Remembering CHILDHOOD

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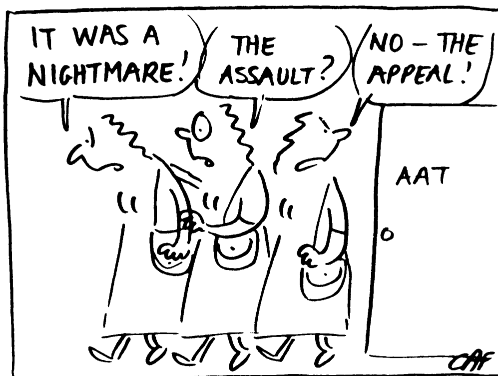
Time limitations: the hurdle for childhood sexual assault survivors seeking compensation.



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The enormous hurdle limitation periods present for survivors of childhood sexual assault cannot be overstated. This is the case with respect to civil actions against the perpetrators of sexual assault and criminal injuries compensation claims by survivors of sexual assault. The problems limitation periods pose for survivors is that the particular nature of the offences, and the effect on the 'victims' severely limit their capacity to claim within the periods prescribed by legislation.

The issues which have arisen as a result of *Arnold v Crimes Compensation Tribunal*[1] suggest that there may be appropriate judicial approaches to the application of limitation periods which increase redress for the devastation sexual abuse has caused in many people's lives. We provide here a potted history of the *Arnold* case, which we have been running since 1990. We believe the arguments and, hopefully, the final outcome, can be applied both to cases in other jurisdictions where criminal injuries compensation is available and civil proceedings.

The Supreme Court of Canada in *M(K) v M(H); Women's Legal Education and Action Fund, Intervener* (1992) 96 DLR (4th) considered the nature of the offence of childhood sexual assault and the effect on the victim in determining when time can be said to run against the victim for purposes of civil litigation. We have relied on the approach adopted in this case. This approach is significant in that it addresses the specific impact of childhood sexual assault and has the potential to increase access to legal redress for survivors of childhood sexual assault.

The Canadian Supreme Court considered academic studies of the effects of child sexual abuse, including an article by Jocelyn Lamm,[2] which is worth quoting at length as it details the problems inherent in cases such as *Arnold.*

> The classical psychological responses to incest trauma are numbing, denial and amnesia. During assaults the incest victim typically learns to shut off pain by 'dissociating', achieving 'altered states of consciousness . . . as if looking on from a distance at the child suffering the abuse'. To the extent that this mechanism is insufficient, the victim may partially or fully repress her memory of the assaults and the suffering associated with them: 'Many, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply do not remember they were abused at all; or . . . they minimise or deny the effects of the abuse so completely that they cannot associate it with any later consequences'. Many victims of incest abuse exhibit signs of Post-Traumatic Stress Disorder (PTSD) . . . Like others suffering from PTSD, incest victims frequently experience flashbacks and nightmares well into adulthood.
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> Experts have also noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder. Additionally, the internalisation of anger and anxiety that the incest victim has not been allowed to express, frequently results in a profound self-hatred that causes self-destructive behaviour later on: incestuous childhood victimisation commonly leads to other abusive relationships, self-mutilation, prostitution and drug and alcohol addiction.
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> Finding that the coexistence of these psychological and emotional disorders is unique to and characteristic of incest victims, experts have joined them under the heading 'Post-Incest Syndrome'. Those suffering from this syndrome will 'persistently avoid any situation, such as initiating a law suit, that is likely to force them to recall and, therefore, re-experience the traumas'.
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> Although the victim may know that she has psychological problems, the syndrome impedes recognition of the nature and extent of the injuries she has suffered, either because she has completely repressed her memory of the abuse, or because the

memories, though not lost, are too painful to confront directly. Thus, until she can realise that the abuser's behaviour caused her psychological harm, the syndrome prevents her from bringing suit. Often it is only through a triggering mechanism such as psychotherapy, that the victim is able to overcome the psychological blocks and recognise the nexus between the abuser's incestuous conduct and the psychological pain. Such understanding may develop in stages over a period of time during which the victim breaks through layers of denial and repression in a painful process. Typically, full recognition that she has been tortiously injured occurs after the victim has reached majority, long after the wrongful acts were committed.

It should be noted that the Canadian Supreme Court, in the case of *M v M*, considered in detail the rationale for limitation periods. The court found that adherence to the strict approach in cases of childhood sexual assault could not be justified given that the rationale for limitation periods had limited applicability in such cases (see pp.301-5).

Arnold v Crimes Compensation Tribunal

Sharon Arnold was sexually abused by a neighbour from the age of seven to fourteen years, from 1974 to 1981. It should be noted that, as a result of these drawn-out proceedings, Sharon continues to remember other incidents and now recalls assault which took place as early as 1971.

At the age of 20, she attended counselling about other matters. During the course of her counselling, however, she began to have flashbacks and nightmares recalling specific incidents of the sexual abuse. Until this time, Sharon had no conscious memory of the assaults. This recollection process began in July 1987 and was extremely traumatic for Sharon.

Sharon was in contact with a number of counsellors and the Centre Against Sexual Assault from August 1987. She decided to report the assaults to police in December 1988, with a view to taking legal action against the perpetrator and as part of a therapeutic recovery process, naming and forcing the abuser to account for the consequences of his actions. Police interviewed the perpetrator, but charges were never laid. Neither the counsellors seen by Sharon, nor the police, advised Sharon of her right to claim crimes compensation.

Sharon became aware of the possibility of claiming compensation from a newspaper article in early 1990. She attended our centre and we lodged an application for crimes compensation on her behalf in 1990. The appeal process has taken four years.

The Crimes Compensation Tribunal

The *Criminal Injuries Compensation Act* 1983 (Vic.) provides that compensation may be payable to the victims of crime who have been injured as a result of that crime. The relevant sections of the Act for the purposes of *Arnold* are as follows:

- *s.18* provides that the Crimes Compensation Tribunal (CCT) may award compensation for a victim's pain and suffering;

  s.3 provides that the definition of 'injury' includes mental illness or disorder (whether or not flowing from nervous shock);

  s.20(2) provides that the Tribunal shall not make an award of compensation where the incident has not been reported within a reasonable time, except where special circumstances resulted in the criminal act not being reported; and where an application for compensation is not made within one year of injury or death, unless an extension is granted under subsection (3);
- *s.20(3)* provides that the Tribunal may at any time extend the time for making an application for compensation for a further time if, in the circumstances, the Tribunal thinks it fit to do so.

Extensions of time are frequently granted by the Tribunal.

Sharon's claim was refused by the CCT on two grounds:

- she had not made a report to police within a reasonable time;
- the application for compensation was not lodged within one year of injury. The CCT refused to grant an extension of time for lodging the claim.

The Administrative Appeals Tribunal (AAT)

An appeal against the decision of the CCT was lodged with the Administrative Appeals Tribunal (AAT).

In the AAT hearing, uncontradicted evidence was given that Sharon had not been told of her right to claim compensation. Expert evidence was led on the particular impact and consequences of childhood sexual assault. This expert evidence provided that repression of memory, either partial or total, is a common response to the trauma of sexual assault; that threats are frequently used to silence children; and that the secrecy associated with child sexual assault often makes people feel implicated and responsible for their own abuse. This is compounded by attitudes of disbelief in the community.

The AAT decided:

- there were 'special circumstances' justifying the failure to report to the police within a reasonable time.
- that the circumstances of the case did not justify the exercise of discretion to extend the time for filing the application for compensation.

Concerning the first decision, in our opinion, the AAT erred in failing to consider whether, in the circumstances of the case, the delay was 'reasonable'. The particular nature of sexual assault and the effects should have resulted in the delay being considered 'reasonable'. As the AAT decided there were 'special circumstances', the subsequent appeal did not raise this issue.

The AAT found there were 'special circumstances' for failure to report to police within a reasonable time, having regard to the following factors:

- the trauma suffered as a result of the alleged assaults and the effect of the revival of those memories in 1987 (the AAT accepted that Sharon had repressed the memories of the assaults and that she had experienced a revival of those memories in the form of 'flashbacks');
- Sharon was still undergoing treatment and counselling for that trauma when she reported the matter to police in December 1988;
- the *Criminal Injuries Compensation Act* 1983 (Vic.) is remedial in nature, and accordingly a liberal approach should be applied to the expression 'special circumstances'.

Concerning the second decision of the AAT, the delay in issue for the purposes of granting an extension of time to claim was the lapse of time between July 1987 and February 1990, given the AAT accepted Sharon had repressed all memory of the assaults until July 1987. The AAT declined to

grant an extension of time and relied on the following factors in coming to this conclusion:

- given Sharon's level of maturity, age, intelligence, standard of education and employment status she should have sought professional advice regarding her right to claim compensation following the revival of her memory of the assaults;
- no 'acceptable explanation' was given for the delay in lodging her claim (the AAT decided that ignorance of her right to claim did not constitute an acceptable reason for delay);
- there was a public interest in bringing finality to litigation for legal claims, perhaps more so where public moneys are involved.

Supreme Court (Full Court)

An appeal against the decision was lodged on the following grounds. In deciding whether there was an 'acceptable explanation' for delay, the AAT did not take into account or give sufficient weight to the following factors:

- the nature of the offences and the particular effect that the injuries have in reducing a person's capacity to pursue legal entitlements;
- ignorance of the right to apply;
- that counselling and treatment for the trauma were continuing;

that the object of the legislation was that it was beneficial.

The Supreme Court affirmed the decision of the AAT.

High Court

Special leave to appeal to the High Court was granted on 10 December 1992 and the case was heard on 9 September 1993.

The grounds of appeal and our arguments were:

the AAT allowed the proper exercise of its discretion to be distracted by its insistence that there must be an 'acceptable explanation' for delay;

- in any event, the AAT decision that there was no acceptable explanation was wrong;
- the AAT failed to take into account a centrally relevant consideration – the applicant's ignorance of her right to apply for compensation;

by failing to consider the particular nature and effects of childhood sexual assault, the AAT failed properly to identify the time of the injury suffered by the applicant; and

- the time for making an application for compensation does not commence to run until the victim has suffered injury and is aware that her pain and suffering were caused by the criminal act and is aware of the right to claim compensation in respect of her pain and suffering.

We sought to rely on the decision of the Supreme Court of Canada in *M v M*. An important finding in that case was:

> Because the victim of incest is typically psychologically incapable of recognising that a cause of action exists until long after the abuse has ceased, the limitation period for incest does not begin to run until the victim is reasonably capable of discovering the wrongful nature of the perpetrator's acts and her injuries. This is so whether the victim always knew about the assaults but did not know the physical and psychological problems caused by them, or whether she had no recollection of the abuse until she commenced the action because of the trauma associated with it. A hypothetically reasonable person in the position of the appellant could not, and the appellant did not, discover the wrongful nature of the respondent's acts and her injuries until she entered therapy . . . Moreover, a presumption arises that an incest victim does not discover the nexus between her injuries and the abus until she commences therapy.

By consent the High Court ordered:

- the decision of the AAT and the appeal division of the Supreme Court be set aside;
- that the time within which the appellant was required to make her application be extended; and
- that the matter be remitted to the AAT to determine the appellant's application for compensation.

The respondent conceded that the AAT had erred in finding that ignorance of the right to claim did not constitute an acceptable explanation for delay. Consequently, the issue of when Sharon's right to claim accrued was not directly addressed by the High Court.

However, the nature and special position that the law should accord to the harm suffered by survivors of sexual assault was raised by the evidence given to the AAT and was in essence accepted by the High Court in determining that the refusal to extend time was not warranted as a matter of law.

Returning to the AAT

The only issue which remains for the AAT to consider is the level of compensation to be awarded. Sharon will be seeking compensation for 'pain and suffering'. The difficulties we now face are determining the best approach for the assessment of the quantum in cases such as this.

The statutory maximum compensation for pain and suffering arising from 'injury' is determined by the date of injury. The *Criminal Injuries Compensation Act* 1972 provided for a maximum award of $3000. The *Criminal Injuries Compensation Act* 1983 provides for a maximum award for pain and suffering as follows:

Date of injury up to 31 July 1988 — $7500

Date of injury on or after 1 August 1988 – $20,000.

Sharon is still experiencing pain and suffering arising from the assaults. The assaults were, at latest, perpetrated in 1981. There are a number of different approaches we are considering at this stage, but there are difficulties inherent in the various approaches.

On the authority of the decision of the Canadian Supreme Court in *M v M*, the 'injury' could be said to occur for the purposes of limitation of actions statutes when the survivor of childhood sexual assault discovers the connection between the harm suffered and the wrong perpetrated against her.

If we are to rely on this approach in determining the quantum to be paid, we would argue that compensation should be paid at the maximum available in 1987, when memory of the assaults was revived and responsibility for the pain and suffering attributed to the perpetrator. On this basis, although the criminal acts were perpetrated between 1974 and 1981, the harm suffered did not manifest until 1987 and onwards.

This approach fails to acknowledge that pain and suffering did exist while the memory of the assaults was latent. As outlined above, drug and alcohol addictions are often symptomatic of the pain and suffering experienced, even where the connection between the assaults and the harm suffered have not been made or where there is a repression of memory of the assaults. This approach would, in effect, provide no com-

pensation for the pain and suffering which occurred between 1974 and 1987. There would, in any case, be difficulties in proving the pain and suffering experienced during the time of repression of memory.

If we argue that the pain and suffering arises at the time of the assaults, we may limit the compensation entitlement for pain and suffering to the statutory maximum available in 1981 – $3000. If this approach is adopted, in effect, Sharon would not be compensated for the years of pain and suffering which have ensued since 1981. There is no doubt that the pain and suffering experienced on the revival of memory is different from the pain and suffering experienced while the memory of the assaults remained repressed.

The full impact of sexual assault is not acknowledged by criminal injuries compensation legislation. Compensation for pain and suffering arising from sexual assault is limited because the compensation payable is tied to the date of injury. The difficulty with compensation, where there are prescribed statutory maximums belies the longevity of the impact of childhood sexual assault.

In addition to arguments about when the pain and suffering can be said to accrue in childhood sexual assault cases, we also intend to seek compensation for each criminal act. The evidence already led before the AAT will be relied on. We may, in addition, lead further evidence of other assaults which Sharon has remembered during the course of these proceedings. It is unlikely that this matter will be listed for hearing until 1994.

For Sharon, the process of remembering the assaults, counselling and recovery continues. The impact of the legal process, particularly given the length of time this appeal process has taken, has placed an enormous strain on Sharon. This has highlighted the lack of funded counselling services, which provide long-term counselling, available to sexual assault survivors. We wish to acknowledge Sharon's courage and strength in pursuing this process.

Reference

1. AAT decision: 4 December 1991; Superme Court of Victoria decision: 10 December 1992; High Court of Australia consent orders: 9 September 1993.
2. Lamm, Jocelyn, 'Easing Access to the Courts for Incest Victims: Towards an Equitable Application of the Delay Discovery Rule', (1991) 100 *Yale LJ* 2187 at 2194-5.

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7. *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* 1992 (110) ALR 97. It is at least noteworthy that the court found the most offensive section – 54R – to be invalid. The court also noted that up until the passage of the new legislation, most of the boat people had been held illegally. For a more detailed discussion of this decision, see Crock, M., 'Climbing Jacob's Ladder: the High Court and the Administrative Detention of Asylum Seekers in Australia', (1993) 15 *Syd LR* 338.
8. *Van Alphen v The Netherlands* (UN Human Rights Committee Communication No. 305/1988), paragraph 5.8.
9. Conclusion No. 44, 'Detention of Refugees and Asylum Seekers' 1986, Executive Committee of the UNHCR. See also letter of UNHCR (signed by Ghassan Arnaout, Director, Division of Refugee Law and Doctrine) to Philip Rudge, Secretary of the European Consultation on Refugees and Exiles (8 January 1987), reproduced in *Asylum Law and Practice in Europe and North America: A Comparative Analysis*, Coll, G. and Bhabha, J. (eds), Federal Publications Inc., Washington, 1992.
10. See Coll and Bhabha, above, particularly the chapters by Lex Takkenberg (on the European countries) and Arthur C. Helton (on Canada and the USA).
11. More serious cases of denial of legal assistance have occurred with other boats. Some of the Vietnamese from the boat 'George' asked for lawyers on their arrival and were told that their cases were 'different', and that they did not need lawyers; and in January 1992, lawyers in Darwin were specifically refused access to see some Chinese from the boat 'Isabella' (Source: author's personal conversations with boat people and lawyers). The worst example may have been the 113 Chinese from the boat 'Norwich', which landed on Christmas Island in late October 1992. These people were summarily turned around by immigration officials and sent back to China. No independent legal advice was made available to ascertain if they were seeking refugee status, and the Australian public was asked to accept the assurances of the Immigration Department that they were merely misguided people who thought they would be allowed to enter Australia to find jobs (see *Canberra Times*, 8.11.92, 'Boat People Sent Home').
12. Those readers who wish to follow up the detention issue will be assisted by a major new text which is due to be published in December: Crock, Mary (ed.), *Protection or Punishment: The Detention of Asylum-Seekers in Australia*, The Federation Press, Sydney, 1993.

References continued from p.285

1. Sandor, Danny, 'The Thickening Blue Wedge', (1993) 18(3) *Alternative Law Journal*, pp.104-8; White, Rob, 'Police Vidiots', (1993) 18(3) *Alternative Law Journal*, pp.109-12.
2. Sandor, above, p.105.
3. Sandor, above, p.105.
4. James, S. and Polk, K., 'Policing Youth: Themes and Directions', in D. Chappell and P. Wilson (eds), *Australian Policing: Contemporary Issues*', Butterworths, Sydney, 1989, pp.41-62.
5. This point is well illustrated in Grabosky, P. and Wilson, P., *Journalism and Justice: How Crime is Reported*, Sydney, 1989, at pp.24,127,130; Sarre, R., 'Reporting Crime', (1992) 17(4) *Alternative Law Journal*, pp.183-6.
6. *Policing in Victoria: The opinions of Victorian High School students.* A study undertaken for the Committee of Inquiry into the Victoria Police Force, Research Section, Ministry of Police and Emergency Services, Government Printer, Melbourne, November 1984, sections 6.4,6.5,8.3,and 11.
7. Beyer, Lorraine, *Community Policing: Lessons from Victoria*, Australian Institute of Criminology, 1993, p.15.
8. Moore, David, 'Measuring Police Productivity' in P. Moir and H. Eijkman (eds), *Policing Australia: Old Issues, New Perspectives*, Macmillan, Melbourne, 1992, p.56. Moore calls police 'the gatekeepers of the criminal justice system'. He explains: 'The question of who would be put into the system and who kept out has since been determined largely by police discretion except where serious offences were involved'.
9. *Police Life*, July/August 1992, p.3.