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Charles J. Duffy III

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## Use of the Discovery Rule in Cases of Alleged Child Sexual Abuse: Does the Statute of Limitations Ever Run?

Recently there has been an attempt to expand the scope of the "discovery rule," traditionally used in medical malpractice cases, to toll the statute of limitations and to allow alleged cases of child sexual abuse or molestation to be heard. The recent cases herein discussed have refused, except under a very narrow set of circumstances, to expand the discovery rule. The approach taken by these courts, considering the circumstances and taking into account the need for a just result, is both responsible and the most reasonable response to a very difficult situation.

In *Tyson v. Tyson*<sup>1</sup> there was an attempt to extend the discovery rule to cases that involved child sexual abuse which had allegedly occurred many years prior to the institution of the action.<sup>2</sup> The Plaintiff, Nancy Tyson, who was 26 years old at the time the complaint was filed, alleged that her father, Defendant Dwight Robert Tyson, committed multiple acts of sexual assault upon her from 1960 through 1969 when she was between the ages of 3 and 11.<sup>3</sup> The plaintiff alleged that the sexual assaults committed by her own father caused her to suppress any memory of those acts and that the memory was only awakened when, in 1983, she entered into psychological therapy.<sup>4</sup> The action was brought some eight years after the plaintiff's 18th birthday.<sup>5</sup> The plaintiff contended that the timing of the filing of her complaint would not bar her claim because the discovery rule would toll the statute of limitations until the plaintiff "using reasonable diligence, would have discovered the cause of action."<sup>6</sup> The basis for this contention was

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1. 727 P.2d 226, 107 Wash.2d 72 (1986).

2. *Id.*

3. *Id.* at 227.

4. *Id.*

5. *Id.* WASH. REV. CODE § 4.16.080(2) (1988) provides that, in general, an action for personal injury must be brought within 3 years of the time the cause of action accrued. WASH. REV. CODE § 4.16.100(1) (1988) provides that an action for assault and battery must be brought within 2 years. If the person bringing the action is under the age of 18 years at the time the cause of action accrues, the statute of limitations is tolled until the person becomes 18 years old. WASH. REV. CODE § 4.16.190 (1988). *Id.*

6. *Id.* The plaintiff contended that she did not discover her cause of action until years

that the sexual abuse caused her such great emotional trauma that she repressed her entire memory of the events.<sup>7</sup>

The rule established by the *Tyson* court limiting the circumstances where the discovery rule may be applied requires: first, that this rule should be adopted only when the risk of stale claims is outweighed by the unfairness of precluding justified causes of action;<sup>8</sup> and second, where there is objective, verifiable evidence of the original wrongful act and the resulting physical injury.<sup>9</sup>

The *Tyson* court's rationale for this two step approach is clear—the first part of this test attempts to protect against stale claims and some of the resulting problems caused by the passage of time.<sup>10</sup> Some of the most significant of these problems include the unavailability of evidence due to the passage of time, because of loss or because the evidence's importance was not understood at the time.<sup>11</sup> An important or critical witness may have died, may have left the jurisdiction or, more importantly, may be unable to recall critical details that were fresh in his mind just after the events occurred. With the passage of time the events of one day may grow to proportions that far exceed those which actually occurred.<sup>12</sup>

The rationale for the second requirement of the discovery rule test is equally clear. The requirement that there be objectively verifiable evidence of the original wrongful act and the resulting physical injury<sup>13</sup> prevents blatant attempts to advance a completely false claim and increases the possibility that the fact finder will be able to determine the truth despite the passage of time.<sup>14</sup> A specific example of a situation where such objectively verifiable evidence exists includes the situation where a surgical procedure results in a type of harm that is not discoverable until many years after the surgery is performed.<sup>15</sup> In *Ruth v. Dight*<sup>16</sup> a medical mal-

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after the statute of limitations expired and only after therapy triggered her knowledge of the abuse and its connection to the emotional problems she was experiencing as an adult.  
*Id.*

7. *Id.*

8. *Id.* at 228 (citing *Ruth v. Dight*, 75 Wash.2d 660, 453 P.2d 631 (1969)).

9. *Id.* See generally notes 13-23.

10. *Ruth* 75 Wash.2d at 664-65.

11. *Id.*

12. *Id.* 75 Wash.2d at 665.

13. *Id.* (The court cites three examples of objectively verifiable evidence which include: surgical procedures, products liability actions and asbestos cases. *Id.*); See generally notes 13-23 *infra* and accompanying text.

14. *Id.*

15. *Ruth* 75 Wash.2d at 662-63.

practice action was brought some twenty-two years after the surgery was performed when it was discovered that an abdominal pain was caused by a sponge left in the patient.<sup>17</sup> After the removal of the sponge during exploratory surgery, the abdominal pain was relieved.<sup>18</sup> In this case there was no other possible explanation for the existence of the sponge in the plaintiff's abdomen other than the negligence of the surgeon some twenty-two years earlier. A second example of objectively verifiable evidence includes the case of *Ohler v. Tacoma General Hospital*.<sup>19</sup> *Ohler* was a products liability action where a premature infant was placed in an incubator and lost his sight as a result of excessive administration of oxygen.<sup>20</sup> The court found evidence to establish that the infant had been placed in the incubator for some sixteen days and given oxygen for that period.<sup>21</sup> Evidence also established that the excessive administration of oxygen caused the infant's blindness.<sup>22</sup> The *Ohler* court found that the blindness suffered by the infant was an objective manifestation of the resulting injury and thus fulfilled the second requirement of the discovery rule test.<sup>23</sup> A third example includes products liability cases involving asbestos exposure.<sup>24</sup> In *Sahlie v. Johns-Manville Sales Corporation*<sup>25</sup> the court held that evidence that the plaintiff had worked around asbestos products for almost forty years coupled with the diagnosis of asbestosis was evidence that satisfied the objectively verifiable evidence of the injury test.<sup>26</sup>

Less than one year later the case of *Raymond v. Ingram*<sup>27</sup> presented a similar situation. In *Raymond* an action was brought by a grandchild against her paternal grandparents for alleged sexual abuse that occurred during her childhood.<sup>28</sup> Ms. Raymond alleged that between the ages of 4 and 17, Aaron Ingram, with the knowledge of Hulda Ingram, her paternal grandfather sexually abused her.<sup>29</sup> As a result of this sexual abuse, Ms. Raymond alleg-

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16. 75 Wash. 2d 660, 453 P.2d 631 (1969).

17. *Id.*

18. *Id.*

19. 92 Wash.2d 507, 598 P.2d 1358 (1979).

20. *Ohler*, 92 Wash.2d at 508-09.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Sahlie v. Johns-Manville Sales Corporation*, 99 Wash.2d 550, 663 P.2d 473 (1983).

25. *Id.*

26. *Sahlie*, 99 Wash. 2d at 551.

27. 737 P.2d 314 (47 Wash. App. 781 (1987)).

28. *Id.* 737 P.2d at 315.

29. *Id.*

edly suffered, among other problems, stomach cramps and a sleep disorder.<sup>30</sup> Like in *Tyson*, the plaintiff in *Raymond* alleged that the sexual abuse caused her emotional injury that was not appreciated until she entered therapy.<sup>31</sup> Unlike *Tyson* though, Ms. Raymond admitted that "before she had therapy, she remembered the assaults and realized that as a child she had mental anguish associated with the sexual abuse."<sup>32</sup> Ms. Raymond also had memories of the events giving rise to her cause of action and some of the injuries associated with those events prior to entering therapy.<sup>33</sup> These facts clearly established that the plaintiff, Ms. Raymond, did not satisfy the first criteria established by the *Tyson* court, that all of the relevant facts pertaining to the injury be repressed.<sup>34</sup> Once the injury had been discovered and the age of majority reached, the statute of limitations began to run.<sup>35</sup>

In *Meires-Post v. Schafer*<sup>36</sup> the plaintiff alleged that while in high school she was seduced and had a sexual relationship with the defendant, a high school teacher. The experience was so traumatic that it caused her to repress her memories and feelings of the events so totally that she was unable to pursue her legal remedies.<sup>37</sup> The plaintiff alleged that between 1970-74, while in high school, she had a sexual relationship with a high school teacher which started when she would go over to his house to help him and his wife, also a high school teacher, correct papers.<sup>38</sup> The *Schafer* Court adopted a test very similar to that of the *Tyson* Court to determine whether or not to apply the discovery rule.<sup>39</sup> The *Schafer* Court held that:

the statute of limitations can be tolled under the insanity clause if (a) plaintiff can make out a case that she has repressed the memory of the facts

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30. *Id.*

31. *Id.* at 317.

32. *Id.* at 317.

33. *Id.*

34. *Id.*

35. *Id.*

36. 427 N.W.2d 606, 170 Mich. App. 174 (1988).

37. *Id.* Under MICH. COMP. LAWS § 600.5805(8) (1987); MICH. STAT. ANN. § 27A.5805(8) (1987) the period of limitation for actions for injuries to a person is three years. Under MICH. COMP. LAWS § 600.5851(1) (1987); MICH. STAT. ANN. § 26A.5851(1) (1987) "the period of limitation on the claim of a child victim does not begin to run until the child reaches the age of eighteen. That section also provides that if a person is insane at the time her claim accrues, she has one year after the disability is removed to bring the action although the applicable period of limitation has run." *Id.* at 608.

38. *Id.* at 607.

39. *Id.* at 610.

upon which her claim is predicated, such that she could not have been aware of the rights she was otherwise bound to know, and (b) there is corroboration for the plaintiff's testimony that the sexual assault occurred.<sup>40</sup>

Plaintiff entered into evidence letters from three doctors which unanimously agreed that it was possible for a 30 year old professional female, otherwise normal, to repress the recollection of a childhood seduction by a male teacher.<sup>41</sup> Based on this evidence, and the fact that no evidence was introduced to indicate that the plaintiff had a recollection of these events until she viewed a television program on the subject and then sought psychiatric counseling, the court felt that the first requirement for application of the discovery rule had been met.<sup>42</sup> The difference between this case and the others already discussed is that the defendant teacher admitted that the sexual relationship alleged by the plaintiff did occur at the time she indicated.<sup>43</sup> This obviously fulfills the corroboration requirement discussed in the second part of the test set forth in this case; the two parties involved agree that the events in question occurred.<sup>44</sup>

As a result of this admission by the defendant, the court makes it clear that they need not decide whether or not any less stringent standard should be used to determine when the discovery rule can be applied.<sup>45</sup>

In *DeRose v. Carswell*,<sup>46</sup> appellant DeRose alleged that her step-grandfather, Carswell, sexually abused her from the age of 4 until she was 11 years old.<sup>47</sup> DeRose contended that she was entitled to an extension of the statute of limitations under the delayed discovery rule because until recently, within the last six months, she did not understand the causal connection between her emotional injuries and the alleged sexual assaults.<sup>48</sup>

The *DeRose* Court adopted a two part test, almost identical to the test for application of the discovery rule, which was adopted in

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40. *Id.*

41. *Id.* at 607-08.

42. *Id.* at 608.

43. *Id.* at 607.

44. *Id.*

45. *Id.*

46. 242 Cal. Rptr. 368; 196 Cal. App. 3d 1011 (1988), *rehg. denied.*

47. *Id.*

48. *Id.* at 370. Under CA. CIV. PROC. CODE, sec. 340(3) the limitations period for assault and battery is one year. Under CA. CIV. PROC. CODE, sec. 352(a) the statute is tolled until the age of eighteen. *Id.*

the cases discussed prior to *DeRose*.<sup>49</sup> In order to take advantage of the delayed discovery rule, the appellant in this case had to show that first, she has not discovered all the facts necessary to state a cause of action and second, that some type of objectively verifiable evidence exists to show the events in question occurred.<sup>50</sup> The *DeRose* court did not have to proceed past the first criteria because under this set of facts the first criteria could not be met by the appellant.<sup>51</sup> It was established here that the appellant was aware of the fact that she had been molested and that she had incurred injury as a result of those actions.<sup>52</sup> It was admitted that the plaintiff had not repressed her memories of the events in question.<sup>53</sup> The only allegation is that the appellant did not know the causal connection between the sexual molestation and the injuries that continue today.<sup>54</sup> Citing *Raymond*, the *DeRose* court held that the failure to understand or discover the causal connection between the sexual abuse and the injury does not satisfy the requirements of the delayed discovery rule test.<sup>55</sup> The rule is only available in situations where all of the relevant facts necessary to state a cause of action have been repressed, not simply the causal connection.<sup>56</sup>

Unquestionably situations involving alleged sexual abuse of a child are very serious and difficult ones. On the one hand, if the alleged event did in fact occur the demand for punishment must be granted. But if the alleged event did not occur and the action was instituted for some other purpose, it should be quickly disposed of in order to minimize the harm which will certainly be suffered by the accused. The cases discussed herein attempt to address, as well as can be done, all of the considerations of all of the parties involved. If in fact sexual abuse has occurred, the test will allow an individual who truly has been unable to assert a legal cause of action for a period of time exceeding the statutory limitations period the opportunity to do so. The test also permits the accused, who may well be hampered in putting on a defense by the passage of time, to require the plaintiff to meet a narrow set of requirements

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49. *Id.* at 373.

50. *Id.*

51. *Id.* at 372.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 373.

56. *Id.*

in order to state a cause of action that will not be barred by the passage of time. Given the competing interests involved in a case of this type and the interest of fairness to all of the parties involved the courts' decisions discussed above have come to the only reasonable conclusion they could have: allowing a claim of this type to proceed only under a narrow set of circumstances that protects the accused, as well as, the victim.

*Charles J. Duffy III*



