

JUDICIAL CONSIDERATIONS OF REASONABLE CONDUCT BY SURVIVORS OF CHILD SEXUAL ABUSE

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I INTRODUCTION

Typical consequences of child sexual abuse, particularly post-traumatic stress disorder ('PTSD'), prevent many survivors of this abuse bringing civil legal proceedings within the statutory time limit. On discovering the nature and extent of their psychiatric injury, or its connection with the abuse, survivors may apply to the court for an extension of time to allow their claim to proceed. Outcomes of these applications often turn on judgments about the survivor's knowledge of the injury and its cause, and about whether the survivor has taken reasonable steps to discover the nature, extent and cause of their injuries.

Reported cases of applications for extensions of time in this context are rare, but Queensland has an emerging body of decisions. These cases demonstrate that judgments about the issues of knowledge and reasonable conduct are made without considering evidence about the symptomatology of PTSD, especially the avoidance criterion. This article summarises the consequences of child sexual abuse, focussing on PTSD, before outlining the statutory provisions for extensions of time. Case studies of applications by survivors with PTSD to extend time are then synthesised. The psychological evidence is used as a standard against which to analyse judicial reasoning about survivors' knowledge and 'reasonable' conduct. Finally, the question of whether PTSD can constitute a legal disability in the context of an application for an extension of time is addressed. Because similar questions are raised by extension provisions in nearly all Australian jurisdictions, the analysis in this article has implications for future cases in both Queensland and other jurisdictions.

II TYPICAL CONSEQUENCES OF CHILD SEXUAL ABUSE

The typical child sex offender is male, and is a family member or relative of the child or is otherwise known to the child. The majority of victims suffer

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numerous abusive acts, which commonly occur over a period of months or years.¹ In many cases, particularly when the abuser is known, a child will make no complaint about the abuse,² for one or more of several reasons: being sworn to secrecy; compulsion by threats; imposed conviction of the normalness of the acts; imposed or misplaced feelings of responsibility for the acts; fear of family dissolution; fear of punishment of the wrongdoer; misplaced shame and guilt; and self-blame.³ Rather than disclosing the abuse, a child is likely to develop coping strategies.⁴

A Psychological Injury: Short-Term and Long-Term

Immediate and short-term consequences for a child who is being, or has been, sexually abused commonly include PTSD,⁵ anxiety,⁶ depression,⁷ low self-esteem,⁸ inappropriate sexualised behaviour,⁹ and difficulty in peer

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- 1 Michael Dunne and Margot Legosz, 'The Consequences of Childhood Sexual Abuse' in Queensland Crime Commission and Queensland Police Service, *Project AXIS Vol 4 – Child Sexual Abuse in Queensland: Selected Research and Papers* (2000) 43, 47–55, <<http://www.cmc.qld.gov.au/library/CMCWEBSITE/AxisPapers.pdf>> at 29 October 2004; David Finkelhor, *Child Sexual Abuse: New Theory and Research* (1984); David Finkelhor, 'Current Information on the Scope and Nature of Child Sexual Abuse' (1994) 4 *Future of Children* 4, 31; Beverly Gomes-Schwartz, Jonathan Horowitz and Albert Cardarelli, *Child Sexual Abuse: The Initial Effects* (1990).
 - 2 Ronald Summit, 'The Child Sexual Abuse Accommodation Syndrome' (1983) 7 *Child Abuse and Neglect* 177.
 - 3 Queensland Crime Commission and Queensland Police Service, *Project AXIS Vol 1 – Child Sexual Abuse in Queensland: The Nature and Extent* (2000) 83–7, <<http://www.cmc.qld.gov.au/library/CMCWEBSITE/AxisV1.pdf>> at 29 October 2004.
 - 4 Summit, above n 2.
 - 5 Susan McLeer et al, 'Post-Traumatic Stress Disorder in Sexually Abused Children' (1988) 27 *Journal of the American Academy of Child and Adolescent Psychiatry* 650; Esther Deblinger et al, 'Post-Traumatic Stress in Sexually Abused, Physically Abused, and Nonabused Children' (1989) 13 *Child Abuse and Neglect* 403; Susan McLeer et al, 'Sexually Abused Children at High Risk for Post-Traumatic Stress Disorder' (1992) 31 *Journal of the American Academy of Child and Adolescent Psychiatry* 875; Susan McLeer et al, 'Psychiatric Disorders in Sexually Abused Children' (1994) 33 *Journal of the American Academy of Child and Adolescent Psychiatry* 313; David Wolfe, Louise Sas and Christine Wekerle, 'Factors Associated with the Development of Post-Traumatic Stress Disorder among Child Victims of Sexual Abuse' (1994) 18 *Child Abuse and Neglect* 37; Sue Boney-McCoy and David Finkelhor, 'Prior Victimization: A Risk Factor for Child Sexual Abuse and for PTSD-Related Symptomatology among Sexually Abused Youth' (1995) 19 *Child Abuse and Neglect* 1401; Peggy Ackerman et al, 'Prevalence of Post-Traumatic Stress Disorder and Other Psychiatric Diagnoses in Three Groups of Abused Children (Sexual, Physical, and Both)' (1998) 22 *Child Abuse and Neglect* 759; Susan McLeer et al, 'Psychopathology in Non-Clinically Referred Sexually Abused Children' (1998) 37 *Journal of the American Academy of Child and Adolescent Psychiatry* 1326; Judith Trowell et al, 'Behavioural Psychopathology of Child Sexual Abuse in Schoolgirls Referred to a Tertiary Centre: A North London Study' (1999) 8 *European Journal of Child and Adolescent Psychiatry* 107; Allison Dubner and Robert Motta, 'Sexually and Physically Abused Foster Care Children and Posttraumatic Stress Disorder' (1999) 67 *Journal of Consulting and Clinical Psychology* 367.
 - 6 Lucy Berliner and Diana Elliott, 'Sexual Abuse of Children' in John Briere et al (eds), *American Professional Society on the Abuse of Children: Handbook on Child Maltreatment* (1996) 51.
 - 7 Theresa Wozencraft, William Wagner and Alicia Pellegrin, 'Depression and Suicidal Ideation in Sexually Abused Children' (1991) 15 *Child Abuse and Neglect* 505.
 - 8 Ibid.
 - 9 Jon McClellan et al, 'Age of Onset of Sexual Abuse: Relationship to Sexually Inappropriate Behaviours' (1996) 35 *Journal of the American Academy of Child and Adolescent Psychiatry* 1375.

relationships.¹⁰ Adolescents are likely to experience even higher levels of depression and anxiety than younger children because of their greater cognitive understanding of their abuse.¹¹ Adolescents may also be more susceptible than younger children to self-harm and suicidal ideation and behaviour.¹² Substance abuse and running away from home are also more frequent in adolescents than younger children.¹³ Low self-esteem continues throughout adolescence.¹⁴

In the long-term, the adult survivor of child sexual abuse typically has PTSD, or depression, or both.¹⁵ Classical sequelae also include anxiety, shame, distrust,

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- 10 Anthony Mannarino, Judith Cohen and Susan Berman, 'The Children's Attributions and Perceptions Scale: A New Measure of Sexual Abuse-Related Factors' (1994) 23 *Journal of Clinical Child Psychology* 204.
- 11 Christine Gidycz and Mary Koss, 'The Impact of Adolescent Sexual Victimization: Standardized Measures of Anxiety, Depression and Behavioural Deviancy' (1989) 4 *Violence and Victims* 139.
- 12 Cheryl Lanktree, John Briere and Lisa Zaidi, 'Incidence and Impact of Sexual Abuse in a Child Outpatient Sample: The Role of Direct Inquiry' (1991) 15 *Child Abuse and Neglect* 447; Beth Molnar, Lisa Berkman and Stephen Buka, 'Psychopathology, Childhood Sexual Abuse and Other Childhood Adversities: Relative Links to Subsequent Suicidal Behaviour in the US' (2001) 31 *Psychological Medicine* 965; Graham Martin et al, 'Sexual Abuse and Suicidality: Gender Differences in a Large Community Sample of Adolescents' (2004) 28 *Child Abuse and Neglect* 491.
- 13 Mary Rotherham-Borus et al, 'Sexual Abuse History and Associated Multiple Risk Behaviour in Adolescent Runaways' (1996) 66 *American Journal of Orthopsychiatry* 390.
- 14 Wozencraft, Wagner and Pellegrin, above n 7.
- 15 The claim made in this article is that PTSD occurs with sufficient frequency in adult survivors of child sexual abuse, especially (but not only) when the abuse is severe (entailing penetration) and of long duration, to demand consideration by legislatures in enacting limitation periods for this class of case, and to warrant adequate consideration by courts in determining reasonable conduct by survivors of abuse who seek an extension of time in which to institute civil litigation. A review of the literature reveals a growing body of evidence of the incidence of PTSD in adult survivors of child sexual abuse. Although PTSD is not an inevitable consequence of child sexual abuse, even when that abuse is severe and of long duration, studies of survivors of child sexual abuse have shown high rates of PTSD. A study of 117 survivors found that 86 per cent met full *Diagnostic and Statistical Manual* ('DSM') criteria for lifetime PTSD: Ned Rodriguez et al, 'Post-Traumatic Stress Disorder in a Clinical Sample of Adult Survivors of Childhood Sexual Abuse' (1996) 20 *Child Abuse and Neglect* 943. Another study of 42 survivors showed that 69 per cent met the DSM criteria: Anderson Rowan et al, 'Post-Traumatic Stress Disorder in a Clinical Sample of Adults Sexually Abused as Children' (1994) 18 *Child Abuse and Neglect* 51. Another study of 45 survivors yielded an incidence of 86 per cent: Ned Rodriguez et al, 'Post-Traumatic Stress Disorder in Adult Female Survivors of Childhood Sexual Abuse: A Comparison Study' (1997) 65 *Journal of Consulting and Clinical Psychology* 53. See also Frederick Lindberg and Lois Distad, 'Post-Traumatic Stress Disorders in Women Who Experienced Childhood Incest' (1985) 9 *Child Abuse and Neglect* 329; Angela Browne and David Finkelhor, 'Initial and Long Term Effects: A Review of the Research' in David Finkelhor (ed), *A Sourcebook on Child Sexual Abuse* (1986) 158; Paul Mullen, 'Impact of Sexual and Physical Abuse on Women's Mental Health', *The Lancet*, 16 April 1988, 841; Judith Stein et al, 'Long-Term Psychological Sequelae of Child Sexual Abuse' (1988) 27 *Journal of the American Academy of Child and Adolescent Psychiatry* 650; Paul Mullen et al, 'Childhood Sexual Abuse and Mental Health in Adult Life' (1993) 163 *British Journal of Psychiatry* 721; Amy Silverman, Helen Reinherz and Rose Giaconia, 'The Long-Term Sequelae of Child and Adolescent Abuse: A Longitudinal Community Study' (1996) 20 *Child Abuse and Neglect* 709; Lynne Briggs and Peter Joyce, 'What Determines Post-Traumatic Stress Disorder Symptomatology for Survivors of Childhood Sexual Abuse?' (1997) 21 *Child Abuse and Neglect* 575; Cathy Widom, 'Post-Traumatic Stress Disorder in Abused and Neglected Children Grown Up' (1999) 156 *American Journal of Psychiatry* 1223; Dawn Johnson, Julie Pike and Kathleen Chard, 'Factors Predicting PTSD, Depression, and Dissociative Severity in Female Treatment-Seeking Childhood Sexual Abuse Survivors' (2001) 25 *Child Abuse and Neglect* 179; Caron Zlotnick, Jill Mattia and Mark Zimmerman, 'Clinical Features of Survivors of Sexual Abuse with Major Depression' (2001) 25 *Child Abuse and Neglect* 357; Allan Horowitz et al, 'The Impact of Childhood

anger, guilt, low self-esteem, and self-destructive behaviour such as alcoholism and other substance abuse.¹⁶ Relationships with other adults are affected due to a negative self-concept and survivors frequently have difficulty navigating adult sexual and non-sexual relationships.¹⁷

B PTSD

1 *Avoidance of Complaint and Litigation*

PTSD, as defined by the *Diagnostic and Statistical Manual of Mental Disorders*,¹⁸ has several criteria, three of which are particularly relevant to this discussion.¹⁹ First, PTSD involves the existence of an unusually traumatic event which involved actual or threatened death or serious physical injury, and in which the patient felt intense fear, horror or helplessness ('the stressor criterion'). Second, the patient repeatedly relives the event in one or more ways including recollections, dreams, flashbacks, distressed responses to cues symbolising the event, and physiological reactions to these cues ('the intrusive recollection criterion'). Third, and most significantly in the legal context, the patient persistently avoids trauma-related stimuli, and has numbed general responsiveness, as shown by three or more factors, including: avoiding thoughts, feelings or conversations concerned with the event; avoiding activities, people or places that recall the event; and an inability to remember an important feature of the event ('the avoidance criterion').²⁰

Beyond the difficulties of disclosing the abuse at the time it occurs, the avoidance response means that many adult survivors of child sexual abuse²¹ will

Abuse and Neglect on Adult Mental Health: A Prospective Study' (2001) 42 *Journal of Health and Social Behaviour* 184; Harriet MacMillan et al, 'Childhood Abuse and Lifetime Psychopathology in a Community Sample' (2001) 158 *American Journal of Psychiatry* 1878; Gina Owens and Kathleen Chard, 'Comorbidity and Psychiatric Diagnoses among Women Reporting Child Sexual Abuse' (2003) 27 *Child Abuse and Neglect* 1075; Josie Spataro et al, 'Impact of Child Sexual Abuse on Mental Health: Prospective Study in Males and Females' (2004) 184 *British Journal of Psychiatry* 416; Dawn Peleikis, Arnstein Mykletun and Alv Dahl, 'The Relative Influence of Childhood Sexual Abuse and Other Family Background Risk Factors on Adult Adversities in Female Outpatients Treated for Anxiety Disorders and Depression' (2004) 28 *Child Abuse and Neglect* 61.

16 Mullen et al, 'Childhood Sexual Abuse and Mental Health in Adult Life', above n 15.

17 Paul Mullen et al, 'The Effect of Child Sexual Abuse on Social, Interpersonal and Sexual Function in Adult Life' (1994) 165 *British Journal of Psychiatry* 35; Jonathan Hill et al, 'Child Sexual Abuse, Poor Parental Care and Adult Depression: Evidence for Different Mechanisms' (2001) 179 *British Journal of Psychiatry* 104; Stein et al, above n 15.

18 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th revised ed, 2000).

19 The other criteria concern hyper-arousal (D), duration (E) (the symptoms must persist for three months or more to be chronic PTSD) and functional significance (F): *ibid* 468.

20 *Ibid* 463–4, 468. Symptoms can have delayed onset, appearing more than six months after the event. In children, response to the event may be agitation or disorganised behaviour, and young children may relive the event through repetitive play, re-enactment or nightmares: at 466.

21 Although this article is limited to adult survivors of child sexual abuse, it may also be that since PTSD can result from extreme physical abuse inflicted on a child that there are a significant number of adult survivors of such physical abuse to whom the arguments in this article apply equally: see generally D Pelcovitz et al, 'Post-Traumatic Stress Disorder in Physically Abused Adolescents' (1994) 33 *Journal of the American Academy of Child and Adolescent Psychiatry* 305.

need a significant period of time to develop the capacity to make even a confidential disclosure of the abuse, or a tentative foray into psychological counselling. Many survivors will never be able to disclose the abuse. Whether a survivor silently suffered the abuse as a child and takes many years to disclose it as an adult, or whether a survivor complained initially but was ignored or punished, or whether a survivor had his or her complaint received but still suffered the typical consequences of the abuse, many adult survivors who eventually desire civil legal remedies will not be psychologically ready to pursue the perpetrator through the courts until some time into their 20s, 30s or even 40s. Statistics on disclosure, let alone readiness to pursue litigation, demonstrate this beyond doubt.²²

It is therefore a normal and reasonable response by adult survivors of child sexual abuse with PTSD to avoid any activity – including legal action – that would require detailed reliving and description of the events, adversarial testing of their account of those events, and confrontation of the perpetrator. The symptoms of PTSD mean that, of those survivors who ever become able to take legal action, most require an extended period of time in which to gain knowledge of the facts required by law to institute civil proceedings for compensation. These facts include those of the personal injury, of the injuries' nature and extent, and of the causal connection between the perpetrator's abuse and those injuries.

Awareness of relevant facts is one thing; the survivor must then have resolved their PTSD symptoms to a sufficient degree to be able to institute civil legal proceedings. Thus, with statutory provisions that give a wronged party only a short period of time in which to institute civil action, PTSD is often an insurmountable barrier to adult survivors of child sexual abuse seeking access to the courts for civil compensation. Before turning to these provisions, it is necessary to comment briefly upon the legal implications of recently emerged psychological evidence of PTSD.

2 *The Significance of New Evidence*

PTSD was first recognised in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* in 1980.²³ The youth of PTSD alone is significant, but when this is added to the recency of medical and social recognition of the incidence, prevalence and consequences of child sexual abuse, the difficulties that can be produced by outdated legal principles start to become obvious. The consequences of child sexual abuse, including PTSD, only became known to the psychiatric and psychological communities (much less to broader society, the legal community and survivors of abuse) in the late 1980s and 1990s. The

22 In Queensland, the Project AXIS survey found that of 212 adult survivors, 25 took 5–9 years to disclose it, 33 took 10–19 years, and 51 took over 20 years: Queensland Crime Commission and Queensland Police Service, *Project AXIS Vol 1*, above n 3, 84 (Table 23). Where the perpetrator is a relative, it is even more likely that the delay will be long. A Criminal Justice Commission analysis of Queensland Police Service data from 1994–98 found that, of 3721 reported offences committed by relatives, 25.5 per cent of survivors took 1–5 years to report the acts, 9.7 per cent took 5–10 years, 18.2 per cent took 10–20 years and 14.2 per cent took more than 20 years: at 86 (Table 25).

23 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed, 1980).

recency of this evidence is significant when assessing the justifiability of statutory time limits, and of judicial expectations about survivors' knowledge of the nature, extent and cause of their injuries, and about what survivors could reasonably have done to discover this knowledge.

Given that statute and common law in this area was developed in a social context without the benefit of recent knowledge about child sexual abuse, those laws are likely to produce results that can now be identified as unjustifiable, but were perhaps understandable in the previous social context. Now that the incidence, extent and consequences of child sexual abuse are known, the failure of contemporary parliaments to change the law to reflect this new knowledge, and the unwillingness of judges to be informed by it, produces gaps in the law and unjust results which are inexcusable.

This problem is illustrated by the failure of the Queensland Parliament to respond to new evidence, and the apparently insufficiently informed nature of judicial reasoning in this area. This is an issue requiring attention, particularly given the significant numbers of children in Queensland who are sexually abused. Between 1994 and 1998, there were 15 774 child sex offences reported to Queensland Police.²⁴ In 2002–03, there were 31 068 notifications of child abuse and neglect to State authorities, involving 22 027 children.²⁵ Of these, there were 12 203 substantiated cases involving 9032 children.²⁶ Of the 12 203 substantiations, 610 were cases of sexual abuse.²⁷ Queensland also has a history of child sexual abuse in State and religious institutions, and in State foster care.²⁸

24 Queensland Crime Commission and Queensland Police Service, *Project AXIS Vol 1*, above n 3, 32 (Table 3). The incidence of child sexual abuse is notoriously difficult to assess due to the low rate of reports. It is sufficient to state that the reported number of offences represent only a proportion of the actual number of incidents.

25 Susie Kelly and Melinda Hecker, *Child Protection Australia 2002–03*, Child Welfare Series Paper No 34, Australian Institute of Health and Welfare (2004) 17 (Table 2.6), <<http://www.aihw.gov.au/publications/cws/cpa02-03/cpa02-03.pdf>> at 29 October 2004.

26 Ibid.

27 Ibid 16 (Table 2.5). The 12 203 substantiations comprised 2806 of physical abuse, 610 of sexual abuse, 4135 of emotional abuse and 4652 of neglect.

28 Two inquiries have found appalling records of abuse and neglect of children in State care: Queensland, Forde Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999), <http://www.families.qld.gov.au/department/forde/publications/documents/pdf/forde_comminquiry.pdf> at 29 October 2004; Crime and Misconduct Commission, *Protecting Children: An Inquiry into Abuse of Children in Foster Care* (2004), <<http://www.cmc.qld.gov.au/library/CMCWEBSITE/ProtectingChildren.pdf>> at 29 October 2004.

III STATUTORY LIMITATION PERIODS

A Time Limits and Minority

1 General Application

The state is not limited by time in prosecuting indictable criminal offences, which include the acts constituting child sexual abuse.²⁹ The High Court has held that individuals accused of criminal acts have no right to a speedy trial, or even to trial within a reasonable time.³⁰ Cases of delayed prosecution for child sexual abuse demonstrate that it is possible for a fair trial to be secured many years after the relevant events.³¹ As well, judges in criminal courts have accepted that many survivors of child sexual abuse, for good reasons, take a long time to report it. In 1995, for example, Wilcox J stated:

It is commonplace for there to be a substantial delay in the reporting of alleged sexual assaults, especially where the complainant is a child ... [M]any sexual assault victims are unable to voice their experience for a very long time. To adopt a rule that delay simpliciter justifies a stay of criminal proceedings would be to exclude many offences, particularly offences against children, from the sanctions of the criminal law.³²

The civil context provides a marked contrast. Statutes set time limits on when a person can bring a civil claim for personal injuries, for several, usually justifiable, reasons. It is necessary to ensure a fair trial for the defendant by ensuring the availability of fresh evidence. People need to be able to proceed with their lives unencumbered by the threat of an old claim. Plaintiffs should not sleep on their rights. The public has an interest in the prompt resolution of disputes.³³ Accordingly, in all Australian States and Territories, except for Western Australia, actions seeking damages for personal injuries must generally be commenced within three years from the date on which the cause of action arose.³⁴

29 *Criminal Code* (Qld) ss 349 (rape), 208 (unlawful sodomy), 210 (indecent treatment of a child under 16), 215 (carnal knowledge with or of a child under 16), 222 (incest), 229B (maintaining a sexual relationship with a child).

30 *Jago v District Court of New South Wales* (1989) 168 CLR 23. Recognition that delay may impede a fair trial remains and courts have, though rarely, stayed proceedings: see *Gill v DPP (NSW)* (1992) 64 A Crim R 82; *R v Davis* (1995) 57 FCR 152.

31 See, eg, *R v Birdsall* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Cole JA, Grove and Simpson JJ, 3 March 1997), involving acts allegedly committed between 1961 and 1967, with the report occurring in 1995; *R v Dodds* [1996] QCA 402 (Unreported, Fitzgerald P, Pincus JA and Lee J, 18 October 1996), involving acts allegedly committed between 1984 and 1986, with proceedings instituted in 1994.

32 *R v Lane* (Unreported, Federal Court of Australia, Wilcox J, 19 June 1995) 2. See also *R v Austin* (1995) 14 WAR 484 (where Owen J states: 'It is not at all uncommon for there to be a delay in the institution of proceedings for sexual offences': at 493); *R v Davis* (1995) 57 FCR 152.

33 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551 ff.

34 *Limitation of Actions Act 1974* (Qld) s 11; *Limitation Act 1969* (NSW) ss 18A(2), 50C; *Limitation of Actions Act 1958* (Vic) ss 5(1AA), 27D(1)(a); *Limitation of Actions Act 1936* (SA) s 36; *Limitation Act 1974* (Tas) s 5(1); *Limitation Act 1985* (ACT) s 16B; *Limitation Act 1981* (NT) s 12(1)(b). The *Limitation Act 1935* (WA) s 38(1)(b) sets a time limit of four years for actions for trespass to the person, assault and battery, and s 38(1)(c)(vi) sets a period of six years for negligence. In *Wilson v Horne* (1999) 8 Tas R 363, it was held that an action exists in both negligence and trespass for the acts constituting child sexual

Minority has traditionally constituted a legal disability and has stopped time from running until the attainment of majority. In most, but not all, Australian jurisdictions, this effect of minority is still generally upheld:³⁵ thus, in Queensland, South Australia, the Northern Territory and the Australian Capital Territory, a survivor of child sexual abuse has three years from turning 18 in which to institute proceedings. In Tasmania, a survivor has until the age of 21, but only if he or she was not in the custody of a parent at the time of the events, and in Western Australia, a survivor will have until 22 or 24 depending on the action. In New South Wales and Victoria, however, where a child suffers injury from someone who is not a parent or a close associate of a parent, amendments motivated by the Commonwealth's *Review of the Law of Negligence*³⁶ ('*Ipp Report*') establish a different position. In these States, if the child is in the custody of a capable parent or guardian, then that child is deemed not to be under a legal disability or incapacity, and the child's parent or guardian is required to bring the action on the child's behalf within a set period of time, which may often be a much shorter period than exists even in other Australian jurisdictions.³⁷ In New South Wales, the action must be brought within three years from when the action is discoverable, while in Victoria the action must be brought within six years from this time.³⁸ In both cases, a long-stop of 12 years from the date of the wrongful acts applies.³⁹

2 Qualitative Differences in Child Abuse Cases

As discussed above, there is no doubt that the legal system must protect the defendant's right to a fair trial. However, judicial and extra-judicial commentators have shown that qualitative differences in child abuse cases (in contrast to typical personal injury suits, such as motor accident cases) outweigh

abuse. This can therefore bring different limitation periods into play, depending on the jurisdiction. An application for special leave to appeal this decision was refused: *Wilson v Horne* (1999) 19 Leg Rep SL4a. Note also that, in New South Wales and Victoria, actions brought concerning injury sustained after the amendments in those jurisdictions have time running from the date of discoverability rather than from when the cause of action accrued: *Limitation Act 1969* (NSW) s 50C; *Limitation of Actions Act 1958* (Vic) s 27D.

35 *Limitation of Actions Act 1974* (Qld) ss 5(2), 11, 29(2)(c). See also *Limitation of Actions Act 1936* (SA) s 45; *Limitation Act 1974* (Tas) ss 2(2), 26; *Limitation Act 1935* (WA) s 40; *Limitation Act 1985* (ACT) ss 8(3), 30; *Limitation Act 1981* (NT) ss 4(1), 36. Under the *Limitation Act 1974* (Tas) s 26(6), however, time is not suspended in cases of personal injury to a child through negligence, nuisance or breach of duty, if the child was in the custody of a parent. The phrase 'breach of duty' has been held by the Victorian Court of Appeal to include acts of intentional trespass: *Mason v Mason* [1997] 1 VR 325, 330. This means that the exclusion of the suspension operates whether the action is brought in trespass or negligence.

36 Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), <http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf> at 29 October 2004.

37 *Limitation Act 1969* (NSW) s 50F(2)(a); *Limitation of Actions Act 1958* (Vic) s 27J(1)(a). These provisions promote recommendations made by the *Ipp Report*: see *Ipp Report*, above n 36, 95–6.

38 *Limitation Act 1969* (NSW) ss 50C(1), 50F; *Limitation of Actions Act 1958* (Vic) ss 27J, 27E.

39 *Limitation Act 1969* (NSW) s 50C(1)(b); *Limitation of Actions Act 1958* (Vic) s 27E(2)(b). Discoverability in these cases is sheeted home to the child's parent or guardian: *Limitation Act 1969* (NSW) s 50F(3); *Limitation of Actions Act 1958* (Vic) s 27J(3).

the generally good reasons for a short standard time period.⁴⁰ These differences flow primarily from the following facts: the injury is inflicted on a child; the acts occur in private and so are not often accompanied by objective evidence; the acts are particularly egregious; the psychological effects of the abuse commonly take many years or even decades to be manifest; the causal connection between abuse and injury also typically takes a long period of time to be realised; the nature and extent of the injuries take a similarly long period of time to be diagnosed; the victim's frequent misplaced sense of guilt, shame and responsibility for the acts impedes their realisation of being the victim of a wrong; and the wrongdoer's position of superiority often deters survivors from proceeding until they feel psychologically equipped to do so.⁴¹

Even the *Ipp Report*, whose terms of reference were to examine methods to reform the common law to limit liability and quantum of damages, recognised the unjustifiable difficulties posed by a short and rigid limitation period in at least some classes of child injury, namely where a child is injured by a parent or a close associate of a parent.⁴² Responding to the recommendations of the *Ipp Report*, legislatures in New South Wales and Victoria enacted a special limitation period for these cases.⁴³ In these cases, the action is deemed to be discoverable by the victim when he or she turns 25 years of age, or when the cause of action is actually discoverable (not constructively discoverable), whichever is later. With the long-stop period of 12 years applying to these cases as well, this means that in this class of case, a plaintiff who has turned 25 has three years to institute proceedings once he or she has actual knowledge of the fact of the injury, of the defendant causing that injury, and of the injury being of sufficient seriousness that it justifies legal action. Effectively then, a plaintiff here can have until the age of 37 to institute proceedings.

Despite cogent arguments that the rationales for strict time limits are outweighed by countervailing factors in cases of child abuse, and despite the fact that, in response to these arguments, overseas jurisdictions have amended their

40 See, eg, *W v A-G* [1999] 2 NZLR 709, 729–30 (Thomas J); *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [98] (Atkinson J). See also *M (K) v M (H)* [1992] 3 SCR 6; *Stubbings v United Kingdom* (1996) IV Eur Court HR 1487, 1503–4 (obiter dicta); Ben Mathews, 'Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice' (2003) 11 *Torts Law Journal* 218, 230 ff; Annette Marfording, 'Access to Justice for Survivors of Child Sexual Abuse' (1997) 5 *Torts Law Journal* 221; Leanne Bunney, 'Limitation of Actions: Effect on Child Sexual Abuse Survivors in Queensland' (1998) 18 *Queensland Lawyer* 128; Janet Mosher, 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44 *University of Toronto Law Journal* 169, 176–81.

41 For a more detailed explanation, see Mathews, above n 40.

42 *Ipp Report*, above n 36, 96–7.

43 *Limitation Act 1969* (NSW) s 50E; *Limitation of Actions Act 1958* (Vic) s 27I. A 'close associate of a parent or guardian' is defined as a person whose relationship with the parent is such that the parent or guardian might be influenced not to proceed, or if the victim might be unwilling to disclose to the parent or guardian the events causing the personal injury: *Limitation Act 1969* (NSW) s 50E(2); *Limitation of Actions Act 1958* (Vic) s 27I(2).

statutes of limitation for these cases,⁴⁴ in Australian jurisdictions, these actions are treated no differently, save the specific classes of case now recognised in New South Wales and Victoria. The significance of this is that most adult survivors of child sexual abuse with PTSD (and many of those who do not have PTSD) will not be able to commence proceedings within the time allowed. Unless the defendant does not plead the expiry of time as a defence – expiry of the time limit must be pleaded as a defence; it does not operate automatically to bar the plaintiff's access to the court⁴⁵ – these plaintiffs will be out of time. They are then forced to abandon their claim, or to argue that they were under a legal disability since attaining majority so that time has not run until that disability ceased,⁴⁶ or to apply to the court for an extension of time in which to bring their claim. Due to the cost of such an application, many will not pursue the matter.⁴⁷

B Extension Provisions

Most Australian jurisdictions have statutory provisions enabling time to be extended by the court, usually on the basis that critical facts about the injury (including the presence of the injury itself, as well as its cause) have only surfaced long after the wrongful event.⁴⁸ Despite the technical availability of an extension, however, Queensland case law demonstrates that in child abuse cases the extension provisions have been almost impossible to satisfy. The discussion of Queensland decisions in Part IV is instructive, not only for future Queensland cases, but also for extension applications in other Australian jurisdictions, given that extension provisions in these jurisdictions import considerations that are identical or similar to those that have proved decisive in Queensland. These

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- 44 British Columbia, Manitoba, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan and the Yukon have abolished time limits for civil actions based on sexual assault: *Limitation Act*, RSBC 1996, c 266, s 3(4)(k)(i); *Limitation of Actions Act*, CCSM 2002, c L-150, s 2.1(2)(a), (b); *Limitations Act*, RSN 1995, c L-16.1, s 8(2); *Limitation of Actions Act*, RSNWT 1998, c L-8, s 2.1(2); *Limitation of Actions Act*, RSN 1989, c 258, s 2(5)(a), (b); *Nunavut Act*, SC 1993, c 28, s 29 (which adopts the Northwest Territories provisions); *Limitations Act*, RSO 2002, c 24, s 10(1)–(3); *Limitation of Actions Act*, RSS 1978, c L-15, s 3(1)(3.1)(a); *Limitation of Actions Act*, RSY 2002, c 139, s 2(3). In Manitoba, the Northwest Territories, Nunavut, Ontario, and Saskatchewan, the abolition of time limits extends to all actions for trespass to the person, assault or battery where at the time of the injury the person was in a relationship of financial, emotional, physical or other dependency with one of the parties who caused the injury: *Limitation of Actions Act*, CCSM 2002, c L-150, s 2.1(2)(b)(ii); *Limitation of Actions Act*, RSNWT 1998, c L-8, s 2.1(1)–(2) (adopted in Nunavut: *Nunavut Act*, SC 1993, c 28, s 29); *Limitations Act*, RSO 2002, c 24, s 10(1)–(3); *Limitation of Actions Act*, RSS 1978, c L-15, s 3(1)(3.1)(b)(ii).
- 45 *Uniform Civil Procedure Rules 1999* (Qld) r 150(1)(c). Nor will the court consider expiry of time on its own initiative: *Commonwealth v Verwayen* (1990) 170 CLR 394, 498.
- 46 For a discussion of the disability argument, see below Part VI.
- 47 Submission 295 to Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (2004) (A Sdrinis) (copy on file with author).
- 48 *Limitation of Actions Act 1974* (Qld) s 31; *Limitation Act 1969* (NSW) ss 58, 60A, 60G, 62A, 62D; *Limitation of Actions Act 1958* (Vic) ss 23A, 27K; *Limitation of Actions Act 1936* (SA) s 48; *Limitation Act 1974* (Tas) s 5(3); *Limitation Act 1985* (ACT) s 36; *Limitation Act 1981* (NT) s 44. The *Limitation Act 1935* (WA) has no general extension provision.

comparative provisions will be summarised after outlining the Queensland provisions.

In Queensland, assuming there is enough evidence to establish the action, an applicant is typically eligible for an extension of time if it is demonstrated to the court that a material fact of a decisive character relating to the action was neither known to the applicant, nor within the applicant's means of knowledge, until a date after the applicant turned 20, and within one year of the applicant seeking the extension.⁴⁹ 'Material facts relating to a right of action' include the fact of the occurrence of negligence or trespass; the fact that the negligence or trespass was capable of causing personal injury; the nature and extent of the injury; and the extent to which the injury was in fact caused by the negligence or trespass.⁵⁰ A material fact will be of a decisive character if a reasonable person knowing that fact, and having taken appropriate advice, would regard it as showing (i) that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify bringing the action; and (ii) that the survivor of the abuse ought, in their own interests and taking their own circumstances into account, to bring an action.⁵¹

A pivotal provision deems a fact to be outside the applicant's means of knowledge only if the applicant does not actually know of the fact, and, as far as the fact is discoverable, the applicant has taken all reasonable steps to discover it before it is actually discovered.⁵² The idea behind this provision is that even if a plaintiff could not have possessed the material facts and so have brought an action within time, that plaintiff is still expected, after time has expired, to take reasonable steps to ascertain those facts and institute proceedings quickly once their ascertainment is possible, in order to reduce the delay produced by otherwise unavoidable circumstances. Similar provisions in other jurisdictions contain, explicitly or implicitly, a requirement that the plaintiff take 'reasonable steps' to discover the decisive facts.

In New South Wales, different extension provisions are available depending on the time when the injury was sustained, or where other reasons for an extension may exist. Several of these provisions require the court to consider the reasonableness of the applicant's conduct in ascertaining the relevant facts. First, for extension applications concerning actions where a person was injured before 1 September 1990, the substance of the Queensland provision discussed above, concerning whether a material fact of decisive character was not within the applicant's means of knowledge, is implicitly duplicated.⁵³ Second, for actions involving injury sustained between 1 September 1990 and 6 December 2002, when considering an application extension, the court must consider, among other things, the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any advice received.⁵⁴ Third, the court must take

49 *Limitation of Actions Act 1974* (Qld) s 31(2).

50 *Limitation of Actions Act 1974* (Qld) s 30(1)(a).

51 *Limitation of Actions Act 1974* (Qld) s 30(1)(b).

52 *Limitation of Actions Act 1974* (Qld) s 30(1)(c).

53 *Limitation Act 1969* (NSW) s 58(2).

54 *Limitation Act 1969* (NSW) s 60E(1)(g).

into account the same considerations where a person applies for an extension of the 12 year long-stop in the case of an action concerning injury sustained after 6 December 2002.⁵⁵ More significantly, the long-stop cannot be extended beyond three years from the date of discoverability, which introduces the element of constructive discoverability, that is, when it can be deemed that a plaintiff 'ought' to have known of the three decisive facts founding an action. A cause of action is discoverable on the first date the plaintiff knows or ought to know of three facts: the injury, the fact that the defendant caused that injury, and the fact that the injury is of sufficient seriousness to justify bringing an action. It is deemed that a person ought to know a fact at a particular time if the fact would have been ascertained by them had they taken all reasonable steps before that time to ascertain the fact.⁵⁶ Fourth, for applications seeking an extension on the ground of recent manifestation of latent injury, the court may also have to consider when the plaintiff ought to have become aware of the facts of the injury, its nature and extent, and the connection between the injury and the defendant's conduct.⁵⁷

In Victoria, the court must consider the extent to which the plaintiff acted promptly and reasonably once he or she knew the defendant's act might be capable at that time of giving rise to an action for damages.⁵⁸ The steps, if any,

55 *Limitation Act 1969* (NSW) s 62B(1)(e).

56 *Limitation Act 1969* (NSW) s 50D(2).

57 *Limitation Act 1969* (NSW) s 60I(1)(b). See, eg, *SD v Director-General of Community Welfare Services (Vic)* (2001) 27 Fam LR 695 where this argument could have been raised by the defendants but was not. In this case, an extension of time was granted to three adult survivors of child abuse to proceed in negligence against government bodies. See also *Johnson v Director of Community Services (Vic)* [2000] Aust Torts Reports ¶81-540, where the application was refused at first instance, but on appeal was allowed.

58 *Limitation of Actions Act 1958* (Vic) ss 23A(3)(e), 27L(1)(f). Two Victorian cases are relevant here. In *Calder v Uzelac* [2003] VSCA 175 (Unreported, Buchanan and Chernov JJA, and Ashley AJA, 14 November 2003), the applicant alleged multiple sexual assaults by her brother in 1972 when she was aged 13. She consulted a psychologist in 2000, after her symptoms had progressively worsened from 1996 when she revisited her childhood home. The application was refused at first instance and on appeal. At first instance, the application was refused because the trial judge thought that the applicant had known of some of her symptoms for years, and that she could reasonably have been expected to consult medical experts to ascertain the precise nature and extent of her injuries before she actually did. On appeal, however, the refusal was based on the exercise of a residual discretion considering the risk of prejudice to the defendant's right to a fair trial. The reason for this was that the Court found that it would no longer be possible to establish with sufficient certainty the causal effect of the sexual assaults on the plaintiff and the extent to which they caused her injuries (since she had suffered other adverse life influences). The Court, finding that the trial judge erred, accepted that it was not reasonable to expect the plaintiff to have taken steps before she did to ascertain the extent of her injuries. It could not be said that a plaintiff, who was aware of the symptoms of a psychological disorder, knew of, or ought to have ascertained, the fact that she was suffering from a psychological disorder. As well, the Court accepted that one acceptable reason that the plaintiff had not taken action before she did was that she felt a misplaced sense of shame, guilt and responsibility for the wrongdoer's actions.

taken by the plaintiff to obtain medical, legal or other expert advice, and the nature of any advice received, must also be considered.⁵⁹ In the Australian Capital Territory, the substance of the Victorian provision for this latter class of extension applications is duplicated.⁶⁰

In the three other jurisdictions, general discretionary powers enable the court to consider the plaintiff's conduct. In South Australia, the court must consider the conduct of the parties generally, and any other relevant factors.⁶¹ In the Northern Territory, the court must consider, among other things, whether in all the circumstances it is just to grant the extension.⁶² In Tasmania, the court must consider whether it is just and reasonable to extend the limitation period.⁶³

Some final points need to be noted before turning to the case studies. Even if, in the relevant jurisdictions, all the conditions about recent discovery of decisive material facts and the taking of reasonable steps are satisfied, the court must still then consider the justice of extending time and exercise its discretion in the applicant's favour. The applicant has a 'positive burden' of showing that justice requires the extension of time.⁶⁴ Whether the court exercises its discretion to extend time depends on its estimation of the prejudice to the defendant's right to a fair trial. This prejudice was the basis for the court's refusal to extend time in the Victorian case of *Calder v Uzelac*.⁶⁵

The intention of the extension provision is therefore to enable the institution of proceedings by someone who could not reasonably have done so within the time allowed, either through lack of knowledge of a material fact (such as the injury sustained or its cause), or because on the facts then available, the action was

In *McGuinness v Clark* (Unreported, County Court of Victoria, Duckett J, 7 May 2003), the plaintiff was granted an extension of time under the *Limitation of Actions Act 1958* (Vic) s 23A to pursue a civil claim for damages arising out of an alleged incident of rape by her cousin in 1981, when she was aged 17. The plaintiff had reported the rape to police within weeks; however, it was not until 2001 that she contacted her solicitor to proceed civilly. The Court accepted that, only after counselling in 2000 (by which time her psychological injuries had become more pronounced), did she believe that there was a causal connection between the incident and her psychological injuries. When considering the issue of when the plaintiff knew her physical injury might be capable of giving rise to an action based on psychological injury, Duckett J considered her Indigenous background, limited schooling and work experience and onset of psychological problems and substance abuse, and concluded that the plaintiff had acted promptly for the purposes of s 23A. In contrast, the Court refused an application for an extension of time in relation to a second alleged incident in 1987. Regarding that matter, the plaintiff had approached solicitors days after the alleged event and, at that meeting, had referred to the 1981 event. The solicitors advised the plaintiff in writing that she could make a civil claim regarding the 1987 event. The Court concluded that the plaintiff decided not to proceed with that action and that this made the s 23A extension of time unavailable in this case.

59 *Limitation of Actions Act 1958* (Vic) ss 23A(f), 27L(1)(g).

60 *Limitation Act 1985* (ACT) s 36(3)(e), (f).

61 *Limitation of Actions Act 1936* (SA) s 48(3b), (c), (d).

62 *Limitation Act 1981* (NT) s 44(3).

63 *Limitation Act 1974* (Tas) s 5(3).

64 *Limitation of Actions Act 1974* (Qld) s 31(2) (imported by the phrase 'the court may order that the period of limitation for the action be extended'): see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551, 554. This requirement is duplicated in other jurisdictions: see the provisions cited above n 48, which commonly refer to 'the justice of the case', or whether it is 'just' or 'just and reasonable' to extend time.

65 [2003] VSCA 175 (Unreported, Buchanan and Chernov JJA, and Ashley AJA, 14 November 2003).

likely to fail or to produce insignificant damages. In *Re Sihvola*, Wanstall CJ distilled the purpose like this:

The issuing of a writ presupposes knowledge, or at least belief, by the plaintiff or his legal advisers that he can establish the cause of action alleged in his writ by proving the facts that are then within his knowledge. The antithesis of this proposition becomes the basic assumption of the scheme, ie, that he has not issued a writ because he lacked knowledge of some material fact, on proof of which his cause depended, either entirely or for a worthwhile result.⁶⁶

In *Sugden v Crawford*,⁶⁷ Connolly J (with whom Shepherdson J agreed) stated that an extension will be justified where there is such an enhancement of the prospect of success as, for example, would raise it from a possibility to a real likelihood. Even if a prima facie case of negligence already existed, legal advisers may deem it too risky to bring an action until the newly discovered fact emerges. In *Sugden v Crawford*, the applicant succeeded because his originally undiagnosed back fractures, sustained after a workplace accident, were diagnosed after the expiry of time. The court found that without this later diagnosis, this was the type of undiagnosed complaint (soft tissue injury to the back) which without evidence of fracture, would be treated with scepticism and would be unlikely to attract a significant award of damages. The diagnosis, therefore, had the effect of transforming his case. It will be seen that this reasoning has particular relevance in cases of child abuse heard to date, due to the recency of social, medical and legal recognition of such abuse.

IV CASE STUDIES: APPLICATIONS TO EXTEND TIME

A *Woodhead v Elbourne*

The applicant in *Woodhead v Elbourne*⁶⁸ was born on 25 February 1974. She suffered alleged sexual assaults between July 1981 and December 1987 (aged 7–13), inflicted by a friend of her adoptive parents. The alleged assaults were of a relatively minor nature;⁶⁹ the most serious incidents appeared to involve the defendant allegedly putting his hand ‘between the Plaintiff’s legs, in the area of her vagina’ and ‘mov[ing] his fingers over the Plaintiff’s vaginal area’.⁷⁰ When aged 12 or 13 the plaintiff told her mother of the assaults and had counselling sessions and police interviews, but no action was taken. She had until 25 February 1995 to begin proceedings. She instituted proceedings on 23 December 1997 – a gap of two years and nine months from the expiry of the time limit. Relevantly, the claim was in assault and battery, not negligence, so the claim was actionable without proof of damage.

66 [1979] Qd R 458, 465.

67 [1989] 1 Qd R 683, 686.

68 [2001] 1 Qd R 220.

69 Using the table of severity of child maltreatment extracted from Kevin Browne and Michael Herbert, *Preventing Family Violence* (1997), referred to in Kevin Browne, ‘Child Protection’ in Michael Rutter and Eric Taylor (eds), *Child and Adolescent Psychiatry* (4th ed, 2003) 1158, 1162.

70 *Woodhead v Elbourne* [2001] 1 Qd R 220, 222.

1 *Discovery of Material Facts*

The applicant suffered a crisis in November 1993 (aged 19) and saw a psychiatrist, who noted that the applicant had never been able to talk through or deal with the abuse, or explore how it had affected her. At this time, no analysis was conveyed to the applicant of her symptoms, their cause, or of the connection between the abuse and its consequences. Until this point she had not connected her symptoms with the abuse because, in her words as reported by a psychologist, ‘this would have meant confronting the trauma she was avoiding in the hope that it would just go away’.⁷¹

Regular psychotherapy began in 1996. Towards the end of 1996, the applicant expressed anger at the assaults and the psychotherapist told her that she could see a lawyer. She consulted a solicitor on 26 March 1997, but was unable to provide details of her injury or condition except to say she was receiving counselling. That day, the psychotherapist told the applicant that she did not think that the applicant was ready for legal proceedings, and refused to provide a medico-legal report.

The applicant began treatment with another psychiatrist on 19 January 1998. After six visits, this psychiatrist wrote a report on 18 December 1998, which included a diagnosis and comments linking the abuse with the conditions suffered by the applicant. The applicant said that only after reading this report did she

first bec[o]me aware that [she] was suffering from ‘post-traumatic stress disorder consequent upon childhood sexual abuse ...’ and ‘borderline personality disorder’ ... Before this time [she] did not know the nature of [her] condition, the extent of [her] condition or whether [her] condition related to the assaults by the defendant.⁷²

The respondent argued that direct knowledge of the material facts existed in 1993, when the applicant began psychotherapy, or, alternatively, no later than 1996. This argument was relied on to the exclusion of the argument usually raised in these cases that the applicant should have taken reasonable steps to discover the fact before she did.

2 *Judicial Reasoning*

Despite assault and battery being actionable without proof of damage, the extension was granted. The judicial reasoning is concerned with the applicant’s direct knowledge, and the effect of the psychiatric diagnosis. Unusually, there is no discussion of the reasonable steps issue.

The first critical finding by White J was that only when the applicant read the December 1998 report did she have direct knowledge of the material facts which, if properly advised, would lead a reasonable person to institute proceedings. The knowledge gained at this time of the psychiatric diagnosis of the precise injury was held to raise the prospect of success from a possibility to a real likelihood by

71 Ibid 223.

72 Ibid 225.

identifying the extent of the injury.⁷³ Implicit here is the notion that without evidence of the extent of the injury, the applicant would have little chance of either success, or of a significant award of damages.

Second, the fact that the applicant had explored the events over two years of psychotherapy was not deemed to be direct knowledge sufficient to dismiss the application. Justice White stated that during this time the applicant ‘may have been led to think that possibly the alleged sexual assaults were the cause of her symptoms’,⁷⁴ but that was deemed insufficient to demonstrate direct knowledge of the material facts.

Third, White J identified the applicant’s adverse life influences (the abuse, her school difficulties and problems with her brother). The psychiatric diagnosis was held to disentangle these influences and to clarify the causal consequences of particular experiences, including the causal link between the alleged abuse and the psychiatric injury.⁷⁵

This reasoning will be revisited during the analyses of the three cases which follow. It will be seen that the reasoning and conclusions of this decision are impossible to reconcile with the following decisions. However, one point all of the judgments have in common is that the effect of avoidance caused by PTSD is not discussed.

B *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton*

The applicant in *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton*⁷⁶ (‘*Carter*’) was born on 23 March 1960. When two months old she was taken into State care and in 1961 she was placed at Neerkol Orphanage, a private institution licensed to care for children, run by an order of nuns. Between 1961 and 1972 (aged 1–12), the applicant suffered personal injuries from numerous incidents of physical and emotional cruelty from the nuns.⁷⁷ From the age of five or six, she allegedly suffered numerous incidents of sexual assault by a Neerkol employee, including almost daily rape from age seven. In August 1968, aged eight, she complained to government employees of physical and sexual abuse, but was not believed and was beaten for complaining. Aged 15, she fled State care to live on the streets.

73 Ibid 227.

74 Ibid.

75 On the question of discretion and delay, White J held that there was no significant prejudice to the defendant. The plaintiff was entitled to bring her action until 25 February 1995, so there was no great delay (although the earliest of the actual events had allegedly occurred nearly 20 years previously), and no witness, document or other evidence was lost. The applicant could not be precise about the dates on which the alleged acts occurred, but there was unlikely to be any dispute about the facts of visits by the applicant to the defendant’s property. The applicant’s action would therefore ‘depend on the view that the tribunal of fact takes of the truthfulness of each of the parties’: *ibid*.

76 [2000] QSC 306 (Unreported, White J, 8 September 2000); *aff’d* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001).

77 The Court of Appeal accepted that at least some of the appellant’s complaints of ill-treatment were confirmed by ‘ample evidence’: *Carter* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [5] (McPherson JA), [46], [77] (Atkinson J).

Throughout her life, the applicant suffered numerous adverse influences and incidents apart from the alleged sexual abuse suffered as a child, including: being placed in State care at 14 months of age; having severe speech impediments; enduring regular severe physical assault, emotional cruelty and torture (for example, solitary confinement and being tied to a pole); enduring childhood emotional neglect; surviving regular forced use of sedative drugs as a child; being shifted to a number of foster placements; running away and living on the streets as a teenager; becoming pregnant while homeless; experiencing the death, in 1977, of her boyfriend who was the father of her first child; enduring the death of her youngest child in 1992; enduring a marriage characterised by verbal and emotional abuse; and suffering from longstanding alcohol abuse, beginning after the death of her boyfriend in 1977.

In 1997, she learned of others who had suffered abuse at Neerkol. At this point she complained to police and on 6 August 1997 she consulted her solicitor regarding criminal charges. Her solicitor offered to investigate a civil claim. The Neerkol Orphanage nuns wrote the applicant a letter of apology and regret for their actions and omissions, and, with the first defendant, agreed on a settlement of the claim. This was, therefore, an application for an extension of time to proceed against the State of Queensland and the alleged individual perpetrator. Despite the nuns' admissions and settlement, the State of Queensland did not admit that the events occurred and claimed that a number of witnesses were either dead, unable to be located or very old. The applicant had until 23 March 1981 to begin proceedings. She instituted proceedings on 27 July 1998 – a gap of 17 years and nine months from the expiry of the time limit. The claim was in negligence against the State of Queensland (so requiring proof of damage), and in trespass to the person against the employee.

1 *Discovery of Material Facts*

The applicant claimed recent knowledge of two material facts of a decisive nature that previously were neither known to her nor within her means of knowledge. The first was the knowledge that she suffered psychiatric injuries (chronic depression, among other things, and PTSD, although the judgments are silent about the latter, save for brief mention by the minority judgment). The applicant claimed that she only gained this knowledge on 7 October 1998 after reading a psychiatrist's report dated 29 September 1998. The second fact was the causal connection between the acts and the personal injury. The applicant said that only after reading the report did she appreciate that there was expert evidence indicating that the abuse had caused the psychiatric injuries she had suffered since leaving Neerkol. She had received psychological and psychiatric treatment over many years but, she said, 'there was never any mention or indication of a connection between the abuse [she] suffered and [her] current condition'.⁷⁸ The applicant admitted that she had harboured a hatred for her abusers (but did not ever consider that she was entitled to compensation), and, in her affidavit, had stated that she became angry and aggressive because of the

78 *Carter* [2000] QSC 306 (Unreported, White J, 8 September 2000) [12].

abuse and that this influenced her aggression as a child towards other children. Both at first instance and on appeal the applicant failed.

2 *Judicial Reasoning at Trial*

At first instance, White J appears to have based her refusal of the application on the assumption that the applicant had direct knowledge of the facts necessary to commence an action from the time the limitation period started to run, or at least to commence proceedings at any time between her marriage at the age of 19 – White J does not explain her selection of the significance of this point in the applicant's life – and her complaint to police in 1997. Justice White also found that there was 'nothing in the material to suggest that she could not have [commenced proceedings between 1978 and 1997 and] she would have been advised, had she sought advice, that the damages would be likely to be considerable'.⁷⁹

It is difficult to discern the key elements of judicial reasoning here. The applicant's mere knowledge of the facts of the abuse seems to underpin the finding that she could have brought proceedings before she did. The judgment does not appear to be based on a finding that the applicant should have taken reasonable steps to ascertain her psychiatric injury before she actually did. The fact that there is no discussion or resolution of the reasonable steps issue in the judgment supports this conclusion. Justice White reaches her judgment without addressing the claim of recent discovery of material facts of a decisive character. This is so despite her Honour's acknowledgement that the psychiatric diagnosis was relevant to the extent of the injury. Notwithstanding this acknowledgement, White J found that the applicant, if advised, could have brought the claim earlier based on facts she already knew since, if successful, she would have been likely to obtain significant damages.

This finding is problematic. It appears to be somewhat more arguable with respect to the assault and battery claim, which is actionable without proof of damage – although to bring an action in the 1980s, for example, when institutional abuse was unacknowledged in Queensland, would have presented arguably insurmountable difficulties. However, the more concerning difficulty with this reasoning lies with its application to the negligence claim against the State of Queensland, which requires proof of damage. Until obtaining the psychiatric diagnosis, all the applicant knew was that the acts had been done to her. She did not know that she had psychiatric injuries, nor did she know that there was a connection between the abuse and the injuries. Neither of these matters is discussed in the judgment. Furthermore, without giving any reasoning to justify the finding, White J assumes that the applicant would have had good prospects of success in a claim against the State, at any time between 1978 and 1997, without knowledge of the psychiatric injury, without knowledge of the causal connection between the abuse and the injury (which was unknown to the psychiatric community until at least the late 1980s), and before revelations and

79 Finally, White J stated that there was no suggestion that she was suffering the effects of the abuse to such an extent as to be legally unable to seek appropriate advice: *ibid* [13].

evidence of institutional abuse existed in Queensland. This is a highly dubious assumption.

Furthermore, in *Woodhead v Elbourne* (an assault and battery action), White J held that the psychiatric diagnosis raised the prospect of success from a mere possibility to a real likelihood, but this finding was not made in *Carter*. It is unclear what could distinguish these cases in this respect. Until gaining the material facts of the psychiatric diagnosis and of the causal connection between the abuse and the injury, the applicant in *Carter* had little evidence on which she could commence proceedings, and even less on which she could prove precise damage.

It is similarly difficult to reconcile these two cases on the issue of discovery of material facts. In *Woodhead v Elbourne*, White J found that the applicant did not have all necessary facts on which to commence proceedings until gaining the psychiatric diagnosis and the evidence of the causal link, yet the applicant in *Carter* was found to have all the necessary facts on which to bring an action without these same pieces of evidence. Neither applicant previously possessed the psychiatric diagnosis or the evidence of causal connection. The applicant in *Woodhead v Elbourne* had attended regular counselling for two years, and had received suggestions that the abuse could cause her injuries. The applicant in *Carter* had attended intermittent psychological and psychiatric counselling, but had endured multiple severe adverse influences in her life, and it had never been suggested to her that her sexual abuse may have produced her injuries. A related irreconcilable matter is that in *Carter*, there was no consideration given to the capacity of the psychiatric report to have the same disentangling effect as her Honour found in *Woodhead v Elbourne*. This is curious, since the applicant in *Woodhead v Elbourne* endured far less severe abuse, and had far fewer and less severe adverse influences in her life, than did the applicant in *Carter*.

Evidence of PTSD and avoidance was not referred to in the judgment.

3 *Judicial Reasoning on Appeal*

On appeal, the appellant had to show that the finding that the material facts were within her means of knowledge before reading the psychiatric report in October 1998 was not reasonably open to the Judge on the evidence presented. The majority (McPherson JA, with whom Muir J generally agreed) made several conclusions about direct knowledge, and about the taking of reasonable steps to ascertain material facts, before dismissing the appeal.⁸⁰

First, regarding whether the appellant knew that she suffered from depression, McPherson JA held that before reading the psychiatric diagnosis of depression, the appellant 'was aware that she suffered from a depressed condition'⁸¹ because when she consulted the psychiatrist she reported that at times she felt depressed

80 Both at first instance and in the Court of Appeal by majority, it was held that the long delay produced sufficient prejudice to the State of Queensland to enliven the discretion to refuse the application as well. Curiously, White J would not have barred the proceedings regarding the fourth defendant (the employee alleged to have committed the rapes) by the exercise of discretion regarding fair trial: *ibid* [18]–[22].

81 *Carter* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [12].

and she drank alcohol to ease this depression. This appears to indicate that, for McPherson JA, the fact that the appellant stated that she was, in lay terms, 'depressed' equated with knowledge that she had depression in a psychiatric sense. This finding seems unjustifiable. Knowing that you have depression in a medical sense requires knowledge of the clinical symptoms of depression, and diagnosis of your exhibition of those symptoms. There is substantial authority for the principle that knowledge of symptoms is not knowledge of the injury, sufficient to make time run, until the nature and extent of the injury is ascertained by expert diagnosis.⁸² The appellant clearly did not know that she suffered depression, or, for that matter, any of her other psychiatric injuries, until she received the psychiatric diagnosis.

Second, regarding whether the appellant knew that her injuries were caused by her abuse, McPherson JA refers to the appellant's statement that because of the abuse she suffered, she became an aggressive and angry person, and would assault other children. From this statement McPherson JA concludes that 'even at that early stage of her life, she was herself able to make a connection between her treatment at Neerkol and her mental state or behavioural condition'.⁸³ Justice Muir made a similar finding.⁸⁴ This conclusion also appears to be unjustifiable. The psychiatric report itself states that '[i]t is difficult to know if the applicant's violence towards others at a young age is in direct relation to her experiences of abuse and her own attempts to cope with the abuse'.⁸⁵ Any one or more of several adverse influences in her life until that point could have caused her early aggression, including the fact of being placed in State care, her speech impediment and its consequences, her forced drug use, her physical abuse, her emotional neglect, and her sexual abuse. The appellant could not make her own psychiatric diagnosis as she was not an expert witness. The disentangling effect of a psychiatric diagnosis and opinion about causal factors referred to in *Woodhead v Elbourne*, if appropriate there, is surely appropriate here, since the number and severity of the appellant's adverse influences are greater.

Third, regarding whether the appellant knew as an adult of the causal connection between her childhood suffering and her psychiatric injuries, McPherson JA found that she could or should have discovered this by acting 'reasonably':

If later in her life she did not appreciate that there was a connection between her childhood treatment and the alcoholism and her chronic depression, [these were facts] which she could have found out by taking the reasonable step of asking any psychiatrist whom she consulted. She was aware of her need to consult psychiatrists and psychologists because she had done so evidently more than once before ... [in] August 1998.

It is true that she says that, before then, there was never any mention of a connection between the abuse suffered and her current condition; but it would have

82 *Commonwealth v Dinnison* (1995) 129 ALR 239, 251–2; *Donnelly v Victoria* (Unreported, Supreme Court of Victoria, O'Bryan J, 30 June 1994).

83 *Carter* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [15].

84 See *ibid* [27] ff.

85 *Carter* [2000] QSC 306 (Unreported, White J, 8 September 2000) [14].

been a reasonable step for her on the occasion of those consultations for her to ask what caused her recurring states of depression.⁸⁶

Then, McPherson JA states that the question is not whether there is any expert evidence of her injury and the connection before that date, but whether the appellant realised the possible connection between the two, or had taken reasonable steps to find out if a connection existed. His Honour concludes, in this regard, that ‘one would have expected her to ask what it was that caused the depressive states’.⁸⁷

These findings appear to be made in ignorance of the appellant’s psychiatric and emotional circumstances. The appellant cannot be judged to have had direct knowledge of the causal link between her childhood sexual abuse and her injuries including alcoholism, depression and PTSD as an adult. The most obvious reason is that until the late 1980s, no medical specialist in Australia – let alone any lay person – knew of the causal connection between childhood sexual abuse and psychiatric injury as a child or an adult. Even when this knowledge became known to the medical profession (which is not to say it was known generally), there were any number of the appellant’s adverse influences that alone, or in combination, could have produced these injuries. It is submitted that this matter of her knowledge of the causal connection between childhood abuse and adult injury is a moot point in any event, since she did not know of her psychiatric injuries until receiving the diagnosis.

The problem with the reasoning in this case is that, in fact, it is not reasoned, but more closely resembles mere opinion. Statements such as ‘one would have expected her to ask what it was that caused the depressive states’ are not supported by an analysis of psychiatric or psychological evidence, or substantiated by detailed reference to the psychiatric reports or by reference to the multitude of adverse influences in the applicant’s life. Such statements, rather than being justifiable conclusions made after an exposition of the grounds underpinning them, instead beg necessary questions such as ‘why would one expect her to ask what caused the depressive states?’ and ‘when could one reasonably expect her to ask what caused the depressive states?’. The answers to these questions can only be arrived at after adequate analysis of psychiatric evidence, of the psychiatric reports in the case, and of the appellant’s testimony.

Later in this article I will draw some conclusions about when the legal system may reasonably expect plaintiffs in this context to institute legal proceedings. At this stage, I will make two points about the issue of ‘reasonable steps’ to discover the injury and the causal connection between the abuse and injury. First, it is clearly unjustifiable to require such an investigation by the survivor before the medical evidence of the consequences of child sexual abuse was broadly known by Australian practitioners. This makes it impossible to find that an adult survivor of child abuse should have taken steps to discover the nature, extent and cause of their injury before the 1990s, and certainly before the late 1980s. Second, in determining what constitutes ‘reasonable steps’, at least where the

86 *Carter* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [15].

87 *Ibid* [16].

survivor has PTSD, the avoidance symptom must be a necessary consideration. In *Carter*, the expectation of reasonable conduct was decided in ignorance of the effects of PTSD, including avoidance. This imposes an unjustifiable strictness on the standard of ‘reasonable steps’.

C *Applications 861 and 864 of 2001*

The applicant (S) in *Applications 861 and 864 of 2001*⁸⁸ (*‘Application 864’*) was born on 31 August 1955. She suffered sexual assaults between October 1963 and July 1965 (aged 8–10), inflicted by the respondent schoolteacher, who later became a member of parliament, and who was found guilty of child sexual offences involving this applicant by a criminal court.⁸⁹ The assaults were of a very severe nature,⁹⁰ and included multiple acts of penetrative intercourse. Under the law at the time, the applicant had until 1 March 1978 to begin proceedings.

The applicant made a complaint to police on 28 September 1998 and disclosed the sexual abuse of her by the defendant. After the respondent was criminally convicted on 1 November 2000, the applicant first thought about bringing civil proceedings. She was contacted by a solicitor and decided to proceed. On the solicitor’s advice she consulted a psychiatrist on 27 December 2000, and there, for the first time, disclosed to a medical specialist her treatment by the respondent. She had experienced several adverse life experiences and had sought help from doctors, but had not previously disclosed the abuse to a doctor. The applicant learned of her psychiatric diagnosis, which included PTSD, in early 2001, and instituted proceedings for negligence and assault on 27 February 2001 – a gap of 22 years and 11 months from the expiry of the time limit. She agreed in evidence that in the last 10 years she had heard of cases where people had been sued for sexually abusing children and had been held liable.

1 *Discovery of Material Facts*

(a) *Criminal Conviction*

The applicant claimed that the criminal conviction constituted a material fact of a decisive character, and Botting J accepted this on the basis that the conviction went to proving the tortious acts, and was therefore relevant to the action’s reasonable prospect of success.⁹¹ Significantly, and unlike as in *Carter*, the Court accepted that had the applicant obtained legal advice prior to the

88 Unreported, District Court of Queensland, Botting J, 21 June 2002. Two applications were dealt with together in this judgment; the application discussed here is that of Applicant S, since she suffered from PTSD while the other applicant did not.

89 Bill D’Arcy, a former schoolteacher and Member of Parliament, was convicted on 1 November 2000 of 11 counts of indecently dealing with a girl under 12, 4 counts of indecently dealing with a boy under 14, and 3 counts of rape. On 17 November 2000, he was sentenced to concurrent gaol terms of between 3 and 14 years. His appeal against conviction was dismissed but appeals regarding the sentence were allowed to the extent that three of the terms of imprisonment were reduced to 10 years: *R v D’Arcy* [2001] QCA 325 (Unreported, McMurdo P, McPherson JA and Chesterman J, 11 October 2001).

90 Using Browne’s table: Brown and Herbert, above n 69.

91 *Application 864* (Unreported, District Court of Queensland, Botting J, 21 June 2002) 33–4. See also *Evidence Act 1977* (Qld) s 79.

convictions, she would have been told that it was unwise to proceed since her case was unlikely to succeed without corroborative evidence or fresh complaint, especially against a person of such good repute. The fact of the convictions was obviously not within the applicant's means of knowledge until they occurred, so the reasonable steps argument could not be raised in this respect.

(b) Diagnosis of PTSD

For present purposes, the notable part of this case concerns the applicant's psychiatric diagnosis. The applicant had seen a psychiatrist in late 2000 and for the first time had divulged the abuse to a medical specialist. The psychiatrist's report stated that as a result of the abuse, S had moderately severe PTSD, as well as other conditions. The second material fact relied on was, therefore, her discovery in early 2001 of her psychiatric diagnosis of PTSD: the nature and extent of her injury. Before contacting police on 28 September 1998, the applicant had not disclosed the sexual assaults for several reasons, including feelings of guilt, shame and self-blame, and because 'to tell someone else meant [she] would have had to describe what had occurred to [her] out aloud and, until [she] gave [her] statement to the police, [she] could not bring [herself] to do that as it meant reliving the events'.⁹²

2 Judicial Reasoning

The application was refused,⁹³ but Botting J did not find that these facts were not material. Nor did he find that they were not decisive. Nor did he find that the applicant had direct knowledge of sufficient facts to institute proceedings before she did.

The judgment turned on the finding that these facts were not beyond S's means of knowledge, because by taking reasonable steps the applicant would have discovered the facts about her psychiatric injuries. Demonstrating a certain degree of awareness of the position of adult survivors of child abuse, albeit not informed by psychiatric evidence – there is still no explicit discussion of PTSD and avoidance – Botting J accepted that 'often child victims of sexual abuse will find it very hard, if not impossible, to tell others of their experiences [and] that when such a victim becomes an adult, it will continue to be extremely difficult for such a person to tell a doctor of the abuse'.⁹⁴

92 *Application 864* (Unreported, District Court of Queensland, Botting J, 21 June 2002) 11–12.

93 The defendant accepted that he had been found guilty of crimes but denied that he had committed the acts, and asserted that undue prejudice would be caused to him in the civil action because of the long delay. The Court accepted that, despite the criminal convictions on a higher standard of proof, which facilitated proof of the applicant's civil action, prejudice was caused by the long delay, and the extension was refused. This remarkable result prompted Botting J to concede that in cases such as this, '[i]t may perhaps trouble some that ... our legal system should deny the complainants the right to pursue their violator for compensation by civil action'. However, he went on to say: 'It is not my function to seek to explain, let alone seek to resolve any such apparent incongruity. My task is to apply the law as I understand it to the facts as I find them': *ibid* 49.

94 *Ibid* 36.

However, this did not lead to a finding that for a person with PTSD, taking ‘reasonable steps’ meant taking those steps when the person felt ready to do so. Justice Botting asserted that by the early 1990s there was a general societal awareness of child sexual abuse and generally held medical knowledge about the consequences of child sexual abuse. His Honour referred to the applicant’s awareness since the early 1990s of numerous health problems, and to her action in seeking medical help regarding them. His Honour also gave weight to the fact that she had made a complaint on 28 September 1998 to police, and to her testimony that she had heard of cases where people had been held civilly liable for child sexual abuse. From these findings, Botting J concluded that ‘[w]hilst one can understand her reluctance to raise such matters with her advisors, it seems to me that by the mid-1990s her failure to do so was not reasonable’.⁹⁵

The conclusion about what steps should reasonably be taken, by someone suffering from PTSD, to ascertain knowledge of their injuries is made without guidance from the symptomatology of PTSD, and in particular, without reference to the PTSD sufferer’s avoidance of stimuli associated with the traumatic events – a process explicitly described by the applicant.⁹⁶ Moreover, even if the applicant had have taken ‘reasonable steps’ and been diagnosed in the mid-1990s, and had then sought legal advice, Botting J himself accepted (when considering the effect of the criminal conviction) that she would have been discouraged from proceeding by legal advisors because there was a high probability of failure in the absence of a criminal conviction. The reasoning is therefore illogical. If the applicant had instituted proceedings in the mid-1990s she would have been discouraged from proceeding by legal advisors; and if she had proceeded, she would almost certainly have failed, both in gaining an extension of time, and in proving liability on the balance of probabilities. Yet, now that she has instituted proceedings in 2001, informed by two decisive material facts, she is still bound to fail. On the reasoning of Botting J, at whatever time in her life the applicant instituted proceedings, she would have been unable to gain access to the civil litigation process.

D *Hopkins v Queensland*

The applicant in *Hopkins v Queensland*⁹⁷ was born on 10 November 1974. She allegedly suffered physical, sexual and emotional abuse from December 1984 to October 1987, the sexual abuse allegedly beginning on 10 November 1985 (aged 11), inflicted by her foster father, with whose family she had been placed in December 1984. The judgment does not describe the abuse alleged, so it is impossible to estimate its severity. The applicant had until 10 November 1995 to begin proceedings. She instituted proceedings on 24 July 2003, after learning of her psychiatric diagnosis of PTSD and borderline personality disorder by reading a psychiatric report dated 19 June 2003, and after receiving her departmental file

95 Ibid.

96 See above n 92 and accompanying text.

97 [2004] QDC 21 (Unreported, McGill J, 24 February 2004).

on 25 July 2002 – a gap of seven years and eight months from the expiry of the time limit.

The application was to extend time to allow a claim in damages for negligence or breach of statutory duty against the State of Queensland regarding acts and omissions of officers of the Children's Services Department. The claim was that the applicant suffered psychiatric illness because of the abuse and that this would have been avoided or reduced if she had been removed from the family when she first complained of physical abuse in late 1986. Complaints of sexual abuse appear to have been made to neighbours and the Department earlier in 1986, but nothing eventuated from these: the applicant said that the officer did not believe the claim and forced her to apologise to the foster parents for telling lies. She was removed from foster care in late 1987. The applicant's two sisters remained with the foster family until 1989, when they complained about sexual abuse by the foster father. At this time, the applicant was asked if she had ever been sexually abused by him and she said this had not occurred, but that she had been physically abused. The Court accepted that this statement was 'consistent with her later attitude of not wanting to think about the issue, or do anything to revive her memories of it'.⁹⁸

In early 2002, one of the applicant's sisters and the foster father's own daughter complained to police of physical and sexual abuse by the foster father. The applicant then made a complaint to police in May 2002. It was suggested that she obtain her departmental file and see a lawyer. The applicant obtained her file in July 2002 and instructed solicitors on 11 September 2002 to investigate a claim. Before speaking to the police officer on 11 May 2002, the applicant had not disclosed the sexual abuse. She felt no-one would believe her because she had previously been told that she was lying. She had tried to block out all thoughts of the abuse and get on with her life. She found it difficult to think about the abuse, let alone talk about it. Since the abuse, she had experienced severe depression, was distrustful of people, had nightmares, was quick to anger, was excessively sensitive in relationships, had difficulty maintaining relationships, and had flashbacks triggered by events that reminded her of the abuse. She had not seen a psychiatrist or psychologist before being referred to a psychiatrist in June 2003 by her solicitors for the purpose of getting a psychiatric report.⁹⁹

1 *Discovery of Material Facts*

The psychiatric report of June 2003 diagnosed PTSD, which the applicant had continually suffered from since her abuse.¹⁰⁰ The report said that the applicant would have been aware of the symptoms she was suffering, and because of

98 Ibid [15].

99 Ibid [17]–[18].

100 The report stated that the psychological trauma she suffered would have been greatly reduced if she had been removed when she complained about abuse in 1986. After this she developed severe anger and behavioural problems, and her personality difficulties escalated. The failure to remove her then increased her prospects of developing PTSD and personality disorder, and promoted her feelings of isolation, depression and emotional instability, which became severe and ongoing.

flashbacks involving the traumatic events she would have been aware of the connection between the symptoms and the traumatic events. The report said that a patient in the applicant's position was aware that she was trying to avoid being reminded of the traumatic events, but that this desire was driven by anxiety and depressed moods when she has the reliving experiences – hence the desire to avoid confronting the issue was a product of the psychiatric condition.¹⁰¹

2 Judicial Reasoning

Using similar reasoning to that used by both courts in *Carter*, McGill J held that the psychiatric diagnosis was not a material fact of a decisive character. This decision primarily turned on the finding that, before she discovered her diagnosis, the applicant knew all the relevant facts about her psychiatric injury and its causal link to the Department's failure to remove her before it did. The decision was, therefore, premised on knowledge already possessed by the applicant. The reasonable steps argument, used in *Application 864* and relied on as a secondary reason in *Carter*, was not raised here.

(a) Knowledge of Symptoms and Causal Connection

The decisive finding by McGill J was that

what matters is whether the applicant is aware of her symptoms, not whether she is aware of the particular psychiatric condition that they represent, and whether [the applicant] connects those symptoms with the relevant incident in the past, or whether that connection is only ascertained with the benefit of expert medical advice.¹⁰²

Here, McGill J held that the applicant was aware of her symptoms, simply because of the fact of suffering them, and because she avoided stimuli associated with the abuse.¹⁰³

Like the findings in *Carter*, this decision is problematic because the applicant did not know that her symptoms were those of a psychiatric condition, and the judgment does not demonstrate the contrary. The applicant was simply aware of her feelings, her memories of the abuse, and her ways of behaving. In a lay sense, this knowledge of symptoms does not amount to knowledge of a psychiatric condition or of the extent of it. In a legal sense, by 2004 there was even more authority for the principle that knowledge of symptoms is not knowledge of the injury, sufficient to make time run, until the nature and extent of the injury is ascertained by expert diagnosis.¹⁰⁴ Nor is this knowledge sufficient to enliven any demand that reasonable steps be taken to find out the exact nature of the

101 The applicant also relied on her discovery of her departmental file on 25 July 2002 as a decisive material fact, but this was also rejected. She claimed that only after access to the file did she become aware that departmental employees, responsible for her placement, had information in October 1986 which ought to have caused them to remove her from the family.

102 *Hopkins v Queensland* [2004] QDC 21 (Unreported, McGill J, 24 February 2004) [32].

103 *Ibid* [17]–[18], [33].

104 *Commonwealth v Dinnison* (1995) 129 ALR 239; *Donnelly v Victoria* (Unreported, Supreme Court of Victoria, O'Bryan J, 30 June 1994). See also *SD v Director-General of Community Welfare Services (Vic)* (2001) 27 Fam LR 695, 704.

injury.¹⁰⁵ The applicant, therefore, should not have been deemed to have knowledge of the existence of either the nature or extent of her psychiatric conditions.

The applicant was also held to be aware of the causal connection between the abuse and these symptoms and, by extension, of their relationship to the department's failure to remove her.¹⁰⁶ Without referring to any evidence, McGill J concluded that sufferers of PTSD will always be aware of the particular trauma producing their symptoms and that, because of this, the sufferers' responses will always be identified by the sufferer as an 'obviously unnatural condition which was caused by that [traumatic] event'.¹⁰⁷ This is problematic because it expects psychiatric diagnosis by a person with no medical expertise. What may be diagnosed by a psychiatrist as a product of abuse, and an unnatural condition, may appear to the lay victim as an ordinary result of their life. In addition, the avoidance criterion means that most sufferers of PTSD will likely not spend their time rationally pondering the causal connections between the traumatic events of their life and their current problems.

Even if Justice McGill's conclusion is accurate, made in reliance on the nature of PTSD, the reasoning in this decision is still questionable. Even if the applicant knew of the fact of her symptoms, and knew that her feelings and ways of behaving were a causal consequence of her abuse, this is not the same as knowing that she had a psychiatric disorder resulting from those events. The reasoning simply does not prove that, before reading the psychiatric report, she knew the precise nature or extent of her injury.

(b) Nature and Extent of Injury, and Reasonable Prospect of Success

The psychiatric diagnosis in *Woodhead v Elbourne* was held to raise the prospect of success from a mere possibility to a real likelihood; this was why it was a material fact of a decisive character. Before that diagnosis, there was no medical evidence of injury. This conclusion followed the reasoning in *Sugden v Crawford*. An action instituted without medical proof of the condition suffered as a consequence of the event, particularly where the claimed injury may be received with scepticism – as psychological injuries produced by child abuse may well be¹⁰⁸ – seems to be exactly the sort of case that legal advisors discourage before obtaining a diagnosis of the precise injury.

For McGill J, the diagnosis of PTSD was not a material fact of a decisive character. His Honour reached this conclusion without reference to the definitions of 'material fact' and 'decisive character'. The justification for this conclusion was that what mattered was the applicant's awareness of her symptoms; her ignorance of the medical condition from which she suffered was

105 *Calder v Uzelac* [2003] VSCA 175 (Unreported, Buchanan and Chernov JJA, and Ashley AJA, 14 November 2003) [10] (Buchanan JA); *S v G* [1995] 3 NZLR 681, 687.

106 *Hopkins v Queensland* [2004] QDC 21 (Unreported, McGill J, 24 February 2004) [34], [38].

107 *Ibid* [38].

108 *Tiernan v Tiernan* (Unreported, Supreme Court of Queensland, Byrne J, 22 April 1993) 4.

irrelevant. The condition of PTSD was held to be simply the technical label for the symptoms that she was aware of:

Her condition of PTSD is simply a diagnostic label attached to a particular collection of unpleasant consequences to her of the particular traumatic events in her past ... A person suffering symptoms of PTSD may well not know that that collection of symptoms is appropriately described in technical terms by that particular label, but will certainly know that those symptoms are present.¹⁰⁹

The applicant's ignorance of the severity of her condition, and of her prognosis, was held to be irrelevant as these facts only enlarged the damages.

But even if the plaintiff was aware of her symptoms, and even of the causal link between her symptoms and her abuse, surely the diagnosis of PTSD defined the true nature and extent of her personal injury. Until obtaining that diagnosis, all she knew was that she had these feelings and behaviours, and, possibly, that some or all of them were caused by the sexual abuse inflicted on her. Would she really bring legal action based on such little knowledge? Before the injuries were revealed by the psychiatric report, would legal advisors have recommended instituting proceedings without knowledge of the exact nature and extent of her injuries?

The reasoning of McGill J appears contrived. In this class of case, medical diagnosis of the exact injury is usually treated as a material fact of a decisive character, as in *Woodhead v Elbourne*, *Carter* and *Application 864*. It is a 'material fact' because it is relevant to the nature and extent of the personal injury caused, and it is of a 'decisive character' since a reasonable person knowing of the diagnosis would regard it as evincing a right of action with a reasonable prospect of success and of an award of damages sufficient to justify bringing the action (whereas the survivor's mere knowledge that he or she is depressed, anxious and has nightmares would not be so regarded). The conventional approach, exemplified by *Carter* and *Application 864*, is not to deny the diagnosis of PTSD being material and decisive, but to argue that the applicant had not taken reasonable steps to obtain that diagnosis. This is the terrain on which the argument should have proceeded.

(c) *Disentangling*

Because the applicant in this case was found to know of the causal connection between her abuse and her injury, McGill J distinguished this case from *Woodhead v Elbourne*, where White J held that the psychiatric diagnosis disentangled the applicant's adverse life influences and their consequences. In *Hopkins v Queensland*, despite the applicant having PTSD, and despite evidence of other incidents in the applicant's life of arguably more gravity than those of

109 *Hopkins v Queensland* [2004] QDC 21 (Unreported, McGill J, 24 February 2004) [38].

the applicant in *Woodhead v Elbourne*,¹¹⁰ the possibility that the psychiatric report had this same disentangling effect was not considered. If the argument was relevant in *Woodhead v Elbourne*, why was it not discussed here?

In *Woodhead v Elbourne*, the applicant had spent two years in regular psychological counselling exploring the assaults (and so was aware of her symptoms and, on Justice McGill's reasoning concerning PTSD, of the causal connection), yet this was held to be insufficient to deny the extension. If there was justification for the disentangling argument in *Woodhead v Elbourne* – with that applicant's PTSD, comparatively minor sexual abuse and relatively normal home life – then when compared with the situation of the applicant in *Hopkins v Queensland* – with the same diagnosis of PTSD, arguably more severe abuse, and a less stable home life – there is a strong case for the same argument to be made.

V EVALUATION OF JUDICIAL REASONING

The decision in *Woodhead v Elbourne* stands out from the other three cases. The applicant was suing for assault and battery (actionable without proof of damage). She suffered minor abuse, had PTSD and received extensive counselling, and had three identified minor adverse life influences, but was deemed not to have sufficient knowledge of the material facts to proceed until receiving the psychiatric diagnosis. The reasonable steps argument was not raised. In *Carter*, the applicant was suing for negligence (requiring proof of damage). She suffered very severe abuse, had PTSD and received intermittent counselling, and had multiple adverse life influences. She was deemed to have knowledge of the injuries and the causal connection, and if not, it was decided that she should have taken reasonable steps to find out the nature, extent and cause of her injury before she did. In *Application 864*, the applicant was suing for negligence and for assault. She suffered very severe abuse, had PTSD, and had several adverse life influences. She was denied the application, not on the basis of knowledge already possessed, nor on the basis that the diagnosis was neither material nor decisive, but on the basis that she had not taken reasonable steps to ascertain her diagnosis before she did. In *Hopkins v Queensland*, the applicant was suing for negligence. Her precise sexual abuse was not identified by the judgment. She had PTSD and had multiple adverse life influences. She was deemed by the Court to be aware of her symptoms and their cause, and this finding was used to justify the conclusion that she had sufficient knowledge on which to institute proceedings before she knew of the psychiatric diagnosis.

110 The applicant in *Hopkins v Queensland* had experienced behaviour problems even before being placed with the foster parents. She had been diagnosed with epilepsy in 1982, aged seven, and she had taken an overdose of epilepsy tablets in January 1983 resulting in a massive fit requiring hospitalisation. As well, there was the fact itself of being a child requiring foster care (the reasons behind this are nowhere elaborated). In 1994, the applicant had seen a social worker for counselling about a drug overdose prompted by a custody dispute over her eight month old child. When considering the exercise of discretion, McGill J indicates that many other experiences in the applicant's life were likely sources of psychological consequences: *ibid* [81].

A Knowledge of Symptoms

The decisions based on the applicants' deemed knowledge – *Carter* at first instance, and *Hopkins v Queensland* – do not seem to be justifiable. An applicant's mere awareness that she has been abused, and even her awareness, in lay terms, of the symptoms ('I have flashbacks, I avoid thinking and talking about my abuse, I avoid things that will remind me of the abuse'), should not be sufficient to cause the application to fail and deny access to the courts. Even if an applicant is deemed to be aware of the causal connection between her perceived symptoms and the abuse, this should not be considered direct knowledge of material facts sufficient to deny the application.

The reason for this, despite the finding of White J to the contrary in *Carter* at first instance, is that in these cases, without knowledge of the exact psychiatric injury and its extent, it is unlikely that an action would have a reasonable prospect of success, or result in an award of damages sufficient to commence proceedings. Under the principle in *Sugden v Crawford*, adopted in *Woodhead v Elbourne*, the psychiatric diagnosis raises the prospect of success from a mere possibility to a real likelihood. This is especially so in claims for negligence where proof of injury is required. Without diagnosis of the injuries, where is the proof of damage that creates a reasonable prospect of success, and the promise of sufficient damages to risk the economic and personal costs of litigation? Mere grief, distress, fear or anxiety is insufficient to be actionable damage if it does not amount to psychiatric illness.¹¹¹ As with *Sugden v Crawford*, without medical evidence, claimed injury in these cases is likely to be met with scepticism, and will be unlikely to produce damages sufficient to justify legal proceedings. Claims brought before the late 1990s would have faced the added difficulty of proving liability in a social context where institutional child abuse was undisclosed, and even successful claims for individual child abuse were rare and not widely known.

In contrast, an applicant who knows of her abuse and its causal consequences, and who knows of her exact injury (and who is psychologically capable of initiating and withstanding legal proceedings), should not receive an extension of time one year after possessing all that knowledge. If this reasoning is accepted, the next question becomes: when is it reasonable to expect survivors of child sexual abuse to take reasonable steps to gain this knowledge?

B Taking Reasonable Steps to Ascertain Material Facts

In *Pizer v Ansett Australia*, Thomas JA stated that there is no requirement to take appropriate advice or to ask appropriate questions 'if in all the circumstances it would not be reasonable to expect a reasonable person in the shoes of the

111 *Tame v New South Wales* (2002) 211 CLR 317, 338 (Gaudron J), 382 (Gummow and Kirby JJ), 414–15 (Hayne J); *Wilson v Horne* (1999) 8 Tas R 363; *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 56.

plaintiff to have done so'.¹¹² Is it reasonable to expect an adult survivor of child sexual abuse who has PTSD to take steps to ascertain the nature, extent and cause of their injury? Is it reasonable to expect this given that, in the post-1990s era, there is broader medical recognition of the consequences of child sexual abuse, broader social recognition of the phenomenon of child sexual abuse, and more common knowledge that perpetrators of abuse have been found civilly liable to their victims? Or should the avoidance symptom of PTSD mean that there should not be a standard of reasonable steps imposed, and that each survivor should be able to take those steps when he or she feels individually able to do so?

The avoidance criterion of PTSD underpins an argument that, when it comes to discovering material facts and commencing litigation, at the very least, the survivor of child sexual abuse who has PTSD cannot justifiably be held to the standard of reasonable behaviour expected of individuals who are not victims of such abuse and who do not suffer from the condition. The avoidance criterion must be part of any reasoned deliberation about what can reasonably be expected of a plaintiff in this context.

None of the judgments in the case studies discusses the symptomatology of PTSD, or the avoidance criterion, in detail. The judicial determinations of what is reasonable for a survivor of child sexual abuse with PTSD are either uninformed by psychological evidence, or are inadequately informed, with insufficient examination of the psychiatric literature and of the psychiatric reports presented in the case. Those that turn wholly, or partly, on the reasonable steps issue – *Application 864* and *Carter* on appeal – do not consider this evidence when determining what the applicants in those circumstances should reasonably have done. Justice Botting makes a partial acknowledgment of the applicant's difficulty in discussing the abuse, but does not refer to medical literature or the applicant's psychiatric reports in detail, and reaches a conclusion that imposes an unreasonable demand upon the applicant. Justice McGill, in an aside, accepts that the avoidance symptom (analysed not as a psychiatric symptom but in a lay sense) may be relevant to a judgment about whether it is reasonable for an applicant to seek advice,¹¹³ but this is deemed to be an irrelevant issue. Justice McGill also comments that

the effect of the reluctance to talk or think about the events is not accommodated by the extension provision: the provision is not concerned with the situation where an applicant who was in possession of the important facts simply did not want to pursue the matter, for whatever reason. I do not think that the situation is changed by the fact that the desire not to pursue the issue is in a sense caused by the psychiatric injury itself ... any understandable reluctance of the plaintiff to pursue this matter earlier because of her psychiatric state is not a factor which can be taken into account.¹¹⁴

A distinction needs to be drawn between whether it would be possible for a plaintiff to ascertain the nature, extent and cause of an injury, if the plaintiff were

112 Unreported, Supreme Court of Queensland, Court of Appeal, Pincus and Thomas JJA, and Byrne J, 29 September 1998, [18].

113 *Hopkins v Queensland* [2004] QDC 21 (Unreported, McGill J, 24 February 2004) [44], although his Honour seems to contradict this at [42] so it is difficult to discern exactly what the judgment represents.

114 *Ibid* [41]–[42].

able to consult appropriate experts, and whether a person in the plaintiff's position could reasonably be expected to take steps to ascertain those things. Due to the avoidance criterion of PTSD, it may not be possible for many survivors of child sexual abuse to take these steps until they feel ready to do so; this readiness will differ among individuals and arguably cannot be reduced to a typical model which enables judgments about what is reasonable. This is a context where, as Thomas J states in *W v Attorney-General*,¹¹⁵ the test should be subjective.

Having made a disclosure should not automatically disentitle an applicant from an extension of time. Such an applicant (for example, the applicant in *Application 864*) may not yet be able to engage in a detailed reliving and retelling of the abuse in a receptive atmosphere, let alone in the hostile and adversarial atmosphere of the civil litigation arena. It is one thing to make a simple report of abuse to a police officer or a doctor; it is quite another to relive the full details of the events. In contrast, where a person with PTSD has brought other proceedings requiring a reliving of the abuse, this would produce a finding against that person's requested extension if they had not acted within one year of being able to bring those proceedings.

Judgments that recognise the psychiatric evidence have reached more reasoned conclusions. In *Carter* on appeal, apart from the finding of the recent discovery of a number of decisive material facts which were relevant to the reasonable prospect of success,¹¹⁶ Justice Atkinson's dissent was primarily motivated by an acceptance of psychological evidence and its impact on the survivor's understanding of the acts and their consequences, and on the conduct that could reasonably be demanded of the survivor as a reasonable litigator. Her Honour referred to research about the psychological effects of childhood sexual abuse, and referred to judicial and extra-judicial recognition of the fact that delay in making and acting on disclosures of child sexual abuse is a common and expected consequence of that abuse. Justice Atkinson concluded that '[t]he resultant inability of a victim of childhood sexual abuse to recognise the true nature of the abuse and the damage caused by it is well documented, as is the difficulty for the victim in complaining of the abuse'.¹¹⁷ This reasoning produced the finding that, for survivors of child sexual abuse, the cognitive understanding of the injury, and the standard of 'reasonable' conduct that can justifiably be expected, is different from that of plaintiffs who have not been so abused. In the applicant's case,

[w]hile a reasonably well-adjusted, ordinarily self-confident person might be able to make the requisite [causal] link and be prepared and able to take civil action for the wrongs done to them, typically adults who have survived such abuse are

115 [1999] 2 NZLR 709, 728.

116 *Carter* [2001] QCA 335 (Unreported, McPherson JA, Muir and Atkinson JJ, 24 August 2001) [85].

117 *Ibid* [88].

lacking in self-esteem and remain powerless. This particularly applies to Ms Carter.¹¹⁸

Judgments in the New Zealand Court of Appeal regarding negligence claims brought by adult survivors of child sexual abuse are similarly notable. In *W v Attorney-General*,¹¹⁹ counsel for the defendant argued that the plaintiff had longstanding awareness of her symptoms, and that insufficient weight had been given to this when deciding the reasonable discoverability issue: the plaintiff had also made an accident compensation claim in 1985. The Court stated that

what counsel called a description by EW of her symptoms was in fact her memories of the abuse. The psychiatric evidence [is] that most child abuse victims will ... remember the abuse, although they may try (consciously or subconsciously) to blot it out from their memory. Counsel's argument ... confused knowledge of the event of abuse with knowledge of the link between that event and the dysfunction it is causing in the present life of the victim.¹²⁰

Informed by the psychiatric evidence, this reasoning and outcome is a stark contrast to the knowledge of symptoms argument in *Carter* and *Hopkins v Queensland*.

Even if the outcome in *Woodhead v Elbourne* appears more justifiable than that in *Carter* or *Hopkins v Queensland*, the reasoning is flawed. Sound reasoning for the decision in *Woodhead v Elbourne* could have developed along the following lines: the applicant did not require proof of damage because assault and battery is actionable per se. However, because of PTSD and, in particular, the avoidance symptom, she could not institute proceedings within time – not because she could not take ‘reasonable steps’, before she did, to ascertain her damage (which would only have been relevant to a claim in negligence) but because she could not institute proceedings that would force her to relate and relive her trauma for the purposes of litigation. This reasoning is more properly based, not on the reasonable steps argument but on the concept of legal disability. It is therefore appropriate to turn briefly to the question of disability.

VI CAN PTSD CONSTITUTE A DISABILITY?

This article has argued that PTSD prevents a typical adult survivor of child sexual abuse from being able to discover the necessary facts on which to bring an action and that, even once the individual is in possession of those facts, PTSD prevents the institution of legal proceedings until the individual is able to do so.

118 Ibid [86]. In addition, Atkinson J refused to accept that public policy reasons justified the operation of the delay defence in this context, thinking it ‘plainly unjust’ not to exercise discretion in the applicant’s favour: departmental officers were still alive, as were many former residents and staff, and hundreds of pages of relevant evidence had been disclosed in this action, together with evidence contained in Forde Commission, above n 28. As well, a fiduciary claim needed to be determined based on the same evidence as was relevant to the negligence action against the State of Queensland: *ibid* [93]–[97].

119 [2003] NZCA 150 (Unreported, Blanchard, Tipping, McGrath, Anderson and Glazebrook JJ, 15 July 2003).

120 *Ibid* [25]. See also *S v A-G* [2003] 3 NZLR 450.

The argument has been made in the context of evaluating judicial reasoning about the possession of sufficient knowledge and the taking of reasonable steps.

However, beyond the relevance of PTSD to the reasonable steps issue, the above arguments may amount to a claim that PTSD is an incapacity which constitutes a legal disability. If, because of his or her psychiatric condition, a person cannot ascertain facts necessary to bring litigation, instruct counsel and endure the rigours of the litigation process, this should constitute a disability such that time does not run until the disability ends. A survivor with PTSD may not always be under a disability; if he or she is still able to institute proceedings and make decisions about the action, but requires the diagnosis for the purpose of ascertaining the nature and extent of the injury, then the reasonable steps issue will remain relevant.¹²¹

In Queensland, a person is under a disability if he or she is an infant or of 'unsound mind'.¹²² In *King v Coupland*,¹²³ Macrossan J interpreted soundness of mind as involving, for example, the capacity to properly instruct a solicitor, to exercise reasonable judgment on a possible settlement, and to understand the nature and extent of any available claim. The lack of such capacities was held to be part of a broader concept of mental illness, causing inability to manage affairs in relation to the injury in the way that a reasonable person would. A similar interpretation is now enshrined in statutory definitions of incapacity in New South Wales, Victoria and South Australia.¹²⁴ Since the effect of incapacity is to suspend the running of time, it is quite possible that, if a child is abused and sustains sufficient psychological injury to constitute incapacity, then, if the condition continues, this could effectively prevent time running even after majority. It could even prevent time running in New South Wales and Victoria, despite the new provisions requiring a capable parent to bring the action.

In *Smith v Advanced Electrics*,¹²⁵ where the plaintiff electrician suffered burns and shock when making electrical repairs, Fryberg J (with whom McMurdo P agreed) found that the plaintiff was under a disability due to unsoundness of mind, on the basis of psychiatric evidence of PTSD. Fifteen months after the event, the plaintiff had instituted proceedings against the owner and occupier of the premises in which he was injured, but he had not commenced proceedings against his employer. Four years and eight months after the event, the plaintiff commenced proceedings against the employer, claiming disability since the date

121 See *W v A-G* [1999] 2 NZLR 709, 728 (Thomas J). *Contra Smith v Advanced Electrics* [2003] QCA 432 (Unreported, McMurdo P, Jerrard JA and Fryberg J, 3 October 2003).

122 *Limitation of Actions Act 1974* (Qld) s 5(2).

123 [1981] Qd R 121, 123.

124 'Incapacitated person' is defined as 'a person who is incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action, due to any disease or any impairment of his or her physical or mental condition': *Limitation Act 1969* (NSW) s 50F(4)(a); *Limitation of Actions Act 1958* (Vic) s 27J(4). In South Australia, the definition of disability includes minority and situations where a person 'is subject to a mental deficiency, disease or disorder' which makes the person 'incapable of reasoning or acting rationally in relation to the action': *Limitation of Actions Act 1936* (SA) s 45(2).

125 *Smith v Advanced Electrics* [2003] QCA 432 (Unreported, McMurdo P, Jerrard JA and Fryberg J, 3 October 2003). Justice Jerrard dissented for procedural reasons and recommended that the issue of legal disability be decided on retrial.

of the event. Despite instituting the other proceedings within time, the plaintiff, who had been diagnosed with PTSD existing from the date of the event, was found to be under a legal disability regarding the action against the defendant employer so that time was suspended in relation to that action.

In *Flemming v Gibson*,¹²⁶ where the plaintiff was injured in a car accident, a finding of disability was upheld based on psychiatric evidence of the plaintiff's intellectual deficit and social phobia. Therefore, there is no doubt that psychiatric conditions including, but not limited to PTSD, can constitute legal disabilities sufficient to stop time running. This argument does not yet appear to have been made in Queensland in the context of an adult survivor of child sexual abuse who has sustained PTSD or some other psychiatric condition. It has, however, been used successfully in this context in New Zealand.¹²⁷

VII CONCLUSION

In *Hawkins v Clayton*, Deane J stated that

[i]f a wrongful action ... not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is doubly injured. There can be no acceptable or even sensible justification of a law which provides that to sustain the second injury will preclude the recovery of damages for the first.¹²⁸

The statutory time limit of three years from majority is unjustifiable in child sexual abuse cases, at the very least for survivors who have PTSD, because of their avoidance of stimuli associated with the traumatic events. Judgments in applications to extend time are important because they enable or deny access to justice. If extensions are not granted where appropriate, the applicant is 'doubly injured' and justice miscarries.

If psychiatric evidence of PTSD and avoidance is not appropriately considered by courts in applications to extend time, then unjust results will flow, compounding the initial statutory injustice. This argument may also apply to evidence of other psychiatric conditions having comparable effects on one's ability to institute proceedings. It is acceptable for the law to take time to incorporate advances in knowledge from other disciplines, but it is not acceptable to deny access to justice once that evidence is settled. Evidence of PTSD in child sexual abuse cases needs no more ripening. It is likely that, throughout Australia, more applications to extend time will be made in the wake of the 2004 Commonwealth Senate inquiry into children in institutional care.¹²⁹ It is also possible that an inquiry in South Australia, if eventuating, will have similar

126 [2001] QCA 244 (Unreported, Davies and Thomas JJA, and Jones J, 22 June 2001).

127 *S v A-G* [2003] 3 NZLR 450, 462–3.

128 (1988) 164 CLR 539, 589–90.

129 Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (2004), <http://www.aph.gov.au/senate/committee/clac_ctte/inst_care/report/report.pdf> at 29 October 2004. A second report will be published later in 2004 about abuse of children in foster care.

results.¹³⁰ It is time for Australian legislatures and courts to respond appropriately in this class of case.

130 The Commission of Inquiry (Children in State Care) Bill 2004 (SA) was introduced on 1 July. The *Commission of Inquiry (Children in State Care) Act 2004* (SA) has since been enacted but has not yet commenced.