

Historical Abuse and the Statute of Limitations

Abstract:

This article will assess the role of the statute of limitations in Irish law and examine the extent to which it impedes an effective remedy for victims and survivors of historical abuse. It will first identify the problem of historical abuse in Ireland and argue that while several non-judicial remedies have been created, a need persists to remedy and acknowledge historical abuse through litigation. It will then assess the Statute of Limitations in Irish law, contrast this position with the law in other common law jurisdictions and note that Irish law denies victims and survivors the potential for a remedy and judicial acknowledgment of such abuse. The article will conclude by examining whether the Irish limitation regime could be challenged as contrary to the European Convention on Human Rights.

Keywords:

Statute of Limitations, Historical Abuse, European Convention on Human Rights

I. Introduction

Historical abuse, especially child sexual abuse, has received extensive coverage internationally, particularly where this abuse occurred in the Roman Catholic Church, and more recently in British public and private institutions.¹ Such abuse has often been accompanied by several psychological damage to victims and survivors, including repressed memories and post-traumatic stress disorder (PTSD).² Historical abuse should be understood to extend to non-sexual forms of historical institu-

¹ Kathleen Daly, *Redressing Institutional Abuse of Children* (2014 Springer); Independent Inquiry into Child Sexual Abuse <https://www.iicsa.org.uk>

² Vicky Wolfe, Carole Gentile, David Wolfe, "The impact of sexual abuse on children: A PTSD formulation" (1989) 20(2) Behaviour Therapy 215-228

tional abuse of both children and adults, including conduct such as physical violence, arbitrary deprivation of liberty, emotional violation, exploitation, and neglect.³ In the Irish context, such abuse should be understood to incorporate harm, including forced servitude, suffered by women in Magdalene laundries, and physical abuse suffered by children in industrial schools and orphanages.⁴

As the British Independent Inquiry into Child Sex Abuse struggles through successive resignations of its leadership,⁵ the experience of Irish victim-survivors engaging with the response of a legal to historical abuse may be instructive. Although some forms of historical abuse have received discrete responses from the Irish state, existing non-judicial schemes, while including limited monetary compensation, have not included admissions of legal State liability.⁶ As a result, victims and survivors have also sought civil remedies against institutions, including State institutions, responsible for their care at the time of the abuse and/or against the perpetrator's employer.⁷ Such victims and survivors of historical abuse must overcome the law of limitation, which allows the plaintiff a specific amount of time from a specified date within which to bring an action against the defendant. This article will assess the role of the statute of limitations in Irish law and examine the extent to which it impedes an effective remedy for victims and survivors of historical abuse. It will argue that the Irish limitation regime places Irish victim-survivors of historical abuse in an invidious position compared to similar victims in other common law contexts and by comparison to victims of gross violations of human rights in a broader comparative perspective. This article will first assess the Statute of Limitations in Irish law, contrast this position with the law in other common law jurisdictions and

³ Johanna Sköld "Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide", (2013) 14:sup1 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 5-23, 7

⁴ Mark Fitzpatrick, Alan Carr, et al, "Profiles of adult survivors of severe sexual, physical and emotional institutional abuse in Ireland" (2010) 19(6) *Child Abuse Review* 387-404

⁵ "Announcement by the Chair to the Inquiry on the resignation of Ben Emmerson QC" 29th September 2016; "Statement from Hon. Dame Lowell Goddard" 5th August 2015

⁶ Taoiseach Apologies to Victims of Child Abuse 11 May 1999, *RTE News*, <http://www.rte.ie/news/1999/0511/1662-abuse/>; Residential Institutions Redress Board Act 2002; Enda Kenny's State Apology to the Magdalene women 19th February 2013, *The Journal.ie* <http://www.thejournal.ie/full-text-enda-kenny-magdalene-apology-801132-Feb2013/>; Department of Justice, Government agreed details of implementation of Quirke Scheme for women in Magdalene laundries <http://www.justice.ie/en/JELR/Pages/PR13000383>

⁷ Elizabeth Adjin-Tettey & Freya Kodar, "Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence" 42(1) *Ottawa Law Review* 97-123, p 98

note that Irish law denies victims and survivors the potential for a remedy and judicial acknowledgment of such abuse. The article will conclude by examining whether the Irish limitation regime could be challenged as contrary to the European Convention on Human Rights.

II. Statute of Limitations in Irish Law

The law on limitation of actions in Ireland is principally governed by the Statute of Limitations 1957, the Statute of Limitations (Amendment) Act 1991, and the Statute of Limitations (Amendment) Act 2000.⁸ First, section 11(2) of the 1957 Act provides that an action founded on tort must be brought within six years from the date the cause of action accrued. However, more specifically, the period for an action claiming damages for negligence, nuisance or breach of duty, or for personal injuries, is two years from the date of accrual or, if later, the date of knowledge.⁹ The 1957 Act also allows for the postponement of a limitation period until they reach 18 years of age or while a person is of unsound mind. These general provisions provide a very short period of action for victims of historical abuse and reflect a legal desire to ensure certainty and avoid the litigation of stale claims. This component of the limitation regime is not designed with historical abuse in mind.

One argument regarding the application of the limitation regime to historical abuse has been that the abuse was concealed by the fraud of State or religious institutions involved. Section 71(1)(b) of the 1957 Act provides that where the right of action is concealed by the fraud of the defendant, the period of limitation does not run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered the fraud. In *Behan v Bank of Ireland*, the Supreme Court concluded "fraud" should be interpreted in the equitable sense of unconscionable conduct.¹⁰ However section 71 has proven of little use to victims of historical abuse. In *E.A.O. v The Daughters of Charity of St.*

⁸ The Statute of Limitations 1957 has also been amended on a number of occasions by other legislation, such as the Civil Liability Act 1961, the Civil Liability and Courts Act 2004 and the Defamation Act 2009.

⁹ Statute of Limitations (Amendment) Act 1991 as amended by the Civil Liability and Courts Act 2004, s7

¹⁰ *Behan v Bank of Ireland* [1998] 2 ILRM 507; *Heffernan v O'Herlihy* unreported High Court, Kinlen J, 3 April 1998

Vincent De Paul, Kearns P rejected the plaintiff's claim that the application of the 1957 Act should be postponed due to the alleged fraud of the defendant in 1969.¹¹ The plaintiff alleged she was a victim of rape who became pregnant and was sent to reside in an institution managed by the defendant. Having given birth, the plaintiff maintained she wanted to keep her child, who was subsequently put up for adoption. Subsequently the plaintiff worked in a Magdalene laundry and, subject to what she claimed was undue influence and pressure, signed adoption papers for her child. The plaintiff maintained that the defendant concealed details of an informal system which operated in breach of the requirements of section 15(1) of the Adoption Act 1952 in order to prematurely obtain consent from mothers for the adoption of their children. Kearns P concluded that there was no indication that the defendant perpetrated a fraud or fraudulently concealed anything from the plaintiff such as would cause section 71 of the Statute to become operative.

Beyond the 1957 Act, the Statute of Limitations (Amendment) Act 1991 introduced a discoverability test for personal injuries claims. Where the plaintiff is not in a position to discover their cause of action until after a limitation period had passed, the ability to bring a claim is available for 2 years or, in the case of a clinical negligence action, 3 years, from the date of knowledge of the person injured.¹² If the plaintiff was under a disability either at the time when that right accrued to him or at the date of his knowledge, the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died.¹³ Section 2 of the 1991 Act defines the "date of knowledge" as the date on which the person first had knowledge:

- (a) that the person alleged to have been injured had been injured,
- (b) that the injury in question was significant,
- (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,

¹¹ *E.A.O. v The Daughters of Charity of St. Vincent De Paul* [2015] IEHC 68

¹² Statute of Limitations (Amendment) Act 1991, section 3(1).

¹³ Statute of Limitations (Amendment) Act 1991, section 5(1).

- (d) the identity of the defendant, and
- (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
- (f) and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

In *Whitely v Minister for Defence*, Quirke J noted that the test for "date of knowledge" was primarily subjective, but qualified by section 2(2) which states that a person's knowledge includes knowledge which they might reasonably have been expected to acquire from facts observable or ascertainable to him or ascertainable with the help of expert advice, which it is reasonable for them to seek.¹⁴ The 1991 Act also provides that a person shall not be fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain and, where appropriate, to act on that advice; and a person injured shall not be fixed with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury.¹⁵ In cases of historical abuse, victims may be aware of the injury, its significance, the identity and the responsibility of the defendant and yet be inhibited from acting within three years due the emotional and psychological effects of the abuse.¹⁶ The adoption of this test of "discoverability" in these circumstances could therefore have the effect of discriminating between victims of abuse who have suffered different types of emotional and psychological injuries.¹⁷ The result may be an penalisation of litigants who do not suffer from particular forms of psychological harm prioritised by the Courts.

¹⁴ *Whitely v Minister for Defence* [1998] 4 I.R. 442; *Gallagher v Minister for Defence* [1998] 4 I.R. 457

¹⁵ Section 2(3) of the 1991 Act

¹⁶ Law Reform Commission, *Consultation Paper on the Law of Limitations of Actions Arising from Non-Sexual Abuse of Children*, LRC-CP16-2000, p 59

¹⁷ Law Reform Commission, *Consultation Paper on the Law of Limitations of Actions Arising from Non-Sexual Abuse of Children*, 60

In the alternative, victim-survivors of historical abuse may be unaware that the form of historical abuse they experienced constitutes negligence, nuisance or breach of duty. This legitimate unawareness may especially arise where the State continues to condone or acquiesce regarding such conduct until a period significantly after the end of the limitation period. Such persons would be denied a remedy under Section 2(f) of the 1991 Act. For instance, it was only in 2013 that the State acknowledged the harm to victims and survivors of the Magdalene laundries,¹⁸ while the subsequent redress given to victims is provided without acknowledgment of legal wrongdoing.¹⁹ The Irish Law Reform Commission recommended that the determination of whether the 1991 Act applies to cases of non-sexual abuse of children, should be made by judicial decision.²⁰ To date, however, there has been no judicial determination regarding the application of the limitation regime to civil actions arising from historical, non-sexual, abuse, involving either child or adult victim-survivors.

Finally, the Statute of Limitations (Amendment) Act 2000 introduced a special regime to deal with child sexual abuse claims. When originally introduced to the Dáil, the Bill was intended to apply to both physical and sexual historical abuse. However the Minister for Justice, Equality and Law Reform stated:

“With other forms of child abuse ... the issues are not always as clear-cut as in the case of sex abuse. Questions arise from the wide range of activities which, at one end of the scale, would have been classed until not too long ago as reasonable corporal punishment and, at the other end of the scale are by any standard unacceptable but may not affect the ability of a person to take legal proceedings in a given time.”²¹

¹⁸ <http://www.thejournal.ie/full-text-enda-kenny-magdalene-apology-801132-Feb2013/>

¹⁹ The Magdalene Commission, Report of Mr Justice John Quirke On the establishment of an ex gratia Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries May 2013

²⁰ Law Reform Commission, *Consultation Paper on the Law of Limitations of Actions Arising from Non-Sexual Abuse of Children* p 62

²¹ Deputy O'Donoghue, Dáil Debates, 27 May 1999 (Vol 505, col 1026).

The Act extends the definition of “disability” under the 1991 Act to circumstances in which a person is suffering from a significant “psychological injury” as a result of being sexually abused during childhood so “that his or her will or his or her ability to make a reasoned decision,” to institute civil proceedings in respect of such abuse is “substantially impaired”.²² The 2000 Act recognises that one of the symptoms of sexual abuse is the inability to institute legal proceedings against the perpetrator of the abuse, to acknowledge the abuse or even to disclose it to third parties.²³ A plaintiff may undergo therapy and then realise a significant injury has been sustained in which case a cause of action accrues, but if because of that injury, a plaintiff’s will or the ability to make a reasoned decision to bring an action is substantially impaired, then the plaintiff is under a disability which preserves the causation of action and the limitation period until the disability ceases.²⁴

However, in *Doherty v Quigley*, an expert psychiatrist was highly critical of the 2000 Act, which he thought was simplistic in its assumptions and did not cater sufficiently for sophisticated psychiatric conditions such as dissociation.²⁵ In *RR v PD, Minister for Defence and Attorney General*, in the face of contradictory expert evidence, Johnson P was required to assess whether the plaintiff fell within the terms of the 2000 Act.²⁶ While the 2000 Act may be of some benefit to victims and survivors, its application remains limited to childhood sexual abuse, excluding other forms of historical abuse, such as physical childhood abuse or the detention and cruel and inhuman treatment experienced by women in Magdalene laundries, and its value and efficacy remains contested by psychiatric experts.

²² Statute of Limitations (Amendment) Act, 2000, s.2.

²³ Paul Ward, “Statute of Limitations (Amendment) Act 2000 And Actions for Child Sexual Abuse” in Breen Casey and Kerr (eds) *Liber Memorialis: Professor James C Brady* (Round Hall 2001), p 361

²⁴ *ibid*, 362

²⁵ *Doherty v Quigley* [2011] IEHC 361

²⁶ *RR v PD, Minister for Defence and Attorney General* [2007] IEHC 252; *TM v JH* [2006] IEHC 261

Finally, according to section 3, nothing in the 2000 Act shall affect any power of a court to dismiss an action on the ground of delay in the interests of justice. In *II v JJ*,²⁷ Hogan J dismissed a case concerning sexual abuse to which the 2000 Act applied, as there was an inordinate, inexcusable delay and hearing the case was not justified on the balance of justice, noting that the plaintiff had given almost no detail of how the events complained of are said to have happened.²⁸ In February 2016, in *McNamee v Boyce*, the Irish Court of Appeal accepted an appeal by a convicted child sex abuser that the civil action by his victim should be struck out for inordinate and inexcusable delay.²⁹ The defendant was tried and convicted in 1999 of sexual assault of the plaintiff between 1979 and 1992. The plaintiff began civil litigation in 2002, but did not serve notice of intention to proceed until 2011. The Court of Appeal concluded that the plaintiff had inordinately and inexcusably delayed, and failed to offer any reasonable excuse for same.³⁰ Irvine J took the view that the plaintiff's delay was indefensible when considered in the balance of justice,³¹ concluding were it not for the plaintiff's delay in pursuing her action following the issue of her plenary summons, her action might well have been disposed of before the death of key witness, Mrs Boyce in 2005.

Where psychiatric damage for childhood sexual abuse cannot be shown to justify delay under the 2000 Act, the courts have been less sympathetic to delays in bringing litigation for historical abuse. In *W v W*, the plaintiff claimed that the defendant, her brother, sexually assaulted, abused, assaulted and battered her between 1969 and 1972, from the age of 11.³² Proceedings were commenced by way of plenary summons at the end of 2006. Kearns P held that it would "unfair to the highest degree" to allow the plaintiff to proceed with her claim, given that the proceedings were in existence since 2006, and dismissed the plaintiff's claim on the grounds of both want of prosecution and the

²⁷ *II v JJ* [2012] IEHC 327

²⁸ *ibid*, para 30.

²⁹ *McNamee v Boyce* [2016] IECA 19

³⁰ [2016] IECA 19, para. 39

³¹ *ibid*, para. 47

³² *W v W* [2011] IEHC 201

Statute of Limitations. Kearns P was of the view that, in this case, the only injury the plaintiff appeared to be relying on was a physical injury, a rare genetic disorder, but no psychological injury.³³ In *Kelly v. O'Leary* the plaintiff sought damages for negligence in respect of physical and mental injuries arising from events that occurred during her placement in an orphanage between 1934 and 1937.³⁴ Kelly J. held that constitutional principles of fairness of procedure required dismissal of an action, noting that the effect of the prolonged delay was such that the defendant would be required to defend proceedings in respect of incidents that took place between 55 and 68 years ago. The witness was 83 years old and cared for approximately 1,000 children over the years that she was at the orphanage. She could not remember specific incidents.³⁵ In *Cassidy v The Provincialate*, the plaintiff claimed damages against the Religious Sisters of Charity for abuse she allegedly suffered between 1977 and 1980 at the hands of a man she claimed was employed by the Sisters.³⁶ The defendants sought to have the proceedings dismissed on the ground that their ability to defend the claim had been severely prejudiced. They were unable to find any record of ever having employed the alleged abuser and it seemed likely he was dead and other potential witnesses had also passed away. The High Court refused to dismiss the proceedings, taking the view that there was no risk of an unfair trial. On appeal, the Court of Appeal was satisfied that, irrespective of which test was applied, the proceedings should be dismissed. The likely death of the alleged abuser “visited the grossest imaginable prejudice” upon the Sisters who were not in a position to challenge or counter the allegations of abuse made by the plaintiff.³⁷ The accuracy of the plaintiff’s account of events could not be tested against any contemporaneous account of what was now alleged to have occurred.

The limitation regime in Ireland thus enables only a limited subset of victims and survivors of historical abuse to recover, where unconscionable conduct on the part of the defendant can be shown

³³ [2011] IEHC 201

³⁴ *Kelly v. O'Leary* [2001] 2 I.R. 526

³⁵ [2001] 2 I.R. 535

³⁶ *Cassidy v The Provincialate* [2015] IECA 74

³⁷ [2015] IECA 74, para. 57

under the 1957 Act, where there was no reasonable prospect of discovering the injury arising from the historical abuse under the 1991 Act, or where victims suffer a recognised psychiatric disability, which prevents them from initiating litigation where they suffer from sexual abuse, under the 2000 Act. This limitation regime presents several challenges for excluded victims and survivors of historical abuse in Ireland.

IV. The Problems for Historical Abuse Cases under Ireland's Limitation Regime

Several concerns arise regarding the application of the Irish limitation regime to historical abuse. Historical abuse covers several civil causes of action captured by the limitation regime, such as negligence actions, including those for the vicarious liability of institutions employing abusers,³⁸ assault or trespass to the person or false imprisonment.³⁹ An action claiming damages for breach of the Constitution of Ireland, such as torture, slavery or forced servitude,⁴⁰ is treated as an action in tort for limitation purposes.⁴¹ However, victims of historical abuse may not have pursued litigation under these causes of action in the reasonable belief that the conduct under which they were abused was legal and endorsed by the State. In particular, some of the women who were in the Magdalene laundries may have been placed in the laundries subject to a court order or State action.⁴² This legitimate lack of knowledge mirrors comparative experience across other jurisdictions. In historical wrongful sterilisation cases, victims were unaware of the wrong.⁴³ Similar issues arise in recent revelations regarding symphysiotomy in Ireland.⁴⁴ In Canadian institutional abuse cases, claimants

³⁸ Statute of Limitation 1957, s. 11(2).

³⁹ *Bailey v Warden* (1815) 4 M&S 400, 105 ER 882; *Hardy v Ryle* (1829) 9 B&C 603, 109 ER 224

⁴⁰ *W v. Ireland* (No. 2) [1997] 2 IR 141 (HC); *The State (C.) v. Frawley* [1976] I.R. 365

⁴¹ *McDonnell v Ireland* [1998] 1 IR 141

⁴² Dail Eireann Parliamentary Debates, Written Answer from Dermot Ahern, TD, Minister for Justice, Equality & Law Reform to Ruairi Quinn, TD (19 January 2010); National Archives of Ireland, Central Criminal Court Trial Record Books (1926-1964), cited by James M. Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (Manchester University Press, 2008), p.63; Irish Human Rights Commission, Assessment of the human rights issues arising in relation to the treatment of women and girls in Magdalen laundries (2010)

⁴³ *Muir v Alberta* (1996), 179 AR 2, 4 WWR 177 (QB); *DE (Guardian ad litem of) v British Columbia*, 2005 BCCA 4, 5 WWR 204, 7 BCLR (4th) 89 (CA)

⁴⁴ "Symphysiotomy scheme pays out nearly €4m to date" 30th January 2015 *The Irish Times*

were not aware the conduct in question was wrongful.⁴⁵ In incest cases, survivors were often unable to draw the necessary nexus between the wrong and the consequences of their victimisation before the ultimate limitation period had expired.⁴⁶

Second, in historical abuse cases, it may be possible to claim that the lack of social and legal recognition of the wrong doing in these contexts would render it unconscionable for a state defendant to rely on the Statute. Suggesting that victim-survivors of historical abuse should have pursued legal action contemporary to their abuse ignores both the psychological and traumatic effects of intense physical or sexual abuse, but also creates an artificially receptive historical context. Investigations into abuse in a variety of historical contexts both in Ireland and internationally demonstrate the unwillingness or inability of State and church authorities to respond effectively to such complaints, or a lack of belief in the accusations of victim-survivors against socially respected authority figures.⁴⁷ The concern may be raised that in addressing historical abuse that standards and perceptions of what conduct is acceptable have changed dramatically and that courts may impose modern standards on conduct which was viewed at the time of the alleged tort to be reasonable. On this view, there is no equivalent risk in relation to sexual abuse.⁴⁸ In contrast, it is possible to construct arguments that the State had put in place regulatory and inspection regime of State run and Church run institutional settings and these and a failure to implement these regimes, or design them to address the mere *possibility* of physical and sexual abuse, gives rise to State responsibility.⁴⁹

⁴⁵ Elizabeth Adjin-Tettey & Freya Kodar, “Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence” 42(1) *Ottawa Law Review* 97-123, 106

⁴⁶ Janet Mosher, “Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest” (1994) 44 *UTLJ* 169.

⁴⁷ Report of the Commission to Inquire into Child Abuse, Executive Summary, available at <http://www.childabusecommission.ie/rpt/ExecSummary.php>;

McGee H, Garavan R, de Barra M, Byrne J, Conroy R. The SAVI Report: sexual abuse and violence in Ireland. (Dublin: Dublin Rape Crisis Centre; 2002)

⁴⁸ Law Reform Commission, *Consultation Paper on the Law of Limitations of Actions Arising from Non-Sexual Abuse of Children*, LRC-CP16–2000, 52

⁴⁹ *O’Keeffe v Ireland* [2014] ECHR 96

Third, the privileging of childhood sexual abuse, as under the 2000 Act, as qualitatively different from other types of abuse is not justifiable in light of the common harmful effects of all childhood abuses,⁵⁰ such as psychological trauma, especially where both types of abuse occurred in the same institutional environment. In addition, barriers to seeking redress, such as psychiatric illnesses, lack of awareness of the wrongfulness of the impugned conduct, inability to draw a link between abuse and current difficulties, lack of financial resources, may affect all historical abuse victims, especially children and vulnerable persons, regardless of the type of abuse.⁵¹ Recent meta-analysis in psychology literature demonstrates that childhood trauma can occur from a variety of sources, not limited to child sexual abuse.⁵² 2015 studies of post-traumatic stress disorder now cover events beyond child sexual abuse, such as victims of physical assault and road traffic victims of whiplash.⁵³ However, in Irish courts, non-sexual historical forms of abuse have not yet been accepted as generating psychological forms of harm, which could be captured by the discoverability and disability regimes in the 1991 and 2000 Acts, than child sexual abuse.

These challenges raise a concern that Irish victims and survivors of such abuse are unjustifiably denied access to a legal remedy by the operation of the limitation regime. To substantiate this claim, this article will contrast the Irish approach to this issue with that taken in other common law jurisdictions. The lack of a general discretionary judicial power in the Irish limitation regime places this regime in stark contrast to the approach of other common law jurisdictions and leaves Irish victims of historical abuse without an effective remedy.

⁵⁰ Elizabeth Adjin-Tettey & Freya Kodar, “Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence” 42(1) *Ottawa Law Review* 97-123, 110

⁵¹ Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Public Works and Government Services, 2000), 45-6, 71

⁵² Childhood Adversities Increase the Risk of Psychosis: A Meta-analysis of Patient-Control, Prospective- and Cross-sectional Cohort Studies (2012) 38(4) *Schizophrenia Bulletin* 661–671

⁵³ Maj Hansen, Philip Hyland, Cherie Armour, Mark Shevlin and Ask Elklit “Less is more? Assessing the validity of the ICD-11 model of PTSD across multiple trauma samples” (2015) 6 *European Journal of Psychotraumatology* 28766; Daniel M. LeBouthillier, Katherine A. McMillan, Michel A. Thibodeau, and Gordon J. G. Asmundson, “Types and Number of Traumas Associated With Suicidal Ideation and Suicide Attempts in PTSD: Findings From a U.S. Nationally Representative Sample” (June 2015) 28 *Journal of Traumatic Stress* 183–190

V. Common Law Limitation Regimes Compared

The limitation regime in the United Kingdom (UK) bears several similar features to the Irish regime, with one notable exception. Under the UK Limitation Act 1980, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.⁵⁴ In actions for negligence, nuisance or breach of duty, the period applicable is three years from the date on which the cause of action accrued or the date of knowledge of the person injured.⁵⁵ The 1980 Act provides for a number of extensions to these standard limitation periods. First, the Act provides for special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual, which can extend the relevant time limits to fifteen years from the date of occurrence.⁵⁶ Second, if on the date when any right of action accrued, the person to whom it accrued was under a disability, the action may be brought for six years from the date when he ceased to be under a disability notwithstanding that the period of limitation has expired.⁵⁷ Third, the court has a discretion to postpone the application of the limitation period in cases of fraud, concealment or mistake.⁵⁸ These provisions are largely mirrored in Irish law. Finally, however, under section 33, courts have an equitable discretion to allow an action to proceed, having regard to the degree to which the limitation periods for personal injuries prejudice the plaintiff or defendant. In exercising this discretion, the court shall have regard to all the circumstances of the case, including the length of, and the reasons for, the delay on the part of the plaintiff; the extent to which evidence is likely to be less cogent than if the action had been brought within the time allowed; the conduct of the defendant after the cause of action arose; the extent to which the plaintiff acted promptly and

⁵⁴ Limitation Act 1980 c.58, section 2

⁵⁵ Limitation Act 1980 c.58, section 11

⁵⁶ Limitation Act 1980 c.58, section 14

⁵⁷ Limitation Act 1980 c.58, section 28

⁵⁸ Limitation Act 1980 c. 58, section 32

reasonably once he knew the act or omission of the defendant might be capable at that time of giving rise to an action for damages; the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.⁵⁹

This discretionary regime had originally been interpreted in manner that led to harsh results for victims of historical abuse. In *Stubbings v Webb*, the claimant was statute barred for sexual and physical abuse by her stepfather, stepmother and stepbrother. She attained majority in 1975 and commenced civil proceedings in August 1987, having attained knowledge of the significance of her injury only in September 1984 through psychiatric counselling.⁶⁰ The House of Lords held that the claim was for trespass to the person and as such had been statute barred in January 1981, 6 years from the date of accrual of the action on her attainment of the age of majority in January 1975.⁶¹ This decision has been the subject of severe criticism in England and Wales.⁶² In *Seymour v Williams*, an action was brought in respect of sexual and physical childhood abuse.⁶³ The perpetrator was the plaintiff's father and the claim for trespass against the person was struck out on the *Stubbings* reasoning. However a claim was also brought against the plaintiff's mother for negligence. In holding that the claim was governed by section 11 of the 1980 Act, with the prospect of extensions under sections 14 and 33, Millett LJ endorsed the judge at first instance who described as "illogical and perhaps surprising" the outcome that the "actual perpetrator of violence should be statute barred while a claim against the non-perpetrator for failing to prevent the violence was not."⁶⁴ Several other cases affirmed the difficulties of the approach taken from *Stubbings v Webb*.⁶⁵

⁵⁹ Limitation Act 1980 c.58, section 33

⁶⁰ *Stubbings v Webb* [1993] 1 All ER 322 [1993] AC 498

⁶¹ Carol Brennan, "An instrument of injustice? Child abuse and the reform of the limitation law" (2006) 18 Child & Family Law Quarterly 67, 71

⁶² Julian R.J. Allinson, "Limitation of Actions in Child Abuse Cases" (1996) JPIL 19; Davies, "Limitation of actions in personal injury cases: law of tort or law of torts?" (1993) SLR 74; Mullis "Compounding the Abuse? The House of Lords, Childhood Sexual Abuse and Limitation Periods" (1997) MedLRev 22; A McGee, "Trespass and Limitation" (1993) 109 LQR 356; WVH Rogers, "Limitation and Intentional Torts" (1993) 143 NLJ 258.

⁶³ *Seymour v Williams* [1995] PIQR 470

⁶⁴ *Seymour v Williams* [1995] PIQR 470, at 474

⁶⁵ *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828; *Hodges v Northampton County Council* [2004] EWCA Civ 526, [2005] 2 PIQR 87; *KR and Ors v Bryn Alyn Community (Holdings) Ltd (in liquidation) and Another*

In *A v Hoare* the House of Lords considered five claims for damages arising from historic child sex abuse, all of which were started more than six years after the sexual abuse took place.⁶⁶ All the claimants argued that they came within the more flexible regime set out by sections 11 to 14 and 33. The House of Lords held that the words “negligence, nuisance or breach of duty” could be construed to include sexual assault and thus bring them within the s33 discretion to dis-apply the limitation period for claims. In reaching this conclusion, the court overruled that *Stubbings v. Webb*, noting its application had given rise to serious anomalies in the law of limitation.⁶⁷ The range of claims which have survived the exercise of s.33 discretion after the decision in *Hoare* have expanded greatly.⁶⁸ Subsequent cases affirm that situations of both physical and sexual abuse can engage a court’s discretion under s.33 of the 1980 Act.⁶⁹ The key factor remains assessing where a fair trial is no longer possible even where a claimant had an ostensible strong case on the facts of abuse.⁷⁰ The cases indicate that where there is significant prejudice such as inability to trace full documentation, the death of witnesses and the death of the abuser the Court may continue to decline to exercise its discretion.⁷¹ This approach demonstrates the viability of individuated assessments of fair trial concerns, and highlights overly restrictive nature of the Irish approach.

[2003] EWCA Civ 85, [2003] 1 FLR 1203; *Adams v Bracknell Forest Borough Council* [2004] UKHL 29 [2005] 1 AC 76 Carol Brennan, “Instrument of Injustice: Child Abuse and the Reform of Limitation Law” (2006) 18(1) Child and Family Law Quarterly, 67-92

⁶⁶ *A v. Hoare* [2008] UKHL 6, [2008] 1 A.C. 844

⁶⁷ [2008] UKHL 6, para. 22

⁶⁸ Alan Inglis, “Institutional child abuse: limitation after *A v Hoare*” (2009) *Journal of Personal Injury Law* 284, p 286; *Albonetti v Wirral MBC* [2008] EWCA Civ 783; *D v Harrow LBC* [2008] EWHC 3048 (QB); *Pierce v Doncaster MBC* [2008] EWCA Civ 146; *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256; *B v Nugent Care Society* (formerly Catholic Social Services (Liverpool)) [2006] EWHC 2986; [2006] EWHC 3031; *B v Nugent Care Society* (formerly Catholic Social Services (Liverpool)) [2008] EWCA Civ 745 CA per Holland J.; *B v Nugent Care Society* [2009] EWHC 481; *B v Nugent Care Society* [2009] EWCA Civ 827 CA per Irwin J.; and *B v Nugent Care Society* (formerly Catholic Social Services (Liverpool)) [2010] EWHC 1005 per Irwin J; *Cain v Francis* [2008] EWCA Civ 1451.

⁶⁹ *RAR v GGC* [2012] EWHC 2338 QB.

⁷⁰ Frank Burton, “Limitation, vicarious liability and historic actions for abuse: a changing legal landscape” (2013) *Journal of Personal Injury Law* 95-126, 125

⁷¹ *EL v Children’s Society* [2012] EWHC 365 (QB)

Other common law jurisdictions adopt a similar combination of rules and judicial discretion that re-enforce how restrictive the Irish approach is. Each of the Canadian provinces has its own statutory rules on limitation of actions. Some provinces, such as British Columbia, only provided exemptions from statutes of limitations for childhood sexual abuse.⁷² Some legislatures amended the Limitation of Actions Act so that it would not apply to actions based on assaults if they were of a sexual nature or other assaults if the plaintiff was dependent on one of the persons alleged to have committed the abuse.⁷³ In *Arishenkoff*, the British Columbia Court of Appeal acknowledged that sexual abuse is qualitatively different from non-sexual abuse due to unique social and psychological factors, including the shame and taboos surrounding sexual abuse, that prevent victims from seeking justice and that do not arise in relation to nonsexual abuse. However, the Court also noted that survivors of non-sexual abuse are not disadvantaged under the limitation period, because they benefit from the discoverability principle and a long ultimate limitation period of 30 years.⁷⁴ While Canadian law therefore accepts a distinction between historical sexual and non-sexual abuse, it does so in part due to a long stop limitation period not present in Irish law.

In the United States, over 40 state legislatures have provided for an extended statute of limitations for child sexual abuse.⁷⁵ Three large trends emerge in the legislatures' approach: (1) delayed "discovery" of the cause of action or a vital element thereof as delaying the accrual of the cause of action; (2) tolling of the statute during disability (i.e., postponing the statute during minority); and (3) a re-opened window: a limited period of years within which historical child sexual abuse litigation can be filed despite otherwise having exceeded the periods of limitation.⁷⁶ The extensive activity of

⁷² Limitations Act, RSA 2000 c L-2, s 13.

⁷³ Limitation of Actions Amendment Act, SM 2002 c 5, s 2.1(2) Saskatchewan Limitations Act, *supra* note 22, s 16(1)(a)(2); NF & L Limitations Act, *supra* note 21, s 8(2); Ontario Limitations Act, *supra* note 22, s 16(1)(h).

⁷⁴ *Arishenkoff v British Columbia*, 2004 BCCA 299, 9 WWR 455, 30 BCLR (4th) 1, 112, 124-25, 129, 140

⁷⁵ National Conference of State Legislatures, State Civil Statutes of Limitation in Child Sexual Abuse Cases, <http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx> (last visited 25th April 2016)

⁷⁶ Marci Hamilton, "The Time Has Come for a Restatement of Child Sex Abuse" (2013-2014) 79 Brook. L. Rev. 397-434, p 401

US legislatures is in contrast to the limited interventions in Ireland, especially the lack of a re-opened window.

Similar to the position in the UK, section 17 of the 2010 New Zealand Limitation Act provides for a discretion to allow relief for claim of abuse of minor or of gradual process, disease, or infection injury. The discretion extends to abuse of a minor for both sexual and non-sexual abuse by parents, legal guardians and close relatives or associates. The 2010 Act defines “sexual abuse” and “non-sexual abuse” in subsection (2), as physical abuse, psychological abuse, or a combination of both.⁷⁷ In exercising the discretion, courts are obliged to consider several factors including the length of and reasons for delay and the defendant's conduct.⁷⁸ Similarly, Australian statutes provide for judicial discretion to extend limitation periods in certain circumstances, with the exception of Western Australia, which has been under pressure from experts to reform its approach.⁷⁹ In *Stingel v Clarke*, the High Court of Australia accepted that Section 23(2) of the Victoria Limitation of Actions Act, which provides for judicial discretion to extend the limitation period for intentional torts, should apply to assault and rape.⁸⁰ The decision aligns Australian High Court with the subsequent House of Lords decision in *A v Hoare*. By failing to provide general judicial discretion to extend the time limits for litigation in Irish legislation, the Irish position stands unjustifiably in stark contrast to the position in England, New Zealand and some jurisdictions in Australia. The lack of legislative response to diverse forms of historical abuse in Ireland also contrasts with extensive reforms of the statutes of limitations across several U.S. states and the provision of a long stop limitation in Canada. This range of approaches in other common law jurisdictions have begun the process of breaking down strict distinctions between historical sexual and non-sexual forms of abuse and enable

⁷⁷ Limitation Act 2010, Section 17(4)

⁷⁸ Limitation Act 2010, Section 18

⁷⁹ Committee Hansard, 15.2.01, pp.48-49; Committee Hansard, 15.3.01, p.222 (Dr Coldrey); Committee Hansard, 22.3.01, p.512 (Mr A Gill); Commission urged to address statute of limitations on rape cases <http://www.abc.net.au/news/2013-05-13/royal-commission-urged-to-address-victoria27s-statute-of-limit/4685150> (last visited 21 March 2016); Queensland Limitation of Actions Act, s. 31; *Tiernan v Tiernan* Supreme Court of Queensland, unrep., 22 April 1992; Victoria Limitation of Actions Act, 1958, s.23A(1)–(2), as amended by s.5, Limitation of Actions (Personal Injury Claims) Act, 1983; Queensland Limitation Act, 1969, s.60(E)(1).

⁸⁰ *Stingel v Clark* (2006) 80 ALJR 1339; [2006] HCA 37

courts to focus on questions of whether the historic nature of abuse renders any trial unfair. This legislative situation puts Irish victims of historic, non-sexual abuse in an invidious position compared to similar victims throughout the common law world.

VI. Limitation Periods, Delay and the European Convention on Human Rights

It may be possible to appeal to the European Court of Human Rights regarding Ireland's limitation regime. Section 3(5)(a) of the Irish ECHR Act 2003 provides that proceedings under s3 shall not be brought in respect of any contravention of the Convention which occurred more than one year prior to the commencement of the proceedings.⁸¹ However s3(5)(b) provides that this limitation period may be extended by order of court, "if it considers it appropriate to do so in the interests of justice." The result of appeal under the 2003 Act is a declaration of incompatibility, resulting in referral of the issue to the Irish parliament, the *Oireachtas*. In the alternative, having exhausted domestic Irish legal remedies, it may be more effective, albeit slower, to file a complaint to the Strasbourg court.⁸²

Limitation issues fall are considered under Article 6(1) of the European Convention on Human Rights. In *Ashingdane v United Kingdom*, the European Court of Human Rights concluded that right of access to the courts may be subject to limitations that pursue a legitimate aim with a reasonably proportionate relationship between the means employed and the aim sought to be achieved.⁸³ In *Stubbings v the United Kingdom*, the Strasbourg Court rejected the allegation that the UK limitation regime contravened the ECHR.⁸⁴ The court acknowledged the merits of limitation periods:

⁸¹ European Convention on Human Rights Act 2003, s.3.

⁸² Fiona de Londras, "Neither Herald nor Fanfare: The Limited Impact of the ECHR Act 2003 on Rights Infrastructure in Ireland" in Suzanne Egan, Liam Thornton & Judy Walsh (eds), *Ireland and the ECHR: 60 Years and Beyond* (Bloomsbury Professional) 2014, 37-54.

⁸³ *Ashingdane v United Kingdom* (1985) 7 EHRR 528, at 546-547

⁸⁴ *Stubbings v the United Kingdom* (1997) 23 EHRR 213, [1996] ECHR 44, 22083/93, 22095/93

“to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.”⁸⁵

Citing the margin of appreciation, the Court held that the right of access to a court was not impaired by the absolute 6-year limitation period in UK regime was proportionate and in pursuit of the legitimate aim of preventing stale claims and possible injustice.⁸⁶ However, the Court continued: “There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions...may have to be amended to make special provision for this group of claimants in the near future.”⁸⁷ Were the issue to be revisited, in light of further medical expert consensus and revelations regarding the extent of historical abuse, the application of limitation statute could be held to constitute a human rights violation.⁸⁸

The suggestion that the Strasbourg Court may look favourable on a challenge to the Irish limitation regime is supported by recent case law. In considering limitation in relation to a criminal appeal in *Shishkov v Bulgaria*, the Court held: '[t]ime-limits are in principle legitimate limitations of the right to a court under Article 6(1) of the Convention but their particularly strict interpretation in disregard of relevant practical circumstances may result in a violation of that provision'.⁸⁹ In *Perez de Rada Cavanilles v Spain*,⁹⁰ the applicant complained of a violation of Art.6. The appellate court had refused to entertain her appeal because she had failed to register it at the court registry within three

⁸⁵ (1997) 23 EHRR 213, para. 51.

⁸⁶ (1997) 23 EHRR 213, paras. 53, 56.

⁸⁷ (1997) 23 EHRR 213, para 54

⁸⁸ Carol Brennan, “An instrument of injustice? Child abuse and the reform of the limitation law” (2006) 18 Child & Family Law Quarterly 67, 69

⁸⁹ *Shishkov v Bulgaria* (Application No 38822/97) [2003] ECHR 23, at para [84].

⁹⁰ *Perez de Rada Cavanilles v Spain* [1998] ECHR 102.

days from the date of service of the impugned decision. Instead, she had sent her appeal by registered post within the three-day period but not registered until after the expiry of this period. In accepting a violation of Article 6, the Strasbourg Court concluded that the particularly strict application of a procedural rule by the domestic courts deprived the applicant of the right of access to a court.⁹¹ In *Howald Moor vs. Switzerland*, the dispute concerned the fixing of the starting point of the ten-year limitation period under Swiss law in relation to claims lodged by individuals suffering from asbestos-related diseases.⁹² Noting that the latency period for these diseases could be several decades, the Court observed that the ten-year period – which started running on the date when the person concerned had been exposed to the asbestos dust – would invariably have expired, time barring victims before they could have been aware of their rights. While the Court was satisfied that the legal rule on limitation periods pursued a legitimate aim of legal certainty, it acknowledged that the systematic application of the rule to persons suffering from diseases which could not be diagnosed until many years after the triggering events deprived those persons of the chance to assert their rights before the courts. The Court considered that in cases where it was scientifically proven that a person could not know that he or she was suffering from a certain disease, that fact should be taken into account in calculating the limitation period. In view of the exceptional circumstances in the present case it considered that the application of the periods in question had restricted the applicants' access to a court to the point of breaching Article 6(1) of the Convention.

In *Cestaro v Italy*, the ECHR found a procedural violation of Article 3, prohibiting torture, cruel inhuman and degrading treatment, on the grounds that no prosecutions had arisen for the ill-treatment perpetrated against the applicant, as the relevant offences had become time-barred. The Court concluded that the failure of the Italian authorities to prosecute, and their inability to do so due to the Italian limitation regime, was incompatible with Italy's procedural obligations under Article 3 of the Convention. The Italian criminal legislation, including the limitation regime, was inadequate to

⁹¹ *ibid*, para. 49.

⁹² *Howald Moor v. Switzerland* (Application nos. 52067/10 and 41072/11)

meet the need to punish acts of torture and devoid of the necessary deterrent effect to prevent other similar violations of Article 3 in the future.⁹³ By analogy, similar arguments could be made regarding the need for punishment and deterrence concerning slavery under Article 4.⁹⁴ The approach of the Strasbourg court regarding limitation for serious violations under Articles 3 and 4 would align with broader international human rights law, which prohibits the application of statutes of limitations to serious violations of human rights law that amount to crimes under international law.⁹⁵

The jurisprudence under these articles may provide suitable relief for victims of historical, non-sexual abuse, where they can demonstrate that the State had a contemporary obligation to prevent the relevant form of abuse and that such conduct amounted to torture, cruel or inhuman treatment, or slavery. For instance in *O’Keeffe v Ireland*, the Court approached the historical application of the Convention based on Ireland’s historical legislative and policy framework, rather than imputing specific knowledge in the applicant’s case.⁹⁶ The Court’s focus in that case could be viewed as seeking to ensure that Ireland’s positive obligations under Article 3 of the ECHR to prevent harm include child abuse, were practical and effective.⁹⁷ The provision of a remedy under the Convention may therefore provide a suitable alternative to alleged victims and survivors whose case is challenged by evidential issues in their particular facts.

VII. Conclusion

⁹³ *Cestaro v. Italy* 6684/11 Judgment 7th April 2015; Pietro Pustorino, A New Case on Torture in Europe, <http://www.ejiltalk.org/a-new-case-on-torture-in-europe-cestaro-v-italy/> (last visited 25 April 2016)

⁹⁴ *Cestaro v. Italy* 6684/11 Judgment 7th April 2015, para. 117

⁹⁵ *Rantsev v. Russia and Cyprus* Application No. 25965/04, Judgment of 7 January 2010; Jean Allain, “*Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery*” (2010) 10(3) Human Rights Law Review 546-557.

⁹⁶ *O’Keeffe v Ireland* [2014] ECHR 96

⁹⁷ *Marckx v Belgium* (1979–80) 2 EHRR 330; *Airey v Ireland* (1979–80) 2 EHRR 305; James Gallen, “*O’Keeffe v Ireland: The Liability of States for Failure to Provide an Effective System for the Detection and Prevention of Child Sexual Abuse in Education*” (2015) 78(1) MLR 140-63

The Irish limitation regime in the Statute of Limitations and its associated amendments can result in formidable difficulties for victims and survivors who seek a legal judicial remedy for historical, especially non-sexual, abuse. The Irish limitation regime is highly inflexible, when compared with other common law jurisdictions, in failing to provide sufficient judicial discretion to enable consideration of whether, despite the time limits for civil action otherwise elapsing, a fair trial should be allowed to proceed in the interests of justice. The approach in Ireland has privileged the experience of victims of child sexual abuse to date, due to recognised psychiatric illnesses and injuries that victims of such abuse can experience. Recent expert evidence suggests, however, that this approach should justifiably be extended to victims of other forms of historical abuse, who also suffer from post-traumatic stress disorder and related injuries.

In addition, no consideration in the limitation regime is given to the possibility that the State has only accepted the wrongfulness of certain forms of historical abuse, most notably the Magdalene laundries, as recently as 2013. Victims' and survivors' only plausible remedy is to demonstrate psychiatric damage, which may have a punitive effect on those who suffered the same wrongdoing, but did not manifest in such damage. The existing limitation regime presents a version of history in which it was plausible to litigate physical and sexual abuse against influential and powerful figures in their historical context, when subsequent investigations and inquiries have demonstrated the enormous difficulties facing victim-survivors, such as institutional inaction or a lack of belief in the accusations of vulnerable victims.

The courts' primary and understandable concern has been to maintain a fair trial where witness testimony may not be available to contest the plaintiff's version of events. Liability for breach of statutory duty under inspection regimes for schools, factory or other institutions in which it is alleged abuse occurred, or appeal to the ECHR, may be a preferable basis for litigation. Whatever option is

pursued, victims of historical abuse dissatisfied with non-judicial schemes are presented with significant legal challenges, ever increasing distance from the time of their abuse, and ongoing suffering and lack of judicial recognition, in their pursuit of justice.