

**BEYOND THE REACH OF JUSTICE?  
COMPLAINANT DELAY IN HISTORIC  
CHILD SEXUAL ABUSE CASES  
AND THE RIGHT TO A FAIR TRIAL**

SINÉAD RING \*

**I. INTRODUCTION**

The publication of the Commission to Inquire into Child Abuse's Final Report<sup>1</sup> (the Ryan Report) in May of this year has forced Irish society to face up to its appalling history of child physical and sexual abuse in State-run institutions. Few could have imagined the scale and intensity of the abuse catalogued in the Report. The publication has generated a renewed public interest in the criminal justice system's role in prosecuting those accused of the sexual abuse of children. However, ever since society's "discovery" of child sexual abuse in the mid-1990s,<sup>2</sup>

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\* Sinéad Ring, BCL (Law and German), LLM (Criminal Justice), PhD Candidate, Centre for Criminal Justice and Human Rights, University College Cork. Irish Research Council for the Humanities and the Social Sciences Scholar. Email: sineadmaryring@gmail.com

<sup>1</sup> Commission to Inquire Into Child Abuse, *Final Report* (Stationery Office, 2009).

<sup>2</sup> See Lalor (ed.), *The End of Innocence: Child Sexual Abuse in Ireland* (Oak Tree Press, 2001). In May 1999 the *States of Fear* documentary exposed the extent of physical and sexual abuse within State-funded religious institutions, giving rise to a public outcry and political and legislative initiatives. The Statute of Limitations (Amendment) Act 2000 altered limitation periods for civil actions where sexual abuse suffered as a child was claimed. The Sex Offenders Act, 2001 established a Sex Offenders Register. In 2002 the Government indemnified the religious orders against 90% of the compensation claims. The Residential Institutions Redress Board Act was set up under the Residential Institutions Redress Act, 2002. The Commission to Inquire into Child Abuse was established by legislation in 2000, and was initially chaired by Laffoy J. She resigned in September 2003, complaining of lack of co-operation from the Government and inadequate resources. The Commission, chaired by Ryan J., issued its *Final Report* in May 2009. The Renewed Programme for Government 2009 contains a commitment to fully execute the Government Implementation Plan in respect of the Ryan

the Irish courts have been grappling with the problems posed by historic allegations of abuse, made by adults who claim they were victimised as children. In some cases the time lapse between the alleged abuse and the making of a complaint to the authorities can be as much as 40 years. Lengthy lapses of time between the alleged offence and reporting present huge challenges to the criminal process, which must vindicate the accused's constitutional right to a fair trial, while also seeking to prosecute these most serious of allegations.

The core argument of this article is that in historic childhood sexual abuse prosecutions, the risk of an unfair trial is unconstitutionally high. Support for this contention is found in two sets of decisions by the Superior Courts relating to historic child sexual abuse cases: the prohibition decisions of the High Court and the Supreme Court; and the decisions of the Court of Criminal Appeal in appeals brought by persons convicted on historic charges of child sexual abuse. It is argued that in light of the risks of an unfair trial, guidance from the appellate courts on directions and warnings to the jury and on rulings in evidential matters arising from the delay is urgently needed, in order to safeguard accused persons' due process rights.

The article first examines the decisions of the High Court and the Supreme Court in prohibition applications. In these cases the courts consider whether the trial of the charges should be halted due to the lapse in time between the alleged abuse and the trial.<sup>3</sup> Prohibition applications present the courts with an invidious dilemma: how to ensure the defendant is not put at risk of an unfair trial, while at the same time recognising that delay in reporting is a common feature in many child sexual abuse cases. It is argued that the accused faces an almost impossible task in trying to show prejudice, and that the reviewing courts rely to an unjustified degree on the power of the trial judge to counter the effects of delay by way of rulings and directions to the jury.

That this over-reliance on the trial judge's ability to protect due process in historic child sexual abuse cases is not

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Report: *Renewed Programme for Government*, 10 October 2009, available at [www.taoiseach.ie](http://www.taoiseach.ie).

<sup>3</sup> This article does not deal with the separate but related issue of prosecutorial and systemic delay; relevant cases are listed at n. 72, below.

merited is revealed in the second part of this article, which examines the decisions of the Court of Criminal Appeal in historic child sexual abuse prosecutions. While the Court is willing to overturn convictions on the basis of inadequate warnings, trial judges are left in the dark as to what constitutes an adequate warning on issues such as delayed reporting, relationships of dominion, inhibition, corroboration, and admissibility of evidence.

Finally, two further matters relating to the prosecution of delayed complaints of childhood sexual abuse are explored: repressed memories, and the disclosure of the complainant's medical and psychiatric reports. These are critical issues that go to the heart of the fairness of historic child sexual abuse cases. However they have yet to be subjected to sustained analysis and consideration by the Irish Superior Courts.

In concluding, it is argued that in light of the difficulties facing accused persons in trying to mount a defence, and in trying to establish prejudice, and in light of the lack of safeguards in terms of (a) judicial rulings on evidential and procedural matters arising from the delay, and (b) directions to the jury on how to incorporate the fact of delay into their deliberations, the risk of an unfair trial is unconstitutionally high, and guidance is urgently needed for trial judges in historic child sexual abuse cases.

## II. DELAY AND THE RIGHT TO A FAIR TRIAL

Unlike summary offences, indictable offences are not subject to any limitation period.<sup>4</sup> However, despite the lack of an express constitutional right to a speedy trial, the courts have interpreted Article 38.1 of the Constitution to include an entitlement to a trial with reasonable expedition.<sup>5</sup> Delay in the

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<sup>4</sup> This is the case even where an indictable offence is tried summarily: *D.P.P. v. Logan* [1994] 3 I.R. 254; *S. v. D.P.P.* (Supreme Court, unreported, 19 December 2000).

<sup>5</sup> Walsh, *Criminal Procedure* (Round Hall, 2002), p. 17; *The State (Healy) v. Donoghue* [1976] 1 I.R. 325; *In Re Singer* 97 I.L.T.R. 131; *D.P.P. v Byrne* [1994] 2 I.R. 236; *C. v. D.P.P.* [2009] I.E.H.C. 400. The fact that the entitlement to a trial with reasonable expedition is implicit in Article 38.1 does not dilute its weight: *The State (O'Connell) v. Fawsitt* [1986] I.R. 362 and *D.P.P. v. Byrne* [1994] 2 I.R. 236. However, "[t]he right of an accused person

institution of proceedings can seriously prejudice the accused person in the preparation of his or her defence: witnesses die or move away; documentary and material evidence is destroyed or lost. Particularly in cases of lengthy delay, witnesses' memories will have faded. The accused person may be faced with having to mount a defence against serious charges in circumstances where corroborative or exculpatory evidence is simply no longer available, or worse, cannot be remembered. To compound these problems, delay may also mean that the prejudice to the defence cannot always be demonstrated:

... 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.<sup>6</sup>

In cases involving delay, the accused can apply to the High Court by way of judicial review for an order prohibiting the continued prosecution of the charges. The reviewing court must decide whether, because of the lapse of time since the alleged offence, the accused's trial can no longer be constitutional, and is in fact a "parody of justice".<sup>7</sup> The onus of proof lies on the applicant,<sup>8</sup> and the standard to be reached is the balance of

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to a trial with reasonable expedition is separate from and in addition to his right to a fair trial": [2001] 1 I.R. 656, at 664, *per* Geoghegan J., Keane C.J. and Murphy J. concurring. The fact that it was not until 1986 that the right to an early trial assumed constitutional status has been described as "somewhat surprising": Hogan and Whyte, *Kelly: the Irish Constitution* (Lexis Nexis Butterworths, 4<sup>th</sup> ed., 2003), p. 1144.

<sup>6</sup> *Barker v. Wingo* (1972) 407 U.S. 514, at 532, *per* Powell J.

<sup>7</sup> This was how Henchy J. described the hearing of a civil action relating to an industrial accident some 23 years earlier: *O'Keeffe v. Commissioners of Public Works* (Supreme Court, unreported, 24 March 1980). See also the judgment of Hardiman J. in *J.O'C. v D.P.P.* [2000] 3 I.R. 478, where he describes the jurisprudence on delay as having its origins in civil cases.

<sup>8</sup> *Z. v. D.P.P.* [1994] 2 I.R. 476.

probabilities.<sup>9</sup> Applications for prohibition must be made promptly, and not later than three months from the conclusion of the investigation.<sup>10</sup> Unlike in other common law countries,<sup>11</sup> the use of the abuse of process remedy in delay cases has been expressly rejected by the Supreme Court.<sup>12</sup> A trial judge does not have jurisdiction to hear an application to stay or to quash an indictment on the grounds of delay.<sup>13</sup> Delay issues require considerable fact-finding, and therefore the separate process of judicial review is more appropriate than a motion at the commencement of the trial.<sup>14</sup> This is in addition to the trial court's general and inherent power to protect its processes from abuse and to safeguard the accused from oppression or prejudice during the course of the trial.<sup>15</sup>

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<sup>9</sup> *The People (D.P.P.) v. Byrne* [1994] 2 I.R. 236; although see *C. v. D.P.P.* [2009] I.E.H.C. 121.

<sup>10</sup> Order 84 rule 21(1) of the Rules of the Superior Courts, 1986. However, time may be extended at the court's discretion, if a good reason to do so is shown: *De Róiste v. Minister for Defence* [2001] 1 I.R. 190. See also *R. v. D.P.P.* [2009] I.E.H.C. 87, where the three month period was extended. See also *McG. v. D.P.P.* [2009] I.E.H.C. 294 (Herbert J.).

<sup>11</sup> For the English approach to complainant delay see Lewis, *Delayed Prosecutions for Child Sexual Abuse* (Oxford University Press, 2006) and Choo, *Abuse of Process in Criminal Proceedings* (Oxford University Press, 2<sup>nd</sup> edn., 2008). For the most recent articulation of the considerations that are relevant to a determination of whether proceedings should be delayed as an abuse of process on the grounds of delay, see *R. v. S.* [2006] E.W.C.A. Crim. 756; [2006] 2 Cr. App. R. 23.

<sup>12</sup> *The People (D.P.P.) v. P.O'C.* [2006] 3 I.R. 238.

<sup>13</sup> The jurisdiction to quash is very limited, and must be based on some technical fault in the indictment: *The People (D.P.P.) v. P.O'C.* [2006] I.E.S.C. 54; [2006] 3 I.R. 238, at 245, *per* Denham J.

<sup>14</sup> *P.O'C. v. D.P.P.* [2006] 3 I.R. 238, at 244-248, *per* Denham J.; *G. v. D.P.P.* [1994] 1 I.R. 374.

<sup>15</sup> *The State O'Connell v. Fawsitt* [1986] I.R. 362.

### III. PROHIBITION APPLICATIONS IN HISTORIC CHILD SEXUAL ABUSE CASES

Historic child sexual abuse cases feature lapses of time so great that, in any other sort of case, the delay would of itself preclude prosecution.<sup>16</sup> However, historic child sexual abuse cases have been found to involve special considerations, so that delayed reporting is not an automatic bar to prosecution. From the first prosecutions of historic childhood sexual abuse claims, the courts emphasised that these cases involved a unique set of issues and considerations that set them apart from other kinds of criminal prosecutions. The decisions illustrate a growing recognition that victims of child sexual abuse often suffer from feelings of fear and shame, particularly where their abuser is a family member or a person in authority. The abuse in some cases is so frequent, prolonged and intense, that by the time the matter reaches the courtroom, the complainants cannot remember how often the abused occurred.<sup>17</sup> Often the accused person is a member or former member of a religious community, or is in a position of authority over children. Typically the accused person<sup>18</sup> will have had a close relationship with the complainants' family, and would have spent many hours in the company of the complainant's family and the complainant. The accused is often a family friend, a swimming coach, a volunteer in the Legion of Mary, a parish priest, a brother, a father. The accused person may

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<sup>16</sup> In *The State (O'Connell) v. Fawsitt* [1986] I.R. 362 a delay of three years was described as extreme. In one of the first cases to deal with a lengthy delay in a sexual offences prosecution, Barr J. found that an unexplained delay of more than 9 years in making a complaint about alleged sexual abuse of a minor was unreasonably long in all the circumstances. The delay hampered the accused in the preparation of his defence and thus "deprived him of his constitutional right to fair procedures and a fair trial". See *N.C. v. D.P.P.* [1991] 1 I.R. 471, at 476, *per* Barr J. Hogan and Whyte note that the case was before the "torrent" of sexual abuse cases came before the courts: Hogan and Whyte, *Kelly: The Irish Constitution* (n. 5 above), p. 1155.

<sup>17</sup> See O'Malley, "Responding to Institutional Abuse: The Law and its Limits", in Flannery (ed.), *Responding to the Ryan Report* (Columba Press, 2009), p. 98.

<sup>18</sup> The word "accused" is used in this article to refer both to the accused person at trial and the applicant making the application for judicial review, in order to capture the criminal due process nature of the values at stake in prohibition applications.

have been investigated as part of an official investigation into child abuse, such as the Ferns Report.<sup>19</sup> The accused person may have an “extremely chequered past”,<sup>20</sup> may have left the Catholic Church in disgrace, or may have been the focus of extensive media attention.<sup>21</sup>

The Courts have recognised that lengthy delay is almost inherent in the nature of the offence of child sexual abuse and victims may find it psychologically impossible to report.<sup>22</sup> Broader societal factors are also relevant, since “such was the climate of disbelief which existed in the community regarding such allegations until recent times, the victim might well have been dissuaded by the risk of ridicule and scorn in coming forward with such a complaint”.<sup>23</sup> It is in this context that the courts have stressed that an accused should not be allowed to benefit from the delay in reporting. Indeed in the cases decided between 1997 and 2006, the accused’s alleged role in causing the delay was relevant to the reviewing court’s decision as to whether or not to prohibit the trial. The development of the early case-law in historic child sexual abuse cases is considered next.

*A. Dominion and Balancing: B. v. D.P.P. and P.C. v. D.P.P.*

From *B. v. D.P.P.*<sup>24</sup> onwards, prosecutions that were unstateable under the previous law came before the courts. B. was charged in 1993 with indecent assault and rape offences alleged to have been committed against three of his daughters 20 and 30 years earlier. Delivering the judgment of the Supreme Court, Denham J. held that, *prima facie*, the delay was an “inordinate lapse of time”.<sup>25</sup> However, this case belonged to special category of cases, which involved allegations of child sexual abuse. The court would balance the accused person’s rights with the community’s right to have the offences prosecuted. If the accused

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<sup>19</sup> As in *D. v. D.P.P.* [2009] I.E.H.C 48.

<sup>20</sup> *J.D. v. D.P.P.* [2009] I.E.H.C. 48.

<sup>21</sup> As in *J.T. v. D.P.P.* [2008] I.E.S.C. 20.

<sup>22</sup> *P.O’C. v. D.P.P.* [2000] 3 I.R. 87, 105, *per* Murray J.

<sup>23</sup> Hogan and Whyte, *Kelly: The Irish Constitution* (n. 5 above), p. 1153, footnote omitted.

<sup>24</sup> [1997] 3 I.R. 140.

<sup>25</sup> *B. v. D.P.P.* [1997] 3 I.R. 140, at 193, *per* Denham J; Hamilton C.J., O’Flaherty, Barrington and Keane JJ. concurring.

ran the real risk of an unfair trial, then on balance, the right to a fair trial would prevail.<sup>26</sup> In attempting to balance the community's right to prosecute with the rights of the accused, the court would inquire as to the reasons for the delay in reporting. Any presumed prejudice arising out of the lengthy delay in reporting was to be balanced not 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.<sup>27</sup>

Crucially, the Court's reasoning as to the justifications for the delay in *B* was premised on an assumption that the complaint was true. This approach prompted McGuinness J. to sound a note of caution in *P.C. v. D.P.P.*<sup>28</sup> The accused was a coach driver and a swimming teacher at a school. The time lapse between the alleged offences and reporting was 13 years. Having examined the automatic disbelief of all sexual complainants in the past, McGuinness J. noted that it would be "equally unfortunate if the discredited orthodoxy of the past were replaced by an equally rigid orthodox view that in all cases of delay ... the delay can automatically be negated by dominion".<sup>29</sup> On appeal to the Supreme Court, Keane J. set out the tripartite test to be applied in such cases, the central pillar of which asked what were the reasons for the delay and, assuming the complaint to be true, whether they were referable to the accused's conduct.<sup>30</sup>

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<sup>26</sup> [1997] 3 I.R. 140, at 196, *per* Denham J. See also *D. v. D.P.P.* [1994] 2 I.R. 465 and *Z. v. D.P.P.* [1994] 2 I.R. 476.

<sup>27</sup> In *B*, the delay was justified by the dominion exercised by the applicant over his daughters, and so the Supreme Court refused to prohibit the trial. The case never proceeded to trial, because the accused died one day after the Supreme Court's judgment. See Doherty and O'Keefe, "Justice Denied: Delay in Criminal Cases" (1998) 49 N.I.L.Q. 385, at 401.

<sup>28</sup> [1999] 2 I.R. 25.

<sup>29</sup> Since the accused was unable to show actual prejudice, the order of prohibition was quashed. [1999] 2 I.R. 25, at 43, *per* McGuinness J.

<sup>30</sup> The *P.C.* test was: (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.

The *P.C.* test centred on the assignment of fault: Could the victim's reasons for delay have been caused by the applicant's actions? Crucially, it involved an assumption as to the veracity of the complaint. However, not only was this assumption inconsistent with the presumption of innocence, it also was unnecessary, since it engaged the court in a fact-finding process that ultimately did not shed any light on whether or not the trial would be unfair. After all, the complainant's reasons for the delay in reporting were irrelevant to the decision as to fairness. In short, the *P.C.* test was indicative of the Supreme Court's (understandable) desire to incorporate the complainant's experiences into the decision-making process. Unfortunately, however, this was at the expense of a focus on the accused's fair trial rights. Indeed, one commentator queried whether the construction of fairness in sexual offences had resulted in the accused's presumption of innocence being usurped by a presumption of guilt.<sup>31</sup> Calls for a more coherent rationale for the courts approach to this "single most contentious area of Irish law"<sup>32</sup> were answered in 2006, with the institution of a simplified, actual-prejudice-based test in the case of *S.H. v. D.P.P.*

*B. A New Test: S.H. v. D.P.P.*

In *S.H. v. D.P.P.*,<sup>33</sup> the Supreme Court signalled an important shift in its approach to complainant delay. The accused, a primary school teacher, was charged in 2001 with 50 counts of indecent assault against minors. The assaults were alleged to have been committed some 40 years earlier.<sup>34</sup> Delivering the judgment

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<sup>31</sup> Fennell, *The Law of Evidence in Ireland* (2<sup>nd</sup> edn., Lexis Nexis Butterworth, 2003), p. 19.

<sup>32</sup> Conroy, "Clarifying the Law on Delayed Prosecutions for Sexual Offences" (2005) 10 *Bar Review* 214, at 214. See also Fennell, "The Culture of Decision-Making: A Case for Judicial Defiance Through Evidence and Fact-Finding" (2001) 1 *J.S.I.J.* 2; Lewis, *Delayed Prosecutions for Childhood Sexual Abuse* (n. 11 above), at p. 91; Lewis, "The Presumption of Innocence in Delayed Criminal Prosecutions for Childhood Sexual Abuse: Lessons from Ireland" [2001] *Criminal Law Review* 636.

<sup>33</sup> [2006] I.E.S.C. 55, [2006] 3 I.R. 575, [2007] 1 I.L.R.M. 401, *per* Murray C.J., Denham, Hardiman, Geoghegan and Fennelly JJ.

<sup>34</sup> The appeal came on for hearing before three judges, but having heard submissions, the appeal was adjourned for hearing before a court of five.

of the Court, Murray C.J. held that judicial knowledge of issues relating to dominion, inhibition, disparity between the ages of the accused and the complainant and other issues relating to reasons why a complainant might delay, was now well-established. It was no longer necessary for the court to inquire into the reasons for the delay, or whether the accused had exercised dominion over the complainant, or to make assumptions as to the truth of the complaints.

Murray C.J.'s judgment set out the new test to be applied in applications for prohibition on the grounds of delay. The test is now solely prejudice-based: the accused must show, on the balance of probabilities, that the delay in reporting has resulted in prejudice, so as to give rise to a real and serious risk of an unfair trial. The court also retains a residual jurisdiction to grant an order of prohibition in exceptional circumstances, where it would be unfair or unjust to put an accused on trial.

The removal of the fault-based test is a welcome development, since it was at odds with the presumption of innocence, and was not relevant to the decision regarding fairness. It also abolishes the exercise of attributing and apportioning blame for the delay in reporting, through expert evidence from psychologists on the reasons why the complainant delayed.<sup>35</sup> However, an examination of the decisions in prohibition applications since *S.H.* reveals that not only are the courts reluctant to grant orders of prohibition,<sup>36</sup> but that accused persons seeking to prohibit their trial, on charges often many decades old, face an extremely difficult battle, where the risk of an unconstitutionally unfair trial is raised to an unacceptably high level. This is because of the reviewing courts' over-reliance on the trial judge's ability to ensure due process and the role of the jury as arbiter of fact, in circumstances where there is a paucity of appellate guidance on how to deal with the evidential and procedural problems stemming from delayed reporting. The prohibition jurisprudence is considered in the next section.

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<sup>35</sup> See, for example, the discussion of the psychologists' evidence in *J.O'C. v. D.P.P.* [2000] 3 I.R. 478.

<sup>36</sup> They will only succeed in "exceptional circumstances": *P.D. v. D.P.P.* [2008] I.E.S.C. 22.

*C. The Post-S.H. Prohibition Jurisprudence  
and the Risk of an Unfair Trial*

The threshold to be reached by the accused in a prohibition application is the real and serious risk of an unfair trial that cannot be avoided by appropriate rulings and directions by the trial judge.<sup>37</sup> It is not an established certainty or a probability of an unfair trial.<sup>38</sup> However, there seems to be some degree of confusion as to what standard is sufficient to “get the [accused] over the line”. Indeed, in a recent case, the burden was described as a “probability” of a real risk of an unfair trial.<sup>39</sup> Nevertheless, the case law shows that the standard to be met is clearly very high indeed.<sup>40</sup> The issue of presumptive prejudice arising from the delay will not of itself normally be enough, the courts preferring instead to rely on the trial court’s power to guarantee due process.<sup>41</sup> A remote, fanciful or purely theoretical form of prejudice is not sufficient.<sup>42</sup> It is now essential for accused persons to fully and actively engage with the facts of the particular case, in order to establish whether their ability to defend proceedings has been fatally compromised.

Before discussing the difficulties facing accused persons in prohibition applications, it is essential to recall the two types of prejudice caused by time’s erosion of evidence. Both of these problems are direct consequences of the delay in reporting and both relate to issues of credibility.

First, the disappearance or destruction of material evidence such as records or files, or the deterioration of witnesses’ memories, can mean that the defendant is unable to

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<sup>37</sup> *Z. v. D.P.P.* [1994] 2 I.R. 476; *S.H. v. D.P.P.* [2006] 3 I.R. 575; *P.O’C. v. D.P.P.* [2008] I.E.S.C. 5; [2008] 4 I.R. 76.

<sup>38</sup> *Z. v. D.P.P.* [1994] 2 I.R. 476, at 506, *per* Finlay C.J.

<sup>39</sup> *J.C. v. D.P.P.* [2009] I.E.H.C. 121 (Peart J).

<sup>40</sup> *McFarlane v. D.P.P.* [2007] 1 I.R. 138, *per* Hardiman J., approved in *D.D. v. D.P.P.* [2008] I.E.S.C. 47.

<sup>41</sup> *P.O’C. v. D.P.P.* [2008] I.E.S.C. 5; [2008] 4 I.R. 76. On the exceptional nature of the prohibition remedy see *D.C. v. D.P.P.* [2005] I.E.S.C. 77; [2005] 4 I.R. 281; [2006] 1 I.L.R.M. 348; *Devoy v. D.P.P.* [2008] I.E.S.C. 13; [2008] 4 I.R. 235.

<sup>42</sup> *McFarlane v. D.P.P.* [2006] I.E.S.C. 11; [2007] 1 I.R. 134; *P.O’C. v. D.P.P.* [2005] 4 I.R. 76.

test the case against him. In such a situation there exists no objectively verifiable “island of fact” against which the credibility of the complainant and other witnesses may be tested.

The second problem, which is caused by the disappearance of evidence, is that both the disappearance *and the prejudice caused thereby* are notoriously difficult to demonstrate. While the courts are more than willing to engage with the facts of the case, accused persons can 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. The irony is that if the evidence were available to use, the accused would perhaps not be as prejudiced by the passage of time, since time has not affected the evidence available. Unfortunately, in the absence of demonstrable prejudice, the reviewing Court will be more likely to presume that the defendant is not prejudiced, and will allow the trial to proceed.

*1. High Threshold of Actual Prejudice: Disappearance of an Island of Fact*

The principal difficulty facing defendants in delayed prosecutions for child sexual abuse is that evidence, witnesses and witnesses’ memories may have disappeared, or degraded over time. If the trial had taken place within a year or two of the alleged abuse, the complaint would have been more detailed, and witnesses and evidence would most likely still be available. Prejudice can result where the complainant makes reference to specific details relating to the circumstances or timing of the offences, but the passage of time has resulted in the destruction of relevant evidence that could have been used to undermine the complainant’s account. The defendant is therefore unable to contest a particular island of fact due to the disappearance of evidence or witnesses:

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 is 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 complainant's may consist of an unsupported assertion) is very perilous.<sup>43</sup>

A good example of a successful argument on the disappearance of islands of fact is *P.O'C.* Although decided under the pre-*S.H.* law, it clearly demonstrates the problems at the heart of historic child sexual abuse cases. *P.O'C. v. D.P.P.* concerned a complaint made 14 years after the alleged offences.<sup>44</sup> Significantly, the complainant graphically described how the applicant would lock the door of a room before committing the offences. The High Court<sup>45</sup> found that because he was the child's music teacher and knew the boy's parents, and because of the expert evidence given, the delay was clearly referable to the accused's own actions. However, the charges were more specific than in most sexual abuse trials. Most importantly, details relating to the locks and keys of the music room doors would have been clear in the memory of the accused and his colleagues had the charges been brought sooner. However, the evidence of this had clearly disappeared. If it were possible to demonstrate that the complainant's account of the locking of the doors was untrue, then the credibility of the complainant's entire account of the incident could be seriously undermined. Therefore, McGuinness J. held that there was specific prejudice to the accused in the preparation of his defence.

On appeal to the Supreme Court, Keane C.J. applied the test set down in *P.C.*,<sup>46</sup> and found that the delay in reporting was explicable by reference to the accused's actions, assuming them to be true.<sup>47</sup> In relation to specific prejudice, the accused's

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<sup>43</sup> *P.D. v. D.P.P.* [2008] I.E.S.C. 22, *per* Hardiman J. dissenting.

<sup>44</sup> *P.O'C. v. D.P.P. and the President of the Circuit Court* (High Court, 4 March 1999). The Supreme Court's judgment is reported at [2000] 3 I.R. 87. The indictment contained five counts of indecent assault on dates between January 1982 and December 1983.

<sup>45</sup> Decision of Mc Guinness J.

<sup>46</sup> [1999] 2 I.R. 25.

<sup>47</sup> This was because of the disparity of ages and the teacher/pupil relationship, coupled with the uncontradicted evidence of the clinical psychologist.

solicitor had placed before the Court, material that went beyond a bald assertion of prejudice. Indeed there was evidence that when enquiries were made of the director of the college at the time, he stated that “[d]etails such as those you seek constitute the minutiae that fade from memory simply because they seem of no particular import at the time”.<sup>48</sup> Had the trial taken place within a reasonable time, there would have been little difficulty in testing the accuracy of the complainant's version of events. The prosecution's appeal was not allowed.

It is far from clear that, had *P.O'C.* been decided under the *S.H.* test, the order of prohibition would have been granted. Certainly, from an examination of the cases decided since *S.H. v. D.P.P.*, it would appear that the courts have adopted a stricter approach to arguments based on the disappearance of islands of fact. Indeed, the disappearance of an island of fact argument has been rejected where the accused argued specific prejudice on a number of grounds, relating to the disappearance of oral and documentary evidence.

This arose in *C.K. v. D.P.P.*, where three witnesses had died, and the van in which the assault was alleged to have taken place had been destroyed, along with its insurance records.<sup>49</sup> It was argued that the absence of this oral and documentary evidence deprived the accused of certain “islands of fact” upon which reliance could otherwise be placed by the defence, to test the reliability of the complainant's account. The Supreme Court rejected this argument, concluding that there was no evidential basis sufficient to justify the prohibition of the trial.<sup>50</sup>

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<sup>48</sup> [2000] 3 I.R. 87, at 92, *per* Hardiman J.

<sup>49</sup> For example, the complainant alleged that some of the offences took place while the accused was babysitting her. The accused denied that he regularly babysat the complainant and asserted that the complainant's grandmother had taken care of the children when the complainant's parents were out. The accused asserted that the death of the complainant's grandmother meant that he could not put her version of events to the jury. The complainant alleged that one offence took place in a particular field. The accused asserted that he could only access this field with the permission of the owner, who had since died: *C.K. v. D.P.P.* [2007] I.E.S.C. 5.

<sup>50</sup> *C.K. v. D.P.P.* [2007] I.E.S.C. 5. The Court held that the complainant's deceased grandmother could have had little or nothing to say on what babysitting arrangements were in place when she was not present. Equally, in

On the other hand, in a case involving no delay, the trial was prohibited due to a risk of unfairness flowing from the loss of telephone records, where an important part of the allegations was that the accused would call or text the complainant on her mobile phone asking her to come to his apartment.<sup>51</sup>

## *2. Prosecution Evidence and Statements Reduce the Likelihood of a Successful Application*

It would seem that the more evidence and statements that are gathered by the prosecuting authorities, the less willing the reviewing court will be to grant prohibition. The issue of the unavailability of witnesses arose in a recent case where a former secretary of a parents' association and member of the church choir was charged with rape and sexual assault against three complainants. The delay involved was 35 years.<sup>52</sup> While prejudice resulting from the death of a number of witnesses was alleged, the most crucial was the death of the accused's mother, who shared a bedroom with the accused. However, the High Court rejected the claim of prejudice, holding that the complainant had neither confirmed nor denied that the accused's mother was present during the abuse, and that any credibility issues could be tested on cross-examination. The Book of Evidence in the case contained numerous statements from the complainants and from other witnesses, against whom no prejudice was alleged, and this was a decisive factor in the Court's finding that the accused would not risk an unfair trial.

## *3. Attempts Should be Made to Locate Alternative Evidence*

The difficulties presented by the disappearance of islands of fact are further compounded by the requirement that accused persons must show not only that relevant witnesses or evidence have disappeared, but also that there are no other alternative witnesses or evidence available. Therefore the accused must demonstrate that serious attempts have been made to locate alternative witnesses and evidence. Indeed, in one case, the loss

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relation to the field there was no evidence that the gate was ever locked, or that access to it could only be obtained by way of the owner.

<sup>51</sup> *R.C. v. D.P.P.* [2009] I.E.S.C. 32.

<sup>52</sup> *C. v. D.P.P.* [2009] I.E.H.C. 121 (Peart J.).

of the accused's training diaries and the death of two relevant witnesses was not enough to establish actual prejudice in a case involving a delay of 16 years, where the accused failed to seek out the whereabouts of alternative witnesses.<sup>53</sup> Similarly, the loss of the accused's work records and the death of a witness who might have been in a position to vouch for the accused's whereabouts was not enough to establish prejudice, where on the evening in question there was a family christening with a gathering of the family, and so it was likely that other witnesses as to the accused's behaviour on that occasion would be available.<sup>54</sup>

The burden on the accused may be heavier where the abuse is alleged to have occurred in an institutional setting. In *D.D. v. D.P.P.*,<sup>55</sup> the accused was a 78-year-old Christian Brother and former director of an industrial school, charged with ten counts of indecent assault and one count of assault against six pupils of the school during the mid to late 1970s and early 1980s. The accused claimed actual prejudice on a number of grounds: his recollection of events was no longer clear; the death of several potential witnesses; the disappearance of documentary records concerning a broken window mentioned in one complaint; the death of a witness who could have given evidence as to whether or not the defendant had access a room where some of the offences were alleged to have taken place; and the demolition of particular school buildings where certain offences were alleged to have taken place. However the Supreme Court held that the accused had not gone far enough: the nature of the offences was that they occurred in secret. Any evidence which the deceased witnesses could have given would at best have been peripheral. Central to the Court's decision was the accused's failure to indicate whether any of the evidence that the three deceased witnesses would have given was available from any other source:

The applicant has not engaged with the circumstances of the case in that he has not indicated whether any of the evidence which the three deceased witnesses would

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<sup>53</sup> *P.O'C. v. D.P.P.* [2008] I.E.S.C. 5, [2008] 4 I.R. 76.

<sup>54</sup> *J.K. v D.P.P.* [2006] I.E.S.C. 56.

<sup>55</sup> [2008] I.E.S.C. 47.

give is available from some other source. In a case such as the present where the community of the Christian Brothers was presumably numerous and the residents of the industrial school ever more numerous, the appellant ought at least to have recounted his efforts to obtain such evidence as he might wish to adduce from other sources.<sup>56</sup>

Nor had the accused made any attempt to obtain witnesses who could give evidence regarding the layout of the demolished buildings.<sup>57</sup>

#### *4. The Accused must Demonstrate the Serious Nature of the Prejudice Suffered*

The prejudice suffered must be demonstrated to be extremely serious, particularly where loss of memory is alleged. In a case involving allegations of abuse against a former Christian Brother dating back almost 40 years,<sup>58</sup> submissions of prejudice based on the accused's depression and grave pre-trial anxiety suffered as a result of vilification in the media<sup>59</sup> was not sufficient to stop the trial, when the accused had receive medical care but had not submitted a medical report. The applicant also deposed that he could only recollect four of the fifteen complainants. Indeed, his police interviews were "littered with references to his inability to remember persons and

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<sup>56</sup> *Per* Finnegan J., Fennelly and Macken JJ. concurring.

<sup>57</sup> The accused also argued prejudice on the ground of the lack of the specificity of the charges. Indeed, each of the offences was alleged to have been perpetrated "on a date unknown" over various time periods, ranging from 4 months to 7 years. He succeeded in having his trial on one charge prohibited, which related to a single incident within a time span of seven years. However the Court allowed the D.P.P.'s cross appeal against an order of prohibition relating to charges concerning two incidents over a six-year period. The Court held that even though the charges spanned 6 years, the two incidents could be pinned down to the year 1978. It is regrettable that the D.P.P. did not delimit the relevant time period in the charges.

<sup>58</sup> *J.T. v. D.P.P.* [2008] I.E.S.C. 20.

<sup>59</sup> The High Court had found that some of the information given to the media had been leaked by the Gardaí. However the Supreme Court did not place much emphasis on this point, stating that the majority of the information relating to the alleged abuse had come from the complainants or people speaking on their behalf.

circumstances”.<sup>60</sup> However, the Supreme Court held that the evidence relating to the applicant’s memory was vague and ambiguous, and there was no medical evidence on the issue. The approach adopted by the court in this case is a sensible one, and is aimed at preventing spurious and unfounded claims of prejudice halting trials; clearly the accused could easily have obtained a medical report grounding the claim of loss of memory.

The Supreme Court is very careful to contextualise the accused person’s claim of prejudice. In *S.A. v. D.P.P.*<sup>61</sup> the accused faced charges of abuse allegedly perpetrated while he was a Christian Brother working at the former Artane industrial school. The number of charges alone was staggering: eight allegations of buggery, 63 charges of indecent assault, and one of attempted buggery. The oldest charge dated back 46 years, and the latest 38 years. The trial judge held that the delay “could not rationally be considered to be anything other than inordinate”. Crucially, however, there were certain features of the case which mitigated the effect of the long periods of delay in the case. The accused had given extensive interviews to the gardaí, and these appeared to demonstrate that the applicant’s memory was functioning and accurate, and that he showed “a marked instinct for precision”. Furthermore, during the course of the interviews, the applicant made certain admissions relating to acts that were “in the nature of inappropriate touching”. The applicant was alleged to have said that these incidents occurred “in moments of human weakness”, and that “if the boys have said this, he must accept it, but that he has no recollection of it. He must accept what they have said on trust. His memory is not as good as it used to be ... something must have taken place”. He also said that he remembered two complainants, and he made specific admissions of conduct in relation to one boy. The Court held that “[h]is admissions are at least open to the interpretation that he also concedes conduct of this sort with other, unnamed boys”. The accused could not say how often he experienced “moments of weakness”, and did not know if he had behaved in a similar way with other boys. The Court held that the inability to recall

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<sup>60</sup> *J.T. v. D.P.P.* [2008] I.E.S.C. 20.

<sup>61</sup> [2007] I.E.S.C. 43, *per* Hardiman J., Macken and Finnegan JJ. concurring. All quotations in this paragraph are taken from the judgment of Hardiman J.

specific children by name was not gravely prejudicial to the defence.<sup>62</sup> The admissions did not appear to have been denied or glossed, so it was reasonable to take them at face value. The applicant's appeal was refused. However, it must be remembered that this was a case of undisputed admissions. The Court specifically distinguished it from cases where alleged admissions are hotly disputed and not independently verified. Presumably, in such cases, the weight to be given to alleged admissions would be significantly less.

##### *5. The Presumption of Innocence and the Prohibition Jurisprudence*

Echoes of the pre-*S.H.* case law have been heard in two recent prohibition decisions, where the court has taken assertions of innocence as negating the claim of prejudice, and have looked for a causal link between the delay and the prejudice alleged by the accused.

The presumption of innocence was thrown into stark relief in *W.M. v. D.P.P.*,<sup>63</sup> which involved charges dating back 28 years. There, the Supreme Court considered pre-charge correspondence between the accused's and the complainant's solicitors, in which the accused denied the allegations, and eventually issued proceedings for defamation. A statement contained in this correspondence stating that the accused would vigorously defend any future criminal prosecution, should one be brought, was taken to constitute evidence that the applicant by his own admission could not be prejudiced by reason of the delay: "Crucially and centrally ... is the fact that the applicant, effectively, through his own mouth, makes it abundantly clear that he has not been prejudiced in any way as a result of the significant delay which has undoubtedly taken place". It is difficult to identify the principle underpinning the court's decision: where is the link between the accused's protestations of innocence and the conclusion that he has not suffered prejudice –

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<sup>62</sup> Despite the general nature of the admissions (the fact that they did not extend to buggery; and the fact that the statements all related to boys and made no mention of the female complainant), they were still a significant factor.

<sup>63</sup> [2007] I.E.S.C. 24. Direct quotations taken from the judgment of Kearns J., Denham and Hardiman JJ concurring.

would a less adamant invocation of the constitutional right to the presumption of innocence have been indicative of prejudice? The decision is confusing, and should be distinguished in future cases.

The Supreme Court sought a causal link between the delay and the prejudice alleged in *R. McC. v. D.P.P.*,<sup>64</sup> in which the accused was charged with eight counts of sexual assault and one of unlawful carnal knowledge against his daughter in the mid 1990s. A formal complaint was not made until October 2001. In the course of an interview with gardaí, the accused had alleged his brother had witnessed a conversation between the accused and the complainant in which the complainant admitted the falsity of the allegations. The accused argued that the death of his brother in 2002 constituted prejudice such that he ran the real and serious risk of an unfair trial. In the course of the judgment, the Supreme Court made reference to the fact that “the [applicant] must show that the complainant unduly and unreasonably delayed in making her complaint if he is able to rely on it in combination with the prejudice he alleges”. It is suggested that this statement is inconsistent with the decision in *S.H.* that the reasons for the delay are no longer relevant. Nevertheless, the crux of the decision related to the issue of the deceased witness. The Court held that the allegedly important piece of evidence did not come into existence until almost the end of the period of delay.<sup>65</sup> It was in this context that the Court (somewhat confusingly, given the decision in *S.H.*) held that the accused’s biggest problem was that there was “no causal link between the complainant’s alleged delay and the loss of this piece of evidence”. It would appear that the main reason for the Court’s decision was that the missing piece of evidence only arose towards the end of the delay period. However, it is far from clear why less weight should be attached to a prejudice that arises at the end of the delay period, as opposed to one that accrues at a time nearer the commission of the alleged offence. It is suggested that there is no relation between when the prejudice accrued and its prejudicial effect on the accused person’s ability to present his defence, and that this

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<sup>64</sup> [2007] I.E.S.C. 29. Direct quotations taken from the judgment of Fennelly J., Denham J. and Finnegan P. concurring.

<sup>65</sup> Furthermore the accused’s account of the conversation could be put to the garda witnesses and the complainant in cross-examination at trial.

case should not be viewed as establishing a precedent for future cases.

*D. Exceptional Circumstances: The Omnibus Argument*

In *S.H.* the Supreme Court retained a residual discretion to grant an order of prohibition in exceptional circumstances where it would be unfair to proceed with the prosecution. Such exceptional circumstances have been found where a number of factors, including the fact that the accused was an elderly man of 86 years of age and in bad health, meant that in order to protect the integrity of the justice system the trial should be prohibited.<sup>66</sup> Denham J. was keen to emphasise that the justice system was not based on vengeance, nor should it be perceived as being so based.<sup>67</sup>

Nevertheless, bad health and age will not always be sufficient to constitute exceptional circumstances. Advanced age and claims of unfitness to stand trial by reason of physical and mental disability have not been accepted by the Supreme Court as amounting to exceptional circumstances.<sup>68</sup> It was stressed that the ability of the applicant to stand trial was effectively a matter for the trial judge. Indeed the Supreme Court has gone even further, stressing that the issue of capacity and fitness to plead is a matter for the trial judge, and it is an error for the High Court to make a determination regarding the “alleged cognitive impairment of the accused”.<sup>69</sup>

The exceptional circumstances test is not limited to the ailments of the applicant. Indeed, in *M.G. v. D.P.P.*, attempts by the complainant to use the criminal courts as an instrument of blackmail, in order to extract money from the accused, have come within the test.<sup>70</sup> The Court held that “it redounds to the credit of

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<sup>66</sup> *P.T. v. D.P.P.* [2007] I.E.S.C. 39, [2008] 1 I.R. 701. The integrity of the criminal process was also cited, in addition to the right to a fair trial, as a ground for an order of prohibition in *C. v. D.P.P.* [2009] I.E.H.C. 400.

<sup>67</sup> *P.T. v. D.P.P.* [2008] 1 I.R. 701, at 710, *per* Denham J.

<sup>68</sup> *J.K. v. D.P.P.* [2006] I.E.S.C. 56.

<sup>69</sup> *D.T. v. D.P.P.* [2007] I.E.S.C. 2.

<sup>70</sup> *M.G. v. D.P.P.* [2007] I.E.S.C. 4; [2007] 2 I.R. 738. The Court noted “a singular distinguishing feature” of the case was that the complainant “persistently and repeatedly resorted to threats, combined with demands for money, of exposure of the applicant’s sexual proclivities. He ultimately

the applicant that, although he was clearly vulnerable to allegations of this type, he never paid or offered to pay anything as the price of the complainant's silence".<sup>71</sup> While the decision in *M.G.* vindicates due process rights, it does not sit comfortably alongside the decision in *W.M.*,<sup>72</sup> where the accused's efforts to clear his name were fatal to his claim of prejudice.<sup>73</sup> The dissonance between the two decisions precludes the discovery of any clear principle.

In addition to the exceptional circumstances test in *S.H.*, it is clear that as a general rule the reviewing court is entitled to consider the "omnibus argument" or the "totality of the circumstances", whereby the cumulative effect of all the relevant factors, including delay, is considered as a ground for granting prohibition.<sup>74</sup> In a lengthy judgment earlier this year, MacMenamin J. found this totality of the circumstances test to be compatible with the *S.H.* test.<sup>75</sup> The refusal of the prosecution to take a statement from the complainant's mother, added to other factors (including the accused's advanced age, blindness and infirmity) has also grounded an order of prohibition.<sup>76</sup> Similarly, quite apart from the *S.H.* test, the Court has identified an "interest

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resorted to a physical attack on the applicant's property. These threats were combined with offers to withdraw charges in consideration of money payments": [2007] 3 I.R. 738, at 746, *per* Fennelly J.

<sup>71</sup> [2007] 3 I.R. 738, at 746, *per* Fennelly J., Murray C.J. and Hardiman J. concurring.

<sup>72</sup> [2007] I.E.S.C. 24.

<sup>73</sup> In a creative twist, the *S.H.* exceptional circumstances test has also been used to halt the summary trial of a minor for arson. In *A.C. (a minor) v. D.P.P.*, Dunne J. held that the emotional and mental vulnerability of the applicant meant that the case came within the wholly exceptional circumstances test established in *S.H.*, so that it would be unfair or unjust to put her on trial; [2008] I.E.H.C. 39, [2008] 3 I.R. 398. However it should be noted that the case centred on prosecutorial delay. This article does not consider prosecutorial delay, on which see *P.M. v. Malone* [2002] 2 I.R. 560; *P.M. v. D.P.P.* [2006] I.E.S.C. 22, [2006] 3 I.R. 172; *T.H. v. D.P.P.* [2006] I.E.S.C. 48, [2006] 3 I.R. 520; *P.D. v. D.P.P.* [2008] I.E.S.C. 22; and *O'H. v. D.P.P.* [2007] I.E.S.C. 12.

<sup>74</sup> *J.M. v. D.P.P.* [2004] I.E.S.C. 47, and *D.D. v. D.P.P.* [2008] I.E.S.C. 47; *J.D. v. D.P.P.* [2009] I.E.H.C. 48; *P.T. v. D.P.P.* [2007] I.E.S.C. 39; [2008] 1 I.R. 78.

<sup>75</sup> *J.D. v. D.P.P.* [2009] I.E.H.C. 48 (MacMenamin J.).

<sup>76</sup> *R. v. D.P.P.* [2009] I.E.H.C. 87 (O'Neill J). The case involved a delay of 30 years.

of justice” jurisdiction justifying the prohibition to be activated by the cumulative effect of: the Court’s duty to protect due process; the fact that the proceedings had been before the courts in one form or another for six years; and the issue of the severance of the charges.<sup>77</sup>

*E. Prohibition Applications: Comment*

It is clear that persons charged with historic offences of child sexual abuse face considerable challenges in trying to show prejudice. The problems in demonstrating prejudice are exacerbated if the complainant fails to offer specific information regarding the circumstances of the alleged offence(s). Indeed, as Hardiman J. has noted, a person in whose case there is an “island of fact” is perhaps, ironically, both in a potentially better position to face a trial (because evidence may not, after all, prove irretrievable) *and* in a better position to demonstrate prejudice in an application for prohibition. By contrast a person who cannot point to any island of fact is not only in what he called “a very perilous position at a trial”,<sup>78</sup> but is *also* unable on a prohibition application to show any prejudice to his defence. It is clear the threshold for establishing the serious nature of the prejudice suffered is very high indeed, with some lingering importance still being accorded to issues such as the accused’s (alleged) role in causing the delay and the time when the prejudice accrued. These factors are irrelevant to a consideration of fairness.

Hardiman J. has indicated that, where prejudice arises from lost or missing evidence or witnesses, there is an onus on the prosecution to show that the relevant aspect of a given defence can be proven by alternative means.<sup>79</sup> It is suggested that the shifting of the onus onto the prosecution to show alternative avenues of defence so that the accused is not confined to a bare denial, would more properly safeguard the accused’s right to due

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<sup>77</sup> *D.S. v. Judges of the Circuit Court and the D.P.P.* [2008] I.E.S.C. 37, [2009] 1 I.L.R.M. 16.

<sup>78</sup> *P.O’C. v. D.P.P.* [2000] 3 I.R. 87, at 118, *per* Hardiman J.

<sup>79</sup> “It seems to me that the Director has been able to point to the probable availability from other sources of at least the essence of the ... evidence, and that this is sufficient to avoid the inference that there is a real or serious risk of an unfair trial”: *P.H. v. D.P.P.* [2007] I.E.S.C. 3, *per* Hardiman J.

process and to a fair trial. This is particularly important given that, since the abolition of the preliminary examination, the prosecution no longer has to show a *prima facie* case against the accused.<sup>80</sup> Such a development would also ensure the disclosure by the prosecution of all relevant evidence relating to the complainant's state of mind when reporting.<sup>81</sup>

Furthermore, while the utilisation of the exceptional circumstances or cumulative factors test is to be welcomed, it is suggested that the fact-specific nature of the courts' decisions in these cases offer little guidance to trial judges in future cases.

Instead of ordering prohibition, the courts prefer to rely on the trial judge's ability to rule on evidential issues and to issue directions to the jury on the effect of the delay on the accused's defence.<sup>82</sup> This approach is not necessarily problematic, in itself, however when viewed in conjunction with the lack of guidance offered to trial judges and to juries on the effects of delay, the risk of an unfair trial is unconstitutionally high. The next section considers the case law of the Court of Criminal Appeal in historic child sexual abuse prosecutions.

#### **IV. UNAVOIDABLE UNFAIRNESS OF TRIAL: THE COURT OF CRIMINAL APPEAL AND GUIDANCE FOR TRIAL JUDGES IN HISTORIC CHILD SEXUAL ABUSE CASES**

On a prohibition application the accused person must show that the prejudice caused by the delay in reporting is not only such that he or she runs the real and serious risk of an unfair trial, but also that the prejudice is not remediable by way of rulings and directions by the trial judge.<sup>83</sup> Only if both limbs of the test are satisfied is the defendant entitled to an order of prohibition.<sup>84</sup> The Supreme Court has reiterated its awareness of the dangers involved in a trial of historic child sexual abuse and

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<sup>80</sup> Criminal Justice Act, 1999, s. 9.

<sup>81</sup> The issue of disclosure of medical and psychiatric records is discussed below.

<sup>82</sup> "The unfairness must be irremediable": *R. McC. v. D.P.P.* [2007] I.E.S.C 29, *per* Fennelly J.; Denham J. and Finnegan P. concurring.

<sup>83</sup> *S.H. v D.P.P.* [2006] 3 I.R. 575.

<sup>84</sup> *C.K. v. D.P.P.* [2007] I.E.S.C. 5.

has emphasised that these dangers are best dealt with by directions and rulings from the trial judge, “who has the opportunity to see and hear observe witnesses and will guard against an unfair trial”.<sup>85</sup> However, while the courts have repeatedly emphasised the importance of the judge’s warnings and directions on delay in historic cases, and have even described the duty to give such appropriate warnings as an obligation,<sup>86</sup> there is a distinct lack of guidance coming from the reviewing courts on how best to advise the jury and how to rule on issues flowing from the delay. It is therefore useful to consider the case law emanating from the Court of Criminal Appeal on directions and rulings by trial judges in delay cases.

*A. Directions to the Jury on the Problems Caused by Delay*

There is a paucity of guidance from the Court of Criminal Appeal on the contents of the required direction and the absence of specific guidelines has led to difficulties for trial judges in formulating appropriate directions.<sup>87</sup>

The length of the delay is not always the determining factor in deciding whether a warning should be given; the warning is supposed to mitigate any prejudice caused to the accused, and not to be a formulaic response to a lapse of time.<sup>88</sup> The content of the warning is usually determined by the prejudice caused to the defence by the delay. On a number of occasions,<sup>89</sup> the Court of Criminal Appeal has approved the warning given by Haugh J. in the High Court in *The People (D.P.P.) v. R.B.*<sup>90</sup> Running to some 100 lines, it warns of the dangers of a contest of credibility, particularly when there is a lack of detail in the

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<sup>85</sup> *B.J. v. D.P.P.* [2007] I.E.S.C. 18.

<sup>86</sup> *C. v. D.P.P.* [2009] I.E.H.C. 121 (Peart J.).

<sup>87</sup> McGrath, *Evidence* (Thomson Round Hall, 2005), p.181.

<sup>88</sup> See Coonan and Foley, *The Judge’s Charge in Criminal Trials* (Thomson Round Hall, 2008), p. 497, and the comments of Hamilton P. in *Z. v D.P.P.* [1994] 2 I.R. 476, at 495.

<sup>89</sup> *The People (D.P.P.) v. P.J.* [2003] 3 I.R. 550; *The People (D.P.P.) v. E.C.* [2006] I.E.C.C.A. 69, [2007] 1 I.R. 749; *The People (D.P.P.) v C.C.* [2006] 4 I.R. 287; *D. W. v. D.P.P.* [2003] I.E.S.C 54.

<sup>90</sup> Court of Criminal Appeal, unreported, 12 February 2003. The warning is reproduced in full in Coonan and Foley, *The Judge’s Charge in Criminal Trials* (n. 88 above), pp. 498-500.

complaints due to the delay. Haugh J.'s warning specifically notes that the prejudice to the defence caused by delay is much greater than the prejudice caused to the prosecution, when memories have deteriorated: "... to prosecute it is easier if you do not nail your colours to the mast because there is less you can be cross-examined on". This dictum is very similar in tenor to the remarks made by Hardiman J. regarding the prejudice caused by allegations that do not contain any "island of fact".<sup>91</sup> Unfortunately for trial judges and for accused persons, however, the *R.B.* warning does not go far enough – as Hardiman J. has noted,<sup>92</sup> it simply points out the dangers, without offering advice to the jury on how to act on them.

A complete failure to direct the jury on the effects of delay in any real way was fatal where the trial judge dealt with the issue of delay in his summing up in a superficial manner, merely telling the jury that "these incidents happened more or less a quarter of a century ago".<sup>93</sup> He neglected to explain fully the consequences of the delay, and told the jury to "remember the length of time that has passed".<sup>94</sup> The Court of Criminal Appeal held that while it was not always necessary to go into as much detail as was given in the *R.B.* warning, it was nevertheless satisfied that the trial judge should have dealt "reasonably fully" with all the problems caused by the delay in this case.<sup>95</sup> The Court of Criminal Appeal has also found a failure to contextualise the warning to be fatal where the trial judge neglected to mention that the complainant's story was uncorroborated, the events in question had happened almost 22 years earlier and no contemporaneous complaint was made.<sup>96</sup>

The trial judge must go beyond a general warning on the effects of delay, and must remind the jury of any specific problems caused to the defence by the passage of time, such as

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<sup>91</sup> *P.O'C. v. D.P.P.* [2000] 3 I.R. 87, at 118, *per* Hardiman J.

<sup>92</sup> *P.O'C. v. D.P.P.* (previous note).

<sup>93</sup> *The People (D.P.P.) v. P.J.* [2003] 3 I.R. 550, at 564.

<sup>94</sup> [2003] 3 I.R. 550, at 564-565.

<sup>95</sup> These included the fact the death of the complainant's mother and grandmother before the complaint was made, and the fact that certain medical and psychiatric evidence was now unavailable.

<sup>96</sup> *The People (D.P.P.) v. Gentleman* [2003] 4 I.R. 22.

the death of a member of the accused's family and the difficulty in gathering evidence as to whether he was living in the house at the time of the alleged offences.<sup>97</sup> However the Court of Criminal Appeal is keen to emphasise the fact-specific nature of their judgments in such cases, and so their potential value as guidance is limited.<sup>98</sup>

In *The People (D.P.P.) v. E.C.*, the lack of a warning also grounded an appeal, even though delay was dealt with as a preliminary matter, and counsel had failed to make requisitions on the requirement to give a warning, in circumstances where the failure to direct went to "a central and critical aspect of [the] whole case".<sup>99</sup> The Court placed emphasis on two factors apart from the delay: there were a number of complaints and various complainants; and the fact that some of the complainants were very young at the time of the alleged offences was a factor which of itself would suggest the requirement for a warning. The Court refused to set out the warning which should have been given, but held that there were some elements of corroboration that were present which would dictate the nature of the warning to be given. For example, the system described by the various complainants was very similar, and the applicant admitted being present in the Savoy cinema with one of the complainants when an offence was alleged to have occurred. Interestingly, the Court in *E.C.* considered that the *R.B.* direction, although a good example of a delay warning, was not "appropriate to the present case, or to every other case".<sup>100</sup>

In a recent decision, the Court held that there is a range of possible sample jury charges to be given between the very bare one given in *D.P.P. v. C.C.*<sup>101</sup> and the more detailed one given in

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<sup>97</sup> *The People (D.P.P.) v L.G.* [2003] 2 I.R. 517, [2003] I.E.C.C.A. 138.

<sup>98</sup> The Court held that these were "incidents of possible prejudice which were specific to these proceedings": [2003] 2 I.R. 517, at 529.

<sup>99</sup> *The People (D.P.P.) v. E.C.* [2006] I.E.C.C.A. 69; [2007] 1 IR 749, at 759. The Court ordered a retrial.

<sup>100</sup> [2007] 1 IR 749, at 758.

<sup>101</sup> Where the Trial judge stated: "As to the timeframe ... I think I harped on that repeatedly, highlighting all the contentions, the length of time ago and the frailties and the question of – I harped, I remember, on witness memories and so on, so I think the course of the charge in its entirety adequately met that

*R.B. or The People (D.P.P.) v. Cooke*.<sup>102</sup> The exact nature of the charge to be given depends on the particular circumstances of the case.

While the Court's willingness to respond to the fact-sensitive nature of these cases demonstrates the flexibility of the common law system, the resulting lack of principles and guidance for trial judges is problematic from a due process perspective. It is the opinion of this writer that, while it is important for the warning on delay to be contextualised to fit the facts of the case at hand, specific guidance on issues common to all historic child sexual abuse prosecutions should be offered to the jury. Issues such as the weight to be given to the fact of delayed reporting when assessing the credibility and reliability of the complainant's account are crucial. Warnings on the lack of medical and other forensic evidence, which would be available were the complainant made contemporaneously, could also be given. Such standardised warnings are particularly important given that a failure to requisition may be fatal to an appeal where the trial judge has given some warning on delay.<sup>103</sup>

Further issues arise in relation to cases involving multiple complainants. Historic child sexual abuse prosecutions often involve numerous complainants, many of whom allege offences very similar in nature against the accused. The need for an adequate warning on delay increases in cases involving multiple complainants.<sup>104</sup> In *The People (D.P.P.) v C.C.*<sup>105</sup> the Court of Criminal Appeal quashed the appellant's conviction for 180 counts of indecent assault and ordered a retrial. The delay ranged

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too": *The People (D.P.P.) v C.C.* [2006] 4 I.R. 287, at 293, *per* Kearns J., O'Donovan, Gilligan JJ. concurring

<sup>102</sup> *The People (D.P.P.) v. Cooke* [2009] I.E.C.C.A. 55.

<sup>103</sup> See *The People (D.P.P.) v. T.O'R.* [2008] I.E.C.C.A. 38. The Court noted that while the trial judge had not dealt with all of the points canvassed by defence counsel in his closing speech regarding the consequences of the delay, he had not been requisitioned in relation to his failure to do so. As a result the Court dismissed this ground of appeal. See also Coonan and Foley (above, n. 88), p. 505.

<sup>104</sup> Coonan and Foley, *The Judge's Charge in Criminal Trials* (above, n. 88), p. 503. See also *The People (D.P.P.) v E.C.* [2007] 1 I.R. 749; *S.H. v. D.P.P.* [2006] 3 I.R. 575.

<sup>105</sup> *The People (D.P.P.) v. C.C.* [2006] 4 I.R. 287.

from 28 to 37 years. The case involved six complainants who alleged abuse over a nine-year period when the appellant was their primary school teacher. The appellant was convicted of abusing the complainants during class in front of a classroom of pupils. Two of the complainants had no memory of the abuse when they were initially approached by gardaí. The Court of Criminal Appeal held that the prejudice caused by delay in the case of a single complainant:

... can only be seen as exponentially magnified where there are multiple complainants and a single accused. His difficulties of recollection, his difficulties in finding witnesses, or of even remembering the identity of individual complainants are all magnified in direct relation to the number of complainants who come forward. So, while the difficulties of delay may in such circumstances recede to some degree from the prosecution's point of view, they are multiplied and exaggerated from a defendant's point of view.<sup>106</sup>

In a recent decision, the Court of Criminal Appeal has offered some helpful guidance on the issue of corroboration and multiple complainants, where the sexual assaults were alleged to have occurred simultaneously or in the presence of the other complainants.<sup>107</sup> The Court held that that, there was no reason in law why, exceptionally, where the offences were not committed in private, the eye-witness evidence of one complainant cannot corroborate the evidence of another complainant, provided that other criteria are met and that no valid argument is made against it.<sup>108</sup> However, in the vast majority of cases the offences are

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<sup>106</sup> [2006] 4 I.R. 287, at 296. The trial judge should have dwelt "at some length" on the difficulties facing a defendant in old cases, particularly where no complaints were made in the aftermath of the offences and where there were few "islands of fact" which would enable a defendant to identify inconsistencies in the complainant's evidence and to address his mind in a specific way to the presence or otherwise of "certain physical arrangements or features of the environment in which it is alleged the various offences took place".

<sup>107</sup> *The People (D.P.P.) v. Cooke* [2009] I.E.C.C.A. 55.

<sup>108</sup> Furthermore, the jury need not be satisfied beyond a reasonable doubt of the accused's guilt in respect of a complainant in order for a co-complainant's

carried out in private, and so the guidance offered in this case is limited.

Defendants are more likely to be convicted in joint trials of multiple allegations.<sup>109</sup> Despite the potentially probative nature of multiple accusations, the jury must be warned against having regard to the cumulative effect of evidence in respect of offences of the same character.<sup>110</sup> It is suggested that more guidance from the Court of Criminal Appeal on how to deal with multiple allegations and multiple complainants is needed in order to safeguard defendants' due process rights.

### *B. The Need for Guidance on Evidential Rulings*

The ease with which inadmissible evidence impinging on the presumption of innocence might emerge, in spite of rulings by the trial judge, was clearly illustrated in a case earlier this year. In order to demonstrate that the absence of particular defence witness was not material, the prosecution witness gave evidence relating back to an account of an assault perpetrated by the accused years earlier, which apparently took place within a very short time and in the victim's house. Such evidence was "illustrative of the formidable challenges that might face the defence and a trial judge in seeking to ring-fence or segregate evidential issues".<sup>111</sup>

Cases involving multiple complainants pose additional challenges, in relation to the admissibility of similar fact evidence

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independent and admissible eye witness evidence to be corroborative of the offence.

<sup>109</sup> See Lewis, *Delayed Prosecutions for Childhood Sexual Abuse* (above, n. 11) at p. 201; Horowitz and others, "A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials" (1980) 10 *Journal of Applied Social Psychology* 444, at 453-454.

<sup>110</sup> *The People (D.P.P.) v. L.G.* [2003] 2 I.R. 517. In *The People (D.P.P.) v. B.K.* [2000] 2 I.R. 199 the offences were alleged to have been committed against young boys in a residential home for children from the Travelling Community. The Court of Criminal Appeal concluded that in respect of specific counts concerning different boys, the manner in which the offences were alleged to have been committed differed to such an extent that a joint trial of the counts had created an unfair prejudice resulting in an unsatisfactory trial.

<sup>111</sup> *J.D. v. D.P.P.* [2009] I.E.H.C. 48, *per* MacMenamin J.

and applications for joinder or severance of the charges.<sup>112</sup> In relation to admissibility, the courts will admit evidence of the defendant's previous misconduct, if it is relevant and the probative value of the evidence outweighs its prejudicial effect.<sup>113</sup> The considerations of relevance and the probative versus the prejudicial value of the evidence are merged in the court's focus on the balancing exercise.<sup>114</sup> The balancing of probative value against prejudicial effect has been criticised on the grounds that the two are incommensurable.<sup>115</sup> Nevertheless, where the alleged abuse offences are alleged to have been committed by the same person, then the probative value of the evidence increases:

... the probative value of multiple accusations may depend in part on their similarity, but also on the unlikelihood that the same person would find himself falsely accused on various occasions by different and independent individuals. The making of multiple accusations is a coincidence in itself, which has to be taken into account in deciding admissibility.<sup>116</sup>

Lewis notes that in some circumstances, evidence of a specific propensity will be relied on by the prosecution, and reasoning from evidence of this specific propensity on one count will be permissible in relation to another.<sup>117</sup> Alternatively, the prosecution may rely on the improbability of coincidence

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<sup>112</sup> It is of course extremely difficult for trial judges to make decisions on admissibility at the outset of the trial. However in *The People (D.P.P.) v L.G.* [2003] 2 I.R. 517 the Court held that the trial judge, when ruling on applications for separate trials, should also have expressly ruled on the question of the admissibility of similar fact evidence at the same time.

<sup>113</sup> *B. v. D.P.P.* [1997] 3 I.R. 140; *R. v. Christie* [1914] A.C. 545.

<sup>114</sup> Maher cites *B. v. D.P.P.* [1997] 3 I.R. 140 and *The People (D.P.P.) v B.K.* [2000] 2 I.R. 199 as examples of the effect of this balancing exercise. See Maher, "Developments in Bad Character Evidence: Undermining the Accused's Shield" (2007) 14 D.U.L.J. 57, at 58.

<sup>115</sup> See Zuckerman, *Principles of Criminal Evidence* (Clarendon Press, 1989), pp. 232-233; Carter, "Forbidden Reasoning Permissible: Similar Fact Evidence a decade after *Boardman*" (1985) 48 M.L.R. 29, at 36.

<sup>116</sup> *B. v. D.P.P.* [1997] 3 I.R. 140, at 157, *per* Budd J. See also *The People (D.P.P.) v L.G.* [2003] 2 I.R. 517.

<sup>117</sup> See generally Lewis, *Delayed Prosecutions for Childhood Sexual Abuse* (above, n. 11), ch. 8.

between allegations made by different complainants.<sup>118</sup> Guidance on how “cross-admissibility” between the charges is to be shaped by principles of constitutional due process would be most useful for trial judges.

### *C. The Memory Minefield*

How credibility is constructed, and how certain truths are validated or discounted, is central to the production of public truths in the form of convictions and acquittals. However, despite the importance placed by the Irish courts on the right to a fair trial, the issue of the credibility and reliability of the memory that lies at the root of the allegations is never discussed at any length. Instead, the reviewing courts prefer to rely on the trial judge’s power to direct the jury on the burden and standard of proof. Appellate guidance is urgently needed for trial judges on (a) how to decide on the admissibility of expert evidence explaining the reasons for the delay and (b) how to direct the jury on matters of credibility relating to repressed and recovered memories. Trial judges also need guidance on how to deal with issues relating to the disclosure of the complainant’s counselling and psychiatric records.

#### *1. Decayed Memories*

With the lengthy lapses of time involved in historic cases, it is not surprising that witnesses’ memories will have decayed. Often witnesses will have difficulty recalling what were mundane facts and “minutiae that fade from memory simply because they seem of no particular import at the time”.<sup>119</sup> Indeed, where the abuse is alleged to have occurred when the complainant was very young, issues around mistaken identification are very live. It is for this reason that discovery, post-conviction, of new evidence that the complainant was previously sexually abused by someone other than the defendant, may lead to convictions for rape and sexual assault being quashed, even where there is no significant delay in reporting.<sup>120</sup>

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<sup>118</sup> Lewis (above, n. 11), p.179.

<sup>119</sup> *P.O’C. v D.P.P.* [2000] 3 I.R. 87, at 93, *per* Hardiman J.

<sup>120</sup> See *The People (D.P.P.) v. T.C.* [2009] I.E.C.C.A. 63. The allegations of previous abuse only came to light during a consultation with a psychiatrist who

Hardiman J. has suggested that the dangers associated with failure of memory, even in trained professionals, should perhaps form the basis of a specific warning to be given in all historic child sexual abuse cases.<sup>121</sup> Such a warning could be similar to the so-called *Casey* warning which is given in relation to visual identification.<sup>122</sup> However, such warnings cannot be given in a “stereotyped” manner, but must be applied to fit the circumstances of the individual case.<sup>123</sup>

## 2. Repressed Memories

The second problem to arise in relation to memory is that of recovered or repressed memories. This is where the abuse is not remembered continuously, but is suddenly remembered many years after the alleged events. Recovered memories may pose problems for a number of reasons. The two main theories in this area, Child Sexual Abuse Accommodation Syndrome<sup>124</sup> and Betrayal Trauma Theory,<sup>125</sup> share a core emphasis on the distortion of information (*i.e.* memories of the abuse) for the purposes of preserving a relationship. Research on the danger of suggestion in the therapeutic context and the possibility for “auto suggestions” as the person seeks to “complete” the

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was preparing the Victim Impact Report for the sentencing hearing. The Court of Criminal Appeal held that, had the previous sexual history evidence been admitted under the trial judge’s discretion as *per* the Criminal Law (Rape) Act, 1981, s. 3, the information could have had an important effect on the course of the trial, on how counsel ran the case, on the cross examination, and on the jury.

<sup>121</sup> *J.B. v. D.P.P.* [2006] I.E.S.C. 66, *per* Hardiman J.

<sup>122</sup> See *The People v. Casey (No. 2)* [1963] I.R. 33.

<sup>123</sup> See for example the judgment of the Court of Criminal Appeal in *D.P.P. v. O’Donovan* [2005] 3 I.R. 385, [2004] I.E.C.C.A. 48, where the Court quashed the conviction on the basis that the warning in the charge consisted *inter alia* “... wholly of a quotation from *Casey*. This was we fear, delivered, as a ‘stereotyped formula’ ... it was not at all related, as it should have been, to the facts of the particular case”: [2005] 3 I.R. 385, at 392, *per* Hardiman J., Laffoy and Peart JJ. concurring.

<sup>124</sup> Summit, “The Child Sexual Abuse Accommodation Syndrome” (1983) 7 *Child Abuse and Neglect* 177; “Abuse of the Child Sexual Abuse Accommodation Syndrome” (1992) 1 *Journal of Child Sexual Abuse* 153.

<sup>125</sup> On betrayal trauma theory, see Freyd, *Betrayal Trauma: The Logic of Forgetting Childhood Abuse* (Harvard University Press, 1996).

memory<sup>126</sup> pose potential obstacles to the reliability of complainant testimony in historic cases.<sup>127</sup> Equally, however, feminist scholars have pointed out that the alleged phenomenon of “False Memory Syndrome” (where the memory of trauma is said to be objectively false, and created by a therapist) has not been recognised by the scientific community.<sup>128</sup>

A recent prohibition case illustrates the challenges presented to the courts in dealing with memories that emerge many years after the alleged abuse.<sup>129</sup> The High Court considered the application of an 84 year old man in ill-health, who was charged with multiple offences of indecent assault and rape against his niece in the mid to late 1970s. The complaint first emerged as a direct response to a question from a counsellor. At the time, the complainant was suffering from depression arising from her mother’s death, and was being treated with specialist medication. Her psychiatrist was of the opinion that the complainant may have had a number of suppressed memories from her youth which only resurfaced once her mother had passed away. Six months after making the complaint to the counsellor, the complainant told her relatives of the alleged abuse, by giving them written therapeutic notes of conversations between her childhood and adult personas. While the complainant continued to receive psychiatric treatment for “some time” after informing her family of the alleged abuse, no formal complaint was made for

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<sup>126</sup> Lindsay and Read, “Psychotherapy and Memories of Childhood Sexual Abuse: A Cognitive Perspective” (1994) 8 *Applied Cognitive Psychology* 281.

<sup>127</sup> Suggestibility is also relevant to understanding the ability of family members to distort memory. See Loftus and Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (New York: St. Martins, 1994).

<sup>128</sup> See Sheehy, “Evidence Law and ‘Credibility Testing’ of Women: A Comment on the E Case” (2002) 2 Q.U.T.L.J.J. 157, at 163. Sheehy notes that FMS is not recognised by the American *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association: Washington D.C., 4th edn., 1994). On recovered memories and the law see further Lewis (above, n. 11), ch. 7; British Psychological Society Research Board, *Guidelines on Memory and the Law* (June 2008), available at [www.bps.org.uk](http://www.bps.org.uk); Schuman and McCall Smith, *Justice and the Prosecution of Old Crimes: Balancing Legal, Psychological and Moral Concerns* (American Psychological Association, 2000).

<sup>129</sup> *C. v. D.P.P.* [2009] I.E.H.C. 400.

several years.<sup>130</sup> Indeed, the Court opined that the decision to make a formal report may have been prompted by an incident, witnessed by a Garda, where the accused made an offensive “V” sign to the complainant. While the Court found that the complainant “credibly” suppressed her memories of abuse for almost 30 years, the decision to prohibit was ultimately based on the omnibus test, looking at the cumulative effect of the delay in reporting, in particular the loss of crucial witnesses and the applicant’s ill-health. Hedigan J. held that the demonstrable prejudice to the accused could not be cured by appropriate warnings and directions by the trial judge. Unfortunately, therefore no guidance was offered as to how reviewing courts should approach the issue of suppressed memories, nor how trial judges should deal with the issue in warnings to the jury.

From a critical feminist perspective, issues also arise in relation to the construction of women’s stories of childhood abuse, particularly where psychiatric diagnoses of dissociative disorders and borderline personality disorder are applied to female complainants. In these cases, the effects of abuse may be misinterpreted as “symptoms”, and stigma is associated with the labels applied. This can mean that when abuse claims are reported, psychiatric diagnoses are often applied that compromise the credibility of the complainant.<sup>131</sup> It is therefore important that trial judges are alert to the dangers of attempts by over-zealous defence practitioners to cast the complainant as hysterical, in order to destroy his or her credibility.

### *3. Disclosure of Psychiatric Records*

The third issue relating to memory and historic child sexual abuse cases is that of disclosure of psychiatric and counselling records. The Irish courts have not considered in any

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<sup>130</sup> The complainant stated that she was afraid to bring charges because her two aunts, sisters of the accused who lived with the accused would deny the abuse and support their brother. When she finally reported to the authorities, the two aunts had died. However there was evidence from both the accused and the D.P.P. that both women denied the alleged abuse.

<sup>131</sup> Hall and Kondora, “‘True’ and ‘False’ Child Sexual Abuse Memories and Casey’s Phenomenological View of Remembering” (2005) 48 *American Behavior Scientist* 1339, at 1355.

great detail the problems associated with the disclosure of third party records,<sup>132</sup> such as counselling and medical records relating to the complainant, by the prosecution. In other countries, such as England and Canada, where there is no appellate review of decisions to allow trials to proceed, persons convicted of historic sex abuse have sought to challenge the lack of proper disclosure of records in order to impugn the fairness of the trial. It is likely that, in light of the reduced numbers of persons seeking prohibition since the decision in *S.H. v. D.P.P.*, appeals based on the lack of disclosure of such records will come more common.

Recovered memories or “flashbacks” experienced by the complainant during counselling at a psychiatric hospital were the basis for a rape allegation against Nora Wall, the first person in the state to receive a life sentence for rape. She was subsequently granted a certificate of a miscarriage of justice.<sup>133</sup> The fact that these were newly recovered memories, and other factors that lead to the granting of the miscarriage of justice certificate, only came to light as a result of an interview given by the complainant to a newspaper following the conviction, and not as a result of prosecutorial disclosure. While there was no suggestion of any *mala fides* on the part of the prosecution, or that the prosecution was aware of the recovered nature of the memories, the case highlights the importance of full disclosure of all *relevant* third-party psychiatric records relating to the complainant. However, in this context it is important to remember that the issue of relevance is a highly controversial one, particularly from a

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<sup>132</sup> An exception to this general trend is *D.D. v. D.P.P.* [2009] I.E.H.C. 48, where the High Court (MacMenamin J.) criticised the late disclosure of psychiatric and counselling records, and noted that any attempt at trial to demonstrate the “possible interlinkage between the two complainants’ narrative” would actually risk the inhibition of the defence in cross-examining prosecution witnesses. The late disclosure was also regrettable in light of the leaked media coverage of the case. See also the dissenting judgment of Hardiman J. in *P.G. v. D.P.P.* [2006] I.E.S.C. 19, [2007] 3 I.R. 48.

<sup>133</sup> See *The People (D.P.P.) v. Wall* [2005] I.E.C.C.A. 140 and O’Sullivan, “The Nun, the Rape Charge and the Miscarriage of Justice: the Case of Nora Wall” (2008) 59 N.I.L.Q. 305. The Ryan Report identifies Ms. Wall as having beaten children in her care, and finds that she exposed children in her care to “additional risk” by allowing male outsiders to stay overnight at the home of which she was the manager. The Report gives Ms. Wall the pseudonym of “Sr. Callida”: *Sunday Tribune*, 31 May 2009.

feminist perspective. The courts must be careful not to incorporate discriminatory myths about complainants into the decision on the importance or otherwise of third party records to the defence.<sup>134</sup>

Challenges also arise in relation to late disclosure of psychiatric and medical reports relating to the complainant(s), particularly the vexed question of who should adduce the evidence of such experts at trial.<sup>135</sup> Where there is late disclosure, issues relating to admissibility and relevance can quickly become issues for the reviewing court on an application for prohibition, instead of being the preserve of the trial judge as is normally the case. Where prohibition is not granted, but both sides have ventilated arguments relating to disclosure and admissibility, the trial judge must be prepared to formulate a charge that can encompass arguments relating to the late disclosure.

#### *D. Trial Judges' Rulings and Direction to the Jury*

There are grave practical difficulties facing trial judges in warning jurors about the dangers presented by delay. Since jurors must try the case only on what evidence is laid before them, there are serious challenges for the trial judge in trying to formulate a suitable direction on how to incorporate the fact of delay into their deliberations. The attempt to warn might well "degenerate into circularity",<sup>136</sup> while the judge may warn of the dangers posed to the defence by the lapse of time, she might also warn the jury of the possibility of the delay being a result of the abuse, thereby rendering the warning meaningless in terms of helping the jury in their deliberations and reducing the risk of injustice. Furthermore, judges must avoid going too far and

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<sup>134</sup> The key point is relevance – the courts must be careful not to incorporate discriminatory myths about hysterical complainants into decisions about the importance of third party records to the defence. See the criticism of third party records disclosure in Canada: Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1-278.9 of the Criminal Code" (2008) 20 *Canadian Journal of Women and Law* 111.

<sup>135</sup> See the comments made by MacMenamin J. in *J.D. v. D.P.P.* [2009] I.E.H.C. 48.

<sup>136</sup> See Hardiman J.'s comments on the difficulties in devising an appropriate warning: *J.O'C. v. D.P.P.* [2000] 3 I.R. 478, at 523.

inviting the jury to try the case on what the evidence *might* have been, had the case been tried earlier. Guidance from the Superior Courts on how to address these practical difficulties would greatly ease the difficult burden facing trial judges in historic cases, and would contribute to a fairer trial process for accused persons.

It is suggested that a standard warning should be given to the jury in every delayed prosecution for childhood sexual abuse. The warning could advise on how to accord appropriate weightings to the dangers and risk involved in delayed cases, by analysing the various dangers first separately and then cumulatively. Trial judges would of course be free to couch the warning in stricter or looser terms, depending on the individual case, but some key points of guidance could be provided. In particular, it is suggested that the jury should be specifically warned of the difficulties in constructing a defence where memories have decayed. The jury should be made aware by the trial judge of the complete absence of medical or forensic evidence, which would normally be present if the complaint was made contemporaneously.

Guidance on the meaning of the concept of dominion is also needed: for example it is not clear what weight should be attached to an alleged fear of reporting that lasted for thirty years after the alleged abuse. Furthermore, it is suggested that trial judges should caution against automatically placing a high probative value on memories of abuse that materialise only after many years. In this regard guidance on how to charge the jury in relation to expert evidence of recovered memories is crucial.

Consideration might also be given to a warning against according too much weight to the fact of multiple complaints. Important questions also arise such as to how trial judges should advise jurors to consider the potential importance (or otherwise) of the missing evidence of a dead witness? Can the trial judge advise on such issues without infringing the role of the jury? Whatever its form, it is suggested that the development of some standard minimum warning on the issues common to most delayed prosecutions for childhood sexual abuse. This would be consistent with the mounting demands placed on accused persons in prohibition applications, who must show not only that they run the real and serious risk of an unfair trial, but that also that this

prejudice cannot be remedied by way of rulings and directions by the trial judge.

### V. CONCLUSION

The silence surrounding child abuse has been shattered by a litany of reports, revelations and scandals. In the decisions on prohibition applications and appeals from convictions in historic child sexual abuse cases, the legal system is constructing the authenticity of suffering and criminalising those found responsible. The principled asymmetry at the heart of the criminal process requires that due process protections, including the right to a fair trial and the presumption of innocence must be jealously protected if the system is to be faithful to the moral foundations of the criminal justice system.<sup>137</sup> It is therefore absolutely imperative that a principled approach to the fairness of these trials is developed. Indeed the right to a fair trial requires the courts to ensure due process “especially ... in storms of controversy or the hardest of cases”.<sup>138</sup>

The courts have recognised that historic child sexual abuse cases take place in a “landscape disconnected from the normal matrix of surrounding physical and circumstantial detail”.<sup>139</sup> Reconciling the secretive nature of these offences with the criminal standard of proof requires much more than a credible complainant. Therefore, investigating and prosecuting authorities must be as diligent as possible in seeking out as much collateral evidence supporting the complainant’s account, and showing the consistency of the complainant’s version of events if the right to a fair trial is to be vindicated.<sup>140</sup> Equally, trial judges must be

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<sup>137</sup> See Roberts, “Double Jeopardy Law Reform: A Criminal Justice Commentary” (2002) 65 M.L.R. 393, at 402 and Dworkin, *Taking Rights Seriously* (Duckworth, 1977), p. 205.

<sup>138</sup> *C. v. D.P.P.* [2009] I.E.H.C. 400, *per* Hedigan J.

<sup>139</sup> *R. v. D.P.P.* [2009] I.E.H.C. 87 (O’Neill J.). That case involved a 30-year delay. “Older sexual abuse cases invariably take the form of a contest between bare assertion and mere denial, in an empty landscape disconnected from the normal matrix of surrounding physical and circumstantial detail.”

<sup>140</sup> Hardiman J. has set out the practical steps to be taken by prosecuting authorities in investigating old allegations of sexual offences. These include a full record being taken by videotaping or otherwise of the allegation as

vigilant in protecting the accused person from overly harsh cross-examination. Indeed, the Supreme Court has specifically criticised cross-examination that oversteps the truth-finding function of the exercise, and instead makes assertions as to the disposition of the accused to sexually abuse children.<sup>141</sup>

The prohibition case law in historic childhood sexual abuse prosecutions exemplifies the common law's ability to adapt and change in accordance with the needs of society. It also reflects a willingness on the part of the courts to accommodate victims' reasons for delayed reporting and the need to prosecute serious crime despite problems posed by lapse of time. By instituting a prejudice-based test the courts have located the core of the prohibition inquiry in the question of fairness of the impending trial. This is a welcome development, since the reasons for the delay in reporting are irrelevant to the issue of whether the trial should be halted. However, the numerous inquiries under the pre-*S.H. v. D.P.P.* case-law into the reasons for the delay has given birth to a presumption that the accused will not be prejudiced by the delay. This is evidenced by the courts' approach to the issue of demonstrable prejudice and the lack of importance placed on the disappearance of witnesses.

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originally made and of any altered, additional or supplemental allegation with a view to establishing consistency and the identification and isolation of "islands of fact": *J.B v. D.P.P.* [2006] I.E.S.C. 66, *per* Hardiman J.

<sup>141</sup> *The People (D.P.P.) v. D.O.* [2006] I.E.S.C. 12; [2006] 3 I.R. 57. In that case a "remarkable series of questions" was put to the accused, culminating in the suggestion that he "fitted the bill" of the type of person "that [the complainant] contends you are a vicious sexual abuser ...". Murray C.J. also criticised the "comment in the form of a question": "You don't seem to have many erections?", and the question, "Now back to masturbation, when did you last masturbate?". The demeaning nature of these questions was underscored by their irrelevance to the issues before the jury. The accused was also cross-examined on his involvement with the Boy Scout movement, with counsel suggesting that his involvement was indicative of his "colossal appetite for engagements involving boys" and that this involvement was part of the "profile" of a sexual deviant or pervert. Murray C.J. observed that, "Apart from the fact that general evidence as to an alleged criminal disposition of an accused, or a profile to that effect, is inadmissible in law there was no evidential basis before the jury for such an inference being drawn from the accused's involvement in the Boy Scout movement nor any as to what the 'profile' of such a deviant or a pervert might be". Hardiman J. commented that he had never heard or read a cross-examination like the one in this case.

The risks of injustice associated with a trial of the credibility of the witnesses are compounded where the passage of time may have destroyed material evidence, and relevant witnesses may have disappeared. Furthermore, the shift from a fault-based to a prejudice-based test has sidelined arguments relating to the prejudice caused by the passage of time in itself. Arguably this has resulted in a lack of adequate consideration of the enormous task facing trial judges in trying to ensure due process in historic child sexual abuse cases.

In light of the serious evidential hurdles posed to defendants charged with historic offences of child sexual abuse, the difficulty facing defendants in trying to show how they have been prejudiced by the delay in reporting, and in light of the risk that an eventual trial may amount to bare assertion countered by bare denial, the risk of an unfair trial for persons accused of historic child sexual abuse is unconstitutionally high. Accordingly it is crucial that trial judges are provided with appropriate directions and warnings in order to ensure the due process rights of the accused are guaranteed. The case law emanating from the Court of Criminal Appeal in historic child sexual abuse cases reveals that the Court is willing to overturn convictions in circumstances where the judge's charge did not adequately deal with the prejudice to the defendant caused by the delay. However, the Court has yet to suggest a standard warning to be given by the trial judge that deals with the issues common to historic child sexual abuse cases, such as the weight to be given to the fact of a deceased witness or missing evidence, or the prejudice caused by decayed and faulty memories. Particular guidance would be most welcome in relation to repressed memories and rulings by trial judges on disclosure and admissibility of the complainant's psychiatric and counseling records. Guidance on rulings and directions to the jury is especially important given the reluctance of the courts to grant an order of prohibition on the grounds of delay, even where that delay extends over decades. It also seems particularly urgent, in light of comments made by Hardiman J. in April 2008:

Perhaps because of the shock which civil society in general sustained from the revelation of incidences of

child abuse by improbable persons and in numbers much greater than might have been anticipated, the fact is that the complainant in cases such as this attracts a considerable level of presumptive credence from judges and jurors.<sup>142</sup>

The provision of appellate court guidance on matters arising from delayed reporting is paramount if the accused person's constitutional right to a fair trial is to be vindicated. Anything less not only undermines due process, but also risks miscarriages of justice,<sup>143</sup> and jeopardises the legitimacy of the entire criminal justice process.<sup>144</sup>

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<sup>142</sup> *P.D. v. D.P.P.* [2008] I.E.S.C. 22, per Hardiman J., dissenting. Indeed the "presumptive credence" of the investigating authorities was a feature of *The People (D.P.P.) v. Hannon* [2009] I.E.C.C.A. 43, where a miscarriage of justice certificate was granted in respect of a conviction on a number of counts of sexual assault and of assault. The granting of the certificate only came about as a result of the complainant's complete retraction of the allegations. In that case, which concerned a contemporaneous complaint, the investigating Gardai "simply did not believe" that a child of ten could make up such allegations. *Hannon* is a salutary reminder of the need for rigorous and critical investigations in all cases of alleged sexual violence. The Court reserved the question of whether only a person whose innocence is recognised or incontrovertible is entitled to a miscarriage of justice certificate for a later date. It is eminently possible that such a case could arise in the context of historic child sexual abuse prosecution, given the potential for unfairness in these cases.

<sup>143</sup> Dworkin argues that a wrongful conviction is a deep injustice and a substantial moral harm. It is avoidance of this harm that underlies the universal insistence on respect for the right to a fair trial, and with it the presumption of innocence. See Dworkin, *Taking Rights Seriously* (above, n. 137), and Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10 *International Journal of Evidence and Proof* 241.

<sup>144</sup> A function of the criminal process is to communicate its legitimacy by demonstrating to the community that its procedures have been fairly applied and that the best attempt at reaching the truth has been made. See Jackson, "Managing Uncertainty and Finality: The Function of the Criminal Trial in Legal Inquiry", in Duff, Farmer, Marshall and Tadros (eds.), *The Trial on Trial, Volume 1: Truth and Due Process* (Hart Publishing, 2004), p.125.