

**THE HIGH COURT**

**[2023] IEHC 458  
[2008 NO. 6467P]**

**BETWEEN:**

**S.T.**

**PLAINTIFF**

**AND**

**DERMOT CLIFFORD**

**DEFENDANT**

**JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 6th day of JULY 2023.**

1. This is a defendant's application to dismiss proceedings claiming damages for assault on the ground that adverse effects of passage of time since alleged occurrence of the matters giving rise to the plaintiff's cause of action are such as to preclude a fair trial, and therefore, it would be unjust to require this defendant to meet the claim. Courts enjoy inherent jurisdiction to dismiss a civil action where evidence demonstrates that effects of passage of time will be deprive a defendant of the constitutional right to a fair trial.
2. The material which the defendant relies on as precluding the prospect of a fair trial is not sufficient to persuade this Court to determine this application in his favour. This Court is not satisfied that passage of time has resulted in a situation where the defendant cannot get a fair trial.
3. The plaintiff was born in February 1973. The defendant is the retired Roman Catholic Archbishop of Cashel and Emily. The plaintiff initially claimed that between 1982 and 1989 he was sexually abused by a curate attached to a parish in this Diocese. The alleged abuse relates to a period when the plaintiff served in that parish as an altar boy. He makes a definitive allegation that he was being abused when he was captain of an under 12s GAA team in the local town. His case is that this abuse was reported to a local GP and Gardaí at the time and that the curate then moved from the area.
4. Investigation of records relating to priests assigned to the parish revealed that a priest with the surname provided by the Plaintiff was assigned to the parish as a curate between 1974 and September 1988. The plaintiff initially attributed an incorrect Christian name to this curate.
5. The defendant is sued as a representative of the Diocese. The plaintiff claims that those in control of the Diocese were vicariously responsible for these assaults and that he should be compensated by them out of diocesan funds. He also alleges that those who exercised authority and control over priests in the Diocese at the time of the alleged abuse failed to properly supervise those priests in a way which would have protected him. This is a recent feature of this claim which arises from an amendment to his statement of claim in 2020.

6. The curate moved to another parish in 1988. He died in January 1996. His parish priest at the time died in 1995. Another curate who served in the parish from 1987 died in 2009. The archbishop of the Diocese died in 1997. Other priests who served with the curate in his new parish are dead. Others have no recollection of any issue relating to him. Some of his clerical friends are also now dead.
7. This action was commenced in 2008. It relates to events which occurred some 22 to 25 years earlier. A further period of 15 years has now passed.
8. A preliminary letter from the defendant's solicitors in August 2008 sought information on the allegations. This was replied to in September 2010. It then emerged that the plenary summons had not been served. An order was obtained for renewal of this summons in February 2011. A letter seeking particulars in 2011 was replied to in February 2015. These replies provided little information.
9. The courts have repeatedly emphasised that those who bring legal actions long after date of accrual of their cause of action have a self-serving duty to proceed to trial with expedition. Procedural delay may prejudice either party.
10. This point applies both to exercise of inherent jurisdiction to dismiss proceedings where the prospect of a fair trial has been compromised by effects of passage of time and to exercise of jurisdiction to dismiss an action on grounds of inordinate and inexcusable delay in the manner in which it has been prosecuted.
11. This application to dismiss the action was initiated in 2018. It was adjourned pending an application by the plaintiff to amend the proceedings and subsequently re-entered by the defendant. Many details of the plaintiff's allegations were first provided to the defendant's solicitors in 2020 , 2021 and 2022.
12. A plaintiff who wishes to see off an application to have a case withdrawn must advance any available material which demonstrates that a defendant will not suffer the alleged prejudice. This material may demonstrate the strength of that plaintiff's case or that there are areas of inquiry which are still available to that defendant. If a plaintiff is aware that admissible material remains available which supports the allegations or rebuts defences of fabrication, then that material should be disclosed, and the content set out in full. If a plaintiff is aware of material such as names and addresses of potential witnesses to surrounding circumstances, then this information should be provided.
13. Documentation accompanying this application indicates that the plaintiff has sought and obtained discovery of diocesan records. It is not clear whether the defendant has the advantage of discovery of the plaintiff's medical records. Information disclosed to the defendant in late 2021 and in 2022 shows that the plaintiff has an extensive medical and psychiatric history. Over the years since 1994 he has attended mental health facilities in Clonmel, Nenagh, Ennis and Limerick. Many of these attendances were in-patient admissions.

14. This defendant is relying solely on the inherent jurisdiction of courts to dismiss an action because passage of time has precluded a fair trial of the issues. He does not rely on the inherent jurisdiction of courts to dismiss legal proceedings where a plaintiff has engaged in inordinate and inexcusable delay in prosecuting a claim.
15. He asserts that it is no longer possible to engage in a meaningful challenge to the plaintiff's claim. He asserts that back in 2008 when this action was initiated it was already impossible to conduct a fair trial because the alleged abuser, his parish priest and his bishop at the time were all long dead. There is nothing in diocesan records to indicate that the curate had any proclivity to sexual impropriety.
16. Any claim made by a litigant, whether plaintiff or defendant, must be supported by convincing admissible evidence. Lapse of time may make it impossible to investigate a claim and present evidence. This difficulty for a defendant may be greater where the basis on which liability is sought to be imposed is vicarious responsibility.
17. Vicarious liability is a common feature of tort claims. Employers and others exercising authority are regularly sued on the basis that they are responsible at law for the torts of their employees or those under their control. The merits of their defences to such claims are only as good or bad as that of an employee or other vicar who may turn out to be an unsatisfactory witness with no good answer to a claim.
18. The plaintiff relied on the following extract from the judgment of Henchy J. in *n O'Domhnaill v. Merrick* [1984] I.R. 151 at page 158 of the report: "Consequently, in my opinion, the defendant, who has not in any material or substantial way contributed to the delay, should be freed from the palpable unfairness of such a trial." The plaintiff submitted that he was not to blame for any lapse of time which resulted in obstacles to proof for the defendant.
19. One of the features of *O'Domhnaill v. Merrick* and later authorities is that courts, in considering whether to exercise this jurisdiction, have regard to whether a defendant's behaviour contributed to lapse of time. Courts also have regard to a plaintiff's behaviour. For example, could a plaintiff who has come of age have decided to bring an action on an earlier date than that when proceedings were eventually commenced? Conduct of parties to litigation may contribute to a situation where it becomes impossible to conduct a fair trial. However, this jurisdiction extends to cases where a plaintiff has not engaged in culpable delay in commencing or prosecuting proceedings.
20. Fault or culpable delay by either side which results in want of admissible evidence or other disadvantage caused by lapse of time may be relevant to exercise of inherent jurisdiction to dismiss an action on grounds relating to the effect of lapse of time for reasons explained in the judgment of Clarke J. in *Nash v. Director of Public Prosecutions* [2015] IESC 32. Culpability may relate to conduct prior to the institution of proceedings and conduct during the course of those proceedings.

21. Clarke J. summarised fundamental principles at para 2.19 of this judgment as follows:

“Thus, it seems to me, in summary, the fundamental principles can be expressed in the following way:-

- a) There is a significant constitutional imperative in favour of all issues of rights, liabilities or obligation, whether criminal or civil, being determined on the merits as a result of a trial at which all admissible and relevant evidence is analysed and the law properly applied to the facts which thereby emerge;
- b) In order that such a trial on the merits not proceed it is necessary that there be a sufficiently weighty countervailing factor involving important constitutional rights which, in the circumstances of the case, outweigh the constitutional imperative for a trial on the merits;
- c) In the context of lapse of time the countervailing factor may, if sufficiently weighty in the circumstances of the case, be one of:-
  - i. culpable delay, which is such that it would, having regard to the period of time over which the proceedings or potential proceedings have been left hanging over the relevant party, be a sufficient breach of constitutional fairness so as to make it proportionate to prevent the proceedings from going ahead;
  - ii. a lapse of time which, irrespective of whether blame can be attached to any person, has rendered it impossible that a true trial on the merits can be conducted and has, therefore, placed whatever controversy might have been the subject of the trial beyond the reach of fair litigation or;
  - iii. culpable delay where a trial on the merits is, nonetheless, still possible but where, in the context of the issues in the case and the evidence which could or might be or have been available, the trial which could ultimately be conducted is, by reason of lapse of time caused by culpable delay, significantly further from the ideal of a perfect trial than would have been the case had no such culpable delay occurred. Where, therefore, justice is diminished through fault. A clear balancing exercise arises in such cases. It will only be appropriate to prevent a final decision on the merits where it is proportionate so to do as a response to any culpable delay established.”

22. A mix of factors may be at play. Some features of applications to dismiss actions because of inordinate and inexcusable delay are also relevant to applications to dismiss actions because passage of time has precluded a fair trial. Proceedings in cases where a long period of time has elapsed between accrual of a cause of action and commencement of litigation are sometimes pursued in a leisurely fashion. A defendant who is responsible for delay with consequent loss of admissible evidential material may be precluded from relying on the inherent jurisdiction. That defendant has an incentive to spin out litigation in the hope that a plaintiff will give up or witnesses will die. A

plaintiff who is responsible for such delay may suffer the drastic consequence of having the action dismissed or find that essential potential witnesses have died.

23. This Court must evaluate from evidence in this application what material was unavailable prior to the start of proceedings in 2008 and what further material has become unavailable since then. This Court must assess matters by reference to whether the process can be fair at the likely date when this action will be tried in the event that it is allowed to proceed.
24. However, if evidence establishes that a fair trial would have been precluded if this action had come on for hearing in 2008, it will follow that what happened thereafter is irrelevant. Whether one side or the other was to blame for procedural delays thereafter which may have resulted in prejudice to either the plaintiff or the defendant as a result of loss of litigation advantages could not affect the outcome.
25. Clarke J. made the following further observations at paras. 2.20 and 2.21 of his judgment in *Nash v. Director of Public Prosecutions*:

“It is important to emphasise that those underlying principles apply equally in the context of criminal and civil proceedings. They inform the jurisprudence which has developed as a means of giving practical implementation to those principles but do so, because of the obvious difference in the nature of the relevant proceedings, in a different way in the civil and the criminal context.

Before leaving the general principles applicable, there are two further points which I would wish to make. First, there has been a growing tendency for the courts, when asked to prohibit or otherwise prevent a trial from going ahead (by means of prohibition in the criminal context or by stay or dismissal for inordinate and inexcusable delay in the civil context) to consider whether it might be more appropriate to leave the final decision to the trial judge. Where it is clear that no true trial on the merits is capable of being conducted then such a course of action may well not be appropriate. Likewise, there may be circumstances where delay *per se* leads to it becoming constitutionally unfair to allow a trial to proceed in circumstances where nothing which would be likely to emerge at the trial would alter the proper assessment of where the balance of justice lies in the case in question. However, in many cases, and most particularly those cases where it is suggested that the fundamental constitutional unfairness stems from an accused or defendant being required to be subjected to a trial which has been rendered significantly more distant from the ideal of a perfect trial by reason of culpable delay, it may well be that an assessment of the extent of any such difficulties will much more easily be made by a trial judge. Such a judge will be able to assess, in the light of the evidence which is actually tendered and in the light of having a much better ability to assess the kind of evidence which might have been tendered were it not for the delay (and the relevance and importance of such evidence in practice), whether the extent of departure from the ideal of perfect trial is sufficiently significant to warrant interfering with the constitutional imperative that

proceedings should be tried on their merits. Likewise, a trial judge will almost invariably be in a better position to determine whether the ability to assess the credibility or cogency of evidence has been impaired by lapse of time.”

26. One issue which emerges from these statements of the law concerns the correct test to be applied in order to determine this application. What must a defendant in civil proceedings establish in order to show that the effect of passage of time such that a court should not permit an action to proceed? In the passage quoted supra, Clarke J. frames the issue as one of proof that “no true trial on the merits is capable of being conducted.”
27. “The test to be applied has been described variously such as, by reason of lapse of time or delay: (i) is there a real risk of an unfair trial, and/or of an unjust result; (ii) is there a clear and patent injustice in asking the defendant to defend; or (iii) does it place an inexcusable and unfair burden on such defendant to so defend?” : see para 40 of the judgment of McKechnie J. in *Comcast International Holdings Inc and Others v. Minister for Public Enterprise and Others* [2012] IESC 50. There are some subtle differences between these formulations.
28. In criminal cases an accused must establish as a matter of probability that there is a “real risk” of an unfair trial. In civil cases less is at stake for a defendant. The “real risk” criterion has been used as a test in relation to other aspects of civil procedure: see *Sweeney and Another v. The Voluntary Health Insurance Board* [2022] 2 I.R. 327; [2022] IESC 58.
29. This Court proposes to apply the “no true trial on the merits is capable of being conducted” formulation to this application. The defendant must establish that. This is closest to the formulation which requires a court to consider whether effects of loss of material and other relevant circumstances, including conduct of that defendant, place an unfair burden on that defendant if that defendant is forced to defend and to the formulation which emphasises that a defendant must demonstrate that a requirement to meet the case on the merits would result in a defendant being subjected to a clear and patent injustice.
30. Criminal and civil proceedings involving allegations of historic sexual abuse give rise to special problems. It is a recognised fact that victims of this type of abuse are severely affected. They may only disclose what happened years afterwards. Victims are often children and others with vulnerabilities. Delay in bringing legal proceedings often arises because of psychological impairment brought on by abuse.
31. Criminal law permits trials of a defendant charged with offences alleging historical sexual abuse to proceed to verdict unless that defendant can demonstrate that there is a real risk that they will receive an unfair trial. These prosecutions were never subject to time-bar rules. There is a public interest in ensuring that perpetrators of crime are brought to justice. Issues of whether a person who alleges abuse might have made a complaint initiating the criminal process at an earlier stage are, in general, not relevant.

32. Courts adjudicating on applications to prevent criminal trials in cases of historic sex abuse these days are less indulgent of arguments that such trials should be prohibited or terminated on the basis of speculative assertions that if only such and such a person were alive or available there might be evidence demonstrating that activities could not have occurred in the manner alleged.
33. These points are relevant to civil actions claiming compensation arising from alleged sexual abuse.
34. What holds good for criminal trials where proof must be beyond reasonable doubt should also hold good for civil cases involving claims of sexual abuse, where less is at stake and the standard of proof is lower.
35. In order to show that the claim is not statute-barred a plaintiff must prove psychological injury as a result of sexual abuse which materially impaired will or ability to make a reasoned decision to bring an action. If there is such evidence, then this will supply a reason for delay by a plaintiff in starting an action during any period of such disability.
36. A defendant's failure to exercise supervision and authority may have contributed to the state of affairs which has produced this psychological difficulty for a plaintiff with resulting long passage of time before institution of proceedings. If this has happened, is it unfair that such a defendant, who may be an institution, or the estate of a deceased defendant can pray in aid effects of that passage of time as precluding a trial on the merits?
37. Civil law actions for assault are generally statute-barred after six years from date of assault. In cases of assault on a minor, this limitation period begins to run when the person reaches 18 years of age. Actions alleging negligence in supervision associated with such assaults eventually become time-barred under different provisions. S.48A of the Statute of Limitations 1957, (the 1957 Act) as inserted by s.2 of the Statute of Limitations (Amendment) Act 2000 (the 2000 Act) treats a claimant as under disability and, in a case of sexual abuse of a child, extends the period of disability beyond the date when a child reaches full age, where that person establishes that sexual abuse caused or contributed to psychological injury of such significance that the will or ability of that person to make a reasoned decision to bring an action is substantially impaired. This period of disability continues until the relevant impairment ceases.
38. In this case a medical report has been exhibited which supports the plaintiff's contention that he was suffering from psychological effects as a result of sexual abuse which prevented him from making a reasoned decision to take legal proceedings until 2008.

39. Prior to enactment of s.8(1) of the Civil Liability Act 1961 (the 1961 Act) any cause of action of this plaintiff against the deceased curate arising from the alleged assaults would not have survived against his estate.
40. This statutory extension of the period limitation for those suffering psychological disability in cases of sexual abuse does not avail a claimant who sues the estate of an alleged perpetrator. Any such action will be time-barred if it is not brought within 2 years of the date of death: see s.9(2) of the 1961 Act.
41. The result of these changes is that many civil actions relating to allegations of sexual abuse may now be brought decades after events which gave rise to the causes of action. However, a plaintiff is deemed responsible for the acts of any concurrent wrongdoer where, as in this case, an action against that wrongdoer in respect of those acts has become statute-barred: see s.35(1)(i) of the 1961 Act.
42. Section 3 of the 2000 Act specifies that S.48A of the 1957 Act does not interfere with the jurisdiction of courts to dismiss actions "on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal." This references examination of effects of passage of time in the period of time prior to the date when legal proceedings are commenced. However, the inherent jurisdiction of courts to dismiss an action because of adverse effects of passage of time on the trial process is not confined to analysis of occurrences during this period.
43. The reference to "delay" in s.3 of the 2000 Act may not equate with culpability of a plaintiff. This word, as used in that section, appears to connote passing of time between occurrence of the cause of action and commencement of legal proceedings. Any extension of the limitation period is premised upon a plaintiff being able to establish by evidence a sound basis for being treated by the law as being under a continuing disability, and therefore not being culpable for not commencing proceedings during the period of that disability.
44. There may be circumstances in which, irrespective of absence of culpability of a plaintiff, it will be appropriate to dismiss an action because effects of passage of time are such as to make it unjust to the defendant to permit the action to proceed further.
45. Where a plaintiff has ceased to be under a disability, then any subsequent delay in either commencing or advancing proceedings to trial will involve culpability. This includes activities which prolong proceedings such lack of cooperation in providing basic information and refusal to provide particulars.
46. The parties cited a number of authorities in the course of submissions to this Court. In particular, the defendant in written and oral submissions relied on passages from the judgment of Hardiman J. on behalf of the Supreme Court in *W v. L* [2014] IESC 75.



47. This was an appeal by a plaintiff from a judgment of Charleton J in *W v. W* [2009] IEHC 542. The High Court had dismissed her action against her grandfather claiming that he sexually abused her on grounds of delay. In the interval between the High Court decision and the hearing of that appeal the defendant had died.
48. This Court is cautious about over-reliance on this judgment. Some of the passages relied on by the defendant appear to suggest that risk of false allegations of sexual impropriety is a factor to be considered in deciding these applications. Mandatory corroboration warnings in criminal trials involving evidence of children or involving evidence of commission of sexual offences have been abolished by statute. Any view that such categories of evidence should be treated as inherently unreliable lacks empiric support.
49. Has a plaintiff a motive or been prompted to make or persist in a false or exaggerated complaint or some personality disorder or psychiatric condition which is associated with such behaviour? There must be some basis for suggestions that evidence is affected by such matters. How has passage of time impaired a defendant in exploring these issues?
50. Death may strike any litigant or potential witness in an action at any time. A potential witness may have died prior to commencement of proceedings or prior to trial. Testimony from a person who has died might have assisted the plaintiff or the defence. Where the death of a potential witness is on the plaintiff's side, one effect may be that the claim is incapable of being proved. Where the death of a potential witness is on a defendant's side, that may affect the ability of that defendant to present a convincing defence. The extent of actual disadvantage to a defendant may depend on evidence touching on whether that deceased could have offered anything significant and convincing in rebuttal of a plaintiff's claims.
51. These issues have been recently considered in in the judgment of the Court of Appeal in *Irish Bank Resolution Corporation Limited and Another v. Fingleton* [2023] IECA 114. This judgment related to an application to dismiss an action which was based on evidence of deterioration of mental faculties of the defendant. It contains a useful analysis of relevant case law. Para. 59 of the unapproved version provides the following summary of legal rules applicable where an application is made to dismiss an action because of adverse effects of lapse of time:

“From these cases the following principles emerge which are relevant to the application before this court:

1. The burden is on the moving party to establish that there is a real and serious risk of an unfair trial or an unjust result or that there is a clear and patent injustice in asking the defendant to defend or that it places an inexcusable and unfair burden on such defendant to so defend.
2. It is an exceptional jurisdiction which must be used rarely.

3. The court must look at the circumstances pertaining at the date of the application and consider the date of the alleged acts and omissions and the likely date of trial when considering the lapse of time in the case.
  4. The court must look at the nature of the claims and the defences raised. It must access the nature of the evidence to be led and the issues to be decided. It must weigh the role of documents in this context. In medical negligence claims the presence or absence of medical records is highly relevant. The court must consider whether it is a case where documents will play a very significant role or not; whether such documents exist and the extent to which oral evidence is likely to be required and/or contested and/or critical to resolving the issues to be decided by the court.
  5. In the context of all of the above the court must assess the prejudice the defendant asserts and the evidence he or she adduces to support the assertion. The fact of the existence of litigation disadvantage does not preclude the conduct of a fair trial or lead to the conclusion that the result will be unfair. The Oireachtas has legislated to allow cases to be brought by or against deceased persons, and persons who lack capacity may both sue and be sued. In each case of necessity, the litigant suffers a degree of disadvantage in comparison to a litigant who is not so situated. Therefore, the fact that a defendant lacks the capacity to conduct the proceedings and to give evidence on his own behalf, while undoubtedly prejudicial, does not lead to the conclusion that proceedings involving such a litigant must be dismissed or permanently stayed..."
52. The defendant also referred to the judgments of Meenan J. in *Barrett v. Hogan* [2020] IEHC 668; of Irvine J. in Court of Appeal itself in *Cassidy v. The Provincialate* [2015] IECA 74, and of Ferriter J. in *Scannell v. Kennedy and others* [2022] IEHC 169. The major factor which influenced these decisions not to allow the actions to proceed to trial was absence of available material which would enable defendants to mount a meaningful challenge to the plaintiffs' evidence. Those defendants were considered to be at such a disadvantage that the court did not permit the actions to proceed.
53. These outcomes all turned on evaluation of facts established by evidence in those applications. For instance, in *Barrett v. Hogan* the plaintiff did not disclose alleged abuse until years after the events complained of. The defendant was unable to challenge any part of the plaintiff's evidence relating to the claimed abuse and no independent material of any sort was available to support the plaintiff's evidence.
54. However, death or incapacity of a potential witness does not automatically compel a court to exercise inherent jurisdiction to refuse to permit an action such as this one to proceed: see Ferriter J. in *Scannell v. Kennedy and others* at paras. 40 to 42 and McDermott J. in *J.C v. S.D* [2012] IEHC 383 at para. 5.17. It is but one factor to be taken into consideration as part of overall evaluation of whether the evidence demonstrates that a true trial on the merits is incapable of being conducted. Death of an

alleged wrongdoer may or may not make defence of an action more difficult for other defendants or for the estate of that deceased.

55. Sometimes a defendant has been able to identify a specific disadvantage as a result of death of a potential witness and convince a court that the trial process was unfair for that reason. An example is *McNamee v. Boyce* [2017] 1 I.L.R.M. 168; [2017] IESC 24. In that case the defendant's wife, who had previously given material evidence in criminal proceedings which resulted in an acquittal, had died. As a result of her death the defendant did not have the advantage of her evidence in a subsequent civil case. Furthermore, he could not rebut an allegation which was first made in the plaintiff's evidence in that civil case of a complaint to the defendant's wife about his conduct. The Court of Appeal considered that the action should have been withdrawn from the jury on grounds that passage of time which resulted in loss of this evidential material precluded the possibility of a fair trial.
56. It may be possible to get around some of these types of difficulties. For example, a deposition may be taken, or evidence given by a person who is now dead in a previous trial relating to matters in dispute may be admitted as an exception to the rule against hearsay. The solution may often be to permit an action to proceed and for the presiding judge at the end of the evidence to assess whether absence of potential evidential material proved to have formerly existed has in fact resulted in an unfair trial. Allegations by an alleged victim of complaints or disclosures to family members or other outsiders who are dead and therefore cannot give evidence of their fact or terms must be excluded from consideration. They are not admissible evidence.
57. A plaintiff in an action alleging historic sexual abuse may be privy to information which demonstrates that a defendant is not prevented from mounting an effective defence or that a line of defence which is claimed to have been lost as a result of passage of time may never existed. A plaintiff may know of potential witnesses or persons having information which is material to relevant issues. A plaintiff will have ready access to records relating to medical history, including psychiatric history. This may contain information which may be inconsistent with the case being made in the action. A plaintiff will know when and to whom alleged sexual abuse was disclosed. A plaintiff may also have information pointing to actions taken by others on foot of any such disclosure.
58. If such evidential material is available, it may not follow that no true trial on the merits is capable of being conducted. Any disadvantage of a defendant may be more to do with inherent weakness of that defendant's case than loss of a potential source of evidential material which either never existed or was unlikely to be accepted.
59. It may be possible for a plaintiff to demonstrate by evidence that prejudice which a defendant claims to suffer as a result of absence of potentially evidential material is not as serious as is asserted and that what is no longer available was unlikely to assist the defendant. An example of a case where this was demonstrated is to be found in the

judgment of O'Malley J. in *O'Carroll and Another v. EBS Building Society and Another* [2013] IEHC 30.

60. In this case the issue of whether the deceased curate could have had anything convincing to say in rebuttal of the plaintiff's claims in this action if he was still alive will depend on what admissible material remains available and the extent to which that material can assist either the plaintiff or the defendant.
61. A plaintiff who wishes to rely on such material in answer to a claim that passage of time precludes a fair trial must set out what is available in a manner which engages with the evidence. While a plaintiff is not obliged to make a defendant's case, failure to provide a defendant with information which will enable that defendant to investigate this type of claim in good time may prejudice a defence. Delay in this type of engagement may result in loss of potentially admissible material which may adversely affect either side. "The Bird of Time has but a little way to fly, and Lo the Bird is on the Wing."
62. For example, there may be evidence available from a person to whom a plaintiff made a disclosure of sexual abuse. Such a disclosure, particularly if made by a child within a short period of time after the events complained of, may be significant evidence of consistency and go to rebut any suggestion that a plaintiff has fabricated an account of events, or that alleged abuse is a product of false or recovered memory.
63. Children may make disclosures of sexual abuse gradually and to different people. Those to whom these disclosures were made may give evidence of both the fact and contents of what was stated to them. Old rules that such disclosures were only admissible in evidence if made at "at the first available opportunity" have been relaxed in light of modern knowledge of effects of sexual offending. This type of evidence is admissible in criminal proceedings as an exception to the rules against hearsay and narrative. In principle, these rules of evidence also apply to civil actions.
64. If a disclosure was made, available evidence of steps subsequently taken by any person who confronted an alleged abuser or reported the matter to the alleged abuser's superiors will be relevant and admissible. Was an alleged abuser confronted and what, if anything was the reaction of that person when first confronted? Was the allegation reported to a person exercising authority over an alleged abuser and what was said by that person? What steps were taken?
65. If this action proceeds to trial, the first issue to be decided is whether the plaintiff was sexually abused by the deceased curate in the manner alleged. This issue is clear-cut. Either the plaintiff's evidence will be accepted, or it will be rejected. Cases involving allegations of sexual assault usually involve issues of whether those assaults took place and whether offending behaviour was as severe as is alleged by the claimed victim. Except in cases of claimed recovered memory, core issues of contest are always whether a claimant is fabricating an account or exaggerating incidents, and if so why.

66. This case is not akin to medical negligence claim relating to alleged misdiagnosis or negligent treatment of a medical condition in the dim past in circumstances where medical notes are ambiguous and insufficient to demonstrate what happened. It is not akin to an issue of whether or not a motor car was driven negligently and was on the incorrect side of the road. A decision on this type of issue might go either way in the absence of some other evidence arising from materials retained in a Garda investigation which may point to some significant feature such as positions of vehicles or skid marks or an admission. For example, *Guerin v. Guerin* [1992] 2 I.R. 287 the plaintiff had an unanswerable case on liability in respect of injury sustained in a road traffic accident in 1964. Costello J. refused to dismiss the claim on grounds that the defendant was prejudiced as a result of passage of time.
67. The second issue which must be determined whether those in charge of the Diocese at the time or a body of priests in the Diocese are vicariously responsible for the actions of the curate, irrespective of absence of actual advance knowledge of his proclivities. This is a matter of law which does not depend on effects of passage of time.
68. The third issue which must be determined is whether those responsible for managing the Diocese at the time of the events complained of by the plaintiff had systems in place which would protect children such as the plaintiff from potential clerical sexual abusers. This would depend on the state of awareness at the time of a risk from this type of offending behaviour and on existence of appropriate measures to ensure safety of children, based on acceptable practice at that time.
69. The fourth issue which must be determined is whether there is any basis in law on which the defendant or the funds of the Diocese are now amenable to suit in respect of the events, assuming that the assault is proved, or that the plaintiff proves actual knowledge by superiors at the time or want of care by them.
70. The evidence in this application does specifically not address the aspect of ability of the defendant to meet the claim in the amended statement of claim relating to alleged failure to supervise. No information is available about awareness of diocesan authorities of potential problems relating to sexual abuse of minors or need to put measures in place restricting interactions of priests with unaccompanied minors during or prior to the relevant period which ran between early 1982 and early 1986. An explanation for this may be that this application was issued in 2018 and pre-dated the amended statement of claim which now makes this case.
71. A court deciding any application to dismiss proceedings because of adverse effects flowing from passage of time must focus on effect on the trial process. This includes consideration of whether and to what extent a defendant has been impaired in taking steps to investigate and meet a claim. These steps are part of that process. Opportunities to contest the claim made by the plaintiff in this action may arise from medical history or diagnosis or because of significant inconsistencies in prior accounts which he has provided in pleadings or to doctors, Gardaí or others. A defendant may be

able to show that relevant records are lost and or that persons who would have contradicted a plaintiff on a vital matter are dead.

72. It is necessary to examine all circumstances relevant to the issue of whether trial of an action should be prevented. What is the claim about? What potentially significant admissible evidence has been lost as a result of passage of time? Who, if anybody, is to blame for that loss? How does such loss adversely affect capacity of a defendant to defend the claim? What evidence is available to support that claim? Does the evidence demonstrate that an opportunity to investigate a significant matter has been lost? The issue of whether passage of time and related factors mean that a defendant will not get a fair trial must be examined in the round.
73. This Court must consider what sources of available admissible evidence remain available. It must also consider what potentially significant sources of admissible evidence are no longer available and assess the likely effect of absence of that material on the trial process. Potentially available evidence may point to matters which strengthen a defendant's case. It may also demonstrate unlikelihood that material which has become unavailable would have assisted a defendant. If an opportunity to investigate some material issue has been lost, the reason for this loss is relevant.
74. Sexual activity generally takes place in private. Sexual abuse of children is conducted in a furtive and opportunistic fashion. The perpetrator knows that others who might interrupt are not present. While there may sometimes be supporting evidence from others who may have noticed inappropriate behaviour, sometimes with benefit of hindsight, absence of independent witnesses who could testify one way or another as to whether incidents of abuse took place is the norm.
75. It follows that speculation that persons who are dead might have provided testimony to rebut a plaintiff's claim of having been sexually abused by another person should not be sufficient to prevent an action proceeding to hearing. The matter might be different where a defendant is in a position to show that a deceased person, while alive, gave an account of events which convincingly contradicted opportunity for abuse or provided some other potentially convincing explanation on a relevant issue such as motive.
76. With these points in mind, this Court has considered the pleadings, affidavits and exhibits to see what information has been made available, what admissible evidence may be available, what has been lost and what open lines of enquiry remain unexplored.
77. The plaintiff is fortunate to have the services of Dr Neville, consultant psychiatrist. Much of the material which is relevant to evaluation of whether a trial on the merits of his action remains possible is contained in her report dated 12 November 2021. This material was first disclosed to the defendant in particulars which were based on the content of her report. While the plaintiff has problems which may have impeded taking instructions, it is difficult to understand why this information has only been made available so recently.

78. The statement of claim as originally formulated in 2008, was brief. It provided no details of the allegations. It failed to accurately identify the period during which the plaintiff alleged that he was abused. It did not refer to the content of any medical report. It disclosed that the plaintiff attended the Rape Crisis Centre in 2002; that he was offered psychological help on a number of occasions and that he attended once with a clinical psychologist in 2005. It stated that in the course of one incident of abuse the plaintiff's shoulder was hurt and that his mother castigated him and physically chastised him when he told her before sending him to bed. She took him to "the doctor" who advised that he rest for the injury. This document did not positively assert that the plaintiff made any disclosure either to his mother or to "the doctor" that this injury related to sexual activity.
79. A preliminary letter from the defendant's solicitors dated 7 August 2008 sought a number of items of relevant information. This was replied to by the plaintiff's then solicitors in September 2010. This reply stated that sexual abuse occurred "approximately 20 times between approximately 1980 and 1983" in the bathroom of the curate's house and in his car. It described the curate as a bulky man who was approximately 6 foot tall with a red face and grey hair. This letter stated that there were no independent witnesses to "any aspects" of the alleged abuse.
80. The matter was reported to Sergeant L at the Garda Station for the area where the plaintiff then currently resided. The solicitors indicated that they had requested a copy of a statement which had been taken by Sergeant L. This information was provided in response to a query in that letter as to whether, and if so when, the plaintiff reported the matter to Gardaí and a request for a copy of any statement which he made to Gardaí. This response did not disclose when the matter was reported to Sergeant L.
81. The plaintiff's solicitors also stated that "prior to consulting" them "the matter was reported" to two named relations who are identified in other documents as his parents; to a named GP in the town where he grew up; Dr O'Flaherty in Cecil Street, Limerick, Dr O'Hara in Limerick Regional Hospital and Dr Maeve Leonard and Dr N. O'Moore of "2 Drummond Road," Nenagh, County Tipperary.
82. This information was provided in response to a request in that letter to indicate whether the alleged abuse had been disclosed to any family member, friend or counsellor and requesting details of any such disclosures and dates thereof. The plaintiff's solicitors did not disclose when these disclosures were made. This response was vague and did not spell out what "matter" was reported.
83. Dr Neville's psychiatric report discloses that at the age twenty-four years the plaintiff attended Dr O'Hara, at Unit 5B in a Psychiatric Unit in Limerick with serious depressive illness and was admitted as an in-patient for six weeks. This timeframe suggests that the plaintiff may have disclosed sexual abuse to Dr O'Hara in Limerick Regional Hospital in 1997. This report also discloses that in more recent times the plaintiff attended Professor Henry O'Connell at a psychiatric out-patient clinic at an address in "Drumin Road," Nenagh,

84. Following renewal and service of the plenary summons and service of the statement of claim in 2011, the defendant's solicitors sent a letter seeking particulars. This letter was replied to in February 2015.
85. The plaintiff asserted that queries as to the identity of the person to whom the plaintiff first disclosed abuse and dates of these disclosures and as to whether he disclosed to family members, and if so when, were not appropriate matters for particulars.
86. He declined to state whether he had made a disclosure to his mother or what he had said when he complained to her that the curate had hurt him. He declined to identify the doctor to whom he had been taken by his mother following the incident when his shoulder was injured. He declined to state whether his mother was still alive.
87. No information was provided on where the incident involving injury to the plaintiff's shoulder was inflicted. The only additional information provided on this subject was that his right shoulder was injured; that he was on the local under-12s football team at the time and that as a result of this injury he was unable to play in a football final for that part of the county. It follows that the alleged incident involving the plaintiff's shoulder injury can be placed as having occurred in 1985 or 1986. This may be partially inaccurate. Later information is that the injury was to his left shoulder and that he was captain of the local under-12s hurling team.
88. A query as to whether the matter was reported to the Garda Síochána and, if so, the time and outcome of the investigation, was met with the answer that the matter was reported to Sergeant F and Sergeant L in the local town in the area where he grew up. No further details were provided. No indication was given of when these reports were made. Again, this reply was also partly inaccurate. The letter in 2010 disclosed that Sergeant L was based at the Garda station serving the plaintiff's then current address.
89. A series of requests to provide particulars of medical information was refused. These requests included queries relating to the identities and details of the individuals who the plaintiff interacted with in the Rape Crisis Centre in 1992 and of a clinical psychologist who he attended in 1994. Particulars were sought relating to alcohol dependence, emotional problems and self-harm pleaded in the statement of claim. These were all answered: "Medico legal reports may be exchanged on a mutual basis in due course."
90. Particulars in an amended statement of claim which was served in 2020 state that the plaintiff was sexually abused when he was between nine and twelve years of age. It follows from this that the relevant timeline of alleged abuse was between 1982 and 1986. This abuse was inflicted in the sacristy of the parish church following mass and after other altar boys had been sent home. He was also sexually abused in a bedroom in the curate's house. These particulars identify that house. He was taken there by the curate following graveyard services after funerals. Following these incidents, the curate put the plaintiff into a bath in the bathroom of that house.



91. These particulars state that abuse began with indecent touching in the sacristy and progressed to incidents of rape which took place in both the sacristy of the church and the bedroom of the house. This sexual abuse continued "...for about two years and it would happen almost every week from the ages of 9 to 11."
92. The plaintiff disclosed further information to Dr Neville, consultant psychiatrist. Her report dated 12 November 2021 sets out this information. This report has been exhibited in the plaintiff's affidavit sworn on 18 May 2022. It forms the basis for the content of particulars of personal injury and abuse which were served on the defendant's solicitors in late November 2021.
93. The plaintiff stated to Dr Neville that the sexual abuse progressed from indecent touching and being asked to touch the curate to oral sex and anal penetration. He estimated that he was subjected to anal rape more than twenty times over a three-year period. He said that he told the GP what happened and that his mother hit him across the face.
94. The medical report names the two other altar boys at that time and states that a "Sister P" "looked after them." It is presumed that she was nun in a local convent who was responsible for arranging services in the church. The report also disclose that the plaintiff's father died in 2016 and that his mother is still alive. The curate moved from the parish and was replaced by a Father M. The plaintiff asserts that the parish priest arranged the curate's departure from the parish. His case is that the matter was hushed up and that the curate was quietly moved elsewhere.
95. This report states that the plaintiff was captain of the local under-12s hurling team when he was 12 years of age. The curate used to call for him (presumably at home). He had a had a new VW car. He brought the plaintiff to and from matches when he was between 9 and 12 years of age. He abused the plaintiff in this car and at his house. The curate used to drop him off at a car park opposite his house while bringing him home. The report does not disclose whether the curate had any role in the local club.
96. This report goes on to state that the plaintiff's mother worked for a number of years for the local GP who is identified by name. This GP was identified by the plaintiff's then solicitors in their letter of September 2010 as a person to whom the plaintiff disclosed that he had been abused.
97. The report recounts how the plaintiff's mother took him to this GP after the curate injured (dislocated) his shoulder while raping him. When he told the local GP what happened, his mother hit him across the face. He "told" his mother who did not believe him. His father believed him. "Later," his father took him to a local Garda station where he provided a statement to "Garda F" in 1986. The report does not provide detail of how much information the plaintiff provided when he "told" his mother, nor does it state what information provided when he "told" his GP. The plaintiff started in secondary school when he was 13 years of age.

98. The report states that he subsequently made a statement in the Garda station which serves his current residence to Sergeant L in 2015. This may be inaccurate. It is at odds with information provided by the plaintiff's then solicitors in 2010.
99. This report provides a detailed history of self-harm, including an attempt by the plaintiff to poison himself which resulted in an involuntary admission to hospital in Limerick under the care of Dr Skelly, a gastroenterologist. He has engaged in many episodes of self-harm and has been admitted to a psychiatric unit in Clonmel hospital and an acute psychiatric unit in Ennis. It discloses that the plaintiff has been treated as an alcoholic since 2005 and has cirrhosis of the liver. He has been diagnosed as suffering from borderline personality disorder and recurrent depression. Dr Neville concluded that he was also suffering from post-traumatic stress disorder as a result of the events "very prolonged and threatening events in childhood including prolonged abuse as described." Her report does not elaborate on what, if any, information the plaintiff imparted to her relating to other "very prolonged and threatening events in childhood."
100. The particulars served by the plaintiff's solicitors in November 2021 provide some supplemental information. The curate had a white VW car and then a red VW car. The model is not disclosed. In the incident involving injury to the plaintiff's shoulder, the curate pulled back his left shoulder resulting in muscle damage. His shoulder was injured on a Friday and his mother took him to the GP. He was upset because he was unable to play in the match even though he was captain. The curate's house was an "L-shaped bungalow." Abuse perpetrated at this location usually took place after funerals. After sexual activity in this house the curate washed him in the bathroom.
101. The evidence presented does not suggest that either side has pursued any of these matters. The defendant's solicitors been aware since September 2010 of a claim that the identified GP in the plaintiff's childhood area was told of abuse prior to 2008. They could infer that this GP was the "doctor" who allegedly treated the plaintiff's shoulder injury. The plaintiff's solicitors were also aware since February 2015 that the plaintiff alleged that he had made a disclosure to Sergeant F.
102. It is not clear whether there is anything in the plaintiff's medical or psychiatric history which discloses inconsistencies in his account or basis for a claim that any psychiatric or personality problems stem from causes other than alleged abuse by the curate.
103. On the state of the evidence so far presented, the defendant has not established that passage of time prior to the issue of these proceedings or thereafter has resulted in a situation where it would be unfair to ask the defendant to meet the plaintiff's claim. Many matters remain to be investigated.
104. It may well be that as a result of effects of passage of time these matters are incapable of investigation or resolution and that the fair course will be to dismiss the plaintiff's claim. However, this Court is not persuaded at this point that the defendant is prejudiced by the fact that the deceased curate is dead to such an extent that this action should be dismissed. The plaintiff's father is the only person so far identified in

the materials before this Court who could have directly assisted either side and who has died since the institution of these proceedings.

105. The proper course is to adjourn this motion to the hearing of the action with liberty to the defendant to re-enter it in the meantime if something emerges which may be decisive in favour of the defendant's application.
106. In this context the plaintiff's solicitors should bear in mind that a plaintiff has a self-serving duty to co-operate in all steps which will secure a fair and speedy trial. This includes a duty to provide information relevant to investigation. The defendant was at a considerable potential disadvantage as a result of refusal by the plaintiff to furnish basic information which would assist in preparation of the defence case and which, incidentally, might demonstrate the strength of his own case.
107. The plaintiff should state candidly what he told his mother, his GP and what he described in his statement to Sergeant F after the alleged incident where his shoulder was injured. He cannot give admissible direct evidence of these disclosures at a trial. However, he may be cross examined on inconsistencies between his version of events and any evidence from the persons to whom he made disclosures. He should consent to provision of information by the GP and Sergeant F.
108. The plaintiff's mother can be interviewed and asked to state what was disclosed to her. Her evidence on the fact, time and content of any childhood disclosure by her son is likely to be admissible.
109. The plaintiff's childhood local GP can also be interviewed, assuming that he is still alive. Even if he has no medical notes relating to this matter, he is hardly likely to forget an incident where his housekeeper's 12-year-old son presented with a shoulder injury and an allegation that this was sustained because a curate injured him in the course of sexually abusing him. If this GP was told about these matters, did he take any steps as a result of the disclosure?
110. Then there is Sergeant F. Is he still alive? What does he have to say about the plaintiff's claim that his father took him to the Garda Station and that he took a statement from the plaintiff in which he disclosed sexual abuse in 1986? Did this happen? What did the plaintiff tell him and what did he do then? What role did the curate have in the local GAA club at the time? Did he confront the curate or contact the parish priest or the authorities in the local GAA club and if so, what were the outcomes? This would be admissible evidence.
111. If Sergeant L or Sergeant F or those in charge of files and records in the two relevant Garda Stations are unable to locate statements, this will not necessarily be decisive. Even if the Sergeant decided to take no action, he is hardly likely to forget a report and provision by a child of a statement that the local curate injured a child's arm or sexually interfered with that child.

112. Was the deceased curate or a parish official on his behalf registered as owner of a white VW motor car and then a red VW motor car during the relevant time? What was the model and year of manufacture of any such car? What can Fr M say about the circumstances in which he took over from the curate and any knowledge which he may have had from any source of why his predecessor was removed and he replaced that predecessor? What can Sister P and the two altar boys say?
  
113. This judgment is being delivered electronically. Written submissions on who should bear the costs of this application or whether they should be costs of the action should be delivered within 21 days. The provisional view of this Court that the appropriate order is that the costs be costs of the action. If the matter is in contest this Court will also give the parties an opportunity to make oral submissions.