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# PERMISSIVE STATUTE OF LIMITATION POLICIES

FRANCIS S. AINSA\*

## INTRODUCTION

With the increase in reports of priest pedophilia over the last decade,<sup>1</sup> a corresponding number of civil cases have been brought against the Catholic Church. Moreover, the recent trend for courts and legislatures to promote more permissive statute of limitations policies in cases of past sexual abuse has greatly expanded the Church's potential liability.<sup>2</sup>

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<sup>1</sup> Since 1984, over 400 Catholic priests in North America have been accused of molesting children. See Elizabeth Fernandez et. al., *Cop Report Says Priest Molested Altar Boys*, S.F. EXAMINER, Aug. 21, 1994, at A-1. The Church estimates that 2% of all priests are potentially abusive. See Donn Esmonde, *Light Must Be Shed to Let Sex-Abuse Victims Be Saved*, BUFF. NEWS, Dec. 23, 1993; see also Jill Fedje, Note, *Liability for Sexual Abuse: The Anomalous Immunity of Churches*, 9 LAW & INEQ. J. 133, 134 (1990) (reporting that approximately 5% of American priests are engaged in misconduct involving children).

<sup>2</sup> The Catholic Church has paid approximately \$400 million in legal and medical costs. See Fernandez, *supra* note 1, at A-1; Barbara L. Fredricksen, *Author Documents Ugly Truth About Pedophilia and the Priesthood*, ST. PETERSBURG TIMES, Nov. 22, 1992, at 6D; see also Jason Berry, *Church Leaders Hide Their Sick Priests*, IRISH TIMES, Oct. 15, 1994, at 7 (providing more recent estimate of \$500 million in legal and medical costs due to child abuse by clergy); Carl Herko, *How the Catholic Church Ducks the Issue of Sex Abuse*, BUFF. NEWS, Mar. 28, 1993, at 7 (describing that \$400 million already expended by Catholic Church for misconduct liability represented nearly six times Vatican deficit). It is projected that the Church may face as much as \$1 billion in short-term, future losses. See Fernandez, *supra* note 1, at A-1; Jason Berry, *Fathers and Sins*, L.A. TIMES, June 13, 1993, at 24 (citing 1985 internal Church document projecting \$1 billion in future losses); Patricia Edmonds, *Priests'*

The statute of limitations<sup>3</sup> is often the only defense a diocese will have when confronted with a child molestation lawsuit involving a member of the clergy. In some states, such as New York,<sup>4</sup> California,<sup>5</sup> and Minnesota,<sup>6</sup> legislatures have tolled the statute of limitations in certain situations where the cause of action is brought many years after the offense allegedly occurs.<sup>7</sup> However, in other states, like Texas and New Mexico, it is still an open issue that has yet to be decided by the states' highest courts. Ironically, these two states are the sources of some of the most potent litigation at this time.<sup>8</sup>

### I. PROBLEMATIC STATUTE OF LIMITATIONS SITUATIONS

Generally, there are two situations where the practitioner will be confronted with a statute of limitations issue. The first situation involves a plaintiff who was allegedly molested many years ago—most often more than twenty—but who does not allege that he or she suffered from any mental disability at the time that the alleged molestation occurred. The plaintiff further alleges that, due to the trauma surrounding the event, he or she completely suppressed the memory of the event and only

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*Path to Redemption After Sex Abuse*, USA TODAY, July 30, 1993, at 6A (reporting projection that Church could spend \$1 billion on pedophilia issue before end of century).

<sup>3</sup> The rationale for the statute of limitations is threefold. First, in the interest of fairness, defendants must be put on timely notice of a claim against them so that they may preserve the availability of evidence and witnesses, and defend while witness' recollections are still fresh. See Gary Hood, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 U. ILL. L. REV. 417, 424 n.77 (1994). Secondly, a potential defendant should remain free of the perpetual fear of having an action brought for some alleged past grievance. See *id.* at 424 n.78. He or she should be provided with a sense of repose after the passage of a predetermined amount of time. Finally, the justice system does not want to encourage plaintiffs to sleep on their rights. See *id.* at 425 n.80. However, most courts and legislatures allow tolling in certain cases involving minors, fraudulent concealment, insanity, or equitable estoppel. See, e.g., CAL. CIV. PROC. CODE § 340.5 (West Supp. 1993) (minors, fraud); N.Y. CIV. PRAC. L. & R. § 208 (Consol. 1990) (minors, insanity); VT. STAT. ANN. tit. 12, § 555 (1993) (fraudulent concealment).

<sup>4</sup> N.Y. CIV. PRAC. L. & R. § 208 (Consol. 1990).

<sup>5</sup> CAL. CIV. PROC. CODE § 340.1 (West Supp. 1993).

<sup>6</sup> MINN. STAT. ANN. § 541.073 (West Supp. 1993).

<sup>7</sup> For a discussion on legislative responses to the problem, see Hood, *supra* note 3, at 435-36.

<sup>8</sup> See, e.g., *Vesecky v. Vesecky*, 880 S.W.2d 804 (Tex. Ct. App., 5th Dist.) (applying discovery rule in child sex abuse case where psychological defense mechanisms prevented discovery of abuse, *writ granted*, 38 Tex. Sup. Ct. J. 120 (1994); *Sanchez v. Archdiocese of San Antonio*, 873 S.W.2d 87 (Tex. Ct. App., 4th Dist. 1994) (holding that discovery rule did not apply to incident where plaintiff alleged sexual abuse by nun forty-five years prior to filing suit); *Martinez-Sandoval v. Kirsch*, 884 P.2d 507 (N.M. Ct. App. 1994) (declining application of discovery rule where sexual abuse alleged resulted in pregnancy and venereal disease), *cert. denied*, 885 P.2d 1325 (N.M. 1994).

recollected it years later, after receiving psychotherapy.<sup>9</sup> The complainant then proceeds to file suit within two years after relearning or reawakening the memory of the event.

In the second situation, a plaintiff alleges very similar facts but admits in the pleading that there was no suppression of the memory of the molestation. Rather, he or she denies comprehending the causal connection between the sexual molestation and the psychological problems discovered years later during psychotherapy.<sup>10</sup> The plaintiff usually files suit within two years of learning of the causal connection between the alleged molestation and the psychological problems. These two fact patterns are recurrent themes in molestation cases.

## II. COMMENCEMENT OF THE STATUTE OF LIMITATIONS

### A. *Legal Injury vs. Discovery Rules*

Under the traditional tort doctrine of most states, the "legal injury rule" governs the commencement of the running of the statute of limitations in tort cases.<sup>11</sup> The legal injury rule states that the statute of limitations begins to run at the time that the legal injury actually occurs.<sup>12</sup>

However, in an effort to ameliorate the injustice that can occur through a strict application of the legal injury rule in child molestation cases, some courts have applied a "discovery" rule: Essentially, the discovery rule operates to delay the commencement of the statute of limitations until the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the existence of the injury or the causal connection between the injury and the plaintiff's physical or psychological injury.<sup>13</sup>

### B. *Application of the Discovery Rule in Sexual Abuse Cases*

While certain legal issues are recurrent in these cases, it is difficult to generalize in this area because each situation requires a state-by-states analysis. In *Tyson v. Tyson*,<sup>14</sup> a case involving child molestation in a memory-suppression situation,<sup>15</sup> the Washington Supreme Court re-

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<sup>9</sup> See Hood, *supra* note 3, at 428-29 (discussing memory suppression situation); Tina Snelling & Wayne Fisher, *Adult Survivors of Childhood Sexual Abuse: Should Texas Courts Apply the Discovery Rule?*, 33 S. TEX. L. REV. 377, 384 (1992).

<sup>10</sup> See Snelling & Fisher, *supra* note 9, at 384.

<sup>11</sup> See 1 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 5:27, at 880 (1983).

<sup>12</sup> See *id.*; Snelling & Fisher, *supra* note 9, at 402.

<sup>13</sup> See generally Snelling & Fisher, *supra* note 9, at 391-94 (reviewing application of discovery rule in sex abuse cases).

<sup>14</sup> 727 P.2d 226 (Wash. 1986).

<sup>15</sup> *Id.* at 227. The plaintiff alleged that she was sexually molested as a child by her father. *Id.*

fused to apply the discovery rule.<sup>16</sup> The court was concerned that the discovery rule permitted the plaintiff to select a time to recall the event,<sup>17</sup> and relied too extensively on psychiatric and psychological testimony.<sup>18</sup> The Washington Supreme Court was not convinced that psychiatric and psychological medicine had advanced to the point where reliance on this testimony provided sufficient empirical proof on which to base a cause of action.<sup>19</sup>

The majority opinion in *Tyson* was met with a vehement dissent,<sup>20</sup> and ultimately led the Washington state legislature to enact a special limitations statute to govern molestation cases.<sup>21</sup> A similar trend appears to be taking hold nationally. Due to the factual nature of the cases and the extreme public outcry that often accompanies them, courts and legislatures are increasingly inclined to either create a judicial discovery rule or enact a similar statutory solution.<sup>22</sup>

Another case that addressed the statute of limitations problem in molestation cases is *Messina v. Bonner*.<sup>23</sup> In *Messina*, two girls sued their stepfather and natural mother for alleged sexual abuse that had occurred some eighteen years earlier.<sup>24</sup> Both girls admitted that they had known that the abuse had occurred,<sup>25</sup> but had failed to make a complete causal connection between the abuse and their psychological problems.<sup>26</sup>

The Pennsylvania District Court held that previous Pennsylvania case law would have justified granting the defendants' motion for summary judgment.<sup>27</sup> It noted, however, that when a causal connection argument is made by a plaintiff in an attempt to toll the statute of limitations, psychiatric medicine is not precise enough to establish a beginning and end to all psychiatric problems.<sup>28</sup> Accordingly, if the discovery rule were to be applied, the possibility would exist that, for some plaintiffs,

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<sup>16</sup> *Id.* at 228-30.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 227.

<sup>19</sup> *Tyson*, 727 P.2d at 228-30.

<sup>20</sup> *Id.* at 230 (Pearson, J. dissenting) (stating that majority does not properly consider enormity of problem of childhood sexual abuse).

<sup>21</sup> WASH. REV. CODE § 4.16.340 (1989).

<sup>22</sup> See *supra* notes 4-6 & 8 and accompanying text (discussing judicial and legislative remedies to statute of limitations).

<sup>23</sup> 813 F. Supp. 346 (E.D. Pa. 1993).

<sup>24</sup> *Id.* at 347.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 348.

<sup>27</sup> *Baily v. Lewis*, 763 F. Supp. 802 (E.D. Pa.) (holding that discovery rule did not apply to memory-suppression situation), *aff'd*, 950 F.2d 721 (3d Cir. 1991).

<sup>28</sup> *Messina*, 813 F. Supp. at 349-50.

the statute of limitations might never commence.<sup>29</sup> Under a causal-connection pretext, complainants might be able to contend that they have never fully appreciated the causal connection between the alleged molestation and their current psychological difficulties.<sup>30</sup> The district court applied this rationale in refusing to apply the discovery rule.<sup>31</sup>

*Tyson* and *Messina* reflect that some courts are not convinced that psychological and psychiatric testimony is a sufficient basis on which to impose the discovery rule. Yet, numerous cases from other jurisdictions reveal that some courts are willing to allow such testimony as a basis for employing the discovery rule.<sup>32</sup>

### III. DIOCESE OF EL PASO

While there are several appellate court decisions in Texas involving the application of the discovery rule to child molestation cases,<sup>33</sup> the Texas Supreme Court has not yet spoken on the issue. The discovery rule has been applied, however, in other contexts.<sup>34</sup> In 1988, the Texas Supreme Court applied the rule to cases of legal malpractice because it concluded that, in many cases, it would be difficult for most plaintiffs to discover the legal malpractice until years after it had taken place.<sup>35</sup>

Texas courts have also applied the discovery rule in fraud cases<sup>36</sup> under a three-prong analysis.<sup>37</sup> A court must examine: "(1) the nature of the plaintiff's case, and the type of evidence required to establish and

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<sup>29</sup> *Id.* at 350.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 349.

<sup>32</sup> See, e.g., *Olsen v. Hooley*, 865 P.2d 1345, 1348-49 (Utah 1993) (holding affidavit submitted by expert witness regarding victim's repressed memories sufficiently supported application of discovery rule); *Evans v. Eckelman*, 265 Cal. Rptr. 605, 609 (Cal. Ct. App. 1990) (disagreeing with *Tyson's* argument that lack of verifiable evidence and reliance on memories and expert testimony would increase "spurious" litigation); *Ault v. Jasko*, 637 N.E.2d 870, 872 (Ohio 1994) (applying discovery rule despite contention of unfairness due to rule's reliance on expert testimony to prove fault and damages); *Lovelace v. Keohane*, 831 P.2d 624, 631 (Okla. 1992) (stating that expert psychiatric testimony can aid in determination of whether discovery rule applies).

<sup>33</sup> See *supra* note 8 (citing relevant decisions by Texas Court of Appeals).

<sup>34</sup> See, e.g., *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988) (legal malpractice); *Kelley v. Rinkle*, 532 S.W.2d 947 (Tex. 1976) (false credit report); *Hays v. Hall*, 488 S.W.2d 412 (Tex. 1972) (negligent vasectomy operation); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967) (foreign object medical malpractice); *Quinn v. Press*, 140 S.W.2d 438 (Tex. 1940) (fraud). *But see Robinson v. Weaver*, 550 S.W.2d 18 (Tex. 1977) (stating that discovery rule does not apply to medical misdiagnosis case).

<sup>35</sup> *Willis*, 736 S.W.2d at 646.

<sup>36</sup> *Quinn*, 140 S.W.2d at 438.

<sup>37</sup> *Precision Sheet Metal Mfg. Co. v. Yates*, 794 S.W.2d 545, 549-50 (Tex. Ct. App. 1990) (interpreting *Southwest Bank & Trust Co. v. Bankers Commer. Life Ins. Co.*, 563 S.W.2d 329, 331 (Tex. Civ. App. 1978)).

defend the claim; (2) the length of the limitations period in question, and the wrongful act's susceptibility to discovery within that period; and (3) the susceptibility of cases to fraudulent prosecution if [the] limitation is tolled."<sup>38</sup>

The cases involving the Diocese of El Paso are instructive on how the discovery rule has the potential to be abused in sexual molestation cases in which the statute of limitations has otherwise expired. During the early 1970s, Father Holley was a priest in the Diocese of Worcester, Massachusetts. He was a known pedophile who was sent by the Diocese of Worcester to the Order of the Paraclete Treatment Center in Jemez Springs, New Mexico<sup>39</sup> to be treated for pedophilia.<sup>40</sup> At this time, there were varying opinions concerning the state of the art of knowledge of pedophilia. At the rehabilitation center, Father Holley received spiritual and medical treatment.

He was subsequently sent out, without warning, to do "weekend work" at various parishes surrounding Albuquerque, New Mexico, which were, at that time, part of the Diocese of El Paso.<sup>41</sup> During the time he was involved in this work, a number of molestation incidents occurred.<sup>42</sup> Eight allegations of molestation were subsequently filed against the Diocese of El Paso.<sup>43</sup> The Diocese ultimately reassigned him to other work. When all of the incidents became public, Father Holley was charged with a criminal offense and returned to New Mexico, where he pled guilty and was sentenced to a maximum of 275 years in New Mexico state prison.<sup>44</sup>

The plaintiffs' New Mexico attorney<sup>45</sup> pled these cases to allege that all eight plaintiffs had suppressed the memory of being molested, and all eight had remembered the sexual abuse at the same time. Clearly, these cases involve some very tragic and unpleasant facts. However, the problem that faces the Diocese of El Paso, and others across the country, is that, today, plaintiffs' attorneys are virtually turning the phrase "suppression of the memory of the event" into magic words. These lawyers condition and school their plaintiffs to parrot these words during depositions. They utilize psychiatric and psychological testimony in such a way that the complaints cannot be dismissed through a summary judgment

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<sup>38</sup> *Id.* at 550.

<sup>39</sup> Stephen Kurkjian, *Priest Accused of Abuse While at Parish in Mass.: Sexual Misconduct Allegations Widen*, BOSTON GLOBE, Dec. 21, 1992, at 1.

<sup>40</sup> Stephen Kurkjian, *New Mexico Lawyer Alleges Boys Abused by Worcester Priest*, BOSTON GLOBE, Dec. 16, 1992, at 42.

<sup>41</sup> *Priests and Abuse*, NEWSWEEK, Aug. 16, 1993, at 42.

<sup>42</sup> *Id.*

<sup>43</sup> Benjamin Keck, *8 Men Filing Lawsuit Accusing Priest of Molestation*, EL PASO TIMES, Dec. 29, 1992.

<sup>44</sup> *Ex-priest Sentenced for Molesting Boys*, CHI. TRIB., June 5, 1993, at 6.

<sup>45</sup> Keck, *supra* note 43.

motion, since this method of pleading complaints almost always raises substantive issues of fact. If the discovery rule is applied to these cases, there is virtually no way to avoid a trial.

#### CONCLUSION

Where defendants are faced with going to trial in these cases, the facts are usually so egregious that it is not difficult to presume where the jury will side. Because, in many instances, the molestation is admitted, if defendants do not prevail at the summary judgment phase, the issue will be whether the diocese is liable or whether the limitations defense is available. Due, in part, to the widespread publicity these cases receive, fraudulent causes of action are being perpetrated. Plaintiffs' attorneys are simply creating fact situations which, in my opinion, do not exist. Unfortunately, the current legal abuses in molestation cases exemplify the remark of a prominent plaintiff's lawyer in El Paso: "When you can't amend the law, amend the facts."

