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Turning Back the Clock on Sexual Abuse of Children: Amending Virginia's Statute of Limitations

Paul A. Lombardo

Georgia State University College of Law, plombardo@gsu.edu

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Turning Back the Clock on Sexual Abuse of Children: Amending Virginia's Statute of Limitations

by Paul A. Lombardo, Ph.D., J.D.

Numerous verified reports of child sexual abuse have combined with the growing literature on that topic to call into question a well-worn Freudian myth. Women's reports of childhood sexual activity with their fathers or other men are no longer assumed to be the products of fantasy nor artifacts of wish-fulfillment and over-active feminine imaginations. Concrete evidence of the incidence of child sexual abuse--of males and females--no longer permits such charges to be dismissed without serious investigation.¹

Increasing popular and professional attention has forced the sexual abuse of children out of the psychic closet and into public view. With increased attention has come vigorous advocacy for "survivors" of abuse. Step-by-step guides for bringing lawsuits against sexual abuse perpetrators have been published.² Proposals have appeared to hypnotize witnesses and unearth childhood memories for use as evidence in civil trials.³

Advocates for the accused have also spoken out. Some, concerned about the potential for unsubstantiated

Paul A. Lombardo directs the Center for Mental Health Law Training & Research

claims, focus upon the rights of those charged with being abusers. Fabrication of an abuse charge for "leverage" during a child custody case has been explored in the legal literature.⁴ A number of prominent mental health professionals have formed the False Memory Syndrome Foundation. The foundation's mission includes efforts to study and combat what is described as "enormous family suffering" caused by misguided programs of therapy during which patients "come to believe that they suffer from 'repressed memories' of incest and sexual abuse."⁵ The potential for false accusation remains a serious consideration both for the therapeutic community and for those who would fashion legal policy.

Thus, adult survivors of the trauma of sexual abuse who choose to reveal the secrets of a lifetime may confront not only professionals who doubt them

but also a skeptical public, whose attitudes concerning intrafamilial privacy and publicized shame have changed slowly, if at all. Equally troublesome for those bold enough to unmask their assailants is a legal system unprepared to address allegations of harms long past, accus-

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tomed instead to a counsel of indifference toward claims so difficult to substantiate.

The first announced survivors of childhood sexual abuse transcended the traditional reticence to report past victimization. They coupled public accusations with claims for financial damages to compensate for years of shame, guilt, emotional pain and the cost of therapy to treat those feelings. But lawsuits between survivors of childhood sexual abuse and their abusers were blocked by legal, as well as attitudinal hurdles. For many adults who had suffered abuse decades earlier, the time frame in which suits could be brought had already passed. Their claims were barred from court by statutes of limitation.

Prior to 1991, Virginia's law reflected a common limitation period for personal injury litigation. People claiming damages had to initiate lawsuits within two years after an injury was sustained.⁶ If the victim was a child at the time of the injury, the statute of limitations was "tolled" or held in abeyance until the child became an adult. Since the age of majority in Virginia is eighteen, a victim of personal injury (including sexual abuse) could wait no longer than the twentieth birthday to pursue a claim in court. Those who delayed forfeited the right to sue.

Statutes of Limitation

A statute of limitation forms chronological brackets around an injury that could lead to a lawsuit and the time when the suit must be filed. The injury gives rise to a legal "cause of action" and marks the first temporal point when a victim has a claim for damages, and thus the first time a suit would be justified. In most personal injury lawsuits, the cause of action is said to "accrue" when an intentional or negligent and wrongful act has occurred and an injury is sustained. The lawsuit for damages is the remedy for the injury. The purpose of the limitation period is to rule out "stale" legal claims, and bring some finality to interpersonal transactions.⁷ Litigants who fail to pursue legal remedies within the limitation period are said to have "slept on their rights."

Statutes of limitation aid social stability by foreclosing disputes about events in the distant past. They also reflect the recognition that even if time

does not heal all wounds, it does dull most memories. Witnesses die or move to other places, recollections fade, and physical evidence that might be necessary to prove a case in court tends to disappear. The possibility of reliably proving fault, causation or even damage diminishes with each passing year.

Therefore, limitation periods vary in length to accommodate evidentiary needs. Limitation periods also protect those who might be falsely accused from being required to counter allegations that reach far into the past and are impossible to disprove. A typical limitation period for bringing suit for breach of a written contract, for example, is four years from the date of breach. In contrast, personal injury actions for slander (oral defamation), must be pursued more quickly, often within one year. The different time limit takes into account the common sense conclusion that recollections about unrecorded conversations are often less reliable than written documents describing commercial transactions.

Statutes of limitation developed long before mental health experts began to study the dynamics of sexual abuse. It should not be surprising that until very recently the law did not address the unique

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circumstances of victims of childhood abuse, and the relationship between relatively short limitation periods and the difficulty of filing a timely lawsuit. Commentaries by therapists who regularly treat adults still suffering the effects of childhood trauma describe several predictable behavioral patterns that make that difficulty understandable.

The psychic wounds that result from sexual abuse are not easily healed. They persist into adulthood, and often manifest themselves in a range of symptoms and disorders, including recurrent or long-term depression and severe anxiety. Adult survivors unable to escape the legacy of childhood sexual abuse are also characterized by an inability to develop

socially and a wide variety of other interpersonal problems. Because of intense feelings of shame or to avoid consequences threatened by the abuser for disclosing secret events, children do not report abuse that has occurred. The process of repression and denial may become so habitual that as years pass, amnesia may develop.

Survivors bury childhood memories, psychologically disassociating themselves from the terrifying events. Conscious or not the memories remain and while causal relationships are still unclear, victims of sexual abuse do seem to be at heightened risk of mental illness or substance abuse.

While mental health therapy may yield insight into the roots of emotional pain and behavioral dysfunction, making the connection between the apparent failure to develop a satisfying adult life and the buried horror of childhood abuse can take years. Long hidden recollections of abuse may emerge from patients in therapy well into middle age. Dealing with the shock of newly unearthed, painful memories takes time; gathering the courage to seek a legal remedy takes more time yet. The impediments to disclosure of injuries suffered by victims of child abuse were, until very recently, not recognized in the laws of most states. More importantly, little attention was paid to the injustice of shielding abusers from potentially meritorious lawsuits simply because they had waited out limitation periods.

1990 Amendments to Virginia Law

Following the lead of states such as California, which in 1990 passed legislation dramatically extending the statute of limitations in childhood sexual abuse cases,⁸ the normally conservative Virginia legislature passed a bill in 1991 allowing lawsuits to begin a full ten years after a victim comes of age. It explicitly recognized the potential role of mental health professionals who assist patients to uncover memories of past abuse. The law permitted all personal injury suits based on sexual abuse of an underage or incompetent person to be brought from the time

... when the fact of the injury and its causal connection to the sexual abuse is first communicated [to the patient]

by a licensed physician, psychologist, or clinical psychologist. However, no such action may be brought more than ten years after the later of (i) the last act by the same perpetrator which was part of a common scheme or plan of abuse or (ii) removal of the disability of infancy or incompetency.⁹

The effect of this amendment to existing law was to extend the limitation period for many adults who had endured sexual abuse as children, from a

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Editor

Paul A. Lombardo

Student Contributors

Peter J. Enko/Caroline F. May
Susan Eisenman

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Bettie Amiss

Desktop Publisher/Circulation Manager

Irene B. Brenneman

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potential outside limit of two years after legal majority (age twenty) to ten years after majority (age twenty-eight). The basic provisions were to apply prospectively to all abuse cases. The final section of the law created a new opportunity even for those abuse victims whose right to sue had expired under the former statute of limitations. Suits could be filed for a full year after the new law went into effect regardless of when the alleged abuse was said to have occurred. Thus, for at least one year, *any* act of child abuse committed in the past could form the basis for litigation.

Questions for Mental Health Professionals

Even though Virginia's law was adopted by a nearly unanimous vote, serious questions remained about how it would be applied. For example, the statute assumes that a "licensed physician, psychologist, or clinical psychologist" will reveal the connection between mental or emotional distress and past sexual abuse. A communication from therapist to patient will start the legal clock ticking. But the language of the new statute was borrowed from another Virginia law¹⁰ describing delayed discovery of asbestosis and other occupational diseases. In that context, where the origin of internal physical injury is rarely understood before a physician's diagnosis, marking the starting point for a claim at the time a diagnosis is communicated to the patient poses few difficulties. Patients consult with their doctors, who perform physical examinations and tests and report their conclusions. In the mental health context, such an approach is more problematic.

Many therapists treat patients without regard to whether the content of the therapeutic encounter yields legally relevant "facts" that can be discovered and reported to the patient. They believe that patients should go through the process of reaching psychological insights and clarifying memories with professional assistance, but they reject the idea that therapists must convince patients that past trauma is related to current distress.

Several legal questions follow from this point of view. Would a nondirective therapist incur malpractice liability for failing to explore the potential that sexual abuse preceded pathology? Would being unwilling to infer the occurrence of sexual abuse from a patient's life report lead to lawsuits against therapists? Do mental health professionals bear a legal "duty to discover" a history of sexual abuse, and thereby preserve timely legal claims for patients?

Designating specific professionals as the gatekeepers of sexual abuse litigation raises other issues. A variety of counselors and therapists work with patients to untangle life traumas and the problems that follow. Does the new law discount insights into childhood abuse if someone not mentioned in the statute trips the lever of memory? Would a communication from a social worker, for example, not be admissible to prove when the cause of action for abuse accrued? How would a person who first revealed details of abuse to a member of clergy fare under the new law? What about a survivor whose only confidant was the lawyer engaged to bring the suit?

Finally, and apart from the concerns that were voiced by mental health professionals, the last part of the Virginia statute appeared to contain a fatal flaw. It declared open season, for one year only, on anyone who ever committed child sexual abuse. Actual perpetrators were vulnerable to suit for one more year; anyone else, guilty or not, was subject to allegations destructive of family, friendships and reputation, but about which no concrete evidence might exist in defense. The retrospective feature of the law threatened to reopen matters that had once seemed officially forgotten.

Starnes v. Cayouette

With the new law in place, plaintiffs wasted no time getting to court. Marjorie Starnes was among the first adults to bring suit for childhood sexual abuse. In July of 1991, she sued Robert Cayouette,¹¹ alleging that for nine years--from age five to four-

teen--she had endured multiple acts of abuse. Cayouette, the father of Starnes' childhood best friend, had often "threatened her with the alienation of her family" if she revealed the abusive events. His threats, she claimed, had caused her "to fear for her safety." Starnes catalogued injuries that included eating disorders, sleep disturbances, depression and anxiety attacks. She specifically charged Cayouette with "assault, battery, sexual battery, rape, sodomy, false imprisonment and intentional infliction of emotional distress."

Starnes was born in 1964 and the last alleged act of abuse occurred in 1978. She turned eighteen, the age of majority, in 1982. Relying on this chronology, Cayouette responded to the allegations by invoking the usual Virginia statute of limitations. It would have required a claim for personal injury to be filed within two years of legal adulthood, in this case by 1984. Starnes relied on the new Virginia law extending the limitation period for childhood sexual abuse. The question for the trial court was whether the new law could, consistent with the Virginia Constitution, be applied retroactively to claims that had already expired under the old limitation period. Regardless of the truth of Starnes' charges, if the new law was unconstitutional, the suit would be dismissed.

The final order of the trial court was issued in October of 1991. That court ruled that the new law violated state constitutional due process guarantees in two ways. First, by extending the limitation period to ten years, it revived some claims that had already expired. Second, by creating a one year "window of opportunity," it stretched the limitation period for claims that had not yet expired, but for which the previous limitation period had already begun to run. Starnes' suit was dismissed, and she appealed to the Supreme Court of Virginia.

Virginia's highest court analyzed the case as a question of the defendant's rights. Did Cayouette, upon expiration of the statute of limitations in 1984, acquire a right that was protected by due process guarantees of the state constitution? The court began its review by noting that as early as 1887, Virginia had rejected the U.S. Supreme Court's ruling¹² (interpreting the federal constitution) allowing states retroactively to revive certain remedies that had already expired under statutes of limitation. In contrast, Virginia cases going back to 1876 had declared the

defendant's right to rely on the finality of an expired limitation period to be a "vested right." Later Virginia cases clarified the rule that retroactive laws were only constitutional if they did not destroy such "vested rights."

On June 5, 1992, the court declared all retrospective applications of the law unconstitutional and invalid.

Though Starnes attempted to distinguish purely "procedural" rights to a defense from other "substantive" rights deserving of due process protection, the court rejected the distinction. Cayouette had, a "valuable property right" in being free of suit, the court declared.

The immunity from suit that arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. . . . If the legislature can infringe a constitutionally protected right of one class by retroactive legislation, it can infringe the rights of every class.¹³

While the provisions of the 1991 law that act prospectively were not disturbed, on June 5, 1992, the court declared all retrospective applications of the law unconstitutional and invalid.

Other states have reached different conclusions in applying statutes of limitation to sex abuse cases. Many states (twenty-one) follow the federal rule and allow retroactive application of new limitation periods. The Nevada Supreme Court reviewed the history of its state law and concluded it was formulated without concern for the issue of child sexual abuse. Because lawmakers never considered that social problem when they drafted statutes of limitations, current law should not be applied to sexual abuse claims, that court declared.¹⁴ Proponents of extended limitation periods quote the conclusion of

the Nevada court, which said:

To place the passage of time in a position of priority and importance over the plight of childhood sexual abuse victims would seem to be the ultimate exultation of form over substance, convenience over principle.¹⁵

Constitutional Amendment

Joseph Gartlan, the state senator who sponsored the 1991 change to Virginia's law on child sexual abuse, announced in the wake of the *Starnes* decision that he would introduce a constitutional amendment during the next session of the Virginia General Assembly that would allow expired sexual abuse claims to be revived. The proposed amendment simply states that

[t]he General Assembly's power to define the accrual date for an action based on an intentional wrong shall include the power to provide for the retroactive application of a change in the accrual date. No person shall have a constitutionally protected property right to bar a wrong on the grounds that a change in the accrual date for the action has been applied retroactively.¹⁶

The constitutional amendment process is quite cumbersome.¹⁷ It requires a majority vote in favor of the amendment by both legislative houses, then a second vote, taken at the next session of the legislature following a general election. If the amendment is carried both times, it must then be submitted to popular vote. A majority of the electorate must approve the constitutional change.

The earliest the proposed change and the legislative amendment could take effect is 1995. Despite this additional lengthy delay, advocates for a new law appear unfazed by their court setback. They wish to insure that those who abuse children, and by trauma and threats delay exposure of guilt, should not escape judgement simply because of the passage of time.

The campaign for a new law embodies a principle announced by ancient courts of equity: a wrongdoer may not benefit from his own evil act. Whether that principle can be preserved without discarding the valuable public policies behind statutes of limitation or providing an avenue for unmerited allegations is a puzzle Virginia legislators will have to resolve.

NOTES

¹ See, for example, Bagley and King, *Child Sexual Abuse* (London: Tavistock/Routledge, 1990) p. 30, 70. Recent studies suggest that at least 15% of all girls are victims of serious sexual abuse; reported figures for boys are somewhat lower.

² Joseph and Kimberley Crnich, *Shifting the Burden of Truth: Suing Child Sexual Abusers--A Legal Guide for Survivors and Their Supporters* (Lake Oswego, Oregon: Recollex, 1992.)

³ Kanovitz, "Hypnotic Memories and Civil Sexual Abuse Trials," 45 *Vanderbilt Law Review* 1185 (1992).

⁴ Gordon, "False Allegations of Abuse in Child Custody Disputes," 135 *New L. J.* 687 (1985); Patterson, "The Other Victim: The Falsely Accused Parent in a Sexual Abuse Custody Case," 30 *Journal of Family Law* 919 (1991-92); Wakefield and Vanderwager, "Recovered Memories of Alleged Sexual Abuse: Lawsuit Against Parents," 10 *Behavioral Science and the Law* 483 (1992).

⁵ FMS Foundation Mission and Purpose pamphlet, Philadelphia, 1992.

⁶ Va. Code Ann. § 8.01-243 (Michie 1950, 1992 cum. suppl.).

⁷ As Justice Holmes commented, the purpose of these statutes is to "[prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost." *Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944).

⁸ Cal. Civ. Proc. Code § 340.1 (West 1990). The California law allows victims of any age to sue within three years after they "discover" the cause of their injuries, no matter how old they are, or eight years after they reach the age of majority, whichever comes later.

⁹ 1991 Va. Acts ch. 674, Va. Code Ann. § 8.01-249 (1950).

¹⁰ Va. Code Ann. § 65.2-406 (Michie 1950, 1992 cum. suppl.).

¹¹ *Starnes v. Cayouette*, 244 Va. 202, 419 S.E.2d 669 (1992).

¹² In *Campbell v. Holt*, 115 U.S. 620 (1885).

¹³ 244 Va. 202, 212.

¹⁴ *Peterson v. Bruen*, 792 P.2d 18, 106 Nev. 271 (1990).

¹⁵ 792 P. 2d 18, at 24.

¹⁶ The text of the proposed amendment is being circulated as part of a petition drive by Virginians Aligned Against Sexual Assault.

¹⁷ Va. Constitution, Art. XII, sec. 1.