia and some unsteadiness, he definitely appears to have continuing neurological difficulties which would appear to operate -- or certainly I found them at both a cognitive and at a physical level. So, when I spoke to him, he was very childlike, he was very reasonable and, I suppose, relatively relaxed with me. When I asked him what he was charged with or what the charges against him were, he didn't know and he had some idea that he was in significant trouble and that he might go to jail. It was very clear that in terms of material facts he was very much limited in terms of his capacity to understand what had happened. He had great difficulty describing the accident itself, the second accident obviously. He couldn't really formulate a very clear description of what had happened to the young lady who had passed on in the accident. He didn't know what her injuries were. He had real difficulty remembering her name, so I felt with -- in those sort of circumstances that there were real significant deficits in terms of his capacity to formulate information and, I suppose, to represent himself in a coherent way."*

18. Dr. Byrne went on to suggest that the cranial injuries that Mr. Harrison had suffered in his initial accident had included damage to the nervous tissue and the frontal part of the brain, which is the decision making part of the brain that does the planning. An injury of this sort affects a person's judgement in stressful situations, specifically "*the subtle parts of your life*". He referred to Mr. Harrison's ataxic gait and simplistic appreciation of what was occurring as proof that the art of driving would have been too extreme a task to overcome, and that he was concerned that he had been driving at all. He added:-

> *"… anybody who has been unconscious for two months has had a very serious brain injury and that they will be driving again within a further six months is -- well, it's, I would have thought, ambitious to say the least and probably hazardous really because the -- Mr. Harrison certainly hadn't the judgement, I felt, to make the sort of decisions required to drive, particularly at night when the second accident occurred."*

19. When asked for his views as to Mr. Harrison's fitness to be tried with reference to the criteria set forth in s. 4(2) of the Criminal Law (Insanity) Act 2006, Dr. Byrne stated:-

> *"Well, I mean, it's nearly all of the above really. In terms of challenging the evidence … he had a very scant*

understanding of what was … what had actually happened. In terms of presenting to … or instructing his counsel, he really didn't know what he was instructing them about, and I asked him several questions about this and I have subsequently saw him when we were in Cavan, and again his ability to process the information, I felt, was very significantly deficient. I feel he suffers from a mental disorder under the meaning of the Act in terms of effectively it's an acquired brain injury with cognitive impairment as a result, and probably developing issues in relation to his executive functioning and his capacity to comprehend complex issues."

20. Dr. Byrne went on to dispute Dr. Monks' opinion, as expressed in his report to the court, that although Mr. Harrison had cognitive difficulties that could present a challenge for him in a courtroom environment, these challenges could be dealt with through making reasonable accommodation.

" Q. … you obviously differ from that?

A. I do. You see, the reality is he's either fit to follow the proceedings or he's not.

Q. Yes?

A. And my personal feeling is that he's not … If you put him in a pressurised situation where he's surrounded … in an environment where he would not be comfortable, there's absolutely no way, in my opinion, that he would be able to follow what was going on and represent himself, instruct counsel and assimilate the information that was coming through."

21. During cross examination, Dr. Byrne is asked about the cognitive functioning testing carried out on Mr. Harrison by Dr. Wilson at the National Rehabilitation Hospital, Dun Laoghaire on 8th March, 2010. It was put to him that overall, and across a number of these tests, Mr. Harrison's results had fallen within the borderline or average ranges relative to his aged peers, and that therefore he did not lack capacity.

22. While agreeing that the tests did not indicate a lack of capacity, Dr. Byrne maintained that the appellant, whom he also accepted was functioning at a sufficient level to allow him to attend an agricultural college and pursue a course of study, was still having extreme difficulties with processing and retaining new information, which would inhibit his ability to instruct counsel during the trial. He also argued that although he was in college, he was not learning new information because he had worked on a farm all of his life.

"I would suggest that he's actually … he was actually sort of honing in on skills he already had as opposed to learning particularly new information."

23. It was further put to Dr. Byrne that, in the course of Dr. Wilson's examination of him in 2012, Mr. Harrison had functioned within the average range in auditory attention and concentration tests. Specifically, Mr. Harrison was within the average range relative to his peers in a demanding prolonged test of auditory attention and an executive functioning test, which measured his organisation, planning, problem solving and reasoning. Dr. Byrne agreed that *"… the test showed that he displayed no particular difficulties in tasks of practical planning and problem solving, coped well on novel task of complex abstract problem solving, did poorly on a basic task of cognitive estimates."*

24. Dr. Byrne later stated that Mr. Harrison's condition was at that stage no better, and possibly worse, than that at the time he had conducted his first assessment in 2010. He referred to experience he had gained while working in a neuropsychiatry unit in Canada, during which the average timeframe for admitting people to the brain injury unit was four and a half years because "*neurological changes continue at pace during that time*". It was put to him that Dr. Monks would say that his condition was no different now than what it was in 2012, and Dr. Byrne responded that "we'll have to agree to differ on that".

25. Following Dr. Byrne's testimony, Dr. Monks gave evidence concerning his findings based upon his own examination of Mr. Harrison on 2nd May, 2014.

26. Dr. Monks stated that the battery of neuropsychological tests that Mr. Harrison had been subjected to at the National Rehabilitation Hospital were routine for a person with a history of brain injury. He accepted that, in the appellant's case, these tests consistently noted personality and behavioural changes, and that the appellant had become prone to irritability and childish behaviour. He also mentioned that at the time of that assessment, there were a number of cognitive deficits, specifically in terms of memory.

28. Dr. Monks had noted Dr. Wilson's findings and had concluded that "*predominantly memory seemed to be the issue or the cognitive function that was most effective, on-effective (sic), rather, on his testing*". He then described how Mr. Harrison had coped well enough on the executive functioning tests:-

"Yes. And I think the executive functioning tests which relate to a person's ability to plan, to problem solve, to judge were within … in the normal range, and so what that would mean really is somebody's ability to understand if their executive functioning is intact as such, as was the case in the testing through Dr Wilson … somebody who would be able to understand as your average person would be, so that's what I took from Dr Wilson's assessment of executive function."

29. Dr. Monks then went on to explain that although Mr. Harrison has certain cognitive impairments, he is not learning or intellectually disabled. Rather, his global intelligence is within the average range amongst peers of his age.

30. During the tests that Dr. Monks conducted with Mr. Harrison, he noted that he was very lucid and coherent, had a slight speech impediment, and was engaging in the process. He also noted that the results of a test of malingered memory, or TOM test, showed that Mr. Harrison was not trying to deceive Dr. Monks.

31. Dr. Monks then testified that Mr. Harrison had indicated, *inter alia*, that he was aware of the second car crash, that he had seen the book of evidence (although he had not read it at the time), that he was aware of the specific charge of dangerous driving causing death, and that he knew the name of his solicitor and understood what his solicitor's function or role was, i.e., (in his own words) that "*his job is trying to keep me out of jail*". He had further indicated that he understood that the role of his legal representatives in general was to speak up for him in court and to give his side of the story. He also had clearly stated his understanding as to what his plea options were, namely "*guilty or not guilty*", and he understood a plea of not guilty to mean that he had not done what he had been charged with and that, in his own words, "*If somebody enters a guilty plea, it means they're saying they've done it*."

32. Dr. Monks had also interviewed Mr. Harrison's parents, and they had stated that he was able to take care of himself. They had confirmed:-

> *"… his self care, his personal hygiene, he's able to cook himself, that he has friends from his rehabilitation programs and he also had a girlfriend over the last couple of years. That's what he said, but the purpose of discussing those matters with his parents was to get a feel for how disabled on a day-to-day basis he might be."*

33. Dr. Monks had then testified that there was nothing to demonstrate that Mr. Harrison's condition had declined or gotten worse since Dr. Wilson's report.

34. Dr. Monks reiterated the opinion he had expressed in his report to the effect that Mr. Harrison was fit for trial, but that some elements of the procedure could pose a challenge to him. He said:-

> *"…he has a mental disability which manifests as personality change and deficits in some aspects of his cognitive functioning, and this mental disability would qualify as a mental disorder as defined in the Criminal Law (Insanity) Act. But my opinion regarding section 4 was that, notwithstanding Mr Harrison's mental disorder, I found that during the course of my assessment with him and, based on my specific assessment of his fitness to be tried, that he would be able to follow the nature and course of criminal proceedings so as to plead to the charge, instruct a legal representative, make a proper defence, challenge a juror and understand the evidence. So, it's -- and my opinion was that he was fit to be tried at the time of my assessment.*
>
> *I would agree with my colleague, Dr Byrne, that stressful situations can put an extra demand or cognitive load on anybody and so that in an individual who may have some cognitive impairments, it might cause them more difficulty than normal. Notwithstanding that, my impression under the, I suppose, relatively stressful situation of being interviewed for an assessment for court was that his cognitive abilities in that regard stood, that they were intact. But I would accept that a real life court situation might be even more stressful, so, in that regard, I was making suggestions which I hope might be helpful in the event that Mr Harrison were found fit to be tried and a trial proceeded, that accommodations could be made to assist him, and I think I've outlined specific accommodation with regard to any difficulty he might encounter with remembering details of the trial.*
>
> *His understanding and his ability to apprehend is intact. The processes which would allow him to assimilate the information, some of those cognitive functions might be -- or, well, on testing are impaired, so memory, and, if my recollection is right, processing speed as well was an area of difficulty. That's not to say that he cannot understand. He can and, on the basis of my assessment, he did understand the elements of -- required for fitness, to be fit."*

The Circuit Court judge's ruling

35. In the course of ruling whether Mr. Harrison was fit to be tried on the 14th of July, 2014, the Circuit Court judge said:-

> *"This is a very difficult case for everybody concerned, not least for the Roberts family, and in the background of that is the life of Nicola Roberts, who died as a result of the accident that occurred in this case, in respect of which the accused man has been charged. It's an unusual case in that the accused man was injured and the main injury which he sustained was not as a result of the accident that occurred involving the fatality to Nicola Roberts, but rather an accident that occurred some months previously, in January 2009, in respect of which the accused man, Mr Harrison, sustained a serious brain injury. I don't think I'm overstating it when I describe it as such. He did suffer a serious brain injury in an earlier road traffic accident that occurred in January 2009, as a result of which he was in a coma for a period of two months, and it appears that, as a result of that, there are some physiological manifestations of the injury, including impairment to his gait and to his speech.*
>
> *Assessments were conducted in respect of the neurological deficit by a Dr Colin Wilson, who is a consultant neuropsychologist, and the Court has the benefit of that report. Dr Wilson concluded that Mr Harrison sustained a severe traumatic brain injury as a result of that first accident. And while it seems that Mr Harrison was able to describe the accident in some detail to Mr Wilson when he interviewed him, it seems that certain impairments were identified. He performed poorly on basic task of cognitive estimates.*
>
> *I accept Dr Monks's evidence. He described it quite well in terms of describing the injury as impairing some aspects of his cognitive functioning but not others, that he could function quite normally in some respects and that he had other impairments in respect of certain aspects of his cognitive function. In particular, I note at page 7 of Dr Wilson's report that one of those impairments, he described as being impaired -- having impaired range on only one item, delayed story recollection. It's noted that during Mr Harrison's in -patient cognitive assessment no formal measures of engagement were administered. And I think that it has been accepted by all parties that Mr Harrison engaged properly with all of the persons who assessed him properly and fully and cooperated fully in that regard, but he has been left with an impairment in respect of story recollection. And he performed poorly on immediate and delayed recall of a story passage, face and picture recognition, immediate and delayed routine recall as well as orientation.*
>
> *Now, Dr Byrne gave evidence that in his view that Mr Harrison has been left with a very significant level of brain injury, leading to an inability to recall. His opinion is that he's unfit to be tried. He said when he interviewed him that he didn't know what he was being charged with, that he was a babe in the woods, and that was his evidence given when I last heard Dr Byrne's evidence in Cavan, that he was a babe in the woods, in terms of identifying his needs and that he was not capable of instructing counsel and doesn't understand the process in front of him.*
>
> *I've considered the evidence given by Dr Monks today and while I'm -- Dr Monks accepts that Mr Harrison suffers from a mental disability within the meaning of the legislation, he indicates that he's nonetheless fit to plead and that the ability -- the inability to recall can be dealt with by assistances being put in place in terms of the proceedings. So, it appears to be common case that there is a memory deficit, and, while Dr Monks indicates that he is of the opinion that the accused is in a position to understand the evidence, he may not be in a position to recall it afterwards. Dr Byrne's -- Dr Byrne goes further than that and indicates that he has difficulty in understanding what's going on and a difficulty in recalling.*
>
> *The standard which the defence must meet is to establish on the balance of probabilities that the accused is unfit to be tried. Taking all of the medical evidence into account, and in view of the conditions which Dr Monks has suggested be*

put in place, it seems that's the only way the trial could proceed in his view. To me, that seems an impossibility because the Court cannot assess specifically what can be put in place. It's a matter that would evolve over time during the process of the trial and it appears difficult to be able to anticipate what structures could possibly be put in place or to anticipate the difficulties that would be encountered on a day-to-day basis by the accused in respect of the conduct of the trial as the evidence evolved. I'm satisfied that Mr Harrison comes within section 4(2)(f) regarding his ability to understand the evidence. Dr Byrne's assessment was that the fact that it would have read back to him and explained to him again would indicate that he has a difficulty in understanding the evidence. I'm satisfied that the defence have made out the case to the required standard. In those circumstances, I'm going to deem Mr Harrison unfit to be tried.

The Court, however, obviously expresses a view in respect of how Mr Harrison came to be driving on the night. It seems extraordinary that these injuries were acquired before he went out in a car on the night in question. I accept that he was assessed in that regard, but obviously the Court has a concern, also expressed by Dr Byrne, as to how Mr Harrison came to be behind the wheel of a car on that night."

Appellant's submission

36. In this appeal a number of complaints are advanced on behalf of the appellant, who in this instance is the Director of Public Prosecutions. The appellant complains that the Circuit Court judge erred in principle in:

(a) determining that the respondent was unfit to be tried on the basis of evidence given by Dr. Stephen Monks when his conclusions did in fact establish that the respondent was fit to be tried;

(b) determining that, because the respondent might have some memory difficulties, he is unfit to be tried;

(c) interpreting the evidence of Dr. Monks as meaning that the respondent was unfit to be tried when Dr. Monks said that the court room environment could present a challenge at times to the respondent and that, if there was a particular aspect of the evidence that the respondent could not remember, he could be reminded of it by his team and instructions taken from him;

(d) failing to give any or any adequate weight to the conclusion of Dr. Monks that the respondent is fit to be tried;

(e) failing to give any or any adequate weight to the circumstances of the case and in particular:

1. that the respondent is a man who is capable of independent living;

2. that the respondent has a girlfriend;

3. that the respondent had embarked on a course in an agricultural college after his first accident in January, 2009; and

4. that in many mental areas, the respondent is of normal ability, and he has reasonable problem solving skills;

all of which factors were not consistent with a determination that the respondent is unfit to stand trial because of an inability to understand the nature or course of proceedings in a criminal case against him;

(f) determining that the respondent would be unable to understand the evidence and, further, that this meant that he is unfit to be tried;

(g) holding that a trial in the ordinary sense could not proceed and that a new procedure would have to be put in place which of itself meant that the court had to find that the respondent was unfit to stand trial.

37. It was submitted that the Circuit Court judge had erred in saying that it "*seems an impossibility*", in relation to the putting of arrangements in place as suggested by Dr. Monks. The appellant's essential complaint is that this was a pre-judgment, and a premature ruling, in that Dr. Monks had not said that the trial should not proceed unless specific arrangements were put in place. What he had in fact said was that if the respondent found the court situation to be stressful to the extent that it placed an extra demand or cognitive load on him, he might have to be provided with accommodations or assistance. However, Dr. Monks was of the view that both the respondent's understanding and ability to apprehend were intact and that, in terms of the statutory criteria, he was fit to be tried.

38. It was further submitted that no proper enquiry was conducted into what the respondent's anticipated difficulties were likely to be, and might possibly be, and whether and to what extent such difficulties might be accommodated within the fluid dynamic of a trial. The full extent of the very limited exploration that took place concerning what might be required is encapsulated in the following short extract from the examination in chief of Dr. Monks:-

"Q. You came to -- you indicated that some elements of the procedure might pose a challenge to him. This has already been discussed, I think, with your colleague by Mr Sammon. Turning to paragraph 25 of your report, perhaps you could explain what that's about?

A. Yes. I would agree with my colleague, Dr Byrne, that stressful situations can put an extra demand or cognitive load on anybody and so that in an individual who may have some cognitive impairments, it might cause them more difficulty than normal. Notwithstanding that, my impression under the, I suppose, relatively stressful situation of being interviewed for an assessment for court was that his cognitive abilities in that regard stood, that they were intact. But I would accept that a real life court situation might be even more stressful, so, in that regard, I was making suggestions which I hope might be helpful in the event that Mr Harrison were found fit to be tried and a trial proceeded, that accommodations could be made to assist him, and I think I've outlined specific accommodation with regard to any difficulty he might encounter with remembering details of the trial.

Q. But in terms of the understanding the proceedings as they're taking place, do you feel that he would have any difficulty in understanding the nature of the case being made or the evidence?

A. No. No. Understanding -- his understanding and his ability to apprehend is intact. The processes which would allow him to assimilate the information, some of those cognitive functions might be -- or, well, on testing are impaired, so memory, and, if my recollection is right, processing speed as well was an area of difficulty. That's not to say that he cannot understand. He can and, on the basis of my assessment, he did understand the elements of -- required for fitness, to be fit."

39. Paragraph 25 of Dr. Monks' report, dated 22nd of May, 2014, had stated:-

> *"Given Mr Harrison's cognitive difficulties it is possible that the court room environment could present a challenge to him at times. For example, memory difficulties may hamper his ability to recall some aspects of the proceedings. Mr Harrison could be assisted in this regard by allowing him the opportunity to be given summaries and recaps of the proceedings where appropriate. In my opinion any similar difficulties arising could be dealt with through making reasonable accommodations."*

40. There was no other reference to assistance or accommodations contained in that report.

41. Counsel for the appellant referred this Court to O'Malley, *The Criminal Process* (Roundhall, Dublin, 2009) at paras. 4.03 - 4.04, where the author states:-

> *"4.03 The ingredients of a fair trial may … vary with the particular circumstances of the accused. Everyone has the right to participate as fully as possible in his own trial. Special provisions may therefore be necessary when the accused is a child or a person with a disability. The State's obligations in this regard were underscored by the European Court of Human Rights in T and V v United Kingdom, (2000) 30 E.H.R.R. 121, a case in which the applicants had been convicted of the murder of an infant, Jamie Bulger. Their trial, which attracted intense publicity, was held in a constantly crowded courtroom. There was also medical evidence to suggest that the applicants, who were then only 11 years of age, were suffering from post-traumatic stress during the trial. The court found a violation of Art.6(1) of the Convention which guarantees, among other things, a fair trial. It said that in view of the applicants' age and the general atmosphere in the court, it was unlikely that they would have been sufficiently uninhibited to consult their lawyers. The court said:*
>
> > *"It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition."*
>
> *4.04 Adequate protection of the due process rights of a child or a disabled person may therefore call for something more than would ordinarily be sufficient to deliver a fair trial to an adult without a disability, though the additional steps, if any, to be taken will vary from one case to another. The same applies to those who are prevented by linguistic incompetence from following their own trial. Close attention must always be paid to the individual circumstances. [Footnoted here - R. v M. [2002] 1 W.L.R. 824 at 840]. As Lord Bingham said in Brown v Stott [2003] 1 A.C. 681 at 704, it is a case of ex facto oritur ius (the law flows from the particular facts). With growing social and legal awareness of the rights of disabled persons, further developments along these lines may be anticipated. What the Constitution guarantees is a fair trial, although, unlike the various human rights instruments, it does not use that particular term. None of these instruments guarantees a perfect trial. As the Canadian Supreme Court has said [in R v Find [2001] 1 S.C.R. 863, 199 D.L.R. (4th) 193 at [28]], with reference to its own Charter of Rights and Freedoms:*
>
> > *"A fair trial, however, should not be confused with a perfect trial, or the most advantageous trial possible from the accused's perspective...'what constitutes a fair trial takes account not only of the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process... What the law demands is not perfect justice, but fundamentally fair justice.'""*

42. It was submitted that the purpose of the hearing was to determine whether the respondent was fit to be tried. The evidence of Dr. Monks, which the Circuit Court judge accepted, was that he was so fit. This hearing was never intended to address what assistance or accommodations might have to be made to ensure that the respondent would receive a fair trial. That was always going to be an issue for another day. To the extent that there was reference to a possible need for accommodations by Dr. Monks, it was a peripheral reference in circumstances where his focus was on his patient's fitness in principle to be tried, not on measures that might have to be taken at the next stage to ensure that any such trial was fair. He was, however, clear that in principle the respondent was fit to be tried.

Respondent's submission

43. It was submitted that the Circuit Court judge's findings of fact were supported by credible evidence, specifically, the reports from Dr. Wilson, Dr. Byrne and Dr. Monks.

44. It is submitted on behalf of the respondent that, in the absence of evidence that a finding of fact by a trial judge is "so clearly against the weight of the testimony as to amount to a manifest defeat of justice", an appellate court is bound by those findings of fact.

45. We were also referred to the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Kelly* [2005] IECCA 50 (Unreported, Court of Criminal Appeal, McCracken J., 29th April, 2005), which adopted principles applied by the Supreme Court to civil appeals in Hay v. O'Grady [1992] 1 I.R. 210, as further authority for the submission that an appellate court is bound by a finding of fact made by a trial judge and supported by credible evidence:-

> *"The principles to be applied by an appellate court in relation to decisions of fact by a trial judge have been set down by the Supreme Court in the well-known case of Hay v O'Grady… This Court considers that those principles, which were enunciated in relation to an appeal in a civil action, are equally applicable to an appeal from the judges of the Special Criminal Court in criminal proceedings. At page 217 McCarthy J set out the principles to be followed, the ones relevant to the present case being:-*
>
> *…*
>
> > *(1) …*

> *(2) If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them. The truth is not the monopoly of any majority.*
>
> *(3) In my judgement, an appellate court should be slow to substitute its own inference of fact, where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."*

46. It was submitted that, in the instant case, the finding of fact by the Circuit Court judge that the respondent was not fit to be tried:

> (a) was consistent with the evidence of Dr. Byrne given to the Court and that the evidence of Dr. Byrne was, having regard his qualifications, expertise and experience in the area of brain injury, credible evidence;
>
> (b) was not "*so clearly against the weight of the testimony as to amount to a manifest defeat of justice";* and
>
> (c) the weight of the evidence against it, being that of Dr. Monks, was itself subject to a significant qualification having regard to his finding that "*difficulties arising* [during the trial process] *could be dealt with through making reasonable accommodations*." This was of itself a concession that the respondent's mental disorder could adversely affect his ability to follow the trial process.

47. Counsel for the respondent further submitted that it is significant that the submissions of the appellant do not identify any error in law on the part of the Circuit Court judge, other than the submission that she erred in law by holding that it was impossible to put in place "*reasonable accommodations*" as contemplated by Dr. Monks. However, the evidence of Dr. Monks adopted by the appellant had acknowledged that the respondent's mental disorder could present a challenge to him in the course of the trial process. No evidence was adduced as to what "*reasonable accommodations*" to ameliorate any prejudicial effect on the respondent might mean in practice. It was submitted that what was suggested by Dr. Monks was a form of hybrid trial process which was not in accordance with law.

Discussion, analysis and decision

48. Where the Director of Public Prosecutions brings a criminal case against an accused, there are two interests to be balanced. On the one hand, there is the public interest in seeing suspected offenders prosecuted, tried and, if found guilty, sentenced to an appropriate punishment. On the other hand, there is the right of the individual accused to be tried in due course of law, which means affording him a fair trial. Wherever possible, both interests should be accommodated. However, it is well established that if it is not possible to do so, the individual's right to a fair trial is to be regarded as a superior right to the public's right to prosecute. Primary responsibility for endeavouring to reconcile the conflicting interests of the State and the accused will always rest with the court to which the accused is returned for trial.

49. We have carefully considered the submissions on both sides, and this Court finds itself in agreement with the submissions made by counsel for the appellant that the Circuit Court judge's ruling that the respondent was unfit to be tried, in circumstances where she had indicated that she was accepting the evidence of Dr. Monks who had opined that he was fit to be tried, was against the weight of the evidence. We find that to have been an error of principle.

50. We further agree with the submission made by counsel for the appellant that the Circuit Court judge's effective ruling that the appellant could not get a fair trial was premature and represented a pre-judgment on an issue that had not yet arisen in concrete form for consideration, and one which had not been fully explored or properly argued. Indeed, there appears to have been a conflation of the discrete issue as to whether the respondent was in principle fit to be tried, having regard to the statutory criteria, and the separate but somewhat related issue as to whether, if so, he could in fact receive a fair trial. There was no meaningful engagement with the question as to whether the public interest in a prosecution proceeding could be reconciled with the need to afford the respondent a fair trial. We find that this was a further error of principle.

51. In the circumstances we will allow the appeal and direct that the matter be re-entered before the next sitting of Cavan Circuit Criminal Court, with a view to it being progressed to trial as soon as possible.

52. It may be helpful in the unusual circumstances of this case to indicate how we would expect this matter to be progressed. In the course of her ruling, the Circuit Court judge stated:-

> "Taking all of the medical evidence into account, and in view of the conditions which Dr Monks has suggested be put in place, it seems that's the only way the trial could proceed in his view. To me, that seems an impossibility because the Court cannot assess specifically what can be put in place."

53. We disagree with that view and consider it an unjustified conclusion in the absence of a thorough, rigorous and searching exploration of the likely extent of the respondent's potential difficulties, and the range of possible measures that might be put in place to address them. The treatment of the issue at the fitness hearing was fleeting and superficial, and there was no proper engagement with the potential problems at any trial that might proceed, far less any cogent analysis. We make no criticism of the fact that that was so. The fitness hearing was not an appropriate one in which to address such issues, other than in the most general way. It was concerned with fitness to be tried in principle, not with any practical arrangements that might have to be put in place for the assurance of a fair trial of the respondent should he be found to be fit to stand trial having regard to the statutory criteria. To the extent that we are critical, it is that the trial judge considered that such practical arrangements were appropriate for consideration at that stage; then, having taken that view, failed to direct a further and more detailed exploration of the possibilities in that regard, concluding instead without a sufficiently rigorous examination of the issue that reconciling the conflicting interests of the State and the respondent was "*an impossibility*". It was not appropriate to use a finding of unfitness to stand trial to reflect such a view even if that view had been properly arrived at after appropriate enquiries, much less where it was arrived at after only the most superficial of enquiries. A question raised as to a person's fitness to be tried in principle must be considered and determined separately and discretely from any issue as to whether a person, having been found fit to be tried in principle, can in fact receive a fair trial in light of particular personal, mental or physical difficulties.

54. That having been said, we adopt and approve of the statement by Lord Bingham in *Brown v. Stott* [2003] 1 A.C. 681 at 704, that it is a case of *ex facto oritur ius* (the law flows from the particular facts). Indeed, it has always been so. To give some examples, deaf people can be accommodated by sign language interpreters or induction loop facilities; blind people can be accommodated by the

provision of documents in brail or the use of Optacon devices, or synthesised speech reading machines; people with speech difficulties can likewise be accommodated by various technical devices; vulnerable witnesses can be accommodated in various ways, such as by video link, screens and advance video-recording; witnesses from outside the State who are unable or unwilling to travel, and unavoidably absent witnesses within the state, can be accommodated by video-link; and non-english speaking foreign nationals can be accommodated by translators and interpreters. Seriously ill persons, who might perhaps tire easily, or who must absent themselves regularly to undergo some procedure, e.g., kidney dialysis or chemotherapy, might be accommodated by shorter sittings, or breaks, or overnight adjournments. An accused person who has to temporarily absent himself or herself from the trial due to the onset of sudden acute illness might be accommodated by an adjournment, or a jury discharge with a view to starting the trial again, or by the provision of a transcript of what occurs in their absence.

55. It is not possible to produce an exhaustive list of the many possible ways that a person who meets the statutory criteria in terms of his/her fitness to be tried, but who nonetheless has particular personal mental or physical difficulties, might be assisted and accommodated. Each case will obviously depend upon its own facts.

56. However, assuming it is possible in a particular case to propose an accommodation or accommodations that may be efficacious to ensure that the accused concerned will receive a fair trial, the only limitation that should be put on such proposals is that they should be reasonably practical; they should be confined to what is strictly necessary, and they should not confer such an unfair advantage on the beneficiary as to render an unfairness to the other side, in this instance the prosecution. We would add that the fact that accommodations might prolong a trial, perhaps significantly, should not be a reason in itself to discount their suitability or practicality.

57. It seems to this Court that there is no reason in principle why efforts could not be made to explore whether a person who is fit to plead within the statutory criteria, but who has a mental difficulty (be that a learning disability, or a speed of information processing or recall difficulty), particularly where that is associated with stress, could not somehow be assisted or accommodated in the interests of ensuring that he or she receives a fair trial. The precise needs would have to be identified, ideally at a pre-trial directions hearing or at a hearing in the absence of the jury at the trial itself (if the issue could not reasonably have been anticipated), with expert evidence being adduced on both sides in the absence of agreement on a proposed reasonable accommodation to address the particular issue that has arisen. We see no reason why, for example, accommodations such as reasonable stress reducing measures; frequent breaks, either scheduled or on request; the provision of extra time to assimilate information and respond to questions put; the facility to have complex propositions or technical matters explained in simpler language, or broken down; and the provision of an overnight transcript service, at least in respect of critical parts of the evidence, so that the person with the difficulty could review again the evidence given both after hours and at his or her own pace, and with the benefit of explanation from his advisers (to instance but some possibilities), might not be considered.

58. This case should have been, and will now be, allowed to proceed to trial at least for the moment. However, the trial judge, at whatever stage the case is at (be it a pre-trial directions hearing, or during the actual trial) has an overall supervisory role with respect to all aspects of the proceedings, and will be under a particular duty to take appropriate steps to ensure that the respondent can receive, and as the case progresses is in fact receiving, a fair trial. If at any stage it becomes apparent that, even with reasonable accommodations, a fair trial will not be (or if already underway will no longer be) possible then the judge concerned should stop the case. Moreover, quite apart from issues of procedural fairness, if in the course of the ongoing proceedings fresh doubts arise concerning the fitness of the respondent to be tried, there is nothing to prevent a trial judge from embarking on a further fitness hearing pursuant to s. 4 of the Act of 2006.

59. As to how the case is progressed from here, it seems to us that in circumstances where the court of trial is on notice from the evidence given at the fitness hearing, which was the subject matter of this appeal, that there is a possibility that the stress of a trial could create information processing difficulties for the respondent, and/or difficulties in speed of recall from memory, but that a fair trial may still be possible with the provision of assistance to, or reasonable accommodations of, the accused, it would be wise to schedule a pre-trial directions hearing at which the parameters of the possible difficulties that the respondent might encounter at trial on account of his particular personal adversities would be fully explored, and at which measures that might be taken to address them would be identified with specificity. The trial judge should then give directions aimed at having such assistance available and at having appropriate accommodations planned and catered for, to the greatest extent possible, before the actual trial starts so as to ensure the smooth running of the trial. Of course, a trial represents a fluid dynamic; hence, it may transpire that, despite pre-trial directions and detailed advance preparations as to assistance and accommodations, other unanticipated issues going to the fairness of the trial may arise, and in that event they will require to be dealt with as they arise.

60. In saying all of this, we are not to be taken as expressing a view as to whether or not it will in fact be possible to afford the respondent a fair trial. We express no such view. To do so would be to pre-empt the outcome of the enquiries which we have recommended should be conducted by the trial judge in advance of the trial, and the outcome of any additional enquiries that might be necessary in the course of the case. We are saying no more than that where there is a demonstrated need for them, there should be such enquiries, that they should be rigorous and meaningful, and that every effort should be made to try to accommodate both the public's right to prosecute and the individual's right to a fair trial. However, it will be a matter for the trial judge to initially determine, and to keep under constant review, whether this case can, or should, proceed to a conclusion. At the end of the day, his or her ultimate objective must be to ensure that any trial of the respondent that is permitted to proceed is a fair one.

61. Accordingly, the Court will allow the appeal.