

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 8

February 25, 2003

A. 234

By: M. of A. Lentol
Assembly Committee: Codes
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to actions for sexual assault of an infant and providing for the repeal of such provisions upon expiration thereof.

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 & RULES (#5)

THE BILL IS DISAPPROVED

This bill proposes to enact a new section 215-a to the CPLR to revive causes of action for physical or psychological injury sustained by a person under the age of 18 years, as a result of sexual assault, which actions had been previously barred or dismissed because the statute of limitations had expired. This bill provides a one-year window of opportunity for such victims to commence an action, and this new section 215-a will expire and be deemed repealed one year after its effective date. For purposes of this new section 215-a, sexual assault is defined as a sex offense under Article 130 of the Penal Law or predecessor statute.

This bill is slightly different from three (3) prior bills which attempted to remedy the injustice which may result when a victim of child sexual abuse discovers the abuse after the statute of limitations has expired. Our committee previously reviewed Assembly Bill A.2088 (introduced in the 1997-1998 legislative session), Assembly Bill A.5754 (introduced in the 1999-2000 legislative session) and Assembly Bill A.4140 (introduced in the 2001-2002 legislative session), all of which proposed to toll the statute of limitations in such personal injury actions and permit a claim to be filed up to one-year after discovery by the plaintiff. All three (3) bills were disapproved by our Committee due to a number of significant problems, many of which subsist in proposed Assembly Bill A.4140, thereby compelling our disapproval of this proposed bill.

Initially, this bill would open the door to actions involving child sexual abuse which may have occurred years or even decades ago, and certainly long 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 an 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 all parties involved.

Secondly, the CPLR presently recognizes a toll of the statute of limitations for infancy or insanity (see CPLR section 208). In addition, the 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 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 (McCarthy v. Volkswagen of America, Inc., 55 NY2d 543 (1982)). 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 v. Burpee, 152 Misc2d 466, 468 [Nassau Co. 8-15-91]). 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; and 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.

Thirdly, such actions are often based solely on the subjective discovery of abuse and recovered memory of the plaintiff. Proof in such a case would most likely involve testimony from the plaintiff concerning her/his repressed memory and testimony from the plaintiff's therapist concerning the consequence of repressed memory syndrome; and the defendant would be unable to offer any evidence other than his/her own testimony which would be difficult to corroborate due to the passage of years. 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. This is particularly so when we already have a CPLR provision which provides a toll for infancy. The theory of recovered memory syndrome is a highly controversial theory. The Report of Council on Scientific Affairs, adopted at 1994 AMA House of Delegates Annual Meeting reported:

"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."

The MPA Position Paper adopted by Executive Council of Michigan Psychological Association, May 17, 1995, stated:

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

The American Psychological Association issued a statement in 1995, stating

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

In sum, the statute of limitations should not be lifted to accommodate a theory with no scientific support, for the purpose of bringing and reviving very old, otherwise uncorroborated claims.

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

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