The Effect of Delay on Historical Child Sex Abuse Cases: Commentary on the Irish Experience

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Abstract

After a notorious case in 1994, Ireland saw a 'tsunami' of allegations of historical child abuse. As well as undermining the Catholic Church in Ireland, this has also posed grave problems for the legal system. On the one hand, there was an enormous, strongly articulated demand for prosecutions for such offences. On the other hand, the prosecution after periods of up to 54 years — often of old or very old defendants some of whom had cognitive or other problems — was difficult to reconcile with Ireland's elaborate requirements for fair procedures, including the right to an expeditious trial. It became usual for defendants confronted with these very old allegations to seek prohibition in the superior courts against what they said were manifestly unfair trials. The tension between the felt need to prosecute and the legal necessity to ensure fair trials troubled the Irish courts and especially divided the Supreme Court of Ireland. This commentary examines some of the key case law, including the landmark 1998 judgment in *PC v Director of Public Prosecutions*, in which the Supreme Court controversially mandated an assumption in such cases that the complainant's account was true (contrary to the presumption of innocence), and the 2008 decision in *SH v Director of Public Prosecutions* that introduced a single, prejudice-focused test.

Keywords: child sex abuse – prosecution – right to a fair trial – reasonable time – delay – presumption of innocence – Ireland

Introduction

Article 38 of the *Constitution of Ireland* requires that: 'No person shall be tried on any criminal charge save in due course of law'. This commentary explores how this fundamental constitutional value has been upheld in Ireland in the face of large-scale allegations of sexual offences against children that have first been brought forward 20–50 years after they were allegedly committed (Ring 2009:163).

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In a succession of cases, the superior courts in Ireland (the Supreme Court and the High Court), following the statements of Kenny J in *Conroy v Attorney General* (at 415), found that the requirements of 'due course of law' were very similar to those connoted by the phrase 'due process' in the United States and, specifically, include a right to trial with reasonable expedition.[1] The routine prosecution of decades-old cases puts considerable pressure on the concept of an expeditious trial.

In recent times, the superior courts have come to acknowledge as valid the reasons why the making of a complaint of child sexual abuse might be significantly delayed. In the 1994 case of *G*, the Supreme Court acknowledged that perpetrators may prevent disclosure by exploiting a relationship of domination or through threats or intimidation (at 380). In the 2006 case of *SH v DPP*, the Supreme Court held that it was unnecessary for the courts to enquire into the reasons for the delay (including whether the accused had caused the delay by the specific exercise of dominion over the complainant), or to make any assumptions as to the truth of the complaint in adjudicating whether a proposed prosecution should be restrained on the grounds of delay. The sole question in such cases, therefore, was: 'whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay' (*SH v DPP* at 620 [47]). The Court specifically retained jurisdiction to prohibit a trial 'where it would be unfair or unjust' to put the accused on trial (at 622 [54]).

These conclusions were reached after a long and sometimes fraught jurisprudential process. The rise in the number of allegations of child sexual abuse, and particularly clerical child sexual abuse, resulted in enormous pressure on the prosecuting authorities, and on the courts, to prosecute and adjudicate upon cases that previously would have been regarded as impossible to prosecute fairly, by reason of delay. The courts did not find it at all easy to develop a rationale for the prosecution of such cases that was consistent with the basic principles of Irish criminal law. Ironically, in the period just before the 'tsunami' of allegations of child sexual abuse, the superior courts in Ireland had recently developed a sophisticated jurisprudence on delay, calculated to encourage or compel the authorities to conduct criminal cases with due speed. This development is exemplified in the case of *The State (O'Connell) v Fawsitt* ('*O'Connell*'), a very ordinary assault prosecution.

O'Connell was the first major, principled, Supreme Court analysis of the significance of the right to trial with reasonable expedition in criminal cases. For some years prior to *O'Connell*, however, a considerable jurisprudence relating to delay in civil cases had developed. This was, in part, based upon a number of actions where defendants were called upon to rebut allegations of negligence in 'one-off' events that took place 20 or more years previously. In the case of institutional defendants, such as hospitals, they were sometimes called upon to defend actions for negligence where the individual alleged to have been negligent, such as a doctor, was himself dead or otherwise unavailable. Clearly, if such actions were permitted to proceed at all, it would almost certainly result in a verdict for the plaintiff, since the defendant would be unable to mount any defence.

In *O'Keeffe v Commissioners of Public Works*, the Court regarded as 'a parody of justice' a hearing that would take place 23 years after an industrial accident in which the plaintiff had lost an eye (Law Reform Commission of Ireland 2009:27). There was evidence that one witness had died and another's memory had been 'all but obliterated by the passage of time' (Law Reform Commission of Ireland 2009:28, fn 104). The Court dismissed the case

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1 See, eg, *Goodman International v Hamilton (No 1)* [1992] 2 IR 542 at 609; *Re National Irish Bank Ltd* [1999] 1 IR 145 at 180.

because a hearing 'would come at a time when the defendants, through no fault of theirs, had been deprived of a true opportunity of meeting the plaintiff's case' (Law Reform Commission of Ireland 2009:27–8).

Equally, in *Toal v Duignan (No 1)*, a medical negligence action was dismissed for delay. This case followed *Ó Dómhnaill v Merrick*, stating:

> Even though, therefore, the plaintiff may be blameless in regard to the date at which these proceedings have been instituted, and with regard to the period of 25 to 26 years since the events out of which they arose, as far as these defendants are concerned there would be an absolute and obvious injustice in permitting the case to continue against them. (at 139)

This was so because:

> It would be impossible for either the hospital authorities or the consultants engaged, in the absence of the most detailed clinical notes and records, to defend themselves 26 years on from attendance at a birth in 1961. (at 138–9)

The position was worsened by the fact that, in the interval, two of the doctors involved had died. Another doctor had been called to attend the plaintiff on one occasion some 10 years after his birth. She too was sued. She had no notes and little recollection of her single (locum) attendance. In *Toal v Duignan (No 2)*, the Court held that she 'would find it virtually impossible to defend herself against the particular allegations that are now being made' (at 144).

On the basis of these findings, the Court expressed the principle involved as follows from *Toal v Duignan (No 1)*:

> [W]here there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the Court may as a matter of justice have to dismiss the action. (at 139)

The superior courts articulated the view that where an action depended on witness testimony, a long delay rendered the process almost random and, as stated by Justice Henchy in *O'Dohmnaill v Merrick*, 'puts justice to the hazard' (at 158).[2]

Parallel with this development, the Irish courts were increasingly exposed to jurisprudence based on the *European Convention on Human Rights*. This instrument provides, at article 6(1):

> In the determination of his civil rights and obligations or of *any criminal charge against him*, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law. (emphasis added)

The Convention is administered by the European Court of Human Rights and was not incorporated into Irish law until 2003 through the *European Convention on Human Rights Act 2003* (Ireland), but it was influential well prior to that date. For example, in *O'Domhnaill v Merrick* the Supreme Court refused to extend the time for a delivery of a statement of claim in an action for damages for negligence allegedly leading to a road accident. The plaintiff had been an infant when the accident took place, so the *Statute of Limitations* did not run against her until she achieved her majority. The result of this was that the action was not statute-barred, though it was not initiated for many years after the

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[2] Originally the phrase of Lord Diplock, approved by Ó Dálaigh CJ in *Dowd v Kerry County Council* [1970] IR 27.

accident. There was then further delay in serving a statement of claim, which detailed the plaintiff's claim against the defendant. The Supreme Court refused to extend the time for this to take place. Mr Justice Henchy said: 'An unaccountable to torpor befell the proceedings' (at 156). He said that the delay was all the more regrettable because the plaintiff's injuries were serious ones. But he pointed out that the defendant did not learn about the claim for 16 years after the accident and that, if the time to deliver the statement of claim were extended, the hearing would be about 24 years after the accident.

Speaking of the effect of delays of this sort, Henchy J said:

> While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons, a trial in 1985 of a claim for damages for personal injuries sustained in a road accident in 1961, would be apt to give an unjust or wrong result, in terms of the issue of liability, or the issue of damages, or both. (at 158)

Mr Justice Henchy, who gave the majority judgment of the Supreme Court, declined to hold that because the action was not statute-barred, the relief sought should therefore be granted. The Judge said:

> Apart from implied constitutional principles of basic fairness of procedures, which may be invoked to justify the termination of a claim which places an inexcusable and unfair burden on the person sued, one must assume that the Statute was enacted subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations. (at 159)

It was in this context that Henchy J referred to the Convention.

It will be immediately apparent that the Supreme Court's remarks about the effect of delay, including creating 'a parody of justice' and 'putting justice to the hazard' are as applicable to criminal trials as to civil claims based on witness evidence. In *O'Connell*, similar arguments were addressed in the context of a criminal prosecution, with far-reaching consequences. In that case, the defendant was returned for trial on charges of assault occasioning actual bodily harm in July 1982, which offences were said to have taken place in January 1981. The principal issue in the criminal case was whether the defendant was correctly identified as the perpetrator of the offences. The trial was listed before the Circuit Criminal Court in the City of Cork. The Court was extremely busy, with the result that on a number of occasions beginning in November 1982, the case was listed, but not reached. It was adjourned on multiple occasions and eventually listed for April 1985. The defendant applied for an Order of Prohibition halting his trial, claiming there had been wholly inordinate delay; that employment which he had found in the United Kingdom (UK) had been imperilled by the need constantly to return to Cork; and that an important alibi witness had emigrated and could not be traced for the trial. The High Court (Murphy J) was gravely critical of the delay and its consequences. But it felt that the case should be left to the trial judge to take such steps as he could to mitigate prejudice arising from delay and, if necessary, to dismiss the case.

The Supreme Court reversed this decision and granted the defendant an Order of Prohibition. Chief Justice Finlay referred to article 38(1) of the *Irish Constitution*. He referred to earlier authority in the Irish courts on the right to trial with reasonable expedition, notably *The State (Healy) v Donoghue*. Chief Justice Finlay, with whom the other members of a very distinguished Court agreed, differed from the High Court judge and

held that it was appropriate for the defendant to complain of the delay by seeking prohibition. The Chief Justice said:

> I am satisfied if a person's trial has been excessively delayed so as to prejudice his chance of obtaining a fair trial, then the appropriate remedy by which the constitutional rights of such an individual can be defended and protected is by an order of prohibition. It may well be that an equal remedy or alternative remedy in summary cases is an application to the justice concerned to dismiss because of the delay. In the case of a trial on an indictable charge, however, I am not satisfied that it is correct to leave to the trial judge a discretion as to whether, as it were, to prohibit himself from letting the indictment go forward or whether to let the indictment go forward. A person charged with an indictable offence and whose chances of a fair trial have been prejudiced by excessive delay should not be put to the risk of being arraigned and pleading before the jury. (at 379)

On the facts of the case, the Supreme Court regarded the delay as not merely 'excessive' and 'prejudicial', but as 'extreme'.

Effects of *O'Connell*

The Supreme Court decision in *O'Connell* had immediate and considerable effects. The stigmatisation of the delay of four years as 'extreme', though undoubtedly justified by the delay in that case in bringing a simple case to trial, was fraught with consequences in the 'tsunami' of child sex abuse cases that shortly afterwards came before the courts.

From a procedural point of view, the finding that the appropriate remedy for a delay in an indictable case was to apply to the High Court for an Order of Prohibition, as opposed to the UK practice of seeking to stay the proceedings in the trial court, meant that over the next 20 years the High Court, and the Supreme Court on appeal, had a very large number of these cases that were very often further delayed by the defendant seeking a remedy for the original delay, because of the backlog of cases in the superior courts. It became usual for the losing party in the High Court to appeal to the Supreme Court, which made no small contribution to the logjam of appeals awaiting hearing in that Court.

The tsunami begins

In his article 'Brokenness of the Irish Church', Dr Andrew McGrady of the Mater Dei Institute, a Catholic Church educational establishment in Dublin, used the term 'tsunami' to indicate the volume of allegations of child abuse (McGrady 2007). Cases of child abuse alleged against Catholic priests or other clerics have so dominated the perception of child abuse cases that it is easy to forget that most allegations of child abuse do not involve clerics (John Jay College 2011:25). But clerics are certainly the largest single group of perpetrators in the consciousness of the public. Since this problem has come to light in Ireland, experience elsewhere shows that large numbers of allegations can be made against other groups as well — such as the multiple allegations made in the UK against prominent entertainers and TV personalities.

McGrady (2007) describes a 'tsunami' as 'an earthquake deep beneath the surface hidden from view'. Ireland has been overwhelmed in the past two decades by allegations of physical, as well as sexual, abuse (Gavrielides 2013:618), and allegations of meticulous concealment of abuse and abusers, and the almost universal policy of protecting the reputation and the assets of the Church in preference to exposing the abusers. There have

been several judicial enquiries of varying types in Ireland into this phenomenon, starting with Mr Justice Ryan's inquiry into child abuse in residential institutions (2000–2009) (*Ryan Report* 2009). This was followed by Judge F Murphy's inquiry into child abuse in the Ferns diocese (culminating in the *Ferns Report*: Murphy, Buckley and Joyce 2005) and this author's two Commissions of Inquiry: first, into allegations of child sexual abuse in the Archdiocese of Dublin (Murphy, Mangan and O'Neill 2009); and second, into the same phenomenon in the diocese of Cloyne, centred in the town of Cobh, County Cork (2006–09) (Murphy, Mangan and O'Neill 2010). These last two inquiries (known as the 'Murphy' and 'Cloyne' reports respectively) were not primarily into clerical child sexual abuse, but focused on the manner in which the ecclesiastical and civil authorities had dealt with these allegations. A feature of the Cloyne Inquiry was that the Bishop of Cloyne, Dr John McGee, had, earlier in his career, been Private Secretary to three Popes.

The 'Murphy Commission', as it was known, rejected the claim that the allegations came as a complete surprise to the Church (the so-called 'learning curve' defence or excuse), pointing to a church literature on the topic going back almost 2000 years. It also pointed to the action of the Dublin Archdiocese in taking out insurance against child abuse claims in the 1980s (Murphy, Buckley and Joyce 2005:15).

Long before any of these inquiries had been established, a case in 1994 triggered almost obsessive media attention on the phenomenon of clerical child abuse and transformed the perception of the Catholic Church in Ireland as among the most doggedly faithful of Catholic communities (Inglis 2007:205). The case was that brought against Father Brendan Smyth, a member of the relatively obscure Nobertine Order, with a monastery in County Cavan, just south of the border with Northern Ireland. Though a monk, Father Smyth was in no sense cloistered, being able to leave the monastery at will and to travel back and forth across the border quite freely. In the criminal proceedings eventually taken against him, it transpired that he had been engaged in abuse, on both sides of the border, for a period exceeding 35 years. The Church authorities were aware, at least in part, of this because the testimony of two of the victims, a boy and a girl, had been taken by a Church Tribunal that was administered by the present Cardinal Archbishop of Armagh, then the local Bishop's Secretary (see generally, Moore 1995).

It is difficult to overstate the shock and disgust caused by the Brendan Smyth case in 1994. The Murphy Commission (Murphy, Mangan and O'Neill 2009:5) stated in its report:

> The controversy and drama surrounding the Fr Brendan Smyth case in 1994 … brought clerical child sexual abuse to public attention. It is probable that this was the first time that many members of the public became aware of the possibility of clerical child sexual abuse.

Abuse in residential institutions

Historically, Ireland had a considerable number of residential institutions for children, typically run by religious orders of priests, brothers or nuns, and supported by the State by per capita payments. The report of Justice Ryan into abuse in these institutions, after an inquiry lasting from 2000 to 2009, found appalling levels of physical, psychological and sexual abuse, especially of boys (*Ryan Report* 2009:53). The Murphy Commission (Murphy, Mangan and O'Neill 2009:174 [11.12]) found that boys outnumbered girls as victims, in their sample, in the ratio 2.3 to 1. The *Ryan Report*, and the *Ferns Report*, considerably heightened public awareness of abuse of these kinds.

Legal problems arising from the tsunami

As soon as the tsunami of allegations of historical child abuse began in the early 1990s, it became all too clear that many of them were very old indeed. In a context where the Supreme Court had described a four year delay as ‘extreme’, there were obvious difficulties, on the existing law, in justifying a delay on the part of the complainant of 20 or more years. There were other complicating factors as well. Many of the defendants were themselves old or very old, with serious health problems, sometimes including cognitive problems. Moreover, the allegations were often phrased with deliberate vagueness. The author’s own experience includes a single incident alleged to have happened ‘between the 1st January and the 31st December’ in a particular year some years previously. The child complainant was examined on deposition, when she immediately and without prompting stated that the offence had taken place on a particular day in July. Asked by the prosecution if she were sure about that, she said she was absolutely positive because it was the day after her brother’s birthday. In Ireland, July is peak holiday season, and the defendant was able to show, via his passport, that he was out of the country at the relevant time.

Such exceptional cases apart, however, most of the cases came down to what Hardiman J later described in *J O’C v DPP* as ‘mere assertion countered by bare denial’ (at 504). A case of this sort is particularly perilous for an innocent defendant.

Justifying delay

When cases of historical child abuse reached a very significant volume, the prosecution, in almost every case, led psychiatric or, more commonly, psychological evidence to show that, in the circumstances, it was not reasonable to conclude that the victim could have complained earlier than he or she actually did, even if that was many decades later. At first, this was presented to the courts by way of a submission that the defendant was responsible for the delay because he exercised ‘dominion’ over the complainant. This, obviously, was more plausible in some cases than others.

The courts’ approach to delay in complaint is well illustrated in *B v DPP*. There, the Supreme Court first held that the alleged offences, being 20–30 years old, were prima facie inordinately delayed. But, per Denham J, the case belonged to a ‘special category’, which involved allegations of child sexual abuse. It was necessary to balance the accused person’s right with the community’s right to have the offences prosecuted. It was specifically held that if the delay was such that the accused ran a real risk of an unfair trial, then the right to a fair trial would prevail. In attempting to balance the community’s right to prosecute with the rights of the accused, the Court should enquire as to the reasons for the delay in reporting. Any presumed prejudice arising out of the lengthy delay in reporting was to be balanced only by the absence of proven actual prejudice, but the Court would also consider the extent to which the delay was due to the conduct of the accused.

In *B v DPP*, the Supreme Court held that, on the facts, the delay was justified by the dominion exercised by the applicant over the complainants, who were his daughters. Critically, the Supreme Court’s reasoning in *B v DPP* was premised on the express assumption that the complaint was true. In a subsequent case, *PC v DPP*, Mrs Justice McGuinness noted that in a previous era there had been automatic disbelief of all allegations of sexual abuse. She stated, however, that it would be ‘equally unfortunate if the discredited orthodoxy of the past were replaced by an equally rigid view that in all cases of delay … the delay can automatically be negatived by dominion’ (at 43).

A more sophisticated test

Perhaps prompted by Mrs Justice McGuinness' observation, the Supreme Court in *PC v DPP* devised a test that was both more sophisticated and more explicitly spelt out than previous invocations of 'dominion'.

Keane J (as he then was; later Chief Justice of Ireland) said:

> Clearly, the fact that the offence charged is of a sexual nature is not of itself a factor which would justify the Court in disregarding the delay, however inordinate, and allowing the trial to proceed. Moreover, even in cases of unlawful carnal knowledge or sexual assault where the complainant is a girl under the age of consent, it is to be borne in mind that the alleged perpetrator may himself be a child. There are cases, however, of which this is one, where the disparity in age between the complainant and the person accused is such that the possibility arises that the failure to report the offence is explicable, having regard to the reluctance of young children to accuse adults of improper behaviour and feelings of guilt and shame experienced by the child because of his or her participation, albeit unwillingly, in what he or she sees as wrongdoing.
>
> This is not to say that the Court in dealing with applications of this nature must disregard the presumption of innocence to which the accused person is entitled. But the issue is not whether the court is satisfied to any degree of proof that the accused person committed the crimes with which he is charged. The issue in every such case is whether the court is satisfied as a matter of probability that the circumstances were such as to render explicable the inaction of the alleged victim from the time of the offence until the initiation of the prosecution. It is necessary to stress again that it is not simply the nature of the offence which discharges that onus. All the circumstances of the particular case must be considered before that issue can be resolved.
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> Manifestly, in cases where the Court is asked to prohibit the continuance of a prosecution on the ground of unreasonable delay, the paramount concern of the court will be *whether it has been established that there is a real and serious risk of an unfair trial:* that, after all, is what is meant by the guarantee of a trial 'in due course of law'. The delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired. *In other cases, the first inquiry must be as to what are the reasons for the delay and, in a case such as the present where no blame can be attached to the prosecuting authorities, whether the Court is satisfied as a matter of probability that,* ***assuming the complaint to be truthful****, the delay in making it was reparable to the accused's own actions*. (at 67–8, emphasis added)

The phrase just emphasised, 'assuming the complaint to be truthful', was to cause enormous difficulty over the following years. It was regarded by some judges as a radical and unacceptable departure from the presumption of innocence (see the cases cited below). Keane J himself was fully conscious of the very radical nature of the step that he and his colleagues took in *PC v DPP*, and he continued, immediately after the passage just cited:

> If that stage has been reached, the final issue to be determined will be whether the degree to which the accused's ability to defend himself has been impaired is such that the trial should not be allowed to proceed. That is a necessary inquiry, in my view, in every such case, because, given the finding that the delay is explicable by reference to the conduct of the accused is necessarily grounded on an *assumption* as to the truth of the complaint, it follows that, in the light of the presumption of innocence to which he is entitled, the court asked to halt the trial must still consider whether the degree of prejudice is such as to give rise to a real and serious risk of an unfair trial. (at 68, emphasis added)

In other words, the Irish Supreme Court, confronted with a very large number of trials for historical child abuse, brought after periods so long that they were impossible to reconcile with recent jurisprudence on delay in criminal cases, attempted to square the circle. It mandated the *assumption* that the complaint was truthful and asked whether, *on that assumption,* the delay in making a complaint was referable to the accused's own action. But, fully accepting that this was an assumption of guilt, this new approach also required a further inquiry as to whether the circumstances gave rise to a real and serious risk of an unfair trial.

Dissent

The very grave reservations about this approach from some judges of the Supreme Court were made clear in *J O'C v DPP*. There, Hardiman J (with whom Barron J agreed) noted that the prosecution had submitted that the presumption of innocence only applied in criminal trials. He continued:

> In fact, the ratio decidendi of some of the judgments in *P.C. v Director of Public Prosecutions* [1999] 2 IR 25 goes further: it involves not merely suspending the operation of the presumption of innocence for some purposes at least but, for the same purposes, *actually assuming the contrary. Specifically, it involves assuming, for the purpose of seeing who is truly responsible for the lapse of time, "that what the complainant said is true" or "assuming the complaint to be truthful"*. To my mind, this is indistinguishable from assuming the guilt of the applicant albeit for a limited purpose. (at 516–17, emphasis added)

Hardiman J continued:

> I cannot subscribe to the proposition that the presumption of innocence applies only in the actual trial of criminal proceedings or is capable of suspension for any purpose relating to the trial. … Nor do I think that either of these things is necessary in order properly to approach proceedings such as these, bearing in mind that they belong to a special category… there is in my view no basis whatever for assuming the truth of the allegations against the accused, prior to conviction, for any purpose or in any proceedings. … The presumption of innocence, of course, confers no immunity. It merely requires evidence to displace it. (at 517)

Hardiman J (at 518–20) cited a number of previous cases of the Irish courts of high authority, and of the European Court of Human Rights, asserting that the presumption of innocence could not be displaced.

A fault line

The fault line in the jurisprudence of the Supreme Court revealed by the three cases just cited deepened over time. For Keane J and other judges, especially Denham J (as she then was), the approach developed in *PC v DPP* was a practical solution to a very pressing problem. The assumption as to the truth of the complaint simply had to be made, according to this line of thought, because in no other way could the complainant's delay be attributed to the accused, so as to justify letting the trial proceed after years or even decades.

From the other point of view, that espoused by Barron and Hardiman JJ, the assumption of the truth of the complaint was not simply a disapplication of the presumption of innocence, but an actual assumption of the contrary. Much Irish and ECHR authority was cited in support of the proposition, but that approach simply could not be accepted.

Evidential matters

In the aftermath of *PC v DPP*, still greater reliance by the prosecution on psychological evidence was a feature of these cases. This, in turn, meant that the psychologists who gave these opinions were quite frequently cross-examined and often made significant concessions as to other considerations that might have contributed to the delay. Possible inconsistencies between psychological evidence and previous reports were avidly pursued and, of course, the whole exercise involved revealing details confided to the psychologist by the complainant.

From a defence point of view, there was also an increased emphasis on demonstrating prejudice, thereby availing of the third test propounded by Keane J. This was often very difficult to do. For example, in *J O'C v DPP* the allegation was that the defendant had persistently abused the daughter of a next-door neighbour over a four-year period 25 years before. He claimed that his defence was prejudiced by the death of his wife, but the majority of the Court would not accept this, since 'it is unlikely that the offending conduct would have taken place while his wife was actually in the house and that he would probably have taken steps to conceal his behaviour from her' (at 486). On the other hand, Hardiman J (dissenting) said:

> Where constant visits to the applicant's home by a child neighbour forms an essential part of the background, ordinary experience suggests that a housewife working at home will have much to say about the circumstances of the visits, if they happened as alleged. Still more so, where the prosecution case involves frequent and regular visits to a particular part of the house by the complainant and the applicant alone. … Nor can it fairly be said that her evidence would add nothing to the applicant's own. … And the wife may very well be able to say more than the applicant: whether the child called when he was not there, what he or she did in the house, whether visits to the alleged location of the crimes occurred in other contexts, whether she herself would have been absent or otherwise engaged often enough and long enough to allow the husband to behave as alleged so frequently. (at 522)

This dissenting view was regarded as 'immeasurably more persuasive' by the editors of *JM Kelly: The Irish Constitution*, the leading text book on the *Irish Constitution* (Hogan and White 2003), but it did not command majority support on the Court.

Proving prejudice

In the leading American case on delay in prosecution, *Barker v Wingo*, Powell J said:

> the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record *because what has been forgotten can rarely be shown.* (at 532, emphasis added)

In Ireland, Hardiman J expressed much the same thought in the phrase 'absence of evidence (of prejudice) is not evidence of its absence' (*P O'C v DPP* at 119).

Many of the cases related to a period so long ago, and were so vaguely pleaded in terms of time and place that there was very often no 'island of fact' on which a defendant could rely to discredit a complainant. The phrase was that of Hardiman J in one of the relatively few cases where an allegation of prejudice was upheld, *P O'C v DPP*. Various judges in that case revisited the point discussed above about displacing the presumption of innocence. No meeting of minds between the different judicial partisans was achieved. But Hardiman J, in a new digression, discussed the difficulties of *demonstrating* prejudice. He said:

> For this to be even theoretically possible requires that the allegation itself contained what I have termed *some island of relevant and demonstrable fact, which **here** consists of the allegation about locking the door.* A person in whose case there is such an island of fact is, perhaps ironically, both in a potentially better position to face a trial (because evidence may not, after all, prove quite irretrievable) *and* in a better position to demonstrate prejudice in a specific way. By contrast, a person in respect of whom the prosecution case as disclosed to him contains no such island of fact *is in a very perilous position at a trial* (because of the inherent risk of a pure contest of credibility) and is unable to avail at all of the third test. (at 118, emphasis added)

P O'C v DPP was a case in which a boy alleged that he had been sexually abused by his music teacher. He was very specific that this abuse happened in the music teacher's room in a School of Music and that the teacher always locked the door before abusing him. He was absolutely certain about that: he said that he would never forget the turning of the key in the door on these occasions. But the music teacher asserted categorically that there were neither locks nor keys on the door and there is no doubt that, if that could be proved, it meant that the complainant had very graphically imagined one detail at least of the alleged assault. The man in charge of the school at the relevant time said that he could not remember when locks were fitted to the door because that sort of detail is easily forgotten, since it seems to be of no importance whatever at the time.

In *P O'C,* the Court was unanimous in granting relief, but the fault line referred to above about the disapplication of the presumption of innocence seemed to widen. Murray J (as he then was) strongly criticised the disapplication of the presumption of innocence:

> It seems to me inconsistent with the fundamental rights of a citizen, particularly in proceedings opposing the citizen and the State prosecuting authority, that such proceedings should proceed on the assumption, however contingent, that the allegation of criminal guilt made by the prosecuting authority against the individual citizen are true. (at 103–4)

An unsatisfactory position

The above cases are sufficient to demonstrate the unsatisfactory and polarised position at which the Irish Supreme Court had arrived on the topic of prosecutions for historical child abuse. It was against that background that the development of the law currently applicable in such cases took place (for discussion of relevant jurisprudence, see also generally: Lewis 2006; Ring 2009).

A move towards resolution

In 2006, an appeal came before the Supreme Court in *SH v DPP*. The High Court decision in the case had been made 'on the jurisprudence which was developed over the last decade in cases where there has been an accusation of child sexual abuse and a significant delay between the alleged actions, the complaint and the prosecution' (at 612). However, the Supreme Court requested counsel to make submissions on the relevant principles of law, and the Court took the opportunity 'to consider the developing jurisprudence on the issue of delay in cases relating to the sexual abuse of children' (at 612).

The judgment of Chief Justice Murray (as he had by then become) was assented to by all members of the Supreme Court, including Denham and Hardiman JJ, who had been strong partisans on their respective sides on the 'presumption of innocence' issue. The judgment

of Murray CJ contained a historical account of the development of Irish jurisprudence on this issue (at 612–18) and also referred to the prominence of such cases in the Irish courts:

> Over the last decade the Courts have had extensive experience of cases where complaints are made of alleged sexual abuse which was stated to have taken place many, many years ago. It is an unfortunate truth that such cases are routinely part of the list in criminal courts today. (at 618)

The Court turned aside from the need to assume the truth of the complaint by ending the necessity to establish that there was a reason for the delay in reporting the allegations. Murray CJ said:

> The Court's judicial knowledge of these issues has been further expanded in the period since [*P O'C*]. Consequently there is judicial knowledge of this aspect of offending. Reasons for such delay are well established, they are no longer "new factors".
>
> Therefore, I am satisfied that *it is no longer necessary to establish such reasons for the delay.* The issue for the Court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial.
>
> …
>
> Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. *As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants' complaints against an applicant no longer arises.* The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. (at 620)

Accordingly, the revolutionary approach, as it seemed at the time, mandated in the case of *PC v DPP*, decided in 1998, held sway for a period of eight years. It sharply polarised the Supreme Court on the question of whether the presumption of innocence was something that applied only at the actual trial or whether it applied more generally: there was very strong Irish and European authority favouring the latter proposition.

After SH v DPP

This whole area has become notably less fraught in a jurisprudential sense after the decision of the Supreme Court in *SH.* Although the number of cases of historical child abuse appearing in the trial courts does not appear to have lessened, the number of applications for prohibition has fallen considerably (Ring 2009:197). In one sense, 'reversing the presumption' as mandated in *PC v DPP*, distracted attention from what is the most significant problem in this area: when a very old allegation of child abuse is made (as is usual) without any significant level of detail, the only thing that an innocent defendant can do is deny it. This is a perilous position because experience shows an enormous propensity on the part of both judges and juries to accord such allegations presumptive credibility. The nature of this difficulty was expressed by Hardiman J in *PD v DPP* as follows:

> If a person, who is innocent, is confronted with an allegation of this sort, he can only hope to counteract it, in practical terms, if he can show that the complainant has previously made false or improbable allegations of the same kind against himself or another person or if he can contradict the complainant on some important matter of fact. This, I think, would be the universal experience of those who have prosecuted or defended such cases… The position of a person, who is innocent in fact, but whose defence can consist only of a bare denial (just as the complainants may consist of an unsupported assertion) is very perilous…

Ring (2009:171–2), discussing the jurisprudence since *SH v DPP*, has suggested that courts remain 'reluctant to grant orders of prohibition', and have applied a high standard to the accused in demonstrating a real and serious risk of an unfair trial. In the 2009 case of *JC v DPP* for example, the test was elevated to the 'probability' of a real risk of an unfair trial (Ring 2009:172). Effects on due process have been exacerbated by the lack of judicial guidance for trial judges in directing the jury in the case of delay (Ring 2009:186, 189). Ring also suggests that the 'burden on the accused may be heavier where the abuse is alleged to have occurred in an institutional setting' (2009:177). In the case of *DD v DPP* for example, the accused was unable to establish prejudice on the basis of the death of witnesses and the demolition of the buildings where the offences were alleged to have occurred. Not only was the evidence of these witnesses unlikely to shed light on offences that occurred in secret, the accused had also failed to seek out alternative witnesses within the large Christian Brothers community (Ring 2009:177–8).

It remains to be seen whether experience in this area, including experience of a number of successful appeals, some within days of the convictions, validates these concerns or not.

Cases

B v DPP [1997] 3 IR 140

Barker v Wingo, 407 US 514 (1972)

Conroy v Attorney General [1965] IR 411

DD v DPP [2008] IESC 47 (23 July 2008)

G [1994] 1 IR 374

JC v DPP [2009] IEHC 121 (13 March 2009)

J O'C v DPP [2000] 3 IR 478

Ó Dómhnaill v Merrick [1984] 1 IR 151

O'Keeffe v Commissioners of Public Works (Unreported, Supreme Court, 24 March 1980)

PC v Director of Public Prosecutions (DPP) [1999] 2 IR 25

PD v Director of Public Prosecutions (DPP) [2008] IESC 22 (23 April 2008)

P O'C v Director of Public Prosecutions (DPP) [2000] 3 IR 87

SH v Director of Public Prosecutions (DPP) [2006] 3 IR 575

The State (Healy) v Donoghue [1976] 1 IR 325

The State (O'Connell) v Fawsitt [1986] IR 362 ('*O'Connell*')

Toal v Duignan (No 1) [1991] ILRM 135

Toal v Duignan (No 2) [1991] ILRM 140

Legislation

European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221, entered into force 3 Sptember 1953 (‘*European Convention on Human Rights*’)

European Convention on Human Rights Act 2003 (Ireland)

References

Gavrielides T (2013) ‘Clergy Child Sexual Abuse and the Restorative Justice Dialogue’ *Journal of Church and State* 55(4), 617–39

Hogan GW and White GF (eds) (2003) *JM Kelly: The Irish Constitution* (4th ed), Bloomsbury Professional

Inglis T (2007) ‘Catholic Identity in Contemporary Ireland: Belief and Belonging to Tradition’ *Journal of Contemporary Religion* 22(2), 205–20

John Jay College of Criminal Justice (2011) *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010*, United States Conference of Catholic Bishops (USCCB)

Law Reform Commission of Ireland (2009) *Consultation Paper: Limitations of Action*, LRC CP 54 <http://www.lawreform.ie/_fileupload/consultation%20papers/cpLimititationofActions.pdf>

Lewis P (2006) *Delayed Prosecution for Childhood Sexual Abuse*, Oxford Monographs on Criminal Law and Justice, Oxford University Press

McGrady A (2007) ‘Brokenness of the Irish Church’ in Bergin L (ed) *According to your Word*, Proceedings of a conference held at the Pontifical College Rome to honour Desmond Cardinal Connell on his eightieth birthday, Four Courts Press

Moore C (1995) *Betrayal of Trust: The Father Brendan Smyth Affair and the Catholic Church*, Marino Books

Murphy FD, Buckley H and Joyce L (2005) *Ferns Report*, Report of the Ferns Inquiry to the Minister for Health and Children, Government Publications

Murphy Y, Mangan I and O’Neill H (2009) Report of the Commission of Investigation into the Catholic Archdiocese of Dublin, Department of Justice and Equality, Ireland <http://www.justice.ie/en/JELR/Pages/PB09000504> (‘Murphy Report’)

Murphy Y, Mangan I and O’Neill H (2010) Report of the Commission of Investigation: Report into the Catholic Archdiocese of Cloyne, Department of Justice and Equality, Ireland <http://www.justice.ie/en/JELR/Pages/Cloyne_Rpt> (‘Cloyne Report’)

Ring SM (2009) ‘Beyond the Reach of Justice? Complainant Delay in Historic Child Sexual Abuse Cases and the Right to a Fair Trial’, *Judicial Studies Institute Journal* 2,162–203

Ryan Report (2009) *Final Report*, Commission to Inquire into Child Abuse, Government Publications