Extending Time Limits in Sexual Abuse Cases: A Critical Comparative Evaluation

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Abstract: An issue common to many common law jurisdictions is the question of civil claims based on alleged past sexual abuse brought a long time after the events. Many survivors of such abuse only make the allegations public, if ever, many years after the abuse took place. Each jurisdiction has time limits within which civil claims must be brought. There are generally sound policy reasons for such limits: to discourage lax attempts to enforce or vindicate claims; to respect the right of the defendant to not have stale claims brought; and to allow for a fair trial given the likelihood that the quality of evidence will deteriorate over time. However, it is difficult to impose such regimes on survivors of sexual abuse who come forward much later. The paper explores psychological literature that helps to explain why it is that such victims may only come forward, if ever, many years after the events. It is submitted that legal systems generally need to take a much more flexible approach to extension of time claims in such contexts, and avoid judgments as to when a victim 'should have' brought their claim. It will be concluded that the approach of several Canadian provinces, removing the limitation period in such cases, is the preferred approach.

Keywords: limitation period, discoverability, sexual abuse, tort

I. Introduction

One of law's difficult issues is how to deal with cases in which survivors[1] of child sexual abuse wish to bring civil action against the alleged abusers a long time after the incident(s).[2] In cases which are

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1 In accordance with most of the literature, this word will be used rather than the term 'victim'.

2 It should be acknowledged at this point that similar issues can arise in relation to other kinds of abuse, for example physical and emotional, and that in some cases the victim of the abuse is not a minor. However, for the purposes of the paper, the focus will be on child sexual abuse cases. It is believed that many, if not all, of the conclusions reached in the paper are also applicable to other types of abuse against children. Further, rather than use the term 'alleged' abuse throughout the

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the subject of this paper, issues have arisen as to whether the claim is within the statutory limitation period within which claims must be made, which raises broader issues about the rationale for such limitation periods, and whether this rationale is relevant to such cases. It has proved difficult for the law to be sensitive to such survivors, in terms of understanding why the survivor may not seek civil legal redress until many years down the track, and finding some way to develop and apply legal rules that can accommodate these situations, while also ensuring that the trial is a fair one.

As will be shown later in the paper, most of the Australian jurisdictions studied, as well as England, Canada and most of the United States, have embraced the concept of 'discoverability' in relation to such claims.[3] In other words, the time within which a claim must be brought will be delayed until such time as the injuries that result become 'discoverable'. It will be seen, as expected, that there is variation among jurisdictions as to the precise meaning of 'discoverability'. It will be argued in this paper that, as demonstrated by some recent cases, the law in several jurisdictions is not satisfactory in this area, in particular with its consideration of the issue of the 'reasonableness' of the response of the survivor of the abuse in terms of time in applying the 'discoverability' principle. These issues are of course not confined to one nation, and comparisons will be made with how other common law countries have grappled with these issues.

In Part II of the paper, some of the vast psychological literature on these issues is discussed, to help our understanding of why there can be a long delay between the alleged incidents and the complaint being made, and to better understand the position of the survivor of such abuse. It is implicit in the inclusion of this material that the author believes that as a general principle, courts have not been sensitive in their dealing with these matters to the extremely difficult position in which survivors of such abuse find themselves, and why many do not complain for a long time, if ever, about the events. In Part III, it is thought necessary to remind ourselves of the rationale for limitation periods, to consider their applicability in cases with which this paper is concerned. Discoverability is a concept that many common law jurisdictions use in assessing applications to extend limitation periods, so current case law from five common law jurisdictions is considered in order to see what the different approaches have been to questions of discoverability in the present context. It is necessary to consider the facts of these cases in some depth in order to test

paper, it will be acknowledged at the start that, in respect of some of the cases discussed, the abuse was not proven by the relevant standard of proof (because the claim was deemed to be out of time so the trial did not proceed). Of course, any claims of abuse need to be proven by the relevant standard of proof.

3 New Zealand formerly took this approach, but its jurisprudence has now moved in a different direction.

whether the law in this area is being applied in ways that deliver satisfactory outcomes, or whether they suggest the need for (further) reform. In Part IV of the paper, a critique of aspects of the current approaches is offered, accepting that it is very difficult to develop legal principles in this area that will do 'justice' in every case. However, accepting this caveat, possible solutions to the identified problem will be considered, and recommendations made as to how the law could best balance the various competing interests involved in these very difficult cases.[4]

II. Some Psychological Evidence Explaining Delays in Disclosure

There is substantial literature documenting the reasons for the failure of survivors of sexual abuse to report the events over a long period. It is only relatively recently that the extent of childhood sexual abuse and its long-term consequences have become better understood.[5]

First, the survivor of the abuse may be suffering from what psychiatrists term 'post-traumatic stress disorder', or PTSD. Many victims of sexual assault exhibit symptoms of PTSD, with studies estimating the percentages of rape survivors who develop the disorder at between 31 and 65 per cent,[6] 73 per cent,[7] 86 per cent lifetime PTSD and 72 per cent current PTSD,[8] and 92 per cent.[9] Between 38

4 Space restrictions mean the paper cannot dwell in detail on whether there should be a general residual discretion for the court to allow an action to proceed although it is out of time, and the interpretation of provisions allowing limitation periods to not run when the claim was fraudulently concealed in some way.

5 For example, Rosenfeld states that prior to 1960 the psychiatric literature concerning childhood sexual abuse was negligible, limited to 'relationships between "retarded" and seductive girls and their sociopathic fathers': Alan Rosenfeld, 'The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy' (1989) 12 *Harvard Women's Law Journal* 206.

6 Cathy Widom, 'Posttraumatic Stress Disorder in Abused and Neglected Children Grown Up' (1999) 156 *American Journal of Psychiatry* 1223.

7 K. O'Neill and K. Gupta, 'Post-Traumatic Stress Disorder in Women Who Were Victims of Childhood Sexual Abuse' (1991) 8 *Irish Journal of Psychological Medicine* 124.

8 Ned Rodriguez, Susan Ryan, Anderson Rowan and David Foy, 'Posttraumatic Stress Disorder in a Clinical Sample of Adult Survivors of Childhood Sexual Abuse' (1996) 20 *Child Abuse and Neglect* 943; Lynne Briggs and Peter Joyce, 'What Determines Post-Traumatic Stress Disorder Symptomatology for Survivors of Childhood Sexual Abuse?' (1997) 21 *Child Abuse and Neglect* 575; Dawn Johnson, Julie Pike and Kathleen Chard, 'Factors Predicting PTSD, Depression and Dissociative Severity in Female Treatment-Seeking Childhood Sexual Abuse Survivors' (2001) 25 *Child Abuse and Neglect* 179.

9 E.A. Saunders, 'Rorschach Indicators of Chronic Childhood Sexual Abuse in Female Borderline Patients' (1991) 55 *Bulletin of the Menninger Clinic* 48.

and 43 per cent met the diagnostic criteria for major depression.[10] The PTSD disorder, which has only been officially recognized since 1980, involves three criteria:

(a) the stressor criterion—an unusually traumatic event involving actual or threatened death or serious physical injury where the patient felt intense fear, horror or helplessness;
(b) the intrusive recollection criterion—the patient repeatedly relives the event through dreams, flashbacks, responses to cues symbolizing the event or physiological responses to them; and
(c) the avoidance criterion—the patient persistently avoids trauma-related stimuli, and has numbed general responsiveness as shown by at least three of the following: avoiding thoughts, feelings or conversations associated with the event; avoiding activities, people or places that recall the event; an inability to remember an important aspect of the event.[11]

This avoidance criterion helps to explain why many survivors of sexual abuse never come forward,[12] or only come forward many years after the events took place. They may not even remember some of the events associated with the abuse.[13] In one study, 46 per cent of surveyed victims of incest reported some degree of memory loss, while

10 D.G. Kilpatrick and R. Acierno, 'Mental Health Needs of Crime Victims: Epidemiology and Outcomes' (2003) 16 *Journal of Traumatic Stress* 119; D.G. Kilpatrick, A.B. Amstadter, H.S. Resnick and K.J. Ruggiero, 'Rape-Related PTSD: Issues and Interventions' (2007) 24 *Psychiatric Times* 50; M.P. Koss, J.A. Bailey, N.P. Yuan, V.M. Herrera and E.L. Lichter, 'Depression and PTSD in Survivors of Male Violence: Research and Training Initiatives to Facilitate Recovery' (2003) 27 *Psychology of Women Quarterly* 130; Amy Silverman, Helen Reinherz and Rose Giaconia, 'The Long-Term Sequelae of Child and Adolescent Abuse: A Longitudinal Community Study' (1996) 20 *Child Abuse and Neglect* 709.

11 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th edn (American Psychiatric Association: Philadelphia, 2000). Meiselman pointed out that the child may also dissociate during the abuse, delaying the onset of the post-traumatic stress reaction: Karin Meiselman, *Resolving the Trauma of Incest: Reintegration Therapy With Survivors* (Jossey-Bass: San Francisco, 1990) 46.

12 R.F. Hanson, H.S. Resnick, B.E. Saunders, D.G. Kilpatrick and C. Best, 'Factors Related to the Reporting of Childhood Rape' (1999) 23 *Child Abuse and Neglect* 559; J.M. Leventhal, 'Epidemiology of Sexual Abuse of Children: Old Problems, New Directions' (1998) 22 *Child Abuse and Neglect* 481. In the survey conducted by Catalina Arata, only 31 per cent of survivors of child sexual abuse reported it: 'To Tell or Not to Tell: Current Functioning of Child Sexual Abuse Survivors Who Disclosed Their Victimisation' (1998) 3 *Child Maltreatment* 63 at 66; Tina Goodman-Brown, Robin Edelstein, Gail Goodman, David Jones and David Gordon, 'Why Children Tell: A Model of Children's Disclosure of Sexual Abuse' (2003) 27 *Child Abuse and Neglect* 525. Another explanation for this is the so-called stages of recovery from child sexual abuse: from (1) denial, (2) bargaining, (3) anger, (4) sadness, and (5) acceptance or forgiveness.

13 Freud in 1893 apparently identified the concept of suppression in the context of survivors of child abuse, only to recant later: Lonnie Richardson, 'Missing Pieces of Memory: A Rejection of "Type" Classifications and a Demand for a More Subjective Approach Regarding Adult Survivors of Childhood Sexual Abuse' (1999) 11 *St Thomas Law Review* 515 at 516–17; Cynthia Bowman and Elizabeth Mertz, 'A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor

28 per cent experienced severe memory impairment.[14] The law regarding limitation periods needs to accommodate these experiences of child abuse survivors.[15]

Secondly, the existence of secondary victimization, where the survivor of abuse is further traumatized by the legal proceedings that might surround it, is well documented. For example, surveys of abuse victims have found that from between 43 per cent and 52 per cent of victims who had contact with the legal system rated their experiences as unhelpful or hurtful.[16] Many survivors report that, if they had known beforehand of the way in which the crime would be dealt with by the legal system, they would not have reported the abuse.[17] Researchers have found that among sexual abuse survivors who had contact with the legal system, many reported that as a result of that

Therapy' (1996) 109 *Harvard Law Review* 549 at 615; Sigmund Freud, 'The Aetiology of Hysteria' in *The Freud Reader* (W.W. Norton: London, 1989) 97, 103–4.

14 J.L. Herman and E. Schatzow, 'Recovery and Verification of Memories of Childhood Sexual Trauma' (1987) 4 *Psychoanalytic Psychologist* 1; these findings were broadly replicated by Briere who found that 42–59 per cent of 450 survivors of sexual abuse were able to identify some time when they were unable to remember the abuse: John Briere and Jon Conte, 'Self-Reported Amnesia for Abuse in Adults Molested as Children' (1993) 6 *Journal of Traumatic Stress* 21; John Briere and D.M. Elliott, 'Posttraumatic Stress Associated With Delayed Recall of Sexual Abuse: A General Population Study' (1995) 8 *Journal of Traumatic Stress* 628; Sheila Taub, 'The Legal Treatment of Recovered Memories of Child Sexual Abuse' (1996) 17 *Journal of Legal Medicine* 183; Shirley Feldman-Summers and Kenneth Pope, 'The Experience of Forgetting Childhood Abuse: A National Survey of Psychologists' (1994) 62 *Journal of Consulting and Clinical Psychology* 636; Cynthia Bowman and Elizabeth Mertz, 'A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy' (1996) 109 *Harvard Law Review* 549; J. Douglas Bremner, 'Dissociation and Post Traumatic Stress Disorder in Vietnam Combat Veterans' (1992) 149 *American Journal of Psychiatry* 328.

15 As Ben Mathews, who has written extensively in this area, concludes: 'It is therefore a normal and reasonable response by adult survivors of child sexual abuse with PTSD to avoid any activity—including legal action—that would require detailed reliving and description of the events, adversarial testing of their account of those events, and confrontation of the perpetrator': 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse' (2004) 27 *University of New South Wales Law Journal* 631 at 635.

16 Rebecca Campbell, 'The Psychological Impact of Rape Victims' Experiences With the Legal, Medical and Mental Health Systems' (2008) *American Psychologist* 702; Rebecca Campbell and P.Y. Martin, 'Services for Sexual Assault Survivors: The Role of Rape Crisis Centres' in C. Renzetti, J. Edleson and R. Bergen (eds), *Sourcebook on Violence Against Women* (Sage: California, 2001); J.M. Golding, J.M. Siegel, S.B. Sorenson, M.A. Burnam and J.A. Stein, 'Social Support Sources Following Sexual Assault' (1989) 17 *Journal of Community Psychology* 92; Henrietta Filipas and Sarah Ullman, 'Social Reactions to Sexual Assault Victims From Various Support Sources' (2001) 16 *Violence and Victims* 673; L.M. Monroe, L.M. Kinney, M.D. Weist, D.S. Dafeamekpor, J. Dantzler and M.W. Reynolds, 'The Experience of Sexual Assault: Findings from a Statewide Victim Needs Assessment' (2005) 20 *Journal of Interpersonal Violence* 767; Sarah Ullman, 'Do Social Reactions to Sexual Assault Victims Vary by Support Provider?' (1996) 11 *Violence and Victims* 143.

17 T. Logan, L. Evans, E. Stevenson and C.E. Jordan, 'Barriers to Services for Rural and Urban Survivors of Rape' (2005) 20 *Journal of Interpersonal Violence* 591.

contact they felt bad about themselves (87 per cent), depressed (71 per cent), violated (89 per cent), distrustful of others (53 per cent), and reluctant to seek further help (80 per cent).[18] Many researchers have found that contact with formal help mechanisms, including police, was more likely to result in post-traumatic stress disorder symptomatology.[19] An earlier study found that adult survivors who sought help were likely to encounter professionals showing emotional resistance, little knowledge and skills, and a tendency to blame the victim.[20]

One must remember also that in many cases, where a victim does disclose details of the abuse to a person in a trusted position, the victim is not believed. Of course, this is not going to encourage the victim to report it to others. The *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions*[21] which investigated a large number of church- and community organization-run orphanages and children's homes and detention centres found that:

> There was a failure to recognize the risk of abuse to children, a failure to treat children with sufficient respect to ensure their feeling able to complain, and a failure to give complaints sufficient credence. The last permeated most of the institutions under consideration here. Those who did complain were not believed by workers, priests or police. The following response to a report of sexual abuse is typical of what was described: 'I told Mr P and all Mr P did was backhand me across the

18 Rebecca Campbell, 'What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences With the Legal and Medical Systems' (2005) 20 *Violence and Victims* 55; Rebecca Campbell and S. Raja, 'The Sexual Assault and Secondary Victimisation of Female Veterans: Help Seeking Experiences in Military and Civilian Social Systems' (2005) 29 *Psychology of Women Quarterly* 97.

19 Filipas and Ullman, above n. 16; L. Starzynski, Sarah Ullman, S.M. Townsend, D.M. Long and S.M. Long, 'What Factors Predict Women's Disclosure of Sexual Assault to Mental Health Professionals?' (2007) 35 *Journal of Community Psychology* 619; Sarah Ullman and Henrietta Filipas, 'Correlates of Formal and Informal Support Seeking in Sexual Assault Victims' (2001) 16 *Journal of Interpersonal Violence* 1028; Sarah Ullman and Henrietta Filipas, 'Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims' (2001) 14 *Journal of Traumatic Stress* 369.

20 J. Frenken and B. Van Stolk, 'Incest Victims: Inadequate Help by Professionals' (1990) 14 *Child Abuse and Neglect* 253. A similar result was found more recently by Micaela Crisma, Elisabetta Bascelli, Daniela Paci and Patrizia Romito in 'Adolescents Who Experienced Sexual Abuse: Fears, Needs and Impediments to Disclosure' (2004) 28 *Child Abuse and Neglect* 1035. This study found that among adolescent survivors of abuse who reported it, many claimed that professionals ignored the problem, minimized the abuse, or blamed the victim (at 1043); D.W. Smith, E.J. Letourneau, B.E. Saunders, D.G. Kilpatrick, H.S. Resnick and C.L. Best, 'Delay in Disclosure of Childhood Rape: Results from a National Survey' (2000) 24 *Child Abuse and Neglect* 273; G.E. Wyatt, T. Burns Loeb, B. Solis and J. Vargas Carmona, 'The Prevalence and Circumstances of Child Sexual Abuse: Changes Across a Decade' (1999) 23 *Child Abuse and Neglect* 45.

21 *Forde Inquiry* (1999).

> mouth. He said: "Where would you be if it wasn't for the priests and the nuns? How dare you talk about the priests and the nuns like that?"'[22]

As Mosher has said:

> Disclosures of any and all forms of childhood sexual abuse by children and by adults recalling their childhood were thought until recently to be, in the main, fantastic or vindictive. Children were assumed not to be able to separate fact and fantasy and their accounts of sexual abuse were presumed to rest largely in fantasy not fact. Female adults who revealed later in life the trauma of their early lives were often labelled as vindictive . . . If the sexual nature of the relationship between child and adult was in fact acknowledged, its formation was often attributed to the seductiveness of the female child.[23]

In one study, more than 75 per cent of those survivors interviewed stated that they were worried about future harm and distress. A similar percentage did not believe that formal social systems could have helped them, or would likely have worsened the situation.[24] Of those that did not disclose, reasons are often divided into three categories—personal barriers including lack of cognitive awareness, relational barriers, or fear of the response from others, and sociocultural barriers, including fears that it was not acceptable to society to be a victim of abuse, or fears (in the case of male victims) of being labelled gay.[25] Forgetting about the abuse is often seen as a self-preservation

22 'The Inquiry noted evidence which it accepted from a witness M who had lived at one of the orphanages since infancy. He told of being sexually abused at the age of 11 or 12 by a Father, the resident chaplain at St Vincent's Orphanage between 1959 and 1963. M had been working in the garden at the priest's college when he was told to come into the house to be punished for damaging a plant. What followed was the first of a number of attempts to sodomise the boy . . . this occurred approximately 14 times over a two and a half year period. There was no tenderness extended to M during this activity and his compliance was secured unwillingly under the threat of being sent to [a notorious institution]. Ultimately the priest's advances culminated in . . . penetration while the boy was tied to the Father's bed. The boy's anus was injured in the encounter, which was notified by a visiting nun who saw him while he was attempting to wash the blood away. M was taken to the infirmary and on his return to the Orphanage the Mother Superior questioned him as to who had caused the injury. According to M, upon being told of the perpetrator, she reacted angrily and with disbelief and had beaten him for lying . . . there were at least three other children who had similar experiences with the Father . . . all have been greatly affected into adult life' (pp. 87–8 of the Report).

23 Janet Mosher, 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44 *University of Toronto Law Journal* 169 at 171–3.

24 Debra Patterson, Megan Greeson and Rebecca Campbell, 'Understanding Rape Survivors' Decisions Not to Seek Help from Social Systems' (2009) 34 *Health and Social Work* 127.

25 Lynn Sorsoli, Maryam Kia-Keating and Frances Grossman, 'I Keep That Hush-Hush: Male Survivors of Sexual Abuse and the Challenges of Disclosure' (2008) 55 *Journal of Counselling Psychology* 333.

mechanism,[26] and many survivors report feeling ashamed about what happened.[27] Not surprisingly, the 'worse' the abuse was, the lower the rate of disclosure.[28] If the abuser and the survivor were related, disclosure rates tend to be lower,[29] and there is a negative correlation between the age of the survivor and disclosure rates.[30]

The Queensland Law Reform Commission in its *Review of the Limitation of Actions Act 1974* (Qld) summarized the position well. It found that an adult who was sexually abused as a child might react in one of the following ways:

(a) not experience the symptoms of abuse for a substantial number of years;
(b) experience the symptoms but fail to recall the abuse;
(c) remember the abuse, but fail to make the connection between it and subsequent symptoms, because of either denial of the effects of the abuse, or continuing self-blame or failure to identify the abusive conduct as wrongful; or
(d) remember the abuse and make the connection between it and current symptoms but remain unable, because of the pain and suffering involved, to seek compensation from the abuser.[31]

Psychologist Mic Hunter discusses five phases of recovery from child sexual abuse: (1) denial; (2) bargaining; (3) anger; (4) sadness; and (5)

26 J.J. Freyd, *Betrayal Trauma: The Logic of Forgetting Childhood Abuse* (Harvard University Press: Boston, 1996).
27 See Crisma, *et al.*, above n. 20.
28 See Arata, above n. 12.
29 See Goodman-Brown, *et al.*, above n. 12; Steven Kogan, 'Disclosing Unwanted Sexual Experiences: Results from a National Sample of Adolescent Women' (2004) 28 *Child Abuse and Neglect* 147.
30 In other words, the younger the survivor, the less likely they are to disclose the abuse: R.L. Sjoberg and F. Lindblad, 'Delayed Disclosure and Disrupted Communication During Forensic Investigation of Child Sexual Abuse: A Study of 47 Corroborated Cases' (2002) 91 *Acta Paediatrica* 1391.
31 Queensland Law Reform Commission, Report No 53 (Queensland, 1998) 159; as Mullis concludes, 'the effect of the abuse makes it very difficult for the victim to complain. While she knows she has been abused, recognizes that she has psychological problems and that these stem, at least in part, from the abuse, she is psychologically unable to bring herself to complain. At least three reasons might contribute to this. First, even when they reach majority, victims often continue to blame themselves for the abuse. Such self-blame is a strong inhibitor to disclosure. Secondly, complaining of abuse, particularly where the abuser is part of the family, takes considerable courage and emotional strength. Yet, such strength is often lacking in victims of child sexual abuse. Thirdly, even where the abuse has ended, that does not necessarily mean that the "relationship" between the abuser and abused has been terminated. The typical victim is abused by someone she knows and trusts. In many of these cases, particularly where the abuser is a parent, the abused may remain dependent on the abuser until well after she reaches majority. In order to maintain this "support" and also to avoid splitting up the family, the victim may feel a strong pressure not to disclose the abuse': A.C.L. Mullis, 'Compounding the Abuse? The House of Lords, Childhood Sexual Abuse and Limitation Periods' (1997) 5 *Medical Law Review* 22 at 26. (The original contains the gender-specific pronouns, but it is conceded that victims may be female or male.)

acceptance or forgiveness.[32] It is argued that often survivors of childhood abuse seek to deny not the existence but the importance of the abuse, making them unable to identify the link between the abuse and their subsequent psychological problems. It is claimed to be only at the third stage of anger that the victim is able to link the abuse with their difficulties later in life.[33]

It is considered important to acknowledge also that, in some cases, the allegations of abuse are false. One of the reasons for this is so-called 'false memory syndrome', where some claimants truly believe that abuse has occurred, whereas in fact it has not.[34] As with any claim, claims of abuse must be supported by appropriate levels of evidence and the claimant must prove their case on the balance of probabilities.

This psychological literature has been referred to at some length here because it is submitted to be essential background understanding when a court considers cases where survivors of child sexual abuse come forward many years after the alleged incidents. The legal system generally must understand the mental state of a survivor of child sexual abuse, and be sensitive to the likely impact of such abuse on the survivor, the stages which the survivor might go through in dealing with the abuse, and reasons why the allegations may not come to light until a long time afterwards.

The legal system must be slow to judge the reasonableness of the survivor's actions in coming forward years later, until it fully digests and understands the psychological literature in this area. This comment is made in light of the fact that in many of these cases, decisions appear to be being made without express reference to such material.

32 Mic Hunter, *Abused Boys: The Neglected Victims of Sexual Abuse* (Random House: New York, 1990) 99.

33 *Ibid.* at 106; Denise DeRose, 'Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages' (1985) 25 *Santa Clara Law Review* 191 at 196.

34 This possibility is explored in further detail by Gary Ernsdorff and Elizabeth Loftus, 'Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression' (1994) 84 *Journal of Criminal Law and Criminology* 129; Lynn Holdsworth, 'Is It Repressed Memory With Delayed Recall Or Is It False Memory Syndrome? The Controversy and its Potential Legal Implications' (1998) 22 *Law and Psychology Review* 103. One researcher estimated that false complaints comprised 2–8 per cent of all reported cases: Judith Herman and Mary Harvey, 'The False Memory Debate: Social Science or Social Backlash?' (1993) 9 *Harvard Mental Health Letter* 5. See also R. Christopher Yingling, 'The Ohio Supreme Court Sets the Statute of Limitations and Adopts the Discovery Rule for Childhood Sexual Abuse Actions: Now it is Time for Legislative Action!' (1995) 43 *Cleveland State Law Review* 499 and Jorge Carro and Joseph Hatala, 'Recovered Memories, Extended Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?' (1996) 23 *Pepperdine Law Review* 1239.

III. Rationale of Statutes of Limitation and Use of Discoverability in Various Jurisdictions

It is now proposed to consider the rationale for statutes of limitation, and specifically how discoverability has been applied as a concept in this area in jurisdictions such as Australia, England, the United States, Canada and New Zealand.

i. The Raison D'Être *of Limitation Periods is Inappropriate in These Cases*

It is not a new problem for the law that legal principles, whether in statute or the common law, are sometimes sought to be applied in contexts far removed from the types of situations for which they were originally designed. This creates real difficulties and the possibility of injustice. It is suggested that this phenomenon exists in the law of limitation periods, both in terms of the primary limitation period they impose, as well as any extensions or exceptional cases. Specifically, some of the extension provisions apply readily to the 'I couldn't have known' scenario; they are sometimes more difficult to apply to the 'I knew but didn't want to admit it' scenario.

The rationale for limitation periods has been set out in various judgments. For example, McHugh J expressed it in *Brisbane South Regional Health Authority* v *Taylor*[35] in similar terms to that expressed in the United States.[36] In McHugh J's words:

> First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even 'cruel' to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilize their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period. [McHugh J referred to a New South Wales Law Reform Commission Report pointing out the benefits in allowing the defendant to make the most productive use of their resources and the disruptive effect of unsettled claims on commercial intercourse.] Even where the cause of action relates to personal injuries, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong.

35 (1996) 186 CLR 541 at 551.

36 The United States courts have embraced a similar rationale for limitation periods as that accepted in other jurisdictions, stating that they 'represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specific period of time . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them . . . [such periods] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise': *United States* v *Kubrick* 444 US 111 at 117 (1978).

> The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.[37]

This rationale was referred to with approval and applied recently by the Queensland Court of Appeal in *HWC* v *Corporation of the Synod of the Diocese of Brisbane* to deny an applicant in a case involving alleged sexual abuse by a teacher against a student an extension of time to allow the allegations to be tested. Keane J noted that to deny an extension of time in the case was more in accord with the legislative policy underlying limitation statutes than to grant one.

With respect, several comments may be made about the above passage and its applicability to the current context. (I will concede that these comments were not made in the context of alleged child abuse, but alleged medical negligence.) First, the question of whether evidence is available or not is surely a matter for the courts to consider when they assess the claim of the plaintiff, if the trial proceeds. Presumably, a plaintiff would not be encouraged to bring a claim if the legal advisers are of the view that there is insufficient evidence to convince the court of the case on the balance of probabilities. Further, since there is no limitation period for criminal cases (except in some parts of the United States), some prosecutions that involve child abuse proceed many years after the alleged events.[38] Possible concerns about evidence being lost do not seem to have dissuaded prosecuting authorities in those cases.

Secondly, the suggested 'cruelty' to the defendant in having matters raised beyond the stated limitation period must be balanced with the disgusting cruelty involved in child abuse. Many victims suffer terribly with these crimes, and often take many years, if ever, to come to terms with the abuse and to report it. If, having gone through this often long journey, the alleged victim comes to the legal system seeking redress of wrongs, is it not extremely cruel for the legal door to be closed upon them by being told they have left the matter too late? McHugh J expressed the view that where the defendant could not fairly defend themselves after the delay in bringing proceedings, then:

> The case is no longer one of presumptive prejudice. The defendant has then proved what the legislature merely presumed would be the case. Even on the hypothesis of presumptive prejudice, the legislature perceives that society is best served by barring the plaintiff's claim.[39]

37 *Brisbane South Regional Health Authority* v *Taylor* (1996) 186 CLR 541 at 554–5.

38 For example, in *Re Kenny and the Queen* (1991) 68 CCC (3d) 36 the allegations related to sexual abuse 20 years prior but the trial proceeded. The court found that delay alone did not impair the accused's right to a fair trial. Similarly, there were lengthy delays prior to trial in *R* v *Birdsall* (unreported, Supreme Court of New South Wales, Court of Appeal, Cole JA, Grove and Simpson JJ, 3 March 1997 (alleged abuse between 1961 and 1967, abuse reported 1995)), and *R* v *Dodds* [1996] QCA 402 (unreported, Fitzgerald P, Pincus JA and Lee J, 18 October 1996 (alleged abuse between 1984 and 1986, proceedings commenced in 1994)).

39 (1996) 186 CLR 541 at 555.

With respect, it is suggested that society is best served by having serious claims of abuse to be tested in court. If the allegations are in fact true, it is in no-one's interest that a person who has committed sexual crimes, often against a child, remain in the community without their behaviour being punished. What kind of message does this send to the perpetrator, as well as the victim(s) of the abuse?

The concern above, that defendants need to be able to organize their affairs with certainty and without stale claims hanging over them, of course can have no relevance or application to a case where abuse is alleged. No child abuser has a right to have the abuse forgotten about or denied. And while, in an ideal world, it may be in the public interest to have matters resolved as soon as possible, in the real world there are often very good reasons for a delay in bringing action. There are good reasons why a survivor of child abuse might never, if ever, report the abuse and why it might take many years for the legal system to hear of the allegations. The victim might deny the abuse as a self-preservation mechanism, or because they are suffering from PTSD. The victim may well not realize that their difficulties are caused by previous abuse. Why can the law not accommodate this reality for survivors of sexual abuse?

It is submitted, with respect, that the Supreme Court of Canada has taken the appropriate view in relation to these issues:

> It is well documented that non-reporting, incomplete reporting and delay in reporting are common in cases of sexual abuse . . . For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting . . . Establishing a judicial statute of limitations would mean that sexual abusers would be able to take advantage of the failure to report which they themselves, in many cases, caused. This is not a result which we should encourage. There is no place for an arbitrary rule.[40]

ii. How Concepts of Discoverability Have Been Applied by the Courts

Many of the jurisdictions studied use the concept of 'discoverability' in different ways in relation to these issues. We need, first, to provide examples of how this concept has been used in different jurisdictions,

40 *R* v *L (W.K.)* [1991] 1 SCR 1091; similarly Wilcox J in *R* v *Lane* (unreported, Federal Court of Australia, Wilcox J, 19 June 1995), 'it is commonplace for there to be a substantial delay in the reporting of alleged sexual assaults, especially where the complainant is a child . . . [M]any sexual assault victims are unable to voice their experience for a very long time. To adopt a rule that delay simpliciter justifies a stay of criminal proceedings would be to exclude many offences, particularly offences against children, from the sanctions of the criminal law'; Owen J, 'it is not at all uncommon for there to be a delay in the institution of proceedings for sexual offences': *R* v *Austin* (1995) 14 WAR 484 at 493.

before attempting a critique of this concept and whether it can be improved at the level of principle or application. Of course, cases turn on the specific provisions relevant to each case, so as each case is discussed, the relevant statutory provision(s) are included.

(a) Australia[41]

SDW v *Church of Jesus Christ of Latter-Day Saints*[42]

The plaintiff was sexually assaulted by her stepfather between the ages of 14 and 17. At this time, the plaintiff and her family were active and practising members of the Mormon Church. The Church discovered the abuse, and the offender was excommunicated from the Church. No further action was taken. The abuse continued until the

41 There is a real divergence in the statutory approaches of different states in relation to these issues. Of course, there is a need to be aware of the statutory context in which particular cases have arisen. Briefly, Victoria (Limitation of Actions Act 1958 (Vic), s. 27D), New South Wales (Limitation Act 1969 (NSW), ss 50C and 50D) and Tasmania (Limitation Act 1974 (Tas), s. 5A) have largely followed the recommendations of the *Ipp Review of the Law of Negligence* (2002) (*Ipp Review*) and have a three-year post-discoverability limitation period for personal injury actions, together with an absolute limitation period of 12 years (long-stop period).

The *Review* appeared to accept a submission that society could reasonably expect parents and guardians and those who care for incapacitated persons to take reasonable steps on behalf of their charges to initiate claims within the general time limits imposed on others (at 95). An exception thus applies in New South Wales and Victoria where the alleged offender is either the parent of the survivor or otherwise in a close relationship with the child's parent such that that parent might be influenced not to bring an action on the child's behalf, or if the existence of the relationship might make it more unlikely that the child would disclose what happened (NSW, s. 50E, Vic, s. 27I). Discoverability here depends on the child's parent or guardian, and will be the date on which the parent knew or ought to have known the fact of the injury, the fact that the injury was caused by the defendant, and that the injury was sufficiently serious to justify the bringing of an action (NSW, s. 50D(1), Vic, s. 27F(1)). A child is not considered in New South Wales, Victoria or Tasmania to be under a legal disability if he or she was in the custody of a capable parent or guardian (NSW, s. 50F(2)(a), Vic, s. 27J(1)(a) and Tas, s. 26(6)). The effect of Victorian s. 5(1A) has been limited to certain actions involving tobacco- and dust-related injuries; in other words, the facts in *Stingel* v *Clark* (2006) 226 CLR 442 would not attract the provisions of s. 5(1A) if the matter were heard today.

In Western Australia there is a three-year uniform limitation period for personal injury actions, with time commencing to run when the injury 'accrues', or when the plaintiff becomes aware that they have sustained a 'not insignificant injury' or at the first symptom of such injury. There is no long stop. Queensland, South Australia and the Northern Territory did not adopt aspects of the *Ipp Review* regarding limitation periods, and provide for a three-year limitation period for personal injury actions once the survivor attains majority, with discretion to extend based on argument that the facts relating to the injury were not knowable until later (Limitation of Actions Act 1974 (Qld), ss 11 and 31); though the Personal Injuries Proceedings Act 2002 (Qld) requires that a notice of claim be given within nine months of the day of the incident giving rise to the injury, or within nine months of the first appearance of symptoms or within one month of first seeing a legal practitioner about a claim, whichever is earlier; these requirements are suspended until the claimant reaches majority (ss 9(3), 19).
[Continued on next page]

42 [2008] NSWSC 1249.

plaintiff went to the police. At this stage, the offender was charged and later convicted. He served a jail term for his offences. The plaintiff claimed that as a result of the abuse she suffered serious psychiatric disability. This action was against the Church for failing to tell police about the abuse or to take more action than they in fact did. As the events occurred in Queensland, the Queensland limitation period of three years applied. Given the plaintiff's age, she was at a disability until March 1990, and so would have had until March 1993, according to the general rules, to commence her action. (The court noted in the case that both counsel had argued that the relevant limitation period expired in 1996, but concluded that it suspected counsel were in error.) She did not commence her action until 2004, and this was an action for an extension of time, rather than a claim.

The plaintiff claimed that it was in 2003 when she received a record of an interview with the offender where she discovered that the Church was aware of what had happened to her. She claimed she obtained legal advice in September of that year but it did not refer to a claim against the Church. In January 2004 she was advised that she might have a claim against the Church. As a result of this meeting, the plaintiff said she became aware that her injuries were of a long-standing nature and would cause her ongoing financial loss and suffering in future. The court found that even if the events of 2003 were 'material facts of a decisive character'[43] and even if the 2004 summons could count as commencing proceedings, she was still outside the 12-month extension period. The plaintiff admitted she was advised in 2002 that she had post-traumatic stress disorder, and the commencement of her proceedings took place more than 12 months after this time. It would also be difficult for her to prove that the Church was negligent in not reporting the abuse to the police. As a result, the claim was statute-barred.

Section 36 of the South Australian Act makes similar provision (with subsection (1)(a) providing for a separate limitation period of three years from when a person has knowledge of a latent injury: Limitation of Actions Act 1936 (SA), s. 36(1)(a); see also Limitation Act 1981 (NT), s. 12). There is no long-stop period in these three jurisdictions. In the Australian Capital Territory, there is a three-year period (with no discoverability provision and no provision for extension); however, if the personal injury consists of a disease or disorder, there is a three-year period after discoverability, with no long stop: Limitation Act 1985 (ACT), ss 11 and 16B. These provisions have been subject to trenchant criticism: see for example Ben Mathews, 'Queensland Government Actions to Compensate Survivors of Institutional Abuse: A Critical and Comparative Evaluation' (2004) 4(1) *QUT Law and Justice Journal* 23 and 'Assessing the Scope of the Post-Ipp "Close Associate" Special Limitation Period for Child Abuse Cases' (2004) 11 *James Cook University Law Review* 63; Lisa Sarmas, 'Mixed Messages on Sexual Assault and the Statute of Limitations: *Stingel* v *Clark*, the Ipp Reforms and the Argument for Change' [2008] *Melbourne University Law Review* 18.

43 The case was considered in terms of the Queensland limitations legislation, relevant (brief) details of which appear above at n. 41.

Tusyn* v *State of Tasmania (No 2)[44]
The plaintiff commenced an action in 2003 for damages in relation to sexual abuse at the hands of a foster father with whom the State of Tasmania sent him to live in 1961 when he was 11. The plaintiff now suffered from a psychiatric disorder caused by the abuse, and possibly other factors. The state conceded that the foster carer had abused the plaintiff and that he suffered psychiatric injury as a result. However, the state raised the limitation period as a defence to the proceedings. It argued that the plaintiff's injuries were of a physical and psychiatric nature and that they were suffered in 1961. It denied that these could be an action for damages for psychiatric injury separate from the action for damages for physical injury.

The plaintiff claimed that he did not experience any psychiatric symptoms until 1996 when, by chance, he happened to see the foster father who had abused him many years ago. His mental health deteriorated at that time, but he claimed that in 2002 he realized that he had psychiatric problems and that they were linked to the sexual abuse. The foster father the subject of the proceedings had died by the time these proceedings were brought.

The court agreed with the state. It found that the plaintiff's cause of action, which included the right to claim for the physical and psychiatric injuries suffered, arose in 1961 when the abuse occurred. No new cause of action arose in relation to the plaintiff's suffering of psychiatric injury. In so deciding, the court refused to apply overseas case law providing for 'delayed discoverability'. The three-year limitation period had well and truly run out.

Michael Brown* v *State of New South Wales[45]
Here the plaintiff alleged that he was sexually abused by employees of the Department of Community Services in 1977 when he was sent to a departmental training school after committing offences. He commenced legal proceedings seeking damages in 2001, well outside the limitation period stated in the Limitations Act 1969 (NSW), and sought an order extending time to commence such proceedings. The trial judge rejected the application in 2003. In 2007, the plaintiff sought to appeal this rejection, and sought a further extension of time within which to do so. One reason why the plaintiff did not appeal the 2003 decision was that he had been advised to pursue an equitable remedy for the alleged wrongdoing, which he did. However, those proceedings were thrown out in 2006.

In denying the extension of time in 2003, the trial judge referred to medical reports detailing the dysfunctional nature of the applicant's

44 [2008] TASSC 76. The Tasmanian limitations legislation, upon which this case was decided, was the Limitations Act 1974 (Tas) which provided for a three-year limitation period, as noted above in n. 41.

45 [2008] NSWCA 287. The relevant limitations legislation is that of New South Wales, details of which are briefly noted above at n. 41.

childhood prior to the detention order. This included his father threatening to chop off his hand with an axe and domestic violence against his mother. His father had been an alcoholic and had a volatile personality. The plaintiff had continued to offend after his release from departmental care, and was sentenced to a seven-year jail term for sexual assault. The plaintiff suffered some serious incidents while in prison and had been diagnosed with depression. A psychiatrist's report concluded that it would be difficult to determine the extent to which the plaintiff's current disabilities could be attributed to the abuse he allegedly suffered, and the extent to which it related to other difficulties in the plaintiff's life. The report also noted some inconsistencies in the plaintiff's reporting of the alleged sexual assaults committed against him. The trial judge rejected the application to extend time. On appeal, the New South Wales Court of Appeal rejected the application for an extension of time to appeal this decision. A further four years had been added to the already lengthy delay. The case would substantially be a word against word case. The court also rejected suggestions that the action was one of breach of fiduciary duty rather than a tort case.

Although the case ultimately turned on questions of a fair trial rather than discoverability, at least at the Court of Appeal level, the most recent example of these issues being examined is *HWC* v *The Corporation of the Synod of the Diocese of Brisbane*.[46] At the time of writing (early 2010), this decision is on appeal from the Queensland Court of Appeal to the High Court of Australia.

There the plaintiff alleged that one of his teachers had abused him in the early 1980s. He commenced legal action in 2002 against the first defendant which ran the school at which the abuse allegedly took place. Actions were also commenced against other authorities which were said to have taken some actions which allowed the teacher to gain registration with the Queensland authorities. Part of the case against the defendant was that it had been told by a principal of another school that the teacher in question had been dismissed from employment with them due to inappropriate physical behaviour with students, yet they still went ahead and engaged him. The defendant denied this.

Section 11 of the Limitation of Actions Act 1974 (Qld) provided for a general three-year limit on actions for negligence, trespass, nuisance or breach of duty involving personal injury, the time running from the date on which the cause of action arose. Section 31 of the Limitation of Actions Act 1974 (Qld) provides that an extension may be available

46 [2009] QCA 168.

from the date on which a material fact[47] of a decisive character[48] relating to the right of action came within the plaintiff's means of knowledge[49] after the three-year period, if the claim otherwise is supported by evidence. In such cases, the limitation period will expire one year after the fact came within the means of knowledge of the plaintiff.

The plaintiff claimed he was not aware until 2001 that the abuse by the teacher was having an ongoing effect on him, that the principal of his school had apparently been warned by another principal of the teacher's proclivities, and that authorities in another state had become aware of the teacher's proclivities but allowed him to maintain his registration as a teacher. There was evidence that in 1988, when the plaintiff attended a lecture on sexual abuse as part of his medical studies, he suffered adverse psychological symptoms. He began using marijuana, and became depressed. He failed some of his exams, and had problems with his personal relationships.

The trial judge allowed the matter to proceed, finding that there was an explanation for the delay. Someone in the plaintiff's position would realize that by commencing an action they would have to relive the experience of the abuse. It was understandable that the plaintiff took no action in the late 1980s or 1990s because he was trying to establish his career. The plaintiff was not aware at this time of the extent to which the abuse had affected him. It had not been until 2002 when the plaintiff suffered a psychiatric condition that the effects of the abuse on him had become apparent. A reasonable person would not have enquired about the possibility of legal action until his symptoms became apparent. As a result, the judge found that there were material facts of a decisive character not within the plaintiff's means of knowledge until 2002.

However, these findings were overturned by the Queensland Court of Appeal. The court found that it would not be possible to have a fair

47 'Material fact' is defined to include the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded, the identity of the person against whom the cause of action lies, the fact that the negligence, trespass, nuisance or breach of duty caused personal injury, the nature and extent of the personal injury so caused, the extent to which the personal injury is caused by the negligence, nuisance, trespass or breach of duty: Limitation of Actions Act 1974 (Qld), s. 30(a)(i)–(v).

48 These facts are of a decisive character only if a reasonable person knowing those facts and having taken the appropriate advice would regard the facts as showing that a cause of action would have a reasonable prospect of success resulting in damages, and that the person whose means of knowledge was in question should in their own interests bring the action: s. 30(b)(i) and (ii). The facts must take on a decisive character before the one-year period begins to run: *Queensland* v *Stephenson* (2006) 227 ALR 17 (Gummow, Hayne, Crennan and Kirby JJ, Heydon J dissenting).

49 This means that the person does not know the fact at the time, and as far as the fact could be found out by the person, they have taken all reasonable steps to do so: s. 30(c)(i) and (ii).

trial of the plaintiff's claims. The key conversation between the principal of the ex-employer of the alleged perpetrator and the principal of the school at which the abuse allegedly occurred took place almost 30 years ago, and not surprisingly, there were different recollections of what was said. In respect of the other defendants, key personnel in their organizations in relation to this case had died, compromising their ability to defend themselves against the allegations.

Keane J of the Court of Appeal found that there were good reasons for limitation periods, and agreed with comments of McHugh J in *Brisbane South Regional Health Authority* v *Taylor* that the general three-year rule:

> . . . should prevail once the defendant has proved the fact or the real possibility of significant prejudice. In such a situation, actual injustice to one party must occur. It seems more in accord with the legislative policy underlying limitation periods that the plaintiff's lost right should not be revived than that the defendant should have a spent liability reimposed on it.[50]

Chesterman J agreed with comments by Keane J in another case involving a lengthy time period between alleged events and a trial when Keane J found that:

> . . . the court is not in the business of preserving the opportunity to conduct solemn farces in which parties and witnesses are invited to attempt to reconstruct recollections which have long since disappeared. Such a trial would not be fair for either party.[51]

In two recent cases, extensions have been granted. In these cases, the plaintiff was able to show that they were under a disability for many years, the result of which was to stop the limitation period from running against them.

In *Saunders and Anor* v *Jackson*[52] the plaintiff alleged she had been sexually and physically assaulted between 1978 and 1987 while a minor. She turned 18 in April 1990. The alleged perpetrators were the victim's sister and her sister's partner. The statement of claim was filed in 2004. Under the relevant (as amended) Limitations Act 1969 (NSW) provision at the time, the limitation period would have expired in April 1996, six years after she became an adult.[53] She sought an extension of time under provisions which suspended the running of the limitation period while the claimant was under a 'disability'. The Act defined a disability to include situations where the person is incapable or substantially impeded in the management of their affairs due to any disease or impairment of his/her physical or mental condition.

50 (1996) 186 CLR 541 at 553–5.
51 Para. 90; Keane J's comments appeared in *Page* v *The Central Queensland University* [2006] QCA 478.
52 [2009] NSWCA 192; the relevant New South Wales legislation is noted above at n. 41.
53 S. 14(1)(b) of the Act.

The plaintiff's family had strong connections with the police force, her father being a senior officer as was her uncle. In 1992, she went to the police station where her uncle was the officer in charge. She reported the assaults to a female police officer. She was told not to pursue the matter because it would take too long. Her mother asked her not to press charges because of 'family status' and the damage it would do to the family's reputation. Her father was also suffering illness at this time, and she was concerned that, if she pressed ahead with the matter, it might exacerbate his illness.

In 1993, the plaintiff's marriage broke down. She claimed it was due to the assaults which caused her anger, led to her abusing alcohol, and gave her flashbacks and nightmares. She had a child in 1995 from a different relationship, but developed post-natal depression. In the following year, she received counselling after attempting suicide. She said at this time she was not in control of herself and not able to make decisions about her life. She told someone at the hospital about the abuse, but found them unhelpful. In 1998, the plaintiff had another child. This child had serious health issues which did not improve until 2002. The plaintiff was very concerned for the child's wellbeing at this time and was stressed and anxious. The plaintiff was on anti-depressants. In 2001 the plaintiff again tried to commit suicide, and continued to suffer flashbacks and nightmares about the assaults. She commenced counselling in 2002.

Later that year, she reported the abuse to police, but the police did not take it any further. She sought legal advice in December 2002 and regularly met with legal advisers until the claim was filed in 2004. The plaintiff claimed it was not until 2002 that she felt physically and emotionally well enough to pursue the sexual assault claim. Psychiatrists testified that the plaintiff's mental state was likely to have been caused by the earlier abuse and that it was consistent with post-traumatic stress disorder.

The court was satisfied that the plaintiff had been suffering from a disability over these years which prevented her from turning her mind to the question of legal action over the assaults. She was not in a position to manage her affairs. It was relevant that the assaults were by a family member over many years in the context of a family with considerable prestige in the community and distinguished police service.[54]

54 In this finding, the case is somewhat similar to *Stingel* v *Clark* (2006) 226 CLR 442, where the court was satisfied that a plaintiff suffering post-traumatic stress disorder could be suffering from a 'disorder' within the meaning of Victorian legislation, justifying the delay in bringing proceedings. However, since this decision, the Victorian Parliament has amended the legislation to exclude these types of claims from that extension provision.

Glennie* v *Glennie[55]

In March 2008, the plaintiff (28) commenced action against her father and uncle claiming damages. It was alleged that the father had sexually assaulted the plaintiff and the uncle, a medical practitioner, had been negligent in not reporting the abuse to the authorities. The plaintiff's father had been jailed for the offences. The second defendant claimed this action was statute-barred. The abuse took place over a seven-year period from when the plaintiff was four. There was evidence that the plaintiff's mother knew of the abuse. The uncle was called to the home and told of the abuse. He and the plaintiff's mother told the plaintiff not to be alone with the father again.

The plaintiff's behaviour began to deteriorate at the time she commenced high school, after the abuse had occurred. She began to use drugs including alcohol and would regularly truant; as a result, her school marks dropped. After school she had a number of sexual partners, one of whom introduced her to heroin. She became addicted and eventually became a prostitute. She commenced criminal activity such as robbery, stealing and drug offences. She was eventually admitted into a drug rehabilitation programme. When she was released, she lived with her parents for some time, while working in a series of low-paid jobs. She had a number of 'one-night stands' and became pregnant. Her daughter was born in 2001. Her boyfriend urged her to move out of her parents' home. At her parents' house while her father held her three-month-old baby, she apparently had a realization that her father could also abuse her daughter. She moved out of the house, and told a departmental representative about her concerns.

Eventually in 2003, the plaintiff told the police about the abuse. Her father was charged some months later. In 2006, he eventually pleaded guilty after evidence corroborating the plaintiff's allegations emerged. Once this occurred, the plaintiff got legal advice about a possible civil claim, and was referred to medical experts for diagnosis. Psychiatrists testified that the abuse had affected the plaintiff throughout her life, making it difficult for her to form and maintain relationships, contributing to her drug dependency as well as flashbacks of the abuse. She did not have a clear self-identity and was prone to impulsive behaviour, as well as anger, irritability and anxiety. One psychiatrist said the plaintiff suffered from post-traumatic stress disorder. One testified that delay in bringing legal proceedings for this kind of injury was explicable by the difficulties for victims in disclosing abuse.

The court was again satisfied that, due to the sexual abuse over a long period, the plaintiff had suffered a disability within the meaning of the Act, affecting her ability to make decisions about her life,

55 [2009] NSWSC 154. The relevant New South Wales limitation legislation is noted above at n. 41.

including the possibility of civil action against her father and uncle.[56] She was during this time drug dependent, committing crimes, and working as a prostitute. It was only after her father pleaded guilty that she felt strong enough to take these proceedings. As a result, the running of the limitation period was suspended until 2006, and this proceeding could continue.

(b) England

Earlier limitations legislation made it difficult for claimants to seek extensions of time within which to bring their case. Often the conclusion was reached that the plaintiff's claim should not proceed, although the time within which to bring a claim may have run out before the plaintiff was aware of the injury or damage they suffered.[57] Various statutes of limitation have been passed over the years to try to remedy this perceived anomaly (and others), often prompted by reports of law reform agencies or criticism of some of the results of the application of these rules in particular cases. However, examples of limitation periods running out despite the plaintiff not having knowledge continue, because cases to which older-style limitation periods apply continue to be brought. A recent example is *McDonnell (FC)* v *Congregation of Christian Brothers*.[58] There the plaintiff claimed to have suffered abuse between 1941 and 1947 at a school run by the defendant. The court, applying the relevant 1939 legislation, found that the time limit for the plaintiff's claims expired six years after he reached majority, in this case 1963. The fact that the plaintiff may not have known that the abuse had affected him later in life was irrelevant. Lord Bingham, with whom other Law Lords in *McDonnell* agreed, concluded that:

> Sympathy for the possible injustice suffered by the appellant must be tempered by recognition of the almost impossible task the respondents face in seeking to resist a claim of this kind after the lapse of half a century.[59]

The House of Lords' decision in *A* v *Hoare and Other Appeals*[60] changed significantly the law in England in relation to statutes of limitation. The case involved various claimants who alleged abuse

56 At the time, the Limitations Act 1969 (NSW) provided for a general limitation period of three years, subject to suspension during times when the plaintiff was under a disability: ss 18A and 52.

57 This occurred in much-criticized decisions such as *Cartledge* v *E. Jopling and Sons Ltd* [1963] AC 758 where the House of Lords dismissed a claim brought more than six years after the plaintiff had suffered damage, and despite the fact that the plaintiff was not aware of this damage for many years afterwards. A similar approach was taken in *Pirelli General Cable Works Ltd* v *Oscar Faber* [1983] 2 AC 1.

58 [2003] UKHL 63.

59 *Ibid.* at para. 24; this parallels the concerns of the Queensland Court of Appeal in the recent case of *HWC* v *The Corporation of the Synod of the Diocese of Brisbane* [2009] QCA 168.

60 [2008] UKHL 6.

occurring between 13 and 20 years earlier. The general limitation period for this case was contained in the Limitations Act 1980, and was six years from the date upon which the cause of action arose. However, s. 11 of the Act provided for a special time limit for actions for damages for negligence, nuisance or breach of duty involving personal injuries of three years from either the date when the cause of action accrued or the date of knowledge, if later. The date of knowledge was the date on which the person first had knowledge of various facts including the significance of the injury. An injury was significant if a reasonable person would have been justified in bringing legal proceedings in relation to it.[61] The Act provided that in assessing whether the applicant knew their injury was significant, knowledge included that which they might have been expected to know from facts known to them, or knowable with the help of expert assistance which could reasonably have been accessed by the applicant.[62] In s. 11 cases, the court had discretion to extend the limitation period where necessary.[63] One relevant factor was the reason(s) for the delay in bringing proceedings.

The House of Lords held that actions for damages for personal injury for intentional trespass to the person fell within s. 11 of the Act, and thus were actions for which an extension of time beyond the typical limitation period could be brought. In so deciding, the House overruled previous decisions such as *Stubbings* v *Webb*[64] that had found that an action for trespass was outside s. 11. In so doing, the House of Lords result was consistent with the finding of the High Court in *Stingel* v *Clark*, and Lord Hoffmann, with whose judgment several other Law Lords expressly agreed,[65] referred with approval to the High Court decision in *Stingel* and its refusal to follow

61 Limitations Act 1980, s. 14(2).

62 *Ibid.*, s. 14(3); the House of Lords has divided on the issue of whether the s. 14 test should be applied objectively or subjectively: see for example *Adams* v *Bracknell Forest Borough Council* [2004] UKHL 29, which will be discussed below. Other cases in which the concept of discoverability was considered in detail include: *Forbes* v *Wandsworth Health Authority* [1997] QB 402, CA; *Nash* v *Eli Lilly and Co* [1993] 1 WLR 782, CA; *Sniezek* v *Bundy (Letchworth) Ltd* [2000] EWCA Civ 212; and *Dobbie* v *Medway Health Authority* [1994] EWCA Civ 13.

63 Limitations Act 1980, s. 33; the fact that some proceedings were commenced within time (but for some reason were discontinued) does not preclude the plaintiff bringing a later application to bring proceedings that would typically be statute-barred, if the court is otherwise minded to exercise its discretion to allow the claim to proceed: *Horton* v *Sadler* [2006] UKHL 27.

64 [1993] AC 498; in relation to this case, the European Court of Human Rights suggested that rules on limitation of actions applied by member states might need to be revisited to make special provision for claimants in sexual abuse cases, but declined to substitute its view for that of state authorities on the appropriate policy setting: [1997] 1 FLR 105.

65 *A* v *Hoare* [2008] UKHL: Lord Walker (at 53), Lord Carswell (at 62), and Lord Brown (at 74). The case is discussed in more detail in T. Prime and G. Scanlan, 'Limitation and Personal Injury in the House of Lords: Problem Solved?' (2008) *Statute Law Review* 29; A. McGee and G. Scanlan, 'Judicial Attitudes to Limitation' (2005) 24 *Civil Justice Quarterly* 460; and Michael Jones, 'Accidental Harm, Intentional Harm and Limitation' [1994] 110 *Law Quarterly Review* 31.

Stubbings.[66] As a result of the previous position in *Stubbings*, anomalies had arisen whereby the perpetrator of the abuse could not be sued because the six-year period applicable to trespass had expired, but the wife of the abuser could be sued in negligence because the time limit of three years was extendable under s. 11. The Law Reform Commission had recommended that no distinction be made between claims in negligence and those in trespass.[67]

In relation to the question of abuse and the explanation it might provide for extension of time, the court first considered the 'date of knowledge' discussed in s. 11. Lord Hoffmann agreed with comments by Lord Griffiths in *Stubbings* that he had 'the greatest difficulty in accepting a woman who knows she has been raped does not know that she has suffered a significant injury'.[68] He did consider, however, the psychological impact of such abuse and whether it might explain the delay in bringing proceedings under s. 33.[69] Lord Hoffmann referred to the Law Reform Commission's Final Report on its review of limitation periods; the Commission had considered the introduction of special rules regarding victims of sexual abuse, given that many victims suffer from 'dissociative amnesia' where they block out traumatic events. The Commission said that such a condition could qualify as a 'disability' within the Act, and eventually concluded that no special rules should be introduced to deal with the psychological incapacity sometimes suffered by survivors of sexual abuse due to definitional problems.[70]

A majority of the House of Lords in *A* v *Hoare* favoured an objective approach to s. 14(2) and (3); in other words, the majority found the personal characteristics of the individual plaintiff not to be relevant in applying s. 14(3). Lord Hoffmann noted that the Law

66 *A* v *Hoare* [2008] UKHL [20]. Michael Jones favours the new approach: 'It is not obvious why medical malpractice claims should be subject to two different limitation periods depending on whether the claim arises in negligence or trespass to the person': Jones, above n. 65 at 34.

67 The Law Commission, *Limitation of Actions* (2001) HC 23, p. 108. The author agrees with this position, accepted by the court in *Stingel* and *Hoare*. It makes no sense to have rules in this area that have the effect that the abuser cannot be sued personally because the limitation period against them (relating to trespass) has expired, yet another claim against someone much less culpable is live because that claim might happen to be brought in negligence (i.e. the situation in *S* v *W* [1995] 1 FLR 862). It would not further the objective of provisions such as s. 11 to exclude trespass to the person matters from their ambit. In the past, it may have been justified on the policy basis that a deliberate wrongdoer (trespasser) should not have the advantage of the shorter limitation period applied to s. 11 cases; however, now that there is discretion in s. 11 cases to extend the shorter period, such policy argument no longer makes sense, if it ever did: this was noted by Lord Hoffmann in *A* v *Hoare*, para. 14.

68 Lord Griffiths also noted the grave difficulty involved in investigating events alleged to have occurred in a period starting over 30 years ago and ending over 20 years ago.

69 This section provides discretion for a court to extend the time within which a claim should otherwise have been brought.

70 Law Commission, above n. 67 at 106.

Commission had in its Final Report recommended that the test of significance should be an objective one.[71] As Lord Hoffmann put it:

> The test itself is an entirely impersonal standard; not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would 'reasonably' have done so. You ask what the plaintiff knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under s. 14(3) and you then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment . . . I cannot accept that one must consider whether someone with the plaintiff's intelligence would have been reasonable if he did not regard the injury as sufficiently serious. That seems to me to destroy the effect of the word 'reasonably'. Judges should not have to grapple with the notion of the reasonable unintelligent person.[72]

In so doing, the House of Lords was following the approach taken in *Adams* v *Bracknell Forest Borough Council,*[73] where a majority of the court applied a purely objective test to the question of when the plaintiff could have been expected to seek expert advice about his learning difficulties.

Lord Hoffmann concluded in *A* v *Hoare* that the court would consider subjective aspects regarding the individual plaintiff, and why they delayed bringing proceedings, in relation to the court's discretion to extend time under s. 33 of the 1980 Act.

71 Law Commission, above n. 67 at para. 3.24.

72 *A* v *Hoare* [2008] UKHL. Lords Walker, Carswell and Brown agreed. As Lord Carswell put it, 'the medical reports set out the ill-treatment [the claimant Young] received, which was so severe that any reasonable person would have regarded it as significant within the meaning of s. 14(2)' (para. 69). It was irrelevant that the plaintiff's personal circumstances or characteristics might have led them not to sue at the time (para. 68).

73 [2004] UKHL 29. For example: 'in the absence of some special inhibiting factor, I should have thought that Mr Adams could reasonably have been expected to seek expert advice years ago. The congeries of symptoms which he described to Dr Gardner, which he said had been making his life miserable for years, which he knew to be rooted in his inability to read and write and about which he had sought medical advice, would have made it almost irrational not to disclose what he felt to be the root cause' (Lord Hoffmann, para. 49) (with whom Lord Phillips, Lord Scott and Lord Walker agreed). As Lord Scott said: 'personal characteristics such as shyness and embarrassment, which may have inhibited the claimant from seeking advice about his illiteracy problems but which would not be expected to have inhibited others with a like disability, should be left out of the equation . . . My own, non-expert inclination would be to think that a person of average intelligence who knew himself to be illiterate, knew that his illiteracy was at the back of problems such as stress, depression etc and who consulted a doctor about these problems, could reasonably be expected to inform the doctor about his illiteracy' (paras 71–2). This was similar to the approach taken in *Forbes* v *Wandsworth Health Authority* [1997] QB 402, CA (Stuart-Smith and Evans LJJ; Roch LJ taking a subjective approach). A contrary argument is made by Prime and Scanlan: 'with respect to Lord Hoffmann, the real issue is not what judges find difficult or relatively straightforward to do, but what is the intention of Parliament': above n. 65.

Baroness Hale acknowledged that the question of a fair trial was relevant to the exercise of the discretion, but that it was possible to have a fair trial long after the events in question, including fair trials of criminal charges of historic sex abuse.[74] She was in favour of considering the plaintiff's subjective attributes in applying s. 14(2) and (3):

> We are used in other contexts to looking at this particular person, with all his personal characteristics and in the position in which he finds himself, and asking what a reasonable person would expect of him . . . Why then should we not look at this particular claimant, with all his personal characteristics and in the situation in which he finds himself, and ask whether a reasonable person would expect him to recognise that his injury was sufficiently serious to justify making a claim against someone who admitted it . . .[75]

In so doing, Baroness Hale was maintaining the position she took in *Adams*, where she stated that the character and intelligence of the plaintiff was relevant in applying s. 14 of the Act.[76]

(c) Canada

A different approach is evident in Canada, with the Supreme Court of Canada decision in *M (K)* v *M (H)*[77] a leading example. There the applicant had been subject to sexual abuse by her father over several years. Her father threatened her that if she disclosed the abuse, her mother would commit suicide, the family would break up, no-one would believe her, and he would kill her. Despite these threats, she attempted on many occasions to report the abuse, but was referred to different individuals and bodies. Attending a self-help group for incest victims, she realized her psychological problems as an adult were caused by the abuse, and that her father was to blame for what happened. She received psychiatric treatment, and the psychiatrist testified that the plaintiff would not have been able to connect the incest with her later injuries until she realized she was not responsible. At the age of 28 she commenced legal action against her father, alleging breach of fiduciary duty and tort. A jury found that the father had sexually abused his daughter; however, the trial judge ruled that the

74 [2008] UKHL 6 at para. [60].

75 *Ibid.* at para. 58; Baroness Hale suggested inconsistency in the position of the majority here, claiming policy reasons why subjective considerations could not be taken into account in applying s. 14(2) and (3), but then applying them in considering s. 33 of the same Act (para. 60). However, she reached a similar conclusion to that of the other judges on the facts.

76 *Ibid.* at para. 81; citing cases such as *Nash* v *Eli Lilly and Co* [1993] 1 WLR 782, CA, where Purchas, Ralph Gibson and Mann LJJ had adopted a subjective test. This was supported by the Law Commission in its 2001 Report: 'we recommend that the claimant should be considered to have constructive knowledge of the relevant facts when the claimant in his or her circumstances and with his or her abilities ought reasonably to have known of the relevant facts' (para. 3.50). A subjective approach was also favoured by Prime and Scanlan, above n. 65.

77 [1992] 3 SCR 6.

tort action was statute-barred. There was no limitation period for breach of fiduciary duty.

On appeal, the Supreme Court found that the limitation period for the tort claim did not commence to run until the plaintiff was reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and their injuries. The causal link between fault and damage was an important fact, essential to the formulation of the right of action. Here, that only occurred when the plaintiff entered therapy. The court found that incest was a breach of fiduciary duty owed by a parent to a child.

In relation to limitation periods, the court noted that they were introduced because there was a time when a defendant should be secure in their expectation that they will not be held to account for ancient obligations. The court noted here that the argument was unpersuasive in the context of claims of the nature described here. While in some cases the cost of professional services could justify the imposition of limits, here there was no public interest in protecting incest offenders from the consequences. The court found that it would be 'patently inequitable' to allow incest offenders to escape liability while their victims continued to suffer the consequences. The court noted further arguments in favour of limitation periods, that the evidence might be stale. However, in many sexual abuse cases, the evidence might be 'stale' in that there may be a long period between when the abuse takes place and when the plaintiff obtains majority and can legally sue. While cases of plaintiffs 'sleeping on their rights' also prompted limitation period arguments, again the argument was not strong in this context.

The court accepted evidence from experts of the existence of 'post-incest syndrome' where victims persistently avoided situations (including lawsuits) likely to force them to recall and re-experience the traumas. The condition impedes recognition by the victim of the nature and extent of the injuries they suffered either because they repress their memory of what happened, or because the memories are too painful to confront. The court welcomed suggestions for law reform in this area, most especially the abolition of limitation periods for cases of incestuous sexual assault.

(d) United States

While the concept of delayed discoverability has been known to United States courts since 1949,[78] originally, the courts took a strict approach to applications to extend time within which to bring a civil legal claim regarding alleged abuse. For example, in *Tyson* v *Tyson*, the plaintiff was in her mid-20s and alleged that her father abused her while she was aged between 5 and 11. She argued that she had not remembered the abuse until she underwent psychotherapy. The court

78 *Urie* v *Thompson* 337 US 163 (1949).

refused the application to extend time to bring the claim based on the lack of evidence of the alleged events and the plaintiff's injuries.[79] Similarly, in *Lindabury* v *Lindabury*, the plaintiff claimed abuse by her father had occurred 20 years ago, which she only discovered during therapy. In denying her claim, the court concluded that the limitation period commenced to run when the last (alleged) abusive act occurred.[80]

Commencing in 1989, states began to enact statutes reflecting the concept of delayed discovery, usually meaning taking into account when a survivor of abuse might reasonably have discovered that their injuries or condition was caused by earlier abuse, and making the limitation period run from then.[81] This is now the position in most states,[82] with some states taking a more liberal view,[83] and others taking a stricter view.[84] Unlike other jurisdictions, in the United States limitation periods also apply to criminal proceedings, including those involving alleged child abuse, and the period generally commences to run when the crime is committed,[85] including a limitation period for the bringing of criminal charges in the current context.[86]

The application of the test, involving the concept of reasonableness in relation to the delay in bringing proceedings, is contentious. For example, in *Roe* v *Archdiocese of St Paul and Minnesota*,[87] Roe began

79 727 P. 2d 226 (Wash. 1986).
80 552 So. 2d 1117 (Fla. Dist. Ct App, 1989).
81 The term often used in the American literature is that the limitation period is 'tolled' until the date of reasonable discoverability.
82 For example, Alaska (Alaska Stat. 9.10.140(b)(1)–(2)) (Supp. 1992) (within three years of discovery), Arkansas (three years), California (three years), Colorado (six years), Connecticut (17 years from majority), Florida (four years from discovery), Idaho (within five years of majority), Iowa (four years after discovery), Kansas (three years from discovery), Maine (six years from discovery), Minnesota (three years from date reported to police), Missouri (three years from discovery), Montana, Nevada, New Mexico, Rhode Island, South Dakota (same), Vermont (three years from discovery), and Virginia (ten years from discovery but long-stop period of ten years): Ernsdorff and Loftus, above n. 34 at 145–6; Gary Hood, 'The Statute of Limitations Barriers in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution' (1994) *University of Illinois Law Review* 417. Unlike the other statutes mentioned, the Maine statute only applies where the victim had repressed the earlier incident(s).
83 There is no limitation period in Illinois, for example, for actions arising from alleged child sex abuse: 735 ILCS 5/13–202.2 (Supp. 1993). Nevada courts have effectively said the same thing, at least where the allegations are corroborated: *Petersen* v *Bruen* 792 P. 2d 18 (Nevada, 1990).
84 Some jurisdictions stop the time from running only until the plaintiff knows or ought reasonably to know of their injuries, whether or not they have linked them to past abuse: *DeRose* v *Carswell* 242 Cal. Rptr 368 (Cal. Ct App 1987), *Franke* 209 Ill. App. 3d at 1009, 568 NE 2d at 931, 154 Ill. Dec. at 710.
85 *Toussie* v *United States* 397 US 112 at 114 (1970). Some states have legislated to this effect (e.g. Connecticut, Delaware, New York, Hawaii and Texas), others provide for an extension of the limitation period in criminal cases where abuse is alleged (e.g. Colorado, Iowa, Kansas, Nebraska, Mississippi).
86 For example, Hawaii has a three-year statute of limitation for criminal cases involving rape of a child, regardless of the child's age or ability to report the crime.
87 518 NW 2d 629 (Minn. Ct App 1994) *rev denied* 24 August 1994.

counselling sessions with the defendant priest, Father Piche, in February 1982. Roe moved into the convent house next to the priest's church and by July that year, after Roe turned 18, the relationship became sexual in nature. This sexual relationship ended in 1984. In 1985, Roe attempted to commit suicide. She later moved to Arizona and married John Roe. She did not tell John about her relationship with the Father, and did not think or talk about this relationship while she was in Arizona. She moved back to Minnesota in 1988, and shortly afterwards memories of her relationship with Father Piche resurfaced. She again considered suicide, and commenced to self-harm. In 1992, she watched a news programme addressing sexual abuse by the clergy, and sought counselling. Her counsellor reported that while Roe was in Arizona she had suppressed her memories of the relationship with the Father, and it was only after seeing the television programme that she was able to link her psychological injuries to her relationship with Father Piche. She commenced action later that year.

However, in finding the claim to be statute-barred because it was brought more than six years from the date of discovery, the court determined that Roe 'should have' causally connected her injuries to the sexual abuse before she went to Arizona.[88] The fact that she might

88 There was a similar result in *Blackowiak* v *Kemp* 546 NW 2d 1 (Minn. 1996) where the plaintiff alleged he was abused by a school counsellor at age 11. The abuse allegedly occurred in 1970, and the plaintiff had told a friend and his mother at the time that something wrong was happening to him, but did not elaborate. The plaintiff developed problems with truancy and drug abuse and saw various counsellors but felt too ashamed to discuss his abuse. In 1991, he talked with an ex-classmate who told him the school counsellor had abused him. It was only at this time that the plaintiff said he felt comfortable talking about the abuse. However, the court found that the statute of limitation had run on the claim. The court relied on the fact that the plaintiff knew he was being abused from age 11; they assumed he was aware of the effects of the abuse on him. The case is discussed in detail in Anne Greenwood Brown, 'Sometimes the Bad Guy Wins: Minnesota's Delayed Discovery Rule' (1997) 23 *William Mitchell Law Review* 401. Knowledge of the abuse was also critical in denying the plaintiff's claim in *Doe* v *First United Methodist Church* 629 NE 2d 402 (Ohio, 1994). Similarly, in *ABC and XYZ* v *The Archdiocese of St Paul and Minneapolis* 513 NW 2d 482 (Minn. Ct App 1994) the court, in refusing the plaintiff's application to extend time, stated that the plaintiff 'should have known that her relationship with the defendant was abusive . . . it is unreasonable to suggest that ABC never realized the true nature of this abusive relationship even though she had known the relationship was wrong from the outset . . . To recognize a subjective standard and allow this case to go to trial would open the floodgates to suits long since time-barred' (at 487). In *E.J.M.* v *Archdiocese of Philadelphia* 622 A.2d 1388 (Penn. 1993) in a similar case where the plaintiff remembered the abuse but denied knowing its implications, the court was similarly dismissive of the application to extend time: 'inclusion of the plaintiff's mental incapacity as a factor to be considered in determining the reasonableness of [the] plaintiff's diligence runs counter to the reasonable person standard' (at 1394).

have suppressed memories of the abuse when she went to Arizona was, therefore, irrelevant.[89]

Some courts have accepted the distinction drawn by psychologists in childhood trauma cases of two 'classes' of abuse:

- Type I abuse, involving a single event. Typically, survivors of this abuse have clear memories of the abuse but do not come forward about it. They may not have connected the abuse with their difficulties.
- Type II abuse involves long-term or repeated abuse, often leading to the survivor completely or partially repressing their memory of the traumatic events until adulthood.[90]

Courts generally will not apply the delayed discovery rule in respect of Type I cases. For example, in *E.W.* v *D.C.H.*, the Montana Supreme Court refused to extend the limitation period, because the plaintiff's knowledge of the abuse required them to investigate the cause:

> To allow a [Type I] plaintiff, who fails to enquire into the cause of an injury, to avoid the time bar under the guise of discovery would hopelessly demolish the protection afforded defendants by the statute.[91]

Type II claimants have often had better luck in seeking an extension of time within which to bring their claim.[92] This distinction between Type

89 The case, and the issues it raises, are discussed in some depth in Sandra Conroy, 'The Delayed Discovery Rule and *Roe* v *Archdiocese'* (1995) 13 *Law and Inequality* 253. On the other hand, some courts have been sensitive to the fact that a strict application of the limitation period in sex abuse cases may force victims prematurely to confront their abusers: see for example *Peterson* v *Bruen* 792 P.2d 18 (Nevada 1990).

90 Richardson, above n. 13 at 531–2.

91 754 P. 2d 817 at 820–1 (Mont. 1988) (plaintiff had sued at age 34, she had always known her step-uncle abused her and suffered emotional and physical disorders as a child but did not associate her problems with her prior abuse until she underwent counselling in 1986; the limitation period was not extended because the court found that she had sufficient knowledge at 18 and the fact that she did not fully understand her legal rights or the impact of the abuse at that time was not relevant); *Bowser* v *Guttendorf* 541 A. 2d 377 (Pa. Super. Ct 1988); *Hildebrand* v *Hildebrand* 736 F. Supp. 1512 at 1521 (1990); *Messina* v *Bonner* 813 F. Supp. 346 at 348–9 (ED Pa. 1993); *E.J.M.* v *Archdiocese of Philadelphia* 622 A. 2d 1388 at 1394 (Penn. 1993); *Barren by Barren* v *United States* 839 F. 2d 987 at 994 (3d Cir. 1988); *Clay* v *Kuhl* 727 NE 2d 217 (Ill. 2000). However, in *Ross* v *Garabedian* 742 NE 2d 1046 (Mass. 2001), the Supreme Judicial Court of Massachusetts allowed an extension of time where the victim knew of the abuse but did not realize its impact on him until many years later—victim was 13 at the time and was abused by a 27-year-old; the court acknowledged that the victim knew what had happened was 'wrong' but accepted his claim that he could not recognize the link between the abuse and the plaintiff's psychological injuries until he entered therapy.

92 *Johnson* v *Johnson* 701 F. Supp. 1363 (N.D III, 1988); *Ault* v *Jasko* 637 NE 2d 870 (Ohio, 1994): the plaintiff was able to bring a claim at age 29 based on alleged abuse at age 12 on the basis that she had repressed all memory of the events for 17 years. The court concluded that to deny the plaintiff's opportunity to have the case heard that she was 'unaware existed until after the expiration of the statute of limitations would be a greater injustice than the defendant's burden in having to defend against such a claim' (at 872–3); *Mary D* v *John D* 264 Cal. Rptr 633 (Ct App, 1989).

I and Type II cases is often criticized as being arbitrary.[93] In relation to so-called Type III cases—which are all cases other than those in the other types, so would deal with cases where the survivor did not suppress memories of the events and was aware of the causal link between the abuse and difficulties for the victim later in life—the courts are typically unsympathetic to extension of time claims. For example, in *O'Neal* v *Division of Family Services*, the plaintiff sued the Division which had placed him in foster care when he was younger. He sued the Division in 1986, claiming that a foster parent abused him in 1973 and 1974. He conceded that he was aware of the abuse and its consequences, but argued that he was not psychologically able to reveal the abuse until 1986. The Utah Supreme Court dismissed the case, finding that the plaintiff's inaction explained the failure to bring suit.[94]

(e) New Zealand

The New Zealand Court of Appeal considered these issues in *S* v *G*.[95] There G alleged that she had been sexually, physically and emotionally abused by S while they were members of a community. The abuse was alleged to have occurred when G was aged from 14 to 16. S was convicted in 1992 for these offences. G claimed breaches of fiduciary duty and negligence against S in a civil claim. G claimed that it was in the course of counselling therapy in 1990 that she recognized that the emotional and psychological damage from which she was suffering was caused by S's conduct, and that the limitation period should only commence to run from that time.

The court agreed, applying the principle of 'reasonable discoverability'[96] of the link between psychological and emotional harm and past sexual abuse. A victim who reasonably had not linked serious psychological and emotional damage to the abuse should not have the limitation period run merely because of awareness of symptoms of the abuse. It was only when the psychological damage was or should reasonably have been identified and linked to the abuse that it could be said that the elements of negligence were known and the cause of

93 E.g. Hood, above n. 82 at 418; Gregory Gordon, 'Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule' (1993) 20 *Pepperdine Law Review* 1359 at 1398; Chrissie Garza, 'Adult Survivors of Childhood Sexual Abuse Seeking Compensation from their Abusers: Are Illinois Courts Fairly Applying the Discovery Rule to all Victims?' (2003) 23 *Northern Illinois University Law Review* 317 at 321.

94 821 P.2d 1139 (Utah 1991).

95 [1995] 3 NZLR 681.

96 This concept had arisen in building negligence cases where some time had elapsed between the existence of latent defects and the plaintiff's means of knowledge of their existence. Initially the courts had found that time began to run against the defendant as soon as the damage occurred (*Cartledge* v *E Jopling and Sons Ltd* [1963] AC 758); eventually it was held that the time began to run only when the damage was discovered or discoverable: *Invercargill City Council* v *Hamlin* [1996] AC 624, PC.

action accrued. There was good reason for the delay in bringing proceedings, and the conduct itself must be assumed to have contributed to the delay. In the alternative, provisions of the limitations legislation provided for a delay in the commencement of the limitation period during any time where the cause of action might have been concealed by fraud.

Subsequently in 2007, the Supreme Court of New Zealand discarded the concept of 'reasonable discoverability' as a doctrine of general application in limitations arguments.[97] The doctrine arose in the context of latent defects in building structures and was not intended to, and should not have been, extended to apply to other situations, including those involving sexual abuse. It had been used in *Hamlin* in the context of assessing when damage occurred, rather than when a limitation period began to run, as occurred in *S* v *G*.

The Supreme Court would not overrule *S* v *G* and similar cases, but chose not to extend them to other fields in which limitations issues arose. It noted that as a result of legislative amendment, a plaintiff in the position of the one in *S* v *G* would be able to proceed with the claim, perhaps reducing the need for a 'reasonable discoverability' gloss on the statute. The court also expressed its preference for seeing such cases as involving a breach of fiduciary duty. It found that in such cases, the cause of action would not accrue until the link between the wrongdoer's conduct and the plaintiff's damage was known or is known to the plaintiff.

IV. Critique of Current Positions and Consideration of Solutions

Having set out the course that the law in this area has taken in various jurisdictions, we can now turn to a critique of aspects of the current orthodoxy, before proposing the 'best way' forward in terms of law reform in this area. Of course, in making comments, care must be taken to acknowledge the content of specific provisions that exist in various jurisdictions, since there are important differences in wording in different limitations statutes. Care must be taken when discussing cases and their possible significance for other jurisdictions for this reason. There have also been substantial amendments made to legislation in this area, as well as substantial work by Law Reform Commissions, which should be taken into account.

It is accepted that no solution to the identified problem will be perfect; inevitably there will be compromise, and it is very difficult, if not impossible, to develop rules that will deliver what most consider to be 'fair' outcomes in all cases. There is a delicate balance between the very important public interest, as well as the very strong personal

97 *Murray* v *Morel and Co Ltd* [2007] 3 NZLR 721, *per* Blanchard, Tipping, McGrath and Henry JJ, Gaunt J dissenting.

interest of the one making the allegations, that such allegations of abuse be heard in court and tested; on the other hand, the fact that every defendant is entitled to a fair trial, and that where a long time has passed between when a case is brought and when the facts underlying the case were alleged to have taken place, the task of running a trial that is 'fair' becomes more difficult.

i. Are Judges in a Position to Judge When Injuries Were 'Discoverable'?

As Mosher has pointed out, the reality for many survivors of sexual abuse is that they have 'discovered' all aspects of their cause of action, yet may not be able to bring a claim. This might be because they are ashamed about what happened, reluctant to make the events public for fear of hurting others, or not be prepared to re-live the terror of what happened.[98] If the discoverability rule is applied, time may well have run out before the survivor is 'ready' to bring the matters to court. As Mosher says, the problem is that 'the assessment of reasonableness is made from the position of someone other than a survivor of incest'.[99] This comment is applicable to the range of jurisdictions considered in this paper. Most recently, the House of Lords in *A* v *Hoare* re-affirmed that an objective test must be applied in this context, discounting the individual circumstances of the plaintiff, and arguably inconsistent with the psychological literature in this area to which reference was earlier made.

There are many possible case examples that could be used to make this point. They include *Roe* v *Archdiocese of St Paul and Minnesota*, where the court found that the survivor 'should have' connected her injuries to the alleged abuse earlier than she in fact did.[100] The House of Lords most recently found in *A* v *Hoare* that the victim who had allegedly been abused while in a detention centre many years ago 'was obviously aware that he had been seriously assaulted' and found that it was very difficult to 'accept that a woman who knows she has been raped does not know she has suffered a significant injury'.[101] Further, in *Adams* the House of Lords rejected the plaintiff's claims that the reason for the delay in bringing proceedings was because he wanted to hide his difficulties, did not want others to think badly of him, and in terms of his ongoing problems, he 'didn't want to go there'. The House concluded that he should have sought advice and assistance many years before he in fact did so.

98 Mosher, above n. 23 at 203.
99 *Ibid.* at 209.
100 518 NW 2d 629 (Minn. Ct App 1994); and in *E.W.* v *D.C.H.* 754 P. 2d 817 at 820–1 (Mont. 1988) the court concluded that the survivor 'should have' investigated the cause of her psychological injuries, as did the court in *O'Neal* v *Division of Family Services* 821 P. 2d 1139 (Utah 1991).
101 *A* v *Hoare* [2008] UKHL 6, paras 40, 43 (Lord Hoffmann).

The case I have chosen to best make the point, however, is the Australian decision in *Carter* v *Corporation of the Sisters of Mercy of the Diocese of Rockhampton*.[102] There the applicant was placed by the government in a church-run orphanage soon after birth. Between 1961 and 1972 she suffered physical and emotional abuse by some of the nuns who ran the orphanage. She allegedly endured daily rape by an orphanage employee from the age of 7. In 1968 she complained to the government about the abuse, but apparently nothing was done and she was punished for complaining. She fled the orphanage at age 15 and lived on the streets.

Her life since that time had been a very difficult one, including the death of her first child, a marriage characterized by verbal and emotional abuse, and dependency on alcohol. In 1997, she learned of others who suffered abuse at the orphanage. She went to the police and sought legal advice. Her lawyers offered to investigate a civil claim. Those who ran the orphanage apologized for the events and settled the claim with the plaintiff. The plaintiff sought an extension of time to bring a claim against the government that had placed her in the orphanage. The government did not admit the abuse occurred and claimed that relevant witnesses were either dead, very old or could not be found. According to the standard limitation rules, the plaintiff had until 1981 to bring proceedings (three years after turning 18). She commenced proceedings in negligence and trespass in 1998, 17 years after the time limit. She claimed it was only in October 1998 when she read a psychiatrist's report dated 29 September 1998 that she found out she was suffering from PTSD, and fully appreciated the causal link between the abuse and her condition. She claimed that although she had obtained psychiatric and psychological treatment for many years, she did not link the abuse to her condition until 1998.

By a majority of 2–1, the Queensland Court of Appeal dismissed the application for extension of time. McPherson JA pointed to the claimant's statements that she was 'depressed', indicating an awareness many years prior to the 1998 report that she suffered mental health issues. In her statement, the plaintiff also acknowledged that because of the abuse she suffered, she became an aggressive and angry person, and would assault other children. McPherson JA used this to conclude that 'even at an early stage of her life, she was able to make a connection between her treatment at [the orphanage] and her mental state or behavioural condition'.[103]

The majority judges go on to 'judge' the plaintiff's actions in seeking redress, and her ability to link the abuse with her later difficulties. A negative view was taken of her efforts in this regard:

102 [2001] QCA 335 (unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001).

103 *Ibid.* at para. [15]; and to like effect Muir J, para. [27].

> If later in her life she did not appreciate that there was a connection between her childhood treatment and the alcoholism and her chronic depression, [these were facts] which she could have found out by taking the reasonable step of asking any psychiatrist whom she consulted. She was aware of her need to consult psychiatrists and psychologists because she had done so evidently more than once before [in] August 1998. It is true that she says that, before then, there was never any mention of a connection between the abuse suffered and her current condition; but it would have been a reasonable step for her on the occasion of those consultations for her to ask what caused her recurring states of depression.[104]

However, as others have pointed out, it was not until the late 1980s that medical specialists knew of the link between child abuse and mental health issues later in life such as PTSD.[105] It is unrealistic to expect a victim to have made the link when experts themselves did not do so for many years.

Further, as we know now, typical responses to trauma such as the abuse the plaintiff suffered over many years is to block out the events, and to avoid events or situations that would cause the plaintiff to re-live the abuse.[106] In this context, it is perfectly understandable that a plaintiff might have forgotten about the abuse for many years, making it difficult for them over a long period of time to connect their current mental difficulties with past abuse. Further, as we know now, some victims of such abuse enter into a 'dissociative state' as a survival mechanism against the abuse; this reaction can also lead the victim not to remember the abuse for many years. Again, this should not be held against them in terms of a 'timely response' when they eventually do remember the abuse. There may also be other 'systemic' reasons for the plaintiff's not coming forward earlier, including: (a) a lack of awareness of health and counselling services available; (b) a lack of awareness of a potential legal claim; or (c) lack of funds to bring a legal action (in some cases). In cases dealing with a person sent to an orphanage at a very young age, family support networks

104 *Ibid.* at para. [15].

105 Ben Mathews, 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse' (2004) 27 *University of New South Wales Law Journal* 631 at 651.

106 McGill J acknowledges this in *Hopkins* v *Queensland* [2004] QDC 21 (unreported, McGill J, 24 February 2004), but claims that 'the effect of the reluctance to talk or think about the events is not accommodated by the extension provision; the provision is not concerned with the situation where an applicant who was in possession of the important facts simply did not want to pursue the matter, for whatever reason. I do not think that the situation is changed by the fact that the desire not to pursue the issue is in a sense caused by the psychiatric injury itself . . . any understandable reluctance of the plaintiff to pursue this matter earlier because of her psychiatric state is not a factor which can be taken into account' (at 41–2).

might also not be available, or not to the same extent as one might otherwise expect.[107]

Further, the author finds an inherent difficulty in a judge making a judgment about the 'reasonableness' of the plaintiff asking or not asking about the reasons for her recurring depression, and a finding that the plaintiff in such a case should 'reasonably' have made enquiries.[108] It is conceded that the concept of 'reasonableness' is inherent in our legal system, and its usefulness in negligence law and criminal law generally is not questioned here. However, its value in cases of the type that are the focus of this paper is questioned.

The judge in such a case has (presumably) not been in the position of a victim of long-term abuse as a child; it is very difficult to expect a judge to pass judgment on the 'reasonableness' of the behaviour of the survivor. The paper has referred earlier to a large amount of psychiatric literature on child sexual abuse, including the multitude of reasons why a victim might not disclose the abuse for many years, and the variables that affect this. It is, in the author's view, dangerous for anyone to pass judgment on the 'reasonableness' of the response of a child abuse survivor when they are not informed by this literature. Of course, this is not a problem confined to cases of child sexual abuse. There are many cases and situations where a judge cannot be expected to have first-hand knowledge or experience of the facts relevant to the case. However, it is expected that where there is expert knowledge in a field, judgments would be informed by such knowledge rather than made in ignorance of it. Referring to *Carter* and other cases, Mathews similarly concludes:

> None of the judgments in the case studies discusses the symptomatology of PTSD, or the avoidance criterion, in detail. The judicial determinations of what is reasonable for a survivor of child abuse with PTSD are either uninformed by psychological evidence, or are inadequately informed, with insufficient examination of the psychiatric literature and of the psychiatric reports presented in the case.[109]

While many jurisdictions do currently look to the question of the

107 Indeed, the *Forde Inquiry* (1999) (see text at n. 21 above) found that in many cases, those sent to orphanages or children's facilities were not encouraged to maintain relations with other family members (at 78).

108 This difficulty led to the Australian Plaintiff Lawyers' Association, in its submission to the Queensland Law Reform Commission's *Review of the Limitation of Actions Act 1974 (Qld),* suggesting that the test refer to the plaintiff's actual knowledge (at 82). The New Zealand Law Commission also noted that the reasonable person standard could work injustice if it was not related to the health, intelligence and social competence of the particular claimant: New Zealand Law Commission, Report No 6: *Limitation Defences in Civil Proceedings* (1988) 72. Other Law Reform Commissions favoured a combined approach, asking what the plaintiff would have discovered had they acted reasonably (Law Commission Consultation Paper 151: *Limitation of Actions* (1997); Law Reform Commission of Western Australia, Project No 36 Part II: *Report on Limitation and Notice of Actions* (1997) 141). This was also the approach recommended by the Queensland Law Reform Commission in its Report (at 90).

109 See Mathews, above n. 105 at 661.

'reasonableness' of the delay in bringing proceedings and what the survivor should or should not have done, the author submits that the rules applicable to limitation periods in cases of alleged child sexual abuse should not embrace this concept because of the difficulties in its implementation, and the invitation it provides to judges to pass judgment on the survivor's response, often (with respect) in a way not informed by relevant psychological literature.

ii. Discoverability is a Useful Concept

However, the above discussion should not be taken to be a criticism of the concept of 'discoverability' at the level of principle, but more as criticism of its application in some cases. The author agrees with the use of this concept to delay the running of the limitation period as occurred in cases such as *Stingel*, *S* v *G*, *M* v *M* and *A* v *Hoare*. Fixing on the date of discoverability as the date upon which the limitation period commences to run was also favoured in the *Ipp Review*.[110]

In this light, the decision of the Tasmanian Supreme Court in *Tusyn* seems, at the very least, anomalous. The plaintiff commenced proceedings in 2003 in relation to abuse which occurred in 1961. He claimed, and it was not in dispute, that he only learned he suffered from post-traumatic stress disorder in 2002. This was surely a material fact of a decisive character of which the plaintiff was unaware until shortly prior to the instigation of proceedings. The Supreme Court did not even refer to *Stingel* v *Clark* when one would have thought that comments in the case were highly relevant to the present proceedings. The court seemed to think that discoverability was a concept confined to Canada and New Zealand. It is submitted to be unfair for the court in *Tusyn* to conclude that the plaintiff's 'only causes of action in respect of which he could claim damages for that psychiatric injury are ones that accrued to him in 1961'[111] when according to the undisputed evidence the plaintiff did not know about his psychiatric injury until 2002. As the *Ipp Review* concluded, in terms highly relevant to the *Tusyn* litigation, 'it would be unjust to provide for limitation periods to run before claimants have suffered damage or know they have suffered damage'.[112]

It is also submitted that, in applying the 'discoverability' principle, the legal advice given to the plaintiff is relevant. This is most clearly demonstrated in *SDW* v *Church of Jesus Christ of Latter Day Saints*, where the plaintiff commenced action in 2004 against the Church for abuse she suffered from her stepfather. The family had been active practising members of the Church, and once the abuse came to light, the Church excommunicated the offender but took no further action. The limitation period for the plaintiff would have run out in 1993 but

110 *Ipp Review of the Law of Negligence* (2002) 90.
111 [2008] TASSC 76 at para. [25] (Blow J, 26 November 2008).
112 *Ipp Review* at 88.

the plaintiff claimed she only discovered the extent of her injuries and its links with the abuse in 2002, but did not know until 2003 that the Church knew of the abuse, and, although she obtained legal advice in 2003, was not advised until 2004 that she may have a claim against the Church. She commenced action within 12 months of receiving this advice, yet was deemed to be out of time because the action was commenced more than 12 months after she discovered she had PTSD.

However, it could be argued that the knowledge that she may have a claim against the Church was a material fact of a decisive character,[113] and she only discovered this in 2004. She commenced proceedings within 12 months of this knowledge, so arguably the extension should have been allowed. The *Ipp Review* recommended that the limitation period should commence to run on the date of discoverability, defined as the date on which the plaintiff knew, or ought to have known, that personal injury had occurred, was attributable to negligent conduct of the defendant, and was sufficiently significant to warrant the bringing of proceedings. That *Review* recommended that the three-year limitation period should run from when the plaintiff knew or ought to have known these things. In *SDW*, the court heard that the plaintiff only discovered that she might have a claim against the Church in 2004, and commenced proceedings that same year. In this case, it is submitted that, consistently with the findings in the *Ipp Review*, the limitation period should only have commenced to run against that plaintiff in January 2004 when she obtained the advice that the Church might be liable.

We see in this case also some anomalies with the provision of legal advice—although she had legal advice in September 2003, it apparently did not refer to the possibility of a claim against the Church; only the advice in January 2004 did so. Further, as the court noted in the case, both counsel appeared to be in error as to the deadline within which the claim should have been brought.[114] If, in fact, there were errors and omissions in relation to the provision of legal advice[115] to a plaintiff in particular cases that might explain the delay, this should be taken into account in the exercise of discretion. The result of the errors should not be that the plaintiff loses the chance to have their day in court and their allegations tested.

113 The definition of 'material fact' in the Queensland legislation applicable in this case includes 'the identity of the person against whom the right of action lies'.

114 [2008] NSWSC 1249 at para. [17].

115 Similarly in *Michael Brown* v *State of New South Wales* [2008] NSWCA 287, one of the reasons for the failure to appeal a decision in a timely manner was that the plaintiff had been advised to pursue an equitable claim instead. This claim was not successful. Equitable claims arising from alleged abuse (sometimes framed in equity in order to avoid otherwise unfavourable limitation period rules) had been accepted in Canada but the existence of such a path in Australia was and remains, at best, highly contentious on existing authorities.

iii. Reliance on Fiduciary Duties is Inadequate

As discussed above, some jurisdictions, in particular Canada and New Zealand, consider such claims as involving, either alone or in conjunction with other legal doctrines, an alleged breach of fiduciary duty. Partly, this might be because limitations statutes typically have no limitation period, or a limitation period greater than the one applicable in tort, for such claims. Is this the preferred option for dealing with cases of child sexual abuse?

The author submits that the answer to this question is 'no'. Reliance on the principle of breach of fiduciary duty inevitably gives rise to the further question of which categories of relationship will be recognized as those in which fiduciary obligations are owed. These categories are open and subject to debate and argument.[116] The argument might be strong in the context where the abuser is a school teacher, for example, and is also strong in cases where the abuser is a parent of the victim. However, the argument starts to become strained where the abuser's relationship with the victim is more remote, for example an uncle of the victim, or a neighbour.

The author is not in favour of what could well amount to an arbitrary distinction. It would not be right, in the author's view, that a longer limitation period apply, for example, in cases where the abuser is the victim's father, than in cases where the abuser was the neighbour of the victim, yet these are the distinctions that may well eventuate if we rely on the doctrine of breach of fiduciary obligation to allow victims to proceed outside regular (tort) limitation periods.

iv. Should Limitation Periods Run While the Survivor is a Minor?

The typical position is that the limitation period does not commence to run while the plaintiff is under a disability, and that being under the age of 18 typically qualifies as a disability. In other words, subject to any other extensions that might be available, the limitation period will commence to run once the plaintiff attains majority.[117]

However, the position was changed in some Australian states following the *Ipp Review*. The *Review* seemed to accept the submission that:

116 *LAC Minerals Ltd* v *International Corona Resources Ltd* [1989] 2 SCR 574 at 597 (Sopinka J). In that case, Sopinka J identified three important factors in establishing the existence of a fiduciary relationship, including whether the claimed fiduciary has scope for the exercise of power, whether in so doing they can affect the beneficiary's interests, and whether the beneficiary is peculiarly vulnerable to the fiduciary's exercise of power. Some courts have found that fiduciary obligations do not apply in cases where a guardian has assaulted their ward because the claims were not economic in nature and adequately dealt with by tort law: *Paramasivam* v *Flynn* (1998) 90 FCR 489 at 507–8; *Cubillo* v *Commonwealth* (2001) 182 ALR 249.

117 E.g. Limitation Act 1980 (UK), s. 28; Limitation Act 1950 (NZ), s. 24; this is also the position in parts of Australia (Queensland, South Australia and the Northern Territory, see n. 41), and is typically the position in the United States statutes: see Garza, above n. 93 at 320.

> Society can reasonably expect parents and guardians, and those who care for incapacitated persons, to take necessary steps on behalf of their charges to initiate claims within the time limits imposed on the rest of the community.[118]

It concluded that it was in the community interest that the limitation period should run against minors provided the minor was in the custody of a parent or guardian.[119] The time would commence to run when the parent or guardian knew or ought to have known of the injury, the fact that it was caused by the defendant, and it was sufficiently serious to justify legal action. The only exception would be cases where the defendant was the parent or was in a close relationship with the parent such that the parent or guardian may be influenced by the potential defendant not to bring a claim, or the minor might be unwilling to disclose the nature of the actions causing the damage. It favoured special rules in such cases.[120]

In its *Limitation of Actions Report*, the Law Commission also considered this reform. However, it concluded differently:

> A majority of consultees responding on this issue were of the opinion that time should not run against a minor even though there is a representative adult, so that the interests of the minor are fully protected. There was concern that if time was to run, the minor would inevitably suffer, as appears to have been the case when a 'representative' adult provision was included in the Limitation Act 1939. Wherever the minor has a representative adult who is conscious of his or her responsibilities, and willing and able to take action, it is likely that proceedings will be issued on behalf of the child promptly even under the current law. The only practical effect of providing that time runs where there is a representative adult would be to penalise those minors where the representative adult is negligent. We therefore do not recommend any rule to the effect that time should run against a minor where there is a representative adult.[121]

It is submitted that the view of the Law Commission is the better one.[122] It is not considered to be sound policy to in effect penalize minors where the representative adult is negligent. The action is, after all, one belonging to the minor rather than their representative. Why should the question whether a person's claim remains alive or not depend on what their parent or guardian did or did not do? There

118 *Ipp Review* at 95.

119 If the minor was not in the custody of a parent or guardian, or was in the custody of the parent or guardian but that parent or guardian was under a disability, or was in the custody of incapacitated persons for whom an administrator had been appointed, that minor would be regarded as being under a disability, and the limitation period would not run during this time.

120 *Ipp Review* at 96; the limitation period would only commence once the plaintiff turned 25 and it would run for three years either from then or the date of discoverability, at the court's discretion.

121 See Law Commission, above n. 67 at 73.

122 Other critiques of the Ipp reforms in this context appear in: Sarmas, above n. 41; Mathews, above n. 63.

may be other factors explaining the failure of the parent or guardian to take action. They may not be in a financial position to do so; they may not believe the allegations made; and they may not want shame or embarrassment being brought on the family. The survivor may not at that time want the claim to be brought due to the feelings of shame or because they do not want to go through the legal process, for reasons explained earlier in this paper. None of these reasons reflects badly on the survivor, and none of them relates to the claimed rationale for enforcement of limitation periods. The position of other jurisdictions on this issue is to be preferred to that of the jurisdictions which have abolished this rule.

v. Disability Exception

One of the ways that some courts have found to 'get around' the problem that a child sexual abuse survivor may otherwise be barred by the statute of limitation in bringing a claim is to argue that the survivor was under a disability. Commonly, in statutes of limitations, the time within which an action must be brought does not run during periods when the plaintiff was under a 'disability'. Since a common consequence of sexual abuse is that the survivor develops PTSD, as described above, it may be argued that PTSD is a disability which would operate to suspend the operation of the statute of limitation.

There is precedent confirming that PTSD is a disability within the meaning of the limitations legislation.[123] The High Court of Australia was satisfied in *Stingel* v *Clark*[124] that PTSD was a 'disorder' with the effect that it suspended the relevant limitation period; there is no reason to think the court would not find PTSD to be a 'disability' within the meaning of other statutes of limitations, and time would not run accordingly. The Law Commission concluded that in cases where plaintiffs suffer from what it termed 'dissociative amnesia',[125] the plaintiff would be under a disability while this continued.[126]

If the courts accept that a person suffering PTSD is under a disability within the meaning of the limitations legislation, it will be critical to identify the precise period for which the disability will be deemed to have lasted. Does this disability commence when the traumatic events

123 *S* v *Attorney-General* [2003] 3 NZLR 450 at 462–3.

124 (2006) 226 CLR 442, although subsequently the legislation was amended by the Victorian Parliament in such a way as to remove sexual abuse claims from the category of cases in which an extension under s. 5(1A) of the Act is allowed. These were confined to dust- and tobacco-related injuries.

125 The Commission referred to two different possible meanings of this concept: (a) an inability to recall personal information of a stressful and traumatic nature, such as sexual abuse; and (b) a situation where the plaintiff is aware of both the trauma and the consequences for their psychological makeup, but the trauma was so bad and memories and reminders of it too psychologically damaging for the plaintiff, leading the plaintiff to dissociate themselves from memory triggers, including litigation (above n. 67 at 106).

126 Law Commission, above n. 67 at 106.

occur? Or, as members of the High Court claimed in *Stingel*,[127] does the disability commence when the symptoms of PTSD manifest themselves?[128] If this is accepted in subsequent cases, it may be difficult to pinpoint the precise time at which the limitation period stops running. Presumably the symptoms of PTSD typically manifest themselves at a time prior to any counselling that the survivor receives. That is why the survivor may be going to counselling. But it will be difficult to identify in many cases the precise time at which symptoms of PTSD manifested themselves. Is it the position that the limitation period continues to run until that time? If so, it may well have run out before we reach the time at which the court says the plaintiff is under a disability, rendering this argument useless for the plaintiff.[129]

vi. No Limitation Period?

Deficiencies in various other options for dealing with the problem of limitation periods in civil child sexual abuse cases have been highlighted. The author's preferred approach is the model adopted by various Canadian provinces, which is to abolish limitation periods in civil cases involving child sexual abuse (and in some jurisdictions, other cases as well).

One good example is the Ontario Limitations Act.[130] Section 10 provides that the limitation period does not run in cases of sexual assault or assault while the plaintiff is not capable of commencing the action due to their physical, mental or psychological condition. There is a presumption that the person is so incapable at a time prior to when they bring proceedings in cases where the defendant is in an intimate relationship with the plaintiff, or the plaintiff is dependent in some way on the defendant.[131] The Labrador and Newfoundland legislation similarly provides that no limitation period applies in cases involving sexual misconduct where the plaintiff was under the care of the defendant, dependent on them, or was a beneficiary of a fiduciary relationship with the defendant.[132] The Saskatchewan legislation provides that no limitation period applies in cases of sexual misconduct or where the defendant was living with the plaintiff in an intimate and personal relationship, or one involving dependency.[133] In British Columbia, no limitation period applies in cases involving sexual assault of a minor.[134]

127 (2006) 226 CLR 442.
128 Gleeson CJ and Callinan, Heydon and Crennan JJ found in this case that 'post-traumatic stress disorder of a delayed type does not exist until there are symptoms' (*ibid.* at 458).
129 Further, some statutes provide that disability is only relevant if it existed at the time the limitation period commenced (Limitation of Actions Act 1974 (Qld), s. 29(1) and (2)(c); Limitation Act 1950 (NZ), s. 24).
130 Ontario Limitations Act 2002.
131 *Ibid.* at s. 10(2).
132 Limitations Act 1995, s. 8.
133 Limitation Act 2004, s. 16.
134 Limitation Act 1996, s. 4(k).

vii. Should There be a Long-stop Period?

Some jurisdictions, including parts of Australia and the United States, have enacted long-stop provisions, placing an outer limit on the time within which a claim must be brought, notwithstanding exceptions in the Act that would otherwise allow the claim. A typical rationale for the inclusion of such provisions is that they provide fairness:

> The date of discoverability is potentially unfair to defendants. The unfairness arises because, in cases where the date of discoverability may not occur until many years after the damage-causing event, witnesses may die or be difficult to find, memory may be impaired and records may be lost. In that event, the defendants could be hampered in the preparation of their defence and the fairness of the trial may be prejudiced.[135]

One of the recommendations of the *Ipp Review*, adopted by three Australian states, was that a long-stop provision of 12 years (from the date on which the alleged negligence took place) be implemented, subject to an overriding discretion to be given to the court.[136]

However, as the authors of the *Review* themselves acknowledged, such a period is essentially arbitrary,[137] seeking as it does to reach a reasonable compromise between competing interests. The Law Commission was initially in favour of a long-stop period of 30 years, but abandoned this approach in its Final Report, concluding that in cases of personal injury, no limitation period should apply. The Commission explicitly acknowledged the difficulties that a long-stop period would have in cases of alleged sexual abuse, and accepted that in the context of such claims there was even less justification for long-stop periods than in other contexts.[138]

In my view, concerns underpinning the suggestion of a long-stop period can be accommodated in other ways. Specifically, the court's inherent jurisdiction to decline to hear cases where such a trial would likely be 'oppressive' to the defendant is broad enough to deal with cases where, due to the lengthy period that has elapsed between the alleged events and the trial, it would not be possible to have a fair trial. Such discretion should be relied upon to deal with specific cases in which this is an issue, rather than a general long-stop rule that its proponents admit to be arbitrary.

V. Conclusion

A range of jurisdictions continue to struggle to deal with difficult legal cases involving a claim of child sexual abuse brought many years after the events. While there is a sound rationale for limitation periods, it is

135 *Ipp Review* at 92.
136 *Ibid*. at 93.
137 *Ibid*.
138 *Ibid*. at 68; Law Commission, above n. 67 at 68.

not applicable in such cases and new ways must be found to deal with these issues in a more satisfactory way. The law must be more accommodating of the psychology literature concerning survivors of child sexual abuse. It must abandon its judgment of whether the bringing of a claim by the survivor was, in terms of the timeframes involved, 'reasonable', because it is ill-equipped to make this assessment. It is not recommended that the concept of fiduciary obligation be the avenue by which greater flexibility is obtained in such cases. While the use of the 'disability' concept has some merit in terms of allowing survivors more time within which to claim, it too suffers from uncertainty in application. The approach of some Canadian provinces, in abolishing limitation periods in relation to these kinds of cases, is the most desirable reform. The court will retain its inherent jurisdiction to make sure that trials are fair to both parties, and to stay proceedings considered to be frivolous, vexatious or abuse of process, in the rare times where cases alleging child sexual abuse are deemed to be within this category.