

Analysing Fairness in Context in Historic Child Sexual Abuse Prohibition Applications

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Introduction

This article investigates the construction of fairness to the accused in applications for prohibition brought by persons accused of historic child sexual abuse offences. In such cases the charges relate to events that are alleged to have taken place many years, often decades, previously. Since Irish society's "discovery" of the extensive and grave nature of child sexual abuse,¹ which resulted in a climate in which adult victims abused as children felt they could finally report,² historic child sexual abuse prosecutions have been a significant feature of the criminal justice landscape. In these prosecutions the stakes are raised; not only do they involve one of the most serious crimes imaginable, and therefore carry risks of juror prejudice and presumptive credence, but they also take place in a landscape disconnected from the normal matrix of physical and circumstantial detail where credibility is key. A defendant accused of historic child sexual abuse crimes may apply to the High Court by way of judicial review to have the trial prohibited. Research conducted by this author indicates that in the period between 1994 and 2012 there were approximately 104 decisions relating to applications brought by persons accused of sexual abuse arguing that their prospective trial should be halted on the grounds of delayed complaint.³ This case law represents a significant (in terms of numbers), coherent body of superior court jurisprudence dealing with questions of fairness. The reviewing court must seek to ensure that old charges are not immune from prosecution, while at the same time seeking to uphold the defendant's constitutional right to a fair trial. Prohibition applications relating to historic child abuse charges are thus a litmus test of the courts' commitment to upholding fairness to the accused.

This article argues that the case law reveals two countervailing trends: one in which claims of unfairness are being marginalised; and another in which fairness is given a particular, contextualised meaning. The article argues that the latter approach may be termed "analysing fairness in context" and represents an attempt to re-imagine fairness to the accused in prohibition applications; it goes beyond rhetorical appeals to the trial judge's ability and duty to ensure a fair trial and instead takes seriously the defendant's claims of unfairness. Analysing fairness in context is shown to be a continuation of a tradition in Irish constitutional jurisprudence of understanding fairness to the accused as both fundamental and evolving.

The article begins by sketching the challenges posed to fairness in historic child sexual abuse prosecutions. Part B explores the test to be applied by the High Court in deciding whether to grant prohibition to persons accused of historic child sexual abuse offences. It explains that despite the Supreme Court's reassertion of the primacy of fairness in the prohibition inquiry, the case law reveals important failures by the courts to safeguard fairness to the accused. Part C describes a body of cases that reveal a different approach; rather than relying on rhetorical appeals to the trial judge's ability to ensure fairness, the courts in these cases are contextualising the accused's claim of unfairness. The decision in the High Court in *MU v DPP*⁴ is identified as the high point of this approach, which is termed "analysing fairness in context". Part D argues that this conceptualisation of fairness may be understood as part of a long tradition of the Irish courts of constructing fairness as both fundamental and dynamic; at once both resistant to instrumental concerns and tailored to the individual circumstances of each case. Part E uses this idea of analysing fairness in context to

argue for a reformed test to be applied in prohibition applications brought by persons accused of historic child sexual abuse crimes.

A The challenges to fairness in historic child sexual abuse prosecutions

A defendant in a criminal trial is constitutionally guaranteed the right to a trial “in due course of law”, which embraces a range of procedural and substantive rights.⁵ The courts have emphasised the constitutional premium on fairness to the accused by constructing the guarantee of a trial in due course of law in conjunction with related constitutional provisions including the right to liberty,⁶ the right to equal treatment before the law,⁷ the right to trial by jury⁸ and the right to open justice.⁹ The right to a fair trial ranks superior to other rights and interests, including the community's right to have crimes prosecuted.¹⁰ Thus, the courts have confirmed the fundamental nature of fairness to the accused in the Irish criminal process. However, historic child sexual abuse prosecutions present challenges that have the potential to impede the criminal process' ability to ensure fairness to the accused.

First, the passage of time can seriously prejudice the preparation of a defence; witnesses die or move away, documentary and material evidence is destroyed or lost; witnesses’ memories fade.¹¹ Crucially, the difficulties flowing from a lack of evidence are bound up with the importance of credibility. Although the questions of whether the defendant's testimony is credible and whether the defendant is guilty are conceptually different,¹² in historic child sexual abuse trials, in which there is limited or no other evidence, it is not a big leap from credibility to guilt. Indeed there is a practical pressure on the defendant to undermine the complainant's credibility and to offer a convincing alternative version of events. Failure to do so may be taken as strong evidence in support of guilt. However, in historic cases it may be difficult due to the passage of time for defendants to provide an explanation of their whereabouts or actions. Witnesses who could support the defendant's account or contradict the complainant's account may no longer be available. Evidence that would, if still available, fail to support the complainant's story may no longer be available. Thus the defence's ability to use the lack of evidence to discredit the complainant is limited because the absence is easily attributable to the passage of time, rather than to the inference the defendant seeks to make: that the complainant is lying or mistaken.¹³

A further potential source of prejudice to the defence are vague complaints. Complainants may experience difficulties in identifying individual incidents of abuse over months or years of alleged victimisation.¹⁴ This may be exacerbated by the effects of time on memory. Allegations that do not contain any “island of fact” inhibit the defence's ability to challenge the complainant's credibility.¹⁵ To compound these problems, the elapse of time (and vague complaints) may also mean that it is not possible to demonstrate the prejudice caused to the defendant's ability to contest the charges. This may be described as “undemonstrable prejudice”.

Furthermore, historic abuse trials carry the risk of jury bias or prejudice.¹⁶ Generic prejudice involves the transferring of pre-existing attitudes, beliefs and stereotypes to the trial setting. It may be directed against people accused of crimes such as child sexual abuse, in which the repulsive nature of the charges against the accused may of itself give rise to an inference of truth. Indeed this kind of prejudice has resulted in the recent conviction in England of a juror in a sexual offences trial for contempt of court. The juror had posted a message on a social networking site saying that he “had always wanted to “f*** up a paedophile and now [he was] within the law”.¹⁷ Such prejudice

may not always operate on a conscious level but, without rationalising it, the jury may find themselves denying the accused the benefit of the doubt as a result of the unfavourable impression they have formed of him,¹⁸ or the very nature of the allegations in themselves may give rise to a bias in the assessment of the complainant's credibility.¹⁹ In addition jurors may feel pressure to reach a verdict *134 consistent with community feelings;²⁰ the risk of such "conformity prejudice" is a significant issue in historic child sexual abuse cases.²¹

As this brief sketch indicates, in order for courts hearing prohibition applications relating to historic abuse prosecutions to properly scrutinise the fairness of the prospective trial, it is necessary to delve into questions around credibility, stereotyped reasoning and the state of physical evidence.

The next part outlines the current approach of the courts to prohibition applications brought by persons accused of historic child sexual abuse cases. It also explains the difficulties that remain from a due process perspective.

B The "fair trial test" in prohibition cases

In the 2006 case of *SH v DPP*²² the Supreme Court set out the test to be applied by the High Court in cases where a person accused of historic child sexual abuse offences seeks an order of prohibition. It replaced the former test, the central pillar of which inquired into the reasons for the delay and (assuming the complaint to be true) asked whether they were referable to the accused's conduct.²³ The court held that its judicial knowledge of issues relating to why a complainant might delay is now well established.²⁴ The test is now 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.²⁵ In exceptional circumstances, regardless of whether the accused has established a risk of an unfair trial, the court may grant prohibition where it would be unfair or unjust to put an accused on trial. The *SH* test's removal of the inquiry into the reasons for the delay (including the assumption that the complaint was true) and its focus on the fairness of the prospective trial was a welcome vindication of the defendant's right to a fair trial.²⁶

Since *SH* the granting of prohibition continues to be exceptional.²⁷ This reflects a recognition that to halt every trial on the grounds of delay alone would effectively preclude the prosecution of historic child sexual abuse crimes.²⁸ Arguably, it also reflects a decision on the part of the prosecuting authorities to only proceed with strong cases. Significantly, for present purposes, in refusing prohibition the courts rely on the trial judge's power to guarantee due process.²⁹ Prohibition is not necessary where the trial judge can give appropriate rulings, directions and warnings to the jury.³⁰ Therefore, the prohibition courts are rejecting claims of unfairness by appealing to the trial judge's constitutional duty to ensure fairness.

However, there is a danger that the courts may place excessive faith in the trial judge's ability to ensure fairness and will fail to adequately scrutinise the prejudice claim. As I have shown elsewhere the *SH* case law reveals that this danger is very real.³¹ The notion of prejudice presumed to arise from the passage of time has effectively been abolished;³² there is no onus whatsoever on the prosecution to justify the prosecution of ancient charges, and on the rare occasions where prohibition is granted, the prohibition order often is not grounded in the unfairness of the prospective trial. Instead, it is justified by reference to the residual categories of exceptional circumstances³³ or the totality of the circumstances.³⁴

The most worrying feature of the SH case law is the lack of significance attached by the courts to the problem of prejudice that the defence cannot demonstrate. The court may fail to attribute importance to a missing witness such as the defendant's spouse because (paradoxically) of the lack of detail in the allegations,³⁵ or assumptions may be made about what an unavailable witness would have said (even when those assumptions are wholly speculative³⁶) so that the absence of the witnesses' evidence is deemed not to be prejudicial.³⁷ The courts have also had recourse to the secretive nature of sexual offences when dismissing arguments relating to the prejudice caused by the death of a witness.³⁸ The worry in such cases is that the absence of a witness or the lack of real evidence may mean that the accused is not in a position to employ the evidence of that witness to undermine and challenge the complainant's account of events. Furthermore, the defendant may not be in a position to demonstrate the real and serious risk of an unfair trial because the surrounding circumstances have faded from memory (his memory and that of the witness). Thus accused persons may be placed in the catch-22 situation of having to show how they are prejudiced by the lack of something that is no longer available to use.

Finally, the SH test asks too much of the defendant in requiring him to show not only the real risk of an unfair trial but also that the unfairness may not be avoided by way of directions and rulings.³⁹ This is particularly so given the paucity of guidance from the Court of Criminal Appeal on how to deal with the challenges in historic abuse trials.⁴⁰

In short, fairness is not as well safeguarded under *135 SH as it first appears. There seems to be an assumption that the trial judge will somehow ensure fairness using warnings and directions to the jury. This is consonant with the broader free proof trend in criminal justice discourse towards increased admissibility of evidence and increased trust in the jury to evaluate evidence.⁴¹ However, there is a danger that appeal to the trial judge's constitutional duty to ensure a fair trial⁴² may be blinding reviewing courts to the real evidential threats to fairness posed by the difficulties inherent in many historic abuse trials.

At the same time, despite the erosion of fairness in many of the cases decided under SH, there are also indications of a countervailing trend. As the next part explains, instead of rhetorical appeals to the constitutional guarantee of fairness, there are indications that in certain cases the courts are taking their duty seriously and are contextualising the defendant's claim of unfairness within its factual and evidential context.

C Towards analysing fairness in context

One of main ways in which the fairness assessment may be contextualised is to recognise the intersection of missing evidence and defendants' inability to challenge prosecution witnesses' credibility. In *SB v DPP*⁴³ the Supreme Court considered charges dating back 31 years. All of the offences were alleged to have taken place in a hospital. Roster records that would have established whether the accused was scheduled to work on particular occasions when charges of indecent assault arose were no longer available. The court held that the records could have been of some assistance in tending to show that the accused was not present in the hospital on some occasions, thus undermining the credibility of the complainant. Further, the deaths of witnesses to whom the complainant had allegedly reported the abuse were significant in terms of the defence's ability to undermine the complainant's credibility.

The unavailability of hospital records also grounded an order of prohibition in *KD v DPP*⁴⁴ which involved numerous counts dating back some 53 years.⁴⁵ The defendant claimed he had been in an accident on a particular date. This directly contradicted part of the complainant's statement. The prosecution could point to a newspaper article that supported the complainant's view as to the date of the accident. However, the newspaper article would be inadmissible hearsay. Dunne J. held that if medical records were available and the newspaper account and the evidence of the complainant could be shown to be incorrect, that would be of considerable assistance to the defendant.

In *O'B v DPP*⁴⁶ the Supreme Court rejected as "ludicrous and self-defeating" the prosecution's contention that the fact of his spouse's death could not avail a defendant unless he could prove what the spouse would have said. As well as being alert to the dangers of undemonstrable prejudice, the court emphasised the particular importance to the defence of a spouse's evidence regarding matters such as identification and opportunity.

These cases represent a significant effort on the part of the reviewing courts to seek to relate the claim of unfairness to the evidential context of the prosecution. They seek to give expression to the standard of proof required of defendants under SH: a real and serious risk of an unfair trial, not a demonstrated certainty.⁴⁷ However, one decision in particular stands out as placing a premium on due process. The judgment in *MU*⁴⁸ draws on a number of different arguments and finds that, in the context of all the circumstances, specific prejudice is present. It also points out the importance of delay itself in magnifying and exacerbating threats to the fairness of the trial.⁴⁹ The next section explores the detail of the High Court's judgment, which was upheld by the Supreme Court in an *ex tempore* judgment in 2012.⁵⁰

MU v DPP

The three complainants were sisters of the accused.⁵¹ This was a deeply dysfunctional family; in separate proceedings the complainants' father and brother were also accused of sexual offences against the complainants.⁵² The accused was aged between 11 and 20 years during the relevant period.⁵³ In such complex circumstances and with the very significant elapse of time (43 years), MacMenamin J. considered that the impact of lost witnesses or evidence was rendered more acute.

MacMenamin J. provided a helpful statement of the principles to be applied to assertion of prejudice based on missing evidence. He considered that there are two "fundamental" tests as to specific prejudice: (i) whether the applicant has engaged with the facts and demonstrated the materiality of unavailable evidence; and (ii) whether the evidence can be *136 obtained elsewhere, or can be dealt with by warnings from the trial judge.

MacMenamin J. considered a record obtained from a children's home run by the Sisters of Charity. The record was a diary page in printed form, relating to the year 1977.⁵⁴ The record contained a reference to one complainant BU having told the creator of the entry that she was being abused by one of her brothers; however the person named was not the accused.⁵⁵ In the context of the complex family circumstances and the accused's contention that he was out of the family home from 1970 onwards this was relevant information. Such material in evidence supported by the author would go to the issue of credibility and be an essential part of any defence.⁵⁶ If the contents of the record were proved and in evidence it might raise questions as to identification.⁵⁷ Unfortunately, because the author was not known, there was no way of proving the document or its contents.

MacMenamin J. was particularly concerned that there was no procedure whereby such information could be put before a jury by the trial judge.⁵⁸ MacMenamin J.'s finding that these circumstances constituted specific prejudice was an important recognition of the problem of undemonstrable prejudice and the limits of the trial process as a mechanism for discovering the reality of past events. Materials such as this diary entry, which have the potential to create a reasonable doubt in the mind of the jury, may be inadmissible because of evidentiary rules such as the rule against hearsay.

Indeed MacMenamin J. noted that the real difficulty was that both the prosecution and the defence would be reliant on inadmissible evidence to prove or disprove their cases.⁵⁹ This points to the problem that the disclosure of records (e.g. employment records) to the defence, does not mean that the defendant can prove the contents of these records in evidence. If the creator of the record is not available then the contents of the record are inadmissible hearsay. So, what is contextual background evidence for a prohibition application may not even be admissible at trial? The impact of evidential rules at trial is a key part of the context when assessing the fairness of the prospective trial and the ability of the defence to show prejudice.

Unfortunately, MacMenamin J.'s approach is not typical. For example, in *PD v DPP*⁶⁰ the absence of a witness to whom the disclosure was first made was held not to be prejudicial. This was despite the fact that it was clear that the complaint would never have been made if the witness, a psychologist, had not strongly encouraged the complainant to report. It is particularly difficult to see how this could not have constituted prejudice given that the contents of the 300 pages of notes relating to the counselling sessions conducted by the absent witness would not be admissible at trial.

In his judgment in *MU* MacMenamin J. attached significance to the accused's police interview, in which he stated that he had informed the gardaí at the time that his father was abusing his sisters. He also said that he had several meetings with a social worker about his father's abuse of the complainants. He specified the garda's name and the station where he was posted at the time. It was established as a matter of fact that a man of that name was a member of the gardaí and that he was stationed in the named station during the relevant period. The man was now deceased and no record of the complaint was found. MacMenamin J. considered the circumstances of the interview; that it had not been suggested the accused could possibly have been aware of the specific allegation that was about to be put to him;⁶¹ that there was no indication that the accused had to pause before thinking of the garda's name. Were it to be demonstrated that the accused had made complaints to members of the gardaí on behalf of his sisters, this would clearly have buttressed his credibility. MacMenamin J. held that the absence of this witness and record constituted specific prejudice.⁶²

MU shows that if an accused engages with the facts in a way that shows the materiality of the missing evidence/witnesses, then he may well be able to show specific prejudice. However, the whole matter is bound up with credibility, and this leaves room for differing interpretations of the scope of the fairness inquiry on a prohibition application. Another judge may have held that the argument as to a missing witness and record was a matter for the jury who would have an opportunity to hear and observe the witnesses. However, such an approach would represent a failure to take seriously the presumption of innocence and the right to a trial in due course of law.

The MU decision is a reminder that courts must be vigilant in their scrutiny of the evidence proffered by the prosecution and must contemplate the impact of the lack of evidence on the defence case,⁶³ including where evidence is proffered at the prohibition stage that will be inadmissible at trial.

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D The roots of analysing fairness in context: the constitutionalisation of the law of evidence

The judgment of MacMenamin J. in MU and the other cases discussed above are indicative of an approach that may be termed “analysing fairness in context”. It involves relating the fairness claim to the particular legal and factual circumstances of the case at hand. Analysing fairness in context is about paying attention to the context in which claims about the fairness or unfairness of a trial process are made; context meaning paying attention to (putative) facts, the available evidence, and how evidence and procedure interact with the evidence. Fairness in context is also about leaving space for the possibility that given the passage of time, perhaps it is simply not fair to allow the continued prosecution of the charges.

The approach of analysing fairness in context adopted in some prohibition cases is representative of an attempt to develop a pragmatic and individualised meaning of fairness to the accused in criminal justice. However, this is not altogether new; rather this trend has its roots in the long tradition of the Irish courts of constructing fairness to the accused as being inherently constitutional and therefore both fundamental and dynamic. A concern for fairness to the accused in the interpretation of evidence and procedure⁶⁴ has produced decisions that characterise fairness as both fundamental and dynamic. The most striking affirmation of its fundamental character is the protectionist stance taken in relation to the exclusion of evidence obtained as a result of invasion of constitutional rights⁶⁵ (even in cases involving a particularly heinous charge⁶⁶). Article 38.1 has grounded decisions excluding prejudicial evidence⁶⁷ such as testimony about an accused's previous convictions or general misconduct⁶⁸ or a confession obtained by unlawful means.⁶⁹ Article 38.1 has also been relied on implicitly as a basis for overturning convictions secured on foot of flawed or incomplete prosecution evidence.⁷⁰

This invocation of constitutional principles for the purpose of excluding inculpatory evidence reveals the potency of so-called adjectival law in safeguarding fairness. It is also a clear prioritisation of fairness over other concerns such as accuracy and the efficient prosecution of crime. This resonates with the notion that upholding defendants' fair trial rights legitimises criminal trials and therefore also legitimises criminal law and punishment.⁷¹

In addition to recognising its fundamental and immutable character, the meaning of fairness is held to be constantly evolving and must be considered in accordance with prevailing notions of justice and the circumstances of specific cases.⁷² The Supreme Court's treatment in *People (DPP) v McGrail*⁷³ of the rule that inhibited accused persons from challenging the evidence of prosecution witnesses illustrates this point. Under the common law if a defendant wished to challenge the evidence of prosecution witnesses, he risked having his own previous bad character being put into evidence. Rather than construing the rule as having legitimate roots in the adversarial mode of trial, the court held it was an infringement of the fundamental right to fair procedures.⁷⁴ McGrail represents a robust assertion of the constitutional construction of fairness and is an example of the dynamic construction of fairness to meet the requirements of particular cases. Thus MU and the

other prohibition decisions discussed with it above represent a continuation of a trend in Irish criminal justice towards constructing fairness as both fundamental (in the sense of being resistant to dilution or balancing in the face of other concerns like the search for truth) and dynamic. Fairness to the accused is much more than a rhetorical gesture, more than an appeal to abstract ideals that have no purchase on the reality facing the defendant at trial. It is a pragmatic and inherently principled response to the myriad challenges that may present themselves to a defendant in an historic child sexual abuse prosecution. On a normative level, analysing fairness in context might also be understood as representing a push back against the broader trend in criminal justice towards increased admissibility and towards trusting the jury to evaluate evidence in the light of warnings and directions from the trial judge.

E A reformed test for prohibition?

As Part B of this article showed, there remains a number of difficulties with the SH test as currently applied. It is suggested that the SH test should be modified to take account of the fairness in context approach indicated by MU. In deciding whether the accused has shown a real and serious risk of an unfair trial the court should consider: (i) whether the accused has engaged with the facts and demonstrated the materiality of unavailable evidence; and (ii) whether the evidence can be obtained elsewhere.⁷⁵ The idea of materiality is useful because it allows the defence to show how evidence could be relevant and helpful ¹³⁹ to the defence, while also leaving room for prejudice that cannot be demonstrated. Under this approach the defendant would be required to engage fully with the evidence and show that the absent witness would have provided relevant information that is likely to have been important to the defence's attempts to undermine the complainant's credibility and reliability. He would also have to show that serious attempts have been made to seek out alternative sources of the same information. Furthermore, the court should also consider the case in the round, including background evidence and whether the background evidence will be admissible at trial.⁷⁶ Exclusionary rules such as the rule against hearsay should be considered. A key part of the notion of materiality is that the reviewing court would bear in mind the possible prejudice flowing from an inability to show prejudice because of the passage of time.

The reviewing court should also pay attention to the risks of presumptive prejudice as part of its overall assessment as to whether the prospective trial can be fair. Cases involving serious mistakes of fact point up the problems that can arise in cases that involve even very short lapses of time.⁷⁷ Blame for the delay is irrelevant – or, more correctly, it is impossible to determine pre-conviction. Instead, a consideration of presumptive prejudice goes to the courts' commitment to the fairness of the trial.⁷⁸

The emphasis in MU on contextualising the prejudice question is a step towards placing an onus of proof on the prosecution in prohibition cases. From the perspective of safeguarding a trial in due course of law this makes eminent sense, particularly given the changes to criminal procedure that mean the prosecution no longer has to show a prima facie case against the accused.⁷⁹ Therefore, the SH test should be modified so that when the accused has shown that he runs the real and serious risk of an unfair trial because key witnesses or evidence are missing, he would not have to go further and show that the unfairness cannot be remedied by the trial judge. Instead, the prosecution would have to show on the balance of probabilities that the unfairness can be remedied by directions and rulings by the trial judge. The prosecution would be required to engage with the

evidence in the case, including the admissibility of background evidence, and to suggest warnings and directions. The warnings could be more focussed on specific prejudice facing the defence. This approach can be defended as giving appropriate priority to the right to a trial in due course of law, whilst at the same time leaving open the possibility that the trial will proceed. It would also assist in the development of an informed jurisprudence providing meaningful guidance to trial judges in historic abuse cases, thus better safeguarding the right to a trial in due course of law.

Conclusion

The prohibition case law in historic childhood sexual abuse prosecutions illustrates the common law's ability to adapt and change in accordance with the needs of Irish society. It also reflects a willingness on the part of the courts to accommodate complainants' reasons for delayed reporting and the need to prosecute serious crime despite problems posed by lapse of time. The constitutional remedy of prohibition is to be preferred to a numerical approach like statutes of limitations, because unfairness can arise as a result of even short periods of delay. Furthermore, the flexibility of prohibition allows the courts to allow the prosecution of sexual abuse in suitable cases.

However, the courts' construction of fairness to the accused in the prohibition case law is deeply problematic. On the one hand, fairness is being eroded and marginalised by courts that fail to take defendants' claims of prejudice seriously. On the other hand, there is an emerging trend of courts employing a definitively constitutional and creative approach to fairness, constructing it as both fundamental and subject to change, ensuring that scrutiny of the potential threats to fairness remains an exercise grounded in the evidential and procedural reality of each individual case. For the courts to treat the defendant in an historic child sexual abuse prosecution as someone whose dignity fundamentally matters⁸⁰ they must take both rules and facts seriously. Scrutinising fairness claims in context provides reviewing courts with the analytical tools to do this.

1.

Public awareness about the nature and extent of sexual abuse in society was precipitated by investigations into intra-familial abuse (McGuinness, *The Report of the Kilkenny Incest Investigation* (Dublin: The Stationery Office, 1993); North Western Health Board Report of the Inquiry into the West of Ireland Farmer Case (Manorhamilton: North Western Health Board, 1998)) and a number of high-profile cases of clerical sexual ¹³²abuse. Television documentaries further focused public debate on the problem of widespread abuse in institutions run by religious orders on behalf of the State: *States of Fear* (May 1999); *Dear Daughter* (1996). However, as O'Sullivan suggests, "it might be more appropriate to question the assumption that there really was a silence over sexual matters of this kind, or, if there was a silence, to ask who was doing the silencing." O'Sullivan, "This otherwise delicate subject": *Child Sexual Abuse in Early Twentieth-Century Ireland*" in O'Mahony (ed.), *Criminal Justice in Ireland* (Dublin: Thomson Round Hall, 2002), p.199.

2.

In 2011 survivors of child sexual violence waited an average of 25 years to access Rape Crisis Centre services, compared to an average of five years for survivors of adult sexual violence. Rape Crisis Network Ireland, *National Rape Crisis Statistics and Annual Report 2011* (Dublin: Rape Crisis Network Ireland, 2012).

3.

Ring, "Principles and Prejudice: The Erosion of Fairness in Admissibility Determinations Relating to Historic Child Sexual Abuse Trials in Ireland" unpublished doctoral thesis (University College Cork, 2013).

4.

[2010] IEHC 156.

5.

Article 38.1. *State (Healy) v Donoghue* [1975] I.R. 325; *People (DPP) v DO'T* [2003] 4 I.R. 286. It includes: in accordance with fair procedures in the pre-trial process, expeditiously, access to a lawyer; the absence of oppression in interrogation; with fundamental fairness in the execution of search warrants; and at trial; the presumption of innocence; the right to counsel; the opportunity to cross-examine and the opportunity to have access to information. See Fennell, *The Law of Evidence in Ireland*, 3rd edn (Dublin: Bloomsbury Professional, 2009), p.34.

6.

Article 40.4.

7.

Article 40.1.

8.

Article 38.5.

9.

Article 34.

10.

D v DPP [1994] 2 I.R. 465.

11.

This article does not deal with the separate issues of prosecutorial and system delay. See *P McC v DPP* [2011] IESC 9; *PM v Malone* [2002] 2 IR 560; *PM v DPP* [2006] 3 I.R. 172; *GC v DPP* [2012] IEHC 430.

12.

See Munday, "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" [1994] CLJ 303.

13.

Lewis and Mullis make a similar point: "Delayed Prosecutions for Childhood Sexual Abuse" (1999) 115 LQR 265 at 276.

14.

See Davies and Seymour, "Questioning Child Complainants of Sexual Abuse: Analysis of Criminal Court Transcripts in New Zealand" (1998) 5 Psychiatry, Psychology and Law 47.

15.

As one trial judge has put it, "[T]o prosecute it is easier if you do not nail your colours to the mast because there is less you can be cross-examined on." *People (DPP) v RB*, unreported, Court of Criminal Appeal, 12 February 2003, citing judgment of Haugh J.

16.

Vidmar, "Case Studies of Pre-and Midtrial Prejudice in Criminal and Civil Litigation" (2002) 26(1) Law and Human Behavior 73; Vidmar, "Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials" (1997) 21(1) Law and Human Behavior 5.

17.

Bowcott, "Two jurors jailed for contempt of court after misusing the internet during trials" *The Guardian*, 29th July, 2013.

18.

Mee, "Similar Fact Evidence: Still Hazy After All these Years" (1994) 1(1) D.U.L.J. 83 at 96.

19.

This claim is supported by studies revealing a prevalent view among practising lawyers that sexual cases are particularly difficult to defend. Jackson and Doran, *Judge without Jury: Diplock Trials in the Adversary System* (Oxford: Clarendon, 1995), p.229.

20.

Vidmar (2002) above n.16. In *People (DPP) v Hannon* [2009] 4 I.R. 147 (not an historic case) a miscarriage of justice certificate was granted in respect of a conviction on a number of counts of sexual assault and of assault. This came about as a result of the complainant's complete retraction of the allegations some nine years later. The gardaí simply did not believe that a child of ten could make up such allegations (see the judgment of Hardiman J. at 150). *Hannon* is a salutary reminder of the potential for presumptive credence during the investigation

21.

PD v DPP [2008] IESC 22 per Hardiman J, dissenting.

22.

[2006] 3 I.R. 575. Murray C.J.; Denham, Hardiman, Geoghegan and Fennelly JJ. concurring.

23.

The PC test asked: (1) Whether, depending on the nature of the charges, the delay was such that despite the absence of actual prejudice the trial should be prohibited; (2) What were the reasons for the delay and whether, assuming the complaint to be true, the delay in making it was referable to the accused's conduct; (3) Whether the accused had suffered actual prejudice such that the trial should not be allowed to proceed. At this stage, the presumption of innocence would apply. [1999] 2 I.R. 25 at 68, per Keane C.J.

24.

SH v DPP [2006] 3 I.R. 575 at 618 per Murray C.J.

25.

SH v DPP [2006] 3 I.R. 575 at 620 per Murray C.J.

26.

See further Ring, "Beyond the Reach of Justice? Complainant Delay in Historic Child Sexual Abuse Cases and the Right to a Fair Trial" [2009] 2 J.S.I.J. 162.

27.

Devoy v DPP [2008] 4 I.R. 235; Ring n.26.

28.

The court must have regard to the public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished. MC v DPP [2011] IEHC 378.

29.

PO'C v DPP [2008] 4 I.R. 76; R McC v DPP [2007] IESC 29.

30.

MC v DPP [2011] IEHC 378 at para. 6.2 per Hedigan J.

31.

Ring above n.26.

32.

Murray C.J. explicitly, if reluctantly, ruled out any idea that prejudice to the defence could be presumed to flow from lengthy delay between the alleged offences and the trial: SH v DPP [2006] 3 I.R. 575 at 614. The abolition of presumptive prejudice was confirmed in PO'C v DPP [2008] I.R. 76. This is surprising given that the courts explicitly recognise presumptive prejudice in applications for prohibition based on alleged prosecutorial delay: McFarlane v DPP [2008] IESC 7. It also compares unfavourably with the English test in abuse of process applications, which considers whether the question of whether the delay means it is simply unfair to try.

33.

The following have come under this heading: advanced age and bad health; *PT v DPP* [2008] 1 I.R. 701; the defendant's limited powers of intellect and recall and the death of his mother *Eamonn K v His Honour Judge Carroll Moran and the DPP* [2010] IEHC 23; attempts to use the criminal courts as an instrument of blackmail *MG v DPP* [2007] 2 I.R. 738; and evidence of the defendant being under "extreme financial pressure" *MU v DPP* [2010] IEHC 156.

34.

JM v DPP [2004] IESC 47, and *DD v DPP* [2008] IESC 47; *JD v DPP* [2009] IEHC 48; *PT v DPP* [2008] 1 I.R. 78; *MC v DPP* [2011] IEHC 378 at para. 6.7.

35.

O'B v DPP [2010] IESC 41.

36.

CK v DPP [2007] IESC 5.

37.

JT v DPP [2008] IESC 20.

38.

BJ v DPP [2007] IESC 18.

39.

PO'C v DPP [2008] 4 I.R. 76; *BJ v DPP* [2007] IESC 18. *R McC v DPP* [2007] IESC 29; [2007] IESC 5.

40.

See *People (DPP) v LG* [2003] 2 I.R. 517; *DPP v Walsh* [2010] IECCA 80; *People (DPP) v Cooke* [2009] IECCA 55. The Court of Criminal Appeal stresses the fact-specific nature of their judgments in such cases and so their potential value as guidance is limited. See further Ring above n.26.

41.

This trend may be traced through legislative changes relaxing rules that keep information from the jury (such as evidence of the defendant's bad character hearsay (Criminal Justice 2006, s.16.) or prevent certain inferences (e.g. about silence when questioned by police Criminal Justice Act 2007, s.28; Criminal Justice Act 2006, s.72A). It has also motivated proposals to abolish the traditional protectionist stance regarding evidence obtained in breach of constitutional rights. (Final Report of the Balance in the Criminal Law Review Group (Stationery Office, 2007) at 165–166 and at 246.)

42.

See comments by Denham J. in *DC v DPP* [2005] 4 I.R. 281 at 283; *JB v DPP* [2006] IESC 66.

43.

SB v DPP [2006] IESC 67. The accused faced 30 charges of indecent assault involving one complainant.

44.

KD v DPP [2011] IEHC 384.

45.

The youngest of the charges dated back 45 years.

46.

[2010] IESC 41.

47.

SA v DPP [2007] IESC 43.

48.

MU v DPP [2010] IEHC 156.

49.

[2010] IEHC 156 at para. 99.

50.

Supreme Court, ex tempore, July 19, 2012, Murray J.

51.

44 charges of indecent assault.

52.

[2010] IEHC 156 at para.39 per MacMenamin J.

53.

The argument that the accused was incapable of committing some of the charges because he was a male of less than 14 years was deemed irrelevant to the prohibition proceedings.

54.

It was originally dated May 2, 1971 but was also headed in handwriting 1977, from which the judge inferred the entry was made in 1977.

55.

[2010] IEHC 156 at para.36 per MacMenamin J.

56.

[2010] IEHC 156 at para.40 per MacMenamin J.

57.

[2010] IEHC 156 at para.37 per MacMenamin J.

58.

[2010] IEHC 156 at para.38 per MacMenamin J.

59.

[2010] IEHC 156 at para.102 per MacMenamin J.

60.

PD v DPP [2008] IESC 22. The case involved a 25 year delay.

61.

The accused attended the interview voluntarily. He refused the offer of consulting with a solicitor. MacMenamin J. concluded from this that the applicant was being presented with a series of allegations without any prior warning. [2010] IEHC 156 at para.48.

62.

MacMenamin J. also held that the failure of memory of another witness to whom the accused also allegedly made complaints of abuse on behalf of his sisters constituted specific prejudice. This was in light of the elapse of time and the evidence with regard to the other garda.

63.

Unfortunately MacMenamin J. analysed these factors under the 'totality of the circumstances' heading rather than the fairness of the prospective trial.

64.

See Hogan and Whyte, J.M. Kelly: The Irish Constitution, 4th edn (Dublin: Butterworths, 2003), pp.1042–1044 and 1121.

65.

People (AG) v O'Brien [1965] I.R. 142; People (DPP) v Kenny [1990] 2 I.R. 110. However this protectionist stance has come under attack from judicial pronouncements seeking to limit Kenny's effect: People (DPP) v Cash [2010] 1 I.R. 609. More problematically the courts accept unconstitutionally-obtained evidence when used to ground suspicion, even if that suspicion is used to obtain further evidence for trial (or is the product of the initial violation). Bloom and Dewey, "When Rights become Empty Promises. Promoting an Exclusionary Rule that Vindicates Personal Rights" (2011) 1 The Irish Jurist 38.

66.

People (DPP) v Curtin, unreported, South-Western Circuit Criminal Court, April 23, 2004. The accused, who was a sitting judge, was acquitted of possessing child pornography on the basis that the warrant pursuant to which evidence was seized had expired at the time of the search.

67.

People (DPP) v Marley [1985] I.L.R.M. 17. See e.g. People (DPP) v Meleady (No.3) [2001] 4 I.R. 16 at 31 per Geoghegan J. Shortt v The Commissioner of An Garda Síochána & Ors [2007] IESC 9..

68.

King v Attorney General [1981] I.R. 233; DPP v Keogh [1998] 1 I.L.R.M. 72.

69.

See e.g. Re National Irish Bank [1999] 3 I.R. 145, 186–187 per Finlay C.J.; People (DPP) v Diver [2005] 3 I.R. 270. People (DPP) v Murphy [2005] 3 I.R. 270; People (DPP) v MK, unreported, Court of Criminal Appeal, 19 July 2005; People (DPP) v Allen [2003] 4 I.R. 295.

70.

King v Attorney General [1981] I.R. 233; DPP v Keogh [1998] 1 I.L.R.M. 72.

71.

Ashworth and Zedner, “Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions” (2008) 2 Crim Law and Philos 21 at 49.

72.

Donnelly v Ireland [1988] 1 I.R. 321; Re National Irish Bank [1999] 3 I.R. 145.

73.

[1990] 2 I.R. 38.

74.

People (DPP) v McGrail [1990] 2 I.R. 38 at 51 per Hederman J. See also Re Haughey [1971] I.R. 217.

75.

The second part of this limb, i.e. whether the missing evidence could be dealt with by way of warnings is omitted.

76.

Of course assessing fairness in context should not blind the court to any factors that weigh against the claim of unfairness, such as any admissions made by the accused, if these are not disputed: see SA v DPP [2007] IESC 43.

77.

People (DPP) v Wall [2005] IECCA 140; JF v DPP [2005] 2 I.R. 174.

78.

See PD v DPP [2008] IESC 22.

79.

Criminal Justice Act 1999, s.9. On the need to place an onus of proof on the prosecution see Hardiman J.'s comments in PH v DPP [2007] IESC 3; JO'C v DPP [2000] 3 I.R. 478.

80.

Dworkin, Justice for Hedgehogs (Cambridge, MA: Harvard University Press, 2011), p.335.