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Limitation periods in child sex abuse cases in Queensland:

Recent cases provide both hope and caution

This article will provide a summary of Queensland's legislative provisions and some recent sex abuse cases, and look at what these mean for adult survivors of child sex abuse who need more time to institute proceedings for compensation.

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Section 11 of the *Limitation of Actions Act* 1974 (Qld) gives plaintiffs claiming damages for personal injuries[1] three years from the date the cause of action arose to institute proceedings. Under sections 29(1) and 29(2)(c), plaintiffs who have been sexually abused as children have this period extended until they turn 21,[2] because as minors they are under a disability.[3]

Many plaintiffs who have been sexually abused as children are unable to institute proceedings before they turn 21 because of the nature and psychological sequelae of child sexual abuse.[4]

For these plaintiffs, deserved redress is often unforthcoming in tort. A common feature of child sexual abuse is that survivors do not know the extent of their psychological injuries or the causal link between the sexual abuse and those psychosomatic problems.

In most cases, knowledge of these factors coalesces only after successful therapeutic intervention, which itself usually begins some years after the onset of the most insidious psychological consequences. It is possible for plaintiffs in this position to gain an extension of the limitation period, but they must institute proceedings within one year of gaining knowledge of their injuries.

Again, because of the psychological sequelae of abuse, this may be impossible for some survivors who are not yet ready to revisit the abuse in detail or to confront their abuser. Current legal provisions put these individuals in an unjust position.

The most important advice for adult survivors of sexual abuse who want compensation is that if they are to have any chance of gaining an extension of time, they must institute proceedings within one year of gaining knowledge of both the injury and the causal link between the abuse and the injury.

Furthermore, plaintiffs who fail to act in time, or to receive extensions of time, will not be entitled to equitable relief for breach of fiduciary duty. This is for two reasons. Firstly, the only relevant relationship capable of attracting fiduciary duties in this context is the guardian/ward relationship, and the infliction of abuse in these relationships forms only a small proportion of cases.

Many offenders are parents or persons known to the child who are in a position of authority. Australian law does not recognise parent/child relationships as attracting fiduciary obligations,[5] and fiduciary claims are not possible against mere acquaintances.

Secondly, Australian courts have consistently held that fiduciary principles protect economic interests, not personal interests.[6]

Claimed justifications for limitation periods – to let defendants proceed with their lives unencumbered by the threat of late claims, to defend themselves with fresh and still existing evidence, and to force plaintiffs not to sit on their rights – have been exposed in this context to be either less significant or inapplicable.[7]

Most Canadian jurisdictions, including some that have abolished time limitations in sexual abuse cases, have elevated the rights of plaintiff survivors over the potential harm to a defendant's right to a fair trial.

Yet Queensland remains subject to an adaptation of a now-repealed English law, which is not only morally problematic, but was described by a bewildered Lord Reid in *Smith v Central Asbestos Co Ltd* as the 'worst drafted Act on the statute book'.[8]

The previous position was that a cause of action accrued on the occurrence of the act, and not on the realisation of damage. This meant that where damage was latent, a plaintiff would be unfairly excluded from proceeding because time could run out before the injury became manifest.

Extension provisions are intended to overcome this, giving plaintiffs in certain circumstances more time to bring proceedings. However, it is questionable whether or not these provisions offer sufficient assistance in this context.

WHEN CAN A PLAINTIFF BE GRANTED AN EXTENSION OF TIME?

In limited circumstances, a plaintiff may be eligible to gain an extension of the time limit under section 31(2). The court's discretion must be exercised in the applicant's favour if the justice of the case demands it.[9]

The court may extend the limitation period, so it expires one year after the discovery of the material fact, when it appears to the court that:

(a) A material fact of a decisive character relating to the right of action was not within the applicant's knowledge until a date after the start of the third year of the limitation period (that is, after the applicant turned 20).

(b) There is evidence to establish the right of action.

This means that a plaintiff, who discovers a material fact of a decisive nature after the second year of the three-year period has expired, must institute proceedings within a year of that discovery.

What can be a material fact?

Material facts include:

- The fact of the occurrence of the negligence / trespass.
- The identity of the wrongdoer.
- The fact that the negligence / trespass causes personal injury.
- The nature and extent of the personal injury.
- The extent to which the personal injury is caused by the negligence / trespass.[10]

When is a material fact of a 'decisive character'?

Material facts are of a decisive character if a reasonable person, knowing those facts and having taken appropriate advice on those facts from qualified persons, would regard them as showing that:

- An action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing the action.
- In their own interests and taking their own circumstances into account, the person ought to bring an action.[11]

A fact is outside the applicant's means of knowledge if the applicant is not aware of the fact, and, as far as the fact is discoverable, the applicant has taken all reasonable steps to discover it.[12]

Best circumstance to gain extension of time

The key material facts in this context are usually:

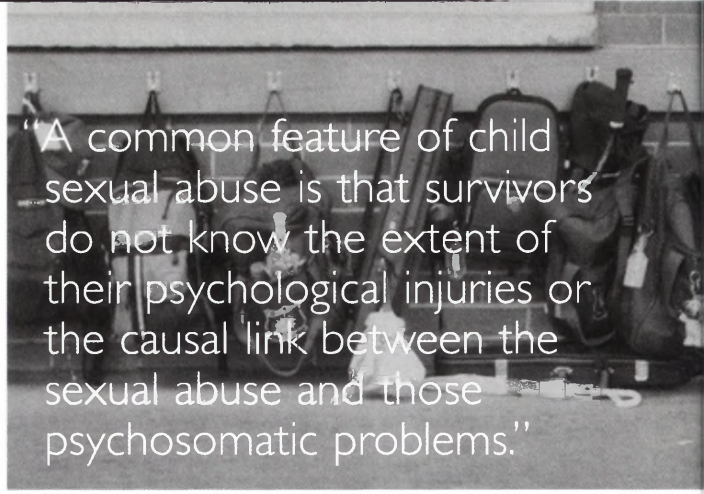
- The nature and extent of the personal injury caused.
- The extent to which the defendant's acts caused the personal injury.

Assuming the plaintiff has always been aware of the abuse,[13] a plaintiff is most likely to gain an extension if it can be demonstrated that he or she did not know until after the second year of the three-year period had expired:

- The personal injury caused (for example, depression) or its extent; or
- The causal connection between the acts done and the personal injury.

The court also must be satisfied that the defendant would not be prejudiced by the extension. It is difficult, but not impossible, for plaintiffs to gain extensions in this context.

Woodhead v Elbourne[14] is a typical demonstration of psychological or psychiatric intervention facilitating the realisation of the personal injury and the link between the abuse and the injury. Action instituted within one year of gaining that knowledge resulted in an extension of time. It was also found that no significant prejudice would ensue to the defendant.



In *Woodhead v Elbourne*, the plaintiff (born 25 February 1974, so having until 25 February 1995 to begin proceedings) had suffered sexual assaults between July 1981 and December 1987. The defendant was a friend of the plaintiff's adoptive parents. When aged 12 or 13 the plaintiff told her mother of the assaults. She had counselling and police interviews, but no action was taken.

The plaintiff suffered a crisis in November 1993 and saw a psychiatrist, who noted that the plaintiff had never been able to talk through or deal with the abuse and how it affected her. At this time, no analysis was conveyed to the plaintiff of her symptoms, their cause, or of the connection between the abuse and its consequences.

According to a subsequent psychologist's report, the plaintiff had not related her problems to the abuse because 'this would have meant confronting the trauma she was avoiding in the hope that it would just go away'.

Psychotherapy began in 1996. Towards the end of that year, the psychotherapist told the plaintiff, who had expressed anger at the assaults, that she could see a lawyer. The plaintiff did so for the first time on 26 March 1997, but was unable to provide details of her injury or condition, except to say she was receiving counselling. On the same day, the psychotherapist told the plaintiff she was not ready for legal proceedings, and refused to provide a medico-legal report.

Despite this, the plaintiff instructed her solicitor on 15 December 1997 to institute proceedings, and a writ was issued eight days later. The following month, the plaintiff began treatment with another psychiatrist, who wrote a report on 18 December 1998, after six visits from the plaintiff.

The plaintiff said that only after reading this report did she first become aware that she was suffering from post-traumatic stress disorder, stemming from childhood sexual abuse and borderline personality disorder.

'Before this time I did not know the nature of my condition, the extent of my condition or whether my condition related to the assaults by the defendant.'

The defendant argued that knowledge of the material facts existed in 1996, when the plaintiff began psychotherapy.

The plaintiff succeeded. Justice White accepted that only after the plaintiff had read the December 1998 report did she

possess the material facts that would lead a reasonable person to institute proceedings.

The psychiatric diagnosis was held to raise the prospect of success from a mere possibility to a real likelihood. Although the plaintiff had explored the events over two years of psychotherapy, her knowledge of the link between the abuse and her injuries was not sufficient to dismiss the application.

'She may have been led to think that possibly the alleged sexual assaults were the cause of her symptoms, but that is insufficient.'

There was no significant prejudice to the defendant, so the court's residual discretion to refuse an extension was not enlivened.

WHEN WILL A PLAINTIFF FAIL?

In contrast, in cases where a plaintiff has always known of the abuse, the personal injury and the causal link between the abuse and the injury, or if the plaintiff should reasonably have ascertained these facts, the plaintiff's application to extend time will fail.

A recent example is *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton*.[15] The application to extend time was dismissed at first instance and on appeal. The appellant was born on 23 March 1960. She was taken into state care when she was two months old, and in 1961 she was placed at Neerkol Orphanage, a private institution licensed to care for children and run by an order of nuns.

The appellant suffered personal injuries from multiple incidents of cruelty by the nuns and from numerous incidents of sexual assault and rape by a Neerkol employee. Under limitations legislation, she had until 23 March 1981 to institute proceedings.

A writ of summons was issued on 27 July 1998. She claimed damages for negligence against the State of Queensland, and damages for trespass to the person against the employee.

The appellant claimed recent knowledge of two material facts of a decisive nature that previously were neither known to her nor within her means of knowledge. The first fact was the knowledge that she suffered a psychiatric injury (depression) caused, at least in part, by the abuse. She stated that she only gained this knowledge on 7 October 1998, after reading a psychiatrist's report dated 29 September 1998.

The second fact was the causal connection between the acts and the personal injury. The appellant said that only after reading the report did she appreciate that the abuse may have affected her psychiatrically and that it had caused the injuries suffered since leaving Neerkol.

She stated: 'I had received psychiatric treatment but there was never any mention or indication of a connection between ▶

the abuse I suffered and my current condition.'

The applicant stated that she had harboured a hatred for her abusers, but did not ever consider that she was entitled to compensation. She had been reluctant to discuss her history, but in 1997 learned of others who had suffered abuse at Neerkol. At this point, she complained to police and on 6 August 1997 consulted her solicitor regarding criminal charges. Her solicitor offered to investigate a civil claim.

Apart from Justice Atkinson's dissent, decisions in both instances exemplify the courts' approach in this context, especially regarding the expectations of a 'reasonable' abuse survivor when the abuse occurred long ago, the marginalisation of psychological evidence, and the emphasis given to the possibility of prejudice to defendants.

At first instance, Justice White focussed on the applicant's cognition of the acts and gave no consideration to psychological sequelae. Justice White thought the applicant 'was in possession of the necessary facts to commence an action...from the time the limitation period commenced to run'. There was 'nothing in the material to suggest that she could not have done so'.

'She would have been advised, had she sought advice, that the damages would be likely to be considerable... She retained a lively awareness of the wrongs which had been done to her over the ensuing years... There is no suggestion that she was in an alcoholic stupor or suffering from depression to such an extent that she could not have sought appropriate advice.'

The psychiatric report was explicitly held to be relevant to the extent of the personal injury (which is mentioned in section 30(1)(iv), and so should arguably have satisfied the extension provisions). Justice White's approach emphasised the fact that if appropriately advised, the plaintiff could have brought the action on facts already in her possession. The second major factor counting against the applicant was the weight given to the prejudice that would occur to the defendants should the trial proceed.

Justice White's approach was embedded in the Court of Appeal, although the majority judges gave a more precise explanation. Justice Muir identified the applicant's longstanding hatred of her abusers. However, this is not the same as knowing of the injury caused or its extent.

He also identified the plaintiff's previous linking of her aggressive behaviour as a young person with the physical and sexual abuse she suffered. But this does not extend to knowledge of depression.

Justice Muir also found that there was no evidence to show the plaintiff had been prevented from making a connection between the abuse and her personal injury.

Justice McPherson held that the appellant's statement about her aggressive behaviour and anger demonstrated knowledge of the causal connection between abuse and consequences. If it did not, then the causal connection was a fact she could have found out by taking the reasonable step of asking a psychiatrist or psychologist. 'In short, one would have expected her to ask what it was that caused the depressive states.'

CONCLUSION

Plaintiffs seeking civil compensation for child sexual abuse who are out of time need to institute proceedings as soon as they become aware of the personal injury suffered and of the causal connection between the abuse and the injury.

Furthermore, in the absence of legislative reform, the courts' application of the legislation in *Carter* indicates that the longer adult survivors leave taking 'reasonable steps' to ascertain the injury and its cause, the less likely it is they will receive an extension.

The special psychological position in which most survivors are placed has not yet been sufficiently recognised by the courts, and the potential or real prejudice to the defendant is given significant weight. These positions have serious implications for plaintiffs, lawyers and, perhaps most importantly, psychologists and psychiatrists who treat adult survivors of abuse. PL

Endnotes:

1 Plaintiffs are usually suing on the basis of battery, which constitutes trespass to the person. Trespass is explicitly mentioned in s 11.

2 ss 29(1), 29(2)(c).

3 Defined in s 5(2).

4 eg J Mosher, 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44 *University of Toronto Law Journal* 169.

5 *Paramasivam v Flynn* (1998) 160 ALR 203.

6 *Breen v Williams* (1996) 186 CLR 71; *Paramasivam v Flynn* (1998) 160 ALR 203.

7 eg L Bunney, 'Limitation of Actions: Effect on Child Sexual Abuse Survivors in Queensland' (1998) 18 *Queensland Lawyer* 128, pp 132-133.

8 [1973] AC 518, 529.

9 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541.

10 s 30(1)(a).

11 s 30(1)(b).

12 s 30(1)(c).

13 If a plaintiff only recently realises the fact of the abuse this itself will be new knowledge of a material fact of a decisive character under s 30(1)(a)(i).

14 [2000] QSC 042; see also *Tiernan v Tiernan* (unreported, Supreme Court of Queensland, 22 April 1993).

15 [2000] QSC 306; [2001] QCA 335; see also *Short v Reid* (unreported, Supreme Court of Queensland, 17 December 1999).