TOLLING THE STATUTE OF LIMITATIONS IN ACTIONS BROUGHT BY ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE

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I. INTRODUCTION

In the past five years a distinct group of claimants has come to the forefront of tort litigation. In several jurisdictions[1] adult survivors[2] of childhood sexual abuse have brought civil actions against the alleged abusers. These claimants encountered a common problem. The statute of limitations, on its face, barred their causes of action.[3] This Note analyzes current Arizona law to anticipate how Arizona courts are likely to treat this issue.[4]

Section One of this Note provides background information about the societal problem of child abuse in the United States and identifies the short and long-term effects of such abuse. This section also addresses why adult survivors of childhood sexual abuse are now attempting to hold the abusers civilly responsible for their acts.

Section Two summarizes the actions that claimants have brought thus far, focusing on the facts of each case and the theories advanced to avoid the statute of limitations bar. Analysis of these cases shows that appellate courts have upheld the statute of limitations bar in most states.[5] Wisconsin, North

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1. Thus far, causes of action have advanced to the appellate level in Washington, California, North Dakota, Wisconsin, Michigan, Montana, Florida and Nevada.

2. The term "adult survivor" has been used to identify an individual who has linked childhood sexual abuse with psychological disorders. *See, e.g.*, Petersen v. Bruen, 792 P.2d 18, 20 (Nev. 1990); Tyson v. Tyson, 107 Wash. 2d 72, 89, 727 P.2d 226, 235 (1986) (Pearson, J., dissenting).

3. *See, e.g.*, E.W. v. D.C.H., 754 P.2d 817 (Mont. 1988); *Tyson*, 107 Wash. 2d 72, 727 P.2d 226; Kaiser v. Milliman, 50 Wash. App. 235, 747 P.2d 1130 (1988).

4. Several law review articles address the issue of a statute of limitations that appears to bar the cause of action brought in various states by an adult survivors of childhood sexual abuse. *See, e.g.*, Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206 (1988-89); Note, *The Discovery Rule and Father-Daughter Incest: A Legislative Response*, 29 B.C.L. REV. 941 (1987-88); Note, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM U.L.J. 709 (1986-87); Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189 (1984); Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191 (1985); Note, *Balancing the Statute of Limitations and the Discovery Rule: Some Victims of Incestuous Abuse are Denied Access to Washington Courts-Tyson v. Tyson*, 10 U. PUGET SOUND L. REV. 721 (1986-87).

5. *See infra* notes 35-183 and accompanying text.

Dakota and, to some extent, Nevada, are exceptions to this general trend.[6] In several states where courts have issued unfavorable rulings on the statute of limitations issue, legislative bodies are responding by enacting statutes that extend the statute of limitations for these claimants.[7]

Finally, this Note addresses how Arizona courts are likely to deal with the statute of limitations issue. The traditional methods of tolling Arizona statutes of limitations are identified and applied to facts representative of claims of adult survivors of childhood sexual abuse.

The right to recover damages for personal injury is a fundamental right under the Arizona Constitution.[8] Accordingly, Arizona courts have universally applied the discovery rule as the point of accrual for tort causes of action.[9] The courts also have found that legislative attempts to limit the discovery rule for tort actions violate equal protection guarantees and article eighteen, section six of the Arizona Constitution.[10] This Note explores the benefits that the discovery rule confers to adult survivors of childhood sexual abuse and the elements Arizona plaintiffs must allege to reach the trier of fact on the discovery issue. Analysis suggests that, in Arizona, plaintiffs will be able to raise a material issue of fact regarding when they should have discovered the cause of action.

II. BACKGROUND

Historically, professionals discounted children's reports of sexual abuse as fantasy or the fault of a seductive child.[11] Children were viewed as the property of their parents, not as individuals with independent rights,[12] and states were reluctant to intrude into family life.[13] There was also wide acceptance of the Freudian theory that daughters' fantasies of incest with their fathers caused neurosis in women.[14]

An influential article on the battered child syndrome first identified child abuse as a societal problem in the early 1960's.[15] The civil rights and youth movements of the 1960's emphasized the rights of individuals whose freedom had traditionally been restricted, and helped society begin to develop a general awareness about human rights.[16] In the 1970's, feminists and child advocates

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6. *Id.*

7. *See, e.g.*, CAL. CIV. PROC. CODE § 340.1 (West Supp.1991); MONT. CODE ANN. § 27-2-216 (1989); WASH. REV. CODE ANN. § 4.16.340 (1988).

8. *See* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984). *See also* ARIZ. CONST. art. XVIII, § 6.

9. *See, e.g.*, Boswell v. Phoenix Newspapers Inc., 152 Ariz. 9, 730 P.2d 186 (1986); *Kenyon*, 142 Ariz. 69, 688 P.2d 961; Anson v. American Motors Corp., 155 Ariz. 420, 747 P.2d 581 (Ct. App. 1987).

10. *Kenyon*, 142 Ariz. at 87, 688 P.2d at 979; *Anson*, 155 Ariz. at 425-26, 747 P.2d at 586-87.

11. J. HAUGAARD & N. REPPUCCI, THE SEXUAL ABUSE OF CHILDREN 2-7 (1988).

12. *Id.*

13. *Id.*

14. *Id.* at 149.

15. INCEST AS CHILD ABUSE 13 (B. Vander Mey & R. Neff eds. 1986) [hereinafter INCEST AS CHILD ABUSE]. *See also* J. HAUGAARD & N. REPPUCCI, *supra* note 11, at 3.

16. INCEST AS CHILD ABUSE, *supra* note 15, at 13.

pushed for public awareness about the sexual abuse of children.[17] As a result, more is known about sexual abuse and its effects today.

Evidence suggests that victims of childhood sexual abuse suffer both short and long-term effects.[18] Short-term effects include feelings of rejection, confusion, humiliation, betrayal, and fear.[19] In the long term, survivors of childhood sexual abuse are more likely to suffer from sexual dysfunction as adults.[20] They are also more likely to abuse alcohol or drugs.[21] Suicide, depression, and inability to cope with the role of wife or mother have also been linked with experiences of sexual abuse.[22]

Currently, all fifty states have laws requiring individuals, such as doctors and teachers, to report suspected cases of child abuse.[23] Despite the laws, these individuals report only thirty-three percent of all abuse cases and fifty-six percent of sexual abuse cases.[24] Several reasons have been cited for the large number of unreported cases. First, individuals required to report argue that current legislation does not define abuse adequately. This makes assessing whether abuse has occurred difficult and uncertain.[25]

Victims also tend to keep the abuse to themselves, out of shame, fear and embarrassment.[26] The perpetrator often occupies a position of authority, such as a father or teacher, and uses the relationship to keep the victim silent.[27] The abuser may also convince the victim that the act is normal or is the victim's fault.[28]

Because the victim is vulnerable and usually knows the abuser, many sexual abuse cases will continue to go unreported.[29] Even when abuse is reported, victims receive inadequate protection and treatment.[30] One study indicates that only sixteen percent of those convicted of abusing male children

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17. J. HAUGAARD & N. REPPUCCI, *supra* note 11, at 3; INCEST AS CHILD ABUSE, *supra* note 15, at 11.

18. *See generally* J. HAUGAARD & N. REPPUCCI, *supra* note 11; HANDBOOK ON SEXUAL ABUSE OF CHILDREN (L. Walker ed. 1988).

19. INCEST AS CHILD ABUSE, *supra* note 15, at 67. The authors define short term effects as those "that the victim experiences or displays during and or immediately after the incest and/or its disclosure." *Id.*

20. *Id.* at 69.

21. *Id.*

22. *Id.*

23. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3620 (1990).

24. J. HAUGAARD & N. REPPUCCI, *supra* note 11, at 22-23. Although researchers agree that there are no reliable figures on the incidence of childhood sexual abuse in the United States, there was a tenfold increase in the number of reported cases from 1976-1982. The number reported has lead researchers to estimate that 336,200 incidents of child abuse occur each year, 261,500 of which go unreported. INCEST AS CHILD ABUSE, *supra* note 15, at 45-46.

25. J. HAUGAARD & N. REPPUCCI, *supra* note 11, at 23.

26. INCEST AS CHILD ABUSE, *supra* note 15, at 46.

27. J. HAUGAARD & N. REPPUCCI, *supra* note 11, at 59; INCEST AS CHILD ABUSE, *supra* note 15, at 6.

28. INCEST AS CHILD ABUSE, *supra* note 15, at 6; *See also* Hammer v. Hammer, 142 Wis. 2d 257, 261, 418 N.W.2d 23, 24 (Ct. App. 1987).

29. INCEST AS CHILD ABUSE, *supra* note 15, at 45-46.

30. HANDBOOK ON SEXUAL ABUSE OF CHILDREN, *supra* note 18, at 152-55.

and one percent of those convicted of abusing female children receive a jail sentence.[31]

Social workers are inadequately prepared to deal with sexual abuse, particularly when the perpetrator is a family member. Federal funding for child protective services in 1985 was 200 million dollars below its 1981 funding level.[32] National and state legislation further hamper social workers by requiring them to reunite families if possible.[33] When confronted by a perpetrator who controls the family, a victim unwilling or unable to speak up, and a nonabusing spouse who is powerless to intervene, it is almost impossible for social workers to remove the victim from the abusive environment.[34]

The above discussion only scratches the surface of the abuse problem in the United States. It suggests, however, that current criminal sanctions and social services are inadequate. Adult survivors of childhood sexual abuse who bring civil actions apparently agree. Although courts can never undo the abuse, they should permit civil actions. This will foster recognition of the abuse and increase public awareness in addition to providing some compensation for abuse victims. Increased public awareness, public identification of the perpetrator and damage awards to victims may also deter future acts of abuse.

III. ACTIONS BROUGHT BY ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE

Adult survivors of childhood sexual abuse have used several theories in actions against their abusers. These theories include personal injury,[35] assault and battery,[36] intentional infliction of emotional distress,[37] negligent infliction of emotional distress,[38] sexual assault,[39] and incestuous abuse.[40]

Statutes of limitations ranging from one to three years govern the theories claimants advance.[41] Although the periods do not begin to run until the

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31. J. HAUGAARD & N. REPPUCCI, *supra* note 11, at 58.
32. HANDBOOK ON SEXUAL ABUSE OF CHILDREN, *supra* note 18, at 152-55.
33. *Id.* at 152-55.
34. *Id.*
35. *See, e.g., Tyson*, 107 Wash. 2d 72, 727 P.2d 226; Meiers-Post v. Schafer, 170 Mich. App. 174, 427 N.W.2d 606 (1988); Kaiser v. Milliman, 50 Wash. App. 235, 747 P.2d 1130 (1988).
36. *Petersen*, 792 P.2d 18; Osland v. Osland, 442 N.W.2d 907 (N.D. 1989); *E.W.*, 754 P.2d 817; DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1988); *Kaiser*, 50 Wash. App. 235, 747 P.2d 1130.
37. *Petersen*, 792 P.2d 18; *E.W.*, 754 P.2d 817; *DeRose*, 196 Cal. App. 3d. 1011, 242 Cal. Rptr. 368; *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23.
38. *Petersen*, 792 P.2d 18; *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23.
39. Raymond v. Ingram, 47 Wash. App. 781, 737 P.2d 314 (1987).
40. *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23. Although the Wisconsin legislature has not enacted a tort entitled "incestuous abuse," the *Hammer* court implied such a cause of action. *See id.* at 259 n.2, 418 N.W.2d at 24 n.2, where the court discusses the two applicable statutes of limitations. *See also* WIS. STAT. ANN. §§ 893.57, 893.54 (West 1979).
41. *See, e.g., Petersen*, 792 P.2d 18 (2 year statute of limitations); *Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (3 year statute of limitations); *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1 year statute of limitations); *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23 (2 year

age of majority,[42] the time limit was an obstacle for all of the claimants. Some adult survivors of childhood sexual abuse overcame the statute of limitations hurdle to reach the merits of their claims, but most did not. Claimants advanced one or more of the traditional theories of claim accrual or tolling of a statute of limitations against the limitations barrier, including the discovery rule,[43] estoppel,[44] fraud,[45] and insanity.[46]

The cases involving adult survivors of childhood sexual abuse share remarkably similar fact patterns. In most cases the claimant was aware of the abuse at the time it occurred and knew, by the age of majority, that the conduct of the perpetrator was wrong.[47] Generally, the victim suffered emotional problems, but did not link the problems to the experience of sexual abuse until much later in life. In other cases, the victim totally repressed memory of the abuse until some external stimulus brought it to conscious memory.[48] These two fact patterns play an important role in the claimants' arguments for overcoming the statute of limitations.

A. Discovery Rule

In most of the actions brought against perpetrators of childhood sexual abuse the claimant attempted to avoid a statute of limitations bar by arguing that the discovery rule should apply.[49] Under the discovery rule the statute of

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statute of limitations). Two reasons are traditionally given for statutes of limitations. The first is to prevent stale claims from clogging the court system. Mayer v. Good Samaritan Hosp., 14 Ariz. App. 248, 482 P.2d 497 (1971). The second is to free defendants from fear of litigation after a fixed period of time. Londen v. Green Acres Trust, 159 Ariz. 136, 765 P.2d 538 (Ct. App. 1988). It would not be "just" to let a plaintiff who sat on a claim for many years bring an action that the defendant has no reason to expect. The rationale in Arizona case law is representative of the reasons generally given for enactment of statutes of limitations. *See also* Hall v. Romero, 141 Ariz. 120, 685 P.2d 757 (Ct. App. 1984).

42. In each jurisdiction where these claims were brought there is a statute similar in effect to Arizona Revised Statute Annotated section 12-502. The relevant portion of the statute reads as follows:

> A. If a person entitled to bring an action ... is at the time the cause of action accrues either under eighteen years of age or of unsound mind, the period of such disability shall not be deemed a portion of the period limited for commencement of the action. Such person shall have the same time after removal of the disability which is allowed to others.

ARIZ. REV. STAT. ANN. § 12-502 (Supp. 1990).

43. *See, e.g., Petersen*, 792 P.2d 18; *Tyson*, 107 Wash. 2d 72, 727 P.2d 226; *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; *Raymond*, 47 Wash. App. 781, 737 P.2d 314; *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23.

44. *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; *Raymond*, 47 Wash. App. 781, 737 P.2d 314.

45. *E.W.*, 754 P.2d 817; Snyder v. Boy Scouts of America, Inc., 205 Cal. App. 3d 1318, 253 Cal. Rptr. 156 (1988).

46. *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; *Meiers-Post*, 170 Mich. App. 174, 427 N.W.2d 606.

47. *See, e.g., Raymond*, 47 Wash. App. 781, 737 P.2d 314; *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23.

48. *See, e.g., Petersen*, 792 P.2d 18; *Tyson*, 107 Wash. 2d 72, 727 P.2d 226; *Meiers-Post*, 170 Mich. App. 174, 427 N.W.2d 606.

49. *See infra* notes 54-129 and accompanying text.

limitations period does not begin to run until the claimant discovers or, by the exercise of reasonable diligence, should have discovered the cause of action.[50]

An adult survivor of childhood sexual abuse first made the discovery rule argument in *Tyson v. Tyson*.[51] Tyson alleged that her father sexually abused her from when she was three years old until the age of eleven.[52] When the defendant moved for summary judgment based on the statute of limitations, Tyson alleged that she did not bring the claim earlier because she had repressed all memory of the abuse until entering therapy at the age of twenty-six.[53]

Tyson argued that the discovery rule should extend to intentional torts when the victim blocks the tortious act from conscious memory in response to the trauma.[54] She also alleged that her claim was identical to other cases, such as medical malpractice and product liability actions, in which the discovery rule applies.[55] The Washington Supreme Court found, however, that objective, verifiable evidence of the wrongful act and the resultant injury existed when the discovery rule was applied in these cases.[56]

According to the *Tyson* court, statutes of limitation prevent stale claims that might present evidentiary problems.[57] The court found evidentiary problems in Tyson's claim. The court was concerned about inaccurate recollection due to the length of the time between the alleged events and the claim.[58] The court also found that psychiatric testimony concerning Tyson's condition would not lessen the subjectivity of the claim.[59] Ultimately, the court refused to apply the discovery rule because the risk of a stale claim outweighed the unfairness of precluding Tyson's cause of action.[60]

A California Court of Appeals recently came to a different conclusion. In *Doe v. Doe*,[61] the court found that whether the discovery doctrine tolls the

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50. RESTATEMENT (SECOND) OF TORTS § 899 comment e (1977). Though this comment speaks specifically to malpractice, it clearly indicates the purpose of the discovery rule. A "statute must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by exercise of reasonable diligence should have discovered it." *See also Petersen*, 792 P.2d at 20 ("The rationale behind the discovery rule is that the policies served by statutes of limitation do not outweigh the equities reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause of their injuries.").

51. 107 Wash. 2d 72, 727 P.2d 226. *Tyson* was the first case brought by an adult survivor of childhood sexual abuse to reach the appellate level on the statute of limitations issue.

52. *Id.* at 74-75, 727 P.2d at 227.

53. *Id.*

54. *Id.* at 75, 727 P.2d at 227.

55. *Id.* at 76-77, 727 P.2d at 228.

56. *Id.*

57. *Id.* at 75-76, 727 P.2d at 227-28.

58. *Id.* at 78, 727 P.2d at 229.

59. *Id.*

60. *Id.* at 76, 727 P.2d at 228. *See also* Lindabury v. Lindabury, 552 So. 2d 1117 (Fla. App. 1989), where the Florida court of appeals strictly applied the statute of limitations to a claim made twenty years after the childhood sexual abuse occurred. The abuse occurred from 1955 to 1965. The plaintiff alleged that she repressed all memory of the abuse until 1985. The court found, however, that it was "beyond contradiction that the alleged incestuous acts, if taken as true, damaged the appellant at the time they occurred." *Id.* at 1117.

61. 264 Cal. Rptr. 633.

statute of limitations is a triable issue of fact when an adult survivor of childhood sexual abuse pleads that she repressed all memory of the abuse during childhood.[62] The court concluded that psychological repression directly caused by tortious acts constitutes unawareness of facts essential to recognizing that a cause of action exists.[63] The difference between the *Doe* court's conclusion and that of the *Tyson* majority suggests that the outcome in similar cases may depend on the individual court's willingness to accept evidence of the effects of childhood sexual abuse.

In *Petersen v. Bruen*,[64] the Nevada Supreme Court did take into consideration some of the long-term effects of childhood sexual abuse. The court's conclusion, however, was that the long term effects of abuse made the discovery rule inappropriate in adult survivor cases. In *Petersen*, the plaintiff attempted to avoid a statute of limitations defense by asserting that he blocked out eight years of sexual molestation until entering therapy.[65] The district court found that a two year limitations period applied to the claim. The court granted the defendant's motion to dismiss because Petersen's complaint was filed five years after the last alleged incident of abuse.[66] On appeal, Petersen argued that his complaint should not have been dismissed because "he did not discover the nexus between Bruen's behavior and his emotional distress" until entering therapy.[67]

The Nevada Supreme Court, like the *Tyson* court, refused to apply the discovery rule to Petersen's claim. Its reasoning, however, differed greatly from the Washington Supreme Court. The *Petersen* court found that applying the discovery rule would cause increased stress for the adult survivor of childhood sexual abuse.[68] It feared that application of the discovery rule would switch the focus of the lawsuit from the actions of the abuser to matters of

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62. *Id.* at 634. The same court previously found that the discovery doctrine does not apply to adult survivor of childhood sexual abuse actions when the plaintiff claims that she knew of the abuse but did not connect it with ongoing emotional problems until after the statute of limitations expired. The court distinguished *Doe* from *DeRose* by finding that "as a matter of law an assault constitutes cognizable harm, and since [DeRose] was aware of the assaults [at the time they occurred] the period of limitations began to run at that time." *Doe*, 264 Cal. Rptr. at 636. *See DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368. *See also infra* notes 96-103 and accompanying text.

63. *Doe*, 264 Cal. Rptr. at 639.

64. 792 P.2d 18.

65. *Id.* at 19.

66. *Id.*

67. *Id.*

68. *Id.* at 23. According to the court,

> adoption of the discovery rule would produce some untoward, if not bizarre, possibilities. First, in undoubted instances, the complex of emotions burdening victims may be exacerbated by forcing them to prematurely confront their abusers in order to preserve their prospects for redress. Second, a victim's suffering may be intensified by the realization that his or her failure to timely muster the will or the courage to seek relief from the abuser has left the latter forever immune from civil accountability. Third, it is reasonable to assume that certain victims, when informed of the discovery rule will add to their inner turmoil by dissembling in order to avoid the bar of the statute. Fourth, under the discovery rule, the [childhood sexual abuse] victim will be subjected to the ultimate irony of having to demonstrate his or her integrity in claiming the benefit of the rule.

proof concerning when the victim discovered, or should have discovered, the cause of action.[69]

The court did, however, reverse the district court's dismissal of Petersen's claim. The court found that the legislature did not consider an action for childhood sexual abuse when the statute of limitations for wrongful acts was promulgated.[70] It therefore framed the issue as "whether the policies favoring the unenforceability of stale claims should prevail in situations involving adult survivors of [childhood sexual abuse]."[71] In making its determination the court considered that the defendant was convicted for sexually abusing Petersen prior to the time the civil action was filed.[72] According to the court, the conviction was clear and convincing evidence of the abuse.[73]

Ultimately, the court found that "no existing statute of limitations applies to bar the action of an adult survivor of [childhood sexual abuse] when it is shown by clear and convincing evidence that the plaintiff has in fact been sexually abused during minority by the named defendant."[74] While this holding provided relief for Petersen it is unclear how helpful it will be in other cases.

The holding is limited on its face because the court imposes a two year statute of limitations unless clear and convincing evidence exists to overcome the possibility of fraudulent claims.[75] A less obvious limitation is the lack of guidance as to what is sufficient evidence to meet the clear and convincing standard. In *Petersen*, a criminal conviction was enough. If a conviction is necessary, however, the court in fact imposed a standard even more difficult to meet than clear and convincing evidence. Before the conviction can be used as clear and convincing evidence of abuse in a civil action, the defendant must be found criminally responsible beyond a reasonable doubt. Even if a criminal conviction is not necessary, the need for clear and convincing evidence of the abuse to avoid the statute of limitations defense requires the plaintiff to prove her case at the pleading stage.

Unlike Tyson, Doe and Petersen, most adult survivors of childhood sexual abuse do not claim that they have no memory of the abuse. Generally, the victim argues that she knew of the abuse she suffered but was unable to discover the cause of action until she recognized the causal link between the abuse and continuing emotional problems. Victims made this argument in *Raymond v. Ingram*[76] and *Kaiser v. Milliman*[77] in the Washington Court of Appeals, following the *Tyson* decision.

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69. *Id.*
70. *Id.* at 22.
71. *Id.*
72. *Id.* at 19. Bruen was convicted of sexual assault, attempted sexual assault, lewdness with a minor under the age of fourteen, use of a minor in producing pornography, and possession of child pornography.
73. *Id.* at 25.
74. *Id.*
75. *Id.* The court "recognized that injustice may result from our ruling.... We are persuaded, however, that the potential for fraudulent claims is sufficiently great to warrant such a ruling." *Id.*
76. 47 Wash. App. 781, 737 P.2d 314.
77. 50 Wash. App. 235, 747 P.2d 1130.

Both *Raymond* and *Kaiser* noted the *Tyson* court's holding that the discovery rule does not apply when no objective, verifiable evidence of the original wrongful act and resulting physical injury exists.[78] The *Raymond* court reasoned that it did not have to apply the objective, verifiable evidence test. Instead, the court denied application of the discovery rule because the claimant remembered the abuse and knew that it was wrong.[79] Recognition of the abuse was enough to start the statute running even though the full extent of the injury was unknown. The plaintiff was entitled to substantial damages as soon as the event occurred because the claim arose out of sexual assault.[80]

The plaintiff in *Kaiser*, like the plaintiff in *Raymond*, alleged that she knew of the sexual abuse when it occurred but did not recognize its connection to her ongoing emotional problems until entering therapy years later.[81] Even though the facts in *Kaiser* were more similar to *Raymond* than to *Tyson*, the *Kaiser* court applied the objective, verifiable evidence test.[82] The *Kaiser* court agreed that regardless of whether the plaintiff remembered the abuse, the need to adhere to the statute of limitations outweighs the unfairness of precluding the cause of action unless there is objective, verifiable evidence.[83]

Courts in California,[84] Montana,[85] Florida,[86] Wisconsin[87] and North Dakota[88] have also considered whether the discovery rule applies to actions brought by adult survivors of childhood sexual abuse. The California and Montana courts, like the *Raymond* and *Kaiser* courts, refused to apply the discovery rule when the plaintiff knew the abuse happened but was not aware of the causal link and extent of emotional harm resulting from the abuse.[89]

The California courts reached this result despite a statute of limitations that applied exclusively to actions arising out of incestuous abuse.[90] The

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78. *Raymond*, 47 Wash. App. at 786, 737 P.2d at 317; *Kaiser*, 50 Wash. App. at 237, 747 P.2d at 1131.

79. *Raymond*, 47 Wash. App. at 787, 737 P.2d at 317.

80. *Id.*

81. *Kaiser*, 50 Wash. App. at 237-38, 747 P.2d at 1130-31.

82. *Id.*

83. *Id.*

84. Evans v. Eckelman, 265 Cal. Rptr. 605 (1990); *Doe*, 264 Cal. Rptr. 633; *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; *Snyder*, 205 Cal. App. 3d 1318, 253 Cal. Rptr. 156.

85. *E.W.*, 754 P.2d 817.

86. *Lindabury*, 552 So. 2d 1117.

87. *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23.

88. *Osland*, 442 N.W.2d 907.

89. *DeRose*, 196 Cal. App. 3d. 1011, 242 Cal. Rptr. 368; *Snyder*, 205 Cal. App. 3d. 1318, 253 Cal. Rptr. 156; *E.W.*, 754 P.2d 817. *See infra* text accompanying notes 90-111.

90. CAL. CIV. PROC. CODE § 340.1 (West 1986), *amended by* CAL. CIV. PROC. CODE § 340.1 (West Supp. 1991), in relevant part reads as follows:

> (a) In any civil action for injury or illness based upon lewd or lascivious acts with a child under the age of 14 years, fornication, sodomy, oral copulation, or penetration of genital or anal openings of another with a foreign object, in which this conduct is alleged to have occurred between a household or family member and a child where the act upon which the action is based occurred before the plaintiff attained the age of 18 years, the time for commencement of the action shall be three years.
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statute in effect at the time allowed, but did not mandate, the use of the discovery rule in actions brought against household or family members by victims of childhood sexual abuse.[91] Even though this statute recognized that childhood sexual abuse was a significant problem and extended the statute of limitations from one to three years, its usefulness was limited,[92] as demonstrated by *DeRose v. Carswell*[93] and *Snyder v. Boy Scouts of America*.[94]

In *DeRose*, the twenty-four year old plaintiff alleged that her stepgrandfather sexually abused her from the time she was four until the time she was eleven.[95] Like the plaintiffs in *Raymond* and *Kaiser*, DeRose argued that the discovery rule should apply to her cause of action because she was unable to recognize the causal link between the abuse and later emotional problems.[96] Although the incestuous abuse statute extended the period of limitations from one to three years and allowed application of the discovery rule, the court found that DeRose's claim was not timely filed.[97]

The court held that the discovery rule applies only when the plaintiff has not discovered all of the facts essential to the cause of action.[98] DeRose offered evidence suggesting that the psychological effects of sexual abuse prevent the victim from understanding the link between emotional injuries and the abuse.[99] The court, however, refused to consider the validity of any psychological theory because DeRose's complaint, on its face, showed that the discovery rule was inapplicable.

DeRose alleged that the sexual acts were committed without her consent. She also believed, at the time of the abuse, that the defendant intended to carry out threats of harm. DeRose had a right to sue as soon as she was aware of the abuse and the harm or, more realistically, when she reached the age of majority.[100] Because her complaint showed that she had discovered all facts essential to her cause of action when the abuse occurred, the discovery

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(c) "household or family member" as used in this section includes a parent, stepparent, former stepparent, sibling, stepsibling, any other person related by consanguinity or affinity within the second degree, or any other person who regularly resided in the household at the time of the act, or who six months prior to the act regularly resided in the household.
(d) *Nothing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor.* (emphasis added).

91. *Id.*

92. *See id.* § 340.1(a).

93. 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368. The claim in *DeRose* was filed before the incest abuse statute of limitations became effective. The statute became effective before the action reached the appellate level, however, and the court of appeals found that DeRose's claim was untimely even under the new statute. Most significantly, the court stated that "[t]he new statute did not change in any way the prerequisites for applying the discovery rule." 196 Cal. App. 3d at 1020, 242 Cal. Rptr. at 373.

94. 205 Cal. App. 3d 1318, 253 Cal. Rptr. 156.

95. 196 Cal. App. 3d at 1015, 242 Cal. Rptr. at 369.

96. *Id.* at 1016-21, 242 Cal. Rptr. at 370-73.

97. *Id.* at 1017-20, 242 Cal. Rptr. at 371-73.

98. *Id.* at 1017, 242 Cal. Rptr. at 371.

99. *Id.* at 1016-17, 242 Cal. Rptr. at 370. DeRose's appellate brief included information from psychological and sociological literature about the effects of incestuous sexual abuse.

100. *Id.* at 1017-18, 242 Cal. Rptr. at 371.

rule was inapplicable.[101] According to the court, applying the discovery rule to the facts of this case would "suggest, incorrectly, that a victim of sexual assault cannot sue unless and until there are delayed consequences."[102]

Snyder v. Boy Scouts of America[103] exemplifies another limitation of the 1986 version of the California statute. Several months after his nineteenth birthday, Snyder filed a claim alleging that he was molested by his Boy Scout troop leader during his early teens.[104] The one year statute of limitations for assault and battery began to run when Snyder turned eighteen. The date of filing therefore took his claim outside the one year statute of limitations for assault and battery.[105] Additionally, The incestuous abuse statute did not cover Snyder because his claim was not against a household or family member.[106] The limited application of the statute to household or family members protected victims of childhood sexual abuse unequally based simply on their relationship to the abuser.

Attempting to save his claim, Snyder, like the plaintiffs in *Tyson*, *Raymond*, *Kaiser*, and *DeRose*, argued for application of the discovery rule. He submitted the declaration of a board certified psychiatrist and neurologist, which asserted that Snyder did not reveal the abuse earlier because of the embarrassment, humiliation and fear that are by-products of post-traumatic syndrome.[107] The *Snyder* court, like the *DeRose* court, refused to consider this information because Snyder knew the essential facts constituting his cause of action before reaching the age of majority.[108] The court therefore found that the discovery rule was not applicable to Snyder's claim.[109]

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101. *Id.* at 1018, 242 Cal. Rptr. at 371.

102. *Id.* at 1018, 242 Cal. Rptr. at 371. *But see Evans*, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605. In *Evans*, the First District Court of Appeals reversed the dismissal of an action brought by adult survivors of childhood sexual abuse. The court directed that leave to amend be granted, suggesting that the discovery rule applies if the victim was unaware of the wrongfulness of the perpetrator's acts at the time of the abuse. The *Evans* court distinguished *DeRose* based on that court's conclusion "that the plaintiff, molested against her will and in fear of defendant, was aware *at the time* [of the abuse] she had suffered substantial harm." *Id.* at 1618, 265 Cal. Rptr. at 610 (emphasis added).

103. 205 Cal. App. 3d. 1318, 253 Cal. Rptr. 156.

104. *Id.* at 1322-23, 253 Cal. Rptr. at 158.

105. *Id.* at 1322-23, 253 Cal. Rptr. at 158. *See also* CAL. CIV. PROC. CODE § 340(3) (West Supp. 1991).

106. *Snyder*, 205 Cal. App. 3d at 1325, 253 Cal. Rptr. at 160. *See also* CAL. CIV. PROC. CODE § 340.1 (West Supp. 1991).

107. *Id.* at 1322, 253 Cal. Rptr. at 158. Post-traumatic syndrome or post-traumatic stress disorder (PTSD) has been recognized by the American Psychiatric Association. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (rev. 3d ed. 1987). Snyder argued that he suffered from PTSD and as a result could not reasonably be expected to discover his cause of action earlier. The court essentially ignored the PTSD argument because the record established that Snyder did in fact discover the cause of action before reaching majority. The court gave no consideration to the psychological effects of the disorder. 205 Cal. App. 3d at 1324-25, 253 Cal. Rptr. at 159-60.

108. *Snyder*, 205 Cal. App. 3d at 1323, 253 Cal. Rptr. at 159.

109. *Id.* at 1324, 253 Cal. Rptr. at 159. *See also E.W.*, 754 P.2d 817, in which the Montana Supreme Court found the discovery rule inapplicable to a claim based on facts similar to those in *DeRose* and *Snyder*. Because the plaintiff was aware of the tortious acts and knew she suffered from psychological problems, her injury was readily apparent. The plaintiff's failure to understand her legal rights did not change the fact that she always knew she had been molested. *Id.* at 819-20.

Apparently, the California legislature recognized the limitations of the statute as it was applied in *DeRose* and *Snyder*. In 1990, the statute was amended so as to eliminate the problems discussed above. Under the amended version of the California statute of limitations, the adult survivor of childhood sexual abuse has eight years from the time she reaches majority or three years from when she discovered or reasonably should have discovered the *psychological* injury stemming from the abuse to bring a cause of action.[110] In addition, the statute is applicable to *all* victims of childhood sexual abuse.[111]

Unlike most courts, the Wisconsin Court of Appeals, in *Hammer v. Hammer*[112] and the North Dakota Supreme Court, in *Osland v. Osland*,[113] applied the discovery rule to actions brought by adult survivors of childhood sexual abuse. In *Hammer*, the plaintiff alleged that her father sexually abused her from the time she was five until she was fifteen.[114] Her father also threatened to harm her for revealing the abuse.[115] When the plaintiff was fifteen she revealed the abuse to her mother and siblings who believed that she caused the abuse.[116] The plaintiff developed various coping mechanisms, including denial, guilt, and disassociation to deal with the abuse and disbelief.[117]

To overcome the expired statute of limitations, the plaintiff submitted the affidavit of her psychologist, which supported the allegations of her complaint.[118] The trial court accepted the affidavit but found that the plaintiff's claim was not timely filed despite the Wisconsin Supreme Court's previous adoption of the discovery rule for all tort actions.[119] The trial court refused to apply the discovery rule because the rule extended the statute of limitations for minors beyond the time mandated by the legislature.[120] The Wisconsin Court of Appeals disagreed with the trial court's reasoning and held, as a

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110. CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1991).

111. *Id.* The 1990 version of the California statute appears to be the most comprehensive statute developed to deal with the issue of actions brought by adult survivors of childhood sexual abuse. *See generally* CAL. CIV. PROC. CODE § 340.1 (West Supp. 1991). There are no reported cases under the new statute as of yet and therefore its limitations, if any, are still unknown.

112. 142 Wis. 2d 257, 418 N.W. 2d 23.

113. 442 N.W.2d 907.

114. 142 Wis. 2d at 261, 418 N.W.2d at 24.

115. *Id.* at 261, 418 N.W.2d at 24.

116. *Id.* at 261, 418 N.W.2d at 25.

117. *Id.* at 261, 418 N.W.2d at 24.

118. *Id.* at 259, 418 N.W.2d at 24. In his affidavit the plaintiff's psychological counselor concluded

> that Laura had not perceived the incestuous conduct as injurious because (1) it was of such a long duration and frequency that it had been perceived by her as natural behavior; (2) Warren had imposed isolation and secrecy on her; (3) the abuse had depersonalizing effects which had made her think of herself as an object to be used rather than as a person with rights; (4) she had been told by her father that the conduct was normal and his right, and (5) the abuse by an authority figure on whom she was dependent had made her distrustful of other authority figures who might have helped her.
>
> He further declared that, as a normal post-traumatic stress reaction, Laura had developed denial and suppression coping mechanisms.

Id. at 262-63, 418 N.W.2d at 25.

119. *Id.* at 259-64, 418 N.W.2d at 24-26. *See also* Hansen v. A.H. Robins Inc., 113 Wis. 2d 550, 560, 335 N.W.2d 578, 583 (1983).

120. *Id.* at 263-64, 418 N.W.2d at 25.

matter of law, that the discovery rule applied to causes of action for incestuous abuse.[121]

The court's analysis of the issue differed markedly from that in the cases discussed above. The *Hammer* court spent a great deal of time considering the effects of childhood sexual abuse. It accepted the possibility that the plaintiff developed mechanisms such as denial and suppression to cope with the abuse.[122] The court was also receptive to the theory that the plaintiff's psychological manifestations were typical symptoms of post-traumatic stress disorder that victims of intrafamilial sexual abuse often exhibit.[123] The plaintiff's inability to understand the abuse completely and to discover the psychological damage it caused was sufficient to invoke the discovery rule.[124]

The discovery rule was available to the *DeRose* and *Snyder* courts as it was to the *Hammer* court. In each case the plaintiffs knew that they had been abused. The *Hammer* court's analysis differed only because it accepted the possibility that sexual abuse, combined with threats from an authority figure, triggered psychological reactions in the victim that prevented recognition of the cause of action. The California courts rejected the same information as irrelevant to the discovery rule issue.

In *Osland v. Osland*, the North Dakota Supreme Court held that the discovery rule should apply to a claim brought by an adult survivor of childhood sexual abuse.[125] It upheld with the trial court which found not only that the discovery rule applied, but also that the abuse caused the plaintiff severe emotional trauma that prevented her from understanding or discovering the cause of action during the applicable limitations period.[126] The court specifically rejected the *Tyson* majority's objective verifiable evidence test and held that "concern about the availability of objective evidence should not preclude application of the discovery rule."[127]

The *Doe*, Wisconsin, North Dakota and, to some extent, the Nevada courts are, thus far, the only appellate courts to allow adult survivors of childhood sexual abuse to defeat a statute of limitations defense. The arguments made and the evidence these courts admitted were, however, also accepted by a dissenting judge in *Tyson*[128] and have had some influence on legislative bodies.[129]

Justice Pearson, dissenting in *Tyson*, found the majority's dependence on the availability of objective evidence for applying the discovery rule an inaccurate gauge.[130] Fairness, according to Pearson, is a more appropriate measure for determining whether the discovery rule applies.[131] Pearson also

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121. *Id.* at 264, 418 N.W.2d at 26.
122. *Id.* at 261-63, 418 N.W.2d at 25.
123. *Id.* at 263, 418 N.W.2d at 25.
124. *Id.* at 259-68, 418 N.W.2d at 24-27.
125. 442 N.W.2d at 909.
126. *See id.*
127. *Id.* (citing *Tyson*, 107 Wash. 2d at 82, 727 P.2d at 231 (Pearson, J., dissenting)).
128. 107 Wash. 2d 72, 727 P.2d 226.
129. *See infra* notes 135-39 and accompanying text.
130. *Tyson*, 107 Wash. 2d at 80-97, 727 P.2d at 230-37 (Pearson, J., dissenting).
131. *Id.*

disagreed with the majority's treatment of the mental health profession. He noted that such professionals often play a substantial role in the judicial system as expert witnesses to help the trier of fact understand concepts outside ordinary knowledge.[132] Finally, Justice Pearson recognized the pervasiveness of childhood sexual abuse and pointed out the necessity of paying increased attention to the problem.[133] According to Pearson, psychological reactions, such as repression, mandate applying the discovery rule to this type of action.[134]

Justice Pearson's argument apparently convinced the Washington legislature. In 1988 the legislature created a statute of limitations to deal with the type of claims advanced in *Tyson*, *Raymond*, and *Kaiser*. This statute did what the Washington courts refused to do, by applying the discovery rule to actions based on childhood sexual abuse.[135] The Washington statute mandates the use of the discovery rule if the rule's application creates a period of limitation that expires more than three years after the date of the alleged abuse.[136] In 1989 the Montana legislature adopted a statute of limitations similar to the Washington statute.[137] Because there have been no reported cases in Washington and Montana since the statutes were enacted, their effect is unknown.

B. Insanity

As previously noted, actions brought by adult survivors of childhood sexual abuse are statutorily tolled until the victim reaches the age of majority.[138] In several states the statute that tolls a limitations period for the disability of minority also tolls the statute for the disability of insanity.[139] Some adult survivors of childhood sexual abuse have asserted this traditional tolling mechanism.[140]

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132. *Id.* at 85-86, 727 P.2d at 232-33 (Pearson, J., dissenting).

133. *Id.* at 87-89, 727 P.2d at 233-35 (Pearson, J., dissenting).

134. *Id.* at 87, 727 P.2d at 234.

135. WASH. REV. CODE ANN. § 4.16.340 (1988) provides, in part, that:

> (1) All claims or causes of actions based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within three years of the act alleged to have caused the injury or condition, or three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act, whichever period expires later.

136. *Id.*

137. MONT. CODE ANN. § 27-2-216 (1989) provides, in part:

> (1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than:
>
> (a) 3 years after the act of childhood sexual abuse that is alleged to have caused the injury; or
>
> (b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.

138. *See supra* note 42 and accompanying text.

139. *See* ARIZ. REV. STAT. ANN. § 12-502 (Supp. 1990); CAL. CIV. PROC. CODE § 352 (West 1986); MONT. CODE ANN. § 27-2-401 (1987); N.D. CENT. CODE § 28-01-25 (1973); WASH. REV. CODE ANN. § 4.16.190 (1977); WIS. STAT. ANN. § 893.16 (West 1979).

140. *Meiers-Post*, 170 Mich. App. 174, 427 N.W.2d 606; *DeRose*, 196 Cal. App. 1011, 242 Cal. Rptr. 368.

In *DeRose v. Carswell* the plaintiff argued for tolling the statute of limitations based on the disability of insanity.[141] She first argued, as she did for application of the discovery rule,[142] that her inability to connect her emotional injuries to the sexual abuse disabled her from bringing the cause of action earlier.[143] The court rejected her argument for the same reason it refused to apply the discovery rule.[144] The court held that a cause of action existed when DeRose perceived the abuse as offensive.[145] In addition, the court held that an argument based on her emotional state failed to meet the definition of insanity for tolling purposes.[146] Nothing in the plaintiff's complaint or in her appeal alleged that she was unable to transact business or understand the effects of her actions.[147]

In *Meiers-Post v. Schafer*,[148] the plaintiff, who alleged that her high school teacher abused her for four years, made only an insanity argument for avoiding a statute of limitations defense.[149] Meiers-Post submitted affidavits suggesting that she repressed all memory of the abuse[150] until some external event triggered it. The triggering event in this case was a television show about teachers sexually exploiting students.[151] Because she did not remember the events until she was thirty, Meiers-Post claimed that she qualified for the insanity tolling provision. The Michigan Court of Appeals identified the issue as whether repression constitutes insanity for tolling purposes.[152]

The *Meiers-Post* court created a two-prong test for determining whether an adult survivor of childhood sexual abuse is insane for purposes of tolling the statute of limitations.[153] First, the plaintiff must prove she repressed the memory of the essential facts establishing her claim. Under this prong the plaintiff is unaware of rights she otherwise would have to know. Second, the plaintiff's allegation of sexual assault must be corroborated.[154]

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141. 196 Cal. App. 3d at 1027, 242 Cal. Rptr. at 378. *See also* CAL. CIV. PROC. CODE § 352(a)2 (West 1986).

142. *See supra* text accompanying note 97.

143. *DeRose*, 196 Cal. App. 3d at 1027-28, 242 Cal. Rptr. at 378.

144. *Id.* at 1027-29, 242 Cal. Rptr. at 378-79.

145. *Id.* at 1027-28, 242 Cal. Rptr. at 378.

146. California courts have defined insanity for the purpose of being disabled from bringing a cause of action as suffering from "mental derangement which renders the sufferer incapable of caring for [her] property or transacting business, or understanding the nature or effects of [her] acts." *Id.* at 1027, 242 Cal. Rptr. at 378 (citations omitted).

147. *Id.* at 1027-28, 242 Cal. Rptr. at 378.

148. 170 Mich. App. 174, 427 N.W.2d 606.

149. *Id.* at 175-76, 427 N.W.2d at 607.

150. *Id.* at 176-78, 427 N.W.2d at 607-08.

151. *Id.* at 177-78, 427 N.W.2d at 608.

152. *Id.* at 179, 427 N.W.2d at 608. In Michigan, insanity for tolling purposes is statutorily defined as "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." MICH. STAT. ANN. § 27A.5851 (Callaghan 1984).

153. *Meiers-Post*, 170 Mich. App. at 180-82, 427 N.W.2d at 609-10 (citing *Tyson*, 107 Wash. 2d 72, 727 P.2d 226; *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368).

154. *Meiers-Post*, 170 Mich. App. at 182-83, 427 N.W.2d at 610. The court stated the test as follows:

Although establishing a test gives some recognition to the need for a cause of action for adult survivors of childhood sexual abuse, it does not go far enough. Because the test is narrow, it affords little protection. As exhibited by the cases analyzed thus far, most adult survivors of childhood sexual abuse do not repress all memory of the abuse but are simply unable to connect the abuse with continuing emotional harm.

It is also unlikely that claimants will have corroborating evidence of the abuse. The *Meiers-Post* case is unusual because the defendant admitted having a sexual relationship with the plaintiff.[155] As indicated by the *Tyson* court, however, such objective, verifiable evidence is hard to find when there is a long time span between the abuse and the filing of an action.[156]

C. Estoppel and Fraud

In *DeRose* and *Snyder*, the plaintiffs argued that the defendant should be estopped from claiming the statute of limitations as a defense.[157] In *DeRose* the plaintiff made two arguments for applying the estoppel doctrine. First, the plaintiff argued that she was afraid of the defendant, who threatened harm if she revealed the abuse to anyone, thus inducing the plaintiff to delay filing her suit. The court agreed that a defendant cannot take advantage of a delay induced by his own improper conduct,[158] but did not apply the estoppel doctrine because the abuse and threats stopped by the time the plaintiff was eleven.[159] According to the court, the plaintiff had sufficient time to make a claim after the inducement stopped and before the statute began to run.[160] She had one year after reaching the age of majority to bring the cause of action.[161] Because the defendant's conduct ceased while the plaintiff's minority tolled her claim, she had the benefit of a full period of limitations.[162]

DeRose also argued that the past threats affected her ability to understand the relationship between the abuse and her emotional injuries and that this continuing influence on her mental state mandated applying the estoppel doctrine.[163] The court rejected this argument for the same reasons it denied the plaintiff's claim for application of the discovery rule. As soon as DeRose was aware of the abuse and knew that it offended her, she had a valid claim even if she did not comprehend the extensive long-term harm that would

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> [T]he statute of limitations can be tolled under the insanity clause if (a) the plaintiff can make out a case that she has repressed the memory of the facts upon which her claim is predicated, such that she could not have been aware of rights she was otherwise bound to know, and (b) there is corroboration for the plaintiff's testimony that the sexual assault occurred.

Id. The court of appeals did not apply the test to the facts of this case but reversed the dismissal and instructed the trial court to apply the test.

155. *Id.* at 176, 427 N.W.2d at 607.
156. 107 Wash. 2d at 79, 727 P.2d at 229.
157. *DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; *Snyder*, 205 Cal. App. 3d 1318, 253 Cal. Rptr. 156.
158. *DeRose*, 196 Cal. App. 3d at 1026, 242 Cal. Rptr. at 377.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 1027, 242 Cal. Rptr. at 377.
163. *Id.*, 242 Cal. Rptr. at 377-78.

result.[164] Thus, the plaintiff was not entitled to application of the estoppel doctrine.[165]

The plaintiff in *Snyder* also failed to persuade the court with two similar arguments for applying the estoppel doctrine.[166] Like DeRose, Snyder argued that because the abuser[167] induced the plaintiff to delay filing the claim, the defendant should not be able to take advantage of the statute of limitations.[168] Although it agreed that a defendant may be estopped from claiming the statute of limitations as a defense when the defendant induced the plaintiff to delay filing the suit, the *Snyder* court held that estoppel did not apply here.[169] Snyder asserted that he left the Boy Scouts because of the abuse. According to the court, the abuser's influence ceased at that time. Thus, the estoppel doctrine did not apply.[170]

Snyder also argued a fraud theory[171] similar to the induced delay argument. If the tortfeasor prevents the plaintiff from instituting a suit, he may not take advantage of the statute of limitations.[172] Under the fraud theory, however, the plaintiff must also show that the abuser fraudulently concealed the cause of action or facts material to that cause of action.[173] Moreover, the plaintiff must not be at fault for failing to discover the facts earlier.[174]

The court again agreed with the general principle of the plaintiff's argument but refused to apply it to his claim.[175] According to the court, the statute is tolled only if the plaintiff is ignorant of the cause of action due to fraud. Snyder admitted that he knew the abuse was wrong and that he left the scouts because of it.[176] This admission indicated to the court that the plaintiff was aware of the facts necessary to state a cause of action before he reached the age of majority.[177] Therefore, fraud could not toll the statute.[178]

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164. *Id.*, 242 Cal. Rptr. at 378.
165. *Id.*, 242 Cal. Rptr. at 377-78.
166. *Snyder*, 205 Cal. App. 3d at 1323-24, 253 Cal. Rptr. at 158-59.
167. The Boy Scouts of America was the defendant in this case. The perpetrator was a former Boy Scout troop leader.
168. *Snyder*, 205 Cal. App. 3d at 1324, 253 Cal. Rptr. at 159.
169. *Id.*
170. *Id.*
171. *Id.* at 1323, 253 Cal. Rptr. at 158-59.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*, 253 Cal. Rptr. at 159.
176.

> Although [the abuser] initially misrepresented the nature of the acts, plaintiff realized they were wrongful and ultimately quit the Boy Scouts to avoid [the abuser]. Thus, by his own admission, plaintiff was well aware of the wrongful nature of [the abuse] long before he reached the age of majority. Whatever fraud there may have been while plaintiff was still in the Boy Scouts, it has long since dissipated. Consequently, the statute was not tolled by fraud.

Id.
177. *Id.*
178. *Id.*, 242 Cal. Rptr. at 158-59.

D. Summary

Most courts are unwilling to toll the statute of limitations on discovery, insanity, estoppel, or fraud bases. Although some legislatures have attempted to create statutes dealing specifically with the issue, their effectiveness is uncertain. As *DeRose* and *Snyder* indicate,[179] a statute allowing use of a tolling method does not guarantee that the courts will consider applying the discovery rule. Even when the statute mandates the discovery rule, the issue is not resolved. There is always a question as to what the plaintiff must discover to start the statute running.[180]

IV. HOW WILL ARIZONA RESPOND?

In Arizona, adult survivors of childhood sexual abuse have not yet advanced a claim against the perpetrator of the act to the appellate level. Undoubtedly, the general issue, and specifically the debate over the statute of limitations, will arise in every state. This portion of the Note analyzes the statute of limitations issue under Arizona law.

A. Applicable Statute of Limitations in Arizona

As previously noted, adult survivors of childhood sexual abuse bring claims under a limited number of theories.[181] Other than negligent infliction of emotional distress,[182] all of the claims are for some type of intentional tort. Although no Arizona statute deals specifically with intentional torts, all of the claims brought in other jurisdictions would be subject to Arizona Revised Statute section 12-542, which provides a two year statute of limitations for "injuries done to the person of another."[183]

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179. 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; 205 Cal. App. 3d 1318, 253 Cal. Rptr. 156.

180. Once it is determined that the discovery rule applies, a standard must be set for what the plaintiff must discover. Because sexual abuse is an intentional tort, arguably all plaintiffs must "discover" the cause of action at the time of the physical act. A more generous standard is that the plaintiff must discover the causal link between the abuse and subsequent emotional injuries. To come to this conclusion, however, the courts or the legislature must be receptive to evidence of the psychological effects of abuse. The California legislature has made clear its intention that the plaintiff must discover the psychological injury or illness caused by the sexual abuse. *See* CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1991).

181. *See supra* text accompanying notes 35-40.

182. *See DeRose*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368; *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23.

183. ARIZ REV. STAT. ANN. § 12-542 (Supp. 1990) reads, in pertinent part, as follows:

> § 12-542. Injury to person;...
> [T]here shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:
> 1. For injuries done to the person of another including causes of action for medical malpractice as defined in § 12-561.

See also Skousen v. Nidy, 90 Ariz. 215, 367 P.2d 248 (1961) (the two year statute of limitations for injuries done to the person of another was the applicable period for an assault and battery claim based on inappropriate touching accompanied by force); Hansen v. Stoll, 130 Ariz. 454, 636 P.2d 1236 (Ct. App. 1981) (the appropriate statute of limitations for intentional infliction of mental distress is Arizona Revised Statute Annotated section 12-542).

In Arizona, the statute of limitations is statutorily tolled until the claimant reaches the age of majority.[184] From that point the period is the same length usually afforded under the applicable statute.[185]

B. Discovery Rule in Arizona

In Arizona, the discovery rule issue is distinct from the issue raised in other jurisdictions because of article eighteen, section six of the Arizona Constitution. Article eighteen, section six provides that "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[186]

This provision means that, though the legislature can regulate causes of action in tort, it cannot abrogate any such action.[187] A cause of action protected by article eighteen, section six is a fundamental right in Arizona.[188] Case law affords this protection to a large group of claims, including medical malpractice,[189] wrongful death,[190] emotional injury,[191] and even tortious injury to reputation.[192] All of these actions now fall under the statute of limitations provided by Arizona Revised Statute section 12-542.[193]

Although the legislature has not defined when tort actions accrue, the courts have held that no cause of action brought under section 12-542 accrues until the plaintiff knew, or by the exercise of reasonable diligence should have known, of the cause of action.[194] Accrual, or application of the discovery rule, is defined in this way because it prevents the abrogation of any cause of action.

Kenyon v. Hammer[195] is a good example of how the discovery rule prevents the abrogation of a cause of action. In *Kenyon*, the plaintiff brought an action against her doctor for the wrongful death of her stillborn baby and for personal injury. The plaintiff based both claims upon the doctor's vicarious

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184. ARIZ. REV. STAT. ANN. § 12-502 (Supp. 1990).

185. This differs from statutes in some states, which fix a period, for example two years, for all claims that are tolled due to the disability of minority. *See, e.g.*, WIS. STAT. ANN. § 893.16 (West 1979).

186. ARIZ. CONST. art. XVIII, § 6.

187. Kenyon v. Hammer, 142 Ariz. 69, 87, 688 P.2d 961, 979 (1984).

188. Boswell v. Phoenix Newspapers, Inc. 152 Ariz. 9, 730 P.2d 186 (1986); *Kenyon*, 142 Ariz. 69, 688 P.2d 961.

189. *Kenyon*, 142 Ariz. 69, 688 P.2d 961.

190. Davis v. Dow Chemical, 819 F.2d 231 (9th Cir. 1987); Anson v. American Motors Corp., 155 Ariz. 420, 747 P.2d 581 (Ct. App. 1987).

191. *Boswell*, 152 Ariz. 9, 730 P.2d 186.

192. *Id.* at 17, 730 P.2d at 194. This list is not all-inclusive. The *Boswell* court held that "the framers did not intend the protection of art. 18, § 6 to extend only to actions for negligent torts involving bodily injury claims." *Id.* This indicates that the protection applies to an undefined set of claims.

193.

> § 12-542. Injury to person;...
> [T]here shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:
> 1. For injuries done to the person of another including causes of action for medical malpractice as defined in § 12-561.

ARIZ. REV. STAT. ANN. § 12-542 (Supp. 1990).

194. *Davis*, 819 F.2d at 235; *Kenyon*, 142 Ariz. at 76 n.6, 688 P.2d at 968 n.6.

liability for his nurse's negligence. The nurse incorrectly recorded the plaintiff's Rh factor as positive, instead of negative, during her first pregnancy.[196]

The mistake was significant because the doctor did not give Kenyon a drug to suppress the immune response that a mother with Rh negative blood may develop to the Rh positive blood cells of her child.[197] To be effective, the drug must be administered within seventy-two hours after the birth of an Rh positive infant.[198] The plaintiff's first child was a healthy infant with Rh positive blood.

Mrs. Kenyon became pregnant with her second child five years after the birth of her first child.[199] The baby was stillborn because Mrs. Kenyon's Rh antibodies destroyed the baby's blood cells. The plaintiff underwent tubal ligation to prevent future pregnancy and to protect herself.[200]

The plaintiff filed a complaint one year after the delivery of her second child.[201] The Arizona Supreme Court upheld Arizona Revised Statute section 12-564(A) as the appropriate statute of limitations for the plaintiff's injury and the child's wrongful death.[202] Pursuant to the statute, a plaintiff had to file a medical malpractice claim within three years from the date of the injury.[203] The court determined that the injury occurred on the date that the plaintiff received improper medical care, not when the plaintiff conceived her second child.[204] The statute of limitations began to run at that point. Due to the three year limitation in section 12-564(A), the cause of action was barred before the plaintiff discovered that it existed.[205]

After determining that section 12-564(A) barred the plaintiff's cause of action, the court considered the constitutionality of the statute.[206] The court ultimately concluded that the right to bring a cause of action for bodily injuries

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195. 142 Ariz. 69, 688 P.2d 961.
196. *Id.* at 72, 688 P.2d at 964.
197. *Id.* at 71, 688 P.2d at 963.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. ARIZ. REV. STAT. ANN. § 12-564(A) (1982) reads as follows:

> § 12-564. Health care injuries; limitations of actions; exception
>
> A. A cause of action for medical malpractice against a licensed health care provider accrues as of the date of the injury and shall be commenced and prosecuted within three years after the date of injury. In no event shall the time for commencement of legal action exceed three years from the date of injury except as provided in subsections B, C and D.

This section was repealed in 1985 after the *Kenyon* decision. 1985 Ariz. Sess. Laws ch. 84, § 3.

203. ARIZ. REV. STAT. ANN. § 12-564(A) (1982). *See also Kenyon*, 142 Ariz. at 75, 688 P.2d at 967.
204. *Kenyon*, 142 Ariz. at 75, 688 P.2d at 967.
205. *Id.* at 76, 688 P.2d at 968. The court noted that this was an undiscoverable injury because "there was neither physical symptom nor abnormality of any type which could have alerted even the most careful individual to the fact that she had suffered some injury." *Id.*
206. *Id.* at 76-87, 688 P.2d at 968-79. The court's opinion also provided extensive historical background for article eighteen, section six of the Arizona Constitution.

is fundamental.[207] Because the statute of limitations barred the plaintiff's claim before she reasonably could have known about it, i.e. at the birth of her second child six years later, the statute abrogated the cause of action.[208] The statute also violated equal protection guarantees because it denied application of the discovery rule to a select group of tort victims.[209] Although the court left the three year limitation intact, it mandated the application of the discovery rule to protect a fundamental right in medical malpractice cases.[210]

Although the discovery rule applies in Arizona, it may not provide as much protection for avoiding a statute of limitations defense as some commentators have suggested.[211] The extent of the benefit depends upon what the plaintiff must "discover."

In most cases, adult survivors of childhood sexual abuse claim that they knew of the abuse when it occurred.[212] They also knew that they suffered continuing emotional problems.[213] They did not, however, recognize the causal link between the abuse and the emotional harm.[214] In Arizona, the discovery rule should apply to this claim. The focus of the debate in Arizona will be on *when* the claim is discovered. The issue is whether the claim is discovered, as a matter of law, when the intentional tort occurs or whether the jury determines when discovery occurred. Arizona case law supports both results. This section analyzes each possibility in turn.[215]

In cases like *Kenyon*, the effect of Arizona's application of the discovery rule is obvious. In *Kenyon*, the plaintiff could not have discovered that something was wrong until the birth of the stillborn child. According to the court, this injury was not only undiscovered but undiscoverable.[216] This holding begs the question. When do arguably discoverable facts constitute a discoverable injury? For example, if the plaintiff knew the abuse offended her at the time of the act, she was at least alerted that she suffered some injury.[217]

An act that a reasonable person knows was offensive to her would arguably put her on notice that a cause of action existed. It can be argued, therefore that, as a matter of law, childhood sexual abuse victims "discover" the cause of action at the time of the abuse. Although the discovery rule's

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207. The court's conclusion that the right to bring a cause of action for bodily harm is fundamental in Arizona is consistent with the framers' intent. *Id.* at 79-83, 688 P.2d at 971-75.

208. *Id.* at 87, 688 P.2d at 979.

209. *Id.*

210. *Kenyon*, 142 Ariz. at 87, 688 P.2d at 979. For a similar analysis abrogating a cause of action for wrongful death and applying the discovery rule, see *Anson*, 155 Ariz. 420, 747 P.2d 581.

211. *See supra* note 4.

212. *See, e.g., Osland*, 442 N.W.2d 907; *E.W.*, 754 P.2d 817; *Kaiser*, 50 Wash. App. 235, 747 P.2d 1130; *Raymond*, 47 Wash. App. 781, 737 P.2d 314; *DeRose*, 196 Cal. App. 3d 1101, 242 Cal. Rptr. 368; *Snyder*, 205 Cal. App. 3d 1318, 253 Cal. Rptr. 156; *Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23. *But see Tyson*, 107 Wash. 2d 72, 727 P.2d 226; *Doe*, 264 Cal. Rptr. 633.

213. *Id.*

214. *See supra* notes 58-103 and accompanying text.

215. *See infra* notes 219-55 and accompanying text.

216. *Kenyon*, 142 Ariz. at 76, 688 P.2d at 968.

217. *Id.*

purpose is to prevent abrogation of the plaintiff's cause of action, it will not protect the plaintiff from her own negligence.[218]

In Arizona, however, the trier of fact will likely determine the discovery issue in adult survivor of childhood sexual abuse actions. Arizona applies the discovery rule to all tort actions that fall under section 12-542.[219] Under the rule, a tort cause of action accrues when the plaintiff discovers or reasonably should have discovered, that she has been injured by the defendant's act.[220] The causal language in the definition arguably requires the plaintiff to connect the injury to the defendant before discovery occurs.

The Arizona Supreme Court's opinion in *Henry v. Industrial Commission of Arizona*[221] also suggests that the discovery issue will reach the trier of fact when the plaintiff knew of the abuse and the emotional problems but did not recognize the causal link. In *Henry*, the issue was whether the claimant timely filed a workers' compensation claim twenty-four years after the incident on which it was based.[222]

At the time of the incident, the claimant was a Phoenix police officer.[223] While on duty, the claimant approached two men suspected of committing an armed robbery.[224] One of the suspects pointed a gun in Henry's face and pulled the trigger.[225] The cylinder began to rotate and Henry thought the gun had fired.[226] The gun misfired, however, and Henry was not physically harmed.[227]

After the incident Henry began to react to loud noises, became nervous, had trouble sleeping and started drinking heavily.[228] Excessive drinking eventually forced him to leave the police department.[229] He was unable to keep a job, was arrested on several occasions, and at one point suffered a mental breakdown.[230]

Twenty-four years later Henry began seeing a therapist at the Veterans Hospital in San Diego. For the first time, the claimant was diagnosed as suffering from post-traumatic stress syndrome triggered by the incident described

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218. *See, e.g.*, Hall v. Romero, 141 Ariz. 120, 685 P.2d 757 (Ct. App. 1984).
219. *See, e.g.*, *Boswell*, 152 Ariz. 9, 730 P.2d 186; *Kenyon*, 142 Ariz. 69, 688 P.2d 961.
220. *See Kenyon*, 142 Ariz. 69, 688 P.2d 961. Although the *Kenyon* opinion uses negligence language in relation to the discovery rule, the wide ranging application of the rule in Arizona suggests that it is not limited to claims arising from negligent acts. *See also supra* notes 186-95 and accompanying text.
221. 157 Ariz. 67, 754 P.2d 1342 (1988).
222. *Id.* at 67, 754 P.2d at 1342.
223. *Id.* at 67-68, 754 P.2d at 1342-43.
224. *Id.* at 68, 754 P.2d at 1343.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*

above.[231] The alcoholism previously identified as the cause of Henry's problems was actually a symptom of the anxiety disorder.[232]

After learning the true cause of his ongoing problems, Henry returned to Phoenix and filed a workers' compensation claim for post-traumatic stress syndrome and resulting substance abuse.[233] The administrative agency denied the claim because Henry did not file it within one year of the incident.[234] The administrative law judge found that the claimant knew he was nervous two years after the incident when he sought treatment from a city doctor who told him the condition was probably related to the incident.[235]

The Arizona Supreme Court reversed, finding that the claim was timely filed.[236] The court reasoned that in workers' compensation cases the cause of action accrues "when the injured employee perceives the nature and seriousness of the injury and recognizes the causal relationship between his injury and his employment."[237] The point of accrual is, therefore, essentially the same as the discovery rule used in tort actions. The employee must know of the injury and know his employment caused the injury.

The court also rested its decision partially on the diagnosis of post-traumatic stress disorder.[238] The disease was not recognized as a diagnostic anxiety disorder until twenty years after the incident.[239] The court found that Henry could not have been expected to make a claim for an injury twenty years before it was diagnosable.[240]

Because this was a workers' compensation action, the evidentiary problems that concerned the *Tyson*[241] court did not exist. The incident was on file in police records, so evidence was not stale. Moreover, because it was a worker's compensation claim, no unsuspecting defendant was involved. This relieved the second concern that statutes of limitations generally address.

Despite the deviations of a workers' compensation claim, the *Henry* decision supports the conclusion that an adult survivor of childhood sexual abuse, bringing a claim based on facts similar to *Tyson* or *DeRose*, will reach the trier of fact on the discovery issue. In *Henry* the Arizona Supreme Court accepted post-traumatic stress disorder as a diagnosable disease.[242] Whether

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231. *Id.*
232. *Id.*
233. *Id.* at 69, 754 P.2d at 1344.
234. *Id.*
235. *Id.*
236. *Id.* at 70, 754 P.2d at 1345.
237. *Id.* at 69, 754 P.2d at 1344 (citations omitted).
238. *Id.*
239. *Id.* at 70, 754 P.2d at 1345.
240. *Id.*
241. *Tyson*, 107 Wash. 2d at 75-76, 727 P.2d at 227-28.
242. Acceptance of post-traumatic stress disorder and similar anxiety disorders is indicated in recent Arizona case law. *See, e.g.*, State v. Robinson, 153 Ariz. 191, 735 P.2d 801 (1987) (court allowed testimony from a state certified psychologist regarding post-traumatic stress disorder); State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986) (court allowed psychiatric evidence on the general behavioral characteristics of child molestation victims in order to allow the jury to weigh the testimony of a child); State v. Huey, 145 Ariz. 59, 699 P.2d 1290 (1985) (Arizona Supreme Court allowed evidence that the plaintiff was suffering from rape trauma syndrome to show a lack of consent).

such a disorder affects a plaintiff's ability to discover a particular cause of action should be a question of fact.[243]

C. Insanity

As seen in *DeRose* and *Meiers-Post*, plaintiffs have argued against the statute of limitations based on a statutory tolling provision specifically designed for the disability of insanity.[244] Arizona has a similar provision.

Arizona Revised Statute section 12-502, tolls the statute of limitations for the period of the disability if a person is of unsound mind at the time the cause of action accrues.[245] The Arizona courts have defined an unsound mind for the purpose of tolling the statute of limitations as an inability to understand legal rights or liabilities.[246]

Allen v. Powell's International[247] illustrates how Arizona courts interpret and apply the insanity tolling provision. In *Allen*, the plaintiff claimed that he suffered depression from an automobile accident.[248] Although Allen filed his claim after the period of limitations had run, he argued that the claim was not barred because he was of unsound mind.[249]

The Arizona Court of Appeals disagreed. Although the plaintiff may have been suffering from depression, he was able to "[carry] out his regular day to day personal and business affairs...."[250] He attended school after the accident and then returned to teaching. Because he was capable of functioning in his normal capacity, the court rejected the plaintiff's contention that he was of unsound mind. In addition, Allen hired a lawyer shortly after the accident, which suggested to the court that he was aware of his legal rights.[251]

Whether an adult survivor of childhood sexual abuse is entitled to advance insanity as a tolling mechanism will, most likely, be decided on a case by case basis. In Arizona, plaintiffs must consider two points when arguing for the insanity disability. First, an unsound mind must exist when the cause of action accrues.[252] If the period of limitation commenced before the disability arose, it will not toll the statute of limitations. Second, the tolling period for the

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243. *See Doe*, 264 Cal. Rptr. at 639-40 where the court found that whether repression tolls the statute of limitations is a triable issue of fact.

244. *See supra* notes 140-88 and accompanying text.

245. ARIZ. REV. STAT. ANN. § 12-502 (Supp. 1990).

246. "Generally, a person of 'unsound mind' as used in this setting has been interpreted to mean that such a person is unable to manage his affairs or to understand his legal rights or liabilities." Allen v. Powell's Int'l, 21 Ariz. App. 269, 270, 518 P.2d 588, 589 (1974). *See also* Sahf v. Lake Havasu City Ass'n for Retarded Children, 150 Ariz. 50, 721 P.2d 1177 (Ct. App. 1986); Nelson v. Nelson, 137 Ariz. 213, 669 P.2d 990 (Ct. App. 1983).

247. 21 Ariz. App. 269, 518 P.2d 588.

248. *Id.* at 269, 518 P.2d at 588.

249. *Id.* at 270, 518 P.2d at 589.

250. *Id.*

251. *Id.*

252. *Nelson*, 137 Ariz 213, 669 P.2d 990. *See also* ARIZ. REV. STAT. ANN. § 12-502 (Supp. 1990).

disability of unsound mind cannot be added to the tolling already allowed for the disability of minority.[253]

In light of these two factors, it appears that a claimant in Arizona must allege that she was of unsound mind from the time the abuse stopped until she recognized the causal link between the abuse and later problems in order for insanity to toll a limitations period. If she repressed the abuse, the claimant must allege that she was of unsound mind until some external stimulus triggered memories of the abuse. Because an inability to understand legal rights and liabilities is one element of the unsound mind definition,[254] this argument might succeed.

Arizona's generous application of the discovery rule supports this argument. Moreover, the argument is consistent with the protection that the Arizona Constitution affords personal injury victims.[255] Whether the courts will consider a claim of unsound mind when the claimant understands all legal rights and liabilities except those related to a particular claim remains unclear.

D. Fraud

Arizona litigants have argued that fraud tolls the statute of limitations. In *Anson v. American Motors*, the plaintiffs brought a wrongful death claim for their son, who died when his jeep overturned.[256] The defendants argued that the statute of limitations barred the cause of action.[257] In response, the plaintiffs claimed that the defendant's fraudulent concealment of certain facts tolled the statute.[258] The allegations included misrepresentations about the jeep's safety.[259]

According to the Arizona Court of Appeals, when the question of a fraudulent concealment for purposes of tolling the statute of limitations arises, a court must determine whether the defendant concealed facts that prevented the plaintiff from discovering the action earlier.[260] This inquiry is very similar to the discovery rule. The *Anson* court found this appropriate because in an action for fraud, the discovery rule is applied to determine the point of accrual.[261]

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253. ARIZ. REV. STAT. ANN. § 12-503 (1982) reads as follows: "The period of limitation shall not be extended by the connection of one disability with another. When the law of limitation begins to run it shall continue to run notwithstanding a supervening disability of the party entitled to sue or liable to be sued."

254. *See supra* note 249 and accompanying text.

255. *See supra* notes 189-213 and accompanying text.

256. 155 Ariz. 420, 747 P.2d 581.

257. *Id.* at 421, 747 P.2d at 582.

258. *Id.*

259. *Id.* at 426, 747 P.2d at 587.

260. The court specifically asked: "whether the defendant has wrongfully concealed facts giving rise to the cause of action in such a manner as to prevent a plaintiff from reasonably discovering a claim exists within the limitations period." *Id.* at 426, 747 P.2d at 587.

261. *Id.* at 426, 747 P.2d at 587. *See also* Coronado Dev. Corp. v. Superior Court, 139 Ariz 350, 678 P.2d 535 (Ct. App. 1984) (the statute of limitations in a fraud claim begins to run when the plaintiff by reasonable diligence could have learned of the fraud).

The *Anson* court indicated several other elements necessary for fraudulent concealment to toll the statute of limitations.[262] The fraud must prevent inquiry, preclude investigation or mislead the person against whom it is perpetrated.[263] The concealment must come after the injury, and the defendant must do some affirmative act to obscure the existence of a cause of action.[264]

Fraudulent concealment, as a tolling method, generally applies to causes of action against health care providers.[265] Courts may, however, apply the fraudulent concealment doctrine to actions brought by adult survivors of childhood sexual abuse. The rule would only apply, however, when the plaintiff was aware of the abuse. If the abuse was totally repressed, the plaintiff could not meet the *Anson* court's standard.

For some purposes, Arizona courts are willing to admit evidence suggesting the link between the behavior of a party and some type of anxiety disorder.[266] Evidence of the effects of a traumatic experience, at least to aid the jury in their deliberations, allows the application of the *Anson* test to facts similar to those set out in *Hammer v. Hammer*.[267] The *Anson* test applies to facts typical of adult survivors of childhood sexual abuse actions as follows.

Assume the perpetrator of abuse occupied a dominant position in the victim's life and that continuous threats of harm accompanied the abuse. This scenario suggests that the perpetrator prevented the victim from filing an action and also told the victim that the abuse was her fault. Such information is misleading when it comes from a dominant authority figure.

When the victim revealed the acts, they were trivialized.[268] The abuser told the victim that the acts caused her no harm and convinced family members to blame the victim's revelation for causing family problems.[269] Such overt acts by the defendant are calculated to hide a cause of action.

Assuming the courts allow expert testimony regarding the effects of child abuse and the symptoms of post-traumatic stress disorder, the above analysis raises an issue of material fact. A reasonable trier of fact could find that: (1) abusive authority figures make misrepresentations to child victims; (2) such misrepresentations wrongfully conceal facts giving rise to causes of action; and (3) the concealment prevents the victims from reasonably discovering a claim exists within the limitations period.[270]

V. CONCLUSION

Several state courts have refused to apply the discovery rule for determining the point of accrual in adult survivor of childhood sexual abuse actions. Legislatures, however, have superseded these decisions by statutorily impos-

262. *Anson*, 155 Ariz. at 427, 747 P.2d at 588.
263. *Id.* at 427, 747 P.2d at 588.
264. *Id.* (citations omitted).
265. *Id.* at 428, 747 P.2d at 589.
266. *See supra* note 240 and accompanying text.
267. 142 Wis. 2d 257, 418 N.W.2d. 23.
268. *Id.* at 261, 418 N.W.2d at 24.
269. *Id.* at 261, 418 N.W.2d at 25.
270. *Anson*, 155 Ariz. at 426, 747 P.2d at 587.

ing the discovery rule. The swift reaction of the Washington and Montana legislatures suggests that society is beginning to recognize the dearth of remedies currently available to adult survivors of childhood sexual abuse.

As the *DeRose* decision indicates, however, the discovery rule's availability does not guarantee its application. Even if the rule is applied, as is likely in Arizona, the plaintiff faces the challenge of reaching the trier of fact on the issue of when the cause of action should have been discovered.

Regardless of the facts alleged, a plaintiff will reach the trier of fact on the statute of limitations issue only if the courts are receptive to evidence of the long term effects of the sexual abuse of children. The *Tyson*, *DeRose*, and *Snyder* courts suggest some unwillingness to allow psychiatric testimony to play a role in assessing the discoverability of a cause of action.

Fortunately, case law indicates that Arizona courts will be receptive to psychiatric evidence. Article eighteen, section six of the Arizona Constitution ensures that Arizona courts will carefully assess whether a right to recover damages for personal injury is abrogated.[271] The Arizona Supreme Court's decision in *Henry* suggests Arizona courts will consider evidence relating to recognized anxiety disorders.[272]

Permitting the actions of adult survivors of childhood sexual abuse to reach the trier of fact on the discoverability issue will benefit not only individual plaintiffs but society as a whole. The actions may serve as a deterrent to future abuse, as well as awaken the public to the prevalence of child sexual abuse and its devastating long-term effects.

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271. *See Kenyon*, 142 Ariz. 69, 688 P.2d 961.
272. 157 Ariz. 67, 754 P.2d 1342.