

CANADA / JUDGMENT

M.(K.) v. M.(H.)

[1992] 3 SCR 6

COURT

Supreme Court of Canada

DECIDED

29 October 1992

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M.(K.) v. M.(H.)

Collection

Supreme Court Judgments

Date

1992-10-29

Report

[1992] 3 SCR 6

Case number

21763

Judges

La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank

On appeal from

Ontario

Subjects

Action

Notes

SCC Case Information: 21763

Decision Content

M.(K.) v. M.(H.), [1992] 3 S.C.R. 6

K.M. Appellant

v.

H.M. Respondent

and

Women's Legal Education and Action Fund Intervener

Indexed as: M.(K.) v. M.(H.)

File No.: 21763.

1991: November 8; 1992: October 29.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Limitation of actions — Torts — Assault and battery — Incest — Woman bringing action against father for damages for incest — Whether or not action limited by Limitations Act — Application of the reasonable discoverability principle — Whether or not incest a separate and distinct tort — Limitations Act, R.S.O. 1980, c. 240, s. 45(1)(j), 47.

Limitation of actions — Equity — Fiduciary relationship — Parent-child — Woman bringing action against father for incest — Whether incest constitutes a breach of fiduciary duty by a parent — Whether limitation period applicable and whether the defence of laches applies.

Limitation of actions — Fraudulent concealment — Incest — Whether a limitation period in an incest action is postponed by defendant's fraudulent concealment.

Appellant was the victim of incest. It began with fondling by her father and, after the age of ten or eleven, involved regular sexual intercourse with him. Her cooperation and silence were elicited by various threats which appellant had good reason to take seriously. She was also rewarded with pop, potato chips and money. In time, respondent gave her the responsibility for initiating sexual contact. Appellant tried several times to disclose this abuse to no avail. At the age of ten or eleven appellant tried to tell her mother and at age sixteen she told a high school guidance counsellor, who referred her to a school psychologist. Her father had her recant both to the psychologist and to a lawyer for the local school board. Other disclosures made after leaving home came to nothing until she finally attended meetings of a self-help group for incest victims and realized that her psychological problems as an adult were caused by the incest. With therapy appellant also came to realize that it was her father rather than herself who was at fault. Professional opinion was that appellant was unable to assess her situation rationally until she entered this therapy.

In 1985, at the age of 28, appellant sued her father for damages arising from the incest and for breach of a parent's fiduciary duty. A jury found that the respondent had sexually assaulted his daughter, and assessed tort damages of \$50,000. The trial judge ruled, however, that the action was barred by s. 45 of the Limitations Act. The Ontario Court of Appeal dismissed an appeal from the trial judge's ruling.

At issue here are: (1) whether incest is a separate and distinct tort not subject to any limitation period; (2) whether incest constitutes a breach of fiduciary duty by a parent not subject to any limitation period; and (3) if a limitation period applies, whether it is postponed by the reasonable discoverability principle.

Held: The appeal should be allowed.

Per La Forest, Gonthier, Cory and Iacobucci JJ.: Incest is both a tortious assault and a breach of fiduciary duty. The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and the plaintiff's injuries. In this case, that discovery occurred only when the appellant entered therapy, and the lawsuit was commenced promptly thereafter. The time for bringing a claim for breach of a fiduciary duty is not limited by statute in Ontario, and this breach therefore stands along with the tort claim as a basis for recovery by the appellant. Incest does not constitute a distinct tort, separate and apart from the intentional tort of assault and battery, and the continuous nature of the tort need not be decided here.

Incest unquestionably constitutes an assault and battery, and based on the jury's verdict, all of the requisite elements of the test were proved. Assault and battery, however, can only serve as a crude legal description of incest; the law must also take account of the unique and complex nature of incestuous abuse and its consequential harms. Various psychological and emotional harms immediately beset the victim of incest, but much of the damage is latent and extremely debilitating. When the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim. A statute of limitations provides little incentive for an incest victim to prosecute his or her action in a timely fashion if the victim has been rendered psychologically incapable of recognizing that a cause of action exists.

The reasonable discoverability rule, as developed in previous decisions of this Court, should be applied and the limitations period should begin to run only when the plaintiff has a substantial awareness of the harm and its likely cause. The causal link between fault and damage is an important fact, essential to the formulation of the right of action, that is often missing in cases of incest. In making this link, the plaintiff must have an awareness of the wrongfulness of the defendant's incestuous conduct. Battery consists of wrongful touching, and the plaintiff must discover the wrongfulness of the contact and its consequential effects before the cause of action accrues. The issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility for his or her childhood abuse, for it is then that the victim realizes the nature of the wrong suffered. As such, responsibility plays a pivotal role in both the genesis

and the cessation of the harms caused by incestuous abuse.

The close connection between therapy and the shifting of responsibility is typical in incest cases and creates a presumption that incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy. If the evidence in a particular case is consistent with the typical features of "post-incest" syndrome, then the presumption will arise. The defendant can refute the presumption by leading evidence showing that the plaintiff appreciated the causal link between the harm and its origin without the benefit of therapy.

In this case, the trial judge did not address the critical issue of when appellant discovered her cause of action, in the sense of having a substantial awareness of the harm and its likely cause, and made no finding that appellant had made the necessary connection at any time before entering therapy. Moreover, the presumption outlined above should be applied here. Appellant was a typical incest survivor, and both presumptively and in fact did not make the causative link between her injuries and childhood history until she received therapeutic assistance. Evidence to the contrary was entirely speculative. In the result, the limitations period did not begin to run against her until she received therapy, and this action was commenced before that period expired.

Appellant argued that the limitation period was also tolled by respondent's fraudulent concealment of her cause of action. This point need not be decided, but some comment on the law of fraudulent concealment is provided for the sake of clarity. Fraudulent concealment (when applicable) will toll the limitation of both common law and equitable claims until the time the plaintiff can reasonably discover her cause of action. Incest cases may be amenable to the application of fraudulent concealment as an answer to a limitations defence; incest takes place in a climate of secrecy, and the victim's silence is attained through various insidious measures which condition the victim to conceal the wrong from herself. The fact that the abuser is a trusted family authority figure in and of itself masks the wrongfulness of the conduct in the child's eyes, thus fraudulently concealing the cause of action.

Incest also constitutes a breach of the fiduciary relationship between parent and child. Ontario's Limitations Act does not limit actions against a fiduciary, although certain equitable doctrines may bar a claim because of delay. The courts below did not consider appellant's claim in equity, but the issue should now be addressed; a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims. The relationship between parent and child is fiduciary in nature, and the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Equity has imposed fiduciary obligations on parents in contexts other than incest, and a duty to refrain from incestuous assaults on one's child is an obvious addition to this category. The three indicia of a fiduciary relationship are all evident in this case, and the non-economic interests of an incest victim are particularly susceptible to protection from the law of equity.

The plaintiff's delay in bringing her claim for breach of fiduciary duty raises three potential hurdles that may bar her claim: limitations legislation, the application of that legislation by analogy, and the equitable doctrine of laches. All of these hurdles, however, are overcome in this case. First Ontario's Limitations Act applies only to a closed list of enumerated causes of action which does not include fiduciary obligations. Equity in some cases will operate by analogy and adopt a statutory limitation period that does not otherwise expressly apply, but this is not such a case. Equity has rarely limited a claim by analogy when the action falls within its exclusive jurisdiction, as in this claim for breach of fiduciary duty. Moreover, even if it is appropriate to draw an analogy to a common law action, the analogy will be governed by the parameters of the equitable doctrine of laches. Finally, any analogy would be nullified by the doctrine of fraudulent concealment. Even if an analogy could be drawn, it would not be fatal to appellant's claim: as with the limitation in tort, a limitation by analogy would be tolled by the operation of the reasonable discoverability principle.

For the respondent to benefit from the defence of laches, acquiescence on the part of the appellant must be demonstrated. Acquiescence in this context consists of delay by a plaintiff despite knowledge that her rights have been violated. Such a delay gives rise to an inference that the plaintiff's rights have been waived. A plaintiff's conduct will be measured objectively: was it reasonable for the plaintiff to have remained ignorant of her legal rights given her knowledge of the facts relevant to a legal claim? In this case, because the appellant mistakenly blamed herself for the incest, it was entirely reasonable for her to have been incapable of appreciating that her rights in equity or in law had been violated. As such, she could not have acquiesced to the respondent's conduct. The doctrine of acquiescence bears a marked similarity to the common law discoverability principle. They share the common requirement of knowledge on the part of the plaintiff. The point of distinction is a residual inquiry in equity: in light of the plaintiff's knowledge, can it reasonably be inferred that the plaintiff has acquiesced to the defendant's conduct? The answer to that question depends on the circumstances of each case, but it would require particularly compelling evidence to demonstrate that an incest victim had "acquiesced" to the sexual assaults made against her.

As for the remedy in this case, the jury has assessed damages in tort, and this award should not be disturbed. An additional remedy in equity should not be awarded in this case, as the policy objectives animating the remedy for this breach of a parent's fiduciary duty are the same as those underlying incestuous sexual assault. Both seek to compensate the victim for her injuries and to punish the wrongdoer.

Per L'Heureux-Dubé J.: The reasons and result of La Forest J. and the comments of McLachlin J. on the nature and quantum of damages associated with a breach of fiduciary duty, as opposed to those underlying the torts of battery and assault, were agreed with.

Per Sopinka J.: The reasons and result of La Forest J. were agreed with except with respect to the creation of a presumption and the shifting of the legal burden of proof.

Resort should not be had to a presumption that a plaintiff typical of the syndrome is unaware of the injury done to her until she undergoes therapy. Firstly, the legal effect of presumptions is varied and uncertain as to its evidentiary effect. Secondly, this presumption will create difficulties for the trial judge and the litigants in that it will reverse the ordinary burden of proof without any justification. It is not clear whether the presumption, which would require determination on a prima facie basis, would create merely an evidentiary burden or a legal burden. The former could be blunted by the defendant's leading some evidence restoring the legal burden of proof to the plaintiff. The latter would reverse the legal burden of proof so that the defendant would bear the risk of non persuasion and is the probable result intended because of the use of the term "refute".

There was no reason to reverse the traditional burden of proof. The basic criteria for the allocation of the burden of proof apply to justify maintaining the legal burden of proof with respect to reasonable discoverability on the plaintiff. It is the plaintiff who is seeking an exemption from the normal operation of the statute of limitations asserting that she was not aware of her cause of action for many years after the statutory period would otherwise have commenced to run. Moreover the plaintiff is in the best position to adduce evidence of her lack of awareness and the defendant is not. The appeal should be disposed of as proposed by La Forest J.

Per McLachlin J.: Agreement with the reasons of La Forest J. was qualified.

A presumption that the plaintiff discovers the cause of action when a therapeutic relationship begins is not necessary. The question is a matter of fact to be determined in all the circumstances. A presumption is appropriate in special circumstances, as where the facts are largely in the possession of the opposing party on an issue, but there were no such circumstances here. Further, there was no magic in the commencement of a therapeutic relationship. The commencement of the relationship is only one of a number of factors which should be considered in determining when the limitation period begins to run.

The award which the jury made was not adequate. The jury assessed damages for the tort of battery and assault, as requested, and the appellant did not appeal from that award and only asked that the jury's award be reinstated. The question of whether the award was appropriate or not did not arise here.

The measure of damages for assault and battery would not necessarily be the same as compensation for breach of fiduciary duty. The wrong encompassed by the torts of battery and assault may be different from the wrong encompassed by the action for a breach of fiduciary duty. Trustees have always been held to highest account in a manner stricter than that applicable to tortfeasors. While agreeing with La Forest J. that where the same policy objectives underlie two different causes of action similar measures of compensation may be appropriate, the policy objectives or the wrong involved in breach of fiduciary duty of this nature are not necessarily the same as those which underlie the torts of battery and assault.

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By Sopinka J.

Referred to: *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481.

By McLachlin J.

Referred to: Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534.

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APPEAL from a judgment of the Ontario Court of Appeal (1989), 18 A.C.W.S. (3d) 490, dismissing an appeal from a judgment of Maloney J. Appeal allowed.

James W. W. Neeb, Q.C., and Shelly J. Harper, for the appellant.

Murray E. McGee, for the respondent.

Elizabeth McIntyre and Nicole Tellier, for the intervener.

//La Forest J.//

The judgment of La Forest, Gonthier, Cory and Iacobucci JJ. was delivered by

La Forest J.—This case concerns the procedural obstacles facing victims of childhood incestuous abuse who attempt to vindicate their rights in a civil action for damages against the perpetrator of the incest. While the problem of incest is not new, it has only recently gained recognition as one of the more serious depredations plaguing Canadian families. Its incidence is alarming and profoundly disturbing. The damages wrought by incest are peculiarly complex and devastating, often manifesting themselves slowly and imperceptibly, so that the victim may only come to realize the harms she (and at times he) has suffered, and their cause, long after the statute of limitations has ostensibly proscribed a civil remedy. It has been said that the statute of limitations remains the primary stumbling block for adult survivors of incest, and this has proved to be the case thus far for the appellant in the present action. The appellant commenced this action for damages occasioned as a result of recurrent sexual assaults between the ages of eight and sixteen when she was twenty-eight. A jury found that the respondent committed sexual assault upon the appellant and assessed damages at \$50,000, but her action was dismissed on the basis of a statute of limitations.

Background

The appellant testified at trial that the abuse began when she was eight when the respondent, her father, asked her about her knowledge of the female genital and breast areas and the male genital area. It progressed to the respondent's touching her body and telling her that "if he played with [her] breasts that they would grow big". Intercourse began when she was between ten and eleven and continued thereafter two or three times a week. Her cooperation and silence were elicited by various means: the respondent reportedly threatened that disclosure would cause her mother to commit suicide, the family would break up, nobody would believe her, and finally that he would kill her. The appellant had good reason to take these threats seriously, inasmuch as she was told that her mother had been hospitalized for attempting to harm her when she was an infant by cutting her wrists; her father pointed out the scars on her wrist as proof. The appellant's mother, who was also named as a defendant in the action, confirmed the incident, but attributed it to depression. The appellant also gave evidence that her mother regularly exhibited irrational

behaviour when she was upset, such as pulling her hair and screaming.

In addition to the threats, the respondent induced his daughter to submit to the abuse silently; he rewarded her with pop, potato chips and money. In time, he gave her the responsibility for initiating sexual contact. She was instructed to leave her bedroom light on when she wanted him, and she complied out of fear that he would turn to her younger sister for gratification. Eventually, she turned on the light because "that was the way for [her] to do it". Her mental process during the act of intercourse was to imagine herself as an inanimate object, for example a door handle or carpet. This process took place against an emotional backdrop of fear — fear of him and fear of discovery.

At the age of ten or eleven the appellant tried to tell her mother what was occurring by obliquely referring to a white substance that appeared on her genital area, but she testified that her mother ignored the complaint. Her mother denied that she was unresponsive, and testified that she gave her daughter a book on menstruation. When the appellant was sixteen she told a high school guidance counsellor that her father was having sex with her. She made the disclosure because she thought she could trust the counsellor and that she would be removed from the home so as to be "safe" from her father. Although she was not certain that having sex with her father was wrong, she knew she did not want him to do it to her any more. She was ultimately referred to a psychologist at the Kitchener-Waterloo Hospital, Dr. McKie, and she recalls that he seemed to disbelieve her complaint since he kept sending her home. His report, dated July 16, 1973, indicates that after interviewing the appellant and respondent separately, both came to see him and told him that "it was all a lie and things are fine now", whereupon no further steps were taken. The appellant does not remember this, but testified that her father brought her to see a lawyer for the local school board and forced her to tell the lawyer that she had been lying about her allegations of incest.

Later that year the appellant left home to live with another family as their babysitter. She told her employer of the incest, but nothing came of it. The following year she obtained employment as a waitress, where she met Steven. They were married a short while later. Her evidence was that she married him so that she could visit her siblings at the family home without being assaulted by the respondent. She harboured the belief that she was protected from further incestuous abuse because she thought her husband now "owned" her and therefore enjoyed an exclusive right to have sex with her, and that he had thus replaced her father as her owner. She also disclosed the incest to her husband, and although there was some conflict in the evidence as to what his response was, the matter went no further.

Over the next few years the appellant had three children and continued to work at a series of low-paying jobs. In the fall of 1982 the appellant and her husband separated because she could no longer tolerate sexual relations with him. She sought counselling for depression and her marital problems in the spring of 1983, and was referred to Dr. Voss, a psychologist at the Kitchener-Waterloo Hospital. He read the hospital file on her consultation with Dr. McKie in 1973, and the subject of incest was accordingly raised during one of their sessions. However, the appellant did not want to talk about the incest and Dr. Voss did not feel it prudent to pursue the subject, in light

of his professional opinion that the requisite degree of trust between patient and therapist had not been established to deal effectively with the problem, and because her current problems did not appear to be directly connected to her history of incest.

Later in 1983 the appellant met Peter, to whom she became engaged to be married. Shortly after they met, she told him of the incestuous abuse because, in her words, she "didn't want to lose him and I wanted him to know right away what I had done". As a result of their discussion, she made enquiries about self-help groups for incest victims and found one in Kitchener. It was during the course of attending meetings of this group in 1984 that the appellant began to recall many of her childhood experiences and to make the connection between that history and her psychological and emotional problems. Until then she believed that her phobias, including a fear of strangers and difficulties coping with her children, were attributable to her own stupidity. She was only able to overcome her overwhelming feelings of guilt for causing the incest once she came to the realization that it was her father who was responsible for the abuse. Beginning in 1985 she has continued in therapy with a marital and family therapist, Ms. Pressman, who also testified at the trial.

In Ms. Pressman's opinion, the appellant would have been unaware of the connection between the incest and her psychological and emotional injuries until she understood that she was not responsible for her childhood abuse, and had assigned the blame to her father. Although she had a constant, if vague, awareness of the fact of incest, the appellant repressed or blocked out much of it and was thus unaware that her level of functioning was related to those earlier events in her life. This repression originally took the form of dissociation, whereby the appellant would imagine herself as some inanimate object during the course of the incestuous assaults. The appellant's later disclosure of the incest to a number of people did not detract from Ms. Pressman's opinion in this regard. Similarly, Dr. Mausberg, a psychiatrist retained by the appellant in contemplation of this litigation, testified that the earlier disclosures indicated some awareness of the incest and its consequences, but it was not until the appellant began therapy that she could make a connection between the two. Although there may at times have been an intellectual awareness of the correlation between cause and effect, the appellant did not have an emotional awareness of the connection. In other words, she was unable to assess her situation rationally. Dr. Mausberg also stressed the great feelings of guilt engendered by the appellant's perceived role in instigating the sexual contact by turning on the light, and how she came to believe that this was part of growing up. Even as she came to realize how untrue this was, she still felt responsible for the abuse. His clinical assessment was that the appellant was suffering major depression resulting from incestuous activity that occurred from childhood into adolescence.

The respondent, on the other hand, retained a psychologist, Dr. Langevin, to conduct an assessment of the appellant. He questioned Dr. Mausberg's findings, but conceded that the appellant had suffered depression at different times in her adult life. He doubted that the appellant would repress an emotional awareness of the incest and its consequences while having an intellectual awareness of it. For him, dissociation would normally entail a lack of awareness of the total cognitive or thought processes and emotions surrounding the anxiety-producing

situation. Dr. Langevin did agree that the best response that can be hoped for in an incest victim is for her to fix responsibility for the abuse on the perpetrator.

In 1985 the appellant sued her father for damages arising from the incest, or in the alternative for the infliction of mental distress. Further damages were claimed for breach of a parent's fiduciary duty to care for and minister to his child. The claims of mental distress and breach of fiduciary duty were also made against the appellant's mother. Before the trial began, counsel for the respondent moved for dismissal of the action on the ground that it was barred by the passage of time pursuant to s. 45 of the Limitations Act, R.S.O. 1980, c. 240. It reads:

45.—(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,

...

(j) an action for assault, battery, wounding or imprisonment, within four years after the cause of action arose;

However, s. 47 of the Act postpones the limitation period if the plaintiff is under a legal disability — i.e., is a minor, mental defective, mental incompetent or of unsound mind, and the appellant had pleaded that she had been of unsound mind until she underwent therapy. It reads:

47. Where a person entitled to bring an action mentioned in section 45 or 46 is at the time the cause of action accrues a minor, mental defective, mental incompetent or of unsound mind, the period within which the action may be brought shall be reckoned from the date when such person became of full age or of sound mind.

The trial judge postponed the limitations motion until the end of the trial, so that it could be decided in light of all the evidence.

The jury found that the respondent had sexually assaulted his daughter, and awarded \$50,000 in damages. However, Maloney J. allowed the respondent's limitations application, and found that action statute-barred. He ruled that the appellant had been of sound mind from the age of majority, in that she had been capable of retaining and instructing counsel. Moreover, assuming that her cause of action only accrued when it was reasonably discoverable, Maloney J. found that from the age of sixteen the appellant was aware that she had been wronged and had suffered adverse effects. Accordingly, her cause of action was reasonably discoverable at that time, and the subsequent lapse of time before commencing the action contravened the Limitations Act.

By endorsement the Ontario Court of Appeal dismissed an appeal of the limitations decision. Leave to appeal to this Court was granted on November 15, 1990 and the Women's Legal Education and Action Fund (LEAF) was subsequently granted leave to intervene.

Issues

Several issues were argued by the appellant, and for the sake of completeness, I will enumerate them all here: (1) incest is a separate and distinct tort which is not subject to any limitation period; (2) incest constitutes a breach of fiduciary duty by a parent and is not subject to any limitation period; (3) if a limitation period applies, the cause of action does not accrue until it is reasonably discoverable; (4) the appellant was of unsound mind pursuant to s. 47 of the Limitations Act; (5) the tort is continuous in nature and the limitation period does not begin to run until the plaintiff is no longer subjected to parental authority and conditioning; and (6) the equitable doctrine of fraudulent concealment operates to postpone the limitation period.

For the reasons that follow, I am of the view that this appeal should be allowed. Incest is both a tortious assault and a breach of fiduciary duty. The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and her injuries. In this case, that discovery took place only when the appellant entered therapy, and the lawsuit was commenced promptly thereafter. The time for bringing a claim for breach of a fiduciary duty is not limited by statute in Ontario, and therefore stands along with the tort claim as a basis for recovery by the appellant. As for the other issues raised by the appellant, I am of the view that incest does not constitute a distinct tort, separate and apart from the intentional tort of assault and battery, and the continuous nature of the tort need not be decided in this case. Similarly, I do not find it necessary to deal with the question of whether the appellant was of unsound mind, although it seems to me that such a pejorative term is inappropriate in this context. Fraudulent concealment was not considered by the courts below, and the respondent argued that additional evidence might have been adduced had the issue been raised in those courts. As such, I make no finding on that issue, but I would not foreclose considering its availability for postponing limitation periods in other cases.

The intervener, LEAF, argued that the Limitations Act, in so far as its provisions bar incest claims, violates s. 15 of the Canadian Charter of Rights and Freedoms. It submits that the provisions bar claims of women in a disproportionate fashion and so constitutes discrimination on the basis of sex. Alternatively, it submits that the Limitations Act should be interpreted in a manner consistent with the Charter in effecting a liberal application of the limitations provisions as they affect incest victims. In view of the result I have arrived at, it is unnecessary to pursue these constitutional arguments.

Recovery in Tort

Incest and the Cause of Action

Incest is defined in the Criminal Code, R.S.C., 1985, c. C-46, s. 155, as follows:

155. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

That definition narrowly prescribes the necessary degree of consanguinity and sexual conduct for the purposes of criminal liability. The civil action may well admit of a wider ambit of relationship and sexual activity. However, it is not necessary for the purposes of this case to stray outside of the criminal law definition, since both elements of consanguinity and sexual intercourse are present in this case.

There is no question, of course, that incest constitutes an assault and battery, which can be compendiously defined as causing another person to apprehend the infliction of immediate harmful or offensive force on her person coupled with the actual infliction of that harmful or offensive force; see Atrens, "Intentional Interference with the Person", in Linden, ed., *Studies in Canadian Tort Law* (1988), at p. 392, and Fridman, *Fridman on Torts* (1990), at pp. 118-19. Although a necessary element of the tort of assault and battery is intention on the part of the defendant with respect to the consequences of his wrongful act, the following dictum of Cartwright J. in *Cook v. Lewis*, [1951] S.C.R. 830, at p. 839, concerning onus of proof of intention has not since been doubted:

. . . where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove "that such trespass was utterly without his fault". In my opinion *Stanley v. Powell* rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part.

In the present case no evidence of the respondent's intention was adduced, since the theory of the defence was that no assault had occurred. I am therefore satisfied, based on the jury's verdict, that all of the requisite elements of assault and battery were proved. The battery is self-evident from the jury's finding of fact, and the evidence going to the respondent's pattern of conduct makes it abundantly clear that the appellant was conditioned to be alert to the circumstances which presaged the battery, such that she had a reasonable apprehension of imminent offensive contact, thereby constituting an assault.

Assault and battery can only serve as a crude legal description of incest, and in order to understand fully the fundamental elements of the tort in this context, it is necessary to examine the unique and complex nature of incestuous abuse and its consequential harms. Considerable expert evidence was presented at trial, and while there was some disagreement concerning the dynamics of incest, there was substantial agreement on the more significant aspects of the phenomenon. Much of the evidence was in accord with the scientific and legal literature on the subject, most of which comes from the United States. For example, Gelinas in her article "The Persisting Effects of Incest" (1983), 46 *Psychiatry* 312, describes the secrecy conditioning that typifies the incestuous relationship. She observes, at pp. 313-14:

It is easy to gain the compliance of a young child by misrepresenting sex as affection or training, by threats and bribes, and by exploiting the child's loyalty, need for affection, desire to please, and especially trust of the parent.

Similarly, Summit in his article "The Child Sexual Abuse Accommodation Syndrome" (1983), 7 Child Abuse & Neglect 177, at p. 181, describes the child victim as entirely dependent on the abusive parent for whatever reality is assigned to the experience. "Of all the inadequate, illogical, self-serving, or self-protective explanations provided by the adult," he states, "the only consistent and meaningful impression gained by the child is one of danger and fearful outcome based on secrecy."

Incest instills feelings of guilt and shame in the child, and these negative connotations become incorporated into the child's self-image; see Finkelhor and Browne, "The Traumatic Impact of Child Sexual Abuse: A Conceptualization" (1985), 55 Amer. J. Orthopsychiat. 530, at p. 532. What is vitally important to recognize at this stage is the sense of responsibility that is conferred on the abused child for both instigating the incestuous activity and maintaining silence to ensure family stability. The child is given the power to destroy the family and the responsibility to keep it together. Dr. Mausberg, in his evidence, thus described it:

Imagine yourself in the role of a child with an abusive father or sibling and you can't tell the secret as to what happens between the two of you because if you reveal it the family will be destroyed, they will all scatter away, your mother might kill herself or suffer an illness of devastating proportions, your father, who is the perpetrator of this, will reject you and not love you. You, as a child of eight or nine or ten, become in one sense a person of authority in this family, you control what is going to happen to you and everyone else.

...

Imagine being a child of eight or nine or ten and facing these awesome powers you have been entrusted with and, at the same time, being so dependent on your father for his love, his money, his shelter, his food, so you can't defy him even if you choose to.

This represents but a sampling of the various psychological and emotional harms that immediately beset the victim of incest. However, much of the damage is latent, only manifesting later in adulthood.

The victim's feelings of guilt, helplessness, isolation and betrayal are reinforced when her attempts at disclosure to persons in authority are met with scepticism, incredulity and anger; see Summit, *supra*, at p. 178, and Finkelhor and Browne, *supra*, at p. 532. With respect to the long-term damages that can normally be expected, the most commonly observed effects are thus summarized by Handler in "Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle" (1987), 15 Fordham Urb. L.J. 709, at pp. 716-17:

The most commonly reported long-term effects suffered by adult victims of incest abuse include depression, self-mutilation and suicidal behavior, eating disorders and sleep disturbances, drug or alcohol abuse, sexual dysfunction, inability to form intimate relationships, tendencies towards promiscuity and prostitution and a vulnerability towards revictimization.

Dr. Langevin, the psychiatrist called by the respondent, conceded that the appellant's clinical pathology might be attributable to incestuous abuse. Her symptoms included depression, hysterical anxiety, family disturbance, suspiciousness, confusion and withdrawal from other people. In short, there is ample evidence that the psychological sequelae from incestuous abuse can be, and in the present case have been, extremely debilitating.

The Limitations Act and Reasonable Discoverability

The appellant argues that her cause of action did not accrue until she went through a form of therapy, because her psychological injuries were largely imperceptible until later in her adult life and thus not reasonably discoverable until she was able to confront her past with the assistance of therapy. During the hearing, counsel for the respondent conceded that the doctrine of reasonable discoverability had application to an action grounded in assault and battery for incest. He submitted, however, that the appellant was aware of her cause of action no later than when she reached the age of majority. In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the Limitations Act, I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales; see Rosenfeld, "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy" (1989), 12 Harv. Women's L.J. 206, at p. 211.

Statutes of limitations have long been said to be statutes of repose; see *Doe on the demise of Count Durore v. Jones* (1791), 4 T.R. 301, 100 E.R. 1031, and *A'Court v. Cross* (1825), 3 Bing. 329, 130 E.R. 540. The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants, for example the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.

The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim; see *Dundee Harbour Trustees v. Dougall* (1852), 1 Macq. 317 (H.L.), and *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 (C.A.). However, it should be borne in mind that in childhood incest cases the relevant evidence will often be "stale" under the most expedient trial process. It may be ten or more years before the plaintiff is no longer under a legal disability by virtue of age, and is thus entitled to sue in her own name; see *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986), at p. 232, per Pearson J. (dissenting). In any event, I am not convinced that in this type of case evidence is automatically made stale

merely by the passage of time. Moreover, the loss of corroborative evidence over time will not normally be a concern in incest cases, since the typical case will involve direct evidence solely from the parties themselves.

Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. This rationale again finds expression in several cases of some antiquity. For example in *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:

The statute is founded upon the wisest policy and is consonant to the municipal law of every country. It stands upon the general principle of public utility. Interest reipublicæ ut sit finis litium, is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right [Emphasis added.]

There are, however, several reasons why this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions.

As I mentioned earlier, many, if not most, of the damages flowing from incestuous abuse remain latent until the victim is well into adulthood. Secondly, and I shall elaborate on this further, when the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim; see DeRose, "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages" (1985), 25 Santa Clara L. Rev. 191, at p. 196. This Court has already taken cognizance of the role that the perpetrator plays in delaying the reporting of incest; see *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091. That case concerned a stay of criminal proceedings, arising out of alleged childhood sexual abuse, commenced after a lengthy delay. Stevenson J., speaking for the Court, observed, at p. 1101:

For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting.

That delay in reporting sexual abuse is a common and expected consequence of that abuse has been recognized in other contexts. In the United States, many states have enacted legislation modifying or extending the limitation period for the prosecution of sexual abuse cases, in recognition of the fact that sexual abuse often goes unreported, and even undiscovered by the complainant, for years. . . . Establishing a judicial statute of limitations would mean that sexual

abusers would be able to take advantage of the failure to report which they themselves, in many cases, caused. This is not a result which we should encourage. There is no place for an arbitrary rule. [Emphasis added.]

Needless to say, a statute of limitations provides little incentive for victims of incest to prosecute their actions in a timely fashion if they have been rendered psychologically incapable of recognizing that a cause of action exists.

Further, one cannot ignore the larger social context that has prevented the problem of incest from coming to the fore. Until recently, powerful taboos surrounding sexual abuse have conspired with the perpetrators of incest to silence victims and maintain a veil of secrecy around the activity. The cogency of these social forces would inevitably discourage victims from coming forward and seeking compensation from their abusers. The English Court of Appeal in *Stubbings v. Webb*, [1991] 3 All E.R. 949 (C.A.), recently acknowledged that the social climate during the mid-1970s was not at all conducive to bringing an action of this nature. That case involved a remarkably similar fact situation to that in the present case. Although the relevant statute of limitations is quite different from the Ontario Act, the following remarks made by Sir Nicolas Browne-Wilkinson, V.-C., at p. 960, are nevertheless telling:

The question is whether, in 1975, the plaintiff acted reasonably in not then suing Mr Webb and Stephen Webb for the serious wrongs alleged to have been done to her. In my judgment it is important not to consider the question by reference to the social habits and conventions of 1991. Over recent years, for the first time civil actions have been brought by victims of adult rape against their assailants. As to actions against child abusers, this is apparently the first case in which the alleged victim has sought to sue her abusers. In the present climate and state of knowledge it would in my judgment be very difficult, if not impossible, for a plaintiff coming of age in the late 1980s to establish that she acted 'reasonably' in not starting proceedings alleging child abuse within three years of attaining her majority. But we are concerned with the reasonableness of the plaintiff's behaviour in the period 1975-78. At that time civil actions based on sexual assaults were unknown in this country. In my judgment, it was accordingly reasonable for the plaintiff not to have considered the injuries done to her sufficiently serious to justify starting proceedings against her adoptive father and brother. In 1975 such proceedings were unthought of and it was therefore reasonable for her not to have started such proceedings.

I would adopt these comments as a reasonable description of the situation in this country at that same time.

The foregoing discussion has examined the policy reasons for limitations from the perspective of fairness to the potential defendant. However this Court has also said that fairness to the plaintiff must also animate a principled approach to determining the accrual of a cause of action. In *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, one of the issues that arose was whether the plaintiff's action was statute-barred by the British Columbia Municipal Act, R.S.B.C. 1960, c. 255, where the plaintiff first became aware of the damage after the one year prescription. Wilson J., writing for the majority, observed that the injustice which statute-bars a claim before the plaintiff

is aware of its existence takes precedence over any difficulty encountered in the investigation of facts many years after the occurrence of the allegedly tortious conduct.

This principle was later adopted in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, where the Court held that the reasonable discoverability rule was as applicable to cases involving professional negligence as it was to actions involving injury to property. Le Dain J. thus articulated the general rule, at p. 224:

. . . a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence

That essentially mirrors the delayed discovery doctrine developed in the United States, where the rationale most often cited is the plaintiff who is "blamelessly ignorant" of his injury; see *Urie v. Thompson*, 337 U.S. 163 (1949).

American courts have also refined the rule to meet different circumstances and harms. In *Raymond v. Eli Lilly & Co.*, 371 A.2d 170 (N.H. 1977), the court set out the gradations of accrual as follows, at p. 172:

There are at least four points at which a tort cause of action may accrue: (1) When the defendant breaches his duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the causal relationship between his harm and the defendant's misconduct.

Kenison C.J. rightly observed that in the typical tort case all of these events occur simultaneously so that the moment of accrual is clear. He also reconciled the apparent conflict in American jurisprudence in which some courts have stated the rule in terms of discoverability of injury while most others have framed the rule in terms of the plaintiff's discovery of the causal relationship between his injury and the defendant's conduct. The former line of cases can be explained on the basis that the relevant injury was of a kind that put the plaintiffs on immediate notice that their rights had been violated. However, many courts have applied the latter rule which requires knowledge of the harm and its likely cause; see for example *Franklin v. Albert*, 411 N.E.2d 458 (Mass. 1980).

Application of the Discoverability Rule to Incest

In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes. I am in complete agreement with Professor Des Rosiers that the causal link between fault and damage is an important fact, essential to the formulation of the right of action, that is so often missing in cases of incest; see "*Les recours des victimes d'inceste et d'agression sexuelle*" to be published in Legrand, ed., *Common law d'un siècle à l'autre* (1992).

What is more, I am satisfied that the weight of scientific evidence establishes that in most cases the victim of incest only comes to an awareness of the connection between fault and damage when she realizes who is truly responsible for her childhood abuse. Presumptively, that awareness will materialize when she receives some form of therapeutic assistance, either professionally or in the general community. I have come to this conclusion after studying the expert evidence in this case and the American jurisprudence which has wrestled with this problem over the past decade. The presumption will, of course, be displaced when the evidence establishes that the victim discovered the harm and its likely cause at some other time.

The psychological manifestations of incest suffered by adult survivors have been the subject of considerable academic study in recent years. Researchers have uncovered behavioural patterns commonly referred to as an "accommodation syndrome" or a "post-incest syndrome"; see Summit, "The Child Sexual Abuse Accommodation Syndrome", *supra*. The academic findings are well summarized by Lamm in "Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule" (1991), 100 Yale L.J. 2189, at pp. 2194-95, in the following passage:

The classic psychological responses to incest trauma are numbing, denial, and amnesia. During the assaults the incest victim typically learns to shut off pain by "dissociating," achieving "altered states of consciousness . . . as if looking on from a distance at the child suffering the abuse." To the extent that this defense mechanism is insufficient, the victim may partially or fully repress her memory of the assaults and the suffering associated with them: "Many, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply do not remember that they were abused at all; or . . . they minimize or deny the effects of the abuse so completely that they cannot associate it with any later consequences." Many victims of incest abuse exhibit signs of Post-Traumatic Stress Disorder ("PTSD"), a condition characterized by avoidance and denial that is associated with survivors of acute traumatic events such as prisoners of war and concentration camp victims. Like others suffering from PTSD, incest victims frequently experience flashbacks and nightmares well into their adulthood.

Experts have also noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder. Additionally, the internalization of the anger and anxiety that the incest victim has not been allowed to express frequently results in a profound self-hatred that causes self-destructive behavior later on: incestuous childhood victimization commonly leads to other abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction.

Finding that the coexistence of these psychological and emotional disorders is unique to and characteristic of incest victims, experts have joined them under the heading "Post-Incest Syndrome". Those suffering from this syndrome will "persistently avoid any situation, such as initiating a lawsuit, that is likely to force them to recall and, therefore, to re-experience the traumas." Although the victim may know that she has psychological problems, the syndrome impedes recognition of the nature and extent of the injuries she has suffered, either because she has completely repressed her memory of the abuse, or because the memories, though not lost,

are too painful to confront directly. Thus, until she can realize that her abuser's behavior caused her psychological harm, the syndrome prevents her from bringing suit. Often it is only through a triggering mechanism, such as psychotherapy, that the victim is able to overcome the psychological blocks and recognize the nexus between her abuser's incestuous conduct and her psychological pain. Such understanding may develop in stages over a period of time during which the incest victim breaks through the layers of denial and repression in a painful process. Typically, full recognition that she has been tortiously injured occurs after the victim has reached majority, long after the wrongful acts were committed. [Emphasis added.]

The key role of professional intervention as a triggering mechanism for uncovering the nexus between fault and damage is the subject of recurring comment in the literature; see Allen, "Tort Remedies for Incestuous Abuse" (1983), 13 *Golden Gate U. L. Rev.* 609, at pp. 630-31, and Nabors, "The Statute of Limitations; A Procedural Stumbling Block in Civil Incestuous Abuse Suits" (1990), 14 *Law & Psychology Rev.* 153. However, even during therapy misplaced feelings of loyalty towards an incestuous parent can elicit "defense of a parent, resistance with concomitant increase in guilt in the patient, or actual flight from treatment"; see Gelinas, "The Persisting Negative Effects of Incest", *supra*, at pp. 328-29.

While there appears to be a consensus on "post-incest syndrome" within the medical community, the American judiciary has been slow to recognize the legal ramifications of this doctrine. However, recent decisions exhibit a tendency to mold the delayed discovery rule to accommodate medical reality. At first, only certain aspects of the syndrome were recognized under the rule, but recent decisions demonstrate a wholehearted acceptance of the doctrine. To make sense of these cases I should note that American courts have divided incest claims involving the delayed discovery rule into two categories: (1) those where the plaintiff concedes that she has always known and remembered the sexual assaults, but that she was unaware that other physical or psychological problems were caused by the abuse; and (2) cases where the plaintiff claims that because of the trauma of the experience she had no recollection of the abuse until shortly before an action was commenced. The courts have in fact adopted a "convenient rubric" of "Type 1" and "Type 2" cases; see *Johnson v. Johnson*, 701 F.Supp. 1363 (N.D Ill. 1988), at p. 1367; *Mary D. v. John D.*, 264 Cal. Rptr. 633 (Cal. App. 6 Dist. 1989), at pp. 636-37. A useful review of the American case law from a Canadian perspective is provided by Professor Des Rosiers, "Limitation Periods and Civil Remedies for Childhood Sexual Abuse" (1992), 9 C.F.L.Q. 43, at pp. 51-56.

The starting point in a review of the American experience must be *Tyson v. Tyson*, *supra*. This 1986 case is apparently the first in which the delayed discovery rule was asserted by an incest victim. There the Supreme Court of Washington by a narrow majority (5-4) refused to apply the rule. According to the preceding taxonomy of incest victims, Ms. Tyson fell into the second category; she claimed to have blocked all memory of her childhood incestuous abuse, which allegedly occurred between the ages of three and eleven, until she entered therapy at the age of twenty-six. The majority ruled that objective, verifiable evidence of the wrongful act and the resulting damage was a prerequisite to any application of the delayed discovery rule. In that case the plaintiff's complaints were entirely "subjective" and would not be made less so by the

testimony of treating psychologists or psychiatrists. Hence, the majority found that a literal reading of the limitations statute struck the proper balance between the evidentiary problems inherent in stale claims and the victim's right to bring an action.

In a vigorous dissent, Pearson J. opined that "objective, verifiable evidence" had never been a necessary condition for the application of the delayed discovery rule; the true test, he stated, was fundamental fairness in balancing the harm of depriving a victim of her remedy against the prejudice suffered by a defendant who is sued on a stale claim. In striking the balance in incest cases, he proffered the traditional factors applied in other delayed discovery cases. First, the plaintiff was unaware of the breach of any duty owed to her by her father; she knew as a child that she did not want the sexual contact with her father, but she could not know that this constituted sexual abuse causing permanent damage until adulthood when she confronted her childhood experiences. Secondly, the father betrayed his child's trust, and the courts cannot ignore the exploitation of a child for sexual gratification. Thirdly, the defendant had sole control over the facts giving rise to his daughter's claim; the abuser always knows his actions are wrongful, but the victim may never realize this.

Pearson J. cited a final factor in applying the delayed discovery rule: the existence of some triggering event that makes the plaintiff aware of the defendant's potential liability. He found that the plaintiff's psychotherapy was such an event, and made the general observation, at p. 235, that "[o]ften it is only through therapy that the victim is able to recognize the causal link between her father's incestuous conduct and her damages from incest trauma". He rebutted the majority's views regarding stale evidence by noting that the earliest a civil claim could have been brought was at the age of majority of the victim, at which point the evidence would already be stale.

A number of decisions since Tyson have preferred Pearson J.'s dissent and have applied the delayed discovery doctrine, at least with respect to Type 2 victims. Initially, in several Type 1 cases, courts refused to apply the rule because the plaintiff had always remembered the abuse. In *DeRose v. Carswell*, 242 Cal. Rptr. 368 (Cal. App. 6 Dist. 1987), the plaintiff alleged that her step-grandfather sexually abused her between the ages of four and eleven, and argued that the discovery rule should apply to her cause of action because she was unable to recognize the causal connection between the abuse and subsequent emotional difficulties, even though she was aware of the assaults (hence, a "Type 1" victim). Brauer J., writing for the court, noted that an assault by definition is perceived as unconsented to and offensive, and causes harm as a matter of law. Since the plaintiff averred that she felt great fear at the time of the assaults and acceded to the defendant's acts owing to her perception of his greater size and strength, she had suffered cognizable and compensable harm at the time, and therefore the delayed discovery rule did not apply. However, the court explicitly left open the possibility that the discovery rule could apply in Type 2 cases, where a plaintiff alleges that she repressed her memories of the sexual assaults. See also *E.W. v. D.C.H.*, 754 P.2d 817 (Mont. 1988); cf. *Lindabury v. Lindabury*, 552 So.2d 1117 (Fla. App. 3 Dist. 1989).

Following this lead, several courts faced with Type 2 claims applied the delayed discovery rule. In the 1988 case of *Johnson v. Johnson*, *supra*, a federal district court recognized the dichotomy between the two classes of plaintiffs, but seemed to suggest that even in Type 1 cases the rule could be applied. In 1989, a California court of appeal developed the dicta from *DeRose*, *supra*, and applied the delayed discovery rule to toll the statute of limitations for a plaintiff who claimed incestuous abuse occurring until the age of five and repression of that memory until entering therapy in adulthood; *Mary D. v. John D.*, *supra*.

The Wisconsin Court of Appeals in *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. App. 1987), broke new ground by applying the rule to a plaintiff who claimed to know of the sexual assault, but was unaware of the causal link between the abusive activity and later psychological and emotional injuries. In *Hammer* the plaintiff alleged that she had been sexually abused by her father on an average of three times a week between the ages of five and fifteen. The abuse was accompanied by threats and assertions that she had caused the incestuous activity and that it was her fault. Disclosure of the abuse to her mother was to no avail, and the plaintiff developed coping mechanisms and symptoms of psychological distress, including shame, embarrassment, guilt, self-blame, denial, depression, and dissociation from her experiences. Although the plaintiff never claimed she had forgotten the period of abuse, and despite harbouring some subjective doubts about the normality of her father's actions, "she had no information to a reasonable probability of the nature of her injuries or the facts with respect to their cause" (at p. 26). Indeed, it was only after the triggering event of her father's seeking custody of her minor sister that the plaintiff began to consider the nexus between the incest and her ongoing psychological problems. At that point she sought psychological counselling and began to understand the past and present impact of her father's abuse.

The court observed that the plaintiff had been misinformed and misled by the authority figure on whom she reasonably relied, and continued, at p. 27:

The policy justification for applying the statute of limitations to protect defendants from "the threat of liability for deeds in the past" is unpersuasive in incestuous abuse cases. . . . Victims of incest have been harmed because of a "most egregious violation of the parent/child relationship." . . . To protect the parent at the expense of the child works an "intolerable perversion of justice." . . . Further, "the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions."

As a matter of law, the court found that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury. However, the court stopped short of deciding whether the facts in the case supported the application of the delayed discovery doctrine, preferring to remit this issue to the trial judge. See also *Doe v. LaBrosse*, 588 A.2d 605 (R.I. 1991).

In a 1989 decision, the Supreme Court of North Dakota upheld a trial judgment applying the delayed discovery rule in what appears to be a Type 1 situation; see *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1987). The Supreme Court agreed with the trial judge who had found that severe

emotional trauma experienced by the plaintiff resulted in her being unable to fully understand or discover her cause of action during the statutory limitations period. Accordingly, the court applied the discovery rule and allowed the action to proceed. In *Osland* the court expressly disapproved the majority judgment in *Tyson*, and declined to follow it. However, courts have been far from unanimous in rejecting the *Tyson* approach. Courts in Washington continue to follow *Tyson*; see *Raymond v. Ingram*, 737 P.2d 314 (Wash. App. 1987), and *Kaiser v. Milliman*, 747 P.2d 1130 (Wash. App. 1988). Courts in some other states also continue to be reluctant to apply the delayed discovery rule in Type 1 cases; see *Whatcott v. Whatcott*, 790 P.2d 578 (Utah App. 1990). Finally, a Nevada decision has followed an approach similar to the majority in *Tyson*, by demanding "clear and convincing evidence" of the sexual assault; see *Petersen v. Bruen*, 792 P.2d 18 (Nev. 1990).

In addition, there is another line of cases that falls outside the emerging typology genre. These cases arise in Michigan, and apply the disability provisions of the limitations statute to prevent tolling. The disability definition includes insanity, and these cases extend insanity to cover memory repression by incest victims; see *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. App. 1988), and *Nicolette v. Carey*, 751 F.Supp. 695 (W. D. Mich. 1990).

A recent case from California appears to reject the dichotomy between Type 1 and Type 2 cases, and suggests a new approach: awareness of the wrongfulness of the defendant's incestuous conduct. In *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Cal. App. 1 Dist. 1990), the plaintiffs brought an action for childhood sexual abuse allegedly suffered at the hands of their foster parents. The court found that the discovery rule for an action based on a parent or parental figure's sexual abuse will postpone the accrual of the cause of action until the plaintiff discovers or ought to have discovered the acts of molestation "and the wrongfulness of the conduct". In that case there were no allegations that the plaintiffs suppressed all memory of their childhood experiences, only that the psychological "blocking mechanisms" prevented them from perceiving the psychological injuries and their causal connection to the defendants' acts.

The court had this to say in respect of the special circumstances attending cases of incestuous abuse, at pp. 608-609:

It has been widely recognized that the shock and confusion engendered by parental molestation, together with the parent's demands for secrecy, may lead a child to deny or block the traumatic events from conscious memory, or to turn the anger and pain inward so that the child blames himself for the events. . . . Even where memory of the events themselves is not suppressed, it may be some time before the victim can face the full impact of the acts.

. . .

As a practical matter a young child has little choice but to repose his or her trust with a parent or parental figure. When such a person abuses that trust, he commits two wrongs, the first by sexually abusing the child, the second by using the child's dependency and innocence to prevent recognition or revelation of the abuse. This may be accomplished by enforcing secrecy around the acts or even by teaching the child that the sexual acts are normal or necessary to the

relationship. As in the professional negligence cases, application of the delayed discovery rule would serve to prevent the molester from using the child's ignorance and trust to conceal the primary tort.

The court distinguished the prevailing California precedent, *DeRose*, supra, on the basis that it had not addressed the central point of whether the plaintiff was aware of the wrongfulness of the defendant's acts. It held that an awareness of wrongdoing is a prerequisite to accrual of the action under the delayed discovery rule.

In my view the approach taken by the court in *Evans v. Eckelman* cuts to the heart of the matter: when does the plaintiff become aware of the wrongful nature of the defendant's acts? Battery consists of wrongful touching, and it is the wrongfulness of the contact and its consequential effects that are the material facts the plaintiff must discover before her cause of action accrues. Much of the expert evidence given at trial in the present case was directed to the question of when the plaintiff, after reaching the age of majority, remembered or became aware of her childhood abuse. There was conflicting evidence as to whether the plaintiff could have an intellectual, but not an emotional awareness of the abuse. To my mind, no useful purpose is served by engaging in this metaphysical debate on the epistemology of discovery. In the end I am satisfied that the issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility for her childhood abuse, for it is then that she realizes the nature of the wrong done to her.

I would note that a similar approach has recently been taken by a Canadian court. In *Gray v. Reeves* (1992), 64 B.C.L.R. (2d) 275 (S.C.), Hall J. concluded that the victim's recognition of the nexus between her injuries and the earlier incest is the point when time should begin to run against the victim. In that case the plaintiff was sexually assaulted by her uncle on approximately fifteen occasions between the ages of four and twelve. She commenced action at the age of thirty, after receiving therapy which identified the true cause of certain psychological problems suffered by the plaintiff during her adult life. This is clearly a "Type 1" case, as the plaintiff always remembered the assaults, had revealed the incestuous abuse to her family, and indeed had fought continuously to have her uncle excluded from family gatherings during her adult life. Nevertheless, the trial judge found as follows, at p. 306:

Here, the plaintiff Ms. Gray knew from a very early age that the assaultive behaviour of her uncle, the defendant, was disgusting to her. She knew at least from the time when she was a teenager that these acts were wrong and she sought to protect younger children from any assaults by the defendant. I am of the view that the evidence in the case discloses that, although the plaintiff was repelled by the assaults, she had no reason to believe and did not believe that she had suffered any material harm, mental or physical, from the assaults. While she had these feelings of revulsion or repugnance to the activities of the defendant concerning herself or others, I am quite unable to find that she was able, until a point in time after the commencement of her therapy with Dr. Way in 1988, to perceive any link between the earlier wrongful conduct of the plaintiff and her depression and inability to establish a satisfactory relationship with a member of the opposite sex.

British Columbia's limitations legislation (Limitation Act, R.S.B.C. 1979, c. 236) is very different from the statute before us in the instant case. It creates a form of statutory reasonable discoverability test, and I note with interest that this legislation emphasizes the importance of professional treatment and advice by stating the test (s. 6(3)) as the knowledge of a reasonable person "having taken the appropriate advice". (The meaning of this provision has most recently been considered by British Columbia's Court of Appeal in *Levitt v. Carr* (1992), 66 B.C.L.R. (2d) 58.) Despite the differences in legislation, the conclusions of Hall J. in *Gray v. Reeves*, at p. 309, are worthy of note:

. . . it seems to me that the hypothetical reasonable person in the shoes of the plaintiff here would not have been acting sensibly in commencing an action until such a person came to appreciate that a wrong or wrongs that had occasioned significant harm to her wellbeing could be established.

This is essentially the test I propose in the instant case.

It is clear from the evidence and the scientific literature that a misapplied sense of responsibility is instrumental in conditioning the child victim to submit silently to the abuse, while at the same time serving as the catalyst for much of the consequential psychological and emotional damages that emerge over time. More importantly, though, it is the redirection of responsibility for the abuse to whom it properly belongs that initiates the therapeutic process, such that the victim becomes aware of the causal connection between her childhood history and resulting injuries. Summit, *supra*, put it succinctly in his article, at p. 183:

Without a consistent therapeutic affirmation of innocence, the victim tends to become filled with self-condemnation and self-hate for somehow inviting and allowing the sexual assaults.

In short, the issue of responsibility plays a pivotal role in both the genesis and the cessation of the harms caused by incestuous abuse.

The close connection between therapy and the shifting of responsibility is typical in incest cases. In my view, this observed phenomenon is sufficient to create a presumption that certain incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy. I base this proposition on the scientific evidence presented at trial and to this Court which confirms a post-incest syndrome amongst incest survivors. If the evidence in a particular case is consistent with the typical features of this syndrome, then the presumption will arise. Of course, it will be open to the defendant to refute the presumption by leading evidence showing that the plaintiff appreciated the causal link between the harm and its origin without the benefit of therapy.

Application to the Present Case

After hearing the evidence, the trial judge concluded that from the age of sixteen the appellant was aware that she had been wronged and had suffered adverse effects. I will not expound on the role of an appellate court when reviewing findings of fact. Here, in my view, the trial judge did

not address himself to the critical issue — i.e., when did the appellant discover her cause of action in the sense of having a substantial awareness of the harm and its likely cause? With respect, the trial judge made no finding that the appellant had made the necessary connection at any time before entering therapy.

In my view, this is a case in which it can be presumed that the nexus between the appellant's injuries and incest was discovered only when the appellant received therapy. The evidence presented at trial shows the appellant to be a typical incest survivor. Her experiences as a child and later in life correspond closely to the symptoms of post-incest syndrome. As a child, she was subjected to the threats and bribes that enforce secrecy on the assaults. Her mental defence mechanism was dissociation, typical in incest cases. Later in life, her attempts at disclosure were met with scepticism, denial and evasion, again a typical feature of post-incest syndrome. As an adult she suffers from depression and difficulty with intimate relationships, which are classic symptoms of the syndrome.

Aside from the presumption available to the appellant, the evidence overwhelmingly indicates that she did not make the causative link between her injuries and childhood history until she received therapeutic assistance, and the evidence proffered to the contrary was entirely speculative. In any event there was no direct evidence to overcome the presumption that the appellant's therapy was the triggering event for discovering her cause of action. As such, the statute of limitations did not begin to run against her until that time, and this action was commenced within all relevant statutory limitation periods. On this basis, together with the reasons which follow, I would allow the appeal and restore the jury's verdict both as to liability and damages.

I cannot leave this topic without adding my voice to the chorus calling for reform in this area of limitations law. I note that a recent consultation draft prepared by the Attorney General of Ontario has proposed the abolition of limitation periods in cases of incestuous sexual assault: A Consultation Draft of the General Limitations Act, s. 18(h), in "Recommendations for a New Limitations Act", report of the Limitations Act Consultation Group. As well, British Columbia has recently amended its Limitation Act to permit survivors of childhood sexual abuse to pursue legal action at any time; see Limitation Amendment Act, 1992, S.B.C. 1992, c. 44. In light of the existing evidence on the nature and extent of the problems faced by incest survivors, these are welcome developments.

Fraudulent Concealment

The appellant raises for the first time in this Court the ground of fraudulent concealment as an alternative basis for postponing the limitations period. The respondent counters that this argument should be rejected because it was not advanced before the trial judge, and because the Court of Appeal declined to add the issue as a ground of appeal. The respondent argues that the Court of Appeal was correct in so deciding for two reasons. First, the trial might have been conducted differently if the allegation of concealment had been put in issue. As well, the respondent agreed to exclude certain evidence from the record both before the Court of Appeal

and in this Court on the basis that fraudulent concealment would not be put in issue.

I share the concern of the Court of Appeal that a fresh issue should not be raised for the first time on appeal unless the evidence at trial can fairly support the appellate court's consideration of that issue. It decided this point in a judgment prior to the hearing on the other issues, and a separate judgment was rendered. That judgment has not been appealed to this Court. Moreover, the appellant's application for leave to appeal does not mention fraudulent concealment as a ground of appeal. Indeed, the respondent received notice of this issue only upon receipt of the appellant's appeal factum. Given the respondent's apparent belief that this issue had been abandoned, it would be unfair to entertain the issue at this stage.

Although fraudulent concealment is not available to the appellant as an independent ground of appeal, it is still open to this Court to consider the factual question of concealment as it relates to both the reasonable discoverability question considered earlier and to the breach of fiduciary duty to be discussed later. To the extent that concealment is relevant to these issues, it is not unfair to the respondent that it be considered at this stage. At trial, once the jury had found as a fact that sexual abuse had occurred, certain evidence on concealment then became relevant to the limitations motion heard by the trial judge, and it was open to the respondent to refute or challenge this evidence at that time. I am referring here in particular to the plaintiff's testimony that her father had never admitted the wrongfulness of his conduct to her, and to Dr. McKie's report showing that the respondent had denied the incest and forced the appellant to lie to Dr. McKie to assist in the concealment.

While not of assistance to the appellant in this instance, the doctrine of fraudulent concealment may impact on limitations questions in other incest cases. For this reason, I propose to comment on the issues argued before us, with a view to clarifying the law. In my view, two doctrinal issues must be resolved. The first concerns the scope of fraudulent concealment. Does it apply only to actions in equity, or can it also assist a plaintiff who seeks to postpone a limitation period at common law? The question is of some importance in incest cases, where the plaintiff may claim both in tort and for breach of a fiduciary duty. The second issue is the meaning of fraudulent concealment, and in particular whether incest cases fall within its compass.

To understand the scope of fraudulent concealment in modern times, it is necessary to delve into its origins. Historically, both common law and equity took account of fraudulent concealment when applying limitation periods. If the plaintiff was unaware of his cause of action owing to the wrong of the defendant, both courts would refuse to allow a limitations defence. I should perhaps draw attention to the fact (more fully discussed later) that limitation periods did not in earlier times in strictness apply to equity. It was not until 1833 that any English statute imposed express limitations on equitable actions; see Halsbury's Laws of England (2nd ed., vol. 20, para. 1041, note (p)). But equity applied them by analogy in certain circumstances. In both courts, the basis for injecting fraudulent concealment into the limitations analysis was the underlying jurisdiction over fraud claimed by both common law and chancery. Fraud was more central to equity's jurisdiction, as says the famous couplet attributed to Sir Thomas More: "Three things are apt to be helpt in Conscience, Fraud, Accident and things of Confidence"; see Meagher, Gummow and

Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984), at p. 326. Not surprisingly then, equity developed fraud well beyond its common law parameters. Inevitably, fraudulent concealment in equity came to be considerably broader in scope than its common law equivalent. Before the fusion of the courts of equity and common law, this disparity created problems in cases where a concurrent remedy was available from either court. The problem is thus explained in Halsbury's, *supra*, para. 771, note (c):

Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), there was a variance between courts of law and courts of equity as to the effect of the fraudulent concealment of the cause of action in those cases where there was a concurrent remedy both at common law and in equity; the courts of common law holding that in spite of such concealment the statute ran from the time when the cause of action arose, except when the concealment was of itself an actionable wrong . . . the courts of equity holding that the statute in such cases ran from the time of discovery only

Thus the application of fraudulent concealment varied depending upon which court entertained the claim. The common law courts would only achieve the same result as in equity in those cases where the concealment itself was actionable fraud. Given the narrow conception of "fraud" at common law, an equivalent result was relatively rare.

After the Judicature Act, the fused courts at first maintained a distinction between equitable and common law fraudulent concealment, but this dichotomy gradually broke down. The sequence of events is well described in Halsbury's, *supra*, vol. 20, para. 771, note (c). It began with *Gibbs v. Guild* (1882), 9 Q.B.D. 59 (C.A.), where it was held that the effect of fusion was to cause the equitable rule to prevail in all cases in which before the Judicature Act there had been a concurrent remedy at common law and equity. This settled the issue for concurrent causes of action, but left uncertain the application of the equitable rule in actions falling solely within common law jurisdiction. However, in a series of later cases the courts moved to the broader conclusion that the equitable rule applied in all cases; see *Armstrong v. Milburn* (1886), 54 L.T. 723 (C.A.); *Oelkers v. Ellis*, [1914] 2 K.B. 139; *Lynn v. Bamber*, [1930] 2 K.B. 72. In *Legh v. Legh* (1930), 143 L.T. 151, Mackinnon J. reviewed this progression of cases, and remarked, at p. 153:

. . . the result of the Judicature Act 1873, s. 24 (sub.-sect. (4) in particular) was that the common law imported the equitable doctrine that where delay had been due not to mere laches on the part of the plaintiff but to the fact that he had been ignorant of the cause of action because of the fraud of the defendant, then the statute would only run against him from the time when he discovered the existence of the cause of action.

An excellent discussion of this history is found in a contemporary text, Brunyate, *Limitation of Actions in Equity*, c. 2; see also Brunyate, "Fraud and the Statutes of Limitations" (1930), 4 Cambridge L.J. 174. These scholarly works trace the shift towards equity's dominant role, although the author expresses reservations about the technical basis for these developments.

Canadian courts wholeheartedly adopted the emerging English position, and in several cases the equitable doctrine was imported into the common law. In *Underwriters' Survey Bureau v. Massie & Renwick Ltd.*, [1938] 2 D.L.R. 31 (Ex. Ct.), Maclean J. considered the English cases and applied

the equitable doctrine in what was clearly an action at law for conversion and copyright infringement. On appeal to this Court, the application of fraudulent concealment was approved (*Massie & Renwick Ltd. v. Underwriters' Survey Bureau*, [1940] S.C.R. 218). A similar approach is revealed in *Pigott v. Nesbitt Thomson & Co.*, [1939] O.R. 66 (C.A.), *aff'd* [1941] S.C.R. 520.

In Canada and England, then, the importation of the equitable doctrine into the common law is settled. I am aware, of course, that there appears to be continuing uncertainty in certain parts of the Commonwealth. In Australia, for example, at least one text suggests that fraudulent concealment remains a purely equitable doctrine with no application to the common law; see *Meagher, Gummow and Lehane*, *supra*, at pp. 746-49. However, as noted, there are no such reservations here. The English and Canadian authorities demonstrate that concealment at common law long ago merged with the substance of equitable concealment. The least that can be said is that it has developed to the point of being consistent with it. Such mingling of law and equity is entirely appropriate, as I argued in a different context in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at pp. 587-88. It is desirable, indeed inevitable, for the two great branches of our judicial law systems to borrow from one another to achieve just and reasonable results and consistency over time.

One final point needs to be added to this historical sketch. In 1939 England's Limitation Act, 1939, 1939 (Eng.), c. 21, codified the existing law of fraudulent concealment, and s. 26 reads as follows:

26. Where, in the case of any action for which a period of limitation is prescribed by this Act . . .

. . .

(b) the right of action is concealed by the fraud of [the defendant or his agent]

. . .

the period of limitation shall not begin to run until the plaintiff has discovered the fraud . . . or could with reasonable diligence have discovered it . . .

Thus in England plaintiffs at common law have since 1939 been entitled by statute to benefit from the equitable doctrine of fraudulent concealment. Similar legislation has been enacted in several Canadian jurisdictions (e.g., s. 6 of Alberta's Limitation of Actions Act, R.S.A. 1980, c. L-15) but not in Ontario. In light of this development, a reading of cases since 1939 must be approached with caution; typically, they speak of "fraudulent concealment" in its statutory sense. As we shall see, however, the English courts have applied the old equitable doctrine in interpreting this new legislation. The current situation in England is thus expressed in *Halsbury's Laws of England*, 4th ed., vol. 28, para. 916, at p. 411:

Before the fusion of courts of law and equity there was a variance between them as to the effect of fraudulent concealment of a cause of action in those cases where there were concurrent remedies at law and in equity; at law the limitation period in personal actions or contract ran from the time when the cause of action arose unless its concealment was an actionable wrong, but in equity time ran only from the date of discovery of a cause of action fraudulently concealed.

After the fusion of the courts of law and equity the equitable doctrine applied in all cases, and it has not been expressly negated by the Limitation Act 1939, although the relevant provisions of that Act substantially supersede the equitable doctrine.

In the result, whether proceeding under a statute like s. 26 of the English Limitation Act, 1939 or under the common law, fraudulent concealment (when applicable) will toll the limitation of either a common law or equitable claim until the time the plaintiff can reasonably discover her cause of action.

There remains the issues of determining the meaning of fraudulent concealment, and its application to cases of incest. In my view, incest cases will often be amenable to the application of fraudulent concealment as an answer to a limitations defence. Incest takes place in a climate of secrecy, and the victim's silence is attained through various insidious measures. As we have seen, these actions by the perpetrator of the incest condition the victim to conceal the wrong from herself. The fact that the abuser is a trusted family authority figure in and of itself masks the wrongfulness of the conduct in the child's eyes, thus fraudulently concealing her cause of action. On this basis, I am satisfied that fraudulent concealment can be applied in incest cases.

The leading modern authority on the meaning of fraudulent concealment is *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), where Lord Evershed, M.R. stated, at p. 249:

It is now clear . . . that the word "fraud" in s. 26(b) of the Limitation Act, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added.]

While stated in the context of statutory "fraud", I have no doubt that this formulation is drawn from the ancient equitable doctrine and is applicable to today's common law concept of fraudulent concealment. I note also that Lord Evershed's formulation has been adopted by this Court; see *Guerin v. The Queen*, [1984] 2 S.C.R. 335. What is clear from *Kitchen* and *Guerin* is that "fraud" in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action.

The factual basis for fraudulent concealment is described in *Halsbury's*, 4th ed., vol. 28, para. 919, at p. 413, in this way:

It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed. [Emphasis added.]

In my view incest falls within the second category outlined in this passage, i.e., concealment arising at the time the right of action arises. As I have stated, it is the very nature of an incestuous assault that tends to conceal its wrongfulness from the victim.

There is an important restriction to the scope of fraudulent concealment, which Halsbury's, 4th ed., vol. 28, para. 919, at p. 413, describes as follows:

In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.

In cases of incest there is, of course, a grievous abuse of a position of confidence. I will have more to say later about the fiduciary nature of the parent-child relationship, but for now it is enough to say that incest is clearly an abuse of a confidential position. As the authorities make clear, incest is really a double wrong — the act of incest itself is followed by an abuse of the child's innocence to prevent recognition or revelation of the abuse; see *Evans v. Eckelman*, *supra*. I should add that given the nature of the concealment in abuse cases, namely, that the abuser compels the complicity of the victim in denying the harm done to her, it may be that the doctrine can operate in a tort as well as fiduciary context to toll the limitation period because of the deliberate attempts at concealment on the part of the abuser.

American authors who have commented on incest and the limitations problem advocate the application of fraudulent concealment in the manner I propose; see DeRose, "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages", *supra*, at pp. 197-99; Handler, "Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle", *supra*, at pp. 722-29; Rosenfeld "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy", *supra*, at pp. 216-19; Salten, "Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy" (1984), 7 *Harv. Women's L.J.* 189, at pp. 208-11. As I understand the American law, fraudulent concealment is there viewed as a sub-set of the larger doctrine of equitable estoppel, by which a person is precluded by his or her own prior conduct from asserting a defence that the person might otherwise have had; see in particular Handler, *supra*, at p. 723. In Canada such a broad application of equitable estoppel has not thus far been recognized, but I would observe that the underlying premise of the American approach is the same as our own: the courts will not allow a limitation period to operate as an instrument of injustice.

Recovery for Breach of Fiduciary Obligation

The appellant argues that incest constitutes not only the tort of assault and battery, but is also a breach of the fiduciary relationship between parent and child. The appellant submits that Ontario's Limitations Act does not apply to fiduciary duties, and as such the plaintiff's delay is no defence to the fiduciary action. I agree. Incest is a breach of both common law and equitable duties, and the latter claim is not foreclosed by the Act. Certain equitable defences may, however, be available to the respondent.

Before turning to these questions in detail, it is useful to first review the history of these proceedings as regards the equitable claim, as it is partially in light of this history that I deem it appropriate to consider the fiduciary question in this case. The appellant's statement of claim seeks damages for incest occasioned as a result of reoccurring sexual assaults. In addition the appellant claims damages for her father's breach of his fiduciary duty to care for and minister to his child. Of course, the proper term for the equitable relief sought would be compensation, but this defect in the pleadings is of no great moment. In the result, the pleadings present neatly compartmentalized concurrent common law and equitable claims.

At trial, the judge remitted to the jury only the factual issue of whether sexual assault was committed, along with the assessment of damages for the tort of sexual assault. The claim for breach of fiduciary duty was not referred to the jury, which was appropriate given s. 121(2) of Ontario's Courts of Justice Act, 1984, S.O. 1984, c. 11, which requires issues of fact and the assessment of damages regarding claims for equitable relief to be tried without a jury. In this case, it was for the trial judge to decide the issue of fiduciary duty; see 447927 Ontario Inc. v. Pizza Pizza Ltd. (1987), 16 C.P.C. (2d) 277 (Ont. H.C.). However, the trial judge did not rule on this question: my review of the trial transcript suggests that the issue was simply overlooked by counsel and by Maloney J. On appeal, the question of fiduciary obligation was apparently argued, but the Court of Appeal does not refer to the issue in its brief endorsement.

Consequently, it is left to this Court to consider the question of fiduciary duty. In my view, the issue must be addressed even though the tort action has survived the limitations defence. It was fully argued by the parties, and there may well be cases where the limitations statute cannot be circumvented but where the fiduciary claim is unaffected by the statute. Moreover, the equitable remedy available to the appellant may vary from the common law award established by the jury. The importance of considering any equitable cause of action has recently been stated by Justice McLachlin in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at pp. 290-91:

These examples underline the importance of treating the consequences of this relationship on the footing of what it is — a fiduciary relationship — rather than forcing it into the ill-fitting molds of contract and tort. Contrary to the conclusion of the court below, characterizing the duty as fiduciary does add something; indeed, without doing so the wrong done to the plaintiff can neither be fully comprehended in law nor adequately compensated in damages. [Emphasis in original.]

In *Norberg*, McLachlin J. and I differed on the path to be followed in upholding recovery. She chose the route of the fiduciary claim whereas I preferred the route afforded by common law tort of battery because in the circumstances of that case there might be difficulties concerning the applicability of fiduciary obligations, an issue I did not find it necessary to decide. I could do this because I did not consider the common law molds to be ill-fitting in that case. Nor, as I will attempt to demonstrate, do I think they are ill-fitting in the present circumstances. Nonetheless, I agree with my colleague that a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims. The point is simply stated by Cooke P. of the New Zealand Court of Appeal in *Mouat v. Boyce*, unreported March 11, 1992, at p. 11: "For breach of these duties, now that common law and equity are mingled the Court has available the full range of remedies, including damages or compensation and restitutionary remedies such as an account of profits. What is appropriate to the particular facts may be granted."

In the present case, the lower courts have not ruled on the question of fiduciary obligation. As such, this Court must assume the role of finder of fact in equity, but in this case that burden poses no difficulty. We have a jury's verdict on the fact of sexual assault, and it is easy enough to apply that finding to the equitable claim. What remains is the legal issue of whether the assaults constitute a breach of fiduciary duty. I turn now to that issue.

Fiduciary Obligation of a Parent

It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Indeed, I can think of few cases that are clearer than this. For obvious reasons society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation. Equity has imposed fiduciary obligations on parents in contexts other than incest, and I see no barrier to the extension of a father's fiduciary obligation to include a duty to refrain from incestuous assaults on his daughter.

Over the past decade, this Court has explored the scope of fiduciary obligations, and we have perhaps reached the point where a "fiduciary principle" can be applied through a well-defined method. The process was started in *Guerin v. The Queen*, *supra*, where Dickson J. (as he then was) found that certain obligations owed by the federal government to an Indian Band were fiduciary in nature. In the course of his reasons, Dickson J. confirmed certain broad principles with respect to fiduciary obligations, at p. 384:

Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

It is sometimes said that the nature of the fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

I would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary. In the present case, however, it is sufficient to say that being a parent comprises a unilateral undertaking that is fiduciary in nature. Equity then imposes a range of obligations coordinate with that undertaking.

The next step in the evolution of the fiduciary principle came with *Frame v. Smith*, [1987] 2 S.C.R. 99. In this case the dissenting judgment of Wilson J. elaborates on the approach established by Dickson J. in *Guerin*. Although the majority held that the remedy of fiduciary obligation did not apply in the circumstances of that case, Wilson J.'s mode of approach was later held to apply in the circumstances that arose in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; see also the concurring reasons in *Canson Enterprises Ltd. v. Boughton & Co.*, *supra*. Recognizing that the categories of fiduciary relationships are not closed, Wilson J. proposed the following approach for their identification, at p. 136:

Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Even a cursory examination of these indicia establishes that a parent must owe fiduciary obligations to his or her child. Parents exercise great power over their children's lives, and make daily decisions that effect their welfare. In this regard, the child is without doubt at the mercy of her parents.

The factual context of *Frame v. Smith* is of some relevance to the present case. The Court was there considering a family law matter, in which a non-custodial parent claimed that his right of access to his children had been frustrated by the custodial parent. The interest purporting to attract the protection of equity was the parent's relationship with his child, but opposing counsel argued that this personal interest fell outside the traditional categories of fiduciary obligation which, it was argued, had the common feature of protecting purely economic interests. Wilson J. rejected this proposition in the following terms, at p. 143:

To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme. In contract law equity recognizes interests beyond the purely economic when, instead of awarding damages in the market value of real estate against a vendor who has wrongfully refused to close, it grants specific performance. Other non-economic interests should also be capable of protection in equity through the imposition of a fiduciary duty. I would hold, therefore, that the appellant's interest in a continuing relationship with his or her child is capable of protection by the imposition of such a duty.

Similarly, the non-economic interests of an incest victim are particularly susceptible to protection from the law of equity.

In *Lac Minerals v. International Corona Resources Ltd.*, *supra*, I suggested a further refinement of the process by which fiduciary relationships could be uncovered. In particular, I identified three senses of the term "fiduciary" in an effort to clarify its import in given situations. The first sense of the term was as used by Wilson J. in *Frame v. Smith*, which I characterized as follows, at pp. 646-47:

There the issue was whether a certain class of relationship, custodial and non-custodial parents, was a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. . . . It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.

It is this first usage of the term "fiduciary" which arises in the present case. The inherent purpose of the family relationship imposes certain obligations on a parent to act in his or her child's best interests, and a presumption of fiduciary obligation arises.

In *Lac Minerals* I stressed the point, which also emerges from *Frame v. Smith*, that the substance of the fiduciary obligation in any given case is not derived from some immutable list of duties attached to a category of relationships. In other words, the duty is not determined by analogy with the "established" heads of fiduciary duty. Rather, the nature of the obligation will vary depending on the factual context of the relationship in which it arises. Recently, I had occasion to return to this point in the context of a doctor-patient relationship in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. I there stated, at p. 149:

In characterizing the physician-patient relationship as "fiduciary", I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as "fiduciary" for some purposes, but not for others.

In certain parent-child contexts, equity has recognized a parental duty to protect the economic interests of his or her child. However, this case law does not limit the range of the obligations that may attach to other aspects of the parent-child relationship.

Canadian cases have recognized the parent-child relationship as a traditional head of fiduciary obligation, albeit in obiter. These include *Follis v. Albemarle TP.*, [1941] 1 D.L.R. 178 (Ont. C.A.); *Henderson v. Johnson* (1956), 5 D.L.R. (2d) 524 (Ont. H.C.), at p. 533, and notably, *Lac Minerals*, supra, at p. 606, per Justice Sopinka. Similarly, academic authorities have placed the relationship in this class; see *Shepherd, The Law of Fiduciaries* (1936), at p. 30. As I earlier suggested, the content of the obligation has most often been determined in the context of contractual relations between a parent and child, where it gives rise to a presumption of undue influence. The extensive case law on this point is cited in *Meagher, Gummow and Lehane, Equity Doctrines and Remedies*, supra, at p. 374. Of course, the intervention of equity will vary when the context changes from that of intra-familial economic relations to the more insidious conduct at issue in this case.

A similar approach can be found in the United States, where a fiduciary parent-child relationship has been judicially recognized to protect the economic interests of the child: see *Menick v. Goldy*, 280 P.2d 844 (Cal. App. 2 Dist. 1955); *Ohio Casualty Insurance Co. v. Mallison*, 354 P.2d 800 (Or. 1960); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d. 557 (N.J. 1970). However, the obligations of a parent go much further, as is evident from the following comments of the Supreme Court of California in *Emery v. Emery*, 289 P.2d 218 (Cal. 1955), at p. 224:

Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions, but that discretion does not include the right wilfully to inflict personal injuries beyond the limits of reasonable parental discipline.

These comments were made in the context of parental immunity from tort actions, but they are equally apposite in describing the fiduciary basis of the obligation. Indeed, the essence of the parental obligation in the present case is simply to refrain from inflicting personal injuries upon one's child.

In *Evans v. Eckelman*, *supra*, the parent's fiduciary obligation as regards incest was considered, and the court there found that an obligation to protect the child's health and well-being was at stake. The court in turn found that the fiduciary nature of the relationship impacted on the application of the delayed discovery rule to the limitations defence at issue in that case. It stated, at p. 608:

Two common themes run through the cases applying the discovery rule of accrual. First, the rule is applied to types of actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries. . . .

Second, courts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed accrual rule. The rule is generally applicable to confidential and fiduciary relationships. . . . The fiduciary relationship carries a duty of full disclosure, and application of the discovery rule "prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure".

Thus the fiduciary nature of the relationship supports a liberal application of the discovery rule. This usage of the fiduciary relationship is supported by American commentators, who advance fiduciary obligation as a justification for a generous application of the delayed discovery rule: DeRose, "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages", *supra*, at pp. 203-208, or as the basis for the doctrine of fraudulent concealment: Hartnett, "Use of a Massachusetts Discovery Rule by Adult Survivors of Father-Daughter Incest" (1990), 24 New Eng. L. Rev. 1243, at pp. 1263-65. See also Jorgenson and Randles, "Time Out: The Statute of Limitations and Fiduciary Theory in Psychotherapist Sexual Misconduct Cases" (1991), 44 Okla. L. Rev. 181.

As in Canada, most American jurisdictions have enacted a general limitations provision that encompasses actions in equity: 54 C.J.S. Limitation of Actions § 36; 51 Am Jur 2d § 83. As such, establishing a breach of fiduciary obligation will not circumvent limitations legislation as conveniently as is the case in Ontario. Indeed, as we shall see, Ontario is relatively unique in this regard. As fiduciary duties are caught by the legislation in most States, the commentaries and court decisions referred to above have restricted themselves to an assessment of the impact of the fiduciary relationship within the statutory limitations model. In this case, of course, we are not so limited.

By way of summary, fiduciary obligation has apparently not been raised in previous incest cases as an independent head of liability. However, it is clear that such an option is available subject to statutory and other limitation defences specific to equitable claims. It is to these defences that I now turn.

Defences

As with the appellant's claim in tort, her delay in bringing the claim for breach of fiduciary duty raises several possible defences. The first is limitations legislation; the second is the application of that legislation by analogy, and finally there is the equitable doctrine of laches. In my view, none of these defences is made out in this case, and the appellant's claim should stand. As will become apparent, many of the factors activating the reasonable discoverability principle in tort are also applicable in assessing these equitable defences. While there is some overlap, there are also different considerations that arise solely in the realm of equity.

Limitations Legislation

Ontario's Limitations Act is one of the few remaining limitations statutes in Canada that is not made applicable to civil actions in general. Such provisions capture any common law or equitable claim, and reference can be made to six provincial statutes in this regard: Limitation Act, R.S.B.C. 1979, c. 236, s. 3(4); Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 4(1)(g); The Limitation of Actions Act, R.S.S. 1978, c. L-15, s. 3(1)(j); Statute of Limitations, R.S.P.E.I. 1988, c. S-7, s. 2(1)(g); The Limitation of Actions Act, R.S.M. 1987, c. L150, s. 2(1)(n); Limitation of Actions Act, R.S.N.B. 1973, c. L-8, s. 6. In Ontario, by contrast, the Act applies only to a closed list of enumerated causes of action. Counsel for both parties have apparently conceded that this list does not include fiduciary obligations, and it is therefore unnecessary to consider this question in great depth. However, some comment on the issue may be helpful in understanding the next defence under consideration, namely, limitation by analogy to the statute.

Section 2 of the Ontario Limitations Act reads as follows:

2. Nothing in this Act interferes with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

This section makes clear that the Act does not exhaust the defences available to a defendant because of the passage of time. Thus, certain actions expressly made subject to the Limitations Act may not yet be out of time under the terms of that statute, but may be precluded by equitable defences that apply notwithstanding the terms of the Act. The section also gives rise to the inference that there is a category of equitable claims not subject to the Act at all, and that the equitable defences survive in those cases. Such is the case here. The Act does not apply to fiduciary obligations, but the respondent may nonetheless argue that the equitable defence of laches is available to the respondent.

Part II of the Act limits certain actions against trustees, and pursuant to s. 42 the Part applies to express or statutory trusts. This obviously does not encompass fiduciary obligations. However, s. 43 defines "trustee" to include a "trustee whose trust arises by construction or implication of law". However, this definition does not include a fiduciary obligation; a trust is a distinct category of equitable obligation. As Dickson J. observed in *Guerin*, *supra*, at pp. 386-87, it is a concept separate and apart from fiduciary relationship, although the two arise from the same equitable source. In *Canson*, *supra*, at p. 578, I commented on this distinction from a remedial perspective. Consistently with this approach, cases considering the scope of the term "trustee" under s. 43 of the Act have limited its application to express or constructive trustees; see *Soar v. Ashwell*, [1893] 2 Q.B. 390 (C.A.); *Taylor v. Davies*, [1920] A.C. 636.

In an abundance of caution, counsel for the appellant cited s. 43(2) of the Act, which has the effect of denying protection to a trustee where the action is based on the trustee's fraudulent breach of trust. This really goes to fraudulent concealment, discussed earlier, and it is unnecessary to consider at this stage because Part II of the Act clearly does not apply to fiduciary relationships.

Statutory Limitation by Analogy

While a breach of fiduciary duty is not expressly limited by Ontario's Limitations Act, can it be said that equity should apply the Act by analogy to bar the appellant's claim? That is, should the limitation period applicable to tortious assault be applied on the fiduciary side because both claims arise out of the same facts? There is a short answer to this question. Having already found that the limitation period was tolled by the reasonable discoverability principle, analogous application of the statute is, of course, not fatal to the appellant's claim in equity. But even apart from this, I think the same result would follow. While there is no doubt that in some cases equity will operate by analogy and adopt a statutory limitation period that does not otherwise expressly apply, in my view this is not such a case. And this for several reasons. First, equity has rarely limited a claim by analogy when a case falls within its exclusive jurisdiction, as in this claim for breach of fiduciary duty. Moreover, even if it is appropriate to analogize from the common law, the analogy will be governed by the parameters of the equitable doctrine of laches. More will be said about laches later when it will become evident that it is of no assistance to the respondent. Finally, any analogy drawn in this case would be nullified by the doctrine of fraudulent concealment.

The concept of limitation by analogy is as old as limitation statutes themselves, and some appreciation of its history is helpful in understanding the true scope of the doctrine. In this regard, Brunyate's *Limitation of Actions in Equity*, *supra*, is again an invaluable source. As he explains, at pp. 1-22, the first English statutes of limitations applied only to actions at common law, and it was only centuries later in 1833 that some equitable actions were so limited; see *Limitation Act, 1623*, (Eng.), 21 Jac. 1, c. 16; *The Real Property Limitation Act, 1833*, (Eng.), 3 & 4 Will. 4, c. 27. In the interim, the chancery courts were often called upon to decide purely legal claims within an equitable proceeding, and a practice evolved whereby the statutes could be

applied even though the proceeding was technically in equity. In the seminal case of *Hovenden v. Annesley* (1806), 2 Sch. & Lef. 607, 9 R.R. 119, at p. 630 and p. 120 respectively, Lord Redesdale explained the practice in this way:

But it is said that courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies: but they are within the spirit and meaning of the statutes, and have always been so considered. I think it is a mistake in point of language, to say that courts of equity act merely by analogy to the statute; § they act in obedience to it. The statute of limitations, applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, & c. Equity, which in all cases follows the law, acts upon legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies: nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law.

In the result, when acting within its auxiliary jurisdiction, equity decided legal claims as an incident of a larger equitable proceeding, or exercised its supervisory jurisdiction, it was compelled to "follow the law" and apply the statutory limitation period.

Over time, Lord Redesdale's remarks were used as the basis for a broader jurisdictional approach to the doctrine of limitation by analogy. Brunyate described the emerging method, at pp. 11-12, of his text:

Suits within the auxiliary jurisdiction of equity are within the very words of the Statute of Limitations so that in applying the statute to them the Court is acting in obedience to it; suits within the concurrent jurisdiction are perhaps within the words of the statute (there is some doubt whether they were included or not); suits within the sole jurisdiction are not within the words of the statute and to them the statute is applied if at all by analogy.

Brunyate criticizes this new approach as a misreading of *Hovenden v. Annesley*, but the approach appears to have survived the Judicature Act. Typical is the often-quoted test established by the House of Lords in *Knox v. Gye* (1872), L.R. 5 H.L. 656, at pp. 674-75:

... where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation.

...

Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords.

In other words, concurrent actions in equity will be subjected by analogy to the limitations statute. However, equity in this instance is not bound to follow the law, and its residual discretion may be employed through the doctrine of laches. Brunyate thus described this distinction, at p. 16:

Thus the substantial difference between cases where the Court acts in obedience to a Statute of Limitations and cases where it acts by analogy with the statute is that in the former the limitation is peremptory whereas in the latter it is part of the law of laches.

Today, the doctrine retains certain remnants of its old jurisdictional foundations, even though the distinction between the exclusive, concurrent and auxiliary jurisdictions is now technically obsolete. Fortunately the notion of acting in "obedience" to the statute appears to have fallen into disfavour; see Halsbury's Law of England, 4th ed., vol. 16, para. 934, at p. 837, notes 2 and 3; Meagher, Gummow and Lehane, *supra*, at p. 744. I have grave doubts about the continuing vitality of this aspect of the doctrine, for it seems distinctly inequitable for a court of conscience to be compelled to apply by inference or analogy a statutory provision that takes no account of the justice of each case.

The surviving authorities maintain a blurred distinction between concurrent and exclusive actions in equity. From the outset it has been difficult to maintain a principled distinction, since even some early cases arising solely in equity were subjected to the limitations period; see Brunyate, *supra*, at p. 20. Nonetheless, it is appropriate to view concurrent actions as being most susceptible to the analogy doctrine; after all, these actions have historical roots in the common law. At the same time actions arising solely in equity will rarely be comparable to a common law analogue.

The present case involves a breach of fiduciary duty, which falls solely within the realm of equity. As such, it is not in my view readily amenable to limitation by analogy to some common law action. However, even if an analogy could be drawn that is not to say that it must be applied. As I noted earlier, equity retains a residual discretion on this point, which is the point of distinction from acting in obedience to the statute. In this respect the analogy takes on the character of laches, a point explicitly recognized by Brunyate. A more detailed consideration of laches follows, but for now it is enough to note the following proposition advanced by Brunyate, *supra*, at p. 17:

Where a Court of Equity is applying the statute as part of the law of laches it may reasonably allow any exceptions that are allowed in the law of laches. . . . since delay by a plaintiff who has been ignorant of his right of action will not amount to laches, we should expect that, where the Court is acting by analogy to the statute, time will not run until the plaintiff is aware of his right of action.

This reasoning would appear to be the basis of the judgment in *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319 (C.A.).

In a similar vein, any analogy that might be drawn in this case is also refuted by the respondent's fraudulent concealment of the appellant's cause of action. I have already discussed fraudulent concealment as a discrete response to the limitations problem in incest cases, and held that it was not procedurally available for that purpose in this case. Here, however, I do not raise fraudulent concealment to counter the express application of the statute, but in relation to the analogy doctrine. In my view it would be unfair to consider the analogy without at the same time considering all possible responses to it. In this case, the evidence overwhelmingly suggests that the respondent's incestuous conduct, together with his later acts of concealment, were sufficient to constitute fraudulent concealment. In the result, any analogous limitation period applicable to this case will be tolled by this concealment.

Laches

Historically, statutes of limitation did not apply to equitable claims, and as such courts of equity developed their own limitation defences. Limitation by analogy was one of these, but the more important development was the defence of laches. While laches must be considered here as in any delayed equitable claim, in my view it does not afford the respondent redress.

The leading authority on laches would appear to be *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, in which the doctrine is explained as follows, at pp. 239-40:

. . . the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

This explanation was approved by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218 (H.L.), where, after quoting the above passage, he comments, at pp. 1279-80:

I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is

inherent in the nature of the inquiry.

In turn, this formulation has been applied by this Court; see *Canada Trust Co. v. Lloyd*, [1968] S.C.R. 300; *Blundon v. Storm*, [1972] S.C.R. 135.

The rule developed in *Lindsay* is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of laches in general is found in *Meagher, Gummow and Lehane*, *supra*, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:

It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb. . . .

Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

In this case, there is no question of the respondent's "altering his position" because of the appellant's delay. Such considerations obviously do not arise in a case such as this. Further, there is nothing about the delay's here rendering further prosecution of the case unreasonable. Therefore, if laches is to bar the appellant's claim, it must be because of acquiescence, the first branch of the *Lindsay* rule.

Acquiescence is a fluid term, susceptible to various meanings depending upon the context in which it is used. *Meagher, Gummow and Lehane*, *supra*, at pp. 765-66, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches — after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived. This, of course, is the meaning of acquiescence relevant to this appeal. The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant's position in reliance on the plaintiff's inaction.

As the primary and secondary definitions of acquiescence suggest, an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this Court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616, at p. 670. In

other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.

It is interesting to observe that in practical terms the inquiry under the heading of acquiescence comes very close to the approach one takes to the reasonable discoverability rule in tort. As we have seen, the latter focuses on more than mere knowledge of the tortious acts — the plaintiff must also know of the wrongfulness of those acts. This is essentially the same as knowing that a legal claim is possible. That the considerations under law and equity are similar is hardly surprising, and is a laudable development given the similar policy imperatives that drive both inquiries.

In the present case, was it reasonable for the appellant to know the facts of her abuse and yet be unable to determine that her father was in the wrong and that a suit in equity could be launched? I believe that in the circumstances of the typical incest survivor the failure to know that one has been wronged is entirely reasonable. I have already discussed the medical evidence which indicates a post-incest syndrome of denial, memory repression, and self-guilt. The very existence of this syndrome is evidence that the reasonable incest survivor is incapable of appreciating her rights in equity or in law, and as such is incapable of acquiescing in the conduct that has breached those rights.

As is now apparent, the considerations outlined in detail under the common law discoverability doctrine must also be considered under the rubric of acquiescence. However, I would not wish to be taken as suggesting that an inquiry under the common law will reach the same result as in equity in every case. Rather, there is an important distinction between the two that has not yet been considered. As I have stated, both doctrines share the common requirement of knowledge on the part of the plaintiff. However, a consequence of that knowledge is that the reasonable discoverability inquiry is at an end, and the statutory limitations period begins to run. In equity, however, there is a residual inquiry: in light of the plaintiff's knowledge, can it reasonably be inferred that the plaintiff has acquiesced in the defendant's conduct? That question depends on the circumstances of each case, but in my view it would require particularly compelling evidence to demonstrate that an incest victim had "acquiesced" in the sexual assaults made against her. In this case I need not consider this second inquiry, as the appellant did not have real knowledge of the wrongfulness of the respondent's conduct until shortly before commencing this action. However, I see nothing in the facts of this case to suggest that the appellant truly acquiesced in her father's abuse.

Remedies

The jury in this case found that the respondent had sexually assaulted the appellant, and assessed general damages of \$10,000 and punitive damages of \$40,000. Though the punitive damages are within the general range of such awards, the general damages seem rather low. The jury, however, had the whole matter before it, and its award should not lightly be disturbed. At all events, the quantum was not disputed on this appeal. However, as I have found that a breach of fiduciary duty has also occurred, it raises the issue whether some additional remedy in equity is

necessary to compensate the appellant fully and properly.

Recently, I have had occasion to consider the relationship between equitable and common law remedies, and in particular compensation for breach of fiduciary obligation; see *Canson Enterprises Ltd. v. Boughton & Co*, supra. In equity there is no capacity to award damages, but the remedy of compensation has evolved. The distinction between damages and compensation is often slight, and as I noted in *Canson*, the courts have tended to merge the principles of law and equity when necessary to achieve a just remedy. There I was speaking of the relationship between remedies for tortious misstatement and breach of fiduciary duty, but the underlying principles are equally applicable in this case. Of particular relevance are my comments beginning at p. 581, and particularly the following passages at pp. 581 and 586-87 respectively:

The truth is that barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.

...

Only when there are different policy objectives should equity engage in its well-known flexibility to achieve a different and fairer result. The foundation of the obligation sought to be enforced . . . is "the trust or confidence reposed by one and accepted by the other or the assumption to act for the one by that other." That being so, it would be odd if a different result followed solely on the manner in which one framed an identical claim. What is required is a measure of rationalization.

The question in this appeal is whether there are different policy objectives animating the breach of a parent's fiduciary duty as compared with incestuous sexual assault. In my view, the underlying objectives are the same. Both seek to compensate the victim for her injuries and to punish the wrongdoer. The jury award of general damages was made with full knowledge of the injuries suffered by the appellant and her rehabilitative needs. The same concerns would apply in assessing equitable compensation, and as such I would decline to provide any additional compensation for the breach of fiduciary obligation. The punitive damages award should also not be varied in equity. Of course, equitable compensation to punish the gravity of a defendant's conduct is available on the same basis as the common law remedy of punitive damages; see *Aquaculture Corp. v. New Zealand Green Mussel Co.*, [1990] 3 N.Z.L.R. 299, at p. 301.

In the result, I am of the view that the jury award of \$50,000 is an appropriate remedy for both the equitable and the common law claims.

Disposition

For the foregoing reasons, I would allow the appeal, set aside the judgment of the trial judge and order that judgment be entered in favour of the appellant in the amount of \$50,000.

//L'Heureux-Dubé//

The following are the reasons delivered by

L'Heureux-Dubé J.—Although I agree with Justice McLachlin's comments as regards the remedies, i.e., the nature and quantum of damages associated with a breach of fiduciary duty as opposed to those which underlie the torts of battery and assault, a question which, as she notes, is not before us, I fully agree with Justice La Forest's reasons and I concur in the result.

//Sopinka J.//

The following are the reasons delivered by

Sopinka J.—I agree with the result reached by my colleague Justice La Forest and with his reasons with one exception. I would not resort to the use of a presumption that a plaintiff who is typical of the syndrome is unaware of the injury done to her until she undergoes therapy. There are two reasons for this position. The first is based on the inadvisability, in general, of using presumptions because of the uncertainty as to their legal effect. The second rests on the difficulties which this presumption will create for the trial judge and the litigants in a case of this kind.

In McCormick on Evidence, 3rd ed., the author states at p. 965 that "presumption is the slipperiest member of the family of legal terms, except its first cousin the burden of proof." The reason for this is that the evidentiary effect of the many different types of presumptions is so varied that their use almost invariably leads to confusion. It is usually preferable to define the legal result sought to be achieved instead of using a label that will mislead rather than define.

My colleague provides a partial definition of the evidentiary effect of the presumption of awareness that he advocates but I am of the opinion that it will create difficulties in the conduct of a trial and reverse the ordinary burden of proof without any justification. The presumption proposed would arise when the evidence shows that the plaintiff displays features consistent with those that are typically associated with the syndrome. This would require a determination at least on a prima facie basis. Upon this determination being made it would be presumed that the plaintiff was unaware of the elements of her cause of action until she had the benefit of therapy. The defendant would be able to refute this presumption by leading evidence. Presumably from that point on the legal burden of proof is restored to the plaintiff. It is not clear whether this creates an evidentiary burden merely, or a legal burden. The former would only require the defendant to lead some evidence tending to blunt the presumption while the latter would reverse the legal burden of proof so that the defendant would bear the risk of non persuasion. I would conclude that the latter is the result intended by reason of the use of the term "refute".

Apart from the practical problem of shifting the legal burden of proof on the basis of an assessment of the evidence in the middle of a trial, I question the justification for reversing the legal burden of proof from the plaintiff to the defendant in respect of the issue of reasonable discoverability. The rationale for the rule that the burden of proof rests with the plaintiff is two-fold: first the legal burden is generally imposed on the party who asserts a proposition. Secondly, the legal burden with respect to an issue is placed on the party who is in the best position to

prove the issue. Since the plaintiff is presumed to know her case and the defendant does not, the burden rests with the plaintiff to prove the elements of the cause of action. The legal burden may be reversed, however if the rationale for its allocation is absent. See for example *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481.

The basic criteria for the allocation of the burden of proof apply to justify maintaining the legal burden of proof with respect to reasonable discoverability on the plaintiff. It is the plaintiff who is seeking an exemption from the normal operation of the statute of limitations asserting that she was not aware of her cause of action for many years after the statutory period would otherwise have commenced to run. Moreover the plaintiff is in the best position to adduce evidence of her lack of awareness and the defendant is not. The lack of awareness will be established largely on the basis of the plaintiff's own testimony bolstered by the evidence of experts whose testimony will likewise depend on personal information supplied by the plaintiff. In most of these cases the defendant will have ceased all contact with the plaintiff for many years and have no knowledge of the plaintiff's circumstances during that period. Moreover, the definition of awareness which my colleague adopts is highly subjective and the second rationale for the allocation of the burden of proof applies a fortiori. I, therefore, see no reason to reverse the traditional burden of proof in this case. In other respects, however, I fully agree with the reasons of my colleague and would dispose of the appeal as he proposes.

//McLachlin J.//

The following are the reasons delivered by

McLachlin J.—I agree with the reasons of my colleague Justice La Forest, subject to the following comments.

I would question whether it is necessary to introduce the notion of a presumption of the plaintiff's discovering a cause of action when a therapeutic relationship begins (pp. 000 and 000). First, I would prefer to leave the question as a matter of fact to be determined in all the circumstances. A presumption is appropriate in special circumstances, as where the facts are largely in the possession of the opposing party on an issue. I see no such circumstances here. Second, I see no magic in the commencement of a therapeutic relationship. In particular, I am concerned that some incest survivors may not discover their cause of action until after lengthy therapy or several therapeutic relationships, and that such a presumption might inure to their disadvantage. I would prefer to view the commencement of the relationship as one of a number of factors which should be considered in determining when the limitation period begins to run.

Third, I would not wish to be taken as sharing the view that the award which the jury made was adequate. The jury was asked only to assess damages for the tort of battery and assault. It did so, and the appellant has not appealed from that award, asking only that the jury's award be reinstated. In these circumstances the question of whether the award was appropriate or not does not arise on this appeal. I would dispose of the appeal as proposed by La Forest J., but on the ground that the question of the quantum of the award was not before us.

Having said that, I add that were I to enter on the matter of the quantum of damages, I would find myself unable to agree that the measure of damages for battery and assault would necessarily be the same as compensation for breach of fiduciary duty. As I see it, the question is whether the wrong encompassed by the cause of action is the same. The wrong encompassed by the torts of battery and assault may be different from the wrong encompassed by the action for a breach of fiduciary duty. The latter encompasses damage to the trust relationship, for example, which the former does not. The action for breach of fiduciary duty may also be more concerned with imposing a measure which will deter future breaches; as I noted in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at pp. 587-88, trustees have always been held to highest account in a manner stricter than that applicable to tortfeasors. In short, while agreeing with my colleague that where the same policy objectives underlie two different causes of action similar measures of compensation may be appropriate (pp. 000-000), I would not conclude that the policy objectives or the wrong involved in breach of fiduciary duty of this nature are necessarily the same as those which underlie the torts of battery and assault.

Subject to these observations, I concur in the reasons of La Forest J.

Appeal allowed.

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Prepared on 25 October 2026 · Esheria