

# THE HIGH COURT

[2024] IEHC 71

[Record No.: 2022/4986P]

**BETWEEN:**

**STEPHEN BEATTY**

**PLAINTIFF**

**AND**

**WALTER BEATTY (REPRESENTED BY HIS GUARDIAN AD LITEM  
WALTER BEATTY JUNIOR)**

**DEFENDANT**

**JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 9th day of February, 2024.**

## **INTRODUCTION**

1. These proceedings concern an alleged incident of sexual abuse occurring in or about May, 1981 when the Plaintiff was a teenager (then aged 15 and ½ years old) home from boarding school on a short visit. The Defendant, who is now over ninety years of age, is the Plaintiff's father.

2. The abuse of the Plaintiff by his father is alleged to have occurred in the bedroom the Plaintiff shared with his now deceased brother in their childhood family home. A criminal prosecution was initiated following investigation of a complaint made by the Plaintiff to An Garda Síochána in 2017. This prosecution was discontinued by the entry of a *nolle prosequi* in or about June, 2020 in circumstances where a stroke occurring in December, 2019 rendered the Defendant permanently incapacitated and unfit to give evidence in his defence.

3. The Plaintiff did not issue these proceedings until September, 2022. As at the date of issue of these proceedings, the Plaintiff's mother and brother, both identified as witnesses of fact in his complaint and interviewed as part of the Garda investigation, were each recently deceased and the Defendant was in declining health and cognitively impaired.

4. The matter comes before me on an application to dismiss the proceedings on grounds of delay. I have decided to dismiss these proceedings because in my view core facts cannot be fairly and properly determined by reason of the unavailability of crucial evidence due to the lapse of time.

5. The factual background to these proceeding as set out in the pleadings and the evidential issues apparent from both the pleadings and discovered material shall now be set out in summary form before proceeding to identify the applicable legal principles and expand upon my reasoning in acceding to this application to dismiss the proceedings.

#### **FACTUAL BACKGROUND**

6. The Plaintiff is the fourth eldest of eight children. He has achieved academic and professional success qualifying as a medical doctor and subsequently entering on a specialist register and being appointed as a medical consultant. He is the married father of adult children. For his part the Defendant enjoyed a long and successful professional career as a lawyer working into his eighties and only retiring in old age. He has been residing in a nursing home for several years.

7. The Plaintiff claims that on the night in question his father, who had been drinking, visited him in the bedroom he was sharing with his brother. It is alleged that his father sat on his bed and initiated a conversation about sex and the Plaintiff's anatomy before proceeding to touch the Plaintiff in a sexually inappropriate, unwelcome and abusive manner, finally falling asleep on the Plaintiff's bed. It is alleged that during this abuse the Defendant told the Plaintiff that he loved him "*more than the others*".

8. The Plaintiff alleges that his now deceased brother was present in the same bedroom at the time of the alleged abuse, albeit he gave the appearance of being asleep. The Plaintiff believes that he was in fact awake because several months later it is alleged that his brother

said to him “*daddy loves you more than the rest of us*” and admitted that he heard the Defendant say this on the night the abuse allegedly occurred.

**9.** The Plaintiff also alleges a discussion with his mother the following day in which she queried his father’s presence in the room the night before. He denies disclosing abuse to her but from the terms of his conversation with her he inferred knowledge or suspicion on her part.

**10.** The Plaintiff claims that the Defendant admitted the incident to him and apologised for it both on his next visit home and in or about 1986 around the time of his twenty-first birthday. He also claims that his father may have disclosed the incident to other family members, although this is an issue in respect of which some contest arises. This notwithstanding, one of the Plaintiff’s brothers (not the brother with whom he shared a bedroom) made a statement during the Garda investigation in which he stated that the Plaintiff had told him in the early 1980s and while he was still at school about “*some abuse of a sexual nature against him from Dad.*” This same brother also stated that the Defendant admitted a version of the events complained of to him in or about Christmas 1983 but denied in that discussion that he had touched the Plaintiff.

**11.** Separately, the Plaintiff disclosed an incident of sexual abuse occurring in broadly similar terms to the incident described in these proceedings to a close friend when he was eighteen years of age. This friend made a statement to An Garda Síochána confirming the disclosure at that time. The Plaintiff made further disclosures to other parties at various times in relation to the abuse he alleges (including his wife in the early 2000s, a counsellor in or about that time and a work colleague). He claims he was advised by a counsellor he attended in either 2003 or 2004 not to report the incident.

**12.** Of great significance to the Plaintiff, he made detailed disclosure of the alleged abuse to family members in or about 2003 when he wrote a letter to each of his siblings but not his parents. The date of the alleged incident offered in this letter was 1980 rather than 1981. In this letter the Plaintiff claimed that his mother was aware of what had happened, a belief seemingly derived from a conversation with her the morning after the alleged incident. He rhetorically questioned:

*“Had she seen through the crack of the door and failed to intervene. But surely, I would have heard the floor boards creak? Had he told (confessed?) to her, and was she now checking that I wouldn’t tell”.*

**13.** The Plaintiff attaches a lot of weight to what he considers to be the refusal of most of his siblings to accept the truth of his account and support him following receipt of his letter in 2003. In his affidavit in response to this application he describes himself as *“estranged from all but one of my siblings since 2003”*. He refers to a *“family omerta”* and the abuse being an *“open family secret”* which he describes as *“oppressive”* and claims exacerbated his injuries and caused delay.

**14.** Despite disclosure to family members and other third parties, most specifically and particularly by letter in 2003, the Plaintiff did not report the matter to An Garda Síochána until 2017. In his statement to the Gardaí the Plaintiff said that he was:

*“coming forward with this now because I don’t really feel that my father is contrite about his remorse. Also when I was practising I was a well known surgeon and I would not have wanted my name in the papers or anything but now I am in a place where this would not bother me.”*

**15.** Following investigation which involved taking statements from the Defendant, the Defendant’s wife, several of the Plaintiff’s siblings including the brother who shared his bedroom at the material time and the brother to whom he had made disclosure in the early 1980s, several friends and a work colleague, a file was sent to the DPP. Certain features of this material require to be recorded as relevant to this dismissal application.

**16.** For his part the Defendant made a statement in which he said:

*“I am aware of an allegation made by my son, Stephen. He first made this allegation by way of letter sent to some or all of his siblings in 2003. I never received any letter. I understand that he has now made a complaint to An Garda Síochána. One of the 2003 letters has been opened to me. The allegations Stephen has made in these letters*

*never occurred. I have never behaved inappropriately with Stephen or any of my children.”*

**17.** He made no further comment during cautioned interview conducted in the presence of his solicitor.

**18.** Notably in her statement the Plaintiff's now deceased mother denied the Plaintiff's allegations in full stating:

*“I never saw or heard anything that made me suspicious and I could never imagine my husband being capable of anything like the allegation as is set out in Stephen's letter. With regard to the specific allegation about me contained in the letter, I definitely did not see anything through the crack in the door as is suggested/alleged. If I had, I would have immediately entered the room. Furthermore, Stephen and I never had any conversation of the type outlined in that letter.”*

**19.** Separately, in his statement to An Garda Síochána during the criminal investigation, the Plaintiff's now deceased brother who shared his room at the material time denied the Plaintiff's allegations stating:

*“I am certain that my father never interfered with Stephen in my presence in this bedroom or anywhere else. My father did not come in and behave in the way as described by Stephen. I also confirm that I never heard my father say to Stephen that he loved him more than the others..... I have never discussed with Stephen as to who was the most preferred child in the family.”*

**20.** On affidavit in these proceedings, the Plaintiff maintains that this same brother had travelled to meet him following the 2003 letter and had confirmed that he remembered the night in question but could not support him because he and his family were financially dependent on the Defendant. This further allegation in respect of his brother's knowledge of the event was made by the Plaintiff on affidavit in these proceedings after his brother died. It was not referred to in his statement to Gardaí. For his part, in his statement to Gardaí, his deceased brother clearly stated that the 2003 letter was *“the first I had heard of any such allegation against my*

*father*” and that he was “*certain*” that his father had never interfered with the Plaintiff. His response to the allegation that he could not support the Plaintiff because he and his family were financially dependent is unknown because there is no record of this allegation having been put to him while he was alive.

21. Also on affidavit in these proceedings, the Plaintiff claims that his eldest brother, the *Guardian ad Litem* was aware of the incident because when he mentioned it to him in the 1980s he “*chortled*” and his response was that he knew because the Defendant had “*confessed*” to him. This is fully disputed by the *Guardian ad Litem*. He claims that the first he knew of the allegation was when he received the letter in 2003.

22. On the referral of the Garda investigation file to her, the DPP directed prosecution of the Defendant in respect of what the Garda narrative records as a “*single historical incident of sexual assault*”. The Defendant was charged as follows:

*“On a date unknown between the 01/01/1981 and 31/12/1981 at [home address] in the said District Court Area of Dublin Metropolitan District, did indecently assault one, Stephen Beatty, a male contrary to common law as provided for by section 6 of the Criminal Law Amendment Act, 1935.”*

23. The matter came before the District Court on some two occasions in 2019 and was listed for service of a Book of Evidence. No Book of Evidence appears to have been served when the Plaintiff’s father suffered a debilitating stroke in December, 2019. This stroke has left him permanently incapacitated. In a letter dated 27<sup>th</sup> of May, 2020, Professor Joseph Harbison, Consultant Stroke Physician/Geriatrician confirmed a significant stroke, severe dementia and a lack of capacity to deal with any legal issue or to testify or appear in court stating:

*“He would be unable to plead to the charge as he would not be able to retain the details associated with the charge or any consequences of doing so. He would not be able to instruct a legal representative in any informed fashion. He would not be able to balance the pros and cons as to whether to elect for trial by jury or to make a proper*

*defence. He would not be able to retain the evidence and I doubt he would have the ability to challenge a juror with any form of reasoned basis.”*

**24.** It is clear from the medical evidence that the Defendant lacks capacity to give instructions in legal proceedings.

**25.** As noted above, a *nolle prosequi* was entered in respect of the criminal charges in June, 2020.

**26.** Since then, the Plaintiff’s brother who shared his bedroom at the material time and his mother have both died (in June, 2020 and July, 2021 respectively).

**27.** Prior to the issue of these proceedings, the Plaintiff attended with a Consultant General Adult Psychiatrist who concluded that the reported incident of abuse had caused symptoms of Post Traumatic Stress Disorder (PTSD) in the mild-moderate range and had impaired him to the point that he did not report the abuse until 2017. The report exhibited on behalf of the Plaintiff is silent as to whether continuing symptoms which it confirmed are present were such as to substantially impair his ability to make a reasoned decision to bring the within civil proceedings until 2022.

**28.** Professor Harbison wrote a further letter dated the 17<sup>th</sup> of October, 2022 following the issue of civil proceedings in which he confirmed:

*“As previously stated in correspondence, Mr. Beatty suffered a significant stroke on a background of previous cerebral vascular disease. His condition is progressively degenerative. He would simply not have the capacity to deal with any legal issue, neither would he be fit to testify or appear in court. His condition will not improve and only degenerate over time.”*

**29.** In a subsequent detailed report prepared by Professor Harry Kennedy, Consultant Forensic Psychiatrist dated November, 2022 relied upon to ground an application for the appointment of a *guardian ad litem* and in moving the application to dismiss he concludes:

*“to summarise, in my opinion Mr. Beatty lacks functional mental capacities to understand and retain information, to consider legal issues so as to instruct solicitors and counsel or make reasoned and balanced decisions concerning litigation”.*

**30.** Concerning the Defendant’s ability to give evidence and defend these proceedings he added:

*“In my opinion Mr. Beatty would be incapable of engaging in a process of answering questions in court either led by his counsel or on cross examination....in my opinion he has severe impairments of the function mental capacities relevant to defending any proceedings in court even of the most basic nature.”*

**31.** The report records the striking fact that as of the date of the report the Defendant appeared unaware of the death, more than a year earlier, of his wife of some sixty years even though she is noted to have visited him regularly until her death.

## **PROCEEDINGS**

**32.** A pre-action letter was sent by the Plaintiff’s solicitor on the 25<sup>th</sup> of April, 2022 to the nursing home in which the Defendant had then been residing for three years, followed by service of a PIAB authorisation which issued on the 24<sup>th</sup> of May, 2022.

**33.** In the absence of a reply to this correspondence, a further letter was sent to the Defendant’s eldest son (and the Plaintiff’s brother) in his capacity as attorney for the Defendant in August, 2022. An awareness on the part of the Plaintiff of the Defendant’s cognitive difficulties was signalled in this letter which stated:

*“We are not certain as to his capacity to defend the proceedings. Our Counsel has advised that you be notified by us as solicitors for Stephen Beatty of the intended proceedings. It is not our client’s responsibility to appoint a guardian ad litem or next friend for Walter Beatty Senior.”*



**34.** These proceedings were commenced by the issue of a Plenary Summons on the 27<sup>th</sup> of September, 2022, more than forty years after the occurrence of the alleged incident of sexual abuse.

**35.** By order *ex parte* dated the 28<sup>th</sup> of November, 2022 the Defendant's eldest son was appointed as his Guardian *ad Litem* for the purpose of these proceedings. An Appearance was entered to proceedings on the 19<sup>th</sup> of December, 2022. A Statement of Claim was delivered on the 23<sup>rd</sup> of January, 2023 (a revised version was delivered on the 24<sup>th</sup> January, 2023). No Defence has been delivered on behalf of the Defendant. Instead, the Defendant's representative has elected to bring this motion seeking an Order dismissing the proceedings on delay grounds.

**36.** The application to dismiss was preceded by a letter dated the 3<sup>rd</sup> of March, 2023 in which the Defendant's solicitor invited the Plaintiff to withdraw these proceedings given the evident delays in pursuing the matter, the fact that the Defendant suffers impairments of cognitive function and is now unable to instruct his legal team or give evidence or defend himself at trial and the fact that on the Plaintiff's version of events, his mother and brother were relevant witnesses but both were deceased having denied allegations when made in 2017. It was further posited that in addition to the real and serious risk of an unfair trial by reason of delay, the proceedings were statute barred. It was contended that to continue with the proceedings in the circumstances outlined in the letter would be an abuse of the process of the Court. By letter of the same date, the Plaintiff's solicitors called on the Defendant to file a Defence. In the absence of agreement to withdraw proceedings, a motion seeking dismissal issued on the 23<sup>rd</sup> of March, 2023. Subsequently, by letter dated the 28<sup>th</sup> of April, 2023, the Defendant's solicitor wrote to advise that as there was a motion before the Court seeking to strike out the Plaintiff's claim, it would not be appropriate for a Defence to be delivered on behalf of the Defendant "*at this juncture.*"

**37.** In the face of this application to dismiss which stood listed for hearing in January, 2024, the Plaintiff was facilitated with an early date for the hearing of an application for non-party discovery in circumstances where it was claimed that the contents of the Garda file could have a material bearing on the outcome of this application. Specifically, the Plaintiff contended in his affidavit in response to the dismissal application that:

*“there may be sufficient evidence already in existence to overcome the Defendant’s incapacity.”*

**38.** The application for non-party discovery came on for hearing before me on the 11<sup>th</sup> of December, 2023 and, not having been served on the DPP, proceeded on the Plaintiff’s election as against the Garda Commissioner alone.

**39.** In ordering discovery of the Garda file, I decided that the fact that the application for discovery pre-dated the filing of a Defence did not operate to preclude me exercising a discretion to direct discovery where I was satisfied that the documents sought were relevant to an issue arising or likely to arise in these proceedings and necessary for the fair determination of that issue. It seemed to me that in this case, even absent a Defence, the issues against which the relevance and necessity for discovery fell to be determined were clear from the exchange of affidavits and from the principles developed in the case-law governing a dismissal application on delay grounds.

**40.** On the hearing of the non-party discovery application, Counsel appearing on behalf of the Non-Party acknowledged that the documents sought were *prima facie* relevant to the issues in the proceedings. The material in question would normally be available to an accused person in any event as part of the Book of Evidence or disclosure documentation, had a trial proceeded. The material could therefore have been available in evidence without the necessity to involve a non-party but for the discontinuance of the criminal trial. It was not suggested that the discovery sought was unduly oppressive or voluminous. It was, however, urged on me that the necessity for discovery required to be demonstrated. The necessity for discovery was questioned principally on the basis that if the dismissal application were successful there would be no trial of the issues at all, thereby obviating any requirement for discovery. Reliance was placed in submissions on several cases including *IBRC v. Fingleton* [2023] IECA 114 and *S.T. v. Clifford* [2023] IEHC 458.

**41.** I found the decision in *S.T. v. Clifford* particularly helpful in addressing the question of necessity. As found by Owens J., the death or incapacity of a potential witness does not automatically compel a court to exercise an inherent jurisdiction to refuse to permit an action to proceed but is rather 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. In his judgment Owens J. identified areas of enquiry and consideration for a court on an application to dismiss on delay grounds and stated at para. 12 of the judgment:

*“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 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.”*

**42.** It seemed to me that the full extent of the information necessary to determine what admissible evidence may be available, what has been lost and what open lines of enquiry remained unexplored would not be available to the Court on the application to dismiss in the absence of the discovery sought. Accordingly, I was satisfied that the Plaintiff demonstrated a necessity for discovery notwithstanding undoubted admissibility issues likely to arise in respect of any discovered material insofar as witnesses who made statements or provided material as part of the Garda investigation were no longer available to be examined on their evidence.

**43.** In deciding in favour of making an order for discovery I was conscious of the very far-reaching consequences of a dismissal order for the Plaintiff’s claim. I concluded that justice required that matters pertinent to prejudice and the impact of the passage of time on the possibility of a fair hearing should be established to the greatest extent possible and any decision on the dismissal application should be informed by all the available material demonstrating the real extent of an asserted difficulty with the case proceeding to trial.

**44.** On foot of the non-party discovery order made on the 11<sup>th</sup> of December, 2023, an Affidavit of Discovery was sworn on the 8<sup>th</sup> of January, 2024. All the witness statements taken during the Garda investigation were disclosed on an affidavit sworn by the investigating member together with, *inter alia*, the memorandum of interview with the Defendant and correspondence from the Plaintiff referred to by witnesses.

## DISCUSSION AND DECISION

45. An action for damages is a means made available by the State for the vindication of its citizens human and personal rights. Accordingly, a person who considers himself or herself to have been wronged in an actionable way can pursue redress in the form of a civil action pursued in accordance with law, most notably applicable time limits. The Statute of Limitations (Amendment) Act, 2000 (hereinafter “the 2000 Act”) extended the time limit for taking civil proceedings for sexual assault (see s.2 of the 2000 Act), recognising the special circumstances of such cases which mean that by reason of the wrongdoing of an abuser, the victim of abuse may have been impaired in pursuing a legal remedy within normal time limits. The institution of proceedings following a long period of delay, notwithstanding that it may not be statute barred, throws up problems not least the difficulty, and sometimes the impossibility, of finding evidence with which to rebut a false claim. Section 3 of the 2000 Act recognises this difficulty by providing:

*“Nothing in s.48A of the Statute of Limitations 1957, (inserted by s.2 of this Act) shall be construed as affecting any power of a court to dismiss an action on the ground of their 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 dismissal”.*

46. In this way, the 2000 Act acknowledges the inherent power of the Court to dismiss proceedings even where those proceedings have been issued within the extended limitation period provided for by law. It is this jurisdiction which I am invited to exercise on this application. The fact that a historic claim may not be statute barred does not preclude the exercise of this discretion.

47. The application was moved before me on behalf of the Defendant both on the basis of the Court’s inherent jurisdiction to dismiss for want of prosecution in reliance on the three-limb test as set out in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 (hereinafter “*Primor*”) and the Court’s jurisdiction to dismiss or permanently stay proceedings in the interests of justice where, by reason of the passage of time, there is a real or substantial risk of

an unfair trial or an unfair result being the test identified in *Ó Domhnaill v. Merrick* [1984] I.R. 151) (hereinafter “*O’Domhnaill*”).

**48.** On an application of both tests, reliance was squarely placed on behalf of the Defendant on the unavailability of evidence material to a defence of the central elements of the alleged sexual abuse. Material evidence was said to be unavailable through the permanent incapacity of the Defendant, who had denied the alleged wrongdoing before losing capacity, and the death of two witnesses of fact relevant to that central allegation, the Plaintiff’s now deceased brother and mother, each of whom had also denied the allegations when made during their lifetimes.

**49.** Emphasis was placed in argument on the fact that this is not a “*documents*” case where reliance may be placed on systems evidence, on the provisions of the Criminal Justice (Miscellaneous Provisions) Act, 2020 and/or on expert evidence (like *IBRC v. Fingleton* [2023] IECA 114, currently under appeal to the Supreme Court on questions identified in the determination of the Supreme Court granting leave in [2023] IESCD 136) nor a case contending vicarious liability arising from a failure to supervise (such as *S.T. v. Clifford*, also under appeal) where other evidence might be available in respect of central elements of the claim advanced. Instead, this case was identified as more analogous to that of *Whelan v. Lawn* [2014] IESC 75 where the action was dismissed as having passed the bounds of fair litigation in a manner which placed justice on the hazard.

**50.** It was the Plaintiff’s position in opposing this application that the *Primor* principles apply only in the case of post-commencement or “*prosecutorial*” delay which did not arise in this case. It was maintained that even if *Primor* principles could properly be extended to combined pre and post commencement delay, the periods of delay identified as inordinate in this case, namely, 1986 to 2003 (from the age of 21 to family disclosure in writing in 2003); 2003 to 2017 (from disclosure to family and counsellor to reporting to An Garda Síochána); and 2017 to 2022 (from reporting to An Garda Síochána to the institution of the within proceedings) were excusable having regard to medical evidence as to the Plaintiff’s impairment by reason of PTSD. This impairment, it was argued, was in turn occasioned by the alleged abuse and therefore attributable to wrongdoing on the part of the Defendant which could not properly be relied upon to defeat the Plaintiff’s claim.

**51.** It was further contended on behalf of the Plaintiff that the *O'Domhnaill* test was not met in this case because the delay in this case was delay for which the Defendant was responsible by reason of his responsibility for the alleged impairments resulting from PTSD which impeded the timely issue of proceedings.

**52.** As for prejudice or fair trial issues common to both tests, acknowledging that there are different thresholds of prejudice, it was the Plaintiff's case that the requisite threshold to justify dismissal of the proceedings was not reached as evidence was available that the Defendant had admitted some form of wrongdoing to some of the Plaintiff's siblings and the occurrence of the abuse was an open family secret. Whether or not admissions of sexual abuse had been made was an allegation which formed part of the Plaintiff's case upon which remaining family members could give evidence and be heard in denial.

**53.** It was also contended on behalf of the Plaintiff in resisting the application to dismiss that the application must be refused on a proper application of either test. It was also submitted that I should consider adjourning my decision pending the outcome of the Supreme Court on appeal from the *IBRC v. Fingleton* [2023] IECA 114 in circumstances where one of the questions identified for determination in that case was whether the unavailability of a party entitled the Defendant to an order dismissing the proceedings *in limine*.

#### *Deferring Judgment or Adjourning the Application*

**54.** On the issue of deferring judgment pending a decision of the Supreme Court in *IBRC v. Fingleton*, I do not understand the Defendant in this case to contend that he is entitled to a dismissal order simply because he has lost capacity which seems to be the issue at the heart of the appeal in that case. As I understand it the case made on behalf of the Defendant in these proceedings is that on the facts and circumstances of this case, the fact of his incapacity together with the unavailability of two other witnesses of fact means that the fairness of the process is on hazard given the nature of the proceedings and the issues which arise. In *IBRC v. Fingleton*, the Court of Appeal acknowledged that the fact that the appellant was unable to give instructions or participate in his defence either as a witness or by way of giving instructions or assistance as the trial progressed was “*a significant litigation disadvantage*” but, found that this in and of itself is not determinative. The Court of Appeal added (para. 78):

*“The jurisprudence in this jurisdiction is more nuanced. The prejudice must be assessed in the context of the nature of the claim, the matters which either side will be required to prove and the nature and availability of the evidence. The Court will then be able to assess the magnitude of the litigation disadvantage flowing from the disability of the defendant.”*

**55.** The Court then addressed the core features of the case in *IBRC v. Fingleton* [2023] IECA 114 which bore on the question of whether the court should grant a permanent stay in that case. In refusing to dismiss in that case regard was had to the fact that the case was limited to the five series of loans issued between 2006 and 2009 in respect of which a case had not been made out that the inability of the appellant to give instructions about or to give evidence in relation to these loans gave rise to the degree of prejudice which is required to dismiss the proceedings. It was considered that on the case as pleaded relevant witnesses other than the appellant remained available to give evidence in relation to the factual matters at issue. It was considered the pared back case was more document dependent (and less dependent on witness recollection or testimony alone). Documents such as the application for the loans, the assessment of the loans and the fixing of the terms upon which the loans were advanced would be available as would documents relating to the difficulties which subsequently emerged in relation to the borrowings. Regard was also made to the provisions of the Criminal law (Miscellaneous Provisions) Act 2020 under which it is now possible to introduce the documents into evidence without the need for the appellant to prove the documents.

**56.** For the reasons given the Court of Appeal considered on the facts and circumstances of *IBRC v. Fingleton* that many crucial matters are objectively provable without the need for the appellant’s testimony in deciding not to dismiss despite Mr. Fingleton’s lack of capacity to defend himself. Crucial matters objectively provable set out in the judgment of the Court of Appeal included the question of the zoning of certain lands, whether or not planning permission existed at the date of the issuing of the loan, whether there were boundary disputes with neighbours, whether the borrower was in a position to offer INBS a first legal charge, whether the terms of the agreement involved a profit-sharing structure and the LTV ratio stipulated in the Letter of Loan offer. Insofar as much of the alleged prejudice related to the appellant’s inability to give evidence as to the commercial justification for the loans, this was discounted

by the Court of Appeal on the basis that remaining issues in this regard would largely turn on expert testimony.

**57.** In concluding that the appellant fell short of a threshold required to dismiss proceedings in advance of a hearing on the merits, the Court of Appeal outlined in detail reasoning from which it is apparent that this is an entirely different type of case. In my view there seems to be little likelihood of the decision of the Supreme Court in *IBRC v. Fingleton* bearing on the outcome of this application in a manner which could reasonably justify further delay in the determination of these proceedings. Accordingly, I see no merit in the argument urged that my decision on this application should await the determination by the Supreme Court of the appeal in *IBRC v. Fingleton*.

**58.** Furthermore, the availability of material garnered in the criminal investigation in evidence together with the facts pleaded and other affidavit evidence on this application allow me to properly consider the potential impact on the trial of missing evidence in a manner which was not possible in *S.T. v. Clifford* with the result that the application was effectively adjourned in that case.

**59.** I will therefore proceed to determine the application by considering the substantive arguments presented during the hearing before me based on established principles.

#### *O'Domhnaill or Primor – the Applicable Test*

**60.** On the case as argued, the first real issue for me to determine is how I should approach the tests developed in the two identified strands of jurisprudence. Notwithstanding that post-commencement delay was not contended for in *Kelly v. O'Leary*, Kelly J. decided not to answer what he described as (*infra* p. 540) “*the interesting question as to whether there are two different tests*” but proceeded to apply the *Primor* test noting that this was the test urged by counsel for the Plaintiff and “*in ease of her*”, being the test “*which is the more demanding of the defendant and the more favourable to the plaintiff.*” There is no similar preference on the part of the Plaintiff for the *Primor* test in this case. On the contrary, it is argued that it does not apply in respect of pre-commencement delay. *Kelly v. O'Leary* is, however, authority for the proposition (subsequently confirmed by Irvine J. in *Cassidy v. the Provincialate* [2012] IECA



74) that the *Primor* test can be applied to pre as well as post commencement delay, contrary to the submission made on behalf of the Plaintiff.

**61.** It is true, however, that the case-law since the decision in *Kelly v. O’Leary* demonstrates that there continues to be two strands of jurisprudence. Notably, one strand of jurisprudence requires the establishment of patent prejudice arising from delay (e.g. *Whelan v. Lawn* [2014] IESC 75 and *S.T. v. Clifford* [2023] IEHC 458) whereas the other requires merely mild or moderate prejudice in the case of inordinate delay which is not excusable (e.g. *Millerick v. Minister for Finance* [2016] IECA 206; *Gibbons v. N6 (Construction) Limited* [2022] IECA 112, *Cave Projects Limited v. Kelly* [2022] IECA 245 and *Nahj Company for Services v. Royal College of Surgeons Ireland* [2023] IEHC 453). As noted above, the Plaintiff maintains that the first does not apply where the delay is occasioned by the alleged abuse itself because culpability for same lies with the Defendant whereas the second does not apply where delay is excusable due to the nature of the abuse consequent upon impairment occasioned by the abuse.

**62.** It seems to me that a review of the case-law disposes of both these contentions. Firstly, in deciding whether the Defendant’s lack of culpability for delay is a necessary factor in dismissing in a case of patent prejudice, it is helpful to consider the decision of the Supreme Court in *Whelan* in more detail. In his judgment for the Supreme Court in *Whelan*, which was itself a case of alleged historic sexual abuse, Hardiman J. considered jurisprudence from *Dowd v. Kerry County Council* [1970] IR 27 to *Kelly v. O’Leary* [2001] 2 I.R. 526 including, *inter alia*, *Sheehan v. Amond* [1982] IR 235, *O’Keeffe v. Commissioners of Public Works* (Supreme Court, unreported, 24 March 1980), *Ó Domhnaill v. Merrick* [1984] IR 151, *Toal v. Duignan (No. 1)* [1991] ILRM 135 and *Toal v. Duignan (No.2)* [1991] ILRM 140. It seems to me that this case-law demonstrates that patent prejudice absent culpability for delay either on the part of the plaintiff or the defendant can justify dismissal.

**63.** In *Dowd v. Kerry County Council* (delay post issue of proceedings in delivery of a Statement of Claim) Ó Dálaigh C.J. found “*wholly admirable*” the following observation of Diplock L.J. in *Allen v. McAlpine* [1968] 2 WLR 366 , [1968] 2 QB 229 , [1968] 1 All ER 543:

“... where the case is one in which at the trial disputed facts would have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The

*chances of the Courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard”.*

**64.** Although the Supreme Court in that case identified as relevant conduct with regard to compliance with time limits set down in the Rules of Court post issue of proceedings, the question remained whether the overall period of delay and consequent prejudice, in the special facts of the case, were such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action. The question of blameworthiness or “*excusability*” of delay was therefore not identified as determinative where justice was put to the hazard.

**65.** In his judgment for the Supreme Court in *Whelan*, Hardiman J. traced the phrase “*beyond the reach of fair litigation*” to *Sheehan v. Amond* [1982] IR 235 where (at p. 239) that phrase was pronounced in the context of a twelve-year delay from the inception of proceedings and seventeen years from the road traffic accident which gave rise to the action. True it is that Henchy J. treated inordinate and inexcusable delays as a factor in his deliberations in *Sheehan v. Amond* but clearly central to his decision, as quoted at length in *Whelan*, was the obvious unfairness of forcing a trial on the defendant at that stage.

**66.** In his judgment for the Court in *Whelan*, Hardiman J. also referred to *O’Keeffe v. Commissioners of Public Works* (Supreme Court, unreported, 24th of March, 1980), where a majority of the Supreme Court regarded as “*a parody of justice*” a hearing which would take place twenty-three years after an industrial accident in which the plaintiff had lost an eye in circumstances where one witness had died and another’s memory “*had been all but obliterated by the passage of time*”. This was because a hearing “*would come at a time, when the defendants through no fault of theirs had been deprived of a true opportunity of meeting the plaintiff’s case*” and “*a hearing in those circumstances would lack the mutuality and fairness which are essential for the administration of justice*”. Although the Court referred to the lack of fault on the part of the defendant in *O’Keeffe* as a relevant factor, it is clear from the decision of the Supreme Court in *Whelan* that the term “*mutuality*” was treated as requiring that both sides, and not merely one side, have a chance to make their case.

**67.** In *Whelan* itself proceedings had been instituted within applicable limitation periods following the Plaintiff's attainment of majority were found to have been properly dismissed by the Supreme Court by reason of the death prior to the institution of proceedings of the Plaintiff's grandmother who lived in the house at the time of the alleged abuse and the subsequent death of the Plaintiff's grandfather, the alleged perpetrator, who had suffered a stroke shortly before the issue of the proceedings. Distinguishing a case of alleged sexual abuse which turn facts on disputed by one person's word against another from other types of case, the Supreme Court (Hardiman J.) found that any trial in the circumstances of that case had passed "*the bounds of fair litigation*" because of the inability of to call evidence in his defence on "*a hotly disputed factual issue*", namely the occurrence of the alleged abuse. He observed that the situation might be otherwise were it a road traffic accident (potentially the subject of professional forensic examination) or an action for work done or services rendered (permitting of proof that something was done) as these are cases where, depending on the facts, it is unlikely that the death of a party would leave his or her side with nothing at all to say.

**68.** Addressing the specific question as to whether the prejudice of which a defendant complains must be shown to be caused by some default on the plaintiff's part Hardiman J. considered *Toal v. Duignan (No. 1)* [1991] ILRM 135 and *Toal v. Duignan (No.2)* [1991] ILRM 140 where the Supreme Court had approved the principles laid down in the judgment of Henchy J. in *Ó Domhnaill v. Merrick* and found that even though a plaintiff may be blameless in regard to the date at which the proceedings had been instituted and a long lapse of time since the events out of which they arose, the case should not proceed where there would be an obvious injustice in permitting the case to continue.

**69.** Finally, on this question of whether the prejudice must be shown to be by some default on the part of the plaintiff, the Supreme Court in *Whelan* referred to the decision in *Kelly v. O'Leary* [2001] 2 I.R. 526. There the High Court (Kelly J.) dismissed proceedings on grounds of delay, albeit in circumstances where the Plaintiff resiled from important facts pleaded in the Statement of Claim during the proceedings, finding that constitutional principles of fairness of procedure required that the action not proceed as to allow the action to go on would put justice on the hazard. The case involved allegations of abuse against two nuns in circumstances where proceedings were instituted some fifty years after the alleged incidents of abuse at a time when one of the nuns was deceased and the other was very elderly with impaired memory. In deciding to dismiss, it was held (Kelly J.):

*“I am satisfied that there is here a clear and patent unfairness in asking the defendant to defend this action after the lapse of time involved. Actual prejudice has occurred to this defendant by reason of the delay. The defendant has not contributed to this delay. There is here a real and serious risk of an unfair trial. As a matter of probability the trial may amount to an assertion countered by a bare denial. Indeed even the ability of this defendant to make such a denial is doubtful in respect of a number of the allegations. Such an exercise would be far removed from the form of forensic enquiry which is envisaged in the notion of a fair trial in accordance with the law of this State. Constitutional principles of fairness of procedure require that the action not proceed. To allow the action to go on would put justice to the hazard”.*

**70.** While it cannot be gainsaid that these comments were made by Kelly J. on an application of *Primor* principles to what was essentially pre-commencement delay where it had been found that delay was not excused on the evidence, the emphasis of the decision in that case was understood by the Supreme Court in *Whelan* as being on whether the underlying dispute has simply “*passed beyond the reach of fair litigation*”. The Court (Hardiman J.) found (see para. 24):

*“If it has, then in my view the ensuing trial, if permitted to continue, would scarcely be a forensic exercise at all. I cannot think of a more radical departure from the requirements of a fair trial, or a more obvious example of a case which has passed beyond the bounds of fair litigation, than a hotly disputed factual issue on which one party will not be able to make any showing whatever.”*

**71.** The Court continued (at para. 26):

*“I do not consider it necessary, in the circumstances of this case, to consider whether the plaintiff has been guilty of “inordinate” or of “inexcusable” delay. In Kelly v. O’Leary, cited above, it was accepted that Ó Domhnaill v. Merrick and Toal v. Duignan did not require the establishment of both inordinate and inexcusable delay before considering the decisive issue of the balance of justice. Having regard to the fact that the plaintiff may wish, if this action is dismissed, to seek a remedy against other persons*

*or bodies, I would not go into that question here at all. I would dismiss the action simply on the grounds that it has “passed beyond the reach of fair litigation”.*

**72.** It seems to me that the words “*whether culpable or not*” as used in *Toal v. Duignan (No.2)* in respect of delay are very significant when read together with the decision of the Supreme Court in *Whelan* where it was found that there had been a total loss of the quality of mutuality because the defendant, the alleged perpetrator, and the person who generated the estate which is the paying party if the plaintiff succeeds, could not be heard at all.

**73.** The fact that culpable delay is not necessary where a patent unfairness of trial is demonstrated is placed beyond doubt by the judgment of the Supreme Court in *Nash v. DPP* [2015] IESC 32 where the different types of delay cases which warrant dismissal or restraining orders were considered (from para. 2.13). It is manifestly clear from the decision of the Supreme Court in *Nash* that delay can ground an order dismissing proceedings even in the absence of culpable delay where a proper trial cannot be had. Dismissal is a consequence of unfairness in the process resulting from delay, irrespective of where the fault for delay lies.

**74.** Clarke J. went on (at para. 2.17) in *Nash* to address cases where a trial is still possible but where, due to the fault of one side there has been a significant increase in the extent to which the trial falls short of perfection from the perspective of the other side. In such cases, therefore, justice is diminished through fault of a party. In respect of this category of case Clarke J. had the following to say:

*“In those circumstances the party on the receiving end (the accused or the defendant) can, in my view, properly suggest that the constitutional unfairness with which they are faced is not so much that they cannot have a fair trial at all but rather that it is unfair that they should have a significantly impaired or diminished trial where that impairment is as a result of culpable delay on the part of their opponent. .... Such cases will, necessarily, involve a balance in which the undoubted desirability of rights, obligations and liabilities being properly determined at a full trial, on the basis of a consideration of all relevant and admissible evidence and the application of the law to the facts thus established, must be given significant weight.”*

**75.** I do not consider the decisions of the Supreme Court in *Whelan v. Lawn* or *Nash v. DPP* (followed in *S.T. v. Clifford*) to be consistent with any conclusion other than one which allows for a jurisdiction to dismiss absent any culpability for delay where the consequence of delay is to put justice on hazard. As I read it the decision of Clarke J. in *Nash* marries the *O'Domhnaill* and *Primor* jurisprudence as representing different types of delay case which each justify dismissal of proceedings. On the one hand real prejudice warrants dismissal even when coupled with no fault or non-culpable delay on the part of a plaintiff and culpability on the part of a defendant, whereas on the other hand general prejudice suffices if culpable delay on the part of a plaintiff is present. It is not necessary in this latter category to establish actual, specific prejudice in terms of a certain unfairness of trial in such cases and a diminution in the quality of the evidence available suffices to ground dismissal even though a fair trial is still possible. It seems to me that the clear dicta in *Whelan* and in *Nash* must dispose of the Plaintiff's contention that his proceedings cannot be dismissed on delay grounds if delay is occasioned by an impairment resulting from the Defendant's alleged culpable behaviour. Neither test (*Primor* nor *O'Domhnaill*) applies to the exclusion of the other. It is the particular facts of a case which guide the selection of the test to be applied or the sequence in which a combined test articulated in *Nash* is applied.

**76.** For completeness I should record that in addition to the two categories of delay case outlined in detail above, the decision in *Nash* recognised a further exceptional category in which delay is so egregious that it simply cannot be tolerated. Although the delay in this case is very significant and proceedings were instituted more than four decades after the alleged incident of abuse, I would not be prepared to dismiss these proceedings on the basis that the delay *per se* renders it constitutionally unfair to allow the proceedings to continue and this is not such an exceptional case. Significant as the delay is, it is an unfortunate reality demonstrated in the case law that such delays are not unusual in cases of sexual abuse. Refusing to dismiss on delay grounds alone absent very exceptional circumstances in cases of this type is consistent both with legislative policy as seen in s. 48A and the significant constitutional imperative in favour of all issues of rights, liabilities or obligation being determined on the merits in a trial at which all admissible and relevant evidence is analysed and the law properly applied to the facts which thereby emerge.

**77.** The delay in this case spanning four decades is clearly inordinate. This is not seriously in issue in these proceedings. While contribution to delay is more readily measurable in post

commencement delay cases where responsibility for delay is assessed by reference to rules of court and normal court practice, this is not the only factor which predisposes to the application of one test rather than the other on the facts of any given case. In the absence of any appreciable post-commencement or prosecutorial delay in this case, I have decided that it is more appropriate that I first consider whether it is established by the Defendant that the right to a fair trial is on a real hazard in a manner which cannot be cured (in other words based on *O'Domhnaill* principles). I adopt this approach in circumstances where:

- i. it is well established that pre-commencement delay in historic sexual abuse cases may be excusable for reasons which at least over-lap with considerations under the Statute of Limitations in terms of impairment (a matter for medical evidence) by reason of the abuse complained of;
- ii. medical evidence is relied upon in this case; and
- iii. the level of prejudice caused is claimed to meet both the test in *Primor* and *O'Domhnaill*.

**78.** Taking this approach, I am not required to conclude that inordinate delay is inexcusable, notwithstanding that it may not be statute-barred, before deciding the application on properly weighted justice considerations. My starting position is that proceedings should be permitted to continue to trial despite gross delay which is clearly inordinate unless I am satisfied that there is a real and substantial risk of unfairness in requiring the Defendant to meet the case. I propose to apply the “*no true trial on the merits is capable of being conducted*” test as espoused by Clarke CJ. in *Nash v. DPP* [2015] IESC 32 and applied by Owens J. in *S.T. v. Clifford* [2023] IESC 458. This requires a consideration of the nature of the case and the circumstances as they now arise.

**79.** In electing to proceed on this basis, I wish to make clear that I do not agree with the submission made on behalf of the Plaintiff that the *Primor* test has no application in respect of pre-commencement delay. I am satisfied from the case-law (not least *Nash v. DPP*) that the *Primor* test is capable of, and has been applied, to both pre and post commencement delay and may be relied upon to dismiss proceedings on delay grounds even in a case which might not otherwise be statute barred by reason of pre commencement delay. Contrary to what was submitted on behalf of the Plaintiff, it does not necessarily follow that the presence of “*substantial impairment*”, if established, which impeded the earlier institution of proceedings

will always constitute a full excuse for delay to defeat the application of the *Primor* test. The test of excusability as part of the *Primor* test is fact dependent and is a separate and distinct test to that which normally rests on a finding on medical evidence of “*substantial impairment*” within the meaning of s. 48A of the 2000 Act.

#### Application of the Test

**80.** Proceeding on an application of the *O’Domhnaill* test as refined in subsequent case-law and applied in *S.T. v. Clifford*, I am concerned first and foremost with assessing the impact or effect of delay on the right to a fair process in accordance with the requirements of constitutional justice rather than the constituent periods of delay and responsibility or culpability for same. On the facts grounding this application, however, my immediate concern is considering unfairness with reference to *O’Domhnaill* test is not with the nature and length of the delay, undoubtedly inordinate, but the impact it has had on the availability of evidence and the ability to determine disputed facts justly and fairly.

**81.** Although not conceded in terms, it is not seriously disputed that the Defendant is unavailable by reason of a lack of competence occasioned by ill-health. I have no hesitation in finding, based on the extensive and uncontested medical evidence adduced on behalf of the Defendant, that the Defendant is no longer available as a witness to be heard in his own defence.

**82.** The unavailability of a party is not determinative of whether a court process may still be fairly conducted. This in turn depends on the overall circumstances of the case. Despite submissions urged on me to the contrary, the central issue in this case is not whether the Plaintiff’s siblings were made aware of allegations of abuse and supported the Plaintiff or engaged in a family omerta, as contended on behalf of the Plaintiff, but rather whether the Defendant abused the Plaintiff. I am satisfied that the core question on this application is whether any hearing on the merits of this central issue is so prejudiced by the Defendant’s unavailability due to ill-health and the death of central witnesses that the fairness of trial would be placed on hazard.

**83.** It is important to note that in his formal statement to the Gardaí during the investigation of the Plaintiff’s complaint and while he retained capacity, the Defendant denied all wrongdoing and crucially denied that he ever behaved inappropriately with the Plaintiff. He is



no longer available to give this evidence during a court hearing. He cannot be heard in support of his own truthfulness and character. The Plaintiff's account given in oral evidence cannot be rebutted by the Defendant's own evidence in response. As Hardiman J. said in *Whelan*:

*“the grossest imagineable prejudice is the death of the defendant himself in a case where the basic facts are disputed by one person's word against another's”.*

**84.** The Defendant in this case is not dead but for the purpose of these proceedings he is unable to defend himself in any way whatsoever. I am satisfied that this is a real prejudice. The question then is whether this is surmountable having regard to the facts and circumstances of this case. I see nothing in the overall circumstances of the case to save the fairness of the process. Instead, the significant and gross prejudice arising from the unavailability of the Defendant, is compounded by the death of the two witnesses of primary fact identified by the Plaintiff in his complaint, namely the Plaintiff's brother on the 24<sup>th</sup> of June, 2020 and his mother on the 12<sup>th</sup> of July, 2021. By reason of the delay in bringing the within proceedings, the Plaintiff's brother is no longer available to respond to those issues of fact which the Plaintiff asserts corroborate his central allegation of abuse by the Defendant. The allegations which cannot be addressed by the Defendant are referenced on affidavit in these proceedings as:

- *“He [deceased brother] was faced away and he did not turn around” (during the alleged assault)*
- *“... my father had turned the light on, and the lights were on during the whole episode”*
- *“My brother [name of deceased brother] appeared to be asleep, he must in fact have been awake during the assault”*
- *That three months post the alleged assault [name of deceased brother] said to the Plaintiff that “Daddy loves you more than the rest of us”. The Plaintiff alleges that this evidences that his deceased brother had heard what the Defendant had said to the Plaintiff during the alleged assault.*
- *That his deceased brother had told him “that he could not support me because he and his family were financially dependent on the Defendant”*
- *“That [name of deceased brother] was clear that he remembered the night of the assault.”*

- *“That witnesses such as my late brother [name] were ‘strong armed’ by the Guardian Ad Litem not to corroborate my claims.”*

**85.** It is noted that there are some small variations between what the Plaintiff has said on affidavit in these proceedings when compared with his statement to the Gardaí in 2017. In his original statement, the Plaintiff said:

- *‘[Name of deceased brother] was in his bed beside mine but he was asleep or pretending to be facing away from us towards the wall.’*
- *‘I remember [Name of deceased brother] moved in his bed and this interrupted my father.’*
- *‘I don’t remember exactly what happened after this but I think he [The Defendant] fell asleep on my bed. This whole incident probably lasted almost ninety minutes’.*
- *‘I would just like to clarify earlier when I told you about [Name of deceased brother]’s statement that ‘Daddy loved me more than the rest, he told me that he had heard my father say it to me on the night he touched me’.*

**86.** These allegations, including possible inconsistencies identifiable, key to issues of credibility and fact finding in these proceedings, cannot be satisfactorily resolved in the Plaintiff’s deceased brother’s absence recalling that, when alive, his deceased brother denied these allegations in full in a formal statement as part of the criminal investigation. Although the Plaintiff contends that this was because his brother was financially dependent on his father, it is not possible to explore this contention satisfactorily or fairly in the absence of the Plaintiff’s deceased brother.

**87.** Similarly, issues of fact concerning the Plaintiff’s mother arise from the terms of the complaint made. In his statement to the Gardaí delivered during the criminal investigation in 2017 the Plaintiff referenced certain facts concerning his mother as follows:

- *“As I said my bedroom light was switched on and there was a slight gap between the door frame of the hinge side. I remember at one point hearing a creaking of the floor boards outside on the landing”.*

- *“I remember walking down the stairs to go for a shower opposite the kitchen. My mother came up to me and started asking about my father and why he had been in my room the previous night.”*

**88.** In her statement made as part of the Garda investigation, the Plaintiff’s mother denied these allegations in full. In his replying affidavit on this application the Plaintiff raises several further issues concerning his mother.

- *“The morning after the assault, my mother [name of mother] stopped me coming out of the shower and interrogated me about what had kept my father up so late, why he was in my room. I say and believe that my mother interrogated me because she suspected, knew and may have witnessed the assault that night.”*
- *The alleged telephone conversation between the Plaintiff’s wife and his mother following a dinner where the war in Iraq arose where it is alleged his mother made a ‘circumspect response.’*

**89.** It seems to me that the Defendant’s inability when combined with the availability of these two witnesses of fact represents an insurmountable difficulty for him in defending these proceedings. The unavailability of the only three witnesses of fact who were alleged to have direct knowledge of the abuse and who each denied it, represents an irretrievable prejudice in the defence of the proceedings. I am satisfied that the core issue of fact which requires to be determined, namely whether the abuse occurred or not, can no longer be safely resolved. No witness to that event itself remains available to be heard in defence to the Plaintiff’s evidence that abuse occurred.

**90.** Insofar as other witnesses may give evidence as to what the Plaintiff and the Defendant said upon the occasion of disclosures and can be examined as to whether they were aware of an alleged incident of abuse prior to 2003, as the Plaintiff alleges and in respect dispute arises as between surviving witnesses, this is not evidence of the central, disputed fact in the case, namely, the event of abuse itself. Surviving defence witnesses can only say whether the Plaintiff told them he was abused and be examined as to whether the Defendant made admissions to them or denied the allegations. They cannot be examined as to the truth of any admission or denial in a manner which cures the patent prejudice which arises from the

unavailability of the three central witnesses to questions of core fact with the result that the Plaintiff is now the only witness of core fact. Accordingly, I cannot accept the submission on behalf of the Plaintiff that the asserted fact that almost all his surviving siblings are likely to favour the Defendant, even were it to transpire to be true, can maintain the balance of a fair trial.

**91.** As I have determined that *O'Domhnaill* type prejudice has been established, it must follow that I would have no hesitation in concluding that the lesser level of prejudice required to meet the *Primor* test has also been established where the fairness of trial has clearly been diminished by reason of delay. Before I could get to a balance of justice considerations on the application of a *Primor* test, however, I would first have to be satisfied that delay on the part of the Plaintiff has not been excused (or is culpable). Although it is not necessary for me to determine this question in these proceedings, I note that the primary (but not only) explanation for delay advanced in this case is the Plaintiff's impairment resulting from the psychiatric injury occasioned by the alleged abuse. It seems to me that the medical evidence goes some way to explain the Plaintiff's delay but it is an open question as to whether it fully excuses it. In this regard I note that the Plaintiff told the Gardaí in his statement during the criminal investigation that he had not come forward previously because he did not consider his father sufficiently "*contrite about his remorse*" and because when he was practising, he would not have wanted his name in the papers but following his retirement, this would no longer bother him. Insofar as the Plaintiff deferred pursuing the matter because he wished to avoid publicity for professional reasons, this cannot justify delay and tends to undermine such justification as might be afforded by the medical evidence.

**92.** Furthermore, while the medical report available refers to continuing symptoms of PTSD, it offers the view that the Plaintiff was impaired by reason of his condition until he made complaint to the Gardaí as part of the criminal process. There is no medical evidence that his ongoing symptoms were such as to impair the bringing of civil proceedings post 2017. Accordingly, the period of delay between 2017 (when criminal complaint was made) and 2022 when proceedings were commenced, is not excused by the medical evidence in the terms given in the report provided on behalf of the Plaintiff even when taken at its height.

**93.** The Plaintiff suggests on affidavit that the capacity required to refer matters to An Garda Síochána who have responsibility for investigation and prosecution is considerably less

than required to take on the burden of prosecuting a civil claim. This is not so persuasive an argument in this case as it might be in another recalling that the Plaintiff has demonstrated a high level of functioning educationally and professionally. Furthermore, he has confronted the alleged incidents of abuse in the past (writing in detailed and lengthy terms to all siblings in 2003). Where the Defendant and his wife, both central witnesses, were of advanced age, it should have been clear to the Plaintiff that it was imperative that steps to advance civil proceedings be taken without delay, if they were to be taken at all. Accordingly, in my view, a serious question arises as to whether the Plaintiff's delay, particularly since 2017, is excusable even though the proceedings may not be statute barred based on the medical evidence adduced.

**94.** Very little by way of justification is advanced in this case in respect of delay during the period 2017-2022 following the making of a criminal complaint. The fact that criminal proceedings were in being was not an impediment to the commencement of civil proceedings even if conventionally any criminal proceedings would be determined first in time. This period, as it has transpired, has been critical when regard is had to changes during this time occasioned by the Defendant's stroke and resulting incapacity followed by the death of material witnesses. Ultimately, in view of my conclusions on *O'Domhnaill* prejudice and having regard to the doctrine of judicial restraint, the questions of whether blameworthy or culpable delay has been established and where the balance lies in this case are not ones I need to decide on this application. If I were required to determine this question, however, it seems to me that even without considering delay prior to 2017, insufficient basis is shown for excusing the delay between 2017 and 2022. Accordingly, even if prejudice were not at a level which requires the dismissal of proceedings, contrary to my findings in this case, and without determining whether delay pre-2017 was excusable, it seems to me that a relatively short period of culpable or unexcused delay in a historic sexual abuse case which already features significant delay (albeit this delay might otherwise be excusable), tilts the balance of justice in favour of a conclusion that dismissing the proceedings on delay grounds is a proportionate and proper exercise of discretion in this case. This leads to the conclusion that on either an *O'Domhnaill* or *Primor* test the outcome on this application is the same and the proceedings should be dismissed.

## **CONCLUSION**

**95.** On the facts and circumstances of this case, this action cannot fairly proceed because of lapse of time. The unavailability of the Defendant, as principal defence witness and the

death of the two witnesses of material fact identified in the terms of the Plaintiff's complaint, each of whom denied the abuse occurred but are not now available to give this evidence, has the effect that the central issue in this case, namely whether the alleged abuse occurred or not, is beyond the reach of fair litigation. As the Defendant is not able to call evidence on the issue of whether abuse occurred, I am satisfied that any hearing would lack that mutuality and fairness which have been found to be essential for the administration of justice.

**96.** Accordingly, I will make an order dismissing the within proceedings and, absent agreement in respect of the terms of the formal order and consequential matters, this case will be listed for final ruling upon the expiry of two weeks from the electronic delivery of this judgment.