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Sometimes the Bad Guy Wins: Minnesota’s Delayed Discovery Rule

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SOMETIMES THE BAD GUY WINS: MINNESOTA'S DELAYED DISCOVERY RULE

Anne Greenwood Brown

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I. INTRODUCTION

The legal community traditionally has discounted reports of childhood sexual abuse as mere "fantasies and falsehoods." Moreover, up until recently a majority of "American society [has] refused to acknowledge the prevalence and severity of childhood sexual abuse." Now that society is slowly awakening to the breadth of the problem, studies have shown just how pervasive the problem is: Between 1976 and 1986, the United States saw a 2100% increase in the number of reported cases of childhood sexual abuse. By 1991, reported cases had increased yet another 327% to 432,000 cases a year. Minnesota's experience reflects national trends. In 1994, the Minnesota Department of Human Services reported that there were 2647 allegations of child sexual abuse filed. Of all the cases filed with the department in 1994, over 25% were confirmed cases of child sexual abuse.

In response to what appears to be an expanding acknowledgment of the pervasiveness of this problem, Minnesota's legislature, courts, and jurors have responded with, among other things, greater criminal penalties and large damage awards.

2. Id.
3. See Lori Koester Scott, Sex Offenders: Prevalence, Trends, Model Programs, and Costs, in Critical Issues in Crime and Justice 52, 54 (Albert R. Roberts ed., 1994) (noting a change from 6000 cases reported annually to 132,000 cases 20 years later).
4. See id.
6. See id.
7. The criminal law has been slow to recognize the harms associated with sexual abuse crimes. For example, the act of incest was not an official crime until Minnesota codified it in 1963. See Act of May 17, 1963, ch. 753, art. I, § 609.365, 1963 Minn. Laws 1185, 1206. Early on, when the Minnesota Legislature did acknowledge a specific sexual act as a crime, the penalty was not too severe. In 1976, the penalty for first-degree criminal sexual conduct was a maximum of 20
In 1989, the Minnesota legislature responded to the community's demand for retribution by promulgating what is popularly known as the "delayed discovery rule." This rule of law suspends the statute of limitations for a child sexual abuse cause of action until the time when the victim recognizes that the abuse caused her or his injuries. From 1989 to 1996, Minnesota adults were able to commence suits against their childhood abusers because the court of appeals had interpreted Minnesota's delayed discovery rule as tolling the statute of limitations until the plaintiff knew or had reason to know that the abuse caused his or her injuries.

Then, in 1996, the Minnesota Supreme Court decided Blackowiak v. Kemp, a decision many believe "dealt a setback to victims of child sexual abuse." Currently, the law under Blackowiak equates a child's knowledge that he or she has been abused, or even a child's feelings of shame or guilt, with the understanding that the abuse has injured the victim. Thus, under this decision, the statute of limitations begins to run against the child's cause of action at the instant the child pauses and thinks, "I don't like this. This is wrong!" Minimal scrutiny of the court's opinion reveals, however, that the court's holding is riddled with illogical rationalizations and ultimately disregards the legislature's motivations. Not only is this holding contrary to the legislative intent of the statute, it is an abuse of the judiciary's power under the separation of powers doctrine and effectively repeals the delayed discovery rule.

This Article discusses the development and current state of the years' imprisonment. See Minn. Stat. § 609.342 (1976). Today, however, the legislature views the penalty for the same crime as requiring a term of not more than thirty years' imprisonment and/or a $40,000 fine. See Minn. Stat. § 609.342, subd. 2 (1996).

8. See, e.g., J.A.H. v. Demo, No. C0-94-588, 1994 WL 411570, at *1 (Minn. Ct. App. Aug. 9, 1994) (affirming a jury award of $450,000 in compensatory damages and $500,000 in punitive damages, which had been reduced at a new trial from the original award of $30 million in punitive damages).


10. See id.


12. 546 N.W.2d 1 (Minn. 1996).

13. High Court Drops Suit Alleging Sex Abuse by School Counselor, Star Trib. (Minneapolis), April 20, 1996, at 3B.

14. See id.

15. See id. (quoting Blackowiak's attorney, John Murrin, as saying, "[T]he court is... superimposing themselves [sic] as rulers of who can sue over and above the Legislature. I think it is an abuse of the constitutional separation of powers").
delayed discovery rule, both inside and outside of Minnesota. Part II describes the scientific impetus behind the delayed discovery rule by discussing the short and long-term effects of childhood sexual abuse, and it considers how the repressed memory debate has factored into the debate over the delayed discovery rule. Part III discusses the history of the delayed discovery rule and its application in other states. Last, Part IV analyzes the Minnesota delayed discovery rule and concludes that in the Blackowiak case the Minnesota Supreme Court incorrectly defined how lower courts are to apply the delayed discovery rule to child sexual abuse causes of action. Moreover, a review of the statute’s legislative history, Minnesota’s precedents, and how other states have addressed this issue will substantiate that the supreme court’s decision is erroneous.

II. THE EFFECTS OF CHILDHOOD SEXUAL ABUSE

A survivor of childhood sexual abuse may first manifest injuries resulting from the abuse either during the abuse, immediately thereafter, or even years after the abuse has ended. Because the effects of abuse can surface at any time, it is necessary to consider the possible short and long-term effects.

A. Initial Effects

While research about child sexual abuse began providing substantial insights only within the last fifty years, much is already understood about the initial effect it has on victims. Initial effects are defined as those effects that occur “within two years of the termination of abuse.” A 1984 study of sexually abused children, conducted by researchers affiliated with the Division of Child Psychiatry at the Tufts New England Medical Center, found that the most common initial mental effects of childhood sexual abuse are fear, anger, and hostility. “Guilt and shame” are other frequently ob-

18. See Browne & Finkelhor, supra note 17, at 149. Thirteen of the four- to six-year-olds studied displayed severe fear, and 13-17% manifested above-normal levels of aggressive and antisocial behavior; 45% of the seven- to 13-year-olds ex-
served reactions to child sexual abuse.\textsuperscript{19} Besides possibly causing numerous mental difficulties, child abuse often affects victims by eliciting numerous physical responses.\textsuperscript{20} Sexual abuse may manifest itself in such ways as sleep disturbances, changes in eating habits, and adolescent pregnancy.\textsuperscript{21} Occurrences of sexual disease, sexual and social dysfunction,\textsuperscript{22} and contemplated and attempted suicide are also common.\textsuperscript{23}

Yet, these are only the initial effects of the abuse. The reality is that regardless of when the injuries manifest, "[t]he effects of childhood sexual abuse are frequently lifelong and severe."\textsuperscript{24} It is therefore necessary to consider some of the enduring implications of being a victim of child abuse.

\textbf{B. The Murky Long-Term Effects}

While knowledge about the initial effects of child sexual abuse is seemingly abundant, less is known about the long-term effects of childhood sexual abuse. There are several interrelated reasons why this is so.

First, victims are understandably reluctant to discuss their problems.\textsuperscript{25} Researchers have been further stymied by the fact that many professionals are hesitant to deal with the problem of sexual

\textsuperscript{19} See id. However, few studies have shown clear percentages. See id. A 1969 study revealed 64\% of sexual abuse victims expressed guilt problems. See id. at 149-50 (citing V. DeFrancis, Protecting the Child Victim of Sex Crimes Committed by Adults (1969)). A 1981 study concluded only 25\% of victims experienced feelings of guilt. See id. at 150 (citing S.C. Anderson et al., Psychosocial Sequelae in Intrafamilial Victims of Sexual Assault and Abuse; a paper presented at the Third International Conference on Child Abuse and Neglect, Amsterdam, Netherlands, April 1981).

\textsuperscript{20} See id. at 144.

\textsuperscript{21} A 1969 study reported that 11\% of child victims became pregnant as a result of sexual abuse; however, this figure is higher than other reports. See id. at 150. A 1978 study reported that only one out of 47 victims was impregnated as a result of incestuous abuse. See id. (citing K. Meiselman, Incest: A Psychological Study of Causes and Effects with Treatment Recommendations (1978)).

\textsuperscript{22} See id. at 151-52.

\textsuperscript{23} See Gelinas, supra note 16, at 317.

\textsuperscript{24} Mic Hunter, Abused Boys: The Neglected Victims of Sexual Abuse 45 (1990).

\textsuperscript{25} See Brandt F. Steele & Helen Alexander, Long-Term Effects of Sexual Abuse in Childhood, in Sexually Abused Children and Their Families 223 (Patricia Beezley Mrazek & C. Henry Kempe eds., 1981).
abuse. The third, and least predictable factor, is how a child will react to sexual abuse. A child's reaction is difficult to gauge because of the numerous variables involved in a typical abuse case. More specifically, the impact of childhood sexual abuse upon the child will differ depending on "the child's age, stage of psychosexual development, the nature of the abusive act, the frequency of repetition, the amount of aggression involved, and the relationship of the abused to the abuser." Thus, researching the long-term effects of child sexual abuse has proven more elusive than the initial consequences.

Yet, clearly identifiable effects have emerged. For example, depression is the most commonly reported effect of child sexual abuse. Some other documented long-term effects include: anxiety, eating disorders, disassociation, feelings of isolation and stigmatization, low self-esteem, failed interpersonal relationships, lack of trust, fear, poor parenting skills, vulnerability and revictimization, sexual dysfunction, prostitution, drug and alcohol abuse, and suicidal tendencies.

While it is essential to comprehend the short and long-term effects of child sexual abuse, this knowledge only serves as a starting point for attaining a full understanding of the delayed discovery rule. Therefore, in order to completely comprehend the delayed

26. See id.
27. See id.
28. Id.; see also Judith L. Herman & Mary R. Harvey, The False Memory Debate: Social Science or Social Backlash?, 9 HARV. MENTAL HEALTH LETTER 4, 5 (1993) (discussing key periods in a survivor's life at which time memories may be recalled).
29. See Browne & Finkelhor, supra note 17, at 152.
30. See id. at 152-62 (describing the detrimental mental health effects of sexual abuse); see also Conroy, supra note 17, at 256 (summarizing symptoms sexual abuse victims often develop years after the abuse has ended). Dr. Judith Herman's research concluded that 60% of adult female survivors of incest suffered from major depression, 55% suffered from sexual dysfunction, 39% attempted suicide, and 35% abused drugs and/or alcohol. See Browne & Finkelhor, supra note 17, at 154, 159, 162.
31. A 1981 study found that 60% of the prostitutes interviewed had been sexually abused before age 16. See Browne & Finkelhor, supra note 17, at 161 (citing M.H. Silbert & A.M. Pines, Sexual Child Abuse as an Antecedent to Prostitution, 5 CHILD ABUSE AND NEGLECT 407, 407-11 (1981)). On average, two persons abused these young women for 20-month time periods. See id. Women who were sexually abused as children are at a greater risk of contracting the HIV virus because of their disproportionately high rate of sexual promiscuity. See Gordon, supra note 1, at 1405; cf. Browne & Finkelhor, supra note 17, at 160-61 (noting that "promiscuity" may be a self-description regarding esteem, as opposed to actual frequency of sexual activity or partners).
discovery rule's development, one must also consider how a victim recovers from child sexual abuse.

C. Recovery and the Repressed-Memory Debate

According to Minnesota psychologist Mic Hunter, recovery from childhood sexual abuse occurs over five phases of grieving. They are (1) denial, (2) bargaining, (3) anger, (4) sadness, and (5) acceptance or forgiveness. Because most survivors of childhood sexual abuse tend to deny not that the abusive act occurred – but that the abuse is important – most survivors are unable to recognize the causal connection between the abuse and their subsequent psychological injuries, despite their awareness that the abuse was wrong. It is not until the survivor is able to become angry at his or her abuser that he or she is able to acknowledge the cause-and-effect relationship between the past abuse and the present injury. Because anger occurs once the survivor “acknowledges not only that something happened but that it was abusive and harmed him,” anger has been coined the “backbone of healing.”

The denial phase presents the greatest obstacle to a victim’s ability to recover and heal. “Denial is ‘accomplished by withholding conscious understanding of the meaning and implications of what is perceived.’” The most extreme form of denial is repression. Freud hypothesized that repression was an intentional process, allowing a person to preserve his or her sanity when confronted with a traumatic event by consciously pushing the memory of the event out of the conscious mind.

32. Hunter, supra note 24, at 99.
33. See Gelinas, supra note 16, at 316.
35. See Hunter, supra note 24, at 106.
36. Id.
38. Rebecca L. Thomas, Adult Survivors of Childhood Sexual Abuse and Statute of Limitations: A Call for Legislative Action, 26 Wake Forest L. Rev., 1245, 1254 n.74 (1991); see also Hunter, supra note 24, at 28 (stating that those “who are not ready to deal with sexual abuse will merely deny or repress information that is too threatening for them to be aware of”).
39. See Dr. Elizabeth Loftus & Katherine Ketcham, The Myth of Repressed Memory 49 (1994). Repression has been called “the most haunting and romantic of concepts in the psychology of memory.” Id.
40. See id.; see also Linda Grant, Beyond Belief, The Guardian, Sept. 14, 1996,
Today, many proponents of the authenticity of repressed memories deviate from Freud's theory. They instead hypothesize that repression is an unconscious defense mechanism.41 Regardless of whether repression is a conscious or unconscious act, advocates of the Incest Survivor Movement42 adamantly believe that repression is rampant.43 The founders of this movement further insist that the abuse's impact can only be accessed through some "triggering event," which overcomes the survivor's entrenched repression.44 The ability of a person to repress the impact of one's victimization, however, is a concept of extreme debate that has polarized the mental health community.45 The apex of the debate is whether repressed memories of childhood sexual abuse are reliable.46 Accordingly, a review of these positions is required.

1. The Doubters of the Authenticity of Repressed Memories

Those who doubt the authenticity of repressed memories base their strongest argument on studies that have shown that it is feasible to implant entirely false memories into the subconscious of a person.47 Elizabeth Loftus, a renowned memory expert, conducted an experiment where her research group attempted to implant an early memory of getting lost in a shopping mall in one of each

41. See Loftus & Ketcham, supra note 39, at 51. Repression is accomplished upon the occurrence of a shocking or traumatic event, . . . by pushing the memory of the event to the unconscious, where it may stay for an indefinite period of time. Childhood sexual abuse is 'especially conducive to repression of memory of the incident.' Conroy, supra note 17, at 257 (quoting Gary M. Ernisdorff & Elizabeth F. Loftus, Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression, 84 J. CRIM. L. & CRIMINOLOGY 129 (1993)).

42. This movement holds as one of its fundamental tenets that victims should sue sexual abusers as a "political statement" against society's years of failing to believe women and children. See Carol Ness, Legal Challenge: Suits Over Incest, S.F. EXAMINER, Apr. 7, 1993, at A1, A14.

43. See Loftus & Ketcham, supra note 39, at 144-48. Male survivors are particularly prone to denial and repression because "American society teaches men that they are the strong ones and are responsible for everything that happens to them, which gives men little permission to see themselves as having been victimized." Hunter, supra note 24, at 93-94.


46. See id. at 127.

member’s relatives. The researchers simply wrote to relatives and asked if they “still remembered the time they were lost in the mall.” The researchers provided only sketchy details, but many of the relatives, over time, recalled very detailed “memories” of the event. One subject developed vivid memories, even describing in great detail the man who rescued him. Relying on Loftus’ finding that false memories can be implanted, those opposed to the repressed memory theory suggest that a person who is told recovery depends upon remembering will be “highly motivated to comply.”

Another argument that the doubters proffer is that the list of potential “symptoms” of childhood sexual abuse, which therapists present to clients, are everyday complaints that nearly every American suffers. For instance, supporters state that “[i]f you think you were abused and your life shows the symptoms, then you were [abused].” The following questions set forth some of the possible symptoms of childhood sexual abuse: (1) Do you have trouble knowing what you want? (2) Are you afraid to try new experiences? (3) If someone gives you a suggestion, do you feel you ought to follow it? (4) Do you follow other people’s suggestions as if they were orders to be observed?

Other symptoms indicative of past childhood sexual abuse include recurring nightmares, difficulty falling asleep, an ability to be startled easily, daydreaming, lack of motivation, and feelings of the need to be perfect. Because most everyone could say “yes” to at least one of these “symptoms,” the doubters question the credibility of repressed memories.

As a final note, because most victims of child sexual abuse

48. See WASSIL-GRIMM, supra note 45, at 131.
49. Id.
50. See id. at 132.
51. See id.
52. Id.
53. Loftus & Ketcham, supra note 39, at 152.
55. See Renee Fredrickson, Repressed Memories: A Journey to Recovery from Sexual Abuse 48-51 (1992). Survivors of Incest Anonymous provides its members the following questions, which are intended to reveal abuse:

Do you feel you have to control your emotions? Currently, do you overreact or misdirect your anger in situations that frustrate you? Are you afraid of anger? Do you have blocks of your childhood you can’t remember? . . . Do you have a problem with alcohol, drugs, food, migraines, or back pain?

Loftus & Ketcham, supra note 39, at 22.
never forget about the abuse and find little benefit in talking about it, the enthusiasm with which persons of newly-recalled memories speak about the abuse raises more suspicion. Melody Gavigan, editor of The Retractor, and former claimant of repressed child sexual abuse memories, made the following observation while she herself was in therapy: "$W$omen without any memories of abuse seemed more ill and dysfunctional than the ones who had always known about their abuse. I watched with fascination as many of these women then entered therapy to gain memories, and each became increasingly disturbed." Thus, while no one disputes the seriousness and severity of abuse victims’ emotional scars, their susceptibility to suggestive creation causes many to look upon these memories with skepticism.

2. The Proponents’ Response

While the validity of one’s repressed memories should always be closely scrutinized, studies show that there is far less evidence of suggestive creation of these memories than opponents of the delayed discovery rule would like to acknowledge. According to researcher Judith Herman, false complaints are rare, comprising only two to eight percent of all reported cases. Moreover, Herman found that of the fifty-three women she worked with who reported delayed recall of abuse, seventy-four percent obtained corroborating evidence for the abuse, either through the admissions of family members or physical evidence of the abuse. More importantly, only six percent of Herman’s patients could not find sufficient evidence to support their claims of abuse. Finally, Herman concludes that repressed memories are not so absurd, considering that adults who were treated for sexual abuse as children often do not

56. See Wassil-Grimm, supra note 45, at 8, 55-56; see also Gelinas, supra note 16, at 316.
57. See Wassil-Grimm, supra note 45, at 55-56.
58. The Retractor is a newsletter for persons who allege that their mental health therapists pressured and induced them into falsely believing that they suffered from repressed memories of childhood sexual abuse. See Sally Jacobs, Memories in Question, BOSTON GLOBE, Apr. 4, 1993, at 1. Melody Gavigan founded the national newsletter in 1992 after she concluded that her therapist led her to believe mistakenly that her father had raped her. Id.
59. Wassil-Grimm, supra note 45, at 56.
60. See Herman & Harvey, supra note 26, at 5.
61. See id.
62. See id. However, Herman admits that more research is needed. See id.
recall the details documented in their own childhood hospital records. 63

Numerous reports document examples of sexual abuse victims who identify a period of time during which they did not remember their abuse. 64 A 1993 study of 196 college undergraduates revealed that half of the twelve percent reporting childhood abuse indicated a period during which they did not remember their abuse. 65 Another study reported that nearly sixty percent of 450 female sexual abuse survivors experienced amnesia regarding their first instance of abuse at some time prior to age eighteen. 66

Repressed memory activists further support their position by explaining that remembering the abuse is the first step toward healing. 67 California attorney Shari Karney, one of the premier advocates for adult survivors of childhood sexual abuse, 68 addresses survivors' need to talk about abuse as a response to a "conspiracy of silence." 69 According to Karney's colleague, family and child counselor Arlene Drake, society seems to feel that talking about sexual abuse is a crime because, ironically, it damages the family unit. 70 Another of Karney's colleagues, attorney Mary Williams, explains

63. See id. (citing a study of 200 adults performed by Linda Meyer Williams of the Family Violence Research Laboratory at the University of New Hampshire, which found that one in three could not recall the specifics of the abusive acts).

64. See D. Stephen Lindsay & J. Don Read, "Memory Work" and Recovered Memories of Childhood Sexual Abuse: Scientific Evidence and Public, Professional and Personal Issues, 1 PSYCHOL. PUB. POLY & L. 846, 854-62 (1995). Lindsay and Read use the term hidden memories rather than repressed memories "to refer to autobiographical information in memory that is not consciously accessible but that might be retrieved given the appropriate cues and procedures." Id. at 846 n.1.

65. See J.A. Sheiman, "I Have Always Wondered if Something Happened to Me": Assessment of Child Sexual Abuse Survivors with Amnesia, 2 J. CHILD SEX. ABUSE 13, 17 (1993). Another seven percent reported no discovered abuse and yet they wondered whether they had been victimized. Both of these groups scored similarly on the Dissociative Experiences Scale. Dissociation is strongly correlated with childhood trauma. Id. at 15.


68. Karney represented Mary Doe in the landmark California case, Mary D. v. John D., in which the California Court of Appeals held that because Mary did not recall repressed memories of childhood sexual abuse until after the statute of limitations had run, she could sue based on the delayed discovery rule. 264 Cal. Rptr. 633, 645 (Ct. App. 1989).


70. See id.
an abused person’s need to talk about abuse as an “expression of standing up as an adult to this person who abused them. It repre-
sents the whole world of people they could not stand up to. It’s an experience of getting out of the victim psychology.” Proponents,
therefore, point to statistics and the healing potential of addressing
the memories to support their belief in the authenticity of re-
pressed memories.

III. MINNESOTA’S DELAYED DISCOVERY RULE
AND ITS CIRCUITOUS DEVELOPMENT

The delayed discovery rule started as a judicially-created doc-
trine that allows a statute of limitations to be extended in cases
where the injured party was “blamelessly ignorant” of the injury un-
til after its cause occurred and after the statute of limitations had run. It has been used in a variety of contexts, including medical
malpractice, libel, invasion of privacy, negligent prescription of
drugs, and negligent breach of contract.

A. Historical Roots of the Delayed Discovery Rule

The United States Supreme Court first applied the delayed
discovery rule in Urie v. Thompson. The petitioner, a fireman on
steam locomotives for the Missouri Pacific Railroad, was forced to
leave his thirty-year position after being diagnosed with silicosis, a
pulmonary disease caused by continuous inhalation of silica dust.

71. Id.
72. Johnson v. Johnson, 701 F. Supp. 1363, 1364 (N.D. Ill. 1988); see also
Urie v. Thompson, 337 U.S. 163, 170 (1949) (holding an injured party’s “blame-
less ignorance” should not bar cause of action, despite the expiration of the stat-
ute of limitations).
73. See, e.g., Huysman v. Kirsch, 57 P.2d 908, 913 (Cal. 1936); see also Doe v.
First United Methodist Church, 629 N.E.2d 402, 408 (Ohio 1994) (citing the ap-
plication of the delayed discovery rule to medical and legal malpractice, injuries
cased by asbestos exposure, and DES-related injuries).
74. See, e.g., Manguso v. Oceanside Unified Sch. Dist., 152 Cal. Rptr. 27, 31
(Ct. App. 1979).
75. See, e.g., Cain v. State Farm Mut. Auto. Ins. Co., 132 Cal. Rptr. 860, 862-
63 (Ct. App. 1976).
76. See, e.g., Warrington v. Charles Pfizer & Co., 80 Cal. Rptr. 130, 133-34
77. See, e.g., Allred v. Bekins Wide World Van Servs., 45 Cal. App. 3d 984,
78. 337 U.S. 163 (1949).
79. See id. at 165-66.
The petitioner filed suit against the trustee of the railroad under the Federal Employers' Liability Act and then, by amended complaint, under the Boiler Inspection Act.

Because the petitioner first inhaled the dust in 1910, the Court's first question was whether the statute of limitations for such acts barred the claim. After considering the congressional purpose of the statutes, the Court held that Urie's claim against his employer was not time-barred, stating:

If Urie were held barred from prosecuting this action... it would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

In Urie, the Supreme Court emphasized the petitioner's knowledge of the resulting injury—not the petitioner's knowledge of the employer's act (that being its failure to protect the petitioner from the danger). As will be shown, this distinction becomes important when applying delayed discovery statutes in relation to sexual abuse cases.

B. Application of the Delayed Discovery Rule to Sexual Abuse Cases: From a Narrow Judicial Beginning Toward a Broader Legislative Purpose

In response to the Incest Recovery Movement, the legal community has revisited the delayed discovery rule and its application to sexual abuse cases. As a result, many states have enacted "delayed discovery" statutes of limitations. These statutes typically possess two components. The first is the length of time a claimant has to commence an action. The second is identifying the event

80. 45 U.S.C. § 51 (1939) (commonly referred to now as the "Employer's Liability Act").
82. See Urie, 337 U.S. at 168.
83. Id. at 169 (emphasis added). The Court's holding was based on petitioner's "blameless ignorance." Id. at 170.
84. See id. at 170-71.
85. See infra notes 86-90.
86. See, e.g., CONN. GEN. STAT. ANN. § 52-577d (West 1992) (17 years after
that triggers the running of the limitation period. Some statutes commence upon discovery of the abuse. Other statutes commence upon discovery of the injury. Still others open the window to litigation by allowing a person to sue when the individual realizes that the abuse suffered as a child caused the emotional and psychological injuries from which he or she now suffers as an adult. Statutorily, Minnesota falls into this last group.

An understanding of Minnesota’s current version of the delayed discovery statute requires a survey of how other states have acted. Specifically, an understanding of Washington and California’s treatment of this issue is imperative, since their experiences shaped the rule that Minnesota ultimately adopted.

1. Initial Defeat in the Courts for the Delayed Discovery Rule

The first case in which a court contemplated the applicability

reaching age of majority); IDAHO CODE § 6-1704 (1990) (five years after reaching age of majority); 735 ILL. COMP. STAT. 5/13-202.2(b) (West Supp. 1996) (two years); IOWA CODE ANN. § 614.8A (West Supp. 1996) (four years); LA. REV. STAT. ANN. § 9:2800.9 (West Supp. 1997) (10 years after reaching majority); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1996) (12 years or six years); MO. ANN. STAT. § 537.046(2) (West Supp. 1996) (five years or three years); UTAH CODE ANN. § 78-12-25.1(2) (West Supp. 1996) (four years); VT. STAT. ANN. tit. 12, § 522(a) (Supp. 1996) (six years); WIS. STAT. ANN. § 893.587 (West 1997) (two years).

87. See, e.g., ARK. CODE ANN. § 16-56-130 (Michie Supp. 1995) (limitation period begins to run when victim knew or should have known of abuse); UTAH CODE ANN. § 78-12-25.1(2) (limitation period begins to run when the victim turns 18 or discovers the sexual abuse, whichever is later).

88. See, e.g., 735 ILL. COMP. STAT. 5/13-202.2(b) (limitation period runs from time injured party discovers or should have discovered, through reasonable diligence, that he or she was injured); ME. REV. STAT. ANN. tit. 14 § 752-C (triggering the statute upon discovery of the action, if sexual intercourse or sexual act, or discovery of the harm, whichever is later).

89. See, e.g., IOWA CODE ANN. § 614.8A (beginning statute at the time of discovery of both the injury and the causal relationship between the injury and the abuse); MO. ANN. STAT. § 537.046(2) (running time upon reaching the age of majority or when plaintiff realizes or should have realized that the injuries were caused by the abuse, whichever occurs later); VT. STAT. ANN. tit. 12, § 522(a) (initiating statute when the victim discovers the abuse or that the injury or condition was caused by the act, whichever is later); VA. CODE. ANN. § 8.01-249(6) (Michie Supp. 1996) (starting the limitation period when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist); WIS. STAT. ANN. § 893.587 (commencing statute when the victim discovers or should have discovered the abuse and that the abuse caused the injury).

90. See MINN. STAT. § 541.073 (1996).

of the delayed discovery rule to sexual abuse cases was *Tyson v. Tyson*. In *Tyson*, the plaintiff alleged that her father compelled her to engage in many different types of sexual activity when she was between three and eleven years old, from 1960 to 1969). The plaintiff further averred that she had no memory of her father's abuse until she started to receive psychological therapy in 1983 at age twenty six. Soon after recalling these memories, the plaintiff filed suit against her father in federal court. The defendant quickly moved for summary judgment, arguing that under Washington's discovery provisions her claim was statutorily barred. The court, unable to resolve the issue itself, certified the question to the Supreme Court of Washington.

The supreme court, in a short opinion, flatly rejected the plaintiff's argument that the delayed discovery rule applied to her claims. In fact, the court seemingly forbade the application of the delayed discovery rule to any case that involved repressed memories of sexual abuse. The court based its decision not to extend the rule to these cases on essentially two grounds. First, the court noted that the purpose of a statute of limitations is to prevent either stale or illegitimate claims. Second, the court relied on the fact that it previously had created exceptions to statutes of limitations only if "empirical evidence of the occurrence of the alleged act...and of the resulting harm" justified tolling the statute. According to the court, repressed memory cases do not fall within this category because they are subjective and, therefore, unverifiable, since the case hinges upon the "plaintiff's alleged recollection

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93. *Id.* at 227.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 226-27.
99. See *id.*
100. *Id.* at 227-28.
101. *Id.* at 228. The court, in supporting its position, cited examples of plaintiffs presenting what the majority classified as "objective evidence." *Id.* This included instances where patients later discovered their physicians left sponges in their bodies, *id.* (citing Ruth v. Dight, 453 P.2d 631 (Wash. 1969)), and product liability cases where liability arose from injuries resulting from asbestos exposure, *id.* (citing Sahlie v. John-Mansville Sales Corp., 663 P.2d 473 (Wash. 1983)). The court relied heavily on the fact that the source of the injury and the corresponding harm "were objectively verifiable." *Id.*
of a memory long buried in the unconscious.\textsuperscript{102}

The plaintiff responded to the court's position by asserting that her claim, due to the presence of expert psychiatric testimony that would support her contentions, possessed the requisite objective element.\textsuperscript{103} The court, however, rejected outright the plaintiff's position by reasoning that psychology and psychiatry are "imprecise disciplines[,] ... their methods of investigation are primarily subjective[,] and most of their findings are not based on physically observable evidence."\textsuperscript{104} The court, therefore, held that as a matter of law the plaintiff's claims began to accrue at the time she reached majority. Thus, Washington's statute of limitations barred Tyson's claim.

Soon after Tyson, the California Court of Appeals became the second court to examine the application of the delayed discovery rule in DeRose v. Carswell.\textsuperscript{105} In DeRose, the plaintiff filed a complaint in 1986 against her step-grandfather, alleging that he sexually abused her from the time she was four years old until she was eleven (from 1966 to 1973).\textsuperscript{106} The plaintiff claimed that although she always remembered the abuse, her cause of action did not ac-

\begin{footnotes}
\begin{enumerate}
\item \textsuperscript{102}Id.
\item \textsuperscript{103}Id.
\item \textsuperscript{104}Tyson, 727 P.2d at 228. Justice Pearson's dissenting opinion clearly reveals the inconsistencies in the majority opinion. He began his rebuttal by first noting that "[f]undamental fairness, not availability of objective evidence, has always been the linchpin of the discovery rule." Id. at 231 (Pearson, J., dissenting). Justice Pearson further criticized the majority by arguing that any evidentiary concerns were for the plaintiff, and not the court, to resolve. Id. According to Pearson, "it is illogical to foreclose a cause of action alleging sexual abuse just because the parties' credibility will be determinative, when such 'swearing contests' are common in other contexts." Id. at 232.

Of all of Pearson's arguments, his critique of the majority's characterization of psychiatry and its usefulness in the courtroom is the most scathing. He first noted that a psychotherapist's testimony, like all other expert testimony, is a legitimate "aid to the trier of fact and may be accepted or rejected by the jury." Id. at 233 (Pearson, J., dissenting) (citing Gerberg v. Crosby, 329 P.2d 184 (1958)). Moreover, a trial court is capable of managing how a jury receives such testimony. Id. at 233 (citing Marianne Wesson, \textit{Historical Truth, Narrative Truth, and Expert Testimony}, 60 \textit{Wash. L. Rev.} 331 (1985) (providing model jury instructions and encouraging the use of mental health testimony)). Pearson resoundingly ended his critique by noting that not only have Washington's courts "relied on the expertise of mental health professionals for many years in a wide range of contexts," but even the United States Supreme Court "has recognized the validity of testimony by mental health professionals." Id. at 233 (citing Barefoot v. Estelle, 463 U.S. 880 (1983)).
\item \textsuperscript{105}242 Cal. Rptr. 368 (Dist. Ct. App. 1987).
\item \textsuperscript{106}Id. at 369-70.
\end{enumerate}
\end{footnotes}
Sometimes the Bad Guy Wins

crue until 1985, when she recognized the causal connection between the abuse and her emotional injuries.\textsuperscript{107} The court held that the delayed discovery rule did not apply because “[a]n assault ... causes harm as a matter of law.”\textsuperscript{108} Thus, the DeRose rule allowed an adult victim with no memory of the abuse only one year from the time they recovered their memories in which to file their claim.\textsuperscript{109} More importantly, if a victim were able to recall the abuse, his or her claim was barred one year after the victim reached majority.\textsuperscript{110} Because the plaintiff had not repressed her memories of the assaults, the court of appeals found that the statute of limitations barred her claims as of 1981.\textsuperscript{111}

\begin{itemize}
\item 107. Id.
\item 108. Id. at 371.
\item 109. Id.
\item 110. Id. at 370-71.
\item 111. DeRose, 242 Cal. Rptr. at 371. The court noted that the delayed discovery rule applies only when a plaintiff does not discover all of the facts essential to a cause of action. See id. The court reserved the question of whether the delayed discovery rule would have applied if DeRose had repressed her memory of the abuse. See id.
\end{itemize}

Other courts, when forced to consider this issue without legislative guidance, have reached conclusions similar to the one in DeRose. For example, in Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988), a federal district court undertook the onerous task of ascertaining how Illinois applied the delayed discovery doctrine. In Johnson, the plaintiff filed a complaint against her parents, alleging that her father sexually abused her from the time she was approximately three years old until she was 12 or 13, from 1958 to 1968. See id. at 1364-65. In contrast to DeRose, this plaintiff alleged that she suppressed her memory of the abuse and was “blamelessly ignorant” of the causal relationship between her father’s abusive acts and the emotional injuries from which she suffered as an adult. Id.

The Johnson court noted that the discovery rule is a judicially-created device under which “the statute of limitations commences ‘when the Plaintiff knew or should have known that he was injured.’” Id. at 1367 (quoting Lincoln-Way Community v. Village of Frankfort, 367 N.E.2d 318, 323-24 (Ill. App. Ct. 1977)).

The court also observed that, prior to this case, Illinois courts had not addressed whether the discovery rule should toll the statute of limitations beyond the abuse period for minors and allow adults to bring claims of incest against their abusers. Id. The court noted that prior cases had fallen into two categories:

1) those where the Plaintiff claimed she knew about the sexual assaults at or before majority, but that she was unaware that other physical and psychological problems were caused by the prior sexual abuse; and (2) cases such as this one, where the Plaintiff claims due to the trauma of the experience she had no recollection or knowledge of the sexual abuse until shortly before she filed suit.

Id. Thus, in contrast to Uri’s focus on the resulting injury, the court followed DeRose and focused primarily on the abusive act. See id. at 1370. In considering the facts at hand, the court determined that because there was a genuine question of material fact as to when the plaintiff “knew or reasonably should have known” that the abuse caused injury, the court had to deny Defendant’s motion for sum-
2. The Legislatures React

While initially it appeared that the Tyson/DeRose treatment of the delayed discovery rule was taking hold nationally, legislatures around the country soon interjected more liberal renditions of the rule. Washington again acted first when, in 1988, the legislature passed a statute permitting a plaintiff to recover if the individual makes his or her claim within three years of discovering the act, or, when the plaintiff realizes or should have realized that the abuse caused his or her injuries. In codifying the delayed discovery rule, the Washington Legislature expressed that it was clearing the way for victims of child abuse to recover from their abusers even if they had repressed the ability to recall the horrific events.

The result of DeRose also proved unsavory for California’s legislature. Using the Washington model, California and, later, Minnesota enacted their own statutes. In language almost identical

mary judgment. Id. Like Illinois, Florida and Pennsylvania courts have modeled their delayed discovery rules after the Tyson and DeRose holdings. See Lindabury v. Lindabury, 552 So. 2d 1117, 1117 (Fla. Dist. Ct. App. 1989) (refusing to reinter-pret Florida’s statute of limitations without some legislative guidance); Bowser v. Guttendorf, 541 A.2d 377, 381 (Pa. Super. Ct. 1988) (barring claim when reasonable person would have been aware of injuries flowing from abuse).


114. See 1991 Wash. Legis. Serv. 212 (West). In 1991, in response to growing confusion over the meaning of its recently enacted discovery rule, the legislature added the following findings to its clarifying amendment:
The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. At that time the legislature intended to reverse the Washington Supreme Court decision in Tyson v. Tyson. It is still the legislature’s intention that Tyson v. Tyson be reversed, as well as the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual abuse commences the statute of limitations. The legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.

Id. (citations omitted).

115. See Schaibley, supra note 91, at 170.

116. See CAL. CIV. PROC. CODE § 340.1 (West Supp. 1997); MINN. STAT. § 541.07 (1996). Illinois law now triggers the tolling of the limitations period when the plaintiff discovers (or reasonably should have discovered) the act and the
to Washington and Minnesota's provisions, California's delayed discovery statute states:

In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever . . . period expires later. \(^{17}\)

causal connection between the abusive acts and the current injuries. See 735 ILL. COMP. STAT. 5/13-202.2(b) (West Supp. 1996). Specifically, the key portion of the statute provides that the plaintiff must file suit when “the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred and that the injury was caused by the childhood sexual abuse.” Id. (emphasis added). While the Johnson case evidences a requirement that the victim repress the memory of the abuse, recent cases evidence the legislature's desire to allow victims more latitude to recover. See D.P. v. M.J.O., 640 N.E.2d 1323 (Ill. App. Ct. 1994) (tolling limitation period even though plaintiff had memories of the abuse, until he had knowledge of the causal connection between the acts and his present injuries). But see M.E.H. v. L.H., 669 N.E.2d 1228, 1236 (Ill. App. Ct. 1996) (holding that the delayed discovery rule does not apply when a “plaintiff alleges that she repressed the conscious awareness of sexual abuse as a child and remembered it years later. Since the injury is immediate and caused by external force or violence, we believe sexual abuse is a traumatic event[,] [and since a traumatic event imputes knowledge of the event,] [t]he discovery rule does not extend the statute of limitations period in such cases.”).

117. CAL. CIV. PROC. CODE § 340.1 (West Supp. 1997); cf. MINN. STAT. § 541.07 (1996). Wisconsin deviates from a majority of the nation with its unique application of the rule. The rule, now in statutory form, is a product of the Wisconsin Court of Appeals' decision in Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987). There the plaintiff filed a complaint against her father in the mid-1980s, alleging incestuous abuse from when she was five years old until she was fifteen (1969-1978). Id. at 24. The plaintiff further alleged that the abuse caused her such psychological distress that she ultimately adopted coping mechanisms that precluded her from knowing the existence or nature of her emotional injuries. Id. at 25. It was not until 1985 that, through the help of her psychological counselor, she slowly discerned the cause of her psychological and emotional problems. See id.

The trial court granted summary judgment in favor of the defendant, but the Wisconsin Court of Appeals reversed and remanded, holding: “as a matter of law . . . a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury.” Id. at 26. The court based its conclusion on a balancing of the plaintiff's and defendant's interests, deciding that “the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions.” Id. at 27 (quoting Hansen v. A.H. Robins, Inc., 335 N.W.2d 578, 582 (Wis. 1983)). Thus, in contrast to other states, the court limited the application of the delayed discovery rule by controlling the type of abuse it applies to, rather than when the abuse occurred.
Thus, Washington's and California's provisions currently toll the limitation period when a victim remembers the abuse, but does not become aware of the resulting injury until some later time. \textsuperscript{118} This result is what Minnesota's drafters surely intended: a standard that provides for having knowledge or memory of the abuse but not making the causal connection to injuries suffered as an adult. Unfortunately, the Minnesota Supreme Court failed to take notice of this fact.

Washington's and California's experiences are insightful for two reasons. First, the California and Minnesota statutes are similar in text: Both statutes suspend the limitation period contingent upon the victim discovering that the cause of her or his injuries stems from the abuse. Thus, it is expected that the courts interpreting their respective laws would reach similar conclusions. Yet, this is not the case. The question then becomes whose interpretation is erroneous. As discussed earlier, the early \textit{DeRose} decision, which is similar to \textit{Blackowiak}, was subsequently \textit{rejected} through leg-

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\textsuperscript{118} See CAL. CIV. PROC. CODE § 340.1 (West Supp. 1997); WASH. REV. CODE ANN. § 4.16.40 (West Supp. 1997); Sellery v. Cressey, 55 Cal. Rptr. 2d 706, 711 (Ct. App. 1996) (citing the California Assembly Judiciary Committee's purpose for amending the statute in 1990). Recently, the California Court of Appeals held that repression of memories is not a prerequisite to triggering a tolling of the limitation period. \textit{See} Lent v. Doe, 47 Cal. Rptr. 2d 389, 389 (Ct. App. 1995). Rather, all that is required is a showing that the plaintiff suffered psychological injury or illness "after reaching majority and that he commenced the action within three years of the time he discovered or reasonably should have discovered such psychological injury or illness was caused by the childhood sexual abuse." \textit{Id}.
islative action. It is clear that both holdings are not only similar, they are at odds with current statutory language.

C. Minnesota's Codification of the Delayed Discovery Rule

In Minnesota, torts resulting in personal injury generally carry a two-year statute of limitations. However, in 1989, State Representative Randy Kelly introduced a bill to create a special statute of limitations for cases of sexual abuse. Representative Kelly introduced the bill in response to the Attorney General's Task Force on the Prevention of Sexual Violence Against Women. The bill addressed the conclusions of the task force report - namely, that victims and survivors of sexual abuse often do not recognize that the abuse occurs or do not discover their psychological injuries until many years after the abuse. The purpose of the 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 that the injury was caused by sexual abuse - whichever is later. The bill was enacted as Minnesota Statutes section 541.073.

Originally, the statute provided a two-year statute of limitation if the sexual abuse was classified as an intentional tort and a six-year statute of limitation if the abuse was classified as negligence. However, in 1991, the legislature amended the statute by deleting the distinction between cases of intentional tort and negligence. Today, the "delayed discovery rule" provides:

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 in-
jury was caused by the sexual abuse. 127

Under the statute, to determine when the statute of limitations has or will run in cases of childhood sexual abuse, the critical fact question is: When did the victim know or have reason to know the sexual abuse caused injury? 128 Nevertheless, the Minnesota Supreme Court has misinterpreted the statute to frame the pertinent question as: When did the victim know or have reason to know he or she was being sexually abused? 129

D. The Minnesota Supreme Court Stunts the Delayed Discovery Rule

1. Delayed Discovery Rule Prior to Blackowiak v. Kemp

The Minnesota Court of Appeals has considered the delayed discovery rule only a handful of times. 130 Generally, the court has focused not on the act, but the resulting injury. In conformity with this focus, the court has taken great care to allow for a tolling of the statute of limitations until the injured party recognizes the causal connection between the abusive act(s) and the resulting injury. 131 The court, however, acknowledged the need to maintain some control over the tolling of the statute of limitations. Thus, to rein in plaintiffs, the courts have interpreted the statute to require an objective inquiry into whether the delayed recognition of the cause of the party's injuries was reasonable. 132 This interpretation

127. MINN. STAT. § 541.073 (1996).
128. See M.L. v. Magnuson, 531 N.W.2d 849, 855 (Minn. Ct. App. 1995). This question of when a reasonable person in the claimant's position should have known that his injuries were caused by sexual abuse requires an objective inquiry and is normally a question of fact for the jury. See id.; see also Roe v. Archdiocese of St. Paul & Minneapolis, 518 N.W.2d 629, 632-33 (Minn. Ct. App. 1994) (affirming summary judgment where a reasonable person should have realized he or she was being abused); ABC v. Archdiocese of St. Paul & Minneapolis, 513 N.W.2d 482, 487 (Minn. Ct. App. 1994) (holding that where there is overwhelming evidence that a reasonable person should have known he or she was abused, summary judgment is appropriate).
129. See infra note 133 and accompanying text.
130. See supra note 128.
131. See Roe, 518 N.W.2d at 631 (stating that "the limitations period begins to run when the plaintiff knows or has reason to know that an injury was caused by sexual abuse, rather than when the abuse actually occurred").
132. See id. at 632 (holding that the statute is not tolled if an adult victim suppresses memories of abuse after recognizing she has been injured by abuse); see also S.E. v. Shattuck-St. Mary's Sch., 553 N.W.2d 628, 632 (Minn. Ct. App. 1995) (stating that a subjective test would elicit a "flood of claims," and requiring an objective inquiry). But see Conroy, supra note 17, at 267-78 (criticizing the Roe decision for not tolling the limitations period when the victim subsequently re-
of Minnesota Statutes section 541.073 prevailed until the Minnesota Supreme Court completely changed the focus from recognition of the resulting injury to knowledge of the abusive act when it ruled in the case of Blackowiak v. Kemp.133

2. Blackowiak v. Kemp
   
a. Background
   
   In Blackowiak, a junior high school counselor sexually abused the plaintiff when the plaintiff was eleven years old.134 The abuse occurred in either 1970 or 1971 and included oral and anal intercourse.135 At the time of the abuse, the plaintiff warned a friend to stay away from the counselor and told his mother the counselor was doing something “wrong” to him.136 Yet, during this time he could not acknowledge that he was the victim of sexual abuse.

   After the abuse, the plaintiff was “excessively truant, became involved with crime, and abused drugs and alcohol.”137 His problems developed slowly over time.138 The plaintiff saw several counselors, but he was unable to discuss the abuse because of his feelings of guilt and shame.139 In 1991, the plaintiff had a conversation with a fellow seventh-grade student from 1970, who told the plaintiff the counselor had abused him.140 According to the plaintiff, this conversation enabled him to realize that his psychological injuries were the result of the past abuse.141 He consequently brought suit against his abuser. The trial court, however, granted summary judgment in favor of the counselor, concluding that even in light of Minnesota’s delayed discovery rule, the law barred his claim.142

   The Minnesota Court of Appeals reversed, distinguishing Blackowiak from Roe and other similar cases where there was “overwhelming evidence” that the plaintiffs knew the abuse caused them

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133. 546 N.W.2d 1 (Minn. 1996).
135. Blackowiak, 546 N.W.2d at 2.
136. Id.
137. Blackowiak, 528 N.W.2d at 249.
138. Id. at 252.
139. Blackowiak, 546 N.W.2d at 2.
140. Blackowiak, 528 N.W.2d at 250.
141. Id.
142. Id.
injury much earlier than they claimed. The court of appeals cited the gradual manifestation of the plaintiff’s injuries and his psychological, rather than physical, injuries as the primary distinguishing features of his case. The court of appeals concluded that “reasonable persons could find that [the plaintiff] did not have reason to know of the cause of his injuries until his conversation with [the classmate] in 1991.”

b. The Minnesota Supreme Court’s Holding and Reasoning

Affirming the trial court’s grant of summary judgment, the supreme court instructed that the inquiry is not “when did the victim acknowledge’ or ‘appreciate’ the nature and extent of the harm resulting from the abuse,” but rather when “the complainant knew or should have known that he was sexually abused.” Thus, in one sentence, the supreme court rendered the delayed discovery statute virtually useless.

The court then turned to the case before it to demonstrate just how ineffectual the delayed discovery rule had become. The court ruled that because the plaintiff knew at age eleven that he was being abused, he also understood, as a matter of law, that the abuse was causing him injury. The supreme court further stated that the plaintiff’s feelings of shame provided additional evidence that he knew, at the time the abuse was occurring, that he was injured. Because the six-year statute of limitations expired while the plaintiff was seventeen and still a minor, he therefore had only until his nineteenth birthday (in 1978 or 1979) to file suit. Hence, the court held that the plaintiff’s 1992 complaint was time-barred.

143. Id. at 251-52.
144. Cf. Roe, 518 N.W.2d at 631 (indicating that the abuse manifested in physical injuries where Roe attempted suicide with a razor blade and engaged in self-mutilation). In ABC v. Archdiocese of St. Paul & Minneapolis, a case the Blackowiak court also cites, the plaintiff suffered physical injuries when ABC became pregnant and then suffered a miscarriage. 513 N.W.2d 482, 488 (Minn. Ct. App. 1994).
145. Blackowiak, 528 N.W.2d at 252-53.
146. Id. at 253.
147. Blackowiak v. Kemp, 546 N.W.2d 1, 3 (Minn. 1996).
148. Id.
149. Id.
150. See id. Justice Sandra Gardebring filed a dissenting opinion, which begins with a most poignant statement: “The majority, by its decision today, would have us equate a moral knowledge of wrongdoing with the legal concept of knowledge of causation of injury.” Id. (Gardebring, J., dissenting). The dissent...
3. Post-Blackowiak World

Following Blackowiak, the Minnesota Court of Appeals reviewed the Roseau County case of Gibbons v. Krowech.\textsuperscript{151} In Gibbons, a neighbor sexually abused two brothers when they were between the ages of five and ten.\textsuperscript{152} The abuse occurred between 1972 and 1978, and then again in 1983.\textsuperscript{153} According to the plaintiffs' testimony, they knew the abuse was wrong when it occurred.\textsuperscript{154} However, they claimed it was not until they reached adulthood – more specifically, when their older brother (who had also been abused) committed suicide in 1990 – that they connected their social, psychological, and emotional problems to the abuse they experienced as children.\textsuperscript{155} The jury awarded the Gibbons brothers more than $250,000 each in compensatory and punitive damages.\textsuperscript{156} The neighbor appealed, arguing that Minnesota's statute of limitations barred the brothers' claims.\textsuperscript{157}

In accordance with the recent Blackowiak decision, the court of appeals reversed, concluding that because the plaintiffs knew, as children, that what their neighbor was doing to them was wrong, they understood, as a matter of law, that they were injured.\textsuperscript{158} Thus, the statute of limitations had run on their actions.\textsuperscript{159}

concludes with the almost sarcastic note: “Apparently this court expects even childhood victims of sexual abuse to possess an understanding of the legal precepts of Fireman’s Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982) which says that ‘as a matter of law one is “injured” if one is sexually abused.” Id. at 4.


\textsuperscript{152} Id.

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} Gibbons, 1996 WL 422513, at *1.

\textsuperscript{158} Id. at *2-3.

\textsuperscript{159} Id. at *3. Recently, the Minnesota Court of Appeals again affirmed Blackowiak, holding that the standard remains when the plaintiff knew or should have known of the abuse, not that the injuries suffered were caused by the abuse. See Doe v. Redeemer Lutheran Church, 555 N.W.2d 325, 328 (Minn. Ct. App. 1996). In Doe, the plaintiff had been sexually abused between 1967 and 1969 and it was not until 1990 that he realized he had been abused. See id. at 326. He filed the claim in 1991 and, thus, the claim was not time-barred under the delayed discovery rule. See id. at 328. In Milbank Ins. Co. v. J.T., the Minnesota Court of Appeals again was confronted with the decision of when the statute of limitations commenced in a sexual abuse case. No. C7-96-1225, 1997 WL 10525, at *1 (Minn. Ct. App. Jan. 14, 1997). The Milbank court reverted to the statutory version of the rule, holding that the plaintiff’s cause of action did not accrue when he was abused, as the insurer maintained, but rather when he knew or should have known that his injuries were caused by the abuse. Id. at *2. Finally, in Scheffler v.
E. The Minnesota Supreme Court’s Underlying Motivations and Willingness to Disregard the Legislature’s Intentions

The supreme court did not specify why it elected to construe the delayed discovery statute narrowly. A cursory survey of the opinion, however, reveals that the court feared that a more liberal interpretation of the law would open the floodgates to litigation and, consequently, subject defendants to fraudulent or stale claims. Deeper inspection of these motivating factors undermines the court’s fears. Notwithstanding these concerns, the legislative history of Minnesota’s delayed discovery statute clearly contradicts the court’s interpretation. Last, a comparison of Minnesota’s experience with that of other states demonstrates that the court’s interpretation is not only erroneous, but is ripe for legislative reversal. Each shall be considered in turn.

1. The Court Improperly Takes on the Role of Policymaker

The Blackowiak court’s reasoning appears to stem from its fear of encouraging litigation and its desire to prevent false or stale claims. While these are important concerns, the court unnecessarily focused upon them here.

First, the Blackowiak holding seems to reflect what may be one of the supreme court’s underlying concerns—that to interpret Minnesota Statutes section 541.073 more broadly would open the floodgates to child sexual abuse cases. Indeed, since the enactment of the delayed discovery rule, the number of appellate court cases of sexual abuse has increased by 900%. Still, the numbers

Archdiocese of St. Paul & Minneapolis, the Minnesota Court of Appeals affirmed the Blackowiak interpretation while reversing the lower court’s denial of summary judgment for the Archdiocese. 563 N.W.2d 767, 770 (Minn. Ct. App.), review denied (Minn. July 28, 1997). In granting summary judgment, the court of appeals held that Scheffler “never forgot the incidents” and that “[a]s a matter of law, a reasonable person in Scheffler’s situation should have known, at least by the time of sexual maturity, that he had been sexually abused.” Id. Therefore, under Blackowiak Scheffler’s action was time-barred. See id.

remain quite small: 1995 brought only nine cases concerning the 
delayed discovery rule. Thus the court’s concern is clearly un-
founded.

A second motivation behind the court’s erroneous decision is 
its fear of fraudulent claims. As previously indicated, in 1994 less 
than one-third of the alleged cases of child sexual abuse were actu-
ally proven. Moreover, recent news stories of a St. Paul psychia-
trist who allegedly planted false memories of sexual abuse in her 
patients add impetus to this concern. However, it is unlikely that 
there will be a flood of sexual abuse litigation, if for no other rea-
sons than the remaining stigma associated with sexual abuse and 
survivors’ continued reluctance to open old wounds. As the Cali-
ifornia Court of Appeals stated, “[a]rguments premised on opened 
floodgates and broken dams are not persuasive where, as here, we 
suspect that only a few drops of water may spill onto a barren des-
ert.”

However, even if a torrent of claims were imminent, one must 
question whether increased litigation is a valid reason for such a 
narrow interpretation. As Dean William L. Prosser scolds: “It 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 in-
competence on the part of any court of justice to deny relief on 
such grounds.”


161. See supra note 160.

162. See supra note 6 and accompanying text.

163. See Conrad deFiebre, In Testimony, Psychiatrist Defends Work/Ex-patient says Memory of Sex Abuse was Planted, STAR TRIB. (Minneapolis), June 23, 1995, at 1B.

164. Reisner v. Regents of the Univ. of Cal., 37 Cal. Rptr. 2d 518, 523 (Ct. App. 1995) (dismissing arguments that justice should be determined by threats of increased litigation); accord Laird v. Blacker, 279 Cal. Rptr. 700, 711 (Ct. App.) (stating that “[v]isions of judicial gridlock cannot color our perception of legislative intent and the temptation to reach a different result is nil where, as here, we see only the usual floodgates argument, devoid of substance”), review granted and opinion superseded by 813 P.2d 652 (Cal. 1991), aff’d, 828 P.2d 691 (Cal. 1992).

165. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56 (5th ed. 1984). Although Professor Prosser’s statement is directed at an in-
crease of infliction of mental distress claims, the same argument can be made for 
all tortious injury.
The Blackowiak holding may also reflect a public policy concern to protect defendants from stale claims. The purpose of statutes of limitation, in general, is to "eliminate stale claims, grant repose to liability that otherwise would linger on indefinitely, and permit the judicial system to husband its limited resources."\(^{166}\) However, a broader interpretation of Minnesota Statutes section 541.073 would not leave the accused open to attack. First, plaintiffs who, for whatever reason, bring their claims many years after the abuse occurred will have a difficult time assembling sufficient evidence to carry their burden of proof.\(^{167}\) Second, defendants are afforded adequate protection through the hearsay and exclusionary rules of evidence.\(^{168}\) This is in addition to the delayed discovery rule itself, which does not toll the statute of limitations from the time the plaintiff has gathered evidence against the defendant, but from the time the plaintiff makes the causal connection between the abuse and the injury.\(^{169}\) While the Minnesota Supreme Court may have had the best of intentions in narrowly interpreting the delayed discovery rule, the facts, figures, and realities associated with sexual abuse and its victims do not indicate the court's fears are well-founded.

2. The Legislature's Intentions

Regardless of the supreme court's motivations, the Blackowiak holding impermissibly modified the delayed discovery rule by usurping the legislature's authority. In doing so, the supreme court essentially vanquished boundaries set through the separation

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168. Rule 802 of the Minnesota Rules of Evidence provides that hearsay evidence is generally not admissible. MINN. R. EVID. 802. Rule 403 of the Minnesota Rules of Evidence allows for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MINN. R. EVID. 403. These rules promote the general interest in ensuring that unreliable evidence does not reach the jury.
169. See Note, supra note 167, at 375-76; see also Hammer v. Hammer, 418 N.W.2d 23, 27 (Wis. Ct. App. 1987) (stating that "[s]ince the discovery rule will not benefit claimants who negligently or purposefully fail to file a timely claim, the statute of limitations will not be 'effectively eliminated'" (citation omitted)); RESTATEMENT (SECOND) OF TORTS § 899 cmt. e (1977) (discussing the tolling of statutes of limitation in all tort actions, not just sexual abuse cases, where knowledge of the injury is not apparent within the statutory period).
of powers,\textsuperscript{170} which are fundamental to our governmental structure.\textsuperscript{171}

It is the province of the legislature to determine the need for a certain statute.\textsuperscript{172} In fact, whether a law is proper in terms of public policy and need is a matter of legislative determination. It is the province of the judiciary to interpret the law the legislature provides.\textsuperscript{173} Judicial interpretation deals with application of the law—i.e., how it applies to individual persons or parties before the tribunal. Whether a court has power to enact a rule or law depends on whether the rule or law involves a procedural or substantive matter.\textsuperscript{174} The judiciary possesses the power to set rules and law regarding procedural matters,\textsuperscript{175} but creating any substantive law\textsuperscript{176} is

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  \item \textsuperscript{170} "Separation of powers" refers to the division of the ability to make, execute, and administer laws. Power is divided between the legislative, judicial, and executive branches of government. The doctrine of separation of powers strives to maintain a balanced government. When one branch is precluded from gaining unreasonable power, tyranny and excessive control is prevented. \textit{See Maynard E. Pirsig \& Randall M. Tietjen, Court Procedure and the Separation of Powers in Minnesota,} 15 WM. MITCHELL L. REV. 141, 142 n.2 (1989).
  \item \textsuperscript{171} Thomas Jefferson was an early proponent of the doctrine of separation of powers:
    \begin{quote}
      The judiciary...members were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes...judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have, accordingly, in many instances, decided rights which should have been left to judiciary controversy .... And this is done with no ill intention. The views of the present members are perfectly upright. When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come.
    \end{quote}
  \item \textsuperscript{172} The United States and Minnesota Constitutions provide that the legislature is the lawmaking body, comprised of representatives of the people. \textit{See U.S. CONST. art. I; MINN. CONST. art. III; see also Hermeling v. Minnesota Fire \& Cas. Co., 548 N.W.2d 270, 276 (Minn. 1996).}
  \item \textsuperscript{173} \textit{See MINN. CONST. art. III} (stating that generally no person or persons belonging to or constituting one government department shall exercise the powers belonging to either of the other two departments).
  \item \textsuperscript{174} \textit{See State v. Johnson, 514 N.W.2d 551, 554 (Minn. 1994).}
  \item \textsuperscript{175} "A statute is procedural when it neither creates a new cause of action nor deprives defendant of any defense on the merits." \textit{Id.} at 555 (quoting Strauch v. Superior Court, 165 Cal. Rptr. 552, 554 (Cal. App. 1980)).
  \item \textsuperscript{176} The Minnesota Supreme Court has defined substantive law as "that part of the law which creates, defines and regulates rights, as opposed to...‘remedial law,’ which prescribes [the] method of enforcing the rights or obtaining redress for their invasion.” \textit{Stern v. Dill, 442 N.W.2d 322, 324 (Minn.}
\end{itemize}
solely a charge of the legislature.\(^{177}\)

In this case, the legislature enacted a statute of limitation specific to an action for damages based on personal injury caused by sexual abuse.\(^{178}\) A statute of limitation, as a well-settled rule, is a substantive matter.\(^{179}\) Thus, the judicial duty is to apply the statute according to its terms. A court may ascertain the legislative intent only when a statute is ambiguous or unclear.\(^{180}\)

Judicial dispute raises an inference that a law lacks clarity; in those circumstances, "[t]he fundamental aim of an appellate court construing a statute is to ascertain and give effect to the legislative intent."\(^{181}\) Thus, where interpretation of the law is not warranted, the court has no flexibility with construction. More importantly, it certainly has no power to extend or modify the statutory terms or, in this case, the statutory limitation period.

Although Minnesota Statutes section 541.073 contains no reference to the survivor’s knowledge of the wrongfulness of the defendant’s conduct, the \textit{Blackowiak} court saw fit to imply one.\(^{182}\) The statute, instead, specifically focuses only on the survivors’ knowledge that the abuse caused injury.\(^{183}\) The \textit{Blackowiak} court, in effect, ignored the statute.\(^{184}\)

Moreover, because 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

\(^{177}\) \textit{See} \textit{Johnson}, 514 N.W.2d at 554.
\(^{178}\) \textit{See} \textit{Minn. Stat.} § 541.073, subd. 2(a) (1996) ("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.").
\(^{179}\) \textit{See} \textit{Johnson v. Winthrop Lab. Div. of Sterling Drug, Inc.}, 291 Minn. 145, 151, 190 N.W.2d 77, 81 (1971) (holding that the alteration of a statute of limitations is within the province of the legislature).
\(^{180}\) \textit{See} \textit{Minn. Stat.} § 645.16(7) (1994). To ascertain legislative intent, a court may refer to the legislative history surrounding the statute’s enactment. \textit{See} \textit{Phelps v. Commonwealth Land Title Ins. Co.}, 537 N.W.2d 271, 274 (Minn. 1995). However, construction is neither necessary nor permitted where the plain, unambiguous language of the statute manifests legislative intention. \textit{See id.}
\(^{181}\) \textit{In re Copeland}, 455 N.W.2d 503, 506 (Minn. Ct. App. 1990) (citing County of Hennepin v. City of Hopkins, 239 Minn. 357, 362, 58 N.W.2d 851, 854 (1953)); \textit{accord Tuma v. Commissioner of Econ. Sec.}, 386 N.W.2d 702, 707 (Minn. 1986) ("Our objective when construing a statute is to ascertain and effectuate the legislature’s intent.").
\(^{182}\) \textit{See} \textit{Blackowiak v. Kemp}, 546 N.W.2d 1, 3 (Minn. 1996).
\(^{183}\) \textit{See} \textit{Minn. Stat.} § 541.073, subd. 2(a) (1996).
\(^{184}\) \textit{See} \textit{Blackowiak}, 546 N.W.2d at 3-4 (Gardebring, J., dissenting).
the time the victim knew or had reason to know he or she was injured by the sexual abuse, the supreme court’s holding does not give effect to the legislative intent.\textsuperscript{185} It reads the conjunctive “or” as an “and,” thereby equating the time of the commission of the act with the time the survivor acknowledges an injury.\textsuperscript{186}

The Minnesota Court of Appeals already rejected a subjective test in favor of an objective, reasonable person standard.\textsuperscript{187} The \textit{Blackowiak} court’s interpretation of the statute provides a stricter rule.\textsuperscript{188} It equates knowledge of abuse with knowledge of injury, thus creating the ultimate objective standard. Hence, the \textit{Blackowiak} court effectively eradicated the delayed discovery rule and turned it into a misnomer.\textsuperscript{189}

Under the present construction, a case where a plaintiff would be allowed a “delayed discovery” is quite improbable. This rare case would require a plaintiff to have no awareness that he or she was being abused at the time of abuse. Such a plaintiff would need be comatose or abused so commonly as a child that the victim would be unaware that what he or she was experiencing constituted abuse. Such a limitation of the standing to bring a sexual abuse case is absurd; it does not give effect to the statute’s legislative intent.

IV. CONCLUSION

Regardless of where one finds oneself in the repressed-memory debate, the ultimate question is whether \textit{Blackowiak v. Kemp} has promoted justice or simply given future courts an avenue

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\item \textsuperscript{185} See 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) (tape on file at the Minnesota Legislative Library). In the February 28, 1989, meeting of the Criminal Justice Division of the House Judiciary Committee, attorney Jeff Anderson testified on behalf of the bill. Anderson stated that the bill “recognized the reality of sexual abuse.” \textit{Id.} Such victims suffer a “unique kind of psychological damage that prevents them from recognizing they are being injured by [the sexual abuse].” \textit{Id.} Fern Sepler, the executive director of the Criminal Witness Advisory Council and the co-chair of the Attorney General’s Task Force also testified in support of the bill. \textit{Id.} Ms. Sepler noted that suppression of the trauma of sexual assault is both a natural and an expected response to the assault for both children and adults. She asserted that this reality must be reflected in the delayed discovery rule. \textit{Id.}
\item \textsuperscript{186} See \textit{Blackowiak}, 546 N.W.2d at 4 (Gardebring, J., dissenting).
\item \textsuperscript{187} See \textit{supra} note 128 (citing cases).
\item \textsuperscript{188} See \textit{supra} note 128 (citing cases).
\item \textsuperscript{189} See \textit{id.}
\end{itemize}
to an easy conclusion. A minority of jurisdictions allow the statute of limitations for sexual abuse cases to be tolled either until the abused party acknowledges the abuse or until the abused party recognizes the causal connection between the early abuse and the later injury. Minnesota had been among that minority prior to the Blackowiak decision. Knowledge of the abuse and its immediate physical harm can still leave a child blamelessly ignorant of the fact that the abuse may cause later psychological injuries. Moreover, it is not only cases of incest that involve secrecy, threats of harm, blaming, and an abuse of authority.190

The Blackowiak holding ignores the Minnesota Legislature’s intent, ignores the plain meaning of Minnesota Statutes section 541.073, and ignores Minnesota case law that puts the emphasis on knowledge of the link between the act and the injury, rather than merely focusing on the time of the abusive act. There was legal support for an affirmance on Blackowiak. However, the supreme court simply chose to look elsewhere, lured by an easy checklist to a quick disposition:

Yes No
☐ ☐ Did you always remember the abuse?
☐ ☐ Did you feel guilt or shame at the time of the abuse?

Check “yes,” and your claim is barred.

190. See Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 788 (Wis. 1995); see also supra note 117 for discussion of Wisconsin’s unique treatment of this issue.