DAMAGES, DURESS, AND THE DISCOVERY RULE: THE STATUTORY RIGHT OF RECOVERY FOR VICTIMS OF CHILDHOOD SEXUAL ABUSE

I. Introduction

The sexual abuse of children,[1] which has been described as

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[1] Child Sexual Abuse is defined in a wide variety of ways. This note will adopt the definition incorporated into the statute recently adopted by the New Jersey Legislature, which offers that child sexual abuse is "an act of sexual contact or sexual penetration between a child under the age of 18 years and an adult who has custody or control over the child or is in a position of parental authority." N.J. STAT. ANN. § 2A:61B-1(1) (West 1992). "Sexual contact" is defined in the statute as being:

> [I]ntentional touching by the victim or the actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the adult with himself must be in the view of the victim whom the adult knows to be present. . . .

N.J. STAT. ANN. § 2A:61B-1(1)(2) (West 1992).

In commenting on the scope of sexual abuse of children, one must recognize the wide range of definitions currently in use; the reason being that statistical analysis, as well as any discussion of sexual abuse, will be affected by the definition used. This note will not differentiate between incest, generally viewed to be the most common form of sexual abuse, and all other types of sexual abuse of children. Current definitions include:

> Sexual abuse, as I define it, does not require penetration, nor does it even require touch: it can occur through genital or non-genital fondling, or in the way a child is talked to, what the child is forced to see, hear, or do with others. It is the use of a minor to meet the sexual or sexual/emotional needs of another person. . . . Sexual abuse does not include sexual exploration between peers, but rather a violation, which, due to her relatively powerless position, makes the victim's "consent" impossible. It is based on coercion, using the child's dependence to control her; it rarely requires physical force.

E. Sue Blume, *The Walking Wounded: Post Incest Syndrome,* SEICUS REPORT 5 (Sept. 1986).

> Childhood sexual abuse. . . has been defined as utilization of the child for sexual gratification or an adult permitting another person to so use the child. Such abuse may encompass a broad range of activity, including rape, sexual contact, intentional touching, and intentional exposure. It also includes sexual exploitation such as forcing or soliciting a child to engage in prostitution or pornographic enterprises.

Ann Marie Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse,* 76 IOWA L. REV. 355 n.1 (1990).

"The National Center on Child Abuse and Neglect has defined child sexual

"[o]ne of the most pervasive problems in the United States,"[2] has recently "become something of a national obsession."[3] In the past few years, countless talk shows, news reports, psychiatric studies, and law review articles have been devoted to this topic.[4] The current "fascination" with this issue has arguably been fueled by its appalling character. Evidence of this situation is provided by the fact that our society is nearly unanimous in the belief that sexual abuse is "the most heinous act[] that can occur between [an adult] and [a] child."[5] While generally considered to

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abuse as 'contacts or interactions between a child and an adult when the child is being used as an object of gratification for the adult sexual needs or desires.'" Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse,* 74 GEO. L.J. 427 n.1 (1985).

Perhaps the broadest definition of sexual abuse includes any unwanted sexual contact between family members. Jocelyn B. Lamm, Note, *Easing Access to the Courts for Incest Victims, Toward an Equitable Application of the Delayed Discovery Rule,* 100 YALE L.J. 2189 n.1 (1991). For additional definitions, see also Margaret J. Allen, Note, *Tort Remedies for Incestuous Abuse,* 13 GOLDEN GATE U. L. REV. 609, 610-11 (1983); MARY DEYOUNG, INCEST: AN ANNOTATED BIBLIOGRAPHY 5 (McFarland & Co. 1985); Ann Marie Boland, Note, *Civil Remedies for Victims of Childhood Sexual Abuse,* 13 OHIO N.U. L. REV. 223 n.1 (1983); Melissa G. Salten, Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy,* 7 HARV. WOMEN'S L.J. 189 n.1 (1984); Edward J. Saunders, Ph.D., *The Child Sexual Abuse Case: A Short Course for Judges,* JUDGES J. 20, 22 (WINTER 1988).

For a breakdown of the different categories of child sexual abuse, see Wayne D. Duehn, Ph.D., *Child Sexual Abuse: Identification, Assessment, and Initial Treatment* (Family Advocacy Program, Army Community Service, Picatinny Arsenal, New Jersey (Workshop Presented Aug. 17-18, 1992))(on file with the *Seton Hall Legislative Bureau*).

For a listing of the various ways sexual abuse is defined in different state criminal statutes, see Karla-Dee Clark, Note, *Innocent Victims and Blind Justice: Children's Rights to be Free from Child Sexual Abuse,* 7 N.Y.L. SCH. J. HUM. RTS. 214, 214-16 n.1 (1990).

[2] Clark, *supra* note 1, at 214.

[3] Cohen, *supra* note 1, at 429. Some would say that it is more accurate to label the growing awareness of child sexual abuse a "media obsession." Debbie Nathan, *Cry Incest,* PLAYBOY MAG., Aug. 1992, at 84; Deborah Petersen, *Recollecting Childhood Sexual Abuse is Like Re-Collecting Pieces of a Broken Vase,* HARTFORD COURANT, Sept. 17, 1992, at E1.

[4] *See, e.g.*, Cohen, *supra* note 1, at 429 n.5.

[5] Clark, *supra* note 1, at 223. The special place our society has for children is manifest in the fact that every state has made the sexual abuse of children a criminal offense. Hagen, *supra* note 1, at 358. Other examples include child labor laws, N.J. STAT. ANN. § 34:2-21.1. In fact, the United States Supreme Court has recognized that, due to inexperience, vulnerability, and limited knowledge, children are to be afforded a special place in the legal system. Bellotti v. Baird, 428 U.S. 132, 147 (1976).

While the American legal system has mirrored society's view that children are

be widespread, the very nature of the act makes it impossible to compile an accurate statistical assessment of the extent of the incidence thereof.[6] Although the number of reported cases of child sexual abuse has increased exponentially in recent years, it is not known for certain whether this is attributable to an increase in frequency or merely recognition of the problem.[7]

The increased notice has corresponded with an elevated demand for redress among victims.[8] This demand became a reality

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to be afforded special protection, not all societies have viewed incest with reproach. For a historical view of incest, see BENJAMIN SCHLESINGER, SEXUAL ABUSE OF CHILDREN 154-55 (Univ. of Toronto Press 1984) (citing ROBIN FOX, THE RED LAMP OF INCEST (Dutton 1980); HERBERT MAISH, INCEST (Andre Deutsch 1973); FLORENCE RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN (Prentice-Hall 1980); and RATTRAY G. TAYLOR, SEX IN HISTORY (Vanguard Press 1954)).

[6] It is presently impossible to give accurate estimates of the total incidence of sexual abuse in this country. Surveys vary enormously depending upon how the information has been obtained, and how sexual abuse is defined. See Blume, *supra* note 1, at 5-6, for an overview of how different surveys employing different research methods lead to various results.

It is easy to become numbed by the vast number of available statistics. *See supra* note 5 and accompanying text. Sheer numbers may serve to betray the intensely personal nature of sexual abuse. Nevertheless, examination of available statistics is the best possible way to gain an understanding of the pervasiveness of the problem. The most common estimate is that between 60 thousand and 100 thousand cases of child sexual abuse are reported yearly. Hagen, *supra* note 1, at 357-58. Some place the number at between 300 thousand and 400 thousand incidents of child sexual abuse per year, implying that as much as 38% of the female population of the United States, and 10% of the male population, have been victimized. James Wilson Harris, Note, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation,* 50 OHIO ST. L.J. 753, 754-55 (1989).

To gain a perspective on the wide variety of statistics, compare Lamm, *supra* note 1, at 2189 n.1, 2192-95; with Saunders, *supra* note 1, at 22.

[7] Cohen, *supra* note 1, at 429-30. Regardless of the reason for the increase in public attention devoted to this problem, advocates for children's rights see it as beneficial. In the words of Anne Cohn, Executive Director of the National Counsel for the Prevention of Child Abuse, "[n]ow that the problem is out in the open, perhaps we will begin to see a decrease in the actual incidence of child abuse." Sally Fuller, *Child Abuse Rises: But Rate of Increase Drops,* A.B.A. J., Feb. 1986, at 34.

For an example supporting the proposition that sexual abuse is not more prevalent in recent times, but that casualties are more willing to report their victimization, see Sanders, *supra* note 1, at 23. "It is not as some people think, creating a problem where none existed before. Rather, it is no longer pretending there is no problem when there is in reality a substantial one." *Id.* (citations omitted).

[8] While statutes allowing for tort recovery for sexual abuse of children are rare, all 50 states have made such action subject to criminal penalty. Hagen, *supra* note 1, at 358.

in New Jersey on September 24, 1992,[9] when Governor James Florio signed into law New Jersey Senate Bill 257 (S. 257) (Statute).[10] This Statute, which grants victims of sexual abuse a specified civil remedy in tort, is one of the first of its type in this country.[11]

Perhaps the most revolutionary provision of the Statute is

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9 John T. McGowan, *N.J. Law Expands Right of Incest Victims To Sue,* CAMDEN COURIER POST, Sept. 24, 1992; *see also infra* note 10 and accompanying text.

10 S. 257, 205th Leg., 1st Sess. (1992) codified at N.J. STAT. ANN. § 2A:61B-1 (West 1992). Senate Bill 257, establishing a civil remedy for sexual abuse, was introduced to the State Senate Judiciary Committee by Sen. James S. Cafiero (R-1st Dist.) on January 28, 1992. Senate Bill 257 was passed by the State Senate by a unanimous 36-0 vote on March 23, 1992. S. 257, 205th Leg., 1st Sess. (1992). The State Assembly version, A. 795 was introduced by State Assemblymen Frank A. LoBiondo (R-1st Dist.) and John C. Gibson (R-1st Dist.) on February 3, 1992. The State Assembly was also unanimous in its approval, voting 67-0 in favor of its passage on August 3, 1992. A. 795, 205th Leg., 1st Sess. (1992). *See, e.g.,* John Froonjian, *Assembly OK's Bill Allowing Sexual Abuse Victims to Sue,* ATLANTIC CITY PRESS, Aug. 4, 1992, at 10.

The deliberations in the Senate Judiciary Committee were highly emotional, and included testimony from victims of childhood sexual abuse. Those offering testimony claim to have repressed all memories of the events until some traumatic event in adult life forced the memories to reenter their consciousness. Bryon Kurzenabe, *Bill Would Aid Those Assaulted By Parents,* PHIL. INQUIRER, Oct. 9, 1991, at B1; Kevin Reynolds, *Senate Committee Moves Bill Expanding Right to Sue For Incest,* ATLANTIC CITY PRESS, Feb. 25, 1992, at B1; Kathy Barrett Carter, *Panel Clears 'Timeless' Civil Suits for Sex Abuse: Measure Would Allow the Victims to Take Actions Years After the Crime,* STAR-LEDGER (Newark), Feb. 25, 1992, at 20.

11 Similar statutes have been enacted in the states of California (CAL. CIV. PRO. CODE § 340.1 (Deering 1992)); Minnesota (MINN. STAT. § 541.073 (1991)); Missouri (MO. REV. STAT. § 537.046 (1991); Utah (UTAH CODE ANN. § 78-12-25.1 (1992)); and Washington (WASH. REV. CODE ANN. § 4.16.340 (1990)). Similar statutes are pending in Mississippi and Florida.

Criminal and civil liability for adults who physically abuse children is not a new concept. Under the English common law of the 18th century, parents could be held liable in tort for excessive punishment of children. Criminal liability for child abuse could be imposed if "the punishment was viewed as grossly unreasonable, cruel and merciless, or when the child was permanently injured." Clark, *supra* note 1, at 222.

For word on an actor's civil liability to the parents of a victim of sexual abuse, see Cheryl M. Baily, Annotation, *Sexual Child Abuser's Civil Liability to a Child's Parent,* 54 A.L.R. 4th 93 (1985). The author notes:

> While sympathetic to the mental anguish suffered by the parents of a sexually abused child, the courts have generally adopted the view set forth in the Restatement, Torts 2d § 46(2)(a), which limits recovery for the intentional infliction of emotional distress to those who actually witness outrageous conduct directed at an immediate family member.

Id. at 96.

the extension of the "discovery rule"[12] to sexual abuse tort litigation as a means of tolling the statute of limitations for those who are unable to bring suit during the statutory period.[13] Accordingly, civil suit may now be brought any time within two years of the discovery of the injury[14] and its causal relation to the sexual abuse.

This note will address the issues surrounding the adoption of the Statute, as well as the anticipated effect of its implementation. Part II will include a general overview of the problem of child sexual abuse currently facing this country. Part III includes a summary of *Jones v. Jones*, the case which brought this problem to the attention of the New Jersey Legislature.[15] Part IV provides a review of the Statute itself, with special emphasis on the tolling provisions included therein.

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12 The relationship between the statute of limitations and the discovery rule can be illustrated as follows:

> A tort statute of limitations ordinarily requires an action for personal injuries to be brought within a specified period, usually from one to six years after the cause of action has accrued. As long as an injury is discoverable within the prescribed period and its date of inception is ascertainable with some degree of certainty, this limitation is not an unreasonable burden to plaintiffs. . . But when a personal injury does not occur immediately, or is not apparent at the time of the tortious conduct, it becomes difficult to determine when the cause of action should accrue.

Susan D. Glimcher, Note, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?* 43 U. PITT. L. REV. 501 (1982).

In the United States, statutes of limitations for personal injury tort claims run from one to six years. Harris, *supra* note 5, at 765-66 n.150.

13 The trend toward application of the discovery rule to tort actions involving the sexual abuse of children is indeed gaining momentum. As of this writing, 14 states other than New Jersey toll the statute of limitations until the date of discovery. These are: Alaska (allowing a plaintiff three years beyond the date of discovery to bring suit), California (three years), Florida (four years), Iowa (four years), Kansas (three years), Maine (six years), Minnesota (six years), Missouri (three years), Montana (until the plaintiff reaches age 38), Oregon (three years, until the plaintiff reaches age 40), South Dakota (three years), Vermont (three years). Connecticut allows a plaintiff to bring suit through age 35, Illinois through age 30, regardless of when the abuse is remembered. Beverly Shepard, *Abuse Suits Challenge Georgia Limits on Filing: Fighting the Clock, the Women's Attorney Wants More Time for Georgia Abuse Victims to Remember and Sue,* ATLANTA J. & CONST., Nov. 17, 1992, at C1.

14 "Injury or illness" is defined in the statute as including "psychological injury or illness, whether or not accompanied by physical injury or illness." N.J. STAT. ANN. § 2A:61B-1 (West 1992).

15 Ronald J. Fleury, *In Trenton, the Subject was Torts: Pending Senate Bill Fosters Incest Victim's Right to Sue,* N.J.L.J., Aug. 4, 1992, at 12.

II. General Overview

Aside from the aforementioned difficulty in compiling an accurate statistical analysis of the problem,[16] there appears to be complete agreement on the fact that all available statistics are vastly underinclusive[17] since many cases are known to remain unreported.[18] Nonetheless, even the most conservative estimates indicate the existence of a widespread problem.[19]

Sexual abuse is not isolated by gender,[20] nor is it limited by geography, mental state,[21] social class, family type,[22] or any other factor one may anticipate.[23] All types of adults[24] and all types of

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16 *See supra* note 5 and accompanying text.

17 Hagen, *supra* note 1, at 357; *see also supra* note 5 and accompanying text.

18 The very nature of the act means that it will often go unreported. The shame and stigma associated with sexual abuse means that victims are often unwilling to tell anyone what has happened to them. Also, many aggressors demand that the abuse be kept secret, enforcing this demand with threats and violence. The experience is often so traumatic that victims simply repress all memory of the events. *See infra* notes 125-43 and accompanying text.

Statistics demonstrate that the overwhelming majority of victims are girls and that the majority of perpetrators are men. This is generally viewed as being an accurate assessment of the current situation. However, a significant number of victims are boys, who are molested either by women or by homosexuals. While the number of male victims is generally considered to be much smaller than the number of women, the number of male victims is more difficult to determine, because male victims are even more invisible than their female counterparts. Boys have two additional reasons for failing to report sexual abuse: 1) men are not as likely to reach out for therapy as are women; and 2) victimization is much more difficult for men to recognize than women. Blume, *supra* note 1, at 5.

Since boys who are victims of incest typically remain silent, social workers and mental health professionals generally have less experience dealing with their special problems. This, in turn, may create additional problems. Interview with Colleen Madigan-Roesing, Mental Health Counselor, Wayne General Hospital, in Newark, N.J. (Nov. 12, 1992).

19 *See supra* note 5 and accompanying text.

20 *See supra* note 18 and accompanying text.

21 Pedophophilia is a sexual disorder that affects both men and women. It is defined by "recurrent, intense, sexual urges and sexually arousing fantasies, of at least six month duration, involving sexual activity with a prepubescent child." Hagen, *supra* note 1, at 358 n.19.

22 Sexual abuse within the family is most likely to occur where a domineering, sometimes tyrannical father is the head of the household. Such a father may exert total authority only when he may expect little resistance, specifically, with a weak or powerless wife or young children. Allen, *supra* note 1, at 611-14. For more information on the prototypical victim and the prototypical assailant, see *infra* note 25 and accompanying text.

23 Clark, *supra* note 1, at 217; *see also* Jessica E. Mindlin, Note, *Child Sexual Abuse*

children are potentially affected by sexual abuse.[25] Sexual abuse is harmful to children, and the effects may stay with a victim for a lifetime.[26] The difficulty in dealing with sexual abuse is exacerbated by the fact that the resulting injury can manifest itself in a wide range of behavioral, emotional, and psychological

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and Criminal Statutes of Limitation: A Model for Reform, 65 WASH. L. REV. 189, 193-95 (1991).

[24] See Claudia Pap Mangel, *Licensing Parents: How Feasible?* 22 FAM. L. Q. 17, 23-28 (Spring 1988), for an inventory of the demographic and other factors by which all types of child abuse may arguably be predicted. As the title indicates, the author examines a novel idea for confronting the problem at hand.

The first attempt at isolating personality traits peculiar to the sexual abuser of children was made in 1966. Psychological analysis was conducted upon 381 convicted felons in the Kansas prison system and 12 men who had participated in father-daughter incest were uncovered. The study revealed no readily identifiable demographic factors among these 12, other than the fact that most had married only once and raised large families. SCHLESINGER, *supra* note 5, at 36 (citing Hector Cavallin, *Incestuous Fathers: A Clinical Report*, 122 AM. J. OF PSYCHIATRY, 1132-38 (Apr. 1966)).

[25] Although each incestuous family will undoubtedly have some of its own unique characteristics, there are several interaction patterns and individual traits that are common among families experiencing this problem:

> COMMON FAMILY DYNAMICS: role reversal and confusion; social isolation; rigid moral code (prohibiting extra-marital sex); intergenerational occurrence; imbalance of power, knowledge, experience; fear of family disintegration; secrecy.
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> VICTIM CHARACTERISTICS: disorganized development; acting out (cry for attention and/or low self esteem); confusion between love, sex and affection (this evolves into "learned seductive behavior"); alienation/ estrangement from mother (or other non-offending parent); takes on caretaking role; learned helplessness; poor peer relationship; guilt
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> OFFENDER CHARACTERISTICS: inadequacy feelings in adult relationship; abusive background; feels justified; rationalizes sexual interactions; inadequate sexual information; home is "his castle"; alcoholism or other drug abuse is common
>
> NON-OFFENDING PARENT: background of abuse; fears family disintegration and being alone in parenting role; not a good nurturer; inadequate sexual information

Duehn, *supra* note 1. For further overview of the domestic situation of the average perpetrator and the average victim, see Salten, *supra* note 1, at 192-99.

See also DEYOUNG, *supra* note 1, at 9-42; SCHLESINGER, *supra* note 5, at 14-16; U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD SEXUAL ABUSE PREVENTION (1986); DIV. OF YOUTH & FAMILY SERVICES (DYFS), N.J. DEP'T OF HUMAN SERVICES, ABOUT THE SEXUAL ABUSE OF CHILDREN (1981); DIV. OF YOUTH & FAMILY SERVICES (DYFS), N.J. DEP'T OF HUMAN SERVICES, ABOUT INCEST (1985); Saunders, *supra* note 1, at 23; Mangel, *supra* note 24, at 25.

[26] *See infra* note 27 and accompanying text; *see also* Salten, *supra* note 1, at 192-93; Duhen, *supra* note 1.

symptoms.[27]

While the current preoccupation may lead one to believe that sexual abuse of children is a modern phenomenon, [28] there is nothing novel about this problem.[29] All varieties of child abuse has been well chronicled throughout the ages.[30] Children were the subject of ritual sacrifices, harsh treatment, exploitation, abandonment, and sexual abuse in ancient Greece, Rome, Scandinavia, England, India, and China.[31]

Just as sexual abuse itself is not new, neither is the analysis of its consequences. Sigmund Freud conducted extensive studies on incest and its effects.[32] Nevertheless, despite the long history of children abuse, the concept that a child could be sexually abused by those closest to him or her was not readily accepted until recent times.[33] Until the 1960s, formal efforts to protect children had not really taken shape.[34] Since that time, great strides have been made in many areas of children's rights.[35]

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27 A list of the symptoms that clinicians have identified as most prevalent in victims of sexual abuse is included in Duehn, *supra* note 1. This list includes both those symptoms exhibited in childhood and those which become apparent later in life. When presenting this list at a seminar for mental health care professionals, the editor cautioned his peers that the wide variety of findings may be attributed, in part, to the fact that "[a]s professionals, you have more contact with [victims of sexual abuse] than any other professionals in our society. Please use this checklist as an informative tool, and *not* as a definitive diagnosis of child sexual abuse." *Id.* (emphasis in original).

28 Hagen, *supra* note 1, at 358 n.15-17. "Public outcry rises as more sexual abuse cases are reported in the media." *Id.* S. KIRSTEN WEINBERG, INCEST BEHAVIOR (1955), is acknowledged to be the first scholarly text devoted to the effects of incest. Since the publication of this treatise, knowledge of all types of childhood sexual abuse has increased exponentially. DE YOUNG, *supra* note 1, at 139.

29 Thomas, Note, *Child Abuse and Neglect Part 1: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972). While the sexual abuse of children is not a new phenomenon, the extent of the problem and the harm inflicted upon the victims has only recently been investigated and understood. Salten, *supra* note 1, at 192.

30 Thomas, *supra* note 29, at 294.

31 *Id.* at 293-300; SCHLESINGER, *supra* note 5, at 153-55.

32 SIGMUND FREUD, TOTEM AND TABOO (Random House 1946).

33 Thomas, *supra* note 29, at 296. Quite to the contrary, father-daughter incest is now seen to be the most common form of sexual abuse of children. Hagen, *supra* note 1, at 357 n. 15.

While the New Jersey statute is limited to persons in position of "parental authority," not all victims are abused within the home. *See supra* note 25 and accompanying text.

34 Clark, *supra* note 1, at 223 n.1.

35 *Id.* at 222-24.

Examination of raw statistical information and case histories is admittedly numbing. However, one gains a personalized perspective of the injuries inflicted upon the victims of child sexual abuse in reading the landmark case of *Jones v. Jones*.[36] The Legislators who drafted the Statute credit the *Jones* case for inspiring its drafting and passage.[37]

While Judge Baime, the author of the *Jones* opinion, declined to "recount at length the sordid facts relating to [the defendant's] alleged sexual misconduct,"[38] the extent of the victims trauma is nonetheless quite apparent.[39]

III. Jones v. Jones

Robert Jones[40] began molesting his natural daughter, Susan Jones,[41] when she was approximately eleven years old.[42] The abuse eventually took the form of forced sexual intercourse,

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36 576 A.2d 316 (N.J. Super. Ct. App. Div. 1990).

37 Fleury, *supra* note 15, at 28.

38 *Jones*, 576 A.2d at 318.

39 One hopes that anecdotal and statistical information does not serve to dehumanize the victims. Although the name is fictitious, Susan Jones was a real person who actually lived through the events recounted herein. For further anecdotal accounts of situations faced by victims of childhood sexual abuse, see Duehn, *supra* note 1; Robert J. Prettyman, *What Happened When Jenny Cried: The Story of One Child's Report of Sexual Abuse*, 20 DEL. LAW. 20 (Winter 1986-87); DE YOUNG, *supra* note 1, at 139-40; C.V. ALLEN, DADDY'S GIRL (Wyndham Books 1980); L. ARMSTRONG, KISS DADDY GOODNIGHT: A SPEAKOUT ON INCEST (Pocket Books 1978); K. BRADY, FATHER'S DAYS, A TRUE STORY OF INCEST (Seaview Books 1979); and M.J. SILVERMAN, OPEN AND SHUT (Bantam Books 1981).

Composite accounts intended to portray the "average" victim are not always precise, but do serve to convey the message that sexual abuse of children does have long term debilitating effects on the victims. *See* Allen, *supra* note 1, at 614-16 (victims of sexual abuse are more likely to run away from home, suffer generalized feelings of guilt, shame, anxiety, hostility, and inferiority, have problems in interpersonal relationships (especially with the opposite sex), suffer from chemical dependency, and engage in prostitution); Hagen, *supra* note 1, at 359 n.29 (the most common long-term effects suffered by incest victims include: learning disabilities, self-mutilation, suicidal behavior, multiple personalities, character disorders, substance abuse, schizophrenia, psychosis, neurosis, chronic depression, eating disorders, sexual dysfunction, prostitution, difficulty or inability to form intimate relationships, running away from home, psychosomatic symptoms, and a vulnerability to revictimization); *see also* Salten, *supra* note 1, at 199-202.

40 The Appellate Division used fictitious names to protect the privacy of the parties involved in the suit. *Jones*, 576 A.2d at 316.

41 Jones v. Jones, 576 A.2d 316, 316 (N.J. Super. Ct. App. Div. 1990).

42 *Id.*

which occurred at approximately weekly intervals.[43] While still a young girl herself, Susan became pregnant and bore a mentally handicapped child as a result of this relationship.[44] Susan "lived in terror of Robert."[45] Robert allegedly threatened to kill Susan if she told anyone of the relationship, and regularly beat her to reinforce the threat.[46]

"Fearful of continuation to the incestuous relationship, Susan claimed that she was even more panicked over the prospect of disclosure."[47] "Racked with guilt and shame and terrified lest anyone learn of her secret, Susan. . . ultimately repressed all awareness of her incestuous relationship with her father."[48] The abuse terminated when Susan moved out of her parent's home in January of 1983.[49]

Plaintiff Susan sought counseling to help deal with her personal problems in the latter part of that year.[50] This counseling eventually enabled her to "break loose from the prison of mental and physical dependance" which had consumed her since the abuse began.[51]

Susan filed a criminal complaint against her father late in

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[43] *Id.*

[44] Court ordered blood tests indicated the probability of paternity to be 99.79%. *Id.* A separate claim filed on behalf of Susan against Robert Jones is beyond the scope of this note.

Research indicates that an extremely high number of children conceived as the result of incestuous relationships are stillborn or die before reaching their first birthday. In addition, as many as 40% of the surviving children suffer some physical or mental defect. SCHLESINGER, *supra* note 5, at 123 (citing *Children of Incest,* NEWSWEEK, Oct. 9, 1972, at 58).

[45] *Jones*, 576 A.2d at 318.

[46] *Id.* Threats of physical violence are a common way of enforcing secrecy. Allen, *supra* note 1, at 615. For an overview on the general pattern of such threats, see Salten, *supra* note 1, at 196-99.

For additional information on the difficulty a victim may have in making a disclosure of sexual abuse, see DEYOUNG, *supra* note 1, at 109-13.

[47] Jones v. Jones, 576 A.2d 316, 317 (N.J. Super. Ct. App. Div. 1990). While victims such as Susan Jones may have a great deal of difficulty reaching out for help, aid to victims of sexual abuse is obtainable. For a listing of the services available to a victim of sexual abuse, see CECILIA ZALKIND, YOU HAVE THE RIGHT: YOUR RIGHTS AS A YOUNG PERSON IN NEW JERSEY 25-27, 157-71 (Ass'n For Children of N.J. 1990).

[48] *Jones*, 576 A.2d at 319. For an in-depth analysis of memory and all of its facets, see BERNSTEIN ET AL, PSYCHOLOGY 280-310 (Houghton Mifflin 1988).

[49] *Jones*, 576 A.2d at 318.

[50] *Id.*

[51] *Id.*

1984.[52] Civil suit against both parents[53] was initiated on October 11, 1985, two years and nine months after the cessation of the incestuous attacks.[54] Since New Jersey did not yet have a specified civil remedy for sexual abuse, Susan sought to recover damages under the legal theories of battery and intentional infliction of emotional distress.[55]

The case was brought before the Appellate Division after the trial court granted a defense motion for summary judgment due to the lapse of the two year statute of limitations for personal injury tort action.[56] Although plaintiff Susan conceded that she had in fact failed to bring suit within the time allotted by the statute of limitations, it was her contention that her father had, through threats and intimidation, precluded her from seeking recompense in court.[57]

The appellate court in *Jones* was therefore confronted with two clearly defined issues: 1) whether the mental trauma suffered

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[52] Jones v. Jones, 576 A.2d 316, 319 (N.J. Super. Ct. App. Div. 1990). The outcome of the criminal action is not known. To publish this information would be to compromise the privacy interests that the appellate court sought to protect.

[53] Susan Jones alleged that the abuse was conducted by her father with the knowing assent of her mother. *Id.* at 317. Apparently, this is not unusual. Often, the female partner of the abuser is also a victim of some type of domestic violence herself. Blume, *supra* note 1, at 6.

Under the new statutory scheme, the *Jones* plaintiff would be able to bring suit against her mother. The expansive definition of "Sexual Abuse" includes:

> [one] who knowingly permits and acquiesces in sexual abuse by the other parent or by any other person also commits sexual abuse, except that it is an affirmative defense if the parent, foster parent, guardian or other person standing in loco parentis was subjected to, or placed in, reasonable fear of physical or sexual abuse by the other person so as to undermine the person's ability to protect the child.

N.J. STAT. ANN. § 2A:61B-1 (1992).

In loco parentis is defined as "[i]n the place of, a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 787 (6th ed. 1991).

[54] *Jones*, 576 A.2d at 319.

[55] *Id.* at 319. These tort theories are the most common for plaintiffs seeking civil redress for injuries resulting from sexual abuse. See *infra* note 189 and accompanying text.

[56] *Jones*, 576 A.2d at 318. The New Jersey statute of limitations for personal injury is provided in N.J. STAT. ANN. § 2A:14-2 (West 1990), which states that: "every action at law for an injury too the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued." *Id.*

[57] Jones v. Jones, 576 A.2d 316, 319 (N.J. Super. Ct. App. Div. 1990).

by the plaintiff, allegedly resulting from her father's sexual misconduct, qualified as "insanity," thereby tolling the statute of limitations until such time as plaintiff Susan recovered sufficiently to bring suit;[58] and 2) whether the duress exerted by the father had the effect of extending two year statute of limitations.[59] The appellate court answered both of these questions in the affirmative, and reversed the trial court's grant of summary judgment.[60]

In its published opinion, the appellate court implicitly recognized that "[a]s victims of actions that are almost universally condemned, victims of childhood incestuous abuse are a group uniquely deserving of legal protection and remedies."[61] One of the factors which contributes to the especially reprehensible nature of sexual abuse is the unique character of the resulting injuries. This peculiarity is manifest in the facts that a victim may repress all memory of the events[62], or may otherwise be prevented by her attacker from bringing suit.[63] In holding in favor of the petitioner, the appellate court examined each of the tolling issues separately.[64] This format is also appropriate to the instant commentary.

A. *"Insanity" Brought About From Sexual Abuse as a Means to Toll the Statute of Limitations*

The court took note of the fact that while the statute of limitations serves several vital functions,[65] its principal effect is to

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58 N.J. STAT. ANN. § 2A:14-21 (West 1990) states that "[i]f any person. . . shall be, at the time of any such cause of action. . . accruing. . . insane, such person may commence such action. . . within such time as limited by such sections, after his coming. . . of sane mind."

59 *Jones*, 576 A.2d at 319.

60 *Id.*

61 Lamm, *supra* note 1, at 2189.

62 It has been estimated that as many as 20% of all victims of child sexual abuse repress memories of the event. Petersen, *supra* note 3, at E1. Memory is generally viewed as being exceptionally fragile. For further information on problems presented in the use of memory in litigation, see Elizabeth F. Loftus & Terrence E. Burns, *Mental Shock Can Produce Retrograde Amnesia,* 10(4) MEMORY & COGNITION 318 (1982); John C. Yuille & Judith L. Cutshall, *A Case Study of Eyewitness Memory of a Crime,* 71 J. OF APPLIED PSYCHOL. 291 (1986); Ellen Scrivner & Martin A. Safer, *Eyewitnesses Show Hypermnesia for Details About a Violent Event,* 73 J. OF APPLIED PSYCHOL. 371 (1988).

63 Jones v. Jones, 576 A.2d 316, 321 (N.J. Super. Ct. App. Div. 1990).

64 *Id.* at 319, 321.

65 *Id.* at 320. The United States Supreme Court has held that the primary pro-

deny access to the courts.[66] Therefore, the court acknowledged that statutory exceptions and tolling provisions have been enacted when the interests of justice so require.[67] The insanity provision is one such remedy to the inequity which would result from indiscriminate application of the statute of limitations.[68]

The *Jones* court recognized that historically, "the aim of [the insanity tolling provision] is to relieve from the strict time restrictions any person who actually lacks the ability and capacity, due to mental affliction, to pursue his lawful rights."[69] The court further stated that the equities are especially strong in cases where the action of the defendant has resulted in the plaintiff's insanity.[70] The appellate court thereby favored the plaintiff's position that "insanity" resulting from a long history of sexual abuse is a valid reason to toll the statute of limitations.[71]

The court found the testimony of plaintiff Susan's expert psychologist,[72] Dr. Howard Silverman, to be especially persua-

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pose of the statute of limitations "is to prevent surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944).

In *Jones*, the court acknowledged that the statute of limitations serves to: 1) allow security and stability of human affairs created by eventual repose; 2) induce litigants to pursue their claims diligently so that answering parties will have a fair opportunity to defend; and 3) spare the courts from litigation of stale claims. *Id.* at 320. (citations omitted).

66 *Jones*, 576 A.2d at 320.

67 Tolling provisions are common in all types of civil litigation. RESTATEMENT (SECOND) OF TORTS § 899, comment f (1979) states that:

> [a]lthough the provisions of the statutes [of limitation] differ to some extent, ordinarily special provision is made for torts committed against persons whose lack of capacity requires them to bring proceedings through others, such as infants and insane persons. A special period beginning at the end of the disability is ordinarily provided for.

Id.

68 Jones v. Jones, 576 A.2d 316, 321 (N.J. Super. Ct. App. Div. 1990).

69 *Id.* (quoting Sobin v. M. Frisch & Sons, 260 A.2d 228 (N.J. Super. Ct. App. Div. 1969), *certif. denied*, 262 A.2d 702 (N.J. 1970)).

70 *Id.*

71 *Id. See also infra* notes 179-80 and accompanying text.

72 Expert testimony in this type of litigation is generally deemed to be essential. A psychiatric expert may be uniquely qualified to explain why an incest victim might repress her experiences and have no knowledge of the damage incurred until a later triggering event. Such testimony, if admitted by the court, would merely permit the plaintiff to overcome the limitations bar and carry forward her cause of action and would not be admissible to prove the truth of the allegations of incest.

sive.[73] In relating the possible debilitating effects of sexual abuse on the victim, Dr. Silverman testified that

> often even long after the cycle of abuse itself has been broken, the victim will repress and deny, even to himself or herself, what happened. . . In many instances, this repression is so complete that the secret inside the victim becomes hidden even from [himself or herself] and can be discovered only through therapy or as a result of subsequent events which trigger the first conscious recollection of the trauma.[74]

In adopting the plaintiff's argument, the *Jones* court afforded legal recognition to the possibility that a victim of child sexual abuse could repress any memory of the incident, only to remember it later.[75] Upon resolving the issue of "insanity" in favor of Plaintiff Susan Jones, the appellate court then turned its attention to the notion of duress as a second means of tolling the statute of limitations.[76]

B. *Duress as a Means to Toll the Statute of Limitations*

In ascertaining whether duress exerted by the defendant upon Susan had the effect of rendering her incapable of bringing suit within the statutory period,[77] the *Jones* court found no state statute or case to be directly on point.[78] However, the court found the well established principle that equity should serve to provide a bar to the statute of limitations in instances where the conduct of the defendant has allegedly served to deprive the plaintiff of access to court to be applicable to the case before them.[79] The appellate court was quite precise in their view that the statute of limitations should be tolled only if the plaintiff is able to present persuasive evidence that her freedom of will was

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Lindabury v. Lindabury, 552 So.2d 1117, 1121 (Fla. 3 Dist. Ct. App. 1989) (Jorgenson, J., dissenting).

73 Jones v. Jones, 576 A.2d 316, 319 (N.J. Super. Ct. App. Div. 1990).

74 *Id.* Recollection of repressed memories is often triggered by some traumatic event. Nevertheless, the victim does not "wake up one day and say[] 'Aha, I was abused'. . . the process is slow, subtle and confusing." Petersen, *supra* note 3, at E1.

75 *See supra* note 27.

76 *Jones*, 576 A.2d at 319.

77 *Id.*

78 Jones v. Jones, 576 A.2d 316, 319 (N.J. Super. Ct. App. Div. 1990).

79 *Id.* (citing Lopez v. Swyer, 300 A.2d 563, 571 (N.J. 1973)).

taken from her by the defendant.[80] Specifically, the court stated that

> the duress and coercion exerted by the prospective defendant must have been such as to have actually deprived the plaintiff of his freedom of will to institute suit in a timely fashion, and it must have risen to such a level that a person of reasonable firmness in plaintiff's situation would have been unable to resist.[81]

On remand, the case settled out of court.[82]

C. *The After Effect*

As stated above, the *Jones* opinion underscored the absence of a specified civil remedy for victims of sexual abuse, as well as the aforementioned difficulty victims may encounter filing suit within the time allotted by the statute of limitations. The *Jones* decision received a great deal of attention, especially for the novel manner in which the statute of limitations was tolled.[83] One especially effective article[84] appeared shortly after the *Jones* opinion was published and was credited by the bill's sponsor with being extremely influential in the formulation of the Statute.[85]

The article praised the *Jones* court for "the significant step taken in recognizing the plight of victims of incest."[86] In acknowledging the importance of this decision, the article called upon the New Jersey Legislature to enact a statutory cause of action.[87] The author reasoned that

> the need for such legislation is grounded upon the breach of the special relationship that exists between the plaintiff and defendant. The defendant, typically a father or stepfather, has complete control over his helpless victim, and thus, a great advantage in avoiding prosecution. Legislation could offset this advantage. . . Such legislation could encompass the same tests

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80 *Id.* at 322. Other courts have held in criminal cases involving sexual abuse that "if the victim and the defendant are not in frequent contact and do not reside together, the defendant's control over the victim may be insufficient to justify tolling the statute of limitations." Mindlin, *supra* note 23, at 199 n.61.

81 *Jones*, 576 A.2d at 319. *See also infra* notes 192-97 and accompanying text.

82 Michael J. Pimpinelli, *Incest: The Secret Tort*, N.J.L.J., Jan. 17, 1991, at 116.

83 *Id.*

84 *Id.*

85 Fleury, *supra* note 15, at 12.

86 Pimpinelli, *supra* note 82, at 116.

87 *Id.*

for tolling the statute of limitations as set out in the *Jones* case.[88]

The author provided an inventory of the benefits of a statutorily defined right of recovery for sexual abuse.[89] These include: compensation in money damages[90] to pay the cost of therapy, psychological benefits of confronting the attacker;[91] the lower threshold for proving a case in civil litigation as opposed to criminal court;[92] and the belief that the statute will inspire more victims to confront their attackers since many who may not be amenable to subjecting their attackers to criminal prosecution could be willing to initiate civil proceedings.[93] It was with these objectives in mind that the statute was signed into law on September 24, 1992. Now that enact-

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88 *Id.*

89 In addition to the benefits assured for the victims of sexual abuse, the author included a list of the benefits to be procured by those attorneys who champion the victims' cause, saying:

> [T]he public has forgotten that almost all major positive social changes in this country were due to the perseverance of attorneys, often working for little or no compensation. History is replete with instances of attorneys championing the weak, the helpless and the victimized. It is the legal profession's obligation to tap its collective social conscience, and carefully investigate and pursue cases involving incest.

Id.

90 The source of damage payments remains unresolved. Plaintiffs generally prefer to recover from the defendant's insurer, since many defendant's are "judgment proof" in that they may lack sufficient assets to pay a sizable judgment or settlement. Nonetheless, public policy favors a system where the defendant is personally compelled to make payment, since this provides greater deterrent value to potential child abusers.

Most insurance policies contain clauses that exclude coverage for personal injuries in which the insured intended both the act and the resulting harm. Griggs v. Bertram, 443 A.2d 163 (N.J. 1982). Since one cannot imagine a scenario by which a sexual assault could be committed unintentionally, it would appear that the intentional injury exclusion would prohibit defendants from seeking coverage from their insurers. For a complete discussion on this topic, see Joseph R. Long II, Note, N.N. v. Moraine Mutual Insurance Co.: *The Liability Insurance Intentional Injury Exclusion in Cases of Child Sexual Abuse*, WIS. L. REV. 139 (1991).

91 *See infra* notes 111-17 and accompanying text.

92 *See infra* notes 111-24 and accompanying text.

93 Pimpinelli, *supra* note 82, at 111. *See also* Lamm, *supra* note 1, at 2195. Criminal prosecution is often as much of an ordeal for the accuser as for the accused. The traumatic nature of the proceeding is unquestionably the reason that fewer than 10% percent of all allegations of child sexual abuse go to court. For an anecdotal account of the criminal process as viewed by a sexual abuse victim, see Heidi Vanderbilt, *Incest: A Chilling Report*, LEAR'S MAG., Feb. 1992, at 65-66.

ment has come to pass, it is necessary to examined the Statute itself to determine its ability to serve its intended purposes.

IV. The Statute

The Statute consists of two main elements: 1) the creation of a new civil action in tort for victims of sexual abuse; and 2) allowance for plaintiffs to sue up to two years after reasonable discovery of their psychological injuries.[94] Each element will have to be examines separately so that the effect of the statute as a whole might best be gauged.

A. *Benefits of a Civil Action in Tort*

Perhaps the most obvious concern is the necessity of a statutory right to recover in tort. It is apparent that victims of sexual abuse have the right of civil recovery, and that special provisions for tolling the statute of limitations will at times be necessary.[95] While the absence of a statute did not prevent Susan Jones from recovery, substantial support for a statutory right of recovery was mobilized in support of the statute.[96] The statute had unanimous support in both houses of the New Jersey State Legislature.[97] This overwhelming support can be traced to the Statute's many identifiable benefits, each of which must be surveyed separately.

1. Damages

As noted above, the injurious effects of child sexual abuse are unique. The victim may sustain psychological damage far more severe than any physical injury.[98] These psychological injuries can last for a very long time.[99] It has also been recognized

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94 N.J. STAT. ANN. § 2A:61B(1)-1 (West 1992).

95 Jones v. Jones, 576 A.2d 316, 320 (N.J. Super. Ct. App. Div. 1990).

96 Pimpinelli, *supra* note 82, at 111.

97 *See supra* note 10.

98 *See supra* notes 20-27 and accompanying text.

99 *See supra* notes 3, 27 and accompanying text. The American Psychiatric Association has likened the trauma sustained by adult survivors of childhood sexual abuse to Post Traumatic Stress Disorder, a malady commonly associated with veterans of the Viet Nam War. Harris, *supra* note 6, at 755; Petersen, *supra* note 3, at E1.

Post Traumatic Stress Disorder (PTSD) describes the psychological impact of traumatic events on a person's psyche. The result of experiencing a traumatic event may be purely psychological, or a combination of psychological and physical impairment. Repression is a possible consequence of PTSD. Harris, *supra* note 5,

that the instance of sexual abuse may be so traumatic that the victim may completely repress any memory of the event.[100] Even if recollection of the incidents remains part of the victim's conscious memory, the victim may not be capable of associating any continuing emotional problems with the abuse that occurred in their childhood.[101]

In light of the aforementioned severity of psychological injuries sustained by victims of child sexual abuse, the strongest argument in favor of the right to recover in tort for injuries resulting from sexual abuse lies in the most basic tenet of tort law. Specifically, the cost of the injury should be borne by the party at fault.[102] The availability of damages is the primary reason behind almost all civil litigation.[103]

Damages in this type of action may prove especially valuable. The injuries inflicted upon the victim of sexual abuse are difficult to detect and treat.[104] To overcome the emotional trauma of sexual abuse, many victims will require psychological therapy,[105] which obviously costs money.[106] Civil litigation is the only avenue available to compensate the victims of sexual abuse so that they might be able to afford the remedy to the harm they suffered as children.[107]

In commenting on the benefits of tort compensation, it must be noted that greater understanding of child sexual abuse makes damage awards more meaningful. Enhanced knowledge of the long term effects of child sexual abuse will aid judges in the as-

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at 755-56 (citing AM. PSYCHIATRIC, DIAGNOSTIC, AND STATISTICAL MANUAL OF DISORDERS § 309.89, at 247 (3d rev. ed. 1987)).

100 *See generally* Blume, *supra* note 1, at 6.

101 *See, e.g., id.*

102 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2 (5th ed. 1984). *See also* Hagan, *supra* note 1, at 363 n.53.

103 KEETON, *supra* note 102, at 2.

104 Duehn, *supra* note 1; *see also supra* note 7 and accompanying text.

105 *See* Allen, *supra* note 1, at 616-17; Duehn, *supra* note 1. For an overview on the process of therapy, its costs, benefits, and other information, see DEYOUNG, *supra* note 1, at 121-23.

106 The monetary cost of treating injuries resulting from sexual abuse may not be limited to the cost of psychological therapy. Damages for other expenditures, such as lost wages, may be appropriate. Lamm, *supra* note 1, at 2195.

107 Victim's compensation funds in a number of states and criminal restitution orders may provide limited financial relief to victims when their abusers are criminally punished. However, the amount actually received by the victim rarely approaches the actual economic loss incurred. Lamm, *supra* note 1, at 2195 n.51.

sessment of damages.[108] The great deal of attention focused on child sexual abuse has lead to a greater understanding of the resulting psychological injuries. More precise information regarding of the nature of the injury can only benefits judges and juries in the assessment of damages.

2. Streamlined Litigation

A second reason for a statutory remedy is that the specific parameters for recovery provided by the statute would simplify tort litigation.[109] While the *Jones* case was an important step toward making the civil courts more accessible to victims of sexual abuse, the appellate panel was required to answer only those questions placed directly before them. If the courts are made solely responsible for the determination of how victims are to be compensated, the litigation process will be made untenable. Every point will have to be fought out at the bar, and inconsistent holdings would result. The Statute prevents this situation from occurring by setting the parameters of how litigation of this type is to be ordered. This provides a level of certainty to the parties. "Now that medical professionals have called public attention to latent incest trauma, it is unreasonable for lawmakers to persist in requiring the incest plaintiff to rely on arguments by analogy to existing delayed discovery exceptions, each of which is less compelling than the facts of [their] own case."[110] The predictability provided by the statute will make the court system more amenable to both parties.

3. Relationship Between the Tortfeasor and Victim

Another advantage to a statutory right of recovery is grounded in the special relationship an incest victim may share with her attacker. While sexual abuse of children is a criminal offense in every state,[111] there are reasons why a victim may want to confront the assailant in court without forcing him to go to jail. The assailant is often a family member or one *in loco parentis* with the victim.[112] The victim may not wish to send such a per-

108 *See supra* note 27 and accompanying text.
109 Mindlin, *supra* note 1, at 206.
110 Salten, *supra* note 1, at 220.
111 Clark, *supra* note 1, at 217.
112 *See supra* notes 1, 6, 27 and accompanying text.

son to jail for any number of personal reasons.[113] Civil litigation allows for courtroom confrontation without subjecting the defendant to criminal sanctions.[114] It is hoped that such confrontation will also benefit the guilty defendant, who will be compelled to seek counselling once the secret has been disclosed.[115] The result, once again, will be greater redress to a larger number of victims.

The profits of in-court confrontation between the victim and the assailant were articulated by Karyn Lehmann, an incest victim who testified in favor of the Statute before the New Jersey State Senate Judiciary Committee.[116] When asked about the benefit of bringing civil tort action, where there was no threat of criminal punishment for the defendant, Lehmann replied: "It would allow me to say, 'Dad, you were wrong,'. . . [although money may be hollow compensation], it is the only thing our system allows for."[117]

4. Burden of Proof

The lower burden of proof is the ultimate advantage the Statute brings to sexual abuse victims.[118] Sexual abuse is ex-

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113 Allen, *supra* note 1, at 609-10 n.4.

114 A victim who brings criminal sexual abuse charges against a family member may be sending the person responsible for their care and upbringing to prison. Obviously, this is especially traumatic for the victim. The possibility of a familial relationship between victims of sexual abuse and the attacker has been cited as a primary explanation for the relatively small percentage of arrests and convictions in this type of matter. *Id.*

115 The *Recommended Guidelines for Treatment of Adult Sex Offenders* is included in Duehn, *supra* note 1. The strategy included therein is considered to be highly effective in clinical practice. Interview with Colleen Madigan-Roesing, Mental Health Counselor, Wayne General Hospital, in Belleville, N.J. (Jan. 8, 1992).

116 Carter, *supra* note 10, at 20.

117 *Id.*

118 The difference between criminal prosecution for child sexual abuse and civil tort litigation flowing from the same act may be explained as follows:

> Civil and criminal suits predicated on similar facts obviously differ in a number of ways, including the disparate burdens of proof. In civil suit, the plaintiff must prove the claim by a preponderance of the evidence, whereas in a criminal suit, the prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt. Criminal defendants also have additional constitutional protection. Thus, it may be more difficult for a prosecutor to convict an incest perpetrator than for a plaintiff to prevail in a civil incest suit.

Lamm, *supra* note 1, at 2198 n.77 (citations omitted).

traordinarily difficult to prove in court.[119] In order to bring the attacker to court, the victim of sexual abuse must undergo an ordeal that is in many ways as traumatic as the attack itself.[120] The lower burden of proof will not make the courtroom experience easy on claimants, but it will insure that a victim is able to exact retribution on her assailant in a less strenuous fashion.

There has been a trend toward using civil litigation as a substitute for criminal prosecution in recent years.[121] In recognizing same, it is not suggested that civil litigation is preferred to criminal action.[122] Persons who have sexually abused children have committed a crime[123] and should be prosecuted. Nonetheless, civil litigation does have some marked advantages for the claimant, and injured persons should have the option of tort recovery at their disposal.

Assuming *arguendo* that a victim of child sexual abuse has in fact repressed all memory of the exploitation, a statutory right of recovery is meaningless absent a provision for tolling the statute of limitations. As stated above, such a provision has been included in the statute,[124] and will be address herein.

B. *Tolling of the Statute of Limitations*

A statute of limitation is one which sets the maximum time period during which a certain type of action can be initiated.[125] Once the applicable time period has elapsed, no legal action can be brought regardless of the merits of the underlying claim.[126]

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119 Prosecution is often hindered by the fact that "the criminal justice system's method for arriving at truth based on credibility of victims and witnesses breaks down when those victims are people whom society is conditioned to disbelieve and when what they allege itself is unbelievable." Boland, *supra* note 1, at 225 n.11; *see also* Susan B. Apel, Comment, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 494-501 (1989)(just as for years women were unable to substantiate rape charges due to allegations of "consent," now victims of childhood sexual abuse are unable to substantiate their claims due to charges that they have been "fabricated").

120 For an anecdotal account of the family court process from the victim's perspective, see Vanderbilt, *supra* note 93, at 65.

121 Tony Trueman, *Victims in Search of Justice*, LONDON TIMES, Jan. 1, 1991, at A1.

122 *Id.*

123 *See supra* note 5 and accompanying text.

124 N.J. STAT. ANN. § 2A:61B-1(5)(c) (West 1992).

125 N.J. STAT. ANN. § 2A:12-2 (West 1990).

126 BLACK'S LAW DICTIONARY 927 (6th ed. 1991).

Generally, accrual starts at the date of the injury.[127] However, this is inequitable if the plaintiff has no way of knowing that they have been injured, or is prevented from bringing suit by circumstances beyond their control.[128]

In such situations, courts often employ the discovery rule.[129] The underlying purpose of the discovery rule is to toll the statute of limitations until the plaintiff knows, or though the exercise of reasonable diligence should know, of the injury and its underlying cause.[130] There are two prevalent reasons for tolling of the statute of limitations in situations such as those under review.

1. Duress

The first, and more obvious reason, is in cases where the victim is intimidated into keeping the abuse secret.[131] Equity certainly favors a tolling the statute of limitations under these circumstances. When confronted with this very issue, the *Jones* court failed to unearth any statutory provisions or prior cases directly on point.[132] "However", the court acknowledged that "we

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127 Comment, *Developments in the Law - Statutes of Limitation*, 63 HARV. L. REV. 1176, 1179 (1950).

128 Jones v. Jones, 576 A.2d 316, 319-20 (N.J. Super. Ct. App. Div. 1990).

129 This is also referred to as the delayed discovery rule. *See, e.g.*, Hammer v. Hammer, 418 N.W.2d 23, 25-26 (Wis. Ct. App. 1987), *review denied*, 428 N.W.2d 552 (Wis. 1988). The two terms are often employed interchangeably. Lamm, *supra* note 1, at 2190 n.14.

130 RESTATEMENT (SECOND) OF TORTS § 899 comment e; *see also* Hagen, *supra* note 1, at 15 n.3. For application of the discovery rule in areas other than those currently at issue, see Note, *Toward a Time-of-Discovery Rule for the Statute of Limitations in Latent Injury Cases in New York State*, 13 FORDHAM URB. L.J. 113, 118-20 (1985).

131 Duress comes in all shapes and forms. An especially horrific example was given by a sex abuse counselor from the State of Washington, who stated:

> I have two little girls in my sex abuse group. They were both sexually abused by their father over a long period of time. The father has been prosecuted for abusing the younger girls, but not the older ones. Presently, he is living outside the home. He's not allowed to have contact with the kids, but he talks to them on the phone every day; he's trying to convince the older girls not to tell about the abuse. He tells them what happens to men like him if they have to go to prison. . . he says that without his income their mother won't be able to support them and that the girls will all end up in foster care. He knows the statute of limitations expires in six months. He's doing all he can to keep the girls from telling. . . . Unfortunately, he's succeeding.

Mindlin, *supra* note 23, at 190 n.10.

132 Nevertheless, the course of action taken by the *Jones* court was not entirely novel. *See* State v. Danieski, 348 N.W.2d 352 (Minn. Ct. App. 1984), where the

in New Jersey have a 'long history of instances where equity has interposed to bar the statute of limitations (defense). . . where some conduct on the part of the defendant . . . has rendered it inequitable that he be allowed to avail himself of the defense.' "[133]

Duress is an especially thorny issue in child sex abuse litigation since many victims of sexual abuse are financially or emotionally dependant on their attackers.[134] Since victims of child sex abuse are, by definition, children, they may be too young to realize that they can go to court.[135] The attacker may threaten all types of reprocussions should the activity be made public.[136] The attacker may even enforce the threat with violence, just as Robert Jones is alleged to have done.[137] In this situation, the *Jones* court was correct in stating that the defendant should not be allowed to avail himself of the protection provided by the statute of limitations. While research has failed to uncover any reported opinions other than *Jones* where this was done in a sexual abuse case, it is not unusual for the court to determine that "a prospective defendant's coercive acts and threats may rise to such a level of

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statute of limitations was tolled in a criminal context during such time as the plaintiff resided with the defendant, and the defendant forced the plaintiff to keep the ongoing abuse silent.

133 Jones v. Jones, 576 A.2d 316, 322 (N.J. Super. Ct. App. Div. 1990)(citing Lopez v. Swyer, 300 A.2d 563, 571 (N.J. 1973)).

134 The typical victim is abused by someone she knows and trusts. These relationships do not necessarily end upon a victim's reaching the age of eighteen, particularly if the abuser is a parent. Many people still live at home at the age of eighteen. They may have the right to vote and drink alcohol, but they may still rely on their parents for shelter, food, and transportation. Children who rely on their parents for these necessities are, for all practical purposes, under their parent's control. They may feel forced to stay in a sexually abusive environment until they can gain financial independence.

In addition to financial dependence, the continuing emotional attachment to the abuser may also delay a victim's legal action. It is very difficult to take a relative or close acquaintance to court and expose the sordid and embarrassing details of the abuse. . . .

Harris, *supra* note 6, at 758-59 (citations omitted).

135 As with all statistics regarding the sexual abuse of children, those regarding the ages of victims vary. Studies have indicated that the age of the average victim at first contact is approximately eight years old. Reports of sexual contact, even forced intercourse, have been made involving children much younger, even infants. Salten, *supra* note 1, at 194-95.

136 *Jones*, 576 A.2d at 318.

137 *Id.*

duress as to deprive the plaintiff of his freedom of will and thereby toll the statute of limitations."[138]

2. Repression, Latent Discovery and the Discovery Rule[139]

The second situation in which equity mandates a tolling of the statute of limitations is more difficult to address. This is when the plaintiff claims to "have develop[ed] amnesia that is so complete that they simply do not remember that they were abused at all; or if they do remember, they minimize or deny the effects of the abuse so completely that they cannot associate it with any later consequences."[140]

Since the concept of tort remedy for victims of child sexual

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138 A lengthy list of cases in which this proposition was employed is provided in Jones v. Jones, 576 A.2d 316, 322-23 (N.J. Super. Ct. App. Div. 1990).

139 This note will follow the definition of the discovery rule used in the Statute. That is: "nothing in this act is intended to preclude the court from finding that the statute of limitations was tolled in a case because of the plaintiff's mental state, duress by the defendant, or any other equitable grounds." N.J. STAT. ANN. § 2A:61B-1 (West 1992).

For the purposes of this article, discussion of Post Incest Syndrome or Child Sex Abuse Accommodation Syndrome will be limited to the problem of repression. *See supra* note 1.

Research failed to uncover any cases in which the plaintiff is alleged to have suffered from a specific malady called Post Incest Syndrome, or Child Sexual Abuse Accommodations Syndrome. However, both the *Jones* case and the statute have allowed for the possibility that victims of sexual abuse may repress all memories of the abuse, only to recall it years later. The Blume article suggests that Post Incest Syndrome manifest itself in many ways in an adult sufferer. These include feelings of helplessness, inability to develop relationships, and generalized feelings of anger, guilt, and self hatred. While Blume's thesis is not without its critics, it has been described as the most accurate explanation of the long term symptoms manifest by victims of childhood sexual abuse. Interview with Colleen Madigan-Roesing, Mental Health Counselor, Wayne General Hospital, in Newark, N.J. (Nov. 12, 1992). *See also Preview of Supreme Court Term,* N.J.L.J., Oct. 19, 1992, at 396.

140 Blume, *supra* note 1, at 5.

> Application of the discovery rule in cases involving sexual abuse means that the statutory period runs from the date at which the adult survivor of childhood sensual abuse discovered or should have discovered the harm caused by the abuse. In many cases, the discovery of sexual abuse during childhood is not made until the victim is a middle aged adult undergoing some type of psychological therapy. Some victims repress all knowledged of the abuse while others remember the abuse but do not discover until their adult years the causal relationship between the sexual abuse and their current emotional and psychological trauma.

Hagen, *supra* note 1, at 356-57 n.5.

abuse is in itself a recent development, it would follow that application of the discovery rule[141] equally novel. In this setting, as in all personal injury cases, use of the discovery rule indicates that the statute of limitations would not begin to run until the plaintiff has discovered, or reasonably should have discovered, the fact that they have been injured.[142] Specifically, the plaintiff must in fact be ignorant of the injury, and the ignorance must not be the plaintiff's own fault.[143]

3. Concern over the Veracity of Repressed Memories: *Tyson v. Tyson*

Judicial acceptance of the concept of repression[144] was slow in coming. The first reported attempt by a plaintiff to extend the discovery rule to civil actions to recover damages resulting from sexual abuse was *Tyson v. Tyson*,[145] a case which is factually akin to *Jones*. The *Tyson* plaintiff was a twenty-six year old woman who brought suit against her father to recover in tort for injuries she alleged were the result of his sexual exploitation of her while she was a child in his home.[146] Her father allegedly initiated the sexual attacks when the plaintiff, Nancy Tyson, was three years old, and continued for eight years.[147] In addition to the sexual abuse, the plaintiff alleged that she was forced to endure all types of emotional mistreatment while a member of her parents house-

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141 *See infra* note 189 and accompanying text.

142 The use of the discovery rule to toll the statute of limitations is most prevalent in latent disease cases arising from products liability actions. *See, e.g.*, Rose v. A.C. & S., Inc. 796 F.2d. 294 (9th Cir. 1990)(product liability action against asbestos manufacturer does not accrue until plaintiff discovers all of the essential elements of the cause of action).

143 Jones v. Jones, 576 A.2d 316, 320 (N.J. Super. Ct. App. Div. 1990).

144 For the purpose of this note, the term "repression" will deal solely with repressed memories of sexual abuse. However, this is not to imply that this is the only area in which repression may occur. "Repression, moreover, can hardly be deemed a novel concept; it appears in the literature as early as the late 19th century and is integral to any number of psychoanalytic theories." Lindabury v. Lindabury, 552 So.2d 1117, 1118 (Fla. 3 Dist. Ct. App. 1989)(Jorgensen, J., dissenting).

A plaintiff's failure to understand that they have a legal cause of action does not qualify as repression. To take this concept "to its logical extreme . . . could have the effect of forever denying potential defendant's the benefits of a statute of limitations." E.W. v. D.C.H., 754 P.2d 817, 820 (Mont. 1988) (citations omitted).

145 727 P.2d 226 (Wash. 1986). Further analysis of the *Tyson* case can be found in Mindlin, *supra* note 23, at 189.

146 *Tyson*, 727 P.2d at 227.

147 *Id.*

hold.[148] Eventually, the alleged acts of sexual abuse caused her such emotional trauma that she repressed her memory of the events entirely.[149] She asserts that years after she removed herself from the abusive environment, and, correspondingly, years after the statue of limitations had expired, therapy triggered her knowledge of the abuse and her recognition that the abuse caused the emotional problems she was experiencing as an adult.[150] Plaintiff Nancy Tyson argued that it would be unfair to "preclude her claim because she was unable to discover her cause of action during the applicable limitation period."[151]

Just as the *Jones* court did in 1990, the *Tyson* court outlined the importance of the statute of limitations, and recognized that the discovery rule is a vital tool by which the court can equitably toll the statute of limitations in cases where the plaintiff has produced "trustworthy . . . objective, verifiable evidence" that she was unable to comply with the statutory dictates.[152] In furtherance of this objective, the majority adopted a balancing test by which "the discovery rule should be adopted only when the risk of stale claims is outweighed by the unfairness of precluding justified causes of action."[153]

The *Tyson* majority[154] was not persuaded by the evidence

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148 *Id.* at 227-29.

149 *Id.* at 227.

150 Tyson v. Tyson, 727 P.2d 226, 227 (Wash. 1986).

151 *Id.*

152 *Id.* at 228.

153 *Id.* at 228. The dissent agreed with the majority on this point. *Id.* at 230 (Pearson, J., dissenting). The balancing test is seen as the primary justification for the discovery rule in this context. *See* Peterson v. Bruen, 792 P.2d 18 (Nev. 1990), where the court stated 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. Plaintiffs should be put on notice before their claims are barred by the passage of time.

Id. at 20.

154 The *Tyson* case was a 5-4 decision. One Justice concurred in the decision reached by the majority, but found the dissent persuasive. He concluded, however, that application of the discovery rule to civil litigation involving sexual abuse was a policy decision to be determined by the legislature. Tyson v. Tyson, 727 P.2d 226, 226 (Wash. 1986)(Goodloe, J., concurring).

The Washington State Legislature did in fact make such a policy decision by enacting WASH. REV. CODE ANN. § 4.16.340(2), which superseded *Tyson*. This statute extends the discovery rule to *Tyson* and *Jones* type plaintiffs, stating:

presented by the plaintiff regarding the concept of repression.[155] While the court acknowledged that the discovery rule is applicable to cases where there is objective physical evidence that lies beyond the perception of the claimant,[156] evidence of psychological injury was deemed to be too unreliable to allow for a tolling of the statute.[157] Specifically:

> [p]sychology and psychiatry are imprecise disciplines. Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence. The fact that the plaintiff asserts she discovered the wrongful acts through psychological therapy does not validate their occurrence. . . [T]he psychoan-

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> [A]ll claims or causes of action 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 course 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 expires later.

Id.

155 Cases in which it was held that the discovery rule was inapplicable in matters such as those under examination are: Smith v. Smith, 830 F.2d 11 (2d Cir. 1987) (New York statutory tolling provision for insanity not applicable to cases involving repression of sexual abuse); Baily v. Lewis, 763 F. Supp. 802 (E.D. Pa. 1991) (Pennsylvania statute of limitations not tolled for insanity); Hildebrand v. Hildebrand, 736 F. Supp. 1512 (S.D. Ind. 1990) (discovery rule not applicable under Indiana law); Lovelace v. Keohane, 831 P.2d 624 (Okl. 1992) (discovery rule not applicable in cases of multiple personality disorder); O'Neal v. Div. of Family Services, 821 P.2d 1139 (Utah 1992) (plaintiff not mentally incompetent); Lindabury v. Lindabury, 552 So.2d 1117, 1117 (Fla. 3 Dist. Ct. App. 1989) (discovery rule held inapplicable under Florida law); E.W. v. D.C.H., 754 P.2d 817, 817 (Mont. 1988) (plaintiff "always knew" that she had been molested as a child); Bower v. Guttendorf, 737 P.2d 226 (Wash. App. 1988) (following the *Tyson* majority); DeRose v. Carswell, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987) (court not required to determine the validity of the concept of repression when allegations in plaintiffs complaint affirm that she had not actually repressed memory of the abuse).

156 As an example of a situation where the use of the discovery rule was considered proper, the *Tyson* majority cited Ruth v. Dight, 453 P.2d 631 (Wash. 1979). The *Ruth* plaintiff brought a malpractice action against a surgeon 22 years after the performance of a hysterectomy. During that period, the plaintiff suffered abdominal pain until she underwent a second operation during which a sponge was removed from her body. That sponge was left during the hysterectomy. Since it was beyond the power of the plaintiff to discover the source of her abdominal pain, the statute of limitations was tolled until the sponge was found. *Id.*

It is beyond cavil that the statute of limitations is to be tolled in *Ruth* type situations, where concrete, objective proof of injury is nonetheless beyond the ability of the plaintiff to perceive. *See E.W.*, 754 P.2d at 819.

157 *Tyson*, 727 P.2d at 228-29.

> alytic process can even lead to a distortion of the truth of events in the subject's past life. The analyst's reactions and interpretations may influence the subject's memories or statements about them. The analyst's interpretations of the subject's statements may also be altered by the analyst's own predisposition, expectations, and intention to use them to explain the subject's problems.[158]

The majority thereby concluded that the purposes underlying the statute of limitations and the discovery rule would not be served should plaintiffs be allowed to maintain "(a cause of) action based solely on an alleged recollection of events which were repressed from her consciousness [without] independent[ ] verif[ication] of her allegations in whole or in part." [159]

Few courts have specifically denied that repression is possible.[160] Nevertheless, it is quite apparent that the notion that repressed memories of childhood sexual abuse may be recalled later in life has not received universal support in the psychological community. Some prominent psychologists, such as Elizabeth A. Loftus of the University of Washington[161] have gone on record saying that empirical evidence of repression is nonexistent.[162] Professor Loftus articulated her findings in an address before the American Psychological Association in the Summer of 1992, stating that many of the reported cases of repression were the result of well intentioned but misdirected counselors planting the necessary seed in the minds of their clients.[163] Upon finding that a client has exhibited many of the

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158 *Id.* at 229 (citing Wesson, Comment, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985)). The *Tyson* majority is not unique in voicing concern regarding the veracity of repressed memory. *See infra* notes 160-72 and accompanying text.

159 Tyson v. Tyson, 727 P.2d 226, 226 (Wash. 1986).

160 *But cf.* Bower v. Guttendorf, 541 A.2d 377, 379-80 (Pa. Super. Ct. 1988), where the court stated that:

> Appellant's contention that the statute of limitation is tolled due to her physical disability. . . [is] without merit. Although Appellant alleged that she was afflicted with a physical disability which diminished her capacity to communicate the event alleged in the complaint, such an allegation is not sufficient to toll the running of the statute of limitation.

Id.

161 Professor of Psychology and adjunct Professor of Law, University of Washington. *See supra* note 62.

162 Deborah Peterson, *Recollecting Childhood Sexual Abuse is Like Re-collecting Pieces of a Broken Vase*, HARTFORD COURANT, Sept. 17, 1992, at E1.

163 *Id.*

symptoms of sexual abuse, a therapist may be inclined to make a hasty diagnosis.[164] Clients who are anxious to find a ready answer for a history of personal problems may be anxious to latch on to this assessment.[165]

While it is impossible to differentiate degrees of harm, it is most unfortunate to note that the horror encountered by one falsely accused of sexual abuse may be nearly as great as that of the victim.[166] Overtly, opposition to extension of the discovery rule to sexual abuse tort litigation centers on the difficulty in bringing proof.[167] An apparently unstated reason for opposition to extension of the discovery rule is the problem brought about by false allegations of child sexual abuse. Just as accusations of sexual abuse are extremely difficult to prove,[168] false accusations are equally difficulty to refute.[169] This is especially troublesome, due to the singularly hateful stigma attached to child molestation.[170] In the words of Dr. Richard Gardener[171], "[Sexual abuse of children] is a heinous crime and I've always tried to make sure that those who commit it get everything that they deserve . . . [However], we've reached the point on this issue where an accusation is tantamount to a conviction. Thousands of lives are being ruined in this country by baseless charges. What we're seeing now is a repeat of the Salem witch trials."[172]

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164 *Id.*

165 *Id.*

166 Associations of persons supposedly falsely accused of abusing children include: The False Memory Syndrome Foundation in Philadelphia, and the Victims of Child Abuse Laws (VOCAL), also in Philadelphia.

167 This difficulty is conceded by those who support extension of the discovery rule. Tyson v. Tyson, 727 P.2d 226, 231 (Wash. 1986) (Pearson, J., dissenting).

168 The high cost of mistakes in child sexual abuse litigation is made painfully clear by the difficulty in testing for venereal disease. Until recently, a positive test for the presence of the sexually transmitted disease Chlamydia was viewed as conclusive evidence that a child was being sexually abused. In 1991, it was discovered that the test for Chlamydia was not perfect, and often gave false positive results. When asked about the devastating effects of an inaccurate finding that a child was sexually abused, an unidentified Manhattan Family Court Judge stated: "[w]hat do you do about a child who was removed [from their family] in 1985 when you find out in 1991 that the test [for Chlamydia] was flawed? Say 'Sorry?'" Vanderbilt, *supra* note 93, at 68.

169 *See supra* notes 160-64 and accompanying text.

170 *See supra* notes 20-27 and accompanying text.

171 Clinical Professor of Child Psychiatry at Columbia University, and a leading expert on the field of child sexual abuse. *See* Hanna W. Rosin, *Getting at the Truth of Sex Abuse,* N.J.L.J., Jan. 4, 1993, at 1.

172 Harry Stein, *Presumed Guilty*, PLAYBOY MAG., Feb. 1992, at 75. Dr. Graham

The recent trend toward burgeoning awareness of childhood sexual abuse has brought with it both an increase in the number of false accusations[173] and an increased awareness of the effects such an accusation may have on one so accused.[174] Increased appreciation of the problem of child sexual abuse has therefore been a double edged sword.

While the reality of the harm that may result from a false accusation of child molestation must be acknowledged, it is insufficient to overcome the arguments favoring the extension of the discovery rule to situations such as those under review.[175] The *Jones* opinion, as well as the dissent in *Tyson* provide the best arguments in support of the Statute. Simply put, the fact that proof will be extremely difficult should not preclude claimants from making the attempt.[176] Since repression is scientifically recognized as a possibility, it should be afforded legal recognition as well. The principles of fundamental fairness underlying the discovery rule support a victims right to

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Jeambey, Ph.D., Executive Director of Victims of Child Abuse Laws (VOCAL), has alleged that only between one and two percent of all child sexual abuse allegations are true. This opinion is not widely accepted. Vanderbilt, *supra* note 93, at 66.

173 While false accusations receive a great deal of attention in the media, some experts dispute the popular assumption that false accusations of child sexual abuse are rampant. Howard Davidson, Director of the American Bar Association's National Legal Resource Center for Child Advocacy and Protection has been quoted as saying that "the best research suggests that only five to eight percent of the allegations of child sexual abuse are fictitious [be they in the context of a divorce proceeding or not]." Nancy Blodgett, *Coping with Child Abuse: Spouses Use Allegations to up the Ante in Divorce Cases*, A.B.A. J., May 1, 1987, at 26.

As with all statistics regarding child sexual abuse, the percentage of accusations which are false is in dispute. *See supra* note 5 and accompanying text. A recent four year period saw the number of abuse reports in New York rise by more than 22 thousand while the number of substantiated cases actually fell by approximately 100. Stein, *supra* note 172, at 76.

174 *Accusations of Sex Abuse, Years Later*, PHIL. SUNDAY INQUIRER, Dec. 24, 1991 at 5-1. Accusations of incest are assumed to be especially effective in child custody cases because one parent may often prefer to withdraw from the battle rather than face such an accusation. Melinda L. Moseley, Note, *Civil Contempt and Child Sexual Abuse Allegations: A Modern Solomon's Choice?*, 40 EMORY L.J. 205 (1991). Moseley's note provides a complete overview of the effect of allegations of sexual abuse in custody battles.

175 This note adamantly opposes the proposition that any of the traditional protection afforded to defendants in civil litigation be disregarded in matters involving sexual abuse. *But cf.* Boland, *supra* note 1, at 233-34 (". . . sexually abused victims should not be barred from pursuing their abusers out of fairness to the offender").

176 Tyson v. Tyson, 727 P.2d 226, 231 (Wash. 1986); Lindabury v. Lindabury, 552 P.2d 1117, 1117 (Fla. 3 Dist. Ct. App. 1989).

present a claim within a reasonable time after the injury has been discovered.[177] Since the possibility exists that claimants may not discover the injury until some time after the statute of limitations has passed,[178] application of the discovery rule to civil actions involving sexual abuse is an appropriate means of serving the interests of justice. The specter of a false accusation, as in all civil and criminal litigation, must be acknowledged. Nevertheless, such a threat cannot be the sole motivation for preventing a claimant from pursuing redress. As stated in *Jones:*

> [w]e do not suggest that [the statute of limitations should be tolled] uncritically whenever a plaintiff claims that his or her failure to initiate suit in a timely fashion was caused by a defendant's wrongful act. We are, nevertheless, of the view that, within certain limits, a prospective defendant's coercive acts and threats may rise to such a level of duress as to deprive the plaintiff of his freedom of will and thereby toll the statute of limitation.[179]

The *Tyson* dissent echoed this sentiment in stating that:

> [t]he purpose behind extending the discovery rule to adult survivor of childhood sexual abuse is not to provide a guaranteed remedy to such plaintiffs. The purpose is to provide an *opportunity* for adult who claims to have been sexually abused as a child to prove not only that she was abused and that the defendant was her abuser, but that her suffering was such that she did not and could no reasonably have discovered all the elements of her cause of action at an earlier time.[180]

Another persuasive dissent favoring this position was published in connection with the case of *Lindabury v. Lindabury.*[181] In *Lindabury*, as in *Jones* and in *Tyson*, a daughter brought suit against her natural parents alleging that she had been sexually abused as a child.[182] The abuse was said to have ceased in 1965, when the plaintiff was thirteen.[183] The plaintiff made a motion to toll the statute of limitations due to her alleged repression of memories concerning the

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177 *Tyson*, 727 P.2d at 231 (Pearson, J., dissenting).

178 *See supra* note 158 and accompanying text.

179 Jones v. Jones, 576 A.2d 316, 322 (N.J. Super. Ct. App. Div. 1990).

180 *Tyson*, 727 P.2d at 237 (Pearson, J., dissenting)(emphasis in original). *See also* Johnson v. Johnson, 701 F. Supp. 1363, 1368 (N.D. Ill. 1988).

181 552 So.2d 1117 (Fla. 3 Dist. Ct. App. 1989).

182 *Id.*

183 *Id.*

abuse.[184] The Florida appellate court upheld the trial court's grant of a defense motion for summary judgment based on the lapse of statute of limitation.[185]

The *Lindabury* dissent shared the *Tyson* majority's uneasiness with the psychiatric profession,[186] stating that it "represents the penultimate gray area." [187] Nevertheless, rather than opt for "mechanical" application of the statute of limitations, the dissent would have held that

> [f]undamental fairness requires that the plaintiff be given the opportunity to prove that repression precluded her from bringing suit within the conventional limitations period. . . It is not clear whether the particular theory of repression alleged in this case or the syndrome of which it is a characteristic is a sufficiently developed and recognized phenomenon to allow application of the delayed discovery rule. However, because incest is such an odious crime which causes deep rooted injuries more subtle and complex than those caused by other tortious acts, plaintiff should have the opportunity to present to the trial court expert testimony on the issue of [repression] and, if the court finds the expert opinion evidence relevant and therefore admissible, allow the fact finder to determine whether plaintiff could have brought the action earlier but for repression. [188]

This theme is consistent in all litigation of this type. No court has ever stated that the statute of limitations should be tolled merely because the plaintiff has claimed repression.[189] The New Jersey

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184 *Id.*

185 *Id.*

186 Apparently, the source of some of the uneasiness between members of the legal profession and psychologists employed to aid the court as expert witnesses is rooted in "the difficulty of exploiting witnesses' expertise without giving undue weight to his conclusions about. . . historical truth." In other words, the fear that the expert witness will commandeer the role of the jury. Wesson, *supra* note 158, at 332.

187 Lindabury v. Lindabury, 552 So.2d 1117, 1118 (Fla. 3 Dist. Ct. App. 1989) (Jorgenson, J., dissenting).

188 *Id.* at 1120.

189 Examples of cases where the court has allowed a plaintiff who claims to have repressed all memories of childhood sexual abuse to take advantage of the discovery are: Johnson v. Johnson, 701 F.Supp. 1363 (N.D. Ill. 1988) (following the *Tyson* dissent); Mary D. v. John D., 216 Cal. App. 3d 285 (1990) (requiring corroborative psychological testimony to support the claim of repression); Evans v. Eckleman, 216 Cal. App. 3d 1609 (1990); Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. App. 1988) (corroborative evidence required to employ discovery rule); Petersen v.

statute is no different. The tolling provision of the Statute merely provides an opportunity to offer proofs to support a claim of repression. This allows a plaintiff to avoid summary judgment, and to have the merits of a claim decided at trial. "Concern about the availability of objective evidence should not preclude application of the discovery rule."[190] Fundamental fairness requires no less.

C. *Protection for the Defendant*

It is essential to recognize that a defendant in matters such as those currently under review is not left unprotected. Sexual abuse does not become easier for a plaintiff to prove as time passes. While it is true that evidence by which the defendant may be exonerated has grown old and stale, so has the evidence by which the plaintiff might prove the claim.[191] Difficulty in assembling evidence makes the burden of proof that much heavier.

The defendant in civil sex abuse litigation is also protected by the standard mechanisms that protect all defendants in our judicial system.[192] For example: hearsay evidence and evidence deemed to be substantially prejudicial are not admissible in court.[193]

It is perhaps most important to remember that the Statute does not eliminate the statute of limitations,[194] but merely tolls it until such time as the victim discovers or in the use of due diligence should have discovered the injury.[195] A claimant has only two years from the date of discovery to initiate a cause of action. Should a potential plaintiff allow this period to lapse, the claim would be time barred.[196]

Bruen, 792 P.2d 18 (Nev. 1990); Osland v. Osland, 442 N.W. 2d 18 (N.D. 1990) (following the *Tyson* dissent); Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987) (Wisconsin courts apply the discovery rule in all tort litigation).

190 *Osland*, 442 N.W.2d at 909.

191 Hagen, *supra* note 1, at 375.

192 *Id.*

193 *Id.*

194 "There comes a time when [a party] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when evidence has been lost, memories have faded, and witnesses have disappeared." Rosenberg v. Town of North Bergen, 293 A.2d 662, 667 (N.J. 1972) (citations omitted).

195 *See supra* note 13 and accompanying text.

196 The statute mandates that any tort action for childhood sexual abuse "shall be

V. Conclusion

Sexual abuse of children is an ongoing problem of enormous magnitude. The act is one of universal condemnation since it involves a perversion of a relationship generally classified as sacred; the relationship between adults and children. Despite the overwhelming amount of attention devoted to the sexual abuse of children in recent years, the very nature of the act ensures that the problem will always remain somewhat of a mystery. Therefore, any endeavor to deal with the problem will in all likelihood be incomplete, and may in fact introduce new problems.[197] However, the model created by the New Jersey Legislature is a vital step toward helping victims become whole.

Civil recovery for victims of child sexual abuse is a good idea for all involved. It is good for victims who, in addition to the possibility of tort damages, gain the opportunity to confront the attacker without the high burden of proof required in criminal trials, and without the possible risk of sending a family member to jail. Civil litigation serves to identify those guilty of this act, hopefully compelling them to seek counseling to prevent it from happening again.

All tort litigation is difficult and imprecise. This is true even when the injury is easily discernable, and objective evidence as to its source is readily identifiable. The act of sexual abuse itself is almost impossible to prove. The resulting injury, if any, may manifest itself in an infinite variety of ways. This is complicated by the well documented fact that victims may have such difficulty dealing with the abuse that they may repress all memory of its

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brought within two years after reasonable discovery [of the injury]." N.J. STAT. ANN. § 2A:61B-1(5) (b) (West 1992).

> The decision to toll the statute of limitations shall be made after a plenary hearing conducted out of the presence of the jury. At the plenary hearing the court shall reach all credible evidence and the Rules of Evidence shall not apply except for Rule 4 or a valid claim of privilege. The court may order an independent psychiatric evaluation of the plaintiff in order to assist in the determination as to whether the statute of limitations was tolled.

N.J. STAT. ANN. § 2A:61B-1(5) (c) (West 1992).

[197] To help lawyers and judges involved in domestic relations cases deal with charges of child sexual abuse, the American Bar Association's National Legal Resource Center for Child Advocacy and Protection has developed written materials, with an accompanying videotape. For more information, contact the Center at 1800 M. St. N.W., Washington, D.C. 20405. Blodgett, *supra* note 173, at 26.

occurrence until some traumatic event forces the memories to reenter the victim's consciousness. The complex character of the tort itself presents a number of hurdles to victims seeking recovery. Unfortunately, any mechanism a court may employ to deal with the special problems of tort actions by victims of sexual abuse will also open the door for false claims. This is especially troublesome, since often an allegation of sexual misconduct is tantamount to a conviction. Additionally, one who has been convicted of child molestation will in all probability be completely ostracized from society.

Nevertheless, examination of Justice Pearson's dissent in *Tyson* illustrates that the course of action taken by the New Jersey Legislature is certainly the fairest way of confronting the problem. While the plaintiff's burden of proof is extremely difficult, it is not impossible. There is empirical, scientific evidence that victims of sexual abuse as children may repress memory of the event as a means of keeping their sanity. It is also quite possible that some traumatic event in adult life (i.e. therapy) may cause the victim to remember the childhood abuse. Since the possibility does exist, accommodation for such victims must be made.

It must be acknowledged that memory is a fragile thing, and the possibility of false memories does exist. Therefore, the risk of false accusations increases if the statute of limitations is tolled until such time as a memory is triggered. Such an accusation may be made by one who actually believes the abuse took place. While this concept is quite disturbing, it is not a sufficient reason to preclude all putative victims of childhood sexual abuse from seeking recovery. The burden of proof remains difficult. Fundamental fairness demands that in situations "where the plaintiff's ignorance is blameless, the cause of action will not arise until the plaintiff knows or is chargeable with knowledge of an invasion of his legal right."[198] At the risk of sounding glib, one must have faith in our legal system and assume that those who are wrongly accused will be exonerated. The dissents in *Tyson* and *Lindabury* provide the best arguments in support of the Statute. Simply put, the fact that proof will be extremely difficult should not preclude claimants from making the attempt. The principles of fun-

198 Lindabury v. Lindabury, 552 So.2d 1117, 1118 (Fla. 3 Dist. Ct. App. 1989) (Jorgenson, J., dissenting).

damental fairness demand that victims of child sexual abuse be allowed to present a case within a reasonable time after the injury has been discovered. Since the possibility exists that the claimants may not discover the injury until some time after the statute of limitations has passed, application of the discovery rule to civil actions involving sexual abuse is an appropriate means of serving the interests of justice.

Brian D. Gallagher