

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 9

March 8, 2001

A. 4140

By: M. of A. Lafayette
Assembly Committee: Codes
Effective Date: July 1, 2001

AN ACT to amend the civil practice law and rules, in relation to limitations of time on civil actions to recover damages for injuries caused by child abuse

LAW AND SECTIONS REFERRED TO: The civil practice law and rules is amended by adding a new section 215-a

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES (#3)

THIS BILL IS DISAPPROVED

This bill proposes to enact a new section 215-a to the CPLR to toll the statute of limitations in personal injury actions arising from child abuse and thereby permit the claim to be filed up to one year after discovery by the plaintiff. For purposes of filing a notice of claim against a governmental entity, the claim will be deemed to have accrued on the date of discovery of the injury by the plaintiff. This new toll on the statute of limitations would apply to acts of child abuse committed or discovered on or after July 1, 1999, and would not eliminate, limit or reduce the extension of time for infants to commence an action pursuant to CPLR 208.

The bill is identical to Assembly Bill A5754 introduced in the 1999-2000 Legislative Session and A2088 introduced in the 1997-1998 session, both of which were disapproved by the Committee. Notably, while the Committee recognized the beneficial intent of this bill, viz., to remedy the injustice that may result when a victim of child abuse discovers the abuse after the statute of limitations has expired, there were a number of significant problems which compelled our disapproval. Now, as then, these problems subsist.

Firstly, the time within which a plaintiff may commence an action for child abuse is limited only by the plaintiff's ability or willingness to discover the abuse, which could occur years or even decades after infancy. Permission to commence litigation after the passage of a substantial period of time should be discouraged unless there is a compelling societal and jurisprudential rationale for the late commencement of the action. Over time evidence is lost or destroyed and witnesses die or become unavailable or, when they are

available, their memories are less reliable. These circumstances make proof and defense of such actions extremely difficult, if not impossible, for the parties involved.

The CPLR presently recognizes a toll of the statute of limitations for infancy or insanity (see CPLR section 208); and General Obligations Law section 17-103 also gives the court the power to prohibit a defendant from interposing a statute of limitations defense if the court finds that by reason of the defendant's conduct it would be inequitable to do so. However, the courts of this state have limited the use of any of these tolling provisions in the area of child abuse. The insanity toll will apply only if a plaintiff can show that he/she is unable to protect his/her legal rights because of an overall inability to function in society in various, requisite ways (Anonymous v. Anonymous, 154 Misc2d 46, 54 [Suffolk Co. 3-10-92]; Burpee v. Burpee, 152 Misc2d 466, 468 [Nassau Co. 8-15-91]). The tolling provision of General Obligations Law is predicated on the plaintiff demonstrating that the defendant conducted him/herself in such an overt manner, after his/her wrongdoing, so as to induce the plaintiff to delay commencement of the action, or otherwise prevent the action (see Hoffman v. Hoffman, 162 AD2d 249; see also Burpee, id at 470).

The Courts have held that the gravity of the defendant's tortious conduct, in and of itself, is insufficient to stop the defendant from pleading the statute of limitations (Hoffman, id at 249; Burpee, id at 469). In fact, a defendant can only be stopped from pleading the statute of limitations where the plaintiff was induced by fraud, misrepresentation or deception to refrain from commencing a timely action; however, even in such a case, the plaintiff must demonstrate not only that the defendant's conduct caused her/him to forego commencing a timely action, but also that she/he was justified in relying on such conduct. Thus, the Courts have been reluctant to deprive a defendant of the benefit of a statute of limitations defense.

Secondly, the cause of action is based solely on the subjective discovery of abuse by the plaintiff. In the prototypical case, the bill would permit a plaintiff to allege sexual abuse occurring many years, and perhaps decades earlier, which will be proved by the recovered memory of the plaintiff. The recovered memories will be explained by the plaintiff's therapist as the consequence of repressed memory syndrome, memories repressed as a result of a traumatic experience and totally unknown to the plaintiff until intervention by the therapist. The defendant is unable to offer any evidence other than his or her own testimony, and corroboration of the defendant's view of the relationship between plaintiff and defendant will be unavailable due to the passage of years and dispersal or death of potential witnesses. When the plaintiff's evidence is entirely subjective and uncorroborated, as is very likely to be the case, the policy served by the statute of limitations is crucial.

The sole rationale for this dramatic change in the statute of limitations is the belief that repressed memory syndrome is common among child victims of sexual abuse. In fact, the theory of recovered memory syndrome itself is highly controversial. Typical conclusions by professional groups include:

"The AMA recognizes that few cases in which adults make accusations of childhood sexual abuse based on recovered memories can be proved or disproved and it is not yet known how to distinguish true memories from imagined events in these cases."

"The AMA considers recovered memories of childhood sexual abuse to be of uncertain authenticity, which should be subject to external verification. The use of recovered memories is fraught with problems of potential misapplication."

Report of Council on Scientific Affairs, adopted at 1994 AMA House of Delegates Annual Meeting.

"At present there are no scientifically valid criteria that would generally permit the reliable differentiation of true recovered memories of sexual abuse from pseudomemories."

MPA Position Paper adopted by Executive Council of Michigan Psychological Association, May 17, 1995.

"At this point, it is impossible , without other corroborative evidence, to distinguish a true memory from a false one."

American Psychological Association (1995), "Questions and answers about memories of childhood abuse," Washington, D.C. In sum, the statute of limitations should not be effectively repealed to accommodate a theory with no scientific support for the bringing of otherwise uncorroborated claims.

Lastly, the bill incorporates by reference the definition of "abused child" as set forth in Social Services Law §§ 371(4)(b). That definition includes both physical and sexual abuse committed by a parent or other person legally responsible for a child's care. Therefore, the bill is limited to claims against parents or guardians, and does not appear to address claims against other individuals or entities. Moreover, the bill does not embrace an action based on negligence as opposed to intentional acts.

For the foregoing reasons, this Bill is **DISAPPROVED**.

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