Balancing the Statute of Limitations and the Discovery Rule: Some Victims of Incestuous Abuse are Denied Access to Washington Courts—*Tyson v. Tyson*

I. INTRODUCTION

The Washington Supreme Court, in *Tyson v. Tyson*,[1] recently rendered a decision that will have a profound effect on many victims of repeated incestuous abuse. In *Tyson*, the plaintiff alleged that the defendant, her father, committed acts of sexual molestation constituting assault, battery, outrage, and negligent infliction of emotional distress when she was between the ages of three and eleven years old.

The plaintiff reached the statutory age of majority on April 20, 1975. She filed the complaint against her father in August 1983, eight years after the commencement of the statute of limitations period and more than five years after its expiration. The plaintiff asserted that her total mental blockage of the fact that she was sexually abused; she had no memory of the events until she entered therapy one year before filing her complaint.

The court considered the issue of whether the discovery rule, which tolls the statute of limitations until the plaintiff discovers or reasonably should have discovered a cause of action, should apply to intentional torts. The intentional tort in this case was past sexual abuse, which the victim had blocked from conscious memory during the duration of the statute of limitations.[2] In a five to four opinion, the court answered in the negative.

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1. 107 Wash. 2d 72, 727 P.2d 226 (1986). Although the victims of incest can be both female and male children, the use of pronoun "she" for the victim and "he" for the abuser in this article reflects that the majority of reported incest cases involve female children and male abusers. *See infra* note 5.

2. Tyson v. Tyson, No. 51908-1 (W.D. Wash. Aug. 8, 1983). Defendant, plaintiff's father, brought a motion for summary judgment arguing, primarily, that the claim was barred by the statute of limitations. The plaintiff responded that the discovery rule delays the accrual of the cause of action, thus, the claim was not time barred. The District Court stayed its ruling pending certification of the issue to the Washington Supreme Court since the issue of whether the discovery rule should apply to claims of this kind is one of state law.

The court's decision in *Tyson* is significant for two reasons. The issue of applying the discovery rule to incest abuse cases was one of first impression in Washington,[3] and the Washington Supreme Court was the first state supreme court to even consider the issue.[4] The Washington court was given the opportunity to provide court access to many incest victims who are unable to bring suit against their offenders—their parents, step-parents, or other relatives.[5]

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3. There are two other cases in Washington in which the application of the discovery rule was considered. In Gordon v. Williams, No. 82-2-0213-0 (Wash. Super. Ct., Snohomish County, June 4, 1983), a twenty five year old incest victim filed suit against her father seeking damages for incestuous assault, sexual battery and outrage. The suit was filed five years after the last instance of sexual abuse and three years after the applicable statute of limitations had expired.

The defendant in *Gordon* moved for summary judgment on the grounds that the statute of limitations barred recovery. The trial court held that the discovery rule did apply. In addition, the court ruled that it was for the trier of fact to determine whether the plaintiff began her action in a timely manner.

The defendant then petitioned the Washington Supreme Court for discretionary review of the trial court ruling. The defendant's petition was denied.

More recently, in Raymond v. Ingram, No. 83-2-14718-2 (Wash. Super. Ct., King County, October 1985), the plaintiff who alleged sexual assault against her grandfather (suit against the grandmother for negligence was dropped), was awarded $81,000 by a jury. The assault had occurred in 1981, so that the suit was timely filed and came within the statute of limitations. However, like the plaintiff in *Tyson*, the plaintiff in *Raymond* had blocked out the memory of earlier abuse by her grandfather from the age of four through fifteen. The 1981 assault triggered her memory, and she has since suffered from recurring nightmares, chronic insomnia, digestive disorders, marital distress and is in therapy.

4. Although legal commentators have focused on the issue of incestuous abuse and have argued for the use of the discovery rule, no other state supreme court has ruled on the issue. *See generally* Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191 (1985); Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609 (1983).

In 1984, the Court of Appeal of California, in Newlander v. Newlander, No. C-319-815 (Cal. App. Dept. 2 Super. Ct. 1984), considered and rejected the creation of a separate tort of incest as an equitable exception to the statute of limitations. The proposal to create a tort of incest has been supported by one commentator in Comment, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L. JOURNAL 189 (1984) (hereinafter *Statute of Limitations in Civil Incest Suits*).

5. The overwhelming majority of incest cases involve female children and their fathers. Incestuous abuse of boys appears to be less pervasive, perhaps due to underreporting. J. HERMAN-LEWIS, & L. HIRSCHMAN, FATHER-DAUGHTER INCEST 14 (1981) (hereinafter HERMAN-LEWIS & HIRSCHMAN); R. SUMMIT, *Beyond Belief: The Reluctant Discovery of Incest*, WOMEN'S SEXUAL EXPERIENCE 127, 128 n.1 (1982) (hereinafter SUMMIT).

The American Psychological Association estimates that 25% of incest cases involve fathers and daughters, 25% involve step-fathers and step-daughters, while the remaining 50% includes adoptive fathers, grandfathers, brothers, half-brothers, uncles, and cousins. Brozan, "Helping to Heal the Scars Left by Incest," N. Y. Times, Jan. 9,

Incest is a crime in Washington as it is in every state.[6] Few incest cases are reported,[7] and still fewer cases are prosecuted.[8] Since many incest victims repress or bury deep within their subconscious mind the memory of the incestuous abuse,[9] they are unaware of the harm done to them until they are adults. At that time, the incest victim can pursue a civil action for damages against the offending parent.[10] However, although tort remedies exist, the statute of limitations remains an obstacle that prevents many victims from gaining access to the

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1984, at B2, col. 6 (hereinafter Brozan); *see also Statute of Limitations in Civil Incest Suits*, *supra* note 4, at 189.

6. Bienen, "The Incest Statutes," reprinted in HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 221-59 (Chart of criminal incest statutes on state-by-state basis).

The incest statute in Washington, WASH. REV. CODE § 9A.64.020 states:

> Incest. (1) A person is guilty of incest in the first degree if he engages in sexual intercourse with a person whom he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or half blood.
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> (2) A person is guilty of incest in the second degree if he engages in sexual contact with a person whom he knows to be related to him, either legitimately or illegimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.
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> (3) As used in this section, "descendant" includes stepchildren and adopted children under eighteen years of age.
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> (4) As used in this section, "sexual contact" has the same meaning as in the WASH. REV. CODE § 9A.44.100(2).
>
> (5) As used in this section, "sexual intercourse" has the same meaning as in WASH. REV. CODE § 9A.44.010(1).
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> (6) Incest in the first degree is a class B felony.
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> (7) Incest in the second degree is a class C felony.

7. In a telephone interview with Jim Teverbaugh, Director of the Governor's Council on Child Abuse, Washington (November 6, 1985), Mr. Teverbaugh stated that the number of reported incest cases is unknown, for they are included within the category of child sexual abuse. In 1984, 9,487 cases of child sexual abuse were reported. From January to May 1985, 4,546 new child sexual abuse cases were reported. Mr. Teverbaugh speculated that there are still a number of sexual abuse cases unreported. He noted that these cases show shifting figures. Five years ago 4% or 5% of all child abuse cases reported were sexual abuse cases. In 1985, the percentage increased to 24.8%.

8. Statistics for 1985 from the Office of the King County Prosecuting Attorney, Sexual Assault Unit, show that in King County, Washington, of the 403 complaints of familial sexual abuse of children under the age of eighteen, 256 were declined by the Prosecutor's Office. Reasons for declining to prosecute include insufficient evidence to make a criminal charge or the withdrawal of the complaint by the complainant. These statistics, although representative of only one county in Washington state, reflect the problems faced by incest victims in bringing suit at the time the incestuous abuse occurs.

9. *See infra* notes 42-45.

10. *See generally* Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609 (1983) (a comprehensive overview of civil tort remedies available to the incest victim).

courts.[11] The Washington courts have applied the discovery rule in a variety of cases in order to counteract the injustice of the statute of limitations.[12] The discovery rule allows the statute of limitations to run when the plaintiff discovers or should have reasonably discovered the injury.

The court's decision in *Tyson* not only denies access to the courts for many victims of incest abuse, it also misinterprets the well-developed reasoning and purpose of the discovery rule in Washington law. This note addresses the court's reasoning in *Tyson* in light of the incest victim and the nature of her injury, with a focus on the justification for the statute of limitations and the development of the discovery rule exception in Washington law. This note then argues for the logical and just extension of the discovery rule to cases involving the victims of repeated incestuous abuse who discover the abuse after the statute of limitations has run.

II. THE COURT'S HOLDING IN TYSON

The majority in *Tyson* held that the discovery rule will not be applied to incest abuse cases, in the absence of objective, verifiable evidence making it substantially certain that facts can be fairly determined despite the passage of time from the occurrence of the injury.[13] The court's refusal to extend the discovery rule to victims of incestuous abuse rests on two major issues: the nature of the victim's injury and the evidentiary problem of proof created by potentially false or stale claims.

Although the court recognizes that "child sexual abuse has devastating impacts on the victim,"[14] the victim's claim "rests on a subjective assertion that wrongful acts occurred and that injuries resulted."[15] The court asserts that in prior cases where the discovery rule was applied, there was objective, verifiable evidence of the original wrongful act and the resulting physical injury,[16] while in the case of an incest victim there is

11. *See infra* note 64.

12. *See infra* notes 150-164 and accompanying text.

13. *Tyson*, 107 Wash. 2d at 79, 727 P.2d at 229.

14. *Id.* at 75, 727 P.2d at 227.

15. *Id.* at 77, 727 P.2d at 229.

16. *E.g.*, Ruth v. Dight, 75 Wash. 2d 660, 453 P.2d 631 (1969) (evidence of surgical sponge left in patient); Ohler v. Tacoma General Hospital, 92 Wash. 2d 507, 598 P.2d 1358 (1979) (evidence that overexposure to oxygen in incubator caused objective manifestation of blindness); Sahlie v. Johns-Manville Sales Corp., 99 Wash. 2d 550, 663

merely an "alleged recollection of a memory long buried in the unconscious which she asserts was triggered by psychological therapy."[17] The court also asserts that there is no objective manifestation of the allegations and that the fact that the wrongful acts were discovered through therapy does not validate their occurrence.

The majority is not only concerned with the problem of speculative claims based on emotional injury, but also with the unreliability of psychiatry and psychology: "Psychology and psychiatry are imprecise disciplines. Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence."[18] The court points out that psychiatrists and psychologists cannot necessarily aid in truth-finding and lessening the subjectivity of the plaintiff's claim, for the psychoanalytic process itself can lead to the distortion of truth of events because the analyst's own reactions and interpretations may influence the subject's memory.[19]

The court asserts that because the nature of the victim's emotional injury is unverifiable and speculative, there is a serious danger of spurious claims being made against potential defendants. In addition, the court notes that allowing potentially spurious and stale claims creates evidentiary problems, which the statute of limitations seeks to prevent.[20]

The *Tyson* opinion presents the traditional justification for the statute of limitations, the problem of stale claims: "Stale claims present major evidentiary problems which can seriously undermine the ability to determine facts."[21] Among the problems encountered are the disappearance of witnesses, the lack of physical evidence, and the passage of time, which makes witness testimony less reliable and trustworthy. Quoting a landmark case in the development of the discovery rule, the court notes that "with the passing of time, minor grievances may fade away, but they may grow to outlandish propor-

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P.2d 473 (1983) (evidence that continuous exposure to asbestos products for almost forty years caused asbestosis).

17. *Tyson*, 107 Wash. 2d at 77, 727 P.2d at 229.

18. *Id.* at 78, 727 P.2d at 229.

19. *Id. See generally* Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985).

20. *Tyson*, 107 Wash. 2d at 75, 727 P.2d at 227.

21. *Id.* at 76, 727 P.2d at 228.

tions."[22] The statute of limitations prevents the filing of stale claims and thus enhances the fact finders's ability to resolve issues fairly and accurately.

III. THE TRAUMA OF INCEST

A. The Child Victim

In order to discuss the court's decision in *Tyson*, an understanding of the incest victim and the nature of her injuries is necessary. Unlike other victims of sexual offenses, the incest victim is surrounded by a "conspiracy of silence."[23] The silence has been fostered by society, which is not only unwilling to believe that the family could create an unsafe environment for children,[24] but is also unwilling to believe the incest victim.[25] Incest victims are often ignored or accused of being at fault when they have attempted to report incestuous abuse.[26] The silence is also maintained by the victim who is unable to overcome the complex psychological and emotional barriers to reporting incestuous abuse both at the time it occurs and later in life.[27]

While the incest victim receives little or no assistance from outside the family, she receives even less support from her immediate family members when she attempts to disclose the fact of incest.[28] In most cases, the mother is unable to protect her daughter because of the mother's own weak position in the family, or unwillingness to protect her from anger or blame.[29]

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22. *Id.* (quoting *Ruth*, 75 Wash. 2d at 665, 453 P.2d at 634.)

23. *See generally* S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST (1978) (hereinafter BUTLER).

24. Eric Press, Holly Morris, Richard Sondza, *An Epidemic of Incest*, Newsweek, Nov. 30, 1981, at 68. Other scholars suggest that if close relatives are included within these figures, one woman in every six is a victim of sexual molestation within the family. *See generally* HERMAN-LEWIS and HIRSCHMAN, *supra* note 5, at 12.

The American Psychological Association, however, estimates that 12-15 million American woman have been victims of incestuous abuse. Brozen, *supra* note 5 at 82.

25. *See generally* N. GAGER & C. SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA (1976) (hereafter GAGER and SCHURR).

26. P. MRAZEK & C. KEMP, SEXUALLY ABUSED CHILDREN AND FAMILIES 227 (1981).

27. *See generally* HERMAN-LEWIS & HIRSCHMAN, *supra* note 5; D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN (1979); Adams-Tucker, *Proximate Effects of Sexual Abuse in Childhood*, 139 PSYCHIATRY 10 (1982) (hereinafter Adams-Tucker).

28. HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 78-79, 83, 89-90; SUMMIT, *supra* note 5, at 137-138.

29. HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 132. Most incest occurs in families where traditional sex roles are most emphasized. The father has an unchallenged position as the authority figure and bread winner, while the mother

The incest victim is most often a young child; the average age is eight years. However, the age of incest victims ranges from birth to sixteen.[30] At such an early age the child is not only unable to understand the significance or wrongfulness of her father's conduct, she also has no power to effectively protest against it.[31] As a child she is vulnerable to her father's power and control as the authority figure in the family.[32] The incestuous father persistently encourages sexual relations, assuring his daughter that their relationship is normal, while at the same time, insuring her silence about the relationship through direct threats of harm to herself and the family or through the daughter's own perceived fear of harm.[33] Her silence, in effect, is coerced.

Incest victims believe that the disclosure of the incestuous relationship will break up the family, thus they feel that they are responsible for holding the family together.[34] In addition, the child fears that revealing the relationship to others will encourage not only her father's anger, rejection, or physical harm to herself, but perhaps even his imprisonment[35] or desertion of the family.[36] At the same time, she fears her mother's anger[37] and her own punishment by law enforcement officials.[38] Thus, from the daughter's point of view, her silence will not only maintain the economic security of her family, but will also insure her own safety from an even worse harm, the dissolution of the family.

By maintaining her silence, however, the incest victim only enhances her "distorted perception of herself as an

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assumes domestic and childcare duties. Mothers in these families are often powerless or passive within the family. They either cannot protect their daughters or will not accept the truth of their husbands' incestuous conduct and thus put their own marriage or economic well-being at risk. *Id.* at 57, 63, 72, 74, 77-79, 83.

30. SUMMIT, *supra* note 5, at 127-150; HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 83.

31. Adams-Tucker, *supra* note 27, at 1252-1256.

32. HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 88.

33. HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 80, 83; *Statutes of Limitations in Civil Incest Suits*, *supra* note 4, at 196.

34. HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 80, 83. One incest victim stated: "My father told me that if I ever let anyone know what he had been doing with me that the police would send him to jail. Living in my neighborhood, all of us kids knew if daddy went there we would have to go on welfare and mom just wouldn't have been able to keep things together." BUTLER, *supra* note 23, at 33.

35. BUTLER, *supra* note 23, at 32-34; SUMMIT, *supra* note 5, at 88, 163.

36. *Statute of Limitations in Civil Incest Suits*, *supra* note 4, at 197.

37. BUTLER, *supra* note 23, at 32, 34, 47.

38. *Id.*

accomplice to her own exploitation."[39] Although terrified, confused, and distraught, the incest victim feels that she herself has created the problem and that she therefore deserves her father's conduct.[40] She feels guilt and shame, and she takes the blame for her father's behavior. Her silence allows the incestuous abuse to continue and, at the same time, prevents her from getting any assurance from others that she is not responsible for her father's behavior.

B. The Nature of the Injury

While some victims of incest learn to accommodate and cope by maintaining silence and hiding the truth, experts have observed that many incest victims, as in *Tyson*, repress the memory of the incest in order to cope with repeated abuse.[41] One expert has stated that "the very nature of the sexual assault will likely make the victim incapable of recognizing the relationship between her problems and the assault because the only way she survived the assaults was to 'compartmentalize' the period of assaults, pretend they were not happening, and try to block the acts out of her memory."[42]

Blocking the memory of the abuse is a coping mechanism that occurs because, as one psychologist states, "some things are so difficult to deal with if remembered that your choices are to go crazy or to forget them."[43] Many incest victims learn to accommodate the repeated assaults, their awareness of the wrongfulness of the molestation, and their feelings of responsibility as a participant in the abuse. This accommodation causes certain psychological processes in which the victim blocks out the abusive experiences and maintains a facade of normalcy.[44]

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39. Comment, *supra* note 10, at 197.

40. BUTLER, *supra* note 23, at 301.

41. SUMMIT, *supra* note 5, at 133-136. *See generally* BUTLER, *supra* note 23; HERMAN-LEWIS & HIRSCHMAN, *supra* note 5.

There are many case histories of repression caused by incestuous abuse. *See, e.g.*, BUTLER, *supra* note 23, at 48 (woman who, as a child, was a victim of incest, but had repressed her memory of the experience until she had an adult sexual relationship); GAGER, & SCHURR, *supra* note 25, at 9-10 (woman who of the assault until she entered therapy after a failed marriage).

42. Affidavit of Lucy Berliner, p. 3, attached as Appendix A to Brief for Plaintiff, *Tyson*, 107 Wash. 2d 72, 727 P.2d 226.

43. *See generally* Summit & Kryso, *Sexual Abuse of Children*, 48 AMERICAN ORTHOPSYCHIATRY 237 (1978).

44. Affidavit of Dr. Gayle Gulick Nelson, p. 4, Brief for Plaintiff, *Tyson*, 107 Wash. 2d 72, 727 P.2d 226.

Coping mechanisms, such as repression, blocking, compartmentalization, denial, or even personality splitting,[45] enable the victim to survive by controlling thoughts and feelings to the point at which there is no recognition of victimization.[46] These psychological coping mechanisms, however, also make it difficult for the victim to recognize and discuss the incestuous experiences.[47] The adult victim often does not remember what happened as a child, and injury is denied until recall of it is triggered by therapy or other events.[48] One psychologist has stated:

> It is common for these victims not to be able to recognize the impact of the victimization during this period of denial. Only after the victim acknowledges the abuse

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45. *Id.*

46. The trauma of incest and its delayed effects is comparable to an illness known as "combat neurosis" or Stress Response Syndrome experienced by war veterans and those who have had acute traumatic experiences such as assault, rape, and accidents. Most recently, this illness has come to the attention of mental health professionals through Vietnam veterans. *See, e.g.*, HOROWITZ & MARDI, STRESS RESPONSE SYNDROME (1976).

The victim or survivor often experiences a period of numbness after the trauma that at least temporarily allows the victim to appear to be well-adjusted and normal. Usually denial and numbness alternate with sever psychic distress helping the victim to avoid any confrontation with his/her guilt, shame, fear, pain or revulsion of the trauma. Eventually a latent period of relief ensues and the victim feels as if effects of the trauma have passed. *See* Figley & Sprenkle, *Delayed Stress Response Syndrome*, MARRIAGE AND FAMILY COUNSELING 54 (July 1978); *see also* Speigel, *Vietnam Grief Work Using Hypnosis*, 24 CLINICAL HYPNOSIS 33, 33-40 (1981).

Victims of trauma cope through repression, blocking, compartmentalization, denial, splitting, and amnesia. They experience such symptoms as nightmares, disassociation, psychosomatic disorders, alcohol and eating disorders, flashbacks, disorientation, and depression. These symptoms can last as long as ten years. S. HALEY, *Treatment Implications of Past Traumatic Stress Response Syndrome for Mental Health Professionals*, in STRESS DISORDERS AMONG VIETNAM VETERANS: THEORY, RESEARCH AND TREATMENT 254-67 (1968).

47. For a discussion of the long-term effects of incestuous abuse, *see generally* Steele & Alexander, *Long-Term Effects of Sexual Abuse in Childhood*, and *The Effects of Child Sexual Abuse: Methodological Considerations*, in SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES (1981); *Statute of Limitations in Civil Incest Suits*, *supra* note 4, at 200-201; HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 98-108.

48. *See* Affidavit of Lucy Berliner, *supra* note 43, at 6. The plaintiff in *Tyson* began therapy in 1980 because she was having difficulties in relationships with men. In addition, she was depressed and expressed a low self-image and lack of trust. Her psychiatrist suspected that she may have been a victim of incest, but when asked, plaintiff denied this.

The plaintiff returned to therapy in 1982 after she began to have nightmares of being raped and chased and was in a state of general anxiety and fearfulness for her safety. She eventually joined a six-week counseling group for women who had been victims of sexual abuse. It was at that time the plaintiff began to remember specific events of the past alleged abuse by her father. *Id.*

> through disclosure or through entering therapy, do the effects begin to be evidenced. The control over thoughts and feelings gradually dissipates and the victim may become severely depressed or suffer other psychological consequences. It is often only at this point that the victim becomes aware of the effects of the sexual assault.[49]

Studies have shown that the incest victim suffers psychological injuries that manifest immediately after the trauma and continue into adulthood.[50] The long-term effects include prostitution, running away from home,[51] attempted suicide,[52] marital problems and difficulty in establishing and maintaining close relationships.[53] In addition, incest victims may experience other problems including learning disabilities, psychosomatic symptoms, sexual dysfunction,[54] obesity, chronic depression, neurosis, psychosis, schizophrenia and, in the extreme, multiple personalities,[55] character disorders,[56] and substance abuse.[57]

The incest victim must overcome a variety of obstacles in order to deal with the effects of the incestuous abuse. She not only must convince society to listen, she must break the silence imposed by her father, as well as by herself through her own fears. Her inability to recognize and understand the harm done to her, however, is only one of the barriers she must overcome; another barrier is the legal one. While the blameless child victim of incest is virtually powerless to overcome

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49. *Id.* at 4.

50. *See* Brief of *Amicus Curiae*, Northwest Women's Law Center at 7, *Tyson*, 107 Wash. 2d 72, 727 P.2d 226.

51. Approximately one-half of all teenage runaways come from homes where they were victims of incest. A higher percentage of teenage prostitutes are incest victims. J. DENSEN-GERBER & J. BENWARD, INCEST AS A CAUSATIVE FACTOR IN ANTI-SOCIAL BEHAVIOR: AN EXPLORATORY STUDY (1976); JAMES & MEYERDING, *Early Sexual Experience and Prostitution*, 134 PSYCHOLOGY 1381-1385 (1977).

52. In one study conducted, almost 35% of incest victims had attempted suicide at one time in their lives. *See* HERMAN-LEWIS & HIRSCHMAN, *supra* note 5, at 99.

53. *Id.* at 31-32.

54. Studies show that as many as 74% of incest victims have experienced orgasmic dysfunction. *Id.* at 29.

55. *Id.* at 31-32.

56. Affadavit of Dr. Gayle Gulick Nelson, *supra* note 45, at 6. Repeated sexual assault retards healthy ego development and denies a child a sense of self-worth. A negative self-image in turn makes it difficult for the incest victim to maintain normal interpersonal relationships.

57. One study conducted in a residential theraputic community for drug users found that 44% of the women who took part in the study had been incest victims. DENSEN-GERBER & BENWARD, *supra* note 52, at 323-40.

the psychological effects of incest, the victim who has done so and then seeks compensation through the legal system will be thwarted by the statute of limitations.[58]

IV. THE STATUTE OF LIMITATIONS

A. Background

Statutes of limitation are legislative determinations that mandate that after the lapse of a specific period of time a claim will not be enforceable in court.[59] All defendants are entitled to assert the statute of limitations as a complete defense to an action brought after the period has lapsed. This is a constitutional guarantee of due process.[60]

When the legislature determines time limits on the assertion of certain rights, after the requisite time has passed, one party is deprived of the opportunity of raising an otherwise valid claim.[61] United States Supreme Court Justice Jackson stated that "statutes of limitations find their justification in necessity and convenience rather than logic . . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and the unavoidable delay . . . . They represent a public policy about the privilege to litigate."[62]

The nature of the cause of action determines the applicable statute of limitation, and the statute of limitation is not operative until there is a cause of action to which it may be applied.[63] The cause of action accrues when the person has the right to gain access to the courts for relief. Usually the limitation period is construed literally so that the date of accrual or

58. *See* Jenkins v. Jenkins, Nos. 82-1101, 82-1403 consolidated (10th Cir. March 21, 1982) *cert. denied*, 464 U.S. 848 (1983) (affirmed decisions of the District Court for the District of New Mexico, granting defendant's motion for summary judgment on grounds the plaintiff's cause of action in first suit based on assault, battery and outrage was barred by the statute of limitations, and granting defendant's motion for summary judgment on the ground of res judicata in the second suit); *Newlander*, supra note 4, (sustaining demurrer to the complaint based on the statute of limitations).

59. *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) (hereinafter *Developments*).

60. 51 AM. JUR. 2D *Limitations of Actions* § 4, at 593 (1970).

61. *Developments*, *supra* note 60, at 1185.

62. Chase Security Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

63. See, e.g., WASH. REV. CODE § 4.16.020 (1987) (the statute of limitations for actions for recovery or possession of real property is ten years); WASH. REV. CODE § 4.16.070 (1987) (the statute of limitations for actions by or against executors is five years); WASH. REV. CODE § 4.16.080 (1986) (the statute of limitations for actions for relief based on fraud is three years).

"date of injury" is that of the wrongful act or omission which is the basis of the claim.[64]

In Washington, a tort personal injury claim has a limitation period of three years, while assault and battery has a limitation period of two years.[65] Traditional tort cases fit neatly into the statutory period because in most instances when the act or omission occurs, the injured party is aware of the injury and has the ability to seek relief within the courts. An underlying premise of the statute of limitations is that "when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts."[66]

One exception to a strict construction of the statute of limitations that offers a plaintiff a more flexible time period in which to bring suit is the exception for disabilities.[67] The disability period excepts plaintiffs who are subject to some legal disability such as infancy, incompetency, or imprisonment, from a strict reading of the statute of limitation. The period of limitations commences when the disability ceases.[68]

The Washington Supreme Court has noted that: "as a matter of basic justice, the courts usually have a cogent reason to give limitations statutes a literal and rigid reading . . .";[69] and that:

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64. *See generally* Linquist v. Mullen, 45 Wash. 2d 675, 676, 277 P.2d 722, 724 (1954) (in malpractice case, the cause of action accrues at the time of the wrongful act that caused the injury).

65. "Within three years: An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated." WASH. REV. CODE § 4.16.080(2) (1985). "Within two years: An action for libel, slander, assault, assault and battery, or false imprisonment." WASH. REV. CODE § 4.16.100(1) (1985).

66. *See Ruth*, 75 Wash. 2d at 665, 453 P.2d at 634 (in medical malpractice case where foreign substance or article was left in surgical wound, statute of limitations began to run when patient discovers or should have discovered presence of the substance or article).

67. If a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency as disability as determined according to Chapter 11.88 WASH. REV. CODE or imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life, the time of such disability shall not be a part of the time limited for the commencement of action.

WASH. REV. CODE § 4.16.190 (1987).

68. The disability must exist at the time the cause of action accrues.

69. *Ruth*, 75 Wash. 2d at 665, 453 P.2d at 634.

> [t]here is nothing inherently unjust about a statute of limitations . . . . No civilized society could lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims brought in good faith, much less whatever stale, illusory, false, fraudulent or malicious accusations of civil wrong might be leveled against him.[70]

B. False or Stale Claims

The underlying policy reasons for statutes of limitations are to promote the assertion of valid claims, to promote repose by offering stability and security to human activity, and to promote the harmony and welfare of society to compel a quick settlement of claims.[71] The court in *Tyson* is most concerned with the assertion of false or stale claims against potential defendants.

The concern for false claims in incest abuse cases should be no more than in other cases. The literature suggests that if the risk of false claims exists at all, it would more likely be before the age of twenty or twenty-one, when the incest victim is still a young woman involved in family power struggles and rebellion.[72]

With regard to stale claims, the court in *Tyson* states that stale claims tend to be suspect, for they are based on old evidence. Parties must, therefore, defend against faded memories of witnesses who can no longer accurately describe events that have taken place.[73] In time, witnesses disappear or die, and complaints fade away or grow to extreme proportions.[74] The Washington Supreme Court has stated that while it is the goal of common law to provide a legal remedy for each valid grievance, "it is also a traditional view that compelling one to answer stale claims in the courts is in itself a substantial wrong."[75]

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70. *Id.* at 664, 453 P.2d at 634.

71. *See* 51 AM. JUR. 2D, *supra* note 61, at 602.

72. Paper by Briere, "The Effects of Childhood Abuse on Later Psychological Functions: Defining Post-Sexual Abuse Syndrome," *Third National Conference on Sexual Victimization of Children* (Washington, D.C. April 1984)).

73. *See* 51 AM. JUR. 2D, *supra* note 61, at 602.

74. *Ruth*, 75 Wash. 2d at 665, 453 P.2d at 634.

75. *Id.* The traditional view of the court was that "it is better for the public that some rights be lost than that stale litigation be permitted." *See generally* Thomas v. Richter, 88 Wash. 451, 153 P. 333 (1915) (in an action against a trustee of a corporation to recover for creditors the amount of an unlawful diminution of the capital stock, the cause of action is barred three years after date of unlawful reduction and is not

Even if the incest victim brings her claim after her age disability disappears and within the statutory period, the court in most cases would have to deal with old evidence. As the dissent in *Tyson* notes, the acts complained of allegedly occurred from the time plaintiff was three years old until she reached the age of eleven. Even if the plaintiff had filed suit within the statutory period, the evidence in her case would be at least ten years old.[76] The plaintiff in *Tyson* filed her suit at age twenty-six. The court's concern for stale claims is not logically lessened in a period of five years. Evidence that is fifteen years old, rather than ten, is not "so much less 'verifiable' that it warrants the harsh result of foreclosing a potentially meritorious claim."[77]

The defendant in an incest suit does not come to court unprotected. Even without the existence of the statute of limitations in such cases, the legal system carefully protects the rights of defendants. The rules of evidence and trial procedures are designed to thwart false claims. Discovery, cross-examination and confrontation of witnesses effectively guard the rights of litigants against stale evidence. The jury hearing the witnesses will decide whether the plaintiff or defendant is to be believed. Just as the risk of an erroneous criminal conviction does not stop criminal prosecutions, the mere possibility that the trier of fact will believe a false or stale claim should not prevent the litigation of incestuous abuse cases.

V. EVIDENTIARY PROBLEMS

A. Physical Evidence

While the *Tyson* court's concern for false or stale claims is exaggerated, its requirement of verifiable, objective evidence is unwarranted. Even in cases of criminal prosecution for sexual abuse in which the standard of proof is higher than in civil cases, the existence of physical evidence of the criminal act is

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extended to three years after insolvency of corporation and discovery of the fraud); Cornell v. Edsen, 78 Wash. 662, 139 P. 602 (1914) (where attorney wrongfully dismissed plaintiff's action without consent and deceived plaintiff into believing action had been adversely decided, running of statute of limitations began at time of wrongful dismissal); Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930) (action against attorney for malpractice or breach of duty in allowing client to lose his legacy by witnessing a will in his favor, is based on breach of contract and governed by three-year statute of limitations).

76. *Tyson*, 107 Wash. 2d at 84, 727 P.2d at 232 (Pearson, J., dissenting).

77. *Id.* at 85, 727 P.2d at 232 (Pearson, J., dissenting).

rare.[78]

In Washington, sexual abuse can be characterized as incest,[79] indecent liberties,[80] rape,[81] or statutory rape.[82] Incest and indecent liberties do not require proof of sexual intercourse. For these crimes "sexual contact" is sufficient. Sexual contact means any touching of the sexual or intimate parts of a person done for the purpose of gratifying sexual desire of either party.[83] Touching is clearly unverifiable except through the testimony of witnesses. Most often the only witness is the child victim, whose fragile word is the only evidence the prosecutor has against the defendant.[84] Implicit within the *Tyson* court's reasoning is the suggestion that even cases of criminal sexual offenses, clearly within the statute of limitations, should be precluded in Washington because of the lack of evidence that would force the decision of a case to rest on the credibility of the witnesses.[85]

As the dissent in *Tyson* points out, actions which essentially turn on the credibility of witnesses are not unique.[86] In fact, it is often the strategy of counsel to impeach the credibility of opposing witnesses through the presentation of prior inconsistent statements, bias, character evidence, or defects in sensory or mental capacity.[87] Whether plaintiff's case would turn on the credibility of the parties, however, should not even be the court's concern. In a case such as *Tyson*, the issue of credibility is one that would rest solely within the province of the trier of fact.

Contrary to the court's assertion in *Tyson*, the verification of incestuous abuse is, in fact, possible through the use of diag-

78. Bailey, *Grueling Child-Abuse Cases Push Many Prosecutors to Their Limits*, Wall St. J., Nov. 19, 1986, at 24, col. 3.

79. *See supra* note 6.

80. WASH. REV. CODE § 9A.44.100 (1985).

81. WASH. REV. CODE § 9A.44.040 (1985).

82. WASH. REV. CODE § 9A.44.070 (1985).

83. WASH. REV. CODE § 9A.44.100(2) (1985).

84. Bailey, *supra* note 78. The author states that in King County, Washington in 1985, prosecutors won only about 60% of the child molestation cases brought to trial, compared with conviction rates of 80% to 90% for other felony cases. District attorneys nationwide have stated that no other crime is more difficult to try. *Id.*

85. For a discussion of children as witnesses in abuse cases, *see generally* Note, *Are Children Competent Witnesses?: A Psychological Perspective*, 63 WASH. U.L.Q. 815 (1985); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985); Berliner and Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. OF SOC. ISSUES 125 (1984).

86. *Tyson*, 107 Wash. 2d at 83, 727 P.2d at 231.

87. E. CLEARY, MCCORMICK ON EVIDENCE 333-47 (3rd ed. 1984).

nostic tools such as observation of behavior and symptoms.[88] Psychiatrists and psychologists who treat incest victims can give testimony that can be supported by other circumstantial evidence. The testimony of family, friends, teachers, and others will most likely reveal the observations of those symptoms identified with sexual abuse.[89] The verification of the damage to the incest victim over time is a crucial factor. Long-term psychological effects can and must be observed over a significant period of time.

B. Psychological versus Physical Injury

Because the injury to the incest victim is more psychological than physical, the court in *Tyson* has emphasized its concerns about evidence and proof. Similar concerns were expressed by the legal community with the recognition of psychic injury in tort claims. One court found this fear to be insufficient to deny recovery:

> To forbid all such actions because groundless charges may be made is not a good reason for denying recovery. That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs and let them go without being brought to account. It is the function of the courts and juries to determine whether claims are valid or false, a responsibility which should not be shunned merely because the task may be difficult to perform.[90]

In response to the growing recognition of the debilitating effects of emotional distress and a better understanding of human psychology, courts have sought to protect the individual's interest in mental and emotional tranquility.[91] For almost a century, Washington courts have allowed recovery of damages for mental distress without physical impact when the

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88. Briere, *supra* note 73.

89. *Id.*

90. Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961) (recovery allowed for emotional distress caused by invitation to elicit intercourse and indecent exposure), *cited in* Lambert, *Tort Liability for Psychic Injuries*, 41 B. U. L. REV. 584, 591 (1961).

91. *See generally* Comment, *Negligent Infliction of Emotional Distress: Formulating the Psycho-Legal Inquiry*, 18 SUFFOLK U. L. REV. 401 (1984); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 (4th ed. 1971); Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339 (1963); RESTATEMENT (SECOND) OF TORTS, § 306 (1965); Rendall, *Nervous Shock and Tortious Liability*, 2 OSGOODE HALL L.J. 291 (1962).

defendant's action was willful or intentional.[92]

The Washington court, like other courts nationwide, at first struggled with the problem of defining the boundaries of liability for mental distress injuries where the issue was *negligently* caused mental or emotional distress resulting in physical injury, without impact to the person. In early cases, in which a defendant's acts were negligent and there was no impact to the plaintiff, the Washington Supreme Court initially adopted the then prevelant rule of not allowing recovery for mental distress.[93]

The Washington court began its departure from the so-called impact rule by allowing recovery for negligently caused mental distress that resulted in physical injury.[94] The departure from the impact rule was further refined by allowing recovery for negligently caused mental distress that resulted in a threat of an immediate physical invasion of the plaintiff's personal security.[95] This rationale constituted the adoption of a zone of danger theory of recovery, rather than actual physical impact: "[G]enerally, in cases which do not involve malice or intent to do harm, there must be either an immediate physical invasion of the plaintiff's person or security, or a direct possibility of such an invasion in order that recovery may be had for mental anguish or distress of mind."[96]

In a more recent case, in which the Washington Supreme Court reexamined the issue of liability for the negligent infliction of mental distress, the court stated:

> In the main, the reasons advanced by the court for denying recovery, *i.e.*, each of precedent, increased litigation, remoteness, and fear of fictitious and feigned claims, have

92. *See* Willson v. Northern Pac. R.R., 5 Wash. 621, 32 P. 468, 34 P. 146 (1893); Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 P. 209 (1904); McClure v. Campbell, 42 Wash. 252, 84 P. 825 (1906); Wright v. Beardsley, 46 Wash. 16, 89 P. 172 (1907); Nordgren v. Lawrence, 74 Wash. 305, 133 P. 436 (1913); Gadbury v. Bleitz, 133 Wash. 134, 233 P. 299 (1925).

93. *See* Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570, 142 P. 29 (1914); Kneass v. Cremation Society of Washington, 103 Wash. 21, 175 P. 172 (1918); Barnes v. Bickle, 111 Wash. 133, 189 P. 998 (1920); Stiles v. Pantages Theatre Co., 152 Wash. 626, 279 P. 112 (1929).

94. *See* O'Meara v. Russell, 90 Wash. 557, 156 P. 550 (1916) (defendant's blasting of stumps caused dislodged stump to be hurled into plaintiff's house; in effort to protect herself and escape danger, plaintiff sustained physical injuries).

95. *See* Frazee v. Western Dairy Products, 182 Wash. 578, 47 P.2d 1037 (1935) (pregnant plaintiff observed runaway truck approaching her home, feared safety of young son in yard and suffered miscarriage).

96. Murphy v. Tacoma, 60 Wash. 2d 603, 620-21, 374 P.2d 976, 987-88 (1962).

> now been generally discarded. The old rationales are simply no longer viable.[97]
>
> Our experience tells us that mental distress is a fact of life. With adequate limitations, the court can administer the adjudication of this tort just as it does the complex intricacies of products liability and medical malpractice.[98]

Eventually the courts accepted recovery for pure psychological injury. Virtually all jurisdictions in the United States now recognize the intentional tort of "outrage," *i.e.*, the intentional infliction of emotional harm. The Washington Supreme Court adopted the tort of outrage in *Grimsby v. Samson*.[99] The tort of outrage allows recovery for mental distress without the necessity of resulting physical harm. The Washington court established the following elements of outrage: (1) the emotional distress must be inflicted *intentionally* or *recklessly*, not negligently; (2) the conduct of the defendant must be outrageous and extreme to be regarded as intolerable in a civilized community; (3) the conduct must result in severe emotional distress to the plaintiff; and (4) the plaintiff must be an immediate family member of the person who is the object of the defendant's conduct, and the plaintiff must be present at the time of the conduct.[100]

The Washington courts have defined "outrage" in a variety of circumstances, including severe emotional distress resulting from abusive racist conduct of the defendant's employees,[101] and severe emotional distress resulting from defendant sellers' refusal to vacate premises upon an agreed date, preventing plaintiff purchasers from taking possession and moving in even after the house was vacant.[102]

With regard to the concern for fraudulent claims and the potential unlimited liability for every type of mental distur-

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97. Hunsley v. Giard, 87 Wash. 2d 424, 433, 553 P.2d 1096, 1101-02 (1976) (plaintiff's home struck by car outside of plaintiff's immediate presence and without impact to her, brought action to recover for heart damage resulting from negligently inflicted emotional distress). The court in *Hunsley* noted that this case did not involve only mental distress and that liability for emotional distress not manifested by physical symptoms must be determined in another case. *Id.* at 433, 553 P.2d at 1102.

98. *Id.* at 435, 553 P.2d at 1103.

99. 85 Wash. 2d 52, 530 P.2d 291 (1975) (plaintiff, husband of decedent, filed a claim for damages based on the tort of outrage for death of wife, for hospital's alleged negligent, reckless, and wanton breach of duty to provide medical care despite plaintiff's requests).

100. *Id.* at 59-60, 530 P.2d at 295.

101. Conteras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977).

102. Phillips v. Hardwick, 29 Wash. App. 382, 628 P.2d 506 (1981).

bance, the Washington Supreme Court in *Grimsby* stated that "the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class."[103] In addition, the court, not willing to disparage the judicial system, remarked that acceptance of the argument of possible fraud "presupposes that courts are so ineffectual and the jury system is so imperfect that fraudulent claims cannot be distinguished from the legitimate."[104]

While the court in *Tyson* does not propose the dissembling of the tort of outrage in Washington, it has cast a wary eye towards the well-established legal recognition of psychic injury in Washington. The majority is not only concerned with psychological injuries, but also, as the dissent notes, with the "mental health professionals' contribution to our justice system."[105]

VI. THE DISCOVERY OF A CAUSE OF ACTION

A. The Psychotherapist's Role

The majority in *Tyson* questions the reliability of the mental health professional's testimony given to assist the jury in ascertaining the truth and suggests that no action should be brought at all if such testimony is necessary. The majority's assumption of unreliability of expert testimony misconstrues the role of the mental health professional in the application of the discovery rule.

In any case involving the use of the discovery rule, the court will decide whether the rule may be applied as a matter of law. If the rule does apply, the trier of fact then determines whether the plaintiff was diligent, *i.e.*, whether the plaintiff discovered or reasonably should have discovered the cause of action.[106]

The role of the psychotherapist in such a case is minimal. It is merely to help the jury to determine the time of discovery of the cause of action. The Washington Supreme Court, in prior cases in which the discovery rule has been applied, has recognized that in some cases a "triggering event" is necessary

103. *Grimsby*, 85 Wash. 2d at 58, 530 P.2d at 295 (quoting Borst v. Borst, 41 Wash. 2d 642, 653-54, 251 P.2d 149, 155 (1952)).

104. *Id.* (quoting Goode v. Martinis, 58 Wash. 2d 229, 234, 361 P.2d 941, 945 (1961)).

105. *Tyson*, 107 Wash. 2d at 85, 727 P.2d at 232 (Pearson., J., dissenting).

106. *See infra* note 181 and accompanying text.

to put the uninformed plaintiff on notice that she may have a cause of action against a defendant.[107]

In *Gazija v. Nicholas Jerns Co.*,[108] plaintiff, a commercial fisherman, sought to recover damages for loss of nets and other fishing gear from his insurance agent for the agent's alleged tortious cancellation of an insurance policy covering the gear. The plaintiff obtained an "inland marine floater policy," which provided insurance coverage for his gear both on his boat and in storage. The plaintiff's father, also a fisherman, had a "web house" policy from the same insurance company, which insured his gear in storage. When plaintiff's father died, the father's policy was endorsed over to plaintiff's mother and renewed for three years. When this policy expired, the insurance agent issued the plaintiff a renewal policy. The plaintiff's own "floater" policy was renewed for three years.[109]

When plaintiff filed a claim for lost gear after his boat sank, he learned that his "floater" policy had been canceled in the previous year without his authority. The still existing "web" policy did not cover his loss on his boat. The filing of his claim triggered awareness that he had a cause of action against the insurance company for the value of his lost equipment. The court held that plaintiff's cause of action accrued when he first suffered actual loss and had an opportunity to discover that he had an actionable claim for the unauthorized cancellation of his policy.[110]

In *Ohler v. Tacoma General Hospital*,[111] the plaintiff knew from an early age that "too much oxygen" administered in an incubator during her first few days of life had caused her blindness. She had always believed that the oxygen had been a necessary treatment, had been administered correctly and that her blindness was a complication of having been born prematurely. At the age of twenty-one, the plaintiff heard through the news media that a friend of hers, who was also blind, had filed a lawsuit claiming that her blindness had been caused by the wrongful conduct of the hospital and the manufacturer of the incubator. The plaintiff claimed it was then that she discovered that her blindness could have been prevented and the amount of oxygen administered had been incorrect.

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107. *See infra* note 179.
108. 86 Wash. 2d 215, 543 P.2d 338 (1975).
109. *Id.* at 216-17, 543 P.2d at 340.
110. *Id.* at 223, 543 P.2d at 343.
111. 92 Wash. 2d 507, 598 P.2d 1358 (1979).

The Washington Supreme Court acknowledged that the plaintiff knew of the oxygen and the resultant blindness. However, the court refused to hold as a matter of law that "knowledge received at age four imparts to that child a realization that administration of 'too much oxygen' did or may have constituted a breach of duty."[112] Even though the plaintiff knew of the injury caused by the oxygen, the court held that the plaintiff's claim did not accrue until she discovered or reasonably should have discovered all of the essential elements of her possible cause of action.[113] The news report heard by plaintiff triggered her discovery of the cause of action.

In a more recent case, *Sahlie v. Johns-Manville Sales Corp.*,[114] the Washington Supreme Court applied the discovery rule where the plaintiff's discovery of his cause of action was triggered by consultation with a lawyer. The plaintiff had worked with asbestos products from 1939 to 1978. In 1970 he found out that he was suffering from asbestosis and he knew that exposure to asbestos products had caused his illness. He was aware of the manufacturers of the products with which he worked, but it was not until he sought legal counsel in 1980 that he discovered that the asbestos manufacturers may have committed wrongful acts, acted negligently, breached a legal duty, or that he might even have a claim for damages.[115]

In these cases, neither the filing of an insurance claim, the news report, nor the consultation with the attorney proved the truth of the plaintiffs' claims of negligence. These events merely gave the plaintiffs notice of a potential cause of action. The testimony of a psychotherapist treating an incest victim purports to do no more than this—to document the time of the victim's awareness or discovery of alleged injury, not the truth of the victim's allegations.

The court in *Tyson* was certified to consider only the issue of the application of the discovery rule. It was not certified to judge the merits of the plaintiff's case. The majority's misplaced concern for the unreliability of psychological treatment and testimony put the plaintiff in *Tyson* on trial. The court's role was a limited one; it was not, however, to make a decision on the facts of the case.

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112. *Id.* at 510-11, 598 P.2d at 1360.

113. *Id.* at 511, 598 P.2d at 1360.

114. 99 Wash. 2d 550, 663 P.2d 473 (1983).

115. *Id.* at 551, 663 P.2d 474 (1983).

VII. PSYCHOLOGY AND THE LAW

A. The Role of Psychology in the Legal System

The problem of using mental health professionals as expert witnesses is an issue outside of the confines of the *Tyson* decision. The court in *Tyson* was certified to rule only on whether the discovery rule could be applied as a matter of law in cases of incest abuse where the victim represses memory. The court's open distrust, however, of mental health professionals and their role in the legal system so overwhelms the *Tyson* decision that this concern must be addressed.

Although the majority in *Tyson* is uncomfortable with the role of mental health professionals in the legal system, it is an undisputed reality that psychology permeates virtually every aspect of our legal system.[116] Litigators have long recognized the value of psychology as a tool for courtroom technique,[117] especially in the selection and understanding of the dynamics of juries.[118] Psychological assessments of individuals have been used extensively in family law,[119] particularly in custody cases,[120] as well as in tort law.[121] Psychological assessment by

116. *See generally* Melton, *Developmental Psychology and the Law: The State of the Art*," 22 J. FAM. L. 445 (1984); LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW & PSYCHOLOGY REV. 83 (1984); *Introduction to this Issue: Psychology of the Courtroom*, 2 BEHAVIORAL SCI. & L. 361, 422 (1984); Cox, *The Contribution of Dynamic Psychotherapy to Forensic Psychiatry and Vice Versa*, 6 INT'L J. L. & PSYCHIATRY 89 (1983); Ziegenfuss & Ziegenfuss, *Psycholegal Assessment, Diagnosis, and Testimony: A Bibliography*, 10 J. PSYCHIATRY & L. 503 (1982).

117. *See generally* Call, *Psychology in Litigation*, 21 TRIAL 48 (March 1985); Rothblatt, *Psychological Techniques of Persuasion in the Trial Process*, 11 OHIO N.U.L. REV. 755 (1984); Vinson, *Litigation: An Introduction to the Application of Behavorial Science*, 15 CONN. L. REV. 767 (1983).

118. *See generally* Less-Haley, *Psychology of Jury Selection*, 28 RES GESTAE 650 (1985); Less-Haley, *The Psychology of Jury Selection*, 47 TEX. B.J. 918 (1984); Saks & Wissler, *Legal and Psychological Bases of Expert Testimony: Surveys of the Law and of Jurors*, 2 BEHAVIORAL SCI. & L. 435 (1984); Deitz & Sissman, *Investigating Jury Bias in a Child Molestation Case*, 2 BEHAVIORAL SCI. & L. 423-34 (1984); Goldman, Freundlich, & Casey, *Jury Emotional Responses and Deliveration Style*, 11 J. PSYCHIATRY & L. 319 (1983).

119. *See generally* Wittmann, *Child Advocacy and the Scientific Model in Family Court: A Theory for Pre-Trial Assessment*, 13 J. PSYCHIATRY & L. 61 (1985); Dunne, *Psychological Processes of Divorce*, 39 WASH. ST. B. NEWS 14 (1985).

120. *See generally* Warshak, *Father-Custody and Child Development: A Review and Analysis of Psychological Research*, 4 BEHAVIORAL SCI. & L. 185 (1986); Waters, *Psychiatric Considerations in Preserving the Best Interests of the Child*, 8 U.N.S.W. L. J. 137 (1985).

121. *See generally* Blinder, *Psychiatric Analysis in Personal Injury Cases*, 22 TRIAL 75 (1986); *Psychology of the Courtroom. Emotional Distress in Tort Law*, 3 BEHAVORIAL SCI. & L. 121 (1985); Mendelson, *Followup Studies of Personal Injury*

mental health professionals, psychologists, and psychiatrists provide the basis for involuntary civil commitments in Washington State.[122] The role of psychology in criminal law has been most profound, ranging from criminal procedure and the use of pretrial assessment and post-trial treatment[123] to the discussion of the right to psychiatric care of prisoners,[124] and to the enactment of legislation.[125] Statutes in Washington allow psychological evaluation and assessment to be used in the determination of imposing the death penalty.[126]

Considering just the area of sex offenses and sexual abuse, within the past half century, psychiatrists, psychologists, and social workers have not only influenced society's response to this social problem, but their expertise has also guided legislatures in formulating policy.[127] Mental health professionals have played a significant role in the development of legal policy, including defining and redefining criminal behavior. This participation by mental health professionals has led to the enactment of statutes governing such behavior.[128] Their role has been comparable to that of physicians who have aided in

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Litigants, 7 INT'L. J. L. & PSYCHIATRY 179 (1984); Sersland, *Mental Disability Caused by Mental Stress: Standards of Proof in Workers' Compensation Cases*, 33 DRAKE L. REV. 751 (1983); Whittington, *The Role of the Psychiatrist in Personal Injury Litigation*, 10 J. PSYCHIATRY & L. 419 (1982).

122. *See generally* WASH. REV. CODE ch. 71.05. (1985) for the process of evaluation and detention of persons defined as mentally disordered.

123. *See generally* Weisberg, *The 'Discovery' of Sexual Abuse: Experts' Role in Legal Policy Formulation*, 18 U.C. DAVIS L. REV. 1 (1984) (hereinafter Weisberg, *Discovery of Sexual Abuse*).

124. *See generally* Brenner & Galanti, *Prisoners' Rights to Psychiatric Care*, 21 IDAHO L. REV. 1 (1985).

125. *See generally* Weisberg, *The Discovery of Sexual Abuse*, *supra* note 123. For discussion of the role of psychology in mental health legislation, *see generally* Schmidt, *Critique of the American Psychiatric Association's Guidelines for State Legislation on Civil Commitment of the Mentally Ill*, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 11-43 (1985); Beran & Hotz, *A Study of the Civil Commitment of Mentally Disordered Criminals*, 12 J. PSYCHIATRY & L. 257 (1984); Applebaum, *Standards for Civil Commitment: A Critical Review of Empirical Research*, 7 INT'L J. L. & PSYCHIATRY 133 (1984); Hamilton, *Observations on the Mental Health Act of 1983*, 6 INT'L J. L. & PSYCHIATRY 371 (1983).

126. *See* WASH. REV. CODE §§ 10.95.060(4), .070(2), .070(5), .070(6), .070(8), .080, .100, .120(1)(f)-(g), .120(2) (c), .120(3) (c).

127. *See generally* Weisberg, *supra* note 123.

128. For a discussion of the role of physicians in this process, *see* Pfohl, *The 'Discovery' of Child Abuse*, 24 SOC. PROB. 310 (1977). The author suggests that the discovery of physical abuse by radiologists could come about because, although radiology as a field enjoyed a marginal medical status, there was an opportunity to advance and to work with the more accepted and prestigious segments of the medical profession. *Id.* at 320.

the identification of the social problem of the battered child and in shaping subsequent legislation.[129]

B. Expert Testimony

Until the 1920's, the psychiatrist's influence in the courtroom was limited to assessment for insanity pleas.[130] During the 1920's, however, their influence grew to include the presentation of expert testimony regarding criminal behavior.[131] Today, expert testimony by mental health professionals is a well-recognized part of the American legal system. The *Tyson* court's implication that Washington should abandon the use of such testimony suggests, as the dissent so succinctly states, that the Washington Supreme Court "disinvent the wheel."[132]

The Washington courts and courts of other jurisdictions have recognized the value and necessity of mental health professionals' expert testimony. As with most testimony, the trial court has discretionary control of psychiatric testimony used to aid the jury. Washington courts follow Evidence Rule 702, which governs the admissibility of expert testimony.[133] The admissibility of such testimony depends on whether (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.[134] The final determination of either a plaintiff's or defendant's mental state rests with the jury who decide the

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129. The first case in Washington concerning the "battered child syndrome" was State v. Muldar, 29 Wash. App. 513, 629 P.2d 462 (1981). The court accepted that the "battered child syndrome" has become a well-recognized medical diagnosis from which the physician draws an inference of non-accidental injury to the child. *Id.* at 15, 629 P.2d at 463. In *Muldar*, the court held that the use of "battered child syndrome" to describe the cause of a child's injury of death does not neccesarily indicate wrongdoing on the part of the defendant. Evidence must still be produced to show that the defendant caused the injury and the trier of fact must decide what weight to give the expert's testimony. *Id.* at 515, 629 P.2d at 463.

For a discussion of the "battered child syndrome" see generally Annotation, *Admissibility of Expert Medical Testimony on Battered Child Syndrome*, 98 A.L.R. 3d 306 (1980); Kempe, Silverman, Steele, Droegmueller & Silver, *The Battered Child Syndrome*, 181 J. AM. MED. A. 17 (1962).

130. Weisberg, *supra* note 124, at 16.

131. *Id.*

132. *Tyson*, 107 Wash. 2d at 87, 727 P.2d at 233 (Pearson, J., dissenting) (quoting Barefoot v. Estelle, 463 U.S. 880, 896 (1983)).

133. Wash. Ct. ER 702.

134. State v. Allery, 101 Wash. 2d 591, 596, 692 P.2d 312, 315 (1984).

probative weight of the expert testimony.[135]

The Washington courts and other state courts and circuit courts have admitted the testimony of mental health professionals on a variety of psychological conditions including delayed stress syndrome, or stress response syndrome[136] (to which the trauma of incest is comparable), rape trauma syndrome,[137] and battered woman syndrome.[138] The courts accept

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135. State v. Skinner, 1 Wash. App. 493, 463 P.2d 193 (1969) (determination of defendant's mental capacity at the time of crime rests with the jury).

136. In United States v. Winters, 729 F.2d 602 (9th Cir. 1984), the court admitted expert testimony regarding both post-traumatic stress disorder and forced prostitution in a case involving kidnapping and transporting women in interstate commerce for immoral purposes. During the trial, the defendant pointed out that the two alleged victims failed to take advantage of an opportunity to escape, thus they voluntarily consented to sexual activity that took place. *Id.* at 605.

The court held that the subject matter of the testimony, the effect of post-traumatic stress disorder, which causes a loss of ego-strength and self-confidence to accept the domination of another, was beyond the common knowledge of the average layman and would assist the jury to understand the evidence. *Id.*

See also Pope v. Rollins Protective Services Co., 703 F.2d 197 (5th Cir. 1983) (psychiatric testimony allowed to show plaintiff suffered from chronic post-traumatic stress disorder as a result of her involvement in life-threatening situation of burglary in progress). *See also supra* note 47.

137. *See* State v. Kim, 645 P.2d 1330 (Hawaii 1982) (expert testimony on rape trauma involving specific characteristics observed and shared among children raped by family members admissible for impeachment of witness credibility); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (testimony of qualified expert on whether reaction of one child is similar to reaction of most victims of familial child abuse will assist jury in deciding whether rape occurred); State v. Harwood, 45 Or. App. 931, 609 P.2d 1312 (1980) (expert testimony that it was not uncommon for sexually abused children to perceive and remember sexual encounters as occurring during sleep was helpful to jury and did not constitute improper expert comment on evidence, and was thus admissible in prosecution of first-degree rape); State v. LeBrun, 37 Or. App. 411, 587 P.2d 1044 (1978) (not abuse of discretion to permit "Rape Victim Advocate" to testify that victim's emotional state was similar to reactions of most sexual abuse victims who came to hospital); State v. Liddell, 685 P.2d 918 (Mont. 1984) (in prosecution for sexual intercourse without consent, expert testimony regarding presence of rape-trauma syndrome was admissible to assist jury in resolving whether or not there was consent); State v. Marks, 647 P.2d 1292 (Kan. 1982) (in prosecution for rape and aggravated sodomy in which defendant raised defense of consent, expert testimony that victim has been suffering from rape trauma syndrome was relevant and did not invade province of jury). *See generally* Massary, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 470 (1985).

138. The Washington courts recognized the battered woman syndrome as an issue in self-defense in State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984). The battered woman syndrome includes the behavioral characteristics of frustration, stress disorders, depression, economic and emotional dependency on husband, hopes that the marital relationship will improve, poor self-image, isolation caused from a loss of contact with friends and family, and learned helplessness which results from the fear and unpredictability of batterings that lead to a feeling of surrender and failure to realize or know there are options to escape the relationship with the batterer. *See*

such testimony as an invaluable aid to a lay jury, uninformed as to the complexities of psychological injury.

The majority in *Tyson* echoes the current general concern about the legitimacy of psychiatric authority.[139] It is not this author's purpose to be an apologist for the shortcomings of psychology. The majority's assertion, however, that the biological or "pure" sciences are less subjective in their methods of investigation is simply naive.

All scientists come to an experiment with prejudices, as well as an initial predisposition to prove or disprove a theory or claim that is the impetus of the experiment. One well-known and respected biologist has noted that it is a "myth that science itself is an objective enterprise, done properly only when scientists can shuck the constraints of their culture and view the world as it really is."[140] The naive faith that these factors do not introduce subjectivity into biological investigation is not borne out by the facts:

> Science, since people must do it, is a socially embedded activity. It progresses by hunch, vision and intuition. Much of its change through time does not record a closer approach to absolute truth, but the alteration of cultural contexts that influence it so strongly. Facts are not pure and unsullied lists of information; culture also influences what we see and how we see it. Theories, moreover, are not inexorable inductions from facts. The most creative theories are imaginative visions imposed upon facts; the source of imagination is also strongly cultural.[141]

The majority in *Tyson* rests its disapproval of psychologi-

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generally Cross, *The Expert as Educator: A Proposed Approach to Use of the Battered Wife Syndrome Expert Testimony*, 35 VANDERBILT L. REV. 741 (1982); Comment, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 N.W. U. L. REV. 348 (1982); Eber, *The Battered Wife's Dilemma: To Kill or To be Killed*, 32 HASTINGS L. J. 895 (1981).

See also State v. Kelly, 102 Wash. 2d 188, 685 P.2d 564 (1984) (in prosecution for second-degree murder, expert testimony was admissible to assist jury in evaluating defendant's actions in light of her subjective impressions and reasonableness of her apprehension of imminent death or bodily harm).

139. Psychiatric testimony has come under increasing attack in the last decade. *See also* Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 174 (1985); Camper & Loftus, *The Role of Psychologists as Expert Witnesses in the Courtroom: No More Daniels in the Lions' Den*, 9 LAW & PSYCHOLOGY REV. 1, 13 (1985); *see generally* Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539 (1979).

140. J. GOULD, THE MISMEASURE OF MAN 21 (1981).

141. *Id.*

cal interpretation on one commentator's questioning of the validity of psychological analysis in light of possible variables introduced by the psychiatrist.[142] The same questioning of variables can be made for other scientific analyses. The scientist's interpretations are always altered by the choice and number of variables used and his or her predisposition and expectations. In order to counteract the prejudicial effect of any expert testimony, whether a biological or psychological science, the legal system requires that the expert establish his or her expertise and that the jury decide the weight of the given testimony in its deliberations.[143]

VIII. THE DISCOVERY RULE

A. Background

The *Tyson* decision forecloses the use of the discovery rule for victims of incestuous abuse who have repressed memory of the abuse. One legal scholar has noted that "as between the duly diligent plaintiff and the wrongdoer, the courts have been unnecessarily sympathetic towards the latter"[144] by depriving plaintiffs of any practical remedy, especially in cases in which the plaintiff could not know of the injury at the time of the wrongdoer's act or omission. Various courts have tolled the statute of limitations so that the cause of action accrues not from the date of injury, but instead from the date of discovery.[145]

In consideration of fundamental fairness and justice, and the common law purpose of providing a remedy for grievances, the Washington courts have, as have other courts, in certain

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142. *See generally* Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985).

143. *Allery*, 101 Wash. 2d at 596, 682 P.2d at 315.

144. *Developments*, *supra* note 60, at 1205.

145. As of 1982, thirty-six jurisdictions have adopted the discovery rule either by statute or judicial determination. *See* Note, *Denial of a Remedy: Former Residents of Hazardous Waste Sites and New York's Statute of Limitations*, 8 COLUM. J. ENVITL. L. 161, 170 n.5 (1982).

However, some jurisdictions have recently replaced their discovery rules with "statutes of repose," which lengthen the limitations time period to twelve years with the commencement at the time the injury occurs. In effect, these statutes are a return to the traditional statutes of limitations. *See* Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983).

Maryland is the only state in which the discovery rule is applied to all civil actions. *See generally* Note, *Poffenberger v. Risser—The Discovery Principle is the Rule, Not the Exception*, 40 MD. L. REV. 451 (1982).

cases, judicially extended the statutes of limitations.[146] While the courts have recognized that it is the constitutional power of the legislature to fix the time limits within statutes of limitations, it is the function of the judiciary to construe the language of the statutes "in a manner consistent with a prima facie purpose to compel the exercise of a right within a reasonable time without doing an avoidable injustice."[147] As the Washington Supreme Court has stated, the statute of limitations "is not such a meritorious defense that either the law or the fact should be strained in aid of it."[148]

The Washington courts have determined that the language of Revised Code of Washington sections 4.16.010 and 4.16.080(2) is not precise, thus, the term "accrual" is open to interpretation. The Washington Supreme Court has noted that "the time fixed for calculating the accrual of the cause of action becomes general instead of specific [when the two statutes are read together], and could as readily be said to commence with the reasonable discovery of the injury as with the occurrence of the event or omission which produced the alleged injury."[149] "In other words, the word 'accrued' does not necessarily mean the same thing in all contexts under all circumstances and for all purposes."[150]

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146. The concurring opinion in *Tyson* reasoned that it is the exclusive function of the legislature to extend the discovery rule. *Tyson*, 107 Wash. 2d at 80, 727 P.2d at 230. In *Ruth*, however, the first case in which the discovery rule was adopted in Washington, the court noted that as between the harm of being deprived of a remedy and the harm of being sued, "the problem . . . remains with the judiciary, for, unless the legislature has acted definitively, the courts, as instruments of the common law and in furtherance of this traditional rule to prevent injustice, should try to strike such a balance." *Ruth*, 75 Wash. 2d at 665, 453 P.2d at 635.

147. Janisch v. Mullins, 1 Wash. App. 393, 399, 461 P.2d 895, 900 (1980) (cause of action for medical malpractice, including negligent diagnosis, accrues when negligence or culpable conduct is discovered by patient).

148. Guy F. Atkinson Co. v. State, 66 Wash. 2d 570, 573, 403 P.2d 880, 882 (1965) (time allowed within which taxpayer may apply for a refund of overpaid taxes is a question of non-claim, not one of state of limitations, but the defense of the statute of limitations is entitled to same consideration as any other defense). *See generally* Rochester v. Tulp, 54 Wash. 2d 71, 337 P.2d 1062 (1959) (in action by executrix of an estate for damages for the conversion of personal property, it was abuse of discretion to refuse to reopen case for reception of new evidence after dismissal on grounds that complaint was filed one day late and thus, barred by statute of limitations); Wickwire v. Reard, 37 Wash. 2d 748, 226 P.2d 192 (1951) (in action upon a promissory note when holder receives part payment, statute of limitations accrued when payment was made).

149. *Ruth*, 75 Wash. 2d at 666, 453 P.2d at 635.

150. *Janisch*, 1 Wash. App. at 399, 461 P.2d at 898.

B. History of the Discovery Rule in Washington

The court's recognition that flexibility was needed in those instances in which the injury did not arise immediately or was apparent from the commission of a tortious act led to the development of the discovery rule.[151] The Washington Supreme Court first adopted the discovery rule in a medical malpractice case, *Ruth v. Dight*, in which the plaintiff claimed that the physician negligently left a foreign substance or article in the body of patient after closing the wound.[152] The court held that the statute of limitations begins to run when the patient discovers, or in the exercise of reasonable care, should have discovered the injury.[153] The court in *Ruth* stressed the knowledge of the blameless plaintiff who could not "in the exercise of reasonable care for her own health and welfare" know of her injury until exploratory surgery revealed the source of her symptoms.[154]

Acknowledging that theoretically it was impossible to justify the application of the discovery rule to one kind of medical malpractice case and not to another, the Washington courts extended the discovery rule to cases of negligent medical diagnosis in *Janisch v. Mullins*.[155] In *Janisch*, the patient alleged that the physician's negligent diagnosis in 1958 resulted in the loss of his vision, and that the physician fraudulently concealed

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151. One of the first cases in Washington to apply the discovery principle was Purdy v. State, 99 Wash. 638, 92 P.2d 880 (1939). In *Purdy*, the state sold shore lands to a proprietor who, like the state, assumed the lake was navigable. Ten years later, the proprietor brought an action to have the lake declared non-navigable and to recover the purchase price. The court held that a judicial decree declaring the lake non-navigable was a condition precedent to bringing the action. Thus, the statute of limitations did not begin to run until the decree was declared. *Id.*

152. 75 Wash. 2d 660, 453 P.2d 631 (1969) (holding that in cases involving allegations of foreign substances left in surgical wounds, the statute of limitations begins to run when the act occurred), (overruling Lindquist v. Mullen, 45 Wash. 2d 675, 277 P.2d 724 (1954)).

153. *Ruth*, 75 Wash. 2d at 667-68, 453 P.2d at 636.

154. *Id.* at 667, 453 P.2d at 635. *Cf.* Denison v. Goforth, 75 Wash. 2d 853, 454 P.2d 218 (1969) (surgical knife left in plaintiff's body during removal of stomach tumor and not discovered until eleven years later).

155. 1 Wash. App. 393, 461 P.2d 895 (1969). *See generally* Fraser v. Weeks, 76 Wash. 2d 819, 456 P.2d 351 (1969) (statute of limitations in medical malpractice cases involving negligent leaving of foreign substances or objects in surgical wound and involving continuous course of treatment for same disease or condition does not begin to run at time of alleged act of malpractice); *cf.* Yerkes v. Rockwood Clinic, 11 Wash. App. 936, 527 P.2d 689 (1974) (limitation period on action based on physician's negligent failure to inform patient of risks in treatment begins to run when patient knows or should know of physician's negligence).

the diagnosis results until 1967. The court emphasized the dependency of a patient on his physician: "As between the patient and the physician, the dependence of the patient in light of the duty of the physician to properly treat the patient entitles the interest of the patient to a claim of higher priority."[156]

The Washington courts eventually made no distinction between medical and other professionals and extended the discovery rule to cases concerning land surveyors,[157] insurance agents,[158] lawyers,[159] accountants,[160] and stockbrokers.[161] The discovery rule has also been found to be appropriate in cases of libel,[162] products liability,[163] latent disease cases,[164] and intentional torts.[165]

In *Urie v. Thompson*,[166] a latent disease case that is referred to as the precursor of the discovery rule, the Supreme Court clearly rejected the limitation of the discovery principle to professions. Referring to *Urie*, the Seventh Circuit in *Stoleson v. United States*[167] stated:

> *Urie* teaches us that it is the nature of the problems faced by a plaintiff in discovering his injury and its cause, and not the occupation of the defendant that governs the applicability of the discovery rule. That a claim may or may not arise from a physician's malpractice is purely incidental. We see no reason to ameliorate the harsh consequences of the statute of limitations in one category of cases to the exclusion of all others. [A]s *Urie* demonstrates, the rule was not created in a medical malpractice context and is not limited to such

156. *Janisch*, 1 Wash. App. at 401, 461 P.2d at 899.

157. Kundahl v. Barnett, 5 Wash. App. 227, 486 P.2d 1164 (1971).

158. Gazija v. Nicholas Jerns Co., 86 Wash. 2d 215, 543 P.2d 338 (1975).

159. Peters v. Simmons, 87 Wash. 2d 400, 552 P.2d 1053 (1976).

160. Hunter v. Knight, Vale and Gregory, 18 Wash. App. 640, 571 P.2d 212 (1977).

161. Hermann v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 17 Wash. App. 626, 563 P.2d 817 (1977).

162. Kittinger v. Boeing Co., 21 Wash. App. 484, 585 P.2d 812 (1978).

163. Ohler v. Tacoma General Hospital, 92 Wash. 2d 507, 598 P.2d 1358 (1979); *cf.* Sahlie v. Johns-Manville Sales Corp., 99 Wash. 2d 550, 663 P.2d 473 (1983).

164. White v. Johns-Manville Corp., 103 Wash. 2d 344, 693 P.2d 687 (1985).

165. United States Oil & Refining Co. v. State of Wash. Dep't of Ecology, 96 Wash. 2d 85, 633 P.2d 1329 (1981).

166. 337 U.S. 163 (1949) (plaintiff who was exposed to silica dust for thirty years, contracted silicosis. The court held that three year statute of limitations began to run when plaintiff discovered the injury). For a discussion of this case, see Birnbaum, *Statutes of Limitations in Environmental Suits: The Discovery Rule Approach*, 24 TRIAL 38, 39 (April 1980).

167. 629 F.2d 1265 (7th Cir. 1980).

cases.[168]

As it is applied in Washington, the discovery rule is based on certain principles: the blameless plaintiff does not and cannot know of the injury, therefore knowledge is delayed and the plaintiff is in a trust or fiduciary relationship with the defendant. The courts also state that until a plaintiff suffers appreciable harm as a result of negligence an intentional tort, he cannot establish a cause of action.[169] In addition, it is not enough for the plaintiff to discover the cause of the injury; he must also discover all the essential elements of the possible cause of action.[170] The running of the statutory period is delayed despite the existence of a theoretical right to recover until the later occurrence of an event that uncovers the elements of the action.[171]

In *United States Oil & Refining Co. v. State of Washington, Department of Ecology*,[172] the Supreme Court of Washington most clearly stated the requisite test for the application of the discovery rule. In the determination of whether to apply the discovery rule, the possibility of stale claims must be balanced against the unfairness of preventing justified causes of action from being presented.[173] The court in that case held that "the balancing test dictates the application of the rule where the plaintiff lacks the means or ability to ascertain that a wrong has been committed."[174] The court stated that the premise underlying limitation statutes, that the plaintiff has the means and resources to detect wrongs within the applicable limitation period, must prove to be inapplicable so that a plaintiff would be denied a meaningful opportunity to bring a warranted cause of action.[175]

IX. APPLICATION OF THE DISCOVERY RULE TO *TYSON*

The *Tyson* majority's concern for the nature of the plaintiff's injury resulted in an inadequate analysis with regard to the discovery rule. Incestuous abuse cases such as *Tyson* fit the necessary requirements for the application of the discovery

168. *Id.* at 1269.
169. *Gazija*, 86 Wash. 2d at 219, 543 P.2d at 341.
170. *Ohler*, 92 Wash. 2d at 511, 598 P.2d at 1360.
171. *Hunter*, 18 Wash. App. at 643, 571 P.2d at 215.
172. 96 Wash. 2d 85, 633 P.2d 1329 (1981).
173. *Id.* at 93, 633 P.2d at 1334.
174. *Id.*
175. *Id.*

rule as it has been applied in Washington. Incest victims such as the plaintiff in *Tyson* often psychologically repress any memory of the abuse until long after the age of majority.[176] The plaintiff in *Tyson* did not know and could not discover the harm until long after the abuse ended. In addition, even if a victim remembers the abuse, she is unaware of the causal link between the childhood abuse and problems experienced as an adult.[177] The primary reason for the extension of the discovery rule to cases of professional malpractice or intentional tort is that the plaintiff does not necessarily have the means or the ability to discover the cause of the harm.[178] In the case of the incest victim who experiences the devastating effects of years of abuse, the ability to discover her psychological and emotional relationship to the abuse and her abuser often comes with therapy or professional help.

Psychological and emotional disorders are often not recognized by the incest victim without professional help. Although there has been much discussion of incest and child abuse, the effects of the abuse have only recently been publicized.[179] Most experts agree that child sexual abuse has serious harmful effects on its victims. However, the incest victim, such as the plaintiff in *Tyson*, does not have enough knowledge of the events to understand the harm or to file a suit against the abuser.

The question of whether the plaintiff should have known or discovered the elements of her claim is also considered by the courts in the application of the discovery rule. This question involves a test of reasonableness that requires juries to decide whether the plaintiff acted with reasonable diligence in asserting her claim[180] and whether knowledge of the elements of her cause of action should be imputed to the plaintiff. The

176. *See supra* notes 42-47.

177. *See supra* notes 48-58.

178. *Peters*, 87 Wash. 2d at 405, 552 P.2d at 1055.

179. Adams-Tucker, *supra* note 27.

180. One commentator points out that reasonableness can be determined early in a proceeding, as well as later during trial. Through pleading requirements that make the plaintiff allege the time, manner, and circumstances justifying the delayed discovery of the harm allow the court is able to evaluate the reasonableness of the delay early in the proceedings in most cases. In addition, procedural devices such as summary judgment and directed verdict are available to challenge such justifications at later stages in the proceeding. Comment, *Accrual of Statutes of Limitations: California's Discovery Exception Swallows the Rule*, 68 CALIF. L. REV. 116, 117 (1980) (hereinafter *Accrual of Statutes of Limitations*).

trier of fact must consider: whether what the plaintiff remembers are childhood experiences; her understanding of them; what symptoms are manifested; whether she sought professional help; and whether such help was even available, depending on her awareness of and financial ability to obtain it. The application of the discovery rule is governed by the rule of reasonableness from the plaintiff's perspective.[181]

In *White v. Johns-Manville Corp.*,[182] the Washington Supreme Court found it unreasonable to expect or require, "as a matter of law," the ordinary wrongful death claimant "to initiate and conduct the massive research necessary to prove the causal link between occupational exposure and resulting cancer."[183]

As in *White*, it is not unreasonable for an incest victim without professional training or sophistication to fail to connect childhood incidents to her current physical and psychological disorders, especially because most incest victims have accepted, since childhood, the blame for the abuse. Most incest victims expect upon leaving home to live normal lives. In most cases, as in *Tyson*, victims seek help in order to deal with problems with which they cannot cope. The incest victim who represses her memory of the abuse cannot discover all the essential elements of her possible cause of action until she not only remembers the fact of the abuse, but also the connection of the abuse to the resultant problems.

In all cases in which the discovery rule has been applied in Washington, the courts have considered the relationship between the plaintiff and defendant in terms of dependency, trust, and reliance.[184] In professional malpractice cases, the blameless plaintiff relies and depends on the professional to perform services and is unaware of the harm done because he has relinquished control. There is no reason to restrict the discovery rule to cases of professional malpractice.[185]

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181. *Ruth*, 75 Wash. 2d at 660, 453 P.2d at 631.

182. 103 Wash. 2d 344, 693 P.2d 687 (1985).

183. *White*, 103 Wash. 2d at 355, 693 P.2d at 594. For further discussion of the factual determination of plaintiff's diligence in discovering their claims, *see* Sahlie, 99 Wash. at 550, 663 P.2d at 473; *Gazia*, 97 Wash. 2d at 215, 543 P.2d at 338; *Ruth*, 75 Wash. 2d at 660, 453 P.2d at 631.

184. *Janish*, 1 Wash. App. at 401, 461 P.2d at 899.

185. *See supra* note 169. One commentator suggests that limiting the discovery rule to the professional context based on a high standard of care would be not only awkward, but also inequitable to innocent plaintiffs "because it would dictate drastically different access to compensation for equally harmed and diligent plaintiffs

The Washington courts have focused, not on the profession of the defendant, but on whether the defendant owes a duty to the plaintiff because of the nature of the plaintiff's trust and reliance on the defendant. In this respect, the facts of *Tyson* and other incest abuse cases are analogous to cases in which the court has applied the discovery rule. The incest victim relies on her father's superior authority and knowledge. As between the doctor and patient, lawyer and client, consumer and manufacturer, the relationship between the child and parent is an unequal one. The incestuous parent can take advantage of the child because of her willingness to please and his power over her as sole support. The incestuous parent educates the child into believing that incest is healthy and normal. If the child is at all aware of the fact of incest, she has learned to remain silent in order to protect her family and herself. The father's power as a parent forces the incest victim not only to tolerate, but to believe that she is somehow at fault.[186]

The Washington courts have consistently protected the integrity of the family.[187] The courts have long held that parental interest in the custody and the control of minor children is a "sacred" right recognized at common law.[188] However, the courts have also stated that children are not chattels and that the rights of parents are measured against the discharge of parental responsibilities.[189] The Supreme Court of Washington has defined parental obligations to mean at a minimum: the expression of love and affection; the expression of concern for the child's well-being; the duty to supply food, clothing and medical care; the duty to provide a home; and the duty to provide social and moral guidance.[190]

The incestuous parent not only abuses his "sacred" right, he unconscionably disregards his parental obligations. His

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on the unrelated basis of whether the injurer is a professional." *Accrual of Statutes of Limitations*, *supra* note 181, at 113.

186. *See generally* SUMMIT, *supra* note 5.

187. *In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942) (child may not be subjected to surgical operation without consent of parents until parents are legally deprived of custody and control).

188. *Id.* at 685, 126 P.2d at 771.

189. *In re* Harney, 19 Wash. App. 85, 88, 574 P.2d 395, 397 (1978) (unfitness of parent as ground for permanent deprivation of parental rights must be established by clear, cogent, and convincing evidence). *See In re* Snyder, 85 Wash. 2d 182, 532 P.2d 278 (1975) (juvenile court's finding that parent-child relationship had dissipated to a point where child was incorrigible was supported by substantial evidence).

190. *In re* the Welfare of Farango, 23 Wash. App. 126, 595 P.2d 552 (1979) (court's primary concern in a deprivation action is the welfare of the child).

expression of "love" is coerced from a child who gives into his demands and abuse out of fear. The child's well-being is not even considered by the abuser, who does not think of the present or future effects of the abuse on the child. The parental duty to provide social and moral guidance is made a mockery by the parent who educates the child into believing that the abuse is acceptable and normal.

The fiduciary responsibilities of a parent to a child are essential to the maintenance of society. The child incest victim is unable to distinguish between a legitimate exercise of parental control and a breach of parental duty. Although the courts in Washington have zealously supported parental rights, they must with equal zeal protect innocent children by promoting parental duties. Applying the discovery rule to incest cases would satisfy this goal.

In *Tyson*, as in other incest cases, it is the defendant's alleged conduct that caused the injury. The conduct of the defendant in contributing to the plaintiff's lack of discovery of claim is an important factor in applying the discovery rule to cases of intentional torts. In *United States Oil & Refining Co.*,[191] the Department of Ecology had to rely on industry reporting to discover discharging of pollutants in violation of the law. United States Oil did not properly report its discharges and discovery of the violations was delayed until the Department of Ecology suspected that monitoring reports were inaccurate and then began investigating. The court noted that by failing to report, industries could escape penalties, and if the discovery rule was not applied, blameless plaintiffs would be penalized while clever defendants would be rewarded.[192] The court stated that "neither the purpose for statutes of limitations nor justice is served when the statute runs while the information concerning the injury is in the defendant's hands."[193]

The incestuous parent controls the victim who is coerced into silence. He slowly initiates her into an abusive relationship that he assures her is normal. The child victim has no way of determining the normalcy of such relationships. The conspiracy of silence that envelopes the relationship does not permit the child to report the abuse. Even when the child

191. 96 Wash. 2d 85, 633 P.2d 1329 (1981).
192. *Id.* at 94, 633 P.2d at 1333-34.
193. *Id.* at 94, 633 P.2d at 1334.

senses that the relationship is wrong, she is unable to break the silence because of threats or fear. Application of the discovery rule to *Tyson* and other incest cases would insure that the blameworthy defendant is penalized for his wrongful conduct.

One commentator has noted that when the notion that defendants should not be burdened forever by potential liability is balanced with the basic principle of justice that a diligent plaintiff should be guaranteed a remedy for a legal wrong, the statute of limitations, which bars relief to blameless victims who have no means to avoid their situation, is a violation of this guarantee of justice.[194] In addition, the defendant's guarantee of repose is not an absolute guarantee.[195] Repose gives the defendant freedom from facing the consequences of his own actions, but it is given only upon a tardy and inactive plaintiff's failure to act diligently in pursuing a claim. However, "if this fairness consideration is the basis of the guarantee of defendants repose, the policy is clearly not applicable where a worthy plaintiff, exercising due diligence, could not discover a cause of action within the limitations period."[196]

The court's objections to the application of the discovery rule in *Tyson* arise primarily from a fear of false or stale claims, which are deemed to be inherently suspicious because memories fade and witnesses may not be available. Yet the Washington courts applied the discovery rule in *Ohler*,[197] where twenty-one years had elapsed, and in *White*,[198] where thirty-eight years had elapsed. In addition, there is concern for the use of fresh evidence. The lack of objective verification of one or more elements of a claim is a potential problem in any case. Nevertheless, the Washington courts have applied the discovery rule to latent disease cases such as *Sahlie v. Johns-Manville Corp.*,[199] where fresh, tangible proof was unavailable.

The extension of the discovery rule to *Tyson* and other incest cases is both fair and just to both parties. The blameless victim would be given the opportunity to recover for her suffering. The blameless defendant would most likely be vindicated. The greatest risk is not that a certain number of

194. *Accrual of Statutes of Limitations*, *supra* note 180, at 119.
195. *Id.*
196. *Id.*
197. 92 Wash. 2d 507, 598 P.2d 1358 (1979).
198. 103 Wash. 2d 344, 693 P.2d 687 (1985).
199. 99 Wash. 2d 550, 663 P.2d 473 (1983).

blameless defendants will be falsely accused or prosecuted, but rather that without giving incest victims access to the courts, incest will continue to be tolerated by society at the expense of the lives and health of innocent children.

X. CONCLUSION

The court in *Tyson* had an opportunity to aid many victims of incestuous abuse. Its refusal to apply the discovery rule in cases of repeated incestuous abuse in which the victim has repressed the memory of the events is an injustice to those children who have suffered at the hands of abusive parents. The Washington courts have consistently applied the discovery rule in cases in which a blameless victim is unable to discover, through no fault of his own, his cause of action. The courts have focused on the plaintiff, as well as the relationship between the plaintiff and defendant. In those cases in which the discovery rule has been applied, the defendant has had knowledge unknown to the plaintiff or has had unequal control. The courts have considered plaintiff's trust and reliance on the defendant, as well as the duty owed to the plaintiff.

The plaintiff in *Tyson* is a model of many incest victims. She is a blameless victim who, as a child, trusted and relied on the authority of her father, only to be exploited and abused. Coerced and caught within a web of secrecy and silence, she is unable to report the abuse. Instead, she learns how to cope and eventually blocks out the memory of the abuse.

Because of the latent nature and delayed recognition of the effects of incestuous abuse, the incest victim remains ignorant of the incest-related injuries until events in her life or therapy trigger her memory. Until she can "discover" her injury, she has no cause of action against her abuser. In light of the research produced by the medical and health care professionals that has focused on child abuse and its effects, and our current concern for victims of such abuse, it is unreasonable for the legal system to deny the victims of incestuous abuse access to the courts to redress their grievances.

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