

THE JUDICIAL MISAPPLICATION OF THE MINNESOTA DELAYED DISCOVERY STATUTE

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A young child has little choice but to repose his or her trust with a parent or parental figure. When such a person abuses that trust, he commits two wrongs, the first by sexually abusing the child, the second by using the child's dependency and innocence to prevent recognition or revelation of the abuse. This may be accomplished by enforcing secrecy around the acts or even by teaching the child that the sexual acts are normal or necessary to the relationship.¹

I. INTRODUCTION

In the last six months an unthinkable child sexual abuse scandal has unfolded. Numerous courageous people have come forward to confront the painful issue of their sexual abuse by a clergy member when they were children. Tragically, we have learned that some of the abuse could have been prevented if church officials had responded appropriately to their knowledge of certain priests' dangerous propensities toward children. The scandal has helped raise awareness of the prevalence and damaging effects of childhood sexual abuse. However, in many states, the law remains inadequate to address the issue or is applied incorrectly.

This comment begins by discussing the life-shattering damage that child sexual abuse has on victims. Next, it discusses the history of the delayed discovery rule and in particular its history in Minnesota.² Further, this comment examines the Minnesota Supreme Court's recent application of the delayed discovery statute in *D.M.S. v. Barber*,³ where the court approved its previous disregard of the clear language of the delayed discovery statute in *Blackowiak v. Kemp*⁴ and also pronounced a new rule that the delayed discovery statute does not begin to run until age eighteen.⁵ Finally, this

1. *Evans v. Eckelman*, 265 Cal. Rptr. 605, 609 (Ct. App. 1990).

2. Delayed discovery is a doctrine stating that a statute of limitations does not begin to run when the victim is injured, as most statutes of limitations do, but at the discovery of some event.

3. 645 N.W.2d 383, 389-90 (Minn. 2002).

4. 546 N.W.2d 1, 3 (Minn. 1996).

5. *See D.M.S.*, 645 N.W.2d at 390.

comment briefly examines how courts from states other than Minnesota have correctly applied delayed discovery statutes, and the recent recognition by both the Connecticut and California legislatures that childhood sexual abuse is a uniquely damaging and heinous crime.

II. CHILDHOOD SEXUAL ABUSE

A. Prevalence

Approximately twenty percent of Americans have been sexually abused as children.⁶ This means almost sixty million living Americans are child molestation victims.⁷

B. Secrecy

Childhood sexual abuse may be one of the most under-reported crimes in the United States.⁸ Under-reporting is so prevalent that virtually every state, including Minnesota,⁹ has enacted a mandatory reporting statute that makes it a crime for certain people associated with children to not report suspected child abuse to the proper authorities.¹⁰

There are numerous reasons for the under-reporting of childhood sexual abuse.¹¹ Almost all childhood sexual abuse instills

6. MEI LING REIN, CHILD ABUSE BETRAYING A TRUST 64-65 (John F. McCoy et al. eds., 2001) (citing a December 1995 Gallup Poll Monthly which asked 1,000 adults if "before the age of eighteen were you personally ever touched in a sexual way, or ever forced to touch an adult or older child in a sexual way); *see also* William Holmes, *Sexual Abuse of Boys: Definition, Prevalence, Correlates, Sequelae, and Management*, 281 JAMA 1855, 1855-62 *at* <http://jama.ama-assn.org/issues/v280n21/rfull/jrv80046.html#a2> (last visited Feb. 7, 2003) (examining 149 previous studies of male sexual abuse and concluding that one in five boys had been abused).

7. U.S. Census Bureau Homepage, *at* <http://www.census.gov/main/www/popclock.html> (last visited Feb. 7, 2003) (using current estimate of U.S. population).

8. MARGARET O. HYDE & ELIZABETH H. FORSYTH, M.D., THE SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 10 (1997).

9. MINN. STAT. § 626.556, subd. 3(a) (2001).

10. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, CHILD ABUSE AND NEGLECT STATE STATUTE SERIES: COMPENDIUM OF LAWS, *at* <http://www.calib.com/nccanch/pubs/stats02/mandrep.cfm> (last visited Feb. 7, 2003).

11. *See* DALE ROBERT REINERT, SEXUAL ABUSE AND INCEST 34-38 (1997).

confusion, guilt, and shame in victims, which makes them feel that they are somehow at fault for the abuse or that it was not abuse at all.¹² Often, abusers tell their victims to keep the "relationship" secret.¹³ Other times, the adult abuser manipulates the child victim to think that the relationship is built on mutual love for one another, rendering the victim powerless to report the abuse.¹⁴ A young child who is sexually abused often lacks the verbal ability to adequately convey what occurred.¹⁵ Sometimes the abusers go so far as to explicitly or implicitly threaten the victims.¹⁶ The threat could be harm to the victim, harm to the victim's family or friends, or even some twisted form of retribution by a higher power, e.g., going to hell.¹⁷ Even in the absence of a threat, adolescents who do find the courage to tell someone about the abuse often find that the listener is horrified, disgusted, or even in disbelief.¹⁸ All of these consequences and realities of childhood sexual abuse lead to its significant under-reporting.

C. *Effects*

Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later and can have a difficult time connecting his adulthood problems with his past.¹⁹

The effects of childhood sexual abuse are numerous.²⁰ They are not only immediately experienced by many survivors in different ways, but often later manifest themselves in a variety of

12. See MIC HUNTER, *ABUSED BOYS* 80-82 (1991).

13. REINERT, *supra* note 11, at 34-35.

14. MAXINE HANCOCK & KAREN BURTON MAINS, *CHILD SEXUAL ABUSE: HOPE FOR HEALING* 33 (1987) (citing Mary Ellen Siemers, *Treatment Methods for Adult Female Survivors of Incest: A Review of The Literature* 11-13 (1986) (unpublished master's thesis, University of Wisconsin)).

15. HYDE & FORSYTH, *supra* note 8, at 10.

16. HANCOCK & MAINS, *supra* note 14, at 33.

17. REINERT, *supra* note 11, at 35 (noting that abusers use all types of threats to keep the abuse secret).

18. HANCOCK & MAINS, *supra* note 14, at 33.

19. HUNTER, *supra* note 12, at 59.

20. See e.g., SUSAN MUFSON, C.S.W., & RACHAEL KRANZ, *STRAIGHT TALK ABOUT CHILD ABUSE* 74-75 (1991).

forms.²¹ Possible effects include lowered self-esteem, suicidal impulses, feelings of shame and guilt, aggression, eating disorders, running away, distrust of authority and authority figures, tendency to be involved with abusive relationships, offender behavior, feeling hopeless or helpless, difficulty in forming trusting, intimate relationships, depression and post-traumatic stress disorder.²²

Survivors of sexual abuse often develop defenses, such as denial, disassociation, and memory repression to deal with ongoing or past sexual abuse.²³ “Because . . . defenses operate mostly on an unconscious level, . . . [survivors of sexual abuse] will probably remain unaware of them.”²⁴ While these defenses operate to shield survivors of sexual abuse from the pain of the past, they unfortunately hinder the ability of a survivor to live a full and happy life.²⁵ Further, these defenses make it almost impossible for victims of sexual abuse to connect the damage and turmoil in their lives with the sexual abuse that they suffered as children.²⁶

D. Childhood Sexual Abuse By Clergy

There has not yet been any comprehensive study to examine the prevalence of childhood sexual abuse by clergy.²⁷ However, it is estimated that about six percent of all U.S. Catholic clergy have engaged in sexual activity with a minor.²⁸ There are approximately

21. See generally REINERT, *supra* note 11, at 36-37.

22. See generally WAYNE KRITSBERG, *THE INVISIBLE WOUND: A NEW APPROACH TO HEALING CHILDHOOD SEXUAL TRAUMA* 56-57 (1993) (listing secondary effects of sexual abuse); MUFSON, *supra* note 20, at 74-75 (listing various effects of sexual abuse); REIN, *supra* note 6, at 71-72 (discussing various studies which examined effects of childhood sexual abuse); REINERT, *supra* note 11, at 36-37 (listing signs of sexual abuse).

23. KRITSBERG, *supra* note 22, at 56-57 (describing memory repression as the memory loss of the abuse as a result of the overwhelming emotional state during the abuse; describing disassociation as feeling disconnected or numb when recalling the abuse; describing denial as minimization or complete unacknowledgement of logic or actual memories of abuse).

24. *Id.* at 48.

25. *Id.*

26. See HUNTER, *supra* note 12, at 59-60.

27. Alan Cooperman, *Does Catholic Church Have Greater Problem With Sexual Abuse than Other Religions?*, WASH. POST, March 16, 2002, at <http://www.detnews.com/2002/religion/0203/24/religion-441972.htm> (last visited Feb. 7, 2003). In the article, Rev. Rossetti stated “[y]ou can’t take [a sample of] 1,200 males and ask them, ‘[h]ow many of you have committed child abuse?’ and expect to get a true answer.” *Id.*

28. Marilyn Elias, *Is Homosexuality to Blame for the Church Scandal?*, U.S.A. TODAY, July, 15, 2002, at <http://www.usatoday.com/news/2002-07-15-church->

60,000 active and inactive Catholic priests²⁹ and brothers³⁰ in the United States today.³¹ This estimate indicates that approximately 3,000 to 4,000 priests and brothers have engaged in sexual activity with a minor.³² This is a staggering number, especially when viewed in light of the fact that most child molesters prey on numerous victims.³³

A survivor of sexual abuse by a clergy member may suffer effects beyond those discussed above. Priests are highly respected authority figures, particularly among Catholic families. Survivors may experience a deeper lack of respect for authority as a result of the abuse by a clergy member. They may also experience a lack of faith and religious belief. Finally, many survivors of sexual abuse by priests are just now learning that often church officials, aware of some priests' abusive propensities, could have prevented the abuse. The realization of this betrayal causes additional harm and injury to those survivors.

III. THE DELAYED DISCOVERY RULE

A. History

The United States Supreme Court first applied the delayed discovery rule in *Urie v. Thompson*.³⁴ In *Urie*, a railroad worker alleged that he had inhaled silica dust and as a result suffered injuries that were manifested years later.³⁵ Had the Court decided that the statute of limitations started to run when the railroad worker first inhaled the dust, his claims would have been barred.³⁶ The Court stated, “[w]e do not think the humane legislative plan

gay_x.htm (citing a study done by A.W. Richard Sipe, psychotherapist and ex-priest, who has done what's believed to be the longest-term, largest study on priests' sexuality, following 1,000 priests for up to twenty-five years).

29. A priest is a clergyman or minister authorized to carry out the Christian ministry. AMERICAN COLLEGE DICTIONARY 961 (1963).

30. A brother is a man who devotes himself to the duties of a religious order. *Id.* at 153.

31. *See generally* Elias, *supra* note 28.

32. *See* Tom Economus, *Catholic Pedophile Priests: The Effects on U.S. Society*, at <http://www.thelinkup.com/stats.html> (last visited Feb. 7, 2003).

33. *See* REINERT, *supra* note 11, at 22 (stating that perpetrators often affect many children in the perpetrator's life).

34. 337 U.S. 163 (1949).

35. *See id.* at 165-66.

36. *See id.* at 169.

intended such consequences to attach to blameless ignorance.”³⁷ The Court concluded that “the afflicted employee can be held to be ‘injured’ only when the accumulated effects of the deleterious substance manifest themselves.”³⁸

In the late 1980s and early 1990s a movement to raise awareness about the prevalence of sexual abuse swept the nation and brought about discussion of the applicability of the delayed discovery rule to cases of sexual abuse. Many states reacted by enacting some type of delayed discovery statute for claims specifically based upon sexual abuse.³⁹ These statutes have generally gone beyond the “manifestation” test articulated in *Urie*, and have recognized that even if injuries are present, sex abuse victims have a difficult time connecting the perpetrator’s wrongful conduct as the cause of their psychological injury.⁴⁰

B. Minnesota Delayed Discovery Statute

The Minnesota delayed discovery statute was enacted in 1989.⁴¹ It states, in pertinent part, that “an action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.”⁴² The statute also states: “[t]his section does not affect the suspension of the statute of limitations during a period of disability under section 541.15.”⁴³ Finally, the statute states that it applies both to the person who

37. *Id.* at 170.

38. *Id.*

39. Anne Greenwood Brown, *Sometimes the Bad Guy Wins: Minnesota’s Delayed Discovery Rule*, 23 WM. MITCHELL L. REV. 401, 413 (1997) (citation omitted); *see also infra*, notes 225-30, discussing other states’ treatment of the statute of limitations for claims based on childhood sexual abuse.

40. *See generally infra*, notes 225-30.

41. 1989 Minn. Laws, ch. 190, § 2 (codified as amended at MINN. STAT. § 541.073 (2002)).

42. MINN. STAT. § 541.073 subd. 2 (2002). Originally, the statute provided for a two-year statute of limitations for claims based upon intentional acts and six years for claims based upon negligent acts. *See* MINN. STAT. § 541.073 (1990), *amended by* Act of May 28, 1991, ch. 232, § 1, 1991 Minn. Laws 629, 629. In 1991, the legislature erased the distinction between claims based upon intentional acts and claims based upon negligent acts, making both subject to a six-year statute of limitations. *See* Act of May 28, 1991, ch. 232, § 1, 1991 Minn. Laws 629, 629 (codified at MINN. STAT. § 541.073, subd. 2 (1992)).

43. *Id.* at subd. 2(d). The disability statute serves to prevent an applicable statute of limitations from running when a victim is under a disability such as minority or insanity. *See* MINN. STAT. § 541.045 (2002).

committed the abuse and the person(s) who negligently permit the sexual abuse to occur.⁴⁴

C. Statutory Analysis of the Minnesota Delayed Discovery Statute

The role of the court in statutory analysis is to discover and effectuate the legislature's intent.⁴⁵ The Minnesota Supreme Court concluded that "where the legislature's intent is clearly discernable from the plain and unambiguous language [of a statute], statutory construction is neither necessary nor permitted."⁴⁶ Words and phrases are to be interpreted according to their plain meaning.⁴⁷ Further, it is a basic maxim of statutory construction that "a statute is to be construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant."⁴⁸

In interpreting the delayed discovery statute, the first question is the meaning of "knew or had reason to know."⁴⁹ This generally requires an objective examination of what a reasonable person would have known in the plaintiff's circumstances.⁵⁰ Hence, the standard is what a reasonable person who was sexually abused when he or she was a child would have known.⁵¹ This examination is a question of fact for the jury.⁵² After determining that the inquiry is objective, the next question is what must the victim know or have reason to know. The statute clearly states that a victim must know or have reason to know 1) that he or she was abused, 2) that he or she was injured, and 3) that the injury was caused by the sexual abuse.⁵³ If the victim does not have knowledge of all three elements, the statute clearly should not begin to run.⁵⁴ Obviously,

44. *Id.* at subd. 3.

45. *Lino Lakes Econ. Dev. Auth. v. Reiling*, 610 N.W.2d 355, 357 (Minn. 2000) (interpreting zoning statutes).

46. *Am. Tower, L.P., v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001) (quoting *Ed Herman & Sons v. Russell*, 535 N.W.2d 803, 806 (Minn. 1995)); *see also* MINN. STAT. § 645.16 (2000).

47. *Am. Tower*, 636 N.W.2d at 806.

48. *Duluth Fireman's Relief Ass'n v. Duluth*, 361 N.W.2d 381, 385 (Minn. 1985).

49. MINN. STAT. § 541.073 subd. 2.

50. *Blackowiak*, 546 N.W.2d at 3; *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998) (stating that "application of a reasonable person standard" is necessary).

51. *See Blackowiak*, 546 N.W.2d at 3.

52. *Bugge*, 573 N.W.2d at 680; *Bertram v. Poole*, 597 N.W.2d 309, 312 (Minn. Ct. App. 1999).

53. *See* MINN. STAT. § 541.073.

54. *See id.*

if the legislature intended the statute to run at the time the victim knew of any of the three elements individually, then it would not have required discovery of all three in the statute.⁵⁵

IV. THE MINNESOTA COURTS' APPLICATION OF THE DELAYED DISCOVERY STATUTE

A. History

The Minnesota Supreme Court first interpreted the delayed discovery statute in 1996 in *Blackowiak v. Kemp*.⁵⁶ Blackowiak alleged that he was sexually abused by Kemp, his school counselor.⁵⁷ The allegations stemmed from incidents that took place when Blackowiak was eleven years old, twenty-two years before suit was commenced.⁵⁸ Blackowiak testified that as an adult he did not tell his counselor about the sexual abuse because he was ashamed of it.⁵⁹ Furthermore, Blackowiak testified that at age twenty-two he “freaked out” when he encountered Kemp (the perpetrator) accompanying a young boy.⁶⁰ However, Blackowiak testified that at that time he still did not even acknowledge to himself that Kemp had sexually abused him.⁶¹ Blackowiak also testified that until 1991, a year before bringing suit, he never thought about the abuse and didn't want to think about it.⁶²

The court held that Blackowiak's claims were barred by the six-year statute of limitations in the delayed discovery statute because the evidence “overwhelmingly demonstrate[d] that he knew of the sexual abuse long prior to 1986 [more than six years before commencing suit].”⁶³ The court based its decision on the fact that

55. *Blackowiak*, 546 N.W.2d at 4 (Gardebring, J., dissenting) (laying out the three elements of the delayed discovery statute).

56. 546 N.W.2d 1.

57. *Id.* at 2. Blackowiak alleged that on one occasion at Kemp's cabin, Kemp forced him to have oral and anal intercourse with him. *Id.* Blackowiak further alleged that he believed there were other incidents of abuse, but because he suffered from traumatic amnesia, he could not remember any of them. *Id.* at 2.

58. *Id.*

59. *Id.*

60. *Id.* Blackowiak stated that he freaked out because he assumed that Kemp was sexually abusing the young boy. *Id.*

61. *Blackowiak*, 528 N.W.2d 247, 250 (Minn. Ct. App. 1995).

62. *Id.*

63. *Blackowiak*, 546 N.W.2d at 3.

Blackowiak felt shame⁶⁴ about the abuse and because Blackowiak freaked out upon seeing Kemp with a young boy, even though there was evidence that Blackowiak did not acknowledge that Kemp abused him until 1991.⁶⁵ The court stated that “as a matter of law, one is ‘injured’ if one is sexually abused,” based upon the observation that in liability insurance disputes criminal sexual conduct is such that an intention to inflict injury can be inferred as a matter of law.⁶⁶ The court concluded that the ultimate question then under the delayed discovery statute was not the “manifestation and form of the injury [which] is significant to the victim,” but rather “the time at which the complainant knew or should have known that he/she was sexually abused.”⁶⁷

Two years after *Blackowiak*, the Minnesota Supreme Court again had the opportunity to interpret the delayed discovery statute in *W.J.L. v. Bugge*.⁶⁸ At age thirty-three, W.J.L. brought suit alleging that Bugge, one of her female high school teachers, sexually abused her.⁶⁹ According to W.J.L., the alleged abuse began more than fifteen years earlier while W.J.L. was a junior in high school.⁷⁰ W.J.L. stated that Bugge repeatedly told W.J.L. that she (W.J.L.) “was a lesbian and that their relationship was therapeutic.”⁷¹ W.J.L. recalled being confused by the relationship, but did not realize that it was sexual abuse at the time.⁷² Further, W.J.L. testified that it was not until 1992 (less than six years from commencement of the suit), when she read the book *The Prince of Tides*, which referenced same-sex rape, that she realized that she had been sexually abused.⁷³ Finally, expert testimony on W.J.L.’s behalf showed that a

64. Shame is an emotion of self-blame. It would seem too obvious to note that a victim who feels “shame” about an assault has not discovered that it was the perpetrator rather than the victim who engaged in wrongful or tortuous conduct. Thus, feelings of “shame” are not evidence that the plaintiff discovered that he/she was sexually abused.

65. See *Blackowiak*, 546 N.W.2d at 3.

66. *Id.* (citing *Fireman’s Fund Ins. Co. v. Hill*, 314 N.W.2d 834, 835 (Minn. 1982)). The court concluded that “concepts of sexual abuse and injury within the meaning of this statute are essentially one and the same, not separable.” *Id.*

67. *Id.*

68. 573 N.W.2d 677, 681-82 (Minn. 1998).

69. *W.J.L. v. Bugge*, No. C6-96-1619, 1997 WL 30721, at *7 (Minn. Ct. App. Jan. 28, 1997) (W.J.L. commenced suit on February 2, 1995).

70. See *Bugge*, 573 N.W.2d. at 678-79. W.J.L. was approximately sixteen years and eleven months old when the abuse began in 1978. *Id.* at 679.

71. *Id.* at 679.

72. *Id.* at 682.

73. *Id.* at 679.

reasonable person in W.J.L.'s circumstances would not have known that she was sexually abused until 1992.⁷⁴ Reaffirming *Blackowiak's* holding that "one is injured if one is sexually abused," the *Bugge* court held that W.J.L.'s claims were time barred on W.J.L.'s twenty-fifth birthday.⁷⁵ Even though W.J.L. offered evidence showing that she did not recognize the nature of the abuse, that she did not recognize the extent of the injury, and that a reasonable person in W.J.L.'s situation would not know that he or she was sexually abused until 1992, the court concluded that W.J.L. "failed to present specific facts giving rise to a genuine issue of material fact."⁷⁶

Justice Gardebring dissented in both *Blackowiak* and *Bugge*,⁷⁷ reasoning that the plain meaning of the delayed discovery statute "demonstrates that it is knowledge of causation which triggers the 6-year limitation period, not merely knowledge that sexual abuse occurred."⁷⁸ Further, Justice Gardebring noted that the clear legislative intent behind the delayed discovery statute was to provide those abused as children additional time to become aware of the link between the abuse and the emotional injuries, which often occurs much later in life.⁷⁹

B. *Post Bugge Decisions*

Not surprisingly, in the wake of *Blackowiak* and *Bugge*, lower courts have had difficulty applying the clear language of the delayed discovery statute in conjunction with the supreme court precedent.⁸⁰ Shortly after *Bugge*, the court of appeals had an opportunity to apply the statute in *J.J. v. Luckow*.⁸¹ In *J.J.*, the

74. *Id.* at 682.

75. *Id.* at 681-82. The court held that under MINN. STAT. § 541.15(a)(1)(2000) the six-year statute of limitations in MINN. STAT. § 541.073 does not begin to run until one year after the plaintiff reaches the age of majority. *Id.*

76. *Id.* at 682.

77. *Bugge*, 573 N.W.2d at 682-84; *Blackowiak*, 546 N.W.2d at 3-4. Justice Blatz joined in the *Bugge* dissent. 573 N.W.2d at 684.

78. *Blackowiak*, 546 N.W.2d at 4.

79. *Id.*

80. See e.g., *Doe 28B v. Archdiocese of St. Paul and Minneapolis*, No. C9-99-2164, 2000 WL 781362, at *2-4 (Minn. Ct. App. June 20, 2000); *Brett v. Watts*, 601 N.W.2d 199, 203-04 (Minn. Ct. App. 1999); *Bertram*, 597 N.W.2d at 312-16; *J.J. v. Luckow*, 578 N.W.2d 17, 19-21 (Minn. Ct. App. 1998).

81. 578 N.W.2d at 19-21.

plaintiff alleged that he was sexually abused by a police officer.⁸² The plaintiff commenced his action when he was twenty-four years old.⁸³ Instead of using the age twenty-five rule applied in *Bugge*, the *J.J.* court construed the delayed discovery statute to give a survivor of childhood sexual abuse six years from the age of majority to bring any claims based upon the alleged abuse.⁸⁴ As a result, the court held that the plaintiff's claims were barred because he failed to commence his action before his twenty-fourth birthday.⁸⁵

A little over a year after *J.J.*, the court of appeals again confronted the delayed discovery statute in *Bertram v. Poole*.⁸⁶ In *Bertram*, two sisters, Katie and Jeannette, alleged that their uncle abused them when they were children.⁸⁷ At the commencement of the suit, Katie was twenty-four and Jeannette was twenty-five.⁸⁸ Basing its decision on *Bugge*, a different panel of judges from that in *J.J.* concluded that a survivor of sexual abuse has until age twenty-five, not twenty-four, to bring a claim based upon that abuse.⁸⁹ Accordingly, the court held that based solely on the delayed discovery statute, absent anything else, Katie's claims would be timely, whereas Jeannette's claims would be barred.⁹⁰ *Bertram* also held that memory repression in the case of childhood sexual abuse tolls the statute of limitations until the victim remembers the abuse.⁹¹ As a result, the court remanded the case for "the determination of whether . . . Katie and Jeannette suffered from memory repression."⁹²

Subsequent to *Bertram*, the court of appeals decided *Brett v.*

82. *Id.* at 18-19.

83. *Id.* at 18.

84. *Id.* The court concluded that no construction of the delayed discovery statute in the current case without adding the year addition of the infancy statute would allow the plaintiff's claim to stand. *Id.* The court then concluded that the plaintiff's cause of action was barred on his twenty-fourth birthday, more than a month before he commenced his suit. *Id.*

85. *Id.*

86. 597 N.W.2d at 309-16.

87. *Id.* at 311. One of the sisters alleged that she became pregnant twice and twice her uncle, a doctor, aborted the pregnancies. *Id.*

88. *Id.* at 314.

89. *Id.* at 313-14. Judge Foley dissented and argued that the reference in the delayed discovery statute to the disability statute only gives a survivor of sexual abuse until age nineteen to bring a claim. *Id.* at 314-16.

90. *Id.* at 314.

91. *Id.* at 312.

92. *Id.* at 314.

Watts.⁹³ In *Brett*, Melissa Brett suffered injuries from being hit in the head by a softball. Melissa's doctor sexually abused her from the time she was sixteen years old until she was twenty-one.⁹⁴ Under the guise of examination and treatment, the doctor made Melissa close her eyes and jump up and down on one leg, while only wearing her underwear, ran a pinwheel over the woman's legs and breasts, touched her breasts, and stayed in the room while she was undressing and dressing.⁹⁵ The abusive nature of the conduct was unbeknownst to Melissa until she discovered that the doctor was doing similar things to other women.⁹⁶ Suit was commenced after Melissa turned twenty-four years old.⁹⁷ The court did not even address the issue of whether Melissa's claims were barred by the six-year delayed discovery statute of limitations and allowed her claim to proceed on the merits.⁹⁸ It is unclear whether the court applied the *Bugge* standard, or instead determined that the statute of limitations did not begin to run until Melissa knew that she had been abused.⁹⁹

The court of appeals again reviewed the delayed discovery statute a year after *Brett* in *Doe 28B v. Archdiocese of St. Paul & Minneapolis*.¹⁰⁰ *Doe 28B* involved two men, John Doe 28B and John Doe 28A, who alleged that they had been abused as boys by two clergymen, one being Father Ronan Liles.¹⁰¹ The record showed John Doe 28A first recognized and started having nightmares about the abuse in 1991.¹⁰² He also stated that as time went on the nightmares became more detailed and at one point the face of Father Liles came into his nightmare.¹⁰³ The record also showed that John Doe 28B wrote a letter to Father Liles in 1994 that stated he was having bad dreams for years, lied to his wife about the dreams, and tried to forget about the abuse.¹⁰⁴

The court concluded that the plaintiffs "were always seriously

93. 601 N.W.2d 199, 199-204 (Minn. Ct. App. 1999).

94. *Id.* at 200.

95. *Id.* at 200-01.

96. *Id.* at 201.

97. *Id.* at 200.

98. *See id.* at 199-200. It is also possible that this defense was never raised and therefore was not before the court of appeals.

99. *See id.*

100. No. C9-99-2164, 2000 WL 781362, at *1-4 (Minn. Ct. App. June 20, 2000).

101. *Id.* at *1.

102. *Id.* at *2.

103. *Id.*

104. *Id.* at *3.

troubled about the contact and had more than a vague sense of shame.”¹⁰⁵ In regard to John Doe 28A, the court concluded that after the abuse, he (plaintiff) “felt that Father Liles had breached their friendship and trust.”¹⁰⁶ As further evidence, the court stated that John Doe 28A “was upset, embarrassed and ashamed of the sexual encounters.”¹⁰⁷

The court relied on *Blackowiak* for the rule that “one is injured if one is sexually abused.”¹⁰⁸ Accordingly, the court held that the plaintiffs’ claims were barred by the statute of limitations because they “knew or should have known that their injuries were caused by sexual abuse six years prior to commencing litigation in 1997.”¹⁰⁹

The court’s reliance on the fact that John Doe 28A felt guilt and shame at the time of the abuse as evidence that he knew he was abused was misplaced. Guilt and shame are two of the very emotions that the legislature recognized were experienced by childhood abuse victims and that it was these emotions that made it extremely difficult for victims to discover the connection between the childhood sexual abuse and their resulting injuries.¹¹⁰ Nonetheless, the court virtually disregarded the delayed discovery statute and determined that the very emotional difficulties that cause delayed discovery for abuse victims—difficulties that led to the statute being enacted in the first place—somehow trigger the immediate running of the statute.¹¹¹

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at *2 (citing *Blackowiak*, 536 N.W.2d at 3).

109. *Id.* at *3-4. The evidence relating to John Doe 28A does not follow the standard cited by the court that the evidence must be “review[ed] in the light most favorable to the party against whom judgment was granted.” *Id.* at *2 (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)). Viewing the evidence in the light most favorable to John Doe 28A would lead to the conclusion that he did not begin to recognize the abuse until 1991, and did not even put a face to who abused him until sometime after 1991. *John Doe 28B*, 2000 WL 781362, at *2. Whether or not the court believes these facts are true does not bear on the summary judgment motion. See *Blackowiak*, 546 N.W.2d at 3 (stating that the issue of when the statute of limitations is triggered is generally a fact issue for the jury unless there is overwhelming evidence). These facts are sufficient to raise a fact question for the jury as to when John Doe 28A first realized that he was abused. *Gron Dahl v. Bulluck*, 318 N.W.2d 240, 243 (Minn. 1982) (stating that “[w]here there are disputed questions of material fact as to whether a plaintiff is barred by a statute of limitation, these questions are to be decided by a jury”).

110. See *Bugge*, 573 N.W.2d at 680 n.5 (generally citing Hearing on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm. (Feb. 17, 1989)).

111. See *John Doe 28B*, 2000 WL 781362, at *4.

As evidenced by these four cases, there was still much confusion in the application of the Minnesota delayed discovery statute after *Blackowiak* and *Bugge*. Specifically, under *Blackowiak*, it remained unclear whether a minor plaintiff could trigger the statute of limitations before he or she reached the age of majority.¹¹² Also, if the statute of limitations did not begin to run until majority, it was unclear whether the plaintiff had until age twenty-four or twenty-five to bring a claim.¹¹³ Finally, it was unclear whether the *Blackowiak* court and its progeny effectively had read the causation and personal injury elements out of the delayed discovery statute.¹¹⁴

V. D.M.S. v. BARBER

A. Facts

D.M.S. was born on September 10, 1979.¹¹⁵ In August or September 1992, D.M.S. was placed in the home of Kennedy Barber, a foster parent, by the Professional Association of Treatment Homes (PATH).¹¹⁶ Barber was licensed as a foster-care provider in October 1990 at the recommendation of PATH.¹¹⁷ Thereafter, PATH was responsible for supervising and evaluating Barber and making recommendations whether to grant or revoke his foster-care license.¹¹⁸ On February 22, 1993, D.M.S. reported to a social worker that Barber was acting suspiciously toward him and other children.¹¹⁹ D.M.S. was removed from the Barber home that day.¹²⁰ Later, D.M.S. alleged that Barber had repeatedly sexually abused him during the five months that he was in Barber's care.¹²¹

112. See *Gibbons v. Krowech*, No. C4-95-2435, 1996 WL 422513, at *2 (Minn. Ct. App. July 30, 1996) (citing *Blackowiak*).

113. Compare *Bugge*, 573 N.W.2d at 681-82, and *Bertram*, 597 N.W.2d at 313-14, with *J.J.*, 578 N.W.2d at 21.

114. See *Bugge*, 573 N.W.2d at 681-82; *Blackowiak*, 546 N.W.2d at 3.

115. *D.M.S.*, 645 N.W.2d at 385.

116. *Id.* PATH is a non-profit private agency licensed in Minnesota to provide foster home placement for children unable to remain in their current living situation. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* At least three other persons have pursued legal actions against Barber and PATH for sexual abuse. *D.M.S. v. Barber*, 627 N.W.2d 369, 371 (Minn. Ct. App. 2001).

120. *Id.*

121. *D.M.S.*, 645 N.W.2d at 386.

Specifically, D.M.S. alleged that Barber gave him uncomfortably long hugs shortly after he arrived at Barber's home and these uncomfortable hugs led to kissing, fondling, and eventually oral sex.¹²² D.M.S. stated that initially he felt like he was in a "daze" and "didn't understand it [the abuse]."¹²³ Over time he felt "used," "like a piece of meat or something" and often had a sick feeling in his stomach and "just felt bad."¹²⁴

On June 8, 1999, D.M.S. served PATH with a summons and complaint, alleging that PATH was liable to D.M.S. under the theories of respondeat superior, negligent hiring, negligent retention, negligent supervision, negligent failure to investigate and failure to act upon prior allegations of sexual misconduct against Barber, and negligent placement of D.M.S. in Barber's care.¹²⁵ The district court granted PATH's motion for summary judgment on the grounds that D.M.S.'s negligence-based claims were barred by the six-year statute of limitations contained in the delayed discovery statute.¹²⁶ The district court also held that the delayed discovery statute did not apply to D.M.S.'s respondeat superior claim and also that the two-year statute of limitations in Minnesota Statute Section 541.07(1) (2000) barred this claim.¹²⁷ D.M.S. appealed.¹²⁸

B. Court of Appeals' Decision

The court of appeals affirmed the district court's decision to dismiss D.M.S.'s claims based on the statute of limitations.¹²⁹ In so doing, the court reaffirmed *Blackowiak's* conclusions that "one is injured if one is sexually abused" and that "[t]he victim is immediately put on notice of the causal connection between the

122. *Id.* D.M.S. also alleged that he had two additional sexual encounters with Barber after he was removed from Barber's home. *Id.* at 386 n.1. The additional abuse allegedly occurred once in Barber's car and once in Barber's home, which was still a PATH foster home at the time. *D.M.S.*, 627 N.W.2d at 371. Both the district court and the court of appeals held that PATH had no duty to protect D.M.S. after he left PATH's care on February 22, 1993. *D.M.S.*, 645 N.W.2d at 386 n.1. The issue was not raised on appeal. *Id.*

123. *Id.* (citing D.M.S.'s deposition).

124. *Id.* (citing D.M.S.'s deposition).

125. *Id.* D.M.S. also named Barber in the complaint as well, but the claims against Barber were not before the court on appeal. *Id.*

126. *Id.*

127. *Id.*; see MINN. STAT. § 541.07(1) (2002).

128. *D.M.S.*, 627 N.W.2d at 371.

129. *Id.*

abuse and the injury so that the statute of limitations begins to run once the victim is abused.”¹³⁰ The court stated that the *D.M.S.* situation was “almost identical” to the situation in *J.J. v. Luckow*.¹³¹ The *J.J.* court held that the plaintiff’s action was barred because he failed to bring his claim within six years of the time at which he realized that the perpetrator’s conduct was improper.¹³²

As in *J.J.*, the court of appeals found that D.M.S. knew of the abuse outside of the six-year statutory period.¹³³ Accordingly, the court held that the statute of limitations for D.M.S.’s claims began to run when he became aware of the abuse, at age thirteen.¹³⁴ The court of appeals also concluded that D.M.S.’s claim of respondeat superior was barred by a two-year statute of limitations.¹³⁵ Here, the court concluded that the statute of limitations for a claim of respondeat superior is the same as the statute of limitations for the underlying tort upon which the claim is based.¹³⁶ In the case of sexual abuse, the court determined that the underlying tort was an intentional tort and therefore the statute of limitations for a claim of respondeat superior, here, was the same as it is for an intentional tort: two-years.¹³⁷

C. The Minnesota Supreme Court’s Reversal of the Court of Appeals

The Minnesota Supreme Court reversed the court of appeals and held that D.M.S.’s claims against PATH were timely under the delayed discovery statute.¹³⁸ D.M.S. brought his action against PATH when he was nineteen years old.¹³⁹ PATH argued that because D.M.S. reported the abuse when he was thirteen, D.M.S. necessarily knew at that point that he had been sexually abused.¹⁴⁰ Applying *Blackowiak*, PATH asserted that the statute of limitations

130. *Id.* at 373.

131. *Id.*

132. *J.J.*, 578 N.W.2d at 20.

133. *D.M.S.*, 627 N.W.2d at 374.

134. *Id.* The court of appeals affirmed the trial court’s decision that the statute of limitations began to run for D.M.S.’s negligence claims on February 22, 1993, the day on which D.M.S. reported the abuse to a social worker. *Id.* at 373-74.

135. *Id.* at 374. The court based its decision on the conclusion that the claim was based on an intentional tort, even though the court acknowledged that the pertinent statute of limitations is the one attached to the underlying claim. *Id.*

136. *Id.*

137. *Id.*

138. *D.M.S.*, 645 N.W.2d at 389-91.

139. *Id.* at 390.

140. *Id.* at 387.

on D.M.S.'s claims began to run when he was thirteen and were time barred on D.M.S.'s nineteenth birthday.¹⁴¹ The Minnesota Supreme Court, however, concluded that "reading the delayed discovery statute in this way would defeat its purpose and render the statute meaningless for children."¹⁴² The court held that

[a]s a matter of law, a reasonable child is incapable of knowing that he or she has been sexually abused and, absent some other disability that serves to delay the running of the statute of limitations, the six-year period of limitation under the delayed discovery statute begins to run when the victim reaches the age of majority.¹⁴³

In addition, the court held that the delayed discovery statute also applied to the respondeat superior claim, because it was based on the case of sexual abuse, which was governed by the delayed discovery statute.¹⁴⁴

In reaching this conclusion, the court extensively discussed its decisions in *Bugge* and *Blackowiak*.¹⁴⁵ The court reaffirmed *Blackowiak's* holding that "as a matter of law one is 'injured' if one is sexually abused" and that the "ultimate question" posed by the delayed discovery statute is "the time at which the complainant knew or should have known that he/she was sexually abused."¹⁴⁶ *D.M.S.* also reaffirmed *Bugge's* holding that "this question is answered by the application of the objective, reasonable person standard."¹⁴⁷ The court, however, recognized that it had improperly applied the delayed discovery statute in *Bugge*.¹⁴⁸ The court held that the delayed discovery statute begins to run at age eighteen, when the disability ends, not at age nineteen as the *Bugge* court concluded.¹⁴⁹

Justices Stringer and Anderson both dissented, arguing for a strict statutory interpretation of the delayed discovery statute.¹⁵⁰ They reasoned that because the delayed discovery statute explicitly

141. *Id.*

142. *Id.* at 390.

143. *Id.*

144. *Id.* at 391.

145. *Id.* at 387-93.

146. *Id.* at 387 (citing *Blackowiak*, 546 N.W.2d at 3).

147. *Id.* (citing *Bugge*, 573 N.W.2d at 681).

148. *Id.* at 389 n.5. In *Bugge*, the court concluded that based on MINN. STAT. § 541.073 (2000) and MINN. STAT. § 541.15(a) (2000), plaintiff had six years from the date of her nineteenth birthday to commence her action. 573 N.W.2d at 682.

149. *Id.*

150. *Id.* at 391-93.

states that Minnesota Statutes section 541.15 (a) is unaffected by the delayed discovery statute,¹⁵¹ D.M.S.'s claims were barred on his nineteenth birthday.¹⁵²

D. Analysis of the D.M.S. Decision

The court in *D.M.S.* had the opportunity to follow the delayed discovery statute's clear language to establish the correct standard for courts to apply when deciding a statute of limitations issue in a case of childhood sexual abuse and to thereby overrule its previous erroneous *Blackowiak* and *Bugge* decisions. Instead, the court attempted to clarify that under the *Blackowiak* rule as a matter of law a child is unable to recognize that he or she was abused.¹⁵³ This "clarification" strays even further from the language of the delayed discovery statute. Moreover, the court's affirmation of *Blackowiak* effectively bars an opportunity at justice for many survivors who are over the age of twenty-four.¹⁵⁴ The court's misguided analysis in *Blackowiak* allows child abusers and those responsible for putting child abusers in positions of authority to continue to hide behind the statute of limitations when the clear language of the delayed discovery statute demands that victims be given an opportunity to show that they were unable to discover 1) the sexual abuse, 2) the resulting injury, and 3) that the injury was caused by the sexual abuse.¹⁵⁵

1. Narrow Holding Based On D.M.S. Facts

The narrow holding of *D.M.S.*, that a survivor of childhood sexual abuse has until at least age twenty-four to bring a claim, at the very least, does not use the erroneous *Blackowiak* standard to penalize survivors of sexual abuse who are under the age of twenty-four.¹⁵⁶ Because *Blackowiak* held that one is injured if one is sexually abused, survivors of childhood abuse who were under the age of twenty-four were in danger of a court examining the facts and determining that the child knew that he or she was abused

151. MINN. STAT. § 541.073(2) (d).

152. *D.M.S.*, 645 N.W.2d at 391-93 (stating that the language of MINN. STAT. § 541.15(a) (2000) clearly states that in no case should the statute be tolled past the plaintiff's nineteenth birthday where the disability of minority is alleged).

153. *Id.* at 390.

154. *See id.* at 387.

155. *Id.*

156. *See D.M.S.*, 645 N.W.2d at 390.

before he or she turned the age of majority.¹⁵⁷ Under this reasoning, the court of appeals in *D.M.S.* held that the statute of limitations began to run on D.M.S.'s claims when he was only thirteen years old because D.M.S., at that age, reported the abuse to a counselor and therefore knew he was abused.¹⁵⁸ The supreme court, however, held that "as a matter of law, a reasonable child is incapable of knowing that he or she has been sexually abused."¹⁵⁹ This holding may have resulted from a judicial recognition that under the harsh *Blackowiak* standard the delayed discovery statute would be almost meaningless for children.¹⁶⁰ This band-aid approach, while beneficial to a small class of victims, continues to ignore the root of the problem—the erroneous *Blackowiak* decision itself.

Although the *D.M.S.* narrow holding prevents certain survivors from being barred by the *Blackowiak* rule, like *Blackowiak* it is not legally defensible.¹⁶¹ The delayed discovery statute does not either expressly or impliedly state that the statute of limitations cannot begin to run before the victim reaches the age of majority.¹⁶² Rather, the statute plainly states that the statute of limitations should begin to run when the "plaintiff knows or has reason to know that his or her personal injury was caused by sexual abuse."¹⁶³ In some cases this discovery could be at the time of the abuse. In most cases, however, it is much later. Regardless, the statute should be applied as it was written and intended.¹⁶⁴

2. Broad Holding Based Upon *Blackowiak* Standard

The tragic part of the *D.M.S.* decision is the broad holding, in which the court reaffirmed its erroneous statutory construction in *Blackowiak*.¹⁶⁵ The *D.M.S.* court stated that in *Blackowiak*, "[w]e observed that 'as a matter of law one is 'injured' if one is sexually

157. See *D.M.S.*, 627 N.W.2d at 374; *Gibbons v. Krowech*, 1996 WL 422513, at *2.

158. *D.M.S.*, 627 N.W.2d at 374.

159. *D.M.S.*, 645 N.W.2d at 390.

160. See *id.*

161. Compare *D.M.S.*, 645 N.W.2d at 390, with MINN. STAT. § 541.073 subd. 2(a) (2002).

162. See § 541.073.

163. *Id.*

164. See *Am. Tower, L.P., v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001); *Duluth Fireman's Relief Ass'n v. City of Duluth*, 361 N.W.2d 381, 385 (Minn. 1985).

165. *D.M.S.*, 645 N.W.2d at 389.

abused,' and stated that the 'ultimate question' posed by the delayed discovery statute is the 'time at which the complainant knew or should have known that he/she was sexually abused.'¹⁶⁶

This insistence on affirming *Blackowiak* is problematic for numerous reasons. First, *Blackowiak* relied on *Fireman's Fund*,¹⁶⁷ a vastly different case.¹⁶⁸ The *Fireman's Fund* situation appears similar to that in *Blackowiak* because both involved the sexual abuse of children.¹⁶⁹ These cases, however, examined vastly different legal questions. The *Fireman's Fund* court solely examined whether a sexual molester could avoid the intentional acts exclusion in a liability insurance policy and thus receive coverage for the damages resulting from his sexual abuse.¹⁷⁰ That decision did not examine the injury that the victim suffered, the time at which the victim realized that he was abused, the time at which the victim discovered that his injuries were caused by the childhood sexual abuse, or any other issue pertinent to the delayed discovery statute.¹⁷¹ On the other hand, the issue before the *Blackowiak* court was the time at which the victim, not the perpetrator, realized that the injury was caused by the childhood sexual abuse.¹⁷² The delayed discovery statute does not involve any inquiry into the perpetrator's intent to injure.¹⁷³

The second problem with the *Blackowiak* standard is that it clearly does not comport with the unambiguous language of the delayed discovery statute.¹⁷⁴ The issue under the delayed discovery statute is not when the victim was abused or even when the victim was injured. Rather, the issue is when the plaintiff ***knew or had reason to know*** that he or she was 1) sexually abused, 2) personally injured, and 3) that the injury was caused by the sexual abuse.¹⁷⁵ The majority in *Blackowiak*, and subsequently in *Bugge* and *D.M.S.*, at a minimum disregarded the first and third elements of the delayed discovery statute, personal injury and causation, narrowing the statute such that the only requirement is knowledge of the sexual

166. *Id.* at 387.

167. *Fireman's Fund Ins. Co. v. Hill*, 314 N.W.2d 834, 834-835 (Minn. 1982).

168. *See Blackowiak*, 546 N.W.2d at 3.

169. *See id.* at 2; *Fireman's Fund*, 314 N.W.2d at 834.

170. *Fireman's Fund*, 314 N.W.2d at 834-35.

171. *Id.*

172. *Blackowiak*, 546 N.W.2d at 2-3.

173. *See* MINN. STAT. § 541.073 (2002).

174. *Compare* MINN. STAT. § 541.073 subd. 2(a), *with Blackowiak*, 546 N.W.2d at 3.

175. *See Blackowiak*, 546 N.W.2d at 4 (Gardebring, J., dissenting).

abuse.¹⁷⁶

However, as Justice Gardebring noted, “[k]nowledge that sexual abuse occurred or even knowledge of the other prerequisite, personal injury . . . is not central; it is the link between them, the causation, one of the other, which must be considered in order to determine whether a lawsuit is within the limitations period.”¹⁷⁷ In *D.M.S.*, however, the court cited *Blackowiak* for the ultimate inquiry regarding the statute of limitations under the delayed discovery statute: when is “the time at which the complainant knew or should have known that he/she was sexually abused.”¹⁷⁸ This standard makes no inquiry whatsoever into either the explicit causation element or the explicit knowledge of personal injury element of the delayed discovery statute.¹⁷⁹

The Minnesota Legislature explicitly mandated that “when words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded.”¹⁸⁰ Further, the Minnesota Supreme Court itself has long declared that “a statute is to be construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant.”¹⁸¹ The *Blackowiak* court, and by extension the *Bugge* and *D.M.S.* courts, did not follow either the legislature’s clear canons of statutory construction or even its own precedent that every word in a statute should be given meaning in interpretation.¹⁸² Rather, the court took on the role of legislator by judicially amending the clear language of the delayed discovery statute from “knew or had reason to know that the injury was caused by the sexual abuse” to “knew or should have known that he/she was sexually abused.”¹⁸³

The third reason that the *Blackowiak* standard is problematic is that it is built on the assumption that “concepts of sexual abuse and injury within the meaning of the [delayed discovery] statute are

176. See *Blackowiak*, 546 N.W.2d at 3 (holding that “while the manifestation and form of the injury is significant to the victim, it is simply not relevant to the ultimate question of the time at which the complainant knew or should have known that he/she was sexually abused”); *Bugge*, 573 N.W.2d at 681-82 (citing *Blackowiak*); *D.M.S.*, 645 N.W.2d at 387 (citing *Blackowiak*).

177. *Blackowiak*, 546 N.W.2d at 4.

178. *D.M.S.*, 645 N.W.2d at 387 (citing *Blackowiak*, 546 N.W.2d at 3).

179. See *id.*

180. MINN. STAT. § 645.16 (2001).

181. *Duluth Fireman’s*, 361 N.W.2d at 385.

182. *Blackowiak*, 546 N.W.2d at 3.

183. Compare *Blackowiak*, 546 N.W.2d at 3, with MINN. STAT. § 541.073 subd. 2.

essentially one and the same, not separable.”¹⁸⁴ Although it is a reasonable assertion that on some level every victim of sexual abuse is injured at some point,¹⁸⁵ the sexual abuse and the injury are still separable.¹⁸⁶ The abuse occurs at specific times, locations, and in a certain manner. However, the injury can take on vastly different forms and can manifest itself at different times throughout the victim’s life. Often, these victims will not even know until years later that the injury they are experiencing is related to the sexual abuse they suffered years before.¹⁸⁷

This assumption of the injury and the sexual abuse being non-separable also implies that all victims are immediately injured [for purposes of the delayed discovery statute].¹⁸⁸ This inference is not reasonable for two reasons. First, the legislative intent behind the delayed discovery statute clearly recognized that “repressed memory, denial, shame, and other similar factors may prevent sexual abuse victims from coming forward with actions against their alleged abusers in a timely fashion.”¹⁸⁹ This intent clearly recognizes that the injury is not immediate. Second, the inference is not reasonable in light of the reality that victims of childhood sexual abuse often do not experience the injury until years later or more often are not able to associate the injury with its cause, the childhood sexual abuse, until years later.¹⁹⁰

The fourth reason the *D.M.S.* court’s approval of *Blackowiak* is problematic is because it violates the spirit behind the delayed discovery statute. The legislature created the delayed discovery

184. See *Blackowiak*, 546 N.W.2d at 3.

185. See REINERT, *supra* note 11, at 36-37, 52; see also MUFSON ET AL., *supra* note 20, at 75 (listing various effects of sexual abuse); REIN, *supra* note 6, at 71-72 (discussing various studies which examined effects of childhood sexual abuse); KRITSBERG, *supra* note 22, at 56-57 (listing secondary effects of sexual abuse).

186. See *Shirley v. Reif*, 920 P.2d 405, 413-14 (Kan. 1996) (holding that knowledge of sexual abuse alone is not enough without discovery that the abuse was the cause of the victim’s injuries).

187. See HYDE & FORSYTH, *supra* note 8, at 47 (noting that often times victims of childhood sexual abuse do not manifest any injury until later in adulthood); see also HUNTER, *supra* note 12, at 59.

188. See *D.M.S.*, 645 N.W.2d at 389 (stating that in *Blackowiak* “we said nothing more than . . . the victim is immediately put on notice of the causal connection between the abuse and the injury”).

189. See *Bugge*, 573 N.W.2d at 680 n.5 (generally citing Hearing on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm. (Feb. 17, 1989)).

190. See generally HYDE & FORSYTH, *supra* note 8, at 47 (stating that “[s]ometimes there are no symptoms [of childhood sexual abuse] until later in life”); see also HUNTER, *supra* note 12, at 59.

statute in recognition that victims of sexual abuse should be given a unique statute of limitations that would allow for recovery years after the abuse occurred.¹⁹¹ The “purpose of the original bill was to amend the statute of limitations for sexual abuse cases so that it would begin to run (1) when the abuse was committed, or (2) at the time the victim knew or had reason to know he or she was injured by the sexual abuse.”¹⁹² Tragically, the *Blackowiak* standard only supports the first portion of the legislature’s purpose and does not allow the victim the benefit of the clear statutory mandate that the statute of limitations only begins to run when the victim had reason to know that the abuse caused the injury.¹⁹³ Had the legislature intended the statute of limitations to run when the abuse occurred there would have been no reason to include the second purpose and virtually no reason to enact the statute at all.

D.M.S.’s approval of *Blackowiak* is also problematic because *Blackowiak* has consistently been cited as support to begin the statute of limitations whenever the victim feels shame and guilt about the abuse.¹⁹⁴ However, as Justice Gardebring pointed out, “[s]hame is not the same as knowledge that sexual abuse caused injury.”¹⁹⁵ The very nature of childhood sexual abuse makes survivors feel shameful and confused about what happened to them.¹⁹⁶ Shame and guilt are feelings of personal fault, not victimization. These feelings cause victims to not understand that they have been abused, and thus fail to report the abuse. Further, these feelings generally arise at the time of the abuse itself, meaning that there almost always would be some indication that the survivor had been abused, triggering the statute of limitations

191. See MINN. STAT. § 541.073; see also *Bugge*, 573 N.W.2d at 680 n.5 (generally citing Hearing on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm. (Feb. 17, 1989) as recognition that “repressed memory, denial, shame, and other similar factors may prevent sexual abuse victims from coming forward with actions against their alleged abusers in a timely fashion”).

192. Greenwood Brown, *supra* note 39, at 421 (citing Tape of Legislative Proceedings, Criminal Justice Div. of the House Judiciary Comm. of the Minn. House of Representatives, H.F. No. 461 (Feb. 28, 1989)).

193. See *Blackowiak*, 546 N.W.2d at 3.

194. See *J.J. v. Luckow*, 578 N.W.2d 17, 19 (Minn. Ct. App. 1998); see also *Doe 28B v. Archdiocese of St. Paul and Minneapolis*, No. C9-99-2164, 2000 WL 781362, at *3-4 (Minn. Ct. App. June 20, 2000); *Gibbons v. Krowech*, No. C4-95-2435, 1996 WL 422513, at *2 (Minn. Ct. App. July 30, 1996).

195. *Blackowiak*, 546 N.W.2d at 4.

196. See *Ross v. Garabedian*, 742 N.E.2d 1046, 1050 (Mass. 2001) (holding that knowledge of wrongfulness and the feeling of shame were not sufficient to trigger the delayed discovery statute).

under *Blackowiak*.¹⁹⁷ Additionally, the coping mechanisms that many of these survivors implement to combat the feelings of shame and guilt and the many other effects of childhood sexual abuse are the very mechanisms which prevent the survivors from being able to realize the cause of their injuries.¹⁹⁸ Survivors often deny that the abuse ever happened, are unable to connect the source of their injuries to the abuse, repress the abuse, or simply do not allow themselves to feel the painful psychological effects of the abuse.¹⁹⁹ Often, it is not until years later that many survivors are able to stabilize their lives and uncover the effects of their childhood sexual abuse through the painful process of breaking their coping mechanisms.²⁰⁰ None of these realities are recognized in *Blackowiak*.²⁰¹ Essentially, the *Blackowiak* standard takes some of the very reasons that the legislature enacted the delayed discovery statute—survivors often deny that they were abused and feel shameful—to trigger the statute of limitations.²⁰²

197. See HANCOCK & MAINS, *supra* note 14, at 32 (recognizing that the theme of guilt shows up often in survivors' lives and is often carried with the survivors).

198. See KRITSBERG, *supra* note 22, at 48, 56-57 (describing the coping mechanisms employed by many survivors of childhood sexual abuse and how these mechanisms affect the survivors' lives).

199. See *Hearndon v. Graham*, 767 So.2d 1179, 1183 (Fla. 2000) (recognizing that many victims of sexual abuse "develop amnesia because of the horrible nature of the abuse"); *Hollmann v. Corcoran*, 949 P.2d 386, 392 (Wash. Ct. App. 1997) (stating that the Washington Legislature explicitly enacted the delayed discovery statute in recognition of possible memory repression, sexual abuse victims' difficulty in understanding the causal connection between the abuse and the injury, and the fact that victims will often suffer more serious injuries many years after the first recognition of the causal connection).

200. See generally HYDE & FORSYTH, *supra* note 8, at 47 (stating that "[s]ometimes there are no symptoms [of childhood sexual abuse] until later in life").

201. A common argument for a harsh standard is that without it there would be a "flood of litigation." See, e.g., *S.E. v. Shattuck-St. Mary's School*, 533 N.W.2d 628, 632 (Minn. Ct. App. 1995) (concluding that "to avoid a flood of claims there must be a reasonable and definitive standard" for claims of childhood sexual abuse under the delayed discovery statute). Even if there were additional claims this policy is weak because "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds." W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56 (5th ed. 1984) (basing statement on potential flood of emotional distress claims).

202. See *Blackowiak*, 546 N.W.2d at 3; *Greenwood Brown*, *supra* note 39, at 421 (citing Tape of Legislative Proceedings, Criminal Justice Div. of the House Judiciary Comm. of the Minn. House of Representatives, H.F. No. 461 (Feb. 28, 1989)).

E. Effects of the D.M.S. Decision

1. Survivors Under Age Twenty-Four

The main effect of the *D.M.S.* decision is that there is now no question that, under the current Minnesota law, survivors of childhood sexual abuse have until at least age twenty-four to bring a claim based upon that abuse.²⁰³

2. Survivors Over Twenty-Four

The *D.M.S.* court was not confronted with the situation where the plaintiff was over twenty-four years of age.²⁰⁴ However, the court does approvingly cite *Blackowiak's* rewriting of the statute for the proposition that the delayed discovery statute begins to run when the victim knows or reasonably should have known that he or she was abused.²⁰⁵ Under this interpretation, victims of childhood sexual abuse who are over age twenty-four have little chance of prevailing over the statute of limitations in order to get to the merits of their claim unless he/she can prove some mental disability that prevented recognition of the abuse.²⁰⁶ A mental disability that would apparently suffice is memory repression.²⁰⁷ Another theory that should overcome the *Blackowiak* rule is the victim's delayed discovery that he or she was a victim and that what occurred was the perpetrator's or entity's fault and not the victim's fault.²⁰⁸

203. *D.M.S.*, 645 N.W.2d at 390.

204. *See id.* at 383-93.

205. *See id.* at 387.

206. *See, e.g., Blackowiak*, 546 N.W.2d at 1-3; *Bugge*, 573 N.W.2d at 677-82.

207. *See D.M.S.*, 645 N.W.2d at 389. *D.M.S.* did not affect the Minnesota common law rule that memory repression is a mental disability that tolls the statute of limitations. *See Bugge*, 573 N.W.2d at 681 (stating that memory repression would toll the statute of limitations); *Bertram*, 597 N.W.2d at 312-14 (remanding case for determination of whether the plaintiffs suffered from repressed memory syndrome). The *D.M.S.* court did not explicitly discuss the issue of memory repression, but the court did cite *Bugge* for the proposition that "the statute of limitations begins to run once a victim is abused unless there is some legal disability, such as the victim's age, or mental disability, such as repressed memory of the abuse." *D.M.S.*, 645 N.W.2d at 389. This clearly states that the court would recognize memory repression as a mental disability that would toll the statute of limitations. *See id.*

208. *See id.; Blackowiak*, 546 N.W.2d at 3. Because the court erroneously focuses on the victim's personal feelings of fault—shame and guilt—it is unlikely that the court would recognize these feelings are actually signs that should serve to

3. *Entities' Negligence and Fraudulent Concealment When Survivor Had No Previous Knowledge*

a. *Negligence*

Even though many victims of clergy abuse did not know until recently that church officials often had knowledge of certain perpetrators' dangerous propensities toward children before the victims were abused, the delayed discovery statute continues to bar many meritorious claims.²⁰⁹ The statute states that it applies to actions against "a person who . . . negligently permit[s] sexual abuse against the plaintiff to occur."²¹⁰ This part of the delayed discovery statute combined with the judicially-made *Blackowiak* rule means that as soon as a victim of sexual abuse had reason to know that he or she was abused, the victim somehow should also have known that church officials were responsible.²¹¹ However, it is unreasonable to put victims on such notice. As unthinkable as it was until recently that a significant number of priests abused children, it was even more unfathomable that church leaders knowingly moved the dangerous priests around and allowed them to have further opportunities to abuse children. It is absurd to charge survivors, when they do discover that they were abused, with the knowledge that an entity, such as the church, was negligent when almost no one in our society would have believed or would have had reason to believe that certain church officials were responsible prior to six months ago.²¹²

b. *Fraudulent Concealment*

A claim of fraudulent concealment should toll the delayed discovery statute. The only purpose of fraudulent concealment is

toll the *Blackowiak* rule because the victim has not truly realized that he or she was abused.

209. See MINN. STAT. § 541.073 (3) (2002).

210. *Id.*

211. See *id.*; *Blackowiak*, 546 N.W.2d at 3.

212. It is arguable that if a victim knew all three elements of the delayed discovery statute (injury, abuse, and causation), that he or she could have sued based on the employment of the perpetrator (*respondeat superior*) and found out through discovery what the church officials knew. However, this argument places too great of a burden on a victim, most of whom did not think any higher ranking church officials were at fault and would thus not have been inclined to sue the church officials.

to prevent a victim from realizing either that they have been injured or who caused that injury. Although the fraudulent concealment did not cause the injury (though it may aggravate the injury) because the abuse had already occurred, it is an intentional effort to prevent a victim from realizing that an entity was a cause of the injury. Those responsible for the concealment should not then be allowed to hide behind a statute of limitations after their active concealment made it practically impossible for a victim to seek justice against this entity before the statute of limitations ran. This is the very reason that the Minnesota Supreme Court applied the rule in the first place.²¹³ The court concluded:

[O]ne who cannot assert his right because the necessary knowledge is improperly kept from him is not within the mischief the statute was intended to remedy; but is within the spirit of the law that restrains its operation. . . . Fraud is bad, it should not be permitted to go unchecked anywhere,²¹⁴ and justice should always be able to penetrate its armor.²¹⁴

The Minnesota Supreme Court has apparently not addressed the specific issues of whether the delayed discovery statute of limitations applies to a claim of fraudulent concealment or what, if any, statute of limitations does apply to these claims.²¹⁵ The court did, however, deal with fraudulent concealment in a similar situation in *Wild v. Rarig*.²¹⁶ Here, the plaintiff alleged that he did not know that defamatory material had been published about him because of fraudulent concealment.²¹⁷ The court held that fraudulent concealment would toll the statute of limitations.²¹⁸ The court indicated that although there “is no categorical definition of what constitutes fraudulent concealment,” the doctrine generally would apply where there is a concealment that is fraudulent or intentional and a fiduciary relationship exists between the parties.²¹⁹ In the cases now coming to light, we know that not all of

213. *Schmucking v. Mayo*, 183 Minn. 37, 40, 235 N.W. 633, 634 (1931).

214. *Id.* at 40-41, 235 N.W. at 634.

215. *See D.M.S. v. Barber*, 645 N.W.2d 383, 383-93 (Minn. 2002); *W.J.L. v. Bugge*, 573 N.W.2d 677, 677-84 (Minn. 1998); *Blackowiak*, 546 N.W.2d at 1-5.

216. 302 Minn. 419, 450, 234 N.W.2d 775, 795 (Minn. 1975) (holding that there was a fact question about whether the defendant fraudulently concealed a defamatory publication and concluding that fraudulent concealment would toll the statute of limitations).

217. *Id.* at 448, 234 N.W.2d at 793.

218. *Id.* at 450, 234 N.W.2d at 795.

219. *See id.* (citing 54 C.J.S. Limitations of Actions § 206f, for the proposition

the concealment of the church officials' knowledge was due to simple negligence. More often the church officials made a concerted effort to conceal that they had any idea that a specific priest or brother was dangerous prior to the abuse. The relationship between church priests and parishioners of the church is "as clearly fiduciary as any relationship between two individuals in our society. To hold otherwise would deny the morality and the purpose of religious institutions."²²⁰

VI. OTHER STATES' TREATMENT OF CIVIL CLAIMS FOR CHILDHOOD SEXUAL ABUSE

In addition to Minnesota,²²¹ nineteen states have enacted causation-focused delayed discovery statutes, under which the limitations period begins to run when the survivor realizes that his or her injuries were caused by childhood sexual abuse.²²² Other states have enacted non-causation delayed discovery statutes, where the limitations period starts on the discovery of an event other than causation.²²³ Some states have enacted statutes that run for a specific number of years after a plaintiff reaches the age of majority.²²⁴ Hawaii has recognized a common law delayed discovery

that fraudulent concealment consists of a concealment that is fraudulent or intentional between fiduciaries).

220. *Langford v. Roman Catholic Diocese of Brooklyn et al.*, 705 N.Y.S.2d 661, 668 (App. Div. 2000) (Miller, J., concurring and dissenting).

221. See MINN. STAT. § 541.073 (2002).

222. See ALASKA STAT. § 09.10.140 subd. b1-2 (Michie 2001); CAL. CIV. PROC. CODE § 340.1 (2002); FLA. STAT. ch. 95.11 (7) (2002); ILL. COMP. STAT. ch. 735 § 5/13-202.2 (2002); IOWA CODE § 614.8A (2002); KAN. STAT. ANN. § 60-523 (2002); MASS. GEN. LAWS ch. 260, § 4C (2002); MINN. STAT. § 541.073; MO. REV. STAT. § 537.046 (2002); MONT. CODE ANN. § 27-2-216 (2002); NEV. REV. STAT. § 11.215 (2001); N.H. REV. STAT. ANN. § 508:4 (2002); N.J. STAT. ANN. § 2A:61B-1 (2002); OR. REV. STAT. § 12.117 (2002); R.I. GEN. LAWS § 9-1-51 (2002); S.D. CODIFIED LAWS § 26-10-25 (Michie 2002); VT. STAT. ANN. tit. 12, § 522 (2002); VA. CODE ANN. § 8.01-249 (Michie 2002); WASH. REV. CODE § 4.16.340 (2002); WIS. STAT. ANN. § 893.587 (2002).

223. ARK. CODE ANN. § 16-56-130 (Michie 2001); KY. REV. STAT. ANN. § 413.249 (Banks-Baldwin 2001); N.M. STAT. ANN. § 37-1-30 (Michie 2002); S.C. CODE ANN. §§ 15-3-40, 15-3-35 (Law. Co-op. 2002) & § 15-3-535 (2002); UTAH CODE ANN. § 78-12-25.1 (2) (a)-(b) (2002); WYO. STAT. ANN. § 1-3-105 (b) (i-ii) (Michie 2002).

224. COLO. REV. STAT. § 13-80-103.7 (1) (2002); CONN. GEN. STAT. § 52-577d (2002); D.C. CODE ANN. § 12-301 & § 12-302 (2002); GA. CODE ANN. § 9-3-33.1 (b) (2002); IDAHO CODE § 6-1704 (2002); IND. CODE § 34-11-2-4, § 34-11-6-1 (2002); LA. CIV. CODE ANN. art. 3496.1 (2002); MD. CODE ANN. CTS. & JUD. PROC. § 5-201 (2002); MI. COMP. LAWS § 600.5805 (9) (2002) & § 600.5851 (1) (2002); MISS. CODE ANN. § 15-1-49 (2002) & § 15-1-59 (2002); N.Y. C.P.L.R. § 208 (McKinney

rule.²²⁵ Maine enacted a statute for survivors of sexual abuse that states that “[a]ctions based upon sexual acts toward minors may be commenced at any time.”²²⁶ Finally, there are some states that unfortunately do not treat childhood sexual abuse any different than other wrongful acts or omissions for statute of limitation purposes.²²⁷

Although the Minnesota Supreme Court effectively disregarded the explicit causation and personal knowledge of injury elements in the Minnesota delayed discovery statute in *Blackowiak, Bugge*, and *D.M.S.*, courts from other states have correctly applied a causation delayed discovery statute.²²⁸ *Werre v. David* represents a particularly insightful examination of such a statute.²²⁹ In *Werre*, the Montana Supreme Court interpreted the state’s delayed discovery statute, which states that a plaintiff must bring a claim based upon the childhood sexual abuse “3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.”²³⁰ The plaintiff alleged that her stepfather sexually abused her when she

2002); N.C. GEN. STAT. § 1-17 (a) (2002); N.D. CENT. CODE § 28-01-18 (2002) & § 28-01-25 (2002); OHIO REV. CODE ANN. § 2305.10 (2002) & § 2305.16 (2002); OKLA. STAT. tit. 12 § 95 & 12 § 96 (2002); 42 PA. CONS. STAT. § 5524 (2002) & § 5533 (2002); W. VA. CODE § 55-2-12 (2002) & § 55-2-15 (2002).

225. See *Dunlea v. Dappen*, 924 P.2d 196, 204 (Haw. 1996) (establishing delayed discovery doctrine in Hawaii).

226. ME. REV. STAT. ANN. tit. 14, § 752-C (West 2002); TENN. CODE ANN. §§ 28-1-106, 28-3-104 (2002) (allowing one year for personal injury actions and tolling until age of majority); TEX. CIV. PRAC. & REM. §§ 16.001, 16.003, 16.0045 (Vernon 2002).

227. ALA. CODE § 6-2-38 (l) (2002); DEL. CODE ANN. tit. 10 § 8119 (2001).

228. See *Dunlea*, 924 P.2d at 204 (holding that it is a fact question of whether a victim of childhood sexual abuse ascertained “her injuries and their causal link”); *Shirley v. Reif*, 920 P.2d 405, 413-14 (Kan. 1996) (holding that the jury should decide whether a victim of childhood sexual abuse’s claim is brought within three years of discovering that the plaintiff’s injuries were caused by the childhood sexual abuse); *Ross v. Garabedian*, 742 N.E.2d 1046, 1049 (Mass. 2001) (concluding in a childhood sexual abuse case that the court will not grant summary judgment when it is “unclear whether, and to what extent, a plaintiff perceived a ‘causal connection’ between a defendant’s misconduct and the plaintiff’s alleged psychological harm”); *Hollmann v. Corcoran*, 949 P.2d 386, 392 (Wash. Ct. App. 1997) (holding that “[t]he statute of limitations is tolled until the victim of childhood sexual abuse in fact discovers the causal connection between the defendant’s act and the injuries for which the claim is brought”).

229. 913 P.2d 625, 630 (Mont. 1996) (holding that where there is conflicting evidence as to the time at which a victim of childhood sexual abuse knew of the causal connection between her injuries and the sexual abuse, the decision should be left to a jury).

230. *Id.*

was approximately twelve to fourteen years old.²³¹ The court noted that there was conflicting evidence with regard to whether the plaintiff had or had not discovered the causal connection between the abuse and her injuries within three years of filing the complaint.²³² Specifically, the plaintiff testified that more than three years before she brought suit she did not tell a male therapist about the sexual abuse because she distrusted men as a result of the abuse.²³³ The plaintiff also testified that more than three years before she brought suit, when she first saw a different therapist, she made some connection between her need for counseling and her childhood sexual abuse.²³⁴ However, the court noted that the plaintiff testified she did not connect her sexual abuse with her psychological problems until within three years of commencing suit.²³⁵ Further, a doctor testified that when he saw the plaintiff within three years of commencement of the suit, the plaintiff was still in the process of connecting the harm to the sexual abuse.²³⁶ Accordingly, the court concluded that there were “substantial conflicts in the evidence regarding when [the plaintiff] discovered that her injuries were caused by the childhood sexual abuse she experienced.”²³⁷ The court held that this evidentiary conflict was a fact question for the jury and not appropriate for summary judgment.²³⁸

The *Werre* decision is an insightful model for other courts applying a delayed discovery statute for at least two reasons. First, the court correctly applied the plain language of the delayed discovery statute. The court held to the specific words that the legislature enacted: discovery “that the injury *was caused* by the act of childhood sexual abuse.”²³⁹ The court did not arbitrarily decide that some of the words in the statute were unnecessary.²⁴⁰ Second, the court did not make decisions about the merits of either party’s

231. *Id.* at 629. Specifically, the plaintiff alleged that while her mother took the other children out for ice cream, the plaintiff’s stepfather gave her “sex education,” which included sexual intercourse. *Id.* She also alleged that after the incident, her stepfather fondled her on several occasions. *Id.*

232. *Id.* at 630.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* (emphasis added).

240. *Id.*

evidence.²⁴¹ Rather, the court correctly viewed the evidence in the light most favorable to the non-moving party and recognized that genuine issues of material fact existed, which precluded summary judgment.²⁴² As a result, the court properly did not decide the case in favor of the plaintiff or defendant, but simply determined that the plaintiff had offered sufficient evidence to warrant that the case be presented to a jury.²⁴³

VII. MOVEMENT TO ALLOW SURVIVORS OF CHILDHOOD SEXUAL ABUSE AN OPPORTUNITY FOR RECOURSE

As the church sex abuse scandal continues to unfold in the media around the country, both Connecticut and California have amended their civil statutes of limitations for survivors of childhood sexual abuse. Also, Arizona, Florida, Illinois, Kentucky, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, New York, Pennsylvania and Washington all have bills under consideration that would change their statutes of limitation for claims of childhood sexual abuse.²⁴⁴ Both the Connecticut and California statutes serve as good examples for other states concerned about re-victimizing survivors of childhood sexual abuse through a harsh statute of limitations, while recognizing the unique problems that victims of childhood sexual abuse have in timely bringing their abuse to justice.

A. Connecticut

The Connecticut statute of limitation for survivors of childhood sexual abuse was amended, effective May 23, 2002, to state: "no action . . . caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than thirty years

241. *Id.*

242. *Id.*

243. *See id.*

244. S.B. 1286, 46th Leg., 1st Reg. Sess. (Ariz. 2003); H.B. 2457, 46th Leg., 1st Reg. Sess. (Ariz. 2003); H.B. 1321, 105th Leg., Reg. Sess. (Fla. 2003); S.B. 1035, 93d Gen. Assemb. (Ill. 2003); S.B. 893, 93d Gen. Assemb. (Ill. 2003); S.B. 51, Reg. Sess. (Ken. 2003); S.B. 68, 417th Gen. Assemb., Reg. Sess. (Md. 2003); H.B. 165, 417th Gen. Assemb., Reg. Sess. (Md. 2003); S.B. 575, 83d Leg., Reg. Sess. (Minn. 2003); H.B. 386, 83d Leg., Reg. Sess. (Minn. 2003); S.B. 669, 92d Gen. Assemb., Reg. Sess. (Mo. 2003); H.B. 707, 158th Gen. Ct., 1st Year (N.H. 2003); S.B. 1421, 210th Leg., Reg. Sess. (N.J. 2002); A.B. 5673, 226th Leg. (N.Y. 2003); S.B. 212, 185th Leg., Reg. Sess. (Penn. 2002); H.B. 1040, 58th Leg., 1st Reg. Sess. (Wash. 2003).

from the date such person attains the age of majority.”²⁴⁵ This means that a survivor of sexual abuse has until age forty-eight to bring an action based upon childhood sexual abuse.²⁴⁶ One objective of this statute is to “afford a plaintiff sufficient time to recall and come to terms with traumatic childhood events before he or she must take action.”²⁴⁷ The Connecticut Legislature recognized that “minor victims of sexual assault often do not understand or recognize the damage which they have sustained until a substantial number of years after they attain majority. In fact, it is not just two or three years, but can be substantially longer than that.”²⁴⁸

This statute serves two important public policies. First, it allows the survivors of sexual abuse ample time to recognize the effects of the abuse and its causal relationship, to break through the defense mechanisms that the survivor has employed to battle the effects of the abuse, and to gain the strength to take the courageous step of bringing an action against the perpetrator or entities responsible.²⁴⁹ Second, the thirty-year period provides a bright line rule for the courts to apply. Thus, courts will simply have to assess whether the plaintiff filed his or her claim before he or she reached the age of forty-eight. This promotes judicial efficiency and allows courts to focus more on the merits of the alleged claims rather than on procedural issues.

B. California

In recognition of the ongoing sexual abuse scandal involving the clergy, the California Legislature, on July 11, 2002, amended its statute of limitation for actions based upon childhood sexual abuse.²⁵⁰ The legislature responded to growing confirmations that

245. CONN. GEN. STAT. § 52-577d (2002) (amending the number of years for personal injury resulting from childhood abuse from seventeen years to thirty years).

246. *Id.*

247. *Roberts v. Caton*, 619 A.2d 844, 849 (1993) (basing statement on the prior amendment to CONN. GEN. STAT. § 52-577d, which extended the statute of limitations from seven to seventeen years).

248. *See id.* at 849 n.8 (quoting Senator Anthony V. Avallone’s commentary before the Senate regarding the proposal to amend the statute of limitations for victims of childhood sexual abuse); *see also* HUNTER, *supra* note 12, at 59.

249. *See generally Roberts*, 619 A.2d at 849 (recognizing the legislative intent behind the previous expansion of the statute of limitations for actions based upon childhood sexual abuse).

250. S.B. 1779, 2001-02 Reg. Sess. (Ca. 2002). California Rule of Civil

church leaders and officials knowingly moved priests who were suspected of molesting children to other parishes where the priests still had unrestricted access to children, some of whom were abused by those very same priests. The prior statute stated that an action against any entity for a negligent act could not be commenced after the plaintiff's twenty-sixth birthday.²⁵¹ The amendment provided that the statute of limitation would not bar a claim of personal injury by a survivor of sexual abuse, if brought within one year of January 1, 2003, against a

[p]erson or entity [who] knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment in which contact with children is an inherent part of that function or environment. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard.²⁵²

This is a major development in the area of delayed discovery for two reasons. First, it gives current survivors of childhood sexual abuse a chance for justice against an entity free of the re-victimizing constraints of a harsh statute of limitations if that entity had control over the perpetrator and knew or should have known or was otherwise on notice of the perpetrator's past unlawful sexual conduct.²⁵³ Second, the statute provides clear guidelines for courts to apply.²⁵⁴ The statute explicitly includes many different types of agency relationships and explicitly provides that counseling of the perpetrator alone is not in itself a reasonable safeguard against childhood sexual abuse.²⁵⁵ This is important because it decreases

Procedure section 340.1 previously stated that a victim of childhood sexual abuse had either eight years after reaching majority or three years after the plaintiff realized that the personal injury was caused by the childhood sexual abuse. CAL. CIV. PROC. CODE § 340.1 (2002).

251. CAL. CIV. PROC. CODE § 340.1(b)(2) (2002).

252. S.B. 1779, 2001-02 Reg. Sess. (Ca. 2002).

253. *See id.*

254. *See id.*

255. *See id.*

the possibility of judicial misinterpretation of the statute, thus making it straightforward for the courts to administer.

In passing the amendment, the legislature recognized that many of the survivors of childhood abuse by priests had no idea until recently of church officials' negligence and fraudulent concealment of the abuse and thus had no idea that they had a cause of action against these church officials. Many statutes of limitation, including the previous California rule and possibly the current Minnesota statute, effectively bar many of these negligence claims against the church, even though until the recent clergy abuse scandal became public, most of the survivors never had any idea that the church was even negligent.²⁵⁶

VIII. CONCLUSION: WHAT CAN BE DONE?

A. Courts

There are numerous things within the power of the courts that can be done to address the current child sexual abuse scandal in the church and to deter child abuse in the future. First, the courts can apply the delayed discovery rule or applicable statute correctly. This means that if the delayed discovery statute or rule of that state mandates that it is the causal connection that triggers the statute of limitation, the court should apply this standard. Specifically, for the Minnesota Supreme Court this means that it should overrule its clearly erroneous decision in *Blackowiak*. Second, courts should properly apply summary judgment standards and view evidence relating to when the survivor made the causal connection between the abuse and the injury in the light most favorable to the survivor. This would allow the fact question to be decided where it is supposed to be decided—with the jury. Third, courts should allow plaintiffs to make an offer of proof that an entity was negligent without the plaintiff's knowledge and/or an offer of proof that the cause of action was fraudulently concealed from the plaintiff, to establish a factual question for determination by the jury. Finally, courts in states having a delayed discovery statute should ascertain the clear legislative intent behind the delayed discovery statute and interpret any construed ambiguities in the pertinent delayed discovery statute to effectuate that intent.

256. See CAL. CIV. PROC. CODE § 340.1 (2002); MINN. STAT. § 541.073 (2002).

B. Legislatures

In addition to courts, legislatures clearly need to respond to the ongoing church sexual abuse scandal, the greater realization that childhood sexual abuse has profound effects on its victims, and recognize the alarming prevalence of all child sex abuse, not just that involving clergy. First, legislatures should examine or re-examine the policies behind allowing a survivor of sexual abuse an extended statute of limitation. When enacting or amending a statute dealing with childhood sexual abuse, legislatures must clearly express that its intentions are clear in the statute to limit the amount of "judicial interpretation" that is done. Legislatures should also consider enacting or amending statutes in a manner similar to the Connecticut and/or California models. Connecticut provides a bright line rule that is easy for judges to apply. California provides a clear response to the church abuse scandal.

C. Public

The public has the opportunity to aid in the healing process of the survivors of childhood sexual abuse and encourage legislation to protect children. As difficult as it may be to confront the issue, the public should educate itself about the prevalence and effects of sexual abuse. More importantly, the public must stand side by side with survivors of sexual abuse and show their belief in, their support for, and a willingness to fight the issue with, those survivors.

The public should also inform their legislators that they are outraged over child sexual abuse and feel that the laws should be changed to reflect the heinousness and lasting damage of the crime as well as the vital importance of deterring child sexual abuse in the future.