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# ARTICLES

## REDRESSING WRONGS OF THE BLAMELESSLY IGNORANT SURVIVOR OF INCEST

*Camille W. Cook\**

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### I. INTRODUCTION

Until recently, our society has refused to acknowledge and recognize the widespread incidence of incest. Childhood sexual abuse,<sup>1</sup> especially incestuous abuse,<sup>2</sup> has reached unconscionable proportions. A representative study by Dr. Diana E. H. Russell determined that as many as thirty-eight percent of the female population have experienced sexual molestation by the age of eighteen years.<sup>3</sup> Formerly, psychiatrists, psychologists, therapists, and other

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1. According to the National Center for Missing & Exploited Children the legal definition of sexual abuse is "sexual acts involving a person responsible for the child's welfare." NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, SELECTED STATE LEGISLATION: A GUIDE FOR EFFECTIVE STATE LAWS TO PROTECT CHILDREN 35 (2d ed. 1989).

2. For purposes of this article, the terms incest and incestuous abuse are defined as secretive, exploitative sexual contact between adult male relatives in positions of authority and trust, and female child relatives under the age of 18 who have sustained some physical, psychological or emotional injury as a result of the secretive, exploitative sexual contact. Because most of the data available on incest supports this definition, this article is prepared from that perspective.

3. Diana E.H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN 19, 25 (L. Walker ed. 1988). Dr. Russell's study of 930 women was conducted in San Francisco in 1978. The survey found that of the 38% of women who had suffered some form of child molestation, 16% suffered intrafamilial child sexual abuse. Dr. Russell defined intrafamilial sexual abuse as "any kind of exploitative sexual contact that occurred between relatives, no matter

investigators who did discover the severe effects of childhood incestuous abuse on adult women reacted by suppressing and denying their findings.<sup>4</sup>

Although incest is now confronted in our society, the unique physical, psychological, and emotional traumas suffered by female child victims are often not treated. Typically, the criminal justice system seeks to penalize and imprison the guilty fathers, while social service agencies either remove the daughter from her home, or work to correct and improve the family dynamics.<sup>5</sup>

Social service professionals who specialize in treating the dysfunctional family, and criminal justice professionals who administer state sanctions, fail to treat the daughter's unique injuries.<sup>6</sup> Victims then reach adulthood with long-term deleterious effects.<sup>7</sup> These effects include, but are certainly not limited to depression, poor self-esteem, and self-destructive behavior including self-mutilation and suicide. A victim may also suppress anger and feel hos-

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how distant the relationship." *Id.* at 22. Consensual sexual contact between persons with an age differential of five years was not included in the study. *Id.*

Five other studies conducted between 1940 and 1978, some by such noted figures as Alfred Kinsey and David Finkelhor, corroborate Dr. Russell's findings that from one-fifth to one-third of all women had a childhood sexual encounter with an adult male, and that between 4% and 12% of all women had a childhood sexual encounter with an adult male relative. JUDITH L. HERMAN, *FATHER-DAUGHTER INCEST* 12 (1981).

4. Russell, *supra* note 3, at 7-18. For instance, Dr. Sigmund Freud theorized that female patients fantasized about sexual seduction by their fathers. He noted that "there was the astonishing thing that in every case . . . blame was laid on perverse acts by the father, and realization of the unexpected frequency of [female] hysteria, in every case of which the same thing applied, though it was hardly credible that perverted acts against children were so general." See Martha J. Zackin, Note, *The Discovery Rule and Father-Daughter Incest: A Legislative Response*, 29 B.C. L. Rev. 941, 945 n.48 (1988) (quoting SIGMUND FREUD, *THE ORIGINS OF PSYCHOANALYSIS* 215-16 (1954)).

The authors expressly recognize that not all perpetrators of incest are male and not all victims are female. However, throughout this article the authors address the problem of incest between male perpetrators and female victims. Therefore, as used herein, the term "father(s)" will be used to refer to male members of the family whether natural fathers, step-fathers, foster fathers, adoptive fathers, grandfathers, uncles, brothers, or other adult male members of the child's family. The term "daughter(s)" will be used to refer to the female child victims whether natural daughters, step-daughters, foster daughters, adopted daughters, granddaughters, nieces, sisters or other female child victims within the family.

5. See Gregory F. Long, *Legal Issues in Child Sexual Abuse: Criminal Cases and Neglect and Dependency Cases*, in *HANDBOOK ON SEXUAL ABUSE OF CHILDREN*, *supra* note 3, at 137.

6. See *infra* notes 7-9 and accompanying text. See generally Phyllis Coleman, *Incest: A Proper Definition Reveals the Need for A Different Legal Response*, 49 Mo. L. Rev. 251, 269-270 (1984).

7. David Finkelhor & Angela Browne, *Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization*, in *HANDBOOK ON SEXUAL ABUSE OF CHILDREN*, *supra* note 3, at 55.

tility toward her mother because the victim holds her mother responsible for not preventing the abuse. In addition, a victim may harbor feelings of guilt and shame because she believes she is responsible for her own victimization.<sup>8</sup> The victim often possesses feelings of isolation and stigma; has difficulty in trusting others, especially men; and experiences problems with intimacy evidenced by marital and relationship problems. Furthermore, victims have a tendency toward revictimization. The situations they often find themselves in range from prostitution to a high incidence of rape; substance abuse, including alcoholism and drug addiction; sexual dysfunctioning including frigidity, a fear of sexual contact, and an inability to tolerate sexual arousal; and multiple personality disorders.<sup>9</sup> The nature and degree of the injury is influenced by the victim's age at the time of the assaults, the degree and severity of the abuse, and the length of the abuse.

Traditional legal obstacles have often prevented civil redress for incest related injuries, even though courts now recognize the severe effects on adult women. The parental immunity doctrine, consent, and statutes of limitation have in many instances blocked attempts to redress these injuries. Time has seen the partial erosion of these defenses, and the doctrine of parental tort immunity has been abrogated in most states.<sup>10</sup> In jurisdictions where the doctrine has not been completely abrogated, exceptions have been made for sexual abuse.<sup>11</sup> Additionally, the inadequacy of a child's consent has been

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8. *Id.* at 56-58.

9. *Id.*; see also BULKLEY, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES, 3-4 (ABA Rev. ed. 1981); MARY DE YOUNG, THE SEXUAL VICTIMIZATION OF CHILDREN (1982); Shirley J. Asher, *The Effects of Childhood Sexual Abuse: A Review of the Issues and Evidence*, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN, *supra* note 3, 6-10; Lusk and Waterman, *Effects of Sexual Abuse on Children*, in SEXUAL ABUSE OF YOUNG CHILDREN 101-11 (1986); Zackin, *supra* note 4, at 947-50.

10. LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE, app. F (1988).

11. See, e.g., *Hurst v. Capitell*, 539 So. 2d 264 (Ala. 1989) (doctrine of parental immunity abrogated for sexual abuse cases). The Supreme Court of Alabama originally adopted the parental immunity doctrine in *Owens v. Auto Mutual Indemnity Co.*, 177 So. 133 (Ala. 1937), and had most recently considered the doctrine in *Hill v. Giordano*, 447 So. 2d 164 (Ala. 1984). In *Hill* the court refused to abrogate the doctrine in a minor's wrongful death action to recover against his father's estate, and expressly deferred to the legislature to modify or abolish the doctrine. *Id.* However, when the *Hurst* court was presented with the incestuous abuse claims of Melissa Hurst against her stepfather, the court noted that the parental immunity doctrine was a judicially created doctrine that was "not exclusively a legislative issue and [thus it could be] judicially qualified." *Hurst*, 539 So. 2d at 266. Because the legislature had failed to act after *Hill* the court ruled that "[t]o leave children who

underscored by statutory<sup>12</sup> as well as case law.<sup>13</sup> Thus, the statute of limitations remains the primary obstacle to adult women who attempt to redress injuries caused by childhood incest.

Possibly of greatest importance to the judiciary in addressing tort actions by adult survivors of incest is an understanding that the incest victim frequently exhibits the symptoms of Post-Traumatic Stress Disorder ("PTSD").<sup>14</sup> PTSD is a "mental disorder in which the victim avoids situations that stimulate recall of traumatic events or experiences."<sup>15</sup> When an adult survivor<sup>16</sup> of incest

are victims of such wrongful, intentional, heinous acts without a right to redress those wrongs in a civil action is unconscionable, especially where the harm to the family fabric has already occurred through that abuse" and thus created a limited exception to the doctrine in sexual abuse cases. *Id.*

The parental immunity doctrine also has been partially abrogated in Tennessee for sexual abuse claims pursuant to the decision of the Court of Appeals for the Sixth Circuit in *Wilson v. Wilson*, 742 F.2d 1004 (6th Cir. 1984). Christine Wilson filed suit through her mother against her adoptive father, Richard Wilson, for sexual assaults between the ages of 8 and 11. The court concluded that the "common law parental immunity rule holds only insofar as it subserves the domestic peace and tranquility of the family, and '[w]here the reason fails the rule should not apply.'" *Id.* at 1005 (citing *Brown v. Selby*, 332 S.W.2d 166, 169 (Tenn. 1960)). Thus the doctrine was abrogated because "[s]uch an act of gross misconduct would be so destructive of a family's parental relations as to eliminate the . . . public policy behind the parental immunity rule, and fully warrant this court's" abrogation of the rule in cases of sexual abuse. *Id.*

The Supreme Court of Utah also has refused to allow a parental immunity defense in an action brought by an adopted daughter against her stepfather for sexual assault and abuse, which occurred from age 9 until the daughter left home at the age of 16. In *Elkington v. Foust*, 618 P.2d 37 (Utah 1980), the court noted that parental immunity was recognized at common law, but held that "there is no foundation in our law, statutory or decisional, upon which to base parental immunity against a suit [for sexual abuse]; and we don't think there should be." *Id.* at 40.

*But see Barnes v. Barnes*, 566 N.E.2d 1042 (Ind. Ct. App. 1991) in which an Indiana appellate court held that the parental immunity rule remains valid. The court overturned a jury award of \$3.25 million in compensatory and punitive damages against a father for the repeated rape of his fifteen-year-old daughter over a four-day period. The court noted its concern that recognition of a child's tort against a parent would damage family unity and concluded that prior case law ruling which states that the parental immunity rule preserves the public interest by preserving family tranquility is still applicable today.

12. *See, e.g.*, ALA. CODE § 13A-13-3 cmt. (Repl. Vol. 1982) (a girl under the age of consent cannot consent to incest so that uncorroborated testimony can result in a conviction); *see also* L.S. Teller, Annotation, *Incest-Consent as Element*, 36 A.L.R. 2d 1299 (1954).

13. *See, e.g.*, *Elkington v. Foust*, 618 P.2d 37, 40 (Utah 1980) (consent is not a defense because plaintiff was a minor and thus incapable of giving consent when the acts of abuse occurred); *see also* 6 AM. JUR. 2d *Assault and Battery* § 156 (1963).

14. The essential feature of PTSD "is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81 (3d ed. 1980). The characteristic symptoms of depression, guilt, and anxiety are common and may result in self-defeating behavior or suicidal actions. *Id.*

15. Carolyn B. Handler, Note, *Civil Claims of Adults Molested As Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709, 717 (1987).

develops PTSD, she may subconsciously avoid any remembrance of the childhood sexual assaults, and thus not recognize the causal connection between unremembered assaults and adult physical, emotional and psychological problems.<sup>17</sup> This inability to re-experience the trauma of the incestuous abuse may prevent the victim from realizing the fact and cause of her adult injuries.<sup>18</sup> When the survivor is able to relate her injuries to the childhood assaults, she may attempt to seek civil damages through traditional tort theories. However, by the time she has recognized the fact and cause of her injuries, and made the leap from victim to survivor, she is usually beyond the statutorily prescribed limitations period. The survivor will, therefore, often be precluded from pursuing her cause of action. Our traditional legal system is not amenable to delayed claims, even when the plaintiff may not have been fully aware of her cause of action within the prescribed time frame.

Survivors of incestuous abuse often suppress memories of the assaults; thus, they may not recognize the source and cause of their injuries until many years after the abuse has ceased. The judiciary must be made aware of the lingering and debilitating injuries that result from incest. Civil claims for damages from incestuous abuse deserve application of the discovery doctrine. Humane justice and "notions of fundamental fairness"<sup>19</sup> dictate that the tort of incestuous abuse be recognized by the judiciary as an effective means of compensating the "blamelessly ignorant"<sup>20</sup> victim for injuries inflicted in childhood. Such a tort should make an express provision for an exception to the statute of limitations when the plaintiff, due to the extent and nature of her injuries, has suppressed her memory of the occurrence of the incest, and thus has failed to rec-

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16. Women who were incestuously abused as children must learn to confront the abuse, its aftereffects, and look upon themselves as "survivors" instead of "victims." An adult woman will not be able to develop a positive self-image and fully recover from the trauma of the abuse until she has made this transformation from victim to survivor. See HERMAN, *supra* note 3, ch. 11, *see also* Christine A. Courtois & Judith E. Sprei, *Retrospective Incest Therapy for Women*, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN, *supra* note 3, at 271-72.

17. Courtois & Sprei, *supra* note 16, at 717-18.

18. *Id.*; *see* Zackin, *supra* note 4, at 947-49.

19. *Tyson v. Tyson*, 727 P.2d 226, 231 (Wash. 1986) (Pearson, J., dissenting) superseded by statute as stated in *North Coast Air Servs. Ltd. v. Grumman Corp.*, 759 P.2d 405 (Wash. 1988).

20. *See* *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (the Court termed the phrase "blameless ignorance" to apply to Mr. Tom Urie when it ruled that the discovery doctrine applied to Mr. Urie's claims for silicosis injuries brought under the Federal Employer's Liability Act).

ognize the causal connection to her adult injuries within the limitations period prescribed for traditional torts.<sup>21</sup>

## II. UNDERSTANDING THE NATURE OF INCEST

The American Humane Society's Clearinghouse on Child Abuse estimates that 60,000 to 100,000 children are victims of incest annually in the United States.<sup>22</sup> This ultimately affects ten percent to fourteen percent of all American families annually.<sup>23</sup> Sexual abuse is also the fastest growing form of reported child abuse.<sup>24</sup> Because the majority of cases go unreported each year,<sup>25</sup> these figures still do not reflect the actual incidents of incestuous abuse. In Dr. Russell's random survey of adult women who had suffered childhood incest, only two percent had reported the abuse to authorities.<sup>26</sup> Similarly, the Child Advocate Association of Chicago estimates that only three percent of incestuous abuse cases are reported annually.<sup>27</sup> Because victims fear reprisal from their fathers or separation from their families, they do not report the assaults to the authorities, or even to close family members or friends. The victims unconsciously choose the horror and fear of continued abuse over the unknown consequences that will result from exposing their abusive fathers. Thus the full extent of the traumatic problem of incest is not known.

### A. *The Requirement for Secrecy*

The childhood requirement for secrecy constitutes one of the greatest forces behind the adult survivor's failure to timely recognize the extent and cause of her injuries and subsequently her failure to timely act in pursuing her civil legal remedies within the prescribed limitations periods for personal injuries.<sup>28</sup> The judiciary

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21. For additional information regarding the problems of the statute of limitations barring civil actions for incest, see Note, Ann M. Hagen, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 355-82 (1991); see also Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 YALE L.J. 2189 (1991).

22. Waterman and Rusk, *Scope of the Problem*, in SEXUAL ABUSE OF YOUNG CHILDREN, *supra* note 9, at 5.

23. *Id.*

24. *Id.*

25. *Id.* at 6.

26. Russell, *supra* note 3, at 35.

27. HERMAN, *supra* note 3, at 164.

28. DE YOUNG, *supra* note 9, at 4.

needs to understand the victim's fear of exposing her tormentor, because the impact on the child of this absolute requirement of secrecy must never be discounted.<sup>29</sup> When children divulge the secret of incest the effect may be as traumatic as tolerating the assaults. For example, in a study of judges involved in rape cases, eighty-four percent of the judges responded that children who testified in court were emotionally traumatized.<sup>30</sup> When a child must testify against a parent it is an especially traumatic event.<sup>31</sup> To avoid this public trauma, victims of incest do not reveal the assaults to persons who could help them stop the assaults and help them redress their injuries.

This conspiracy of silence becomes overwhelming and daughters are unable to speak out against their fathers, even after the abuse has ceased, because the parental domination and coercion totally overpower the victim.<sup>32</sup> When the incest lasts for a period of years, which is not uncommon, the daughter learns to believe that she is responsible for the assaults, and that the incest must be hidden from everyone at any cost.<sup>33</sup>

Fathers, because of fear of criminal punishment or public ostracism, play the most important role in convincing their minor daughters that silence must be maintained and that no one must know of their special secret.<sup>34</sup> This "corruption of the parental love" is, quite possibly, the greatest harm of all because the father abuses not only his daughter's body, but also the trust and reliance that she has placed in him.<sup>35</sup> Thus the individual who should be responsible for protecting his daughter from sexual assault and bodily injury is ultimately responsible for her injuries. He compounds the harm by so deeply imbedding requirements of secrecy,

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29. Melissa G. Salten, Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 196-99 (1984).

30. Lusk and Waterman, *Effects of Sexual Abuse on Children*, in SEXUAL ABUSE OF YOUNG CHILDREN: EVALUATION AND TREATMENT 109 (1986).

31. Whetstone, Alabama Law Institute, *Legal Aspects of Child Abuse and Neglect*, in CHILD ABUSE AND NEGLECT: A COMMUNITY APPROACH 76 (1978).

32. See generally SANDRA BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST (1978). The requirement for secrecy is paramount to maintaining the incestuous relationship. The father knows the act is wrongful and illegal, and will use any method of coercion to assure his daughter's silence and availability. The term "conspiracy of silence" refers not only to the requirement that the child maintain absolute secrecy but also refers to the silence within the professional community that becomes necessary as a means of self-protection when treating incestuous families. *Id.* at 8-9.

33. See *id.* at 32-34.

34. See HERMAN, *supra* note 3, at 88.

35. *Id.* at 4.



that his daughter cannot remember the fact and cause of her adult injuries.

Incest most often occurs in a very patriarchal family situation in which the father exercises absolute dominion and control over his minor daughter and his financially dependent family members.<sup>36</sup> A domineering father may use any one of many techniques to encourage his daughter to remain silent about abuse. As long as incest remains a secret and other family members or authorities are not alerted to the assaults, the father is assured that he will not be held accountable and that his daughter will remain continually available to him.<sup>37</sup>

One method fathers use to maintain secrecy is an attempt to convince their daughters that the incestuous relationship is normal, necessary and healthy, though subject to misunderstanding by others.<sup>38</sup> Further, he often persuades the daughter that she, not her father, is to blame for the abuse, and that if she reveals the special secret, dire consequences will befall the entire family. Additionally, the father may warn the daughter that if she betrays him to the authorities, he will be put in jail, and the family will be without food, clothing, and shelter.<sup>39</sup> Further, he may warn his daughter that if she tells her mother, her mother will suffer a nervous breakdown,<sup>40</sup> that the parents will divorce, or that she (the daughter) will be separated from the rest of her family and sent to a foster home, all because of the evils she has committed.<sup>41</sup> Unfortunately, in these patriarchal families the mother may be incapable of recognizing the abuse or of rescuing her daughter. The mother may also be too afraid to do what is necessary to protect the child once she becomes aware of the abuse.<sup>42</sup>

In some instances fathers will threaten severe bodily harm, and further physically abuse their daughters and other family members in order to maintain secrecy.<sup>43</sup> However, an incestuously abusive

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36. Salten, *supra* note 29, at 192-96.

37. *Id.* at 195-96.

38. DE YOUNG, *supra* note 9, at 39.

39. Salten, *supra* note 29, at 196-97.

40. HERMAN, *supra* note 3, at 88.

41. See Salten, *supra* note 29, at 196-99.

42. See *id.* at 195; Coleman, *supra* note 6, at 270-71. See also *Incest Takes Time to Overcome*, in *The Ann Landers Column*, BIRMINGHAM POST-HERALD, Aug. 15, 1990, at B4, col. 4, in which a woman relates the secretive experiences of her childhood incest.

43. Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 611-16 (1983).

father is careful not to beat his daughter to the extent that medical attention is necessary, or to the extent that outside attention is focused on his daughter's injuries or his abuse.<sup>44</sup> The father's goal is always to control his daughter and to maintain her secrecy, cooperation and compliance.<sup>45</sup> The daughter's injuries, therefore, go unnoticed by teachers, other family members, medical personnel and other adults around her who may be in a position to halt the assaults.

Insistence that the daughter's seductiveness precipitated the incestuous activity<sup>46</sup> induces the daughter to view herself as the cause of the incestuous abuse as well as its victim. This intensifies her feelings of guilt and shame. If the daughter views herself as the cause of her pain and suffering, her shame and guilt for her own self-destruction cause her to actually block her conscious thinking about the acts of assault.<sup>47</sup> She is then unable later in life to relate her injuries to acts which she has forced herself not to remember.

Most incest begins when the victim is eight or nine years old, although sexual contact and even intercourse at an earlier age is not uncommon.<sup>48</sup> Since the incestuous assaults usually continue into adolescence, the daughter is subjected to many years of enforced silence. Therefore, the necessity that the incest must never be disclosed becomes firmly and indelibly imprinted on the daughter's mind.<sup>49</sup>

The judiciary must understand that failure to report the abuse does not indicate that the abuse has not occurred. Nor does it indicate consent to or approval of the assaults, or that the daughter does not suffer severe physical, psychological, and emotional injuries. Her silence evidences only the father's domination and power over her and her total inability to act affirmatively to halt the assaults. The years of silence make the daughter internalize her injuries and develop the belief that she is both at fault and the vic-

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44. *Id.* at 611-12.

45. *Cf.* HERMAN, *supra* note 3, at 74.

46. According to Dr. Judith Herman, a noted expert in the treatment of incest injuries, the seductive daughter theory is prevalent not only in popular men's magazines but is also still found in some professional clinical literature on the subject of incest. Dr. Herman asserts that minor children are wholly incapable of consenting to any sexual exploitation and that the incestuous father seeks to place the blame on his minor daughter to relieve his own guilt and shame. *See* HERMAN, *supra* note 3, at 36-42.

47. *See infra* notes 48-51 and accompanying text.

48. Salten, *supra* note 29, at 194-95.

49. DE YOUNG, *supra* note 9, at 37-41.

tim.<sup>50</sup> She thus enters adulthood with her secret hidden not only from everyone around her, but from herself as well.

### B. *Repression*

A victim of incest will develop various coping mechanisms to survive the pain of the abuse because she is unable to break the silence and seek help for her injuries. "Coping mechanisms such as repression, blocking, compartmentalization, denial, or even personality splitting allow the child to believe he or she is not a victim."<sup>51</sup> These coping mechanisms, developed as a means of self-preservation, add to the element of secrecy further preventing the adult survivor from recalling the facts of the abuse.<sup>52</sup> If the victim blocks, denies, or otherwise represses the fact of the incestuous assaults, she is not able to relate the childhood assaults to her adult injuries.

The incestuous relationship and resulting injuries may become so deeply repressed and buried within the victim's subconscious mind that she is actually unable to remember the abuse.<sup>53</sup> It is not until her memory is triggered by a traumatic event, or through intensive professional therapy, that she is able to relate the cause of her adult physical, psychological, and physiological injuries back to the incestuous abuse suffered as a child.<sup>54</sup> Until she does make this connection she is wholly unable to associate the cause of her adult injuries to the childhood incestuous abuse.<sup>55</sup>

### C. *Delayed Realization of the Extent of Injury*

The unique nature and extent of incest injuries requires their separate recognition from injuries sustained by victims of more traditional torts. The incest victim may not realize the fact, extent, and cause of incest-related injuries until years after the assaults have ceased.

Sexual dysfunctioning is one of the greatest areas in which the

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50. See Salten, *supra* note 29, at 198.

51. KARP & KARP, *supra* note 10, at 176 (1989).

52. See *id.*

53. *Id.*

54. See *id.*; see also BUTLER, *supra* note 32, at 48.

55. See Naomi Berkowitz, Note, *Balancing the Statute of Limitations and the Discovery Rule: Some Victims of Incestuous Abuse Are Denied Access to Washington Courts* — Tyson v. Tyson, 10 U. PUGET SOUND L. REV. 721, 723 (1987).

extent of long-term injuries remains unknown for many years.<sup>56</sup> The survivor of incest may not realize or comprehend that she has latent sexual injuries until she has matured and attempts to develop an adult, intimate relationship.<sup>57</sup> A girl in her teens cannot reasonably be expected to have mature sexual judgment nor the healthy intimacy normally experienced in long-term adult relationships. Thus, the inability to act as a normal, mature woman may not be perceived as a harmful injury until she is well beyond the statute of limitations period.<sup>58</sup> Professional therapy becomes a necessary prerequisite for the survivor of incest to become a fully functioning, healthy adult woman. However, specialized therapy<sup>59</sup> may be beyond the survivor's financial capabilities without recovery of damages in a civil action against the one responsible for her injuries.

### III. STATUTES OF LIMITATION AND THE DISCOVERY DOCTRINE

#### A. *Definition and Policy*

Statutes of limitation are legislatively prescribed time limitations on the right to litigate certain described causes of action. Typically, the statutes declare that no suit shall be maintained on such action unless the suit is brought within a specified period of time after the right accrues.<sup>60</sup> These statutes encourage plaintiffs to bring actions in a timely manner. However, the statutes are usually tolled for persons whose lack of capacity, due to either infancy, insanity, or imprisonment, requires them to bring proceedings through others.<sup>61</sup>

Legislatures and courts have stated different policy reasons for encouraging timely suits, but three main policy concerns prevail.<sup>62</sup>

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56. DE YOUNG, *supra* note 9, at 60-64.

57. See Salten, *supra* note 29, at 202.

58. *Id.*

59. See generally Courtois and Sprei, *supra* note 16, at 282-84 (therapists must be aware of the extremes of theoretical orientation from: 1) the most extreme that holds incest is not real but only the child's Oedipal wishes; 2) to those theories that hold that incest occurs only rarely and then as a result of the daughter's seductiveness and sexual desires; 3) to those theories that accept the reality of incest and consider family therapy the treatment of choice).

60. See BLACK'S LAW DICTIONARY 477 (abr. 5th ed. 1983).

61. RESTATEMENT (SECOND) OF TORTS § 899 cmt. f (1977).

62. Handler, *supra* note 15, at 720-21; see also Denise M. DeRose, Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 216-20 (1985).

First is the recognition that the plaintiff's harm is readily apparent, and should be readily pursued and compensated.<sup>63</sup> Traditional tort claims, such as injuries from automobile collisions and slip and fall accidents, can ordinarily be brought within the statute of limitations and the plaintiff is not denied the right to pursue compensation for her injuries. This is true for three reasons: (1) The wrongful act is readily apparent and recognizable; (2) the plaintiff is aware of the nature and extent of her injuries; and (3) the plaintiff is aware of her need to seek judicial relief to compensate her for her injuries.<sup>64</sup> However, this policy concern fails to consider the delayed claims of plaintiffs who are unable to recognize the fact and cause of their injuries within the statute of limitations period.

The second main policy concern rests on the belief that after a period of time a defendant's right to be let alone and free of stale claims exceeds the plaintiff's right to prosecute a right of recovery.<sup>65</sup> This policy concern should not apply to an action brought by an adult survivor of incest. Traditional tort theories consider a defendant's negligent, and sometimes intentional, conduct in permitting a defendant a maximum period of time to be subject to prosecution. In a civil incest action, however, the defendant's conduct has been so egregious and so atrocious that the defendant should not be entitled to be let alone merely because an arbitrary time frame has passed before the victim becomes fully aware of the fact and cause of her injuries.

A third policy reason to prohibit stale claims is that they reduce judicial efficiency when evidence becomes less reliable and less available.<sup>66</sup> Statutes of limitation are "designed to promote justice by preventing . . . claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared."<sup>67</sup> But this last policy concern, while certainly a valid one, should not operate to defeat actions by survivors of incest. Evidence may also be unreliable or unavailable to support personal injury claims brought within limitation periods. The pursuit of a claim within a statutorily prescribed time frame does not guarantee judicial efficiency. Further, survivors of incest have not delayed claims because they have "allowed their claims to slumber." The

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63. Handler, *supra* note 15, at 721.

64. KARP & KARP, *supra* note 10, at 185.

65. Handler, *supra* note 15, at 720.

66. *Id.* at 720-21.

67. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

judiciary should act to recognize the difference between the voluntarily dilatory plaintiff and the incest survivor who is incapable of realizing the fact and cause of her injuries at an earlier date.

Statutes of limitation usually begin to run from the date the action accrues; therefore, it is the responsibility of the judiciary to interpret the date of accrual.<sup>68</sup> Courts generally hold that an action accrues when the plaintiff has the right to gain access to the courts.<sup>69</sup> If the date of accrual is interpreted literally, the statute of limitations begins to run at the time the wrongful act is committed or omitted.<sup>70</sup> However, in an action for incestuous abuse courts should look to the unique nature and extent of the plaintiff's injuries and find that the action accrued when the plaintiff discovered, or reasonably should have discovered the fact and cause of her injuries.

### B. *The Discovery Doctrine*

The harshness and inflexibility of statutes of limitation have led both legislatures and courts to adopt the discovery doctrine for certain actions that would otherwise be barred by the statutory limitation periods.<sup>71</sup> The discovery doctrine provides that "the statute of limitations does not begin to run at the time of injury, but may be tolled until such time as the plaintiff knows, or through the exercise of reasonable diligence should know, of her injury and its cause."<sup>72</sup> Courts have applied the discovery doctrine to professional malpractice actions,<sup>73</sup> products liability suits,<sup>74</sup> ex-

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68. See Handler, *supra* note 15, at 719.

69. See, e.g., *Armstrong v. Life Ins. Co. of Va.*, 454 So. 2d 1377, 1379 (Ala. 1984) (a negligence cause of action accrues as soon as the plaintiff is entitled to maintain an action), *overruled on other grounds*, *Hickox v. Stover*, 551 So. 2d 259, 264 (Ala. 1989).

70. See RESTATEMENT, *supra* note 61, cmt. e.

71. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 166-67 (5th ed. 1984) [hereinafter PROSSER & KEETON].

72. DeRose, *supra* note 62, at 197; see also RESTATEMENT, *supra* note 61, cmt. e (judicial decisions hold that the statute of limitations starts to run when plaintiff has in fact discovered that she has suffered injury or by the exercise of reasonable diligence should have discovered it).

73. See, e.g., *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962) (applying the discovery rule to medical malpractice injuries).

74. See, e.g., *Harper v. Eli Lilly & Co.*, 575 F. Supp. 1359 (N.D. Ohio 1983) (applying the discovery rule to products liability actions for personal injuries resulting from in utero exposure to the drug DES); *North Coast Air Servs. v. Grumman Corp.*, 759 P.2d 405 (Wash. 1988) (en banc) (holding that the statute of limitations in a products liability action arising out of an airplane crash begins to run when the claimant discovered, or in exercise of due diligence should have discovered, the factual causal relationship between the alleged defect in the product and the harm).

posure to toxic substances,<sup>75</sup> fraudulent concealment,<sup>76</sup> and other traditional tort actions.<sup>77</sup>

The Supreme Court recognizes the importance of the discovery doctrine as early as 1949.<sup>78</sup> In *Urie v. Thompson*,<sup>79</sup> the Court applied the discovery doctrine and permitted the plaintiff to pursue his claim, under the Federal Employer's Liability Act (FELA), for injuries sustained as a result of on-the-job exposure to silica dust.

Mr. Urie was first exposed to the silica dust in 1910, and in 1940 he was forced to cease work when his pulmonary disease was diagnosed as silicosis.<sup>80</sup> Although a rigid application of the three-year statute of limitations of the FELA would have precluded Mr. Urie from maintaining a suit filed after 1913, the Court ruled that Mr. Urie's 1941 action was not barred by the FELA's limitations period.<sup>81</sup> The Court stated "[w]e do not think the humane legislative plan intended such consequences to attach to blameless ignorance."<sup>82</sup> Under the discovery doctrine the Court held that "no specific date of contact . . . can be charged with being the date of injury . . . [consequently, the plaintiff] can be held to be 'injured' only when the accumulated effects . . . manifest themselves. . . ."<sup>83</sup> The Court reasoned further that a plaintiff should not be charged with having waived his right to pursue a claim within the applicable time period when the disease "had not yet obtruded on his consciousness."<sup>84</sup> Finally, the Court found that the "traditional purposes of statutes of limitations . . . require the assertion of claims within a specified period of time after notice of the invasion of legal rights."<sup>85</sup> As *Urie* illustrates, inherent in the

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75. See, e.g., *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (ruling that unique circumstances of a case may determine when an action accrues and applying the discovery rule to asbestos exposure injuries).

76. See, e.g., *Hildebrand v. Hildebrand*, 736 F. Supp. 1512 (S.D. Ind. 1990) (applying a statutory discovery rule when an allegation of fraudulent concealment existed in an action by an adult survivor of childhood incest against her physician father because he had concealed from her, intentionally and fraudulently, the true nature of her injuries).

77. PROSSER & KEETON, *supra* note 71, at 166-67.

78. See *Urie v. Thompson*, 337 U.S. 163 (1969).

79. *Id.* at 163.

80. *Id.* at 165-66.

81. *Id.* at 171.

82. *Id.* at 170.

83. *Id.* (quoting *Associated Indem. Corp. v. Industrial Accident Comm'n*, 12 P.2d 1075, 1076 (Cal. 1932) (emphasis added)).

84. *Id.* at 169.

85. *Id.* at 170 (emphasis added).

concept of the discovery doctrine is the recognition that the "blamelessly ignorant" plaintiff should not be barred from recovery, when such a bar would only serve to thwart the intent in providing recovery for the injury.

The judiciary should not bar an adult plaintiff from pursuing a claim for personal injuries resulting from incest when the plaintiff did not have knowledge of the fact and cause of her injuries, and thus did not have notice of the invasion of her legal right to be free from incestuous assaults. Like Mr. Urie, an adult woman who suffers from injuries resulting from incestuous assaults, inflicted over a long period of her childhood, should not be restricted to any one date of injury. Only after the accumulated effects of incestuous assaults manifest themselves, usually in her adulthood, does the injury occur. The defendant's "right to be free of stale claims"<sup>86</sup> does not outweigh the unique nature of an incest survivor's injuries which may not be evident until after the statutory time frame has passed.

### C. *Statutes of Repose*

In response to pressure from defendants affected by the discovery doctrine, some legislatures have enacted statutes of repose.<sup>87</sup> Such statutes place an outer limit on the commencement of tort actions regardless of any tolling provisions or the discovery doctrine.<sup>88</sup> Since statutory periods of repose place an outer limit on an action, they are longer than limitation periods and act as an absolute bar to an action. However, a statute of repose may still run before a cause of action is fully discovered because a statute of repose, like a limitation period, usually begins to run at the date when all elements of the cause of action have accrued.<sup>89</sup> Thus if a state has a statute of repose that could act to bar an incest survivor's action after a specified time period, the application of the dis-

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86. See *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

87. PROSSER & KEETON, *supra* note 71, at 167-68.

88. *Id.*; see, e.g., ALA. CODE § 6-2-8(a) (1975) (no disability can extend the limitations period beyond 20 years from the date of accrual).

89. RESTATEMENT, *supra* note 61, cmt. g. Some statutes of repose may further limit plaintiffs in various tort actions by running from a date before the plaintiff sustains injury. See, e.g., Francis E. McGovern, *Symposium Products Liability: The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 585 n.28 (1981) (statutes of repose for product liability actions may begin to run when the product is sold).



covery doctrine may still not permit the plaintiff to pursue her claims.<sup>90</sup>

#### D. *Minority Tolling Provisions*

In enacting statutes of limitation a state may provide that the statutory time frame is tolled during the injured person's minority.<sup>91</sup> Such a tolling provision recognizes a minor's incapacity to act in her own behalf to seek civil redress for personal injuries, and thus permits an adult to bring an action for personal injuries sustained as a child. When a statute of limitation is tolled for minority, the time period for bringing civil suit does not begin to run until the child reaches her age of legal majority.<sup>92</sup> Limitation periods and age of majority statutes vary from state to state. Limitations periods are usually one to three years in duration, while age of majority statutes range from age seventeen to twenty-one.<sup>93</sup>

However, a tolling provision for minority may not be sufficient to afford the incest survivor relief. In a healthy father-daughter relationship the daughter will separate emotionally and physically from her father's control by the legal age of majority. But incestuous families evidence a much higher degree of patriarchal control.<sup>94</sup> The child who has been a victim of incest may not develop at the same emotional pace as other women her age. She may, therefore, be wholly unprepared at her legal age of majority to break the family's conspiracy of silence and challenge her father's control in a court of law. The short limitation periods, even when tolled for

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90. The full ramifications and constitutionality of statutes of repose are beyond the scope of this article. For a more complete discussion, see generally McGovern, *supra* note 89; Francis E. McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future* 16 FORUM 416 (1981).

91. KARP & KARP, *supra* note 10, app. G (all states except Connecticut, Delaware, Florida, and Louisiana provide for tolling during minority).

92. Thus, if a state recognizes the age of majority as 18 and has a general two-year statute of limitations for personal injuries, an injured plaintiff may bring suit on her own behalf up to the age of 20 for injuries sustained anytime during her minority. However, for various public policy reasons some specific causes of action are not subject to unlimited tolling provisions. See, e.g., ALA. CODE § 6-5-482(a),(b) (1975) (§ 6-5-482(a) recognizes that the discovery rule may apply to medical malpractice claims such that while claims must be brought within two years after the act or omission giving rise to the claim, the action may be brought within six months of the date of discovery of the action; but § 6-5-482(b) states that "notwithstanding . . . no action shall be commenced more than four years after the act . . . except, that in the case of a minor under four years of age, such minor shall have until his eighth birthday to commence such action.").

93. KARP & KARP, *supra* note 10, app. G.

94. See *supra* notes 32-47 and accompanying text.

minority, fail to recognize that the victim may still be under the influence of her father and attempting to escape his domination.<sup>95</sup>

The short limitation periods, even when tolled for minority, also fail to recognize and address the unique sexual nature of the incest survivor's injuries<sup>96</sup> and the effects of Post-Traumatic Stress Disorder ("PTSD").<sup>97</sup> Even when limitation periods are tolled for minority, a young woman of only twenty or twenty-one years old who is a survivor of incest will usually not have developed a mature adult sexual relationship in which she has confronted problems of frigidity, fear of trusting men or fear of intimacy.<sup>98</sup> She may be incapable of discovering the fact and cause of her injuries within the limitations period after reaching her majority. Further, if she has developed PTSD she may be unable to remember the abuse or confront the traumatic situation that will enable her to recall the abuse and connect the childhood assaults to the cause of her adult injuries.<sup>99</sup>

The result in the majority of cases is that survivors of incest are unable to recover under traditional tort theories even with the tolling provisions for minority. However, some courts have been applying the discovery doctrine to incest abuse cases to hold that the limitations period does not run until the plaintiff is aware of the fact and cause of her injuries, regardless of her age of majority.<sup>100</sup>

Before discussing the judicial response to incest injuries, the authors wish to point out that nearly every state penalizes incest as a criminal act.<sup>101</sup> State legislatures have recognized the egregious nature of incest and impose criminal sanctions for the infliction of sexual assaults on minor family members. When legislatures have failed to allow the discovery doctrine to apply to civil claims for incest injuries, the judiciary should impute the nature of the defendant's criminal conduct to civil actions and allow survivors of incest to pursue their civil claims beyond limitation periods enacted for far less egregious tort actions. The father's criminal conduct, when considered with the unique nature of incest injuries,

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95. Beckowitz, *supra* note 55, at 733.

96. *See supra* notes 56-58 and accompanying text.

97. *See supra* notes 14-17 and accompanying text.

98. *See DE YOUNG, supra* note 9, at 60-62.

99. *See supra* notes 14-17 and accompanying text.

100. *See discussion infra* part IV.

101. Every state except New Jersey has criminal incest statutes, but New Jersey has one of the strictest criminal sexual offense statutes. *See, Coleman, supra* note 6, at 255 n.28.

supports application of the discovery doctrine to civil claims for damages.

#### IV. JUDICIAL RESPONSE TO INCEST INJURIES

In addressing traditional tort actions brought by adult survivors of incest, some courts consider application of the discovery doctrine in two main categories of cases. Type two cases are those in which "the [p]laintiff claims [that] due to the trauma of the experience she had no recollection or knowledge of the sexual abuse until shortly before she filed suit."<sup>102</sup> Type one cases are those in which "the [p]laintiff claimed she knew about the sexual assaults at or before [the age of] majority, but that she was unaware that other physical and psychological problems were caused by the prior sexual abuse."<sup>103</sup> Courts differentiate between the plaintiff who alleges she had knowledge of and remembered the childhood assaults within the statute of limitations, but failed to make the causal connection to her adult physical and emotional injuries (type one), and the plaintiff who alleges she had repressed all memory of the sexual abuse and had no recollection of the childhood assaults during the statutory time period (type two). The type two plaintiffs are, therefore, more often permitted to utilize the discovery doctrine and pursue their claims beyond mandated time frames because they were incapable of pursuing their claims at an earlier time.

##### A. *Type Two Cases: Repressed Memory*

Type two cases are those in which the trauma of the incest actually caused the victim to repress her memory of the facts of the assaults, thus burying all remembrance of the assaults in her subconscious mind.<sup>104</sup> The child's coping mechanisms allow and force her to forget the assaults occurred, then later prevent the survivor from causally connecting her adult injuries to the unremembered assaults within the statute of limitations. In such instances courts have permitted application of the discovery doctrine so that the limitation period commences to run when the incest survivor discovers, or reasonably should have discovered, that she was injured

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102. *Johnson v. Johnson*, 701 F. Supp. 1363, 1367 (N.D. Ill. 1988), *summary judgment granted*, 766 F. Supp. 662 (N.D. Ill. 1991).

103. *Id.*

104. *See supra* notes 36-47 and accompanying text.

and that her injuries were caused by the wrongful act of another.<sup>105</sup>

A landmark repressed memory case is *Johnson v. Johnson*,<sup>106</sup> containing the enlightened opinion of Judge Plunkett. In *Johnson* the federal district court, sitting in diversity, held that under the law of Illinois the discovery doctrine would apply to a plaintiff who had suppressed all memory of childhood incest and was therefore unable to bring suit within the limitations period. Judge Plunkett's opinion, recognizing the distinctions in the two types of cases, represents an understanding of the unique nature of the injuries suffered by adult survivors of incest.<sup>107</sup> The court noted that incest is a crime and "a major social problem"<sup>108</sup> and that application of the discovery doctrine would entail "a case-by-case method which seems to take into account equitable considerations as strongly, if not more strongly, than it takes into account problems of proof."<sup>109</sup>

Deborah Johnson was thirty-three years old when she filed suit against her parents alleging intentional and negligent causes of action for personal injuries stemming from her father's repeated sexual assaults inflicted when she was ages three to thirteen, and her mother's knowledge of and failure to halt the assaults.<sup>110</sup> Ms. Johnson was seeking compensatory and punitive damages for wrongful acts that occurred over twenty years prior to the time she filed suit.<sup>111</sup> Ms. Johnson alleged in her amended complaint that she "suppressed all memories of the alleged sexual abuse and was blamelessly ignorant of the causal connection between [d]efendants' acts and the injuries she suffered until . . . when in the course of psychotherapy, [she] was able to begin to remember, perceive and understand the nature and scope of her injuries and

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105. *Johnson*, 701 F. Supp. at 1370.

106. 701 F. Supp. 1363 (N.D. Ill. 1988).

107. *Id.* at 1367.

108. *Id.* at 1370.

109. *Id.* at 1369-70.

110. *Id.* at 1364-65.

111. In 1988, when the United States District Court of the Northern District of Illinois first heard *Johnson v. Johnson*, the Illinois statute of limitations provided that "[a]ctions for damages for an injury to the person . . . or for seduction . . . shall be commenced within 2 years next after the cause of action accrued. . . ." ILL. REV. STAT. ch. 110, para. 13-202 (1987). A literal reading of the Illinois statute, even providing for the tolling provision for minors, would have barred Deborah Johnson's claims. At that time, however, Illinois had already applied the discovery doctrine to personal injury claims in the following situations: exposure to asbestos, fraud and tortious misconduct in a leaky roof claim, a wrongful death action in a medical malpractice claim, products liability and legal malpractice. See *Johnson*, 701 F. Supp. at 1369.

their causal connection to [d]efendants' earlier acts."<sup>112</sup>

Ms. Johnson's parents filed a motion to dismiss alleging that the Illinois two-year statute of limitations was an absolute bar to their daughter's action.<sup>113</sup> The court treated the motion to dismiss as a motion for summary judgment, pursuant to Federal Rule of Civil Procedure 12(b), because matters outside the pleading were considered by the court, including the affidavit of Ms. Johnson's psychotherapist.<sup>114</sup> The affidavit stated that Ms. Johnson was suffering from multiple personality disorder and that because of this "psychiatric disturbance . . . was unable to remember the sexual abuse by her father until . . . when in the course of therapy . . . she was able to trust another individual enough to allow suppressed memories and personalities or personality fragments to surface."<sup>115</sup>

The court applied the discovery doctrine to Ms. Johnson's action and ruled that "[t]he point at which the statute of limitations commences under the discovery rule is a question of fact."<sup>116</sup> In recognizing the issue as a question of fact the court stated: "At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. At that point, under the discovery rule, the running of the limitations period commences."<sup>117</sup> Under this reasoning, the court denied the defendants' motion to dismiss.<sup>118</sup>

Nearly three years later, on a new motion for summary judgment by Ms. Johnson's parents, the same federal district court reconsidered the matter.<sup>119</sup> On January 1, 1991, the Illinois Code of Civil Procedure had been amended by adding section 313-202.2 addressing childhood sexual abuse. In pertinent part, that section provides:

An action for damages for personal injury based on childhood sexual abuse must be commenced within 2 years of the date the person abused discovers or through the use of reasonable diligence should

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112. *Johnson*, 701 F. Supp. at 1364.

113. *Id.* at 1364.

114. *Id.*

115. *Id.* at 1366 (quoting affidavit of Elizabeth E. Raymer, M.A., M.F.C.C.).

116. *Id.* at 1370.

117. *Id.* (quoting *Knox College v. Celotex Corp.*, 430 N.E.2d 976, 980-81 (Ill. 1981)).

118. *Id.* at 1370.

119. *Johnson v. Johnson*, 766 F. Supp. 662 (N.D. Ill. 1991).

discover that the act of childhood sexual abuse occurred and that the injury was caused by the childhood sexual abuse, but in no event may an action for personal injury based on childhood sexual abuse be commenced more than 12 years after the date on which the person abused attains the age of 18 years.<sup>120</sup>

Ms. Johnson's parents argued that under the new provision their daughter's complaint would be time-barred and should be dismissed.<sup>121</sup>

The court explained that at the time of its previous holding, Illinois had not addressed a situation where an adult incest victim had no conscious memory of the abuse until after the statutory tolling provision had expired. Since this was a case of first impression, the court had considered case law approaches from other jurisdictions in reaching its decision.<sup>122</sup> However, in the face of Illinois' new statutory discovery rule which is coupled with a statute of repose,<sup>123</sup> the court determined that Ms. Johnson's complaint was time-barred. The court found dispositive the fact that she did not file the action until she was thirty-six years of age.<sup>124</sup> Under the new provision, she was barred from filing a timely complaint after her thirtieth birthday. The court granted the parents' motion for summary judgment but left undisturbed its reasoning in the previous decision.<sup>125</sup>

In regard to claims for incestuous abuse filed beyond the limitations periods, the judge in the initial *Johnson* case should be applauded for considering the factual issues of when the plaintiff became aware of her abuse, its causal connection to her adult injuries, her awareness that the injuries were caused by the wrongful acts of another, and whether she acted promptly to pursue her claims once she became aware of the fact and cause of her injuries.

The discovery doctrine has also been applied by the Court of Appeals of Wisconsin in *Hammer v. Hammer*.<sup>126</sup> In *Hammer* the

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120. ILL. ANN. STAT. ch. 110, para. 13-202.2 (Smith-Hurd 1991).

121. *Johnson*, 766 F. Supp. at 663.

122. *Id.*

123. For a discussion of statutes of repose, see *supra* text accompanying notes 87-89.

124. *Johnson*, 766 F. Supp. at 664. There is confusion in the *Johnson* cases about Ms. Johnson's age. The 1988 opinion indicates she was 32 years old in 1987. *Johnson*, 701 F. Supp. at 1365. However, the 1991 opinion gives her birthdate at 1952. *Johnson*, 766 F. Supp. at 662.

125. *Johnson*, 766 F. Supp. at 664-65.

126. 418 N.W.2d 23 (Wis. Ct. App. 1987), *review denied*, 428 N.W.2d 552 (Wis. 1988).

court held "*as a matter of law*, that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, *the fact and cause of the injury*."<sup>127</sup> The *Hammer* court actually combined the two types of incest cases by holding as a matter of law that the discovery doctrine applies to toll the statute of limitations until the plaintiff discovers both the fact that childhood abuse has occurred and its causal connection to her adult injuries.

Plaintiff Laura Hammer was twenty-one years old when she filed her action alleging incestuous abuse, and intentional and negligent infliction of emotional distress resulting from injuries inflicted on her by her father when she was between the ages of five and fifteen.<sup>128</sup> Ms. Hammer's complaint alleged that the trauma of the abuse had caused her to develop various coping mechanisms such that she suppressed the nature and existence of her psychological and emotional injuries. Ms. Hammer's psychological distress caused her "great shame, embarrassment, guilt, self-blame, denial, depression, and disassociation from her experiences."<sup>129</sup> Ms. Hammer believed that she was responsible for the abuse, for her parents' divorce, and for the family's subsequent breakup.<sup>130</sup> She "was unable to perceive or know the existence or nature of her psychological and emotional injuries" until she was twenty-one, and only then because she suffered "shock and distress" when her father attempted to gain legal custody of her minor sister.<sup>131</sup>

The court found, based upon an affidavit submitted by Ms. Hammer's psychological counselor, that "Laura's psychological manifestations were the usually recognized symptoms of post-traumatic stress disorder [present] in victims of intrafamilial sexual abuse" and that "as a normal post-traumatic stress reaction, Laura had developed denial and suppression coping mechanisms."<sup>132</sup> Because these coping mechanisms had prevented Ms. Hammer from pursuing her claims within the statutory time frame,<sup>133</sup> the discov-

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127. 418 N.W.2d at 26 (emphasis added).

128. *Id.* at 24.

129. *Id.*

130. *Id.* at 24-25.

131. *Id.* at 25.

132. *Id.*

133. Wisconsin had a two-year statute of limitations for intentional torts and a three-year statute of limitations for negligent torts. WIS. STAT. ANN. §§ 893.57, 893.54(1) (West 1983). Even though these statutes were tolled during Ms. Hammer's minority, the limitations periods had still expired by the time she filed her complaint. *Hammer*, 418 N.W.2d at 24 n.4.

ery doctrine was applied as a matter of law.

It is important to note that the court in *Hammer* expressly recognized the unique nature of the tort of incestuous abuse. The court balanced the rights of the parties involved and recognized that in incestuous abuse cases "the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions"<sup>134</sup> because to "protect the parent at the expense of the child works an intolerable perversion of justice."<sup>135</sup>

The result of the reasoning in *Johnson* and *Hammer* is that a plaintiff's realization of when she discovered the fact and cause of injuries is a factual issue. However, whether the discovery doctrine is to be applied is a legal issue that must first be determined by the court. Thus, the judiciary must apply the discovery doctrine and permit a plaintiff to offer proof to the finder of fact about: (1) When she became aware of her childhood assaults; (2) when she became aware that these childhood assaults are the cause of her adult injuries; and (3) whether she acted in a timely fashion from the date of discovery to pursue her cause for civil damages.

The Supreme Court of North Dakota has also applied the discovery rule to a type two case in which the plaintiff did not understand or discover her cause of action during the applicable statute of limitations. In *Osland v. Osland*<sup>136</sup> plaintiff Rebecca Osland filed an action against her father for assault and battery when she was twenty-two years old based on sexual assaults inflicted between the ages of ten and fifteen.<sup>137</sup> The trial court applied the discovery doctrine to Ms. Osland's claims and refused to dismiss her action as beyond the statute of limitations.<sup>138</sup> On appeal the court agreed with the trial court that plaintiff had "suffered 'severe emotional trauma' from the sexual abuse and that she 'was not able to fully understand or discover her cause of action during the applicable statutory time period. . . .'"<sup>139</sup> The trial court's determination that Ms. Osland's emotional trauma "resulted in her being unable

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134. *Id.* at 27 (quoting *Hansen v. A.H. Robins Co.*, 335 N.W.2d 578, 582 (Wis. 1983)).

135. *Hammer*, 418 N.W.2d at 27 (quoting Margaret J. Allen, Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 631 (1983)).

136. 442 N.W.2d 907 (N.D. 1989).

137. *Id.* at 908.

138. *Id.* at 908-09.

139. *Id.* at 908. In this cross-appeal, the Supreme Court of North Dakota upheld the trial court's application of the discovery doctrine to Ms. Osland's claims, but also upheld the trial court's denial of punitive damages. The court further ruled that "the amount of damages is



to fully understand or discover her cause of action" was a factual question that the Supreme Court of North Dakota found was not clearly erroneous.<sup>140</sup> Ms. Osland's inability to pursue her claims within the mandated time frames warranted application of the discovery doctrine to toll the two-year statute of limitations for assault and battery.<sup>141</sup>

It is especially noteworthy that the Supreme Court of North Dakota specifically refused to apply the rationale of *Tyson v. Tyson*,<sup>142</sup> and instead agreed with Justice Pearson's dissent in *Tyson* "that concern about the availability of objective evidence should not preclude application of the discovery rule."<sup>143</sup> Explicitly rejecting the majority opinion in *Tyson*, the *Osland* court agreed with the trial court's finding that incest victims suffer severe emotional trauma that can result in an inability to understand or discover their cause of action during the limitation period.<sup>144</sup> This issue was recently addressed by the Supreme Court of Nevada in *Petersen v. Bruen*<sup>145</sup> in which the court decided to toll the limitations period without benefit of the discovery doctrine. The court held that no existing statute of limitations applies to bar an adult survivor of childhood sexual abuse when the plaintiff can show by clear and convincing evidence that she has been sexually abused during minority.<sup>146</sup>

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a finding of fact which will not be set aside on appeal unless it is clearly erroneous." *Id.* at 910.

140. 442 N.W.2d at 909.

141. *Id.* North Dakota had a two-year statute of limitations for actions for assault and battery, N.D. CENT. CODE § 28-01-18(1) (1974), and a one-year minority tolling provision that recognized age 18 as the age of majority, *Id.* § 28-01-25(1). Ms. Osland's claims were, therefore, still filed three years beyond the applicable time periods.

142. 727 P.2d 226 (Wash. 1986) *superseded by statute* as stated in North Coast Air. Serv. Ltd. v. Grumman Corp., 759 P.2d 405 (Wash. 1988); *see infra* text accompanying notes 164-77.

143. *Osland*, 442 N.W.2d at 909 (citing *Tyson*, 727 P.2d at 213 (Pearson, J., dissenting)).

144. *Id.* at 907.

145. 792 P.2d 18 (Nev. 1990). The plaintiff alleged that he was sexually abused as a child from 1975 to 1983 while he was a member of the Big Brothers program. He repressed memories of the abuse until he commenced psychotherapy in 1987. *Id.* at 19. The Supreme Court of Nevada was not willing to apply the discovery rule, reasoning that in those cases where clear and convincing proof of childhood sexual abuse exists, adoption of the rule "would produce some untoward, if not bizarre, possibilities." *Id.* at 23. However, the court looked at the public policy concerns surrounding the statute of limitations and found that the fact that a claim was based on allegations of childhood sexual abuse did not eliminate or diminish concerns about fraudulent or oppressive claims. *Id.* at 23.

146. *Id.* at 24-25.

California courts have both accepted<sup>147</sup> and rejected<sup>148</sup> application of the discovery doctrine to sexual abuse cases. In a type two/repressed memory case, *Mary D. v. John D.*,<sup>149</sup> the Sixth District Court of Appeals held:

[T]he period of limitations is tolled when the child victim of alleged sexual abuse psychologically represses all memory of the acts of abuse while she is still a minor and does not remember those acts until a date after attaining majority, which date will constitute the time of accrual of the cause of action.<sup>150</sup>

Mary Doe was twenty-four years old when she filed an action against her father for sexual assaults inflicted upon her when she was younger than five years old. Thus, her action was filed nineteen years after the assaults occurred. Ms. Doe alleged that the acts of abuse "were accomplished by dominance and duress on [her father's] part . . . that [her father] committed the acts in secret and accompanied [these acts with] implicit and explicit directions never to tell others," and that these factors, when "coupled with the relationship of dependency and trust . . . caused [Ms. Doe] to develop various psychological mechanisms including but not limited to denial, repression, and disassociation from the experiences."<sup>151</sup> The psychological mechanisms precluded her "from becoming aware of her injuries and their probable causal connection to [her father's] acts"<sup>152</sup> within the limitations period.<sup>153</sup> The court concluded:

[T]he doctrine of delayed discovery may be applied in a case where plaintiff can establish lack of memory of tortious acts due to psychological repression which took place before plaintiff attained the age

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147. See *Mary D. v. John D.*, 264 Cal. Rptr. 633 (Cal. Ct. App. 1989), *review dismissed*, 800 P.2d 858 (Cal. 1990).

148. *DeRose v. Carswell*, 242 Cal. Rptr. 368 (Cal. Ct. App. 1987); see discussion *infra* notes 184-99 and accompanying text.

149. 264 Cal. Rptr. 633 (Cal. Ct. App. 1989), *review dismissed*, 800 P.2d 858 (Cal. 1990).

150. *Id.* at 634.

151. *Id.*

152. *Id.*

153. *Id.* This case was decided under California's former statute of limitations for actions arising out of incestuous abuse, which stated that "the time for commencement of the action shall be three years." CAL. CIV. PROC. CODE § 340.1(a) (West 1986). However, subsection (d) mandated that "[n]othing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor." *Id.* § 340.1(d).

of majority, and which caused plaintiff to forget the facts of the acts of abuse until a date subsequent to which the complaint is timely filed.<sup>154</sup>

At least two other cases have recognized the validity of applying the discovery doctrine to type two instances of repressed memory. *Meiers-Post v. Schafer*<sup>155</sup> was an action brought by a thirty-year-old woman for injuries resulting from sexual abuse inflicted by her high school teacher while the plaintiff was a student. The Court of Appeals of Michigan held that "the period of limitation is tolled where the child victim of an illicit sexual relationship psychologically represses the memory of the events. . . ."<sup>156</sup> The court went on to conclude that the "statute of limitations can be tolled under the insanity [tolling provisions] if . . . plaintiff can make out a case that she has repressed the memory of the facts upon which her claim is predicated, such that she could not have been aware of rights she was otherwise bound to know. . . ."<sup>157</sup>

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154. 264 Cal. Rptr. at 639. Because of the procedural posture of this case, i.e., consideration of the trial court's order granting the father summary judgment on his statute of limitations defense, the court noted that "opinions as to the existence or cause of specific psychological processes such as repression or disassociation would require competent expert opinion testimony" to be presented to the trial court. *Id.* at 640.

155. 427 N.W.2d 606 (Mich. 1988); see also *Nicolette v. Carey*, 751 F. Supp. 695 (W.D. Mich. 1990); *Callahan v. Iowa*, 464 N.W.2d 268 (Iowa 1990).

In *Nicolette*, the United States District Court for the Western District of Michigan relied on *Meiers-Post* and allowed an adult to bring a tort action against her father for alleged incidents of sexual abuse during her childhood. *Nicolette*, 751 F. Supp. at 698.

Also relying on *Meiers-Post*, the Supreme Court of Iowa allowed the mother of a deaf and cerebral palsied child to bring action against Iowa under the state tort claims act for abuse of her child while he was a student at a state-operated school. *Callahan*, 464 N.W.2d at 272. The court found that the child suffered from Post-Traumatic Stress Disorder and that Iowa's statutory discovery rule would apply to the statute of limitations governing the state tort claims act. *Id.* at 271-72.

156. *Meiers-Post*, 427 N.W.2d at 607. The court imposed an additional requirement that there be corroboration that the alleged sexual abuse actually occurred. In this instance the former high school teacher admitted to the illicit sexual relationship and relied solely on the statute of limitations defense. Therefore, the court held that it would "not decide whether a less restrictive rule is justified since the facts presently before [the court] do not necessitate an examination of that issue." *Id.*

157. *Id.* at 610. In finding that a plaintiff who had repressed memories of childhood sexual abuse or who was otherwise so traumatized by the experience so as to impair his or her ability to bring legal action could avoid the bar of the statute of limitations, the courts of both Michigan and New Jersey have stressed that the alleged incapacity or repression would bring the plaintiff within the insanity tolling provisions of the statutes of limitation. See, e.g., *id.*; *Jones v. Jones*, 576 A.2d 316, 321, cert. denied, 585 A.2d 412 (N.J. 1990).

In *Jones*, the plaintiff sued her parents under a tort cause of action, alleging that her father sexually abused her as a child with her mother's approval. She also alleged her father threatened her with violence if she exposed him. *Jones*, 576 A.2d at 317-18. The court found

Although not an incestuous abuse case, in *Simmons v. United States*<sup>158</sup> the Court of Appeals for the Ninth Circuit affirmed the decision of the United States Western District of Washington and permitted recovery under the Federal Tort Claims Act in a case in which the plaintiff alleged repressed memory of sexual abuse.<sup>159</sup>

Jerrie Simmons filed suit against the federal government for injuries resulting from a sexual affair she had with her Indian Health Service counselor, a federal government employee. The court applied the discovery doctrine and held that for purposes of the Federal Tort Claims Act the two-year statute of limitations began to run, not when the plaintiff was actually assaulted, but when she first discovered through psychiatric analysis that her trust in, and sexual relationship with her counselor caused emotional injury.<sup>160</sup> The court analogized the actions of the counselor with those of a parent in an incestuous relationship because the trust and faith a patient places in her counselor are much like the trust and faith a child places in a parent.<sup>161</sup> The court was persuaded that the impact of the sexual affair had the same severe traumatic effects on Ms. Simmons that a child experiences when incestuously assaulted by a trusted parent.<sup>162</sup> The discovery doctrine was applied because the plaintiff suffered from post-traumatic stress syndrome which prevented her from knowing, within the limitations period, that her emotional and psychological injuries were the result of her counselor's improper conduct in her case.<sup>163</sup>

Not all repressed memory cases have resulted in application of the discovery doctrine. The landmark case denying recovery to a survivor of childhood incest is *Tyson v. Tyson*,<sup>164</sup> decided by the

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that, as a victim of sexual misconduct, the plaintiff suffered mental trauma so severe as to constitute "insanity" under N.J. STAT. ANN. § 2A:14-21 (West 1987) which tolls the statute of limitations if the plaintiff was "insane" at the accruing of the cause of action until such time as he or she becomes sane. *Jones*, 576 A.2d at 317.

158. 805 F.2d 1363 (9th Cir. 1986).

159. *Id.*

160. *Id.* at 1367.

161. *Id.* at 1365.

162. *Id.*

163. *Id.* at 1367. The two-year statute of limitations of the Federal Tort Claims Act was held to apply not when Jerrie Simmons first had sexual intercourse, but when she was subsequently advised by her psychiatrist and learned for the first time that the counselor's conduct caused her emotional injury. *Id.* at 1368.

164. 727 P.2d 226 (Wash. 1986) *superseded by statute* as stated in *North Coast Air Servs. Ltd. v. Grumman Corp.*, 759 P.2d 405 (Wash. 1988). The *Tyson* court refused to apply the discovery rule to any civil incest case in the absence of independent verification of the allegations. Other courts taking such an approach include *Whatcott v. Whatcott*, 790 P.2d 578

Supreme Court of Washington in 1986. In *Tyson* the twenty-six-year-old plaintiff had repressed all memory of her father's sexual assaults from her conscious mind until her memory was triggered by professional therapy less than one year before she filed her civil action. However, the plaintiff was barred by the statute of limitations from maintaining a traditional tort action against her father.<sup>165</sup>

Nancy Louise Tyson filed her original action in the United States District Court for the Western District of Washington for adult injuries resulting from sexual assaults inflicted when she was between the ages of three and eleven.<sup>166</sup> Ms. Tyson alleged that severe emotional trauma caused her to repress all memory of the assaults. She did not recall the facts of the childhood assaults. Thus until Ms. Tyson's memory was triggered by professional therapy, she did not equate the assaults to the emotional problems she was experiencing as an adult.<sup>167</sup>

After her father moved for summary judgment the following question of state law was certified to the Supreme Court of Washington: "Does the discovery rule, which tolls the statute of limitations until the plaintiff discovers or reasonably should have discovered a cause of action, apply to intentional torts where the victim has blocked the incident from her conscious memory during the entire time of the statute of limitations?"<sup>168</sup> The court concluded:

[T]he substantial risks of stale claims in cases of this nature . . . [require] a literal reading of the statutes of limitation. . . . [T]he

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(Utah Ct. App. 1990) and *St. Michelle v. Robinson*, 759 P.2d 467 (Wash. App. 1988). In *Whatcott*, the plaintiff alleged that his father had sexually molested him. He was aware of the abuse when he was 18 but claimed that the mechanism of psychological repression constituted either an "exceptional circumstance" or mental incompetence which tolled the running of the statutes of limitations. *Whatcott*, 790 P.2d. at 580-81. Because the plaintiff had attended college, married, and was employed during the time of alleged incompetence, the court concluded that he was competent and should have been able to file a timely action. *Id.* at 581.

In *St. Michelle*, a daughter brought suit against her father for outrage, intentional and negligent infliction of emotional distress, and child abuse alleging that he sexually abused her while she was a minor. The court held that the three-year general statute of limitations was applicable to torts of outrage and infliction of emotional distress. *St. Michelle*, 759 P.2d at 470. However, the court held that the plaintiff was not time barred by the three-year statute of limitations because she filed her complaint before she turned 21. *Id.*

165. *Tyson*, 727 P.2d at 227.

166. *Id.*

167. *Id.*

168. *Id.* at 226-27.

discovery rule does not apply to an intentional tort claim where the plaintiff has blocked the incident from her conscious memory during the period of the statute of limitations.<sup>169</sup>

The court refused to apply the discovery doctrine because “[p]sychology and psychiatry are imprecise disciplines . . . [that] are primarily subjective and most of their findings are not based on physically observable evidence”<sup>170</sup> and because of the evidentiary problems inherent in pursuing claims after the statutory time period. The court’s main concern was that “the availability and trustworthiness of objective, verifiable evidence” would not be capable of proof.<sup>171</sup> The obvious error in this rationale is that by denying application of the discovery doctrine, the court did not permit the parties to reach the evidentiary issues. Application of the discovery doctrine would have permitted Ms. Tyson to pursue her claims to the evidentiary stage, at which point proof of her claims would have had to satisfy the finder of fact for actual recovery. Whether plaintiff’s ultimate proof will be objective, verifiable and capable of proof is irrelevant to the issue of the statute of limitations.

Justice Pearson vehemently dissented from the majority’s opinion in *Tyson*. He asserted that the majority opinion violated notions of fundamental fairness in several ways: First, by confusing proof problems with the threshold determination of whether the discovery doctrine should permit the plaintiff to pursue an action to the stage of proof;<sup>172</sup> second, by discrediting the validity of expert mental health professionals’ testimony regarding a plaintiff’s memory and recollection,<sup>173</sup> and, third by failing to recognize the enormous problems of childhood sexual abuse and how the trauma of the sexual abuse may cause total repression from conscious memory.<sup>174</sup> Justice Pearson stated that “it is unfair to deny adult

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169. *Id.* at 230. Ms. Tyson’s claims were considered under the general three-year statute of limitations for personal injury actions and the tolling provisions recognizing a child’s disability to act during minority. See WASH. REV. CODE ANN. § 4.16.080(2) (West Supp. 1991). However, even with the tolling provisions, Ms. Tyson’s claims were still filed five years after the limitations period expired. Note that these statutes were not amended between 1986 (the time of the *Tyson* decision) and 1991.

170. *Tyson*, 727 P.2d at 229.

171. *Id.* at 228.

172. *Id.* at 230-32 (Pearson, J., dissenting).

173. *Id.* at 232-33 (Pearson, J., dissenting).

174. *Id.* at 233-37 (Pearson, J., dissenting).

survivors of childhood sexual abuse a legal remedy."<sup>175</sup> He believed the discovery doctrine should apply to cases in which plaintiffs allege they did not pursue an action within the statute of limitations due to repressed memory of the abuse,<sup>176</sup> thus, supporting application of the discovery doctrine to type two/repressed memory cases. Justice Pearson concluded by stating:

The purpose behind extending the discovery rule to adult survivors of childhood sexual abuse is not to provide a guaranteed remedy to such plaintiffs. The purpose is to provide an *opportunity* for an adult who claims to have been sexually abused as a child to prove not only that she was abused and that the defendant was her abuser, but that her suffering was such that she did not and could not reasonably have discovered all the elements of her cause of action at an earlier time. The policy behind providing this opportunity has been demonstrated: the nature of child sexual abuse, according to extensive expert commentary, is often so secretive, so humiliating, and so devastating that a victim typically represses the events until the abuse is "discovered" — often through psychotherapy, and often well into adulthood.<sup>177</sup>

*Lindabury v. Lindabury*<sup>178</sup> is another decision denying application of the discovery doctrine in a type two/repressed memory case. Nancy Lindabury was thirty-four years old when she filed her action for sexual battery against her parents for assaults inflicted by her father when she was between the ages of four and thirteen.<sup>179</sup> Ms. Lindabury had repressed or blocked memories of the sexual assaults until the memories were rediscovered by psychological counseling shortly before she filed suit. The District Court of Appeals of Florida held that, as a matter of law, the action was clearly time barred because "the alleged incestuous acts . . . damaged [Ms. Lindabury] at the time they occurred. The last contemporaneous injury is itself sufficient to complete the cause of action and commence the limitations period."<sup>180</sup> Thus, the court strictly adhered to the limitations period and refused to apply the discovery doctrine even though Ms. Lindabury had been unable to recall

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175. *Tyson*, 727 p. 2d at 235 (Pearson, J., dissenting).

176. *Id.* at 230 (Pearson, J., dissenting).

177. *Tyson*, 727 P.2d at 237 (Pearson, J., dissenting).

178. 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989), *appeal dismissed*, 560 So. 2d 233 (Fla. 1990).

179. *Id.* at 1117.

180. *Id.*

the facts of the abuse within the statutory time frame.<sup>181</sup>

Justice Jorgenson dissented in *Lindabury* and stated that the "delayed discovery rule *may* apply to actions brought by adult victims of childhood incest upon the factfinder's determination that the claimant, suffering from post traumatic stress syndrome, blocked or repressed conscious memory of the alleged abuse throughout the limitations period."<sup>182</sup> Although Justice Jorgenson did not advocate immediate application of the discovery rule to the facts at hand, he did state:

[B]ecause incest is such an odious crime which causes deep-rooted injuries more subtle and complex than those caused by other tortious acts, [Ms. Lindabury] should have the opportunity to present to the trial court expert testimony on the issue of post traumatic stress syndrome and, if the court finds the expert opinion evidence relevant and therefore admissible, allow the fact finder to determine whether [Ms. Lindabury] could have brought the action earlier but for repression.<sup>183</sup>

The objective, verifiable evidence that Justice Jorgenson would utilize for application of the discovery doctrine is not that the alleged acts actually occurred, or that the claimant has actually suffered injury, or that the injuries were caused by the acts of the defendant, but only that the claimant repressed her memory and this repression should entitle her to pursue her claims beyond the statutory time frame.

Application of the discovery doctrine to delayed claims of incestuous abuse does not assure a plaintiff that she will recover damages, but it does assure the plaintiff that her claims will not be summarily dismissed as time barred. An analysis of the special proof and evidentiary requirements, as well as constitutional issues, which confront the parties once the discovery doctrine is applied are beyond the scope of this article.

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181. *Id.* The court applied the state's four-year statute of limitations period for assault, battery and other intentional torts. See FLA. STAT. § 95.11(3)(o) (1987). The court refused to concede that there might be a tolling provision for minority. *Lindabury*, 552 So. 2d at 1117-18. Florida is one of the states that does not provide tolling the statute of limitations for minority. See *supra* notes 91-93 and accompanying text.

182. *Lindabury*, 552 So. 2d at 1118 (Jorgenson, J., dissenting).

183. *Id.*



### B. *Type One Cases: Known Abuse/Unknown Injury*

Courts generally deny recovery to plaintiffs who allege they had factual knowledge of the abuse within the statute of limitations. In type one cases, the plaintiffs request application of the discovery doctrine to their delayed claims because they only recently realized all elements of their cause of action.

A typical example of the judiciary's reaction to type one cases is the reasoning of the California Court of Appeals in *DeRose v. Carswell*.<sup>184</sup> Dianne DeRose was twenty-four years old when she sought damages for assault, battery, and infliction of emotional distress from her step-grandfather for assaults inflicted from ages four to eleven. Ms. DeRose did not allege that she had repressed all memory of the sexual assaults, but instead that she had not made the causal connection between the remembered assaults and her adult injuries.<sup>185</sup> The court dismissed the plaintiff's complaint as barred by the one-year statute of limitations.<sup>186</sup> The court held, as a matter of law, that the discovery rule did not apply because the plaintiff was actually aware of the assaults within the statute of limitations and was therefore aware of the facts necessary to state a cause of action.<sup>187</sup> Because the plaintiff was aware of the assaults in a timely manner, even though she was not aware of the causal connection to her adult injuries, the discovery doctrine did not apply.<sup>188</sup> The court explained that "the delayed discovery doctrine applies *only* when a plaintiff has not discovered all of the facts essential to [her] cause of action."<sup>189</sup>

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184. 242 Cal. Rptr. 368 (Cal. Ct. App. 1988).

185. *Id.* at 370.

186. *Id.* at 369. California has a one-year statute of limitations for assault, battery, and intentional and negligent infliction of emotional distress. See CAL. CIV. PROC. CODE § 340.3 (West 1986). California permits tolling the limitations periods during minority and requires the plaintiff to file her action within one year of reaching the age of majority (18). See CAL. CIV. PROC. CODE § 352(a) (West 1986). The court ruled that Ms. DeRose's claims were filed four years and ten months too late. *DeRose*, 242 Cal. Rptr. at 370.

187. *DeRose*, 242 Cal. Rptr. at 372.

188. *Id.* at 371. The court stated in dicta that plaintiff's claims would have been barred even under California's revised three-year statute of limitations period for sexual abuse cases that was adopted subsequent to plaintiff filing her complaint. *Id.* 373; see CAL. CIV. PROC. CODE § 340.1 (West Cum. Supp. 1991).

189. *DeRose*, 242 Cal. Rptr. at 371; accord *Doe v. Doe*, 264 Cal. Rptr. 633 (Cal. Ct. App. 1990). But cf., *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Cal. Ct. App. 1990) (awareness of assault at the time it occurred is not awareness of the wrongfulness that may be realized after the statute of limitations).

In *Doe*, an adult woman filed suit against her father for alleged sexual abuse when she was a child. The plaintiff alleged she denied and repressed memories of the abuse and that sub-

Since the *DeRose* decision, California has joined an increasing number of state legislatures that have passed a statutory discovery rule for civil childhood sexual abuse cases.<sup>190</sup> The California statute, which became effective January 1, 1991, allows victims, regardless of age, to sue within three years after discovering their injuries, or eight years after reaching majority, whichever date occurs later.<sup>191</sup>

In 1991, the California Sixth District Court of Appeals which had decided *DeRose* reconsidered their opinion in *Daly v. Derrick*.<sup>192</sup> Three adult plaintiffs sued their former high school teacher, the school district and school district agents in 1987, alleging that the teacher sexually molested them from 1977-78 while they were students.<sup>193</sup> On an appeal from the defendants' successful motion for summary judgment, the court noted that California had recently amended the statute of limitations for childhood sexual abuse and that such amendment effectively rejected their holding in *DeRose*. However, the court also noted that the statutory discovery rule could not apply in the instant case as the rule applied only to actions commenced after January 1, 1991.<sup>194</sup>

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sequent therapy triggered her knowledge of the abuse. The court found that the plaintiff's allegations were sufficient for application of the discovery rule. The deciding factor was whether the repression occurred before the plaintiff was of the age of majority and then continued until a recent time. *Doe*, 264 Cal. Rptr. at 638.

In *Evans*, three brothers brought suit against their foster parents for damages allegedly resulting from the foster parents' abusing them as children from 1966-68. The brothers filed suit in 1987 claiming that abuse had caused them to develop blocking mechanisms including repression and disassociation. They were consequently unable to perceive the psychological injuries caused them or their causal connection to the foster parents' acts until they engaged in therapy. The court held that in order to prevail the plaintiffs had to show that they remained unaware of, and had no reason to suspect, the wrongfulness of the conduct until a time less than three years before the action was filed. The brothers were given leave to amend their complaint, since their claims were not sufficient to invoke the discovery rule. *Evans*, 264 Cal. Rptr. at 611.

190. See ALASKA STAT. § 09.10.140. (1986); CAL. CIV. PROC. CODE § 340.1 (West Cum. Supp. 1991); ILL. ANN. STAT. ch. 110, para. 13-202.2 (Smith-Hurd Cum. Supp. 1991); IOWA CODE ANN. § 614.8 (West Cum. Supp. 1991); ME. REV. STAT. ANN. tit. 14, § 752-C (West Cum. Supp. 1990); MINN. STAT. ANN. § 541.073 (West Cum. Supp. 1991); MO. ANN. STAT. § 537.046 (Vernon Cum. Supp. 1991); MONT. CODE ANN. § 27-2-216 (1989); S.D. CODIFIED LAWS ANN. § 26-10-25 (Supp. 1991); VT. STAT. ANN. tit. XII, § 522 (Cum. Supp. 1991); VA. CODE ANN. § 8.01-249(6) (Michie Cum. Supp. 1991); WASH. REV. CODE ANN. § 4.16.340 (Cum. Supp. 1991).

191. CAL. CIV. PROC. CODE § 340.1 (West Cum. Supp. 1990).

192. 281 Cal. Rptr. 709, (Cal. Ct. App. 1991).

193. *Id.* at 707.

194. *Id.* at 716.

Relying on *Evans v. Eckelman*,<sup>195</sup> the court analyzed delayed discovery of the wrongfulness of a defendant's conduct in the context of childhood sexual molestation.<sup>196</sup> Observing that the nature of the relationship between plaintiff and defendant plays a significant part in a court's application of the delayed discovery doctrine, the court found that a teacher, who stands in loco parentis, is in a fiduciary relationship with his students. Since a fiduciary relationship carries a duty of full disclosure and application of the discovery rule "prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure,"<sup>197</sup> the discovery rule was appropriate in this case. Reiterating their position in *DeRose*, the court then observed that the delayed discovery doctrine applies only when a plaintiff has not discovered all of the facts essential to the cause of action.<sup>198</sup> However, the court went one step further than *DeRose* and stated that the plaintiff's knowledge of the fact that she has been wronged is an essential part of the cause of action. Holding that the statute of limitations begins to run only when a plaintiff knows or should have known of all the facts essential to the cause of action, including the fact that she has been wronged, the court reversed the decision granting summary judgment for the defendants.<sup>199</sup>

The Supreme Court of Montana in *E.W. and D.W. v. D.C.H.*<sup>200</sup> held the discovery doctrine did not apply when the adult survivor

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195. 265 Cal. Rptr. 605 (Cal. Ct. App. 1990). For a discussion of *Evans*, see *supra* note 189.

196. *Daly v. Derrick*, 281 Cal. Rptr. 709, 717 (Cal. Ct. App. 1991).

197. *Daly*, 281 Cal. Rptr. at 717.

198. *Id.*

199. *Id.* at 723. But see *Marsha V. v. Gardner*, 281 Cal. Rptr. 473 (Cal. Ct. App. 1991) for a different approach by the California Second District Court of Appeals heard one week before *Daly*. In *Marsha V.*, an adult brought suit against her step-father for allegedly sexually molesting her in 1963 when she was eight years old until 1972 when she was seventeen years old. *Id.* at 474. Since the plaintiff brought suit in 1987, California's new statutory discovery rule did not apply. The court held that the facts of the case were indistinguishable from *DeRose* and that the delayed discovery doctrine was inapplicable. *Id.* at 476. In a vigorous dissent (modified after the *Daly* decision), Justice Johnson urged a remand to give the plaintiff the opportunity to amend her complaint in case she was in a position to allege she repressed the wrongfulness of the abusive conduct which caused her alleged injuries. *Id.* at 480 (Johnson, J., dissenting).

200. 754 P.2d 817 (Mont. 1988). See also *Bowser v. Guttendorf*, 541 A.2d 377 (Pa. 1988) in which a Pennsylvania court refused to apply the discovery rule when the plaintiff had continuous memory of the prior abuse. The plaintiff brought a tort action against her foster parents alleging that her foster father had sexually abused her, causing her present emotional problems. *Id.* at 378-79. The court found that the plaintiff did not allege sufficiently why she was not able to discover her injuries; thus, her allegations were inadequate to consider application of the discovery rule. *Id.* at 380.

of incest was aware the childhood assaults had occurred within the statute of limitations.<sup>201</sup> E.W. and her husband filed this action for assault and battery, intentional infliction of emotional distress, negligence, and loss of consortium when E.W. was thirty-four years old. The action was filed against her step-uncle for sexual assaults inflicted when she was five to twelve years old.<sup>202</sup>

In her complaint E.W. "acknowledged that she 'always knew' she had been molested as a child and that she has suffered from psychological problems since late adolescence."<sup>203</sup> The court stated that "[f]or this reason alone, her claim must fail."<sup>204</sup> E.W. had sought counseling for her injuries since she was a teenager, but it was not until she received psychiatric counseling pending her second divorce in 1983 that the childhood assaults were causally linked to her continuing adult emotional problems.<sup>205</sup> The court refused to apply the discovery doctrine because "[t]he central precept of [the] discovery rule is that the plaintiff was unaware, and could not reasonably have been aware, of the wrongful act which later resulted in . . . her injury until after the statute of limitations had run."<sup>206</sup> Thus because this plaintiff always remembered the fact she had been assaulted as a child, she was precluded from pursuing her tort action, even though she was unaware of the causal connection to her adult injuries.<sup>207</sup>

The court's language leads to the presumption that had E.W. alleged she had repressed all memory of the childhood assaults until a point subsequent to the running of the statute of limitations, she would have been permitted to apply the discovery doctrine to her claims for adult injuries.

The Court of Appeals of Washington also refused to apply the discovery doctrine in two cases in which the plaintiffs admitted they remembered the incestuous assaults within the statute of limitations but only recently made the causal connection to their adult injuries. In *Raymond v. Ingram*<sup>208</sup> and *Kaiser v. Milliman*,<sup>209</sup> the plaintiffs were aware of the fact they had been incestuously

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201. *E.W. and D.W.*, 754 P.2d at 820.

202. *Id.* at 818.

203. *Id.* at 820.

204. *Id.*

205. *Id.* at 818.

206. *Id.* at 820.

207. *Id.*

208. 737 P.2d 314 (Wash. App. 1987).

209. 747 P.2d 1130 (Wash. App. 1988).

abused within the limitations period but sought application of the discovery doctrine because they were unable to realize the causative element of their adult injuries, and thus were unable to pursue an action for damages, within the limitations period.

In *Raymond v. Ingram*, decided in 1987, Pamela Jo Raymond was already past the age of majority when she filed an action against her paternal grandparents for sexual assaults by her grandfather that began when she was four years old and continued to the age of seventeen. The court held that because Ms. Raymond knew she had been sexually assaulted as a child but only alleged that professional therapy alerted her to the causal connection between the abuse and her adult injuries, the discovery rule did not apply and she was precluded from pursuing her action.<sup>210</sup>

Raymond admitted that . . . she remembered the assaults and realized that as a child she had mental anguish associated with the sexual abuse. Before her therapy, she also had memories of the events giving rise to her cause of action and of some injury associated with those events. . . . It does not matter that Raymond had not discovered the causal connection to all her injuries, because when Raymond reached the age of majority she knew that she had substantial damages associated with the sexual abuse.<sup>211</sup>

The court also stated that "[a]n indecent or sexual assault gives rise to a suit for mental anguish and entitles the plaintiff to recover substantial damages."<sup>212</sup> But, "[i]t is not necessary to know the total extent of damages that an act causes to begin the running of the statute of limitations."<sup>213</sup> Presumably, Ms. Raymond would have been able to pursue her claims if she had alleged she repressed all memory of the facts of the abuse and was thus unaware of her cause of action.

It is important to note that the *Raymond* court, unlike the *Tyson* opinion discussed above,<sup>214</sup> expressly did "not decide whether there was objective, verifiable evidence of the original wrongful act"<sup>215</sup> since the case was dismissed as time barred.

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210. *Raymond*, 737 P.2d at 317.

211. *Id.*

212. *Id.* (citing *Martin v. Jansen*, 193 P. 674, *aff'd en banc*, 198 P. 393 (Wash. 1921)).

213. *Id.* at 317 (citing *Streifel v. Hansch*, 698 P.2d 570 (Wash. Ct. App. 1985)).

214. See *supra* text accompanying notes 164-77.

215. *Raymond*, 737 P.2d at 317.

In 1988, the same court in *Kaiser v. Milliman* considered and rejected Wendy Kaiser's request for application of the discovery doctrine to her sexual abuse claims.<sup>216</sup> Ms. Kaiser filed an action against her father when she was twenty-five years old for injuries resulting from assaults inflicted when she was between the ages of two and six. Although Wendy remembered at least one incident of abuse when she reached the age of majority (which was eighteen in Washington) and was also aware that she had emotional problems, she did not make the causal connection between her injuries as an adult and the childhood sexual assaults until she was in professional therapy at age twenty-five.<sup>217</sup> The court held that the discovery doctrine was not applicable because Ms. Kaiser was aware she had been sexually assaulted and was aware she suffered injuries within the statute of limitations. The fact she did not discover the causative element of her action until a point beyond the statute of limitations did not warrant application of the discovery doctrine.<sup>218</sup> Unlike the opinion in *Raymond*,<sup>219</sup> this court quoted from *Tyson v. Tyson*, and ruled that the discovery rule should only be applied when "there was objective, verifiable evidence of the original wrongful act and the resulting physical injury."<sup>220</sup> The court believed that Ms. Kaiser's remembrance of her father's sexual assaults was not sufficiently objective to overcome her father's reply that the assaults never occurred.<sup>221</sup>

It is the authors' opinion that the flaw throughout the Washington state cases is the courts' failure to recognize the conflicting issues between the plaintiff's right to commence an action and her standard of proof once she is permitted to pursue that action. Whether the plaintiff acted promptly after she discovered that her adult injuries were the result of childhood sexual assaults, and whether the sexual assaults were actually inflicted by the person

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216. 747 P.2d 1130 (Wash. Ct. App. 1988).

217. *Id.* at 1130-31.

218. At the time of Ms. Kaiser's action, Washington recognized a two-year limitation period for assault, see WASH. REV. CODE ANN. § 4.16.100 (West 1988), and a three-year period for other personal injuries, see WASH. REV. CODE ANN. § 4.16.080(2) (West 1988). Further, Washington permitted tolling during minority. See WASH. REV. CODE ANN. § 4.16.190 (West 1988). Thus, Ms. Kaiser's claims should have been filed no later than age 21. See *Kaiser*, 747 P.2d at 1131.

219. See *supra* text accompanying notes 208-15.

220. *Kaiser*, 747 P.2d at 1131 (quoting *Tyson v. Tyson*, 727 P.2d 226, 228 (Wash. 1986) *superseded by statute* as stated in *North Coast Air Servs. Ltd. v. Gromman Corp.*, 759 P.2d 405 (Wash. 1988).

221. *Id.* at 1131.

the plaintiff sued, are both factual issues to be determined by the trier of fact. In Washington the courts estopped the plaintiffs from pursuing their causes of action because of a lack of objectively verifiable information. However, whether the plaintiffs' allegations can be objectively verified should be matters of proof, not matters applied to the initial question of whether the discovery rule permits the plaintiff to proceed to the stage of proof of her allegations. The decisions in *Tyson*, *Kaiser*, and *Raymond* were thankfully abrogated by the Washington Legislature in 1988 when it specifically recognized a tort for childhood sexual abuse.<sup>222</sup>

The United States Court of Appeals for the Second Circuit considered an appeal that was a mixture of type one and type two cases. In *Smith v. Smith*<sup>223</sup> the court refused to apply the New York's tolling provisions for insanity to an incest abuse case. The court affirmed the decision of the district court that thirty-two-year-old Jeanne Smith could not maintain an action against her father for sexual assaults that had ceased twenty years prior to filing her action. Ms. Smith alleged she "was suffering from a post-traumatic stress disorder which caused her to repress her memories of the incestuous occurrences of her childhood and disabled her from instituting litigation which might stimulate a traumatic recall of the childhood event."<sup>224</sup> However, she also admitted that she was aware that she had been sexually abused by her father and was aware that the abuse had caused her harm within the statute of limitations period.<sup>225</sup> Thus, Ms. Smith was precluded from maintaining her action under traditional, intentional tort theories because she was not legally insane as a result of Post Traumatic Stress Disorder.<sup>226</sup>

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222. The new statute expressly provides for application of the discovery rule in cases of injuries sustained as a result of childhood incest. The Washington legislature provided that

(1) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within three years of the act alleged to have caused the injury or condition, or three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act, whichever period expires later.

See WASH. REV. CODE ANN. § 4.16.340(1) (West 1988 & Supp. 1990).

223. 830 F.2d 11 (2d Cir. 1987).

224. *Id.* at 12.

225. *Id.* The court noted that Ms. Smith could not avoid conceding that she was aware of the sexual assaults within the limitations period because her father, the defendant, was confined to a mental institution when Ms. Smith was ten years old for "the very acts of which [Ms. Smith] now complains." *Id.* at 12-13.

226. The court ruled that legal insanity does not apply to a person claiming a post-trau-

One additional theory under which a survivor of incest has been entitled to pursue her action beyond the statutory time frame is fraudulent concealment. In *Hildebrand v. Hildebrand, M.D.*,<sup>227</sup> Susan Hildebrand was twenty-six years old when she brought suit against her father for intentional infliction of emotional distress and negligent failure to exercise reasonable care with her while she was a minor. Ms. Hildebrand stated that her father sexually abused her from age thirteen through age seventeen when she finally left home.<sup>228</sup> Ms. Hildebrand knew that she had been sexually abused as a minor and knew that she had suffered depression and other emotional problems. However, she equated her adult emotional problems to the childhood assaults only as a result of professional therapy at age twenty-four.<sup>229</sup> Her physician-father had previously told Ms. Hildebrand that her depression and emotional problems were due to a chemical imbalance. Therefore, the court found that her father's diagnosis and medication "can reasonably be interpreted as designed to prevent her from understanding or disclosing his alleged abuse of her, or its emotional impact upon her."<sup>230</sup> The court thus permitted Ms. Hildebrand to pursue her claims despite the fact that her action was filed beyond the Indiana two-year statute of limitations.<sup>231</sup>

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matic neurosis. Instead, legal insanity applies only to "those [persons] 'who are unable to protect their legal rights because of an over-all inability to function in society.'" *Id.* at 12 (quoting *McCarthy v. Volkswagen of America, Inc.*, 435 N.E.2d 1072, 1075 (N.Y. 1982)).

227. 736 F. Supp. 1512 (S.D. Ind. 1990); see also *Doe v. LaBrosse*, 588 A.2d 605 (R.I. 1991) in which the Supreme Court of Rhode Island was faced with a case of first impression applying the delayed discovery rule to a civil sexual assault case. The plaintiff adult daughters alleged their father forced sexual contact upon them several times per week from 1959 until 1972. The daughters sued in 1991 and alleged they had discovered only recently the connection between the physical assaults suffered as children and the resulting psychological injuries they suffered as adults. *Id.* at 606. The trial court concluded that the discovery rule should be available to the plaintiffs and that the statute of limitations did not bar the case. The Supreme Court of Rhode Island remanded the case for an evidentiary hearing. The trial judge was ordered to determine the date the plaintiffs discovered, or with all diligence should have reasonably discovered, the causal connection between the defendant's alleged acts and the plaintiffs' alleged injuries. After receiving the trial court's findings, the supreme court would then determine the propriety of applying the discovery rule to toll the statute of limitations in the case. *Id.* at 606-07.

228. *Hildebrand*, 736 F. Supp. at 1512.

229. *Id.* at 1516.

230. *Id.* at 1524.

231. *Id.*; see also IND. CODE ANN. § 34-1-2-2(1) (Burns 1986).



## V. CONCLUSION

The survivor of incest is not likely to realize the extent of her injuries immediately after the abuse has ceased. It is often years later that the harm caused by the egregious actions of the father, trusted counselor, relative or family friend develops into serious adult psychological problems. In many cases the survivor is not within the prescribed statutory limitations period when she becomes aware of the fact and cause of her injuries.

Once she recalls the facts of the assaults she must then come to realize that she is not merely a victim, but a survivor; that the sexual assaults were not her fault but were the result of another's wrongful conduct; and that her adult problems are manifestations of another's wrongful acts. A realization of this process supports application of the discovery rule to the time when the plaintiff discovers both the fact and cause of her injuries.

To provide redress for the "blamelessly ignorant" plaintiff, it is important that the discovery doctrine be applied. Without application of the discovery doctrine, the adult survivors will often not have a civil redress for the wrongs inflicted by childhood sexual abuse.

Two avenues of approach are available for putting the discovery doctrine in place. One approach is by statute as adopted by a number of states.<sup>232</sup> These statutes, which expressly recognize childhood sexual abuse and incest as tort actions, provide for recovery within a designated period from the point in time when the victim discovered or reasonably should have discovered the fact and cause of her injury. The second approach is by judicial recognition of and application of the discovery doctrine to actions brought under traditional tort theories for adult injuries that result from childhood incestuous abuse.<sup>233</sup>

Whether by case law or statutory provision, the application of the discovery doctrine is logical, just and equitable. It provides the blamelessly ignorant survivor of incest with the threshold determination to commence her tort action.

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232. For a listing of states having statutory discovery rules, see *supra* note 190.

233. See *Johnson v. Johnson*, 701 F. Supp. 1363 (N.D. Ill. 1988), *summary judgment granted*, 766 F. Supp. 662 (N.D. Ill. 1991); *Hildebrand v. Hildebrand*, 736 F. Supp. 1512 (S.D. Ind. 1990); *Daly v. Derrick*, 281 Cal. Rptr. 709 (Cal. Ct. App. 1991).