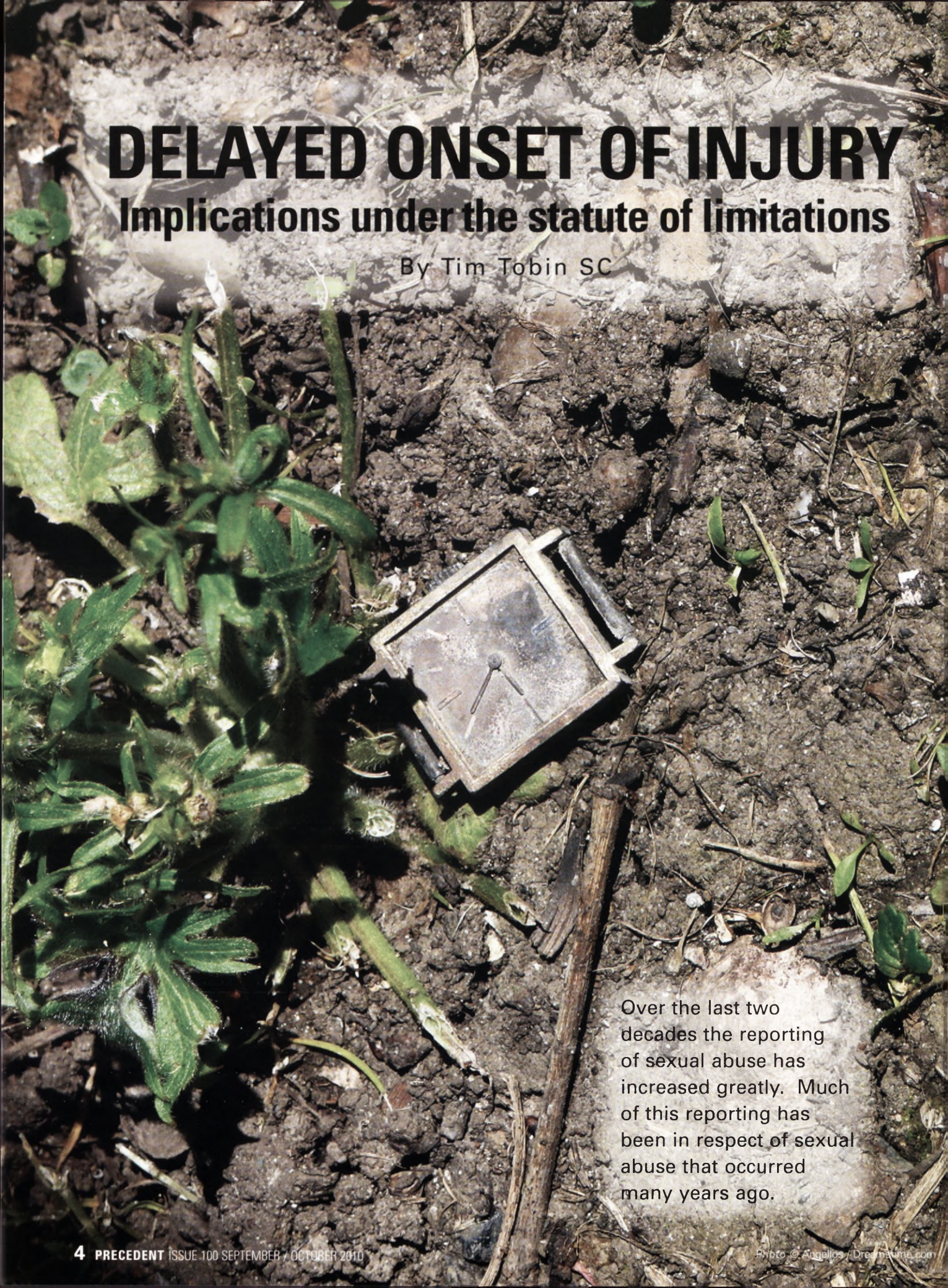
DELAYED ONSET OF INJURY

Implications under the statute of limitations

By Tim Tobin SC



Over the last two decades the reporting of sexual abuse has increased greatly. Much of this reporting has been in respect of sexual abuse that occurred many years ago.

Most jurisdictions have developed new procedures to deal with the special issues related to complainants giving evidence, particularly where the abuser is considered to be a person of some power by reason of age, authority or family relationship.

There has also been a corresponding increase in litigation for damages by victims. Much of this growth is not obvious to the public, as many such proceedings are brought through a pseudonym and many are often settled.

This article reflects the perspective of a Victorian practitioner, especially in relation to the *Limitations of Actions Act* (Vic) 1958 (LAA), but the degree of consistency between states in such legislation means that it has national relevance.

CATEGORIES OF CLAIMS

The majority of civil writs for damages for sexual assault fall into one of the following categories:

1. The victim was assaulted at a young age, and is only now able to talk of the events;
2. The victim was assaulted at a young age, and is only now aware of the nature and extent of the injury;
3. The victim is only now aware of the injury, because it was repressed in the memory, and some recent treatment or event has triggered the memory;
4. The victim now realises that the abuser has a capacity to pay damages, having previously thought that pursuing damages would be futile. This situation often arises in a testator's family maintenance circumstances.

PROBLEMS RE PROOF IN SEXUAL ASSAULTS

Although the abuser has often been convicted of the assault, one of the great difficulties in acting for victims is usually proving the event, as there is often no corroboration.

As well as difficulty in proving the abuse, there is also great difficulty in defending such allegations, especially where the relevant events are alleged to have occurred many years ago.

While practitioners must accept their clients' instructions, they must be careful not to be made the vehicle for false allegations, sometimes at the behest of another. This problem is well-recognised among family law practitioners, and we should remain alive to that risk.

REGAINED MEMORY

Clients who proclaim a renewed knowledge of past events fall into three categories:

1. those regaining memory of an event that took place;
2. those obtaining a false memory of an event that they believe took place, but that did not – that is, the truthful but inaccurate witness;
3. those manufacturing evidence of a retrieved memory of an event that never took place.

We all have, I suspect, acted for people in each category and have wrongly assessed the category into which they fall. The nature of the complaint (and frequently its age) makes such errors so much more likely than with other torts. The fact that events are being retold by an adult through the eyes of a child, and that the injury is a psychological one, contribute to this problem.

THE EFFECTS OF SEXUAL ASSAULTS

Much has been written about the reaction of people to sexual assaults, depending upon their age and their understanding of what happened to them. The one recurring observation after many years of acting for victims is that the magnitude of the injury suffered is dictated more by the quality of the relationship that is breached, rather than by the nature of the sexual assault. The young child fondled by the family relative, teacher or priest often suffers greater psychological injury than, say, the young person who is the victim of a rape by someone whom they would consider a peer.

Many victims also suffer most from their abuse not at the time, but when other events remind them of that abuse and its effect upon them. For example:

1. Many victims of the very active paedophile priest, Father Risdale, in Victoria, showed significant effects of the abuse or came forward only when their own children reached the age at which they were themselves abused, causing them to relive the memories and fear for their children. >>

Discoverability includes not only fault, but knowledge of the extent of the injury.

2. People such as Carol Stingel, of *Clark v Stingel*,[1] who had full knowledge of her rapes by Clark, and even some ongoing symptoms, suffered from late onset post-traumatic stress disorder (PTSD) from repeatedly viewing features of Clark on television and hearing of his denial of rape allegations made against him by Joanne McGuiness.[2]

WHO, AS WELL AS THE ABUSER, MAY BE LIABLE

Even when there is proof of the assaults having taken place, a major problem in bringing claims is often that perpetrators have no assets, and those who have provided them with the opportunity to carry out the assaults – orphanages, religious institutions, and so on – have no legal status or liability.

Unfortunately, the High Court in *New South Wales v Lepore & Anor*[3] did not follow the lead of the English and Canadian courts as to vicarious liability, and the test laid down by the House of Lords in *Lister v Hesley Hall Ltd*,[4] consistent with the Canadian Supreme Court in *Bazley v Currie*[5] and recently confirmed by the Master of the Rolls, Lord Neuberger, in *Maga v The Trustees of the Birmingham Archdiocese*.[6]

It is therefore necessary, in Australia, to show not merely a close connection to the defendant and to the assaults, but that the bishop, parish priest or employer knew of the proclivity and/or assault history of the teacher or priest and placed them in the classroom or the parish without regard to the risk they posed to their young charges.

The question of incorporation, employment and liability, vicarious or otherwise, has been a major issue in respect of litigation against religious orders and, in particular, paedophile priests. It has led to the Catholic Church establishing a process of limited no-fault compensation through the *Beyond Healing* program.

STINGEL AND *MCGUINESS v CLARK*

The problem faced by the practitioner in bringing proceedings for sexual assaults that occurred many years ago was highlighted in the actions brought by Joanne McGuiness and Carol Stingel against Geoff Clark, who was the ATSIC leader at the time of trial (although not at the time of the alleged conduct).

An examination of these cases shows that despite their similarity, different results were achieved because different provisions of the LAA applied.

Joanne McGuiness – then a 16-year-old woman from the Framlingham aboriginal community – alleged that Geoff Clark (her cousin) raped her at a beach near Warrnambool on 14 February 1981. Others were present at the beach at the time of the rape, one of whom she alleged observed the rape and others to whom she made immediate complaint. All of these witnesses were unavailable or likely to be unavailable for trial. A short time after the rape, McGuiness reported it to the local police who, after some investigation, did not pursue the complaint.

By 2000, Clark had risen to prominence in ATSIC and McGuiness re-visited her complaint with the police on 18 May 2000. Criminal proceedings were commenced but, on 1 December 2000, the charges were dismissed at committal. In late 2001, McGuiness sought legal advice as to whether she could pursue her allegations by civil proceedings, and these were issued on 22 September 2002.

On 7 May 2003, Judge Duckett in the County Court extended the period of time for McGuiness to issue proceedings by applying the principles of s23(A) of the LAA, finding that it was 'just and reasonable to do so'.

Carol Stingel was also aged 16 in 1971 when she was twice raped by Clark with others in Warrnambool. She did not report the rape to police. In 1999, she observed Clark's rise to prominence in the media and, in 2000, when she heard of McGuiness' allegations against Clark, she contacted McGuiness to support her allegations, although she did not know her. In July 2000, Stingel made a police report of the rapes, but no action was taken. After the McGuiness committal result ended in Clark's discharge, Stingel – in support of McGuiness and for herself – instructed the same solicitors as McGuiness in late 2001; proceedings were issued in 2002.

Stingel, because she was raped before 1977, faced different extension of time provisions in the LAA. To seek an extension of time under s23A, she had to show that she had acquired knowledge of a material fact within the 12 months prior to her issuing her proceeding. She would not have been able to do so. However, in the preparation of the defence of such an application, Stingel was sent by Clark's solicitors to Professor Dennerstein OA, a psychiatrist of international renown. She examined Stingel on 23 July 2003, after having provided an opinion to those solicitors in March 2003 based upon materials they had provided to her. After the examination, Professor Dennerstein reported that the plaintiff had, by disassociation, put the rapes away in her mind until events in 1999, when Clark was elected head of ATSIC. From this time onwards, he featured frequently in the media and Stingel's support of McGuiness and her police statement then caused PTSD of delayed onset in 2000.

Being unable to seek an extension of time, Stingel sought to rely upon s5(1A) of the LAA, which is similar to the discoverability provisions of recent amendments to such Acts Australia-wide. It reads:

'1A – An action for damages for negligence, nuisance or breach of duty…where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries consisting of a disease or disorder contracted by any person may be brought not more than six years from, and the cause of action shall be taken to have accrued on, the date on which the person first knows –

(a) that he suffered those personal injuries; and >>

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(b) that those personal injuries were caused by the act or omission of some person.'

Judge Hanlon in the County Court found that, as Stingel suffered the injury with the emergence of the PTSD, her proceedings issued within six years of the emergence were not statute-barred, and struck out the defendant's defence as it pertained to the LAA.

Clark appealed against both orders, and the appeals were heard simultaneously by a five-member Court of Appeal.

The Court unanimously upheld the appeal in *McGuiness*, principally because it did not think it was just and reasonable to grant an extension of time given the prejudice Clark faced in conducting his defence at the trial.

The Court – splitting 3:2 – also upheld the appeal in *Stingel*, principally on the basis that s5(1A) related only to insidious diseases, following a line of reason earlier explained in *Mazzeo v Caleandro*.[7]

Stingel appealed to the High Court, which upheld her appeal, finding that there was no reason to limit s5(1A) to insidious diseases because:

'there is, however, nothing in the language which denies its application to a case where knowledge of a disorder, and of its cause, occurs at or about the same time as the occurrence of the disorder' (Gleeson CJ, para 28).

Stingel proceeded to prosecute her claim against Clark and ultimately a jury found that both rapes she alleged did occur. She told the jury that her main reason for bringing the action was to have a finding against Clark that he had raped her, and through her counsel she specifically asked that damages be assessed at a low amount, as it was the finding of liability that was important to her. The jury so assessed the damages at $20,000.

RECENT AMENDMENTS TO THE *LIMITATIONS OF ACTIONS ACT*

The LAA, as it applied to these cases, underwent significant amendments from 2002 to 2005, principally in accordance with the recommendation of Justice Ipp. Similar amendments occurred nationally, although Victoria still has slightly more liberal provisions in respect of applications for extension of time.

As a consequence of these amendments, an application for extension of time in sexual assault cases is considered under ss27K and 27L, which read:

'*27K*

A person claiming to have a cause of action to which this part applies may apply to a court for an extension of a period of limitation applicable to the cause of action under division 2;

Subject to s27L the court:

(a) after as it sees fit;

(b) after just and reasonable to do so order the extension of the period of limitation.

.....

27L

(1) In exercising the powers conferred on it by s27K, a court shall have regard to all the circumstances of the case, including (but not limited to) the following:

(a) the length of and reasons for the delay in the part of the plaintiff;

(b) the extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;

(c) the extent, if any, to which the defendant had taken steps to make available to the plaintiff the means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the defendant;

(d) the duration of any disability or legal incapacity of the plaintiff arising on or after the date of discoverability;

(e) the time within which the cause of action was discoverable;

(f) the extent to which the plaintiff acted promptly and reasonably once the plaintiff knew that the act or omission of the defendant, to which the injury of the plaintiff was attributable, might be capable at that time of giving rise to an action for damages;

(g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of the advice he or she may have received.

(2) To avoid doubts, the circumstances referred to in subsection 1 include the following:

(a) whether the passage of time has prejudiced a fair trial of a claim;

(b) the nature and extent of the plaintiff's loss; and

(c) the nature of the defendant's conduct.

(3) ...

(4) ...

It is important to note that when these provisions were introduced, s27N set out transitional provisions, which included s27N(4)....

'Nothing in division 2 operates to extend a period of limitation applicable to a cause of action in relation to an act or omission that occurred before 21 May 2003 to a period longer than the period of limitation that would have applied to the cause of action if this part had not been enacted.'

These provisions of course are added to the limitation provisions of s27D, which specifies:

'(1) an action in respect of a cause of action to which this part applies shall not be brought after the expiration of whichever of the following periods is the first to expire:

(a) the period of three years from the date on which the cause of action is discoverable by the plaintiff;

(b) the period of 12 years from the date of the act or omission alleged to have resulted in the death or personal injury with which the action is concerned.'

Section 27F states:

'(1) For the purposes of this part, a cause of action is *discoverable* by a person on the first date that the person knows or ought to have known of the following facts:

(a) the fact that the death or personal injury concerned has occurred;
(b) the fact that the death or personal injury was caused by the fault of the defendant;
(c) in the case of the personal injury, the fact that the personal injury was sufficiently serious to justify the bringing of an action on the cause of action.'

The effect of the transitional provision is that if the cause of action that accrued before the new sections were enacted is barred, it remains barred and an extension of time needs to be sought. The relevance of s5(1A) is that a cause of action accruing before these amendments may be valid through the amending time, and the new definition of discoverability may permit that cause of action to remain valid.

It must also be remembered that, prior to the various amendments of 2002, a child – by reason of their disability, being infancy – could validly bring proceedings for six years after their 18th birthday.

It is, accordingly, only those who are under disability in 2003 or who could make s5(1A) apply that can possibly have the concept of discoverability to that cause of action validated without an extension of time being sought.

In any event, the new limitation of three years from the date that a cause of action is discoverable, and 12 years from the date of occurrence, governs most proceedings, save for the special provisions under s27I. This means that where the sexual assault is by a family member or some close associate the limitation date is at age 25 or when they know, whichever is the latter, but in any event by 12 years from the age of 25, which is age 37.

DISCOVERABILITY OF CAUSE OF ACTION

If it is acknowledged that the delayed onset PTSD that Carol Stingel suffered would be the date of discovery, the cause of action she would have had would have been 12 years from the date of the rapes. If the person was a family member or close associate it would have been until she was aged 37.

The interpretation by the High Court of s5(1A) is similar in effect to the discoverability provision under the LAA. Justice Kaye in *Spandideas v Vellar*,[8] considered when a cause of action was discoverable to a lady who had significant anal sphincter damage in surgery post-childbirth. He found that she knew of the injury for some considerable period but, in effect, did not know whose fault the injury was, as required by s27F(1b), for discoverability to be triggered. His Honour said (at para 32):

'The meaning of "fault" is plain and unambiguous, both in the ordinary parlance and its context in part 2A of the Act. Its usual everyday meaning connotes culpability or blame worthiness. In particular, where injury or damage is said to be the result of the "fault" of another person, ordinarily such an accusation would involve the attribution of a degree of culpability or blame on the behalf of the person who caused the damage.' >>

Discoverability includes not only fault, but knowledge of the extent of the injury. Thus, a person suffering from the affect of a sexual assault may know that they are suffering from, say, anorexia but do not know that it is a psychological reaction to the abuse. Further, they may know that they suffered the abuse but did not develop PTSD or other symptoms until a much later time, and so discoverability does not occur until then.

MATTERS TO CONSIDER WHEN RECEIVING INSTRUCTIONS

Because many victims of sexual assault do not have an appreciation of the injury they have suffered until many years after the accident, and do not report the assault until their adult years, practitioners who are approached by someone seeking damages for such assault should consider certain factors:

(a) Assess whether the claim is yet statute-barred. Generally this means:
   (i) if it is a stranger assault, is it within 12 years of the date of the assault and within 3 years of the discoverability;
   (ii) if it is a family or close family associate, is it within 3 years of the date of discoverability, and is the person still under 37 years of age; and
   (iii) if barred by part of i or ii, you know that you will have to obtain leave from the court to bring proceedings, although such leave can be achieved *nunc pro tunc*.

(b) After satisfying yourself as regards the limitation issues, you must then consider if it is in your client's best interests to sue or seek compensation in some other way. There are many forms of compensation which may avoid a proceeding, including:
   (i) Apply to the Victims of Crimes Tribunal. The eligibility and magnitude of these benefits vary from state to state and depend on the age of the offence, and may depend upon a police report being made. While the compensation is modest and usually does not exceed $100,000 in any jurisdiction, it is relatively hassle-free and often the only source from which payment can be achieved with an impecunious defendant.
   (ii) Following conviction, apply under s86 of the *Sentencing Act* for an award of compensation. There are strict time-limits for the making of such claims, and should instructions be received after a conviction an application may need to be issued urgently. Again, as in (a) this is a relatively painless exercise, and has the benefit that the crown may seize the assets of the accused pre-hearing to satisfy any such potential liability.
   (iii) Is there another source of compensation available to the victim, such as the *Beyond Healing* programme by the Catholic Church?;
   (iv) Should civil proceedings be issued in conjunction with or in alternative to (a). (b) and (c, see below) against:
      - the perpetrator; or
      - someone else who may be liable for the acts of the perpetrator, such as the school, orphanage or church.

(c) If the answer to any part of (iv) is yes, consideration should be given to whether the proceeding should be in the plaintiff's own name or whether leave of the court should be sought to be bring the proceedings in a pseudonym. This question requires careful consideration. With someone such as Carol Stingel, whose priority was to see the defendant made publicly accountable, it is of course not relevant. For others, if it is the only way in which they are prepared to bring a claim, practitioners must ensure that a pseudonym is applied for a proper purpose, and is not in effect intended to legally blackmail the defendant with the threat of exposure unless they settle. A detailed analysis of the principles in such an application was made by Justice Jack Forrest in *ABC v D1 & Ors.*[9]

(d) When making various decisions, you are often faced with whether your client should be advised to report the matter to the police. Often you know from the dynamics of the situation – especially with incest – that the client could not handle doing so, but you must nonetheless give them appropriate advice.

Remember, also, when acting for people who are the victims of sexual abuse, that:

1. Often their legal adviser is the only person to whom they are prepared to give full details of assaults. Because of their embarrassment, sensitivity, etc, do give them time to provide instructions without any family member being present, and especially if that family member has issues with the person who is the subject of the complaint.
2. The client's wish is not always to maximise damages; sometimes they want to ensure that others do not suffer as they have, or to expose the perpetrator for their conduct. Respect your client's instruction, even if your inclination may be to 'go for the jugular'.

Finally, remember our privileged position with respect to clients. Often, when we are conducting their personal injury litigation, we become aware from reading medical records or reports, or from taking detailed instructions, that they have been the victim of sexual abuse. We must, of course, advise them in such circumstances of their rights, but be particularly careful to accept that it is their right not to pursue damages for an assault. They may feel that the consequences of bringing proceedings will in itself exceed whatever you can achieve for them in terms of financial outcome. ■

Notes: **1** (2006) 228 ALR 229. **2** *Clark v McGuiness* (2005) VSCA 108. **3** (2003) 212 CLR 511. **4** (2002) 1AC 215. **5** (1999) 174 DLR 445. **6** (2010) WL 889 335 (CA). **7** [2003] VR172. **8** (2008) VSC 198. **9** (2007) VSCA 480.

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