

August 1995

Adults survivors of early childhood sexual abuse are pursuing their legal remedies in ever-increasing numbers. As a result, practice in this area of tort law has become emotionally charged for both the attorney and the client, presenting daunting procedural issues, social policy arguments and expensive factual investigation. Tolling agreements long-employed by commercial, regulatory and insurance lawyers to suspend the running of a statute of limitation or repose are finding increasing usefulness for sexual abuse claims due to the judiciary's willingness to apply delayed discovery principles to sexual abuse occurring years before the claim is filed.

It is clear that courts will enforce agreements which contractually alter the statute of limitations when a properly drafted agreement so provides. There are no special formalities for a tolling agreement to be effective and as such must simply pass muster under a traditional contract analysis. Consideration must flow from the defendant obtaining the benefit of the agreement not to plead the statute of limitation. Typically a claimant's forbearance in the bringing of his cause of action is sufficient, but it would not be uncommon for the cautious attorney to promise to pay a nominal additional consideration, receipt of which is recited in the agreement. There is no reported case that would require that strict construction. In one very limited situation, the U.S. Supreme Court has determined that tolling agreements are not enforceable, if it conflicts with a limitation period provided for by federal statute and that the remedy in question was express rather than implied.

The jurisdictions where tolling agreements for sexual abuse are frequently employed follow closely those states that have codified delayed discovery jurisprudence into a specific tort for sexual abuse or where courts have specifically held that an action for sexual abuse does not accrue until the victim knew or should have known that the physical or psychological sequelae suffered was a result of the abuse. These claims can be readily divided into two types of cases. The first group involves survivors who recall the abuse, but are unaware that their current or past psychiatric sequelae is the result of childhood or adolescent trauma in the form of sexual abuse. While the earlier trend of these cases rarely allowed the discovery rule to be applied to toll the statute, recent legislative enactments and judicial expansion of claims for sexual abuse has created a more hospitable climate. For example, in New Jersey the Legislature in 1994 specifically acknowledged in the committee notes that "because of the unique nature of sexual abuse, which may only be discovered by an adult victim after years of repression . . . a civil suit for sexual abuse shall accrue at the time of reasonable discovery of the injury and its causal relationship to the act of sexual abuse." In addition, the pertinent section of the statute, N.J.S.A. 2A:61B-1(5)(b) and (c) provides as follows:

In any civil action for injury or illness based on sexual abuse, the cause of action shall accrue at the time of reasonable discovery of the injury and its causal relationship to the act of sexual abuse. Any such action shall be brought within two years after reasonable discovery. (Emphasis supplied.)

Nothing in this act is intended to preclude the court from finding that the statute of limitations was tolled in a case because of plaintiff's mental state, duress by defendant, or any other equitable grounds. Such a finding shall be made after a plenary hearing, conducted in the presence of a jury. At the plenary hearing the court shall hear all credible evidence and the rules of evidence shall not apply, except for Rule 4 or a valid claim of privilege. The court may order an independent psychiatric evaluation of the plaintiff in order to assist in the determination as to whether the statute of limitations was tolled.

The second group of cases that apply the delayed discovery principles are when the abuse itself creates a coping mechanism that allows the survivor to disassociate their conscious awareness and memory from the unspeakable, to such an extent, that memory of the events is repressed partially or in some cases in its entirety. It is clear that more and more courts are recognizing the historical frequency of incest and childhood sexual abuse in our culture. That being so, Appellate judges are wisely urging trial courts to cobble a detailed factual record so that delayed discovery decisions can rest on a thorough analysis of the factual record or a case by case basis. Notwithstanding the practical difficulties in corroborating and in some cases verifying the accuracy of revived memories, the

courts in these cases have been facile in vigorously expressing the rationale which balances the public policy of providing adult survivors a remedy, against a perpetrator's arguments that there should be protection from uncorroborated and stale claims. If possible, appellate courts seem willing to apply the rule of delayed discovery in cases of incest and sexual abuse so that the claimant can be provided an opportunity before a jury to bring forward the truth of the allegations.

PRACTICE CONSIDERATIONS FOR THE TOLLING AGREEMENT

Before contemplating the terms of a tolling agreement for an adult survivor of sexual abuse, the practitioner should give the client a reasonable assessment as to whether the action would be time-barred under a delayed discovery analysis in the particular jurisdiction. The point bespeaks the obvious, however, the tolling assessment requires significant time and energy in collecting a factual record. The process can only be achieved by taking a complete medical/psychological history and reviewing all available therapy notes. The process is costly and time consuming, but is absolutely critical to the successful representation of an adult survivor of sexual abuse. Careful probing of the client is required here. A full repression case versus a semiconscious dissociative case emanates from two completely different theoretical platforms. Frequently lawyers have accepted the client's understanding of repression (typically garnered from support group meetings and the like) without an objective review of the factual underpinnings contained in therapeutic notes or other reporting. Forcing clients to look back over the years post abuse will reveal the legal issues to be faced during motion practice on the statute.

Interviews of over 300 clergy abuse survivors are marked by their similarities in how the abuse occurred. It is a myth that the predator concentrates on homes where there is only a single parent. While that frequently occurs, it is the parent(s) response to the increased attention of the priest that is key in the perpetrators decision to continue the "grooming" process. The perpetrator is either approaching the family unit as a trusted and loyal friend beyond reproach, often officiating at family religious functions such as baptisms, confirmations and weddings, or a welcome relief to a single parent that their child, in need of supervision, is certainly safe with a priest and is pleased that a man of God would take time with their offspring. The perpetrator in these situations artfully manipulates the power dynamics that our culture recognizes in clergy, thus shielding their crimes from disclosure.

As a result of early childhood trauma and emerging symptoms, adult survivors frequently undertake psychotherapy years before the perpetrator is or can be revealed, further delaying the survivors recognition and causal effect of injury. The trauma sustained by children, developing adolescents and surviving adults, can affect all aspects of life and over the years cause a colossal drain on energies - physical, intellectual, psychic and spiritual. For the survivor, this kind of overriding, comprehensive assault translates into lost opportunity, a condition that is indeed difficult, if not impossible, to measure, but nevertheless warrants sophisticated legal representation. The sexual and spiritual assault of a child constitutes a violation of trust more profound than any violation of body. Mental health experts reporting in the literature on sexual abuse identify a wide array of presenting symptoms typically centered around substance abuse, promiscuity, in a personal conflict, eating disorders, aggressive behavior, failed adult relationships or depression. Many clients will report self loathing and feel that somehow they attracted the abuse and it is their fault. Others retreat to narcissistic displays of sexually acting out, many abused children are besieged by nightmares that continue well into adulthood. They cannot bear to touch or be touched. They shut down emotionally, which makes intimacy impossible. Parents and other mentors who, under normal "circumstances" would help establish and reinforce self-esteem, are shut out by these children and in many cases are replaced by drugs, alcohol, or mental illness. Some survivors drop out of society completely, while others turn inward to draw on their talents and heal successfully. Whatever the outcome, there is always the tragedy of innocence lost through assault and exploitation.

The spectrum of clinical note taking varies from taped interviews to no notes at all. Since the function of a tolling agreement is to preserve the status quo as to rights or defenses on the effective date of the agreement, a limitations assessment is impossible without clinical notes detailing the history of reporting. The full repression case presents a much more fluid tolling analysis presuming there is no therapeutic history discussing the abuse or any other reporting. Close questioning on the client with regard to reporting to parents, siblings, ex-spouses, close friends and other clergy, or to

the perpetrator himself, is strongly suggested. Frequently in cases involving females, you will find large amounts of apparently innocent correspondence and greeting cards which obliquely refers to the "close relationship" or "special relationship." Assuming no reporting exists, counsel should be quick to identify the timing of the triggering event that began recall and seek out a referral for an effective mental health regimen since it is reasonable to expect the client to be severely retraumatized by the continuing "revictimization" that is inherent in the litigation crucible. Clients should be regularly advised of this phenomena and the attorney should confirm that a effective support system is in place since virtually every contact a lawyer will have with the client will be perceived as a negative contact from the past, typically expressed by emotional upset.

The dissociative case with memory of the abuse presents a much more challenging assessment. Issues of duress, shame, guilt, threats and perceived complicity on the part of the client must be explored in detail. This period of time typically occupies several years and is often complicated by the array of symptoms noted above. Care should be given to ferret out other causes for the presently mental illness so as to be able to distinguish from a proximate cause standard that which was caused by sexual abuse versus those mental conditions exacerbated by the sexual abuse or caused by a wholly different entity.

DRAFTING THE AGREEMENT

It would not be uncommon for the practitioner faced with a fast approaching statute of limitation to be the last of a series of attorneys consulted with regard to the filing of a claim for sexual abuse. Careful questioning of the client may reveal that the search for an attorney willing to take the case exceeds the statutory limit in your particular jurisdiction under any delayed discovery rationale. Without this sometimes uncomfortable screening, an attorney can become an unwitting victim of a sanction award once suit is filed after the expiration of a tolling agreement. The attorney-client privilege would not protect from discovery the fact that the client sought advice on a legal claim involving the perpetrator; in most if not all jurisdictions only the contents of the communication is protected. While perhaps not dispositive in motion proceedings on the tolling of the statute, the mere seeking of advice from an attorney on the viability of a claim is powerful, albeit circumstantial, evidence that the client knew or should have known that their injuries were causally related to the original abuse. The first task in drafting the agreement is the proper identification of the parties. For example, in an incest setting, certain parties other than the perpetrator may be within the umbrella of liability. It is not uncommon for other family members or physicians to be aware of the abuse and thus be subject to statutory reporting obligations. The presence of homeowner's insurance from a non-perpetrating spouse of the insured may also be implicated. The same could be said for a host of treatment professionals, clergy, teachers, physicians or any other person who acquires knowledge of the abuse, but fails to discharge their responsibilities under the reporting statutes in a particular jurisdiction. Another class of potential parties to a tolling agreement are the employers of the perpetrator and possibly treatment professionals of the perpetrator involving those clergy who were returned to ministry prior to your client's assault. These corporate entities are unable to bind their individual employees or patients to a tolling agreement without their consent, however, counsel should recognize that the source of eventual recovery is frequently based on negligence theories involving failure to supervise or a breach of fiduciary duty, thus calling into play the effect of comparative negligence and joint and several liability legislation in your jurisdiction. The finding of employer liability for intentional tort rests soundly on principles of respondeat superior. The decisions vary widely among jurisdictions and is beyond the scope of this note. Frequently, decisions turn on subtle variations and the trial court's understanding of when an employee is acting within the scope of his employment. Cases in one jurisdiction which clearly place outside the scope of employment of sexual abuse may in turn create liability in another jurisdiction when the initial contact which led to the sexual abuse was within the scope of employment. Consider the following hypothetical.

An adult survivor one month within the statute comes to you with a four-year history of sexual abuse during her adolescence. At the time of the client interview there does not appear to be any evidence that the employing diocese had any prior complaints against the priest involving sexual misconduct. Two weeks prior to your first interview, the client reported the abuse to the police who in turn opened an investigative file. The alleged perpetrator is still in active ministry and is possessed of few, if any, assets. The perpetrator is represented by counsel who refuses any participation in a

tolling agreement and refuses to give any statement to the police. The diocese is willing to enter into a tolling agreement insisting that any action against it would be frivolous and will be pursued under its State's sanction statute. Your research in the annual volumes of the Official Catholic Directory yields a disturbing pattern of multiple transfers of the alleged perpetrator (nine out of 13 years of ministry) and two years listed on sick leave. Your client has been in several rehabilitative facilities for alcoholism and prescription drug dependency. She is married twice, and divorced twice. She is 30 years old and had her first psychotherapeutic contact when she was 17, the last year of abuse. She reports "that the first person told about the abuse was her father's personal counsel, nearly two years ago." While the tolling agreement is perfectly appropriate for the diocese preserving all the claims, time and lack of discovery prevents lack of identification of other potential defendants. A savings action must be filed within time or run the risk of being barred. If John Doe practice is permitted in your jurisdiction plead in any treatment officials, who may have been part of the decision to return the perpetrator to active ministry. In the event that the perpetrator elects to embrace the protective mantle of the Fifth Amendment shielding any forced "testimony," counsel for the plaintiff in the civil case should be aware that discovery requests that remain unanswered can be awarded sanctions, including substantive admissions against the interests of the perpetrator and perhaps other co-conspirators. In NJ Division of Youth and Family Services v. S.S. and V.E., 275 N.J. Super. 173 (App.Div.1994), the court concluded that while a defendant may be faced with a very difficult decision, the Constitution's protection is limited to the individual's right *not to* answer any questions put to him in any proceeding, civil or criminal, if those answers may incriminate the defendant in a future criminal proceeding. Here, Family Services sought an action to declare two children abused and neglected. The trial court after hearing particularly virulent testimony concerning the minors' sexual and physical abuse while under the care and custody of the natural mother and stepfather, denied the defendant's motion to dismiss for failure to make out a *prima facie* case, thus triggering New Jersey's burden-shifting procedure. Both S.S. and V.E. testified and thereafter the judge found that both had caused and/or permitted the abuse and neglect of the minor child. As a result of the testimony, the judge removed the children from the custody of their natural mother. The defendant appealed that the burden-shifting requirements violated her privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The court at page 180 noted the following:

That the respondent's do not wish to assume this burden, this fact by itself does not make the presumption unconstitutional. There is no mandatory requirement that they take the stand and testify. That would be unconstitutional. The constraint upon respondent to give testimony arises here simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution. . . . It may be a difficult decision for the respondents and their attorneys. [But] it is a question of procedure and legal options for the defense, not one that the constitutionality of incrimination . . . The respondents here have a right to stand mute. If they do so, however, in this type of case, they run the great risk of having the *prima facie* case . . . stand against them with finality.

(See N.J. Super. 173, at page 180).

It is suggested that a key element in pursuing both the tolling analysis as well as employer liability is a keen understanding of the psychological phenomena of transference. Typically that principle is found in psychiatric malpractice cases involving sexual abuse, but has equal application to any sexual abuse committed by a parent, teacher, or clergy member. If the psychological phenomena of transference has occurred, the survivor will not have the same emotional response to sexual contact with a clergy member that he or she would have had to sexual contact with other persons. Transference can occur in any relationship where there is a significant degree of trust, confidence or good faith reposed in the person in the position of relative authority. One of the earliest cases to discuss the phenomena of transference was *Zipkin v. Freeman*, 436 S.W.2d 753 (MO.1968) (en banc). While in many cases mishandling of transference leads to inappropriate and sometimes illegal sexual contact with a patient, negligent transference can occur without sexual contact. The *Zipkin* court noted that very point at page 761 of their opinion:

Once Dr. Freeman started to mishandle the transference phenomena, . . . it was inevitable that trouble was ahead. It is pretty clear from the medical evidence that the damage would have been done to Mrs. Zipkin even if the trips outside the state were carefully chaperoned,

the swimming done with suits on, and if there had been ballroom dancing instead of sexual relations.

(See also *Simmons v. United States*, 805 F.2d. 1363 (9th Circ.1986).

CONCLUSION

The sexual assault of a minor in our culture causes profound alienation and isolation. Its illicitness consigns the survivor to unhealthy secrecy and pseudo-maturity. Many survivors turn away from family and peers only to be embraced by sadness and depression. That the sexual violation could be by a parent or representative of God makes trust - of anyone - on any level - impossible. Making good use of the time a tolling agreement will provide can be an emotional roller coaster for both lawyer and client. One aspect of this practice area is clear and that is that words really do fail to describe the isolation, loneliness, and pain of sexual abuse by a mentor figure. Many at the bar have no personal reference point to such tragedy, however, there are some maxims that everyone can agree on: the sexual exploitation of a child by another person in the family or one who stands before the child in a parental role invested with significant intimacy and authority is a crime of immense proportion. It is an assault on the human spirit and should be compensated by the wrongdoers, if at all possible. The nuances of procedure and case law require the utmost care for both the lawyer and his client. The struggle to survive from childhood sexual abuse is fraught with difficulty and mystery. For healing to take place, the struggle must be lived through, however loud the soul screams, however great the feelings of spiritual loss. Many cases will be turned away, but our job is to provide the client with the best advice that is available under the law. Tolling agreements act as a threshold which either embraces that wonderful feeling of reclaiming a portion of a client's lost innocence, or a rational closure which bespeaks the old adage that the law cannot provide a remedy for every wrong.