CHAPTER SEVEN

PRESCRIPTION

Author:

NIKKI NAYLOR
Women's Legal Centre

1. INTRODUCTION

Prescription refers to either the acquisition or the extinction of a right or claim by the lapse of time.[1] The rationale for prescription is the promotion of certainty in legal affairs. In Maasdorp Institutes[2] it is stated that prescription is based on:

> "[T]he principle that penalties should be imposed on those who, through their negligence and carelessness about their own affairs and property, do an injury to the state by introducing an uncertainty as to the ownership and an endless *multiplicity of lawsuits."*

Our Courts have accepted this approach.[3] At present prescription is governed, apart from the common law and certain other statutory enactments, by the Prescription Act 68 of 1969, which came into force on 1 December 1970.

For present purposes I propose dealing with the provisions:

- governing prescription of crimes preventing the State from charging an accused; and
- prescription of a civil debt arising out of a sexual offence

and how this impacts on the rights of the victims of sexual offences.

2. PRESCRIPTION IN RELATION TO THE RIGHT TO INSTITUTE CRIMINAL PROCEEDINGS

At the outset it is important to note that serious offences such as rape never prescribe. However, this only applies to the current definition of rape and does not

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[1] SALC-Project 107 Executive Summary at page 22 and 23
[2] Maasdorp's Institutes 76. See also Grotius 2 7 4
[3] *Welgemoed v Coetzee* 1946 TPD 701 at 711 and *Pienaar v Rabie* 1983 (3) SA 126 (A) at 138H

for example apply to rape in the context of sodomy / rape between two males (as per the proposed definition by the Law Commission).

Section 18 of the Criminal Procedure Act was amended on 27 April 1994. Whilst the existing period of 20 years is preserved as the expiration period, after which a prosecution for certain crimes is not possible, there are now a number of exclusions, where certain crimes will not be hit by the 20 year time period. One of the crimes falling under this exclusion is the crime of rape.

Thus, whilst the State may prosecute at any stage in relation to the crime of rape this does not extend beyond the current limiting definition of rape. Thus, it is recommended (and the Law Commission's proposals in this regard are applauded) that the amendment to the current definition should be brought in line with the Criminal Procedure Act[4] and the exceptions listed in section 18.

3. PRESCRIPTION IN RELATION TO THE RIGHT TO INSTITUTE CIVIL PROCEEDINGS

The reality in most cases of sexual abuse is that a victim would much rather prefer to institute action civilly as in such cases the victim has more control over the conduct of the case and a different standard of proof would be applicable. However, in these cases prescription problems may arise.[5]

This often occurs within the context of non-reporting of sexual offences especially in relation to child sexual abuse and incest. Often victims choose to remain silent and not pursue action until they reach the age of majority and sometimes well beyond the age of majority.

There are also scenario's where women have effectively "blocked out" the rape or have not been in a psychological state to fully realise what has happened or that they have legal recourse. In these cases prescription often prevents the victim from instituting a civil action beyond the prescriptive periods. In the context of the under-

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[4] Act 51 of 1977
[5] SALC – Project 107 Executive Summary at page 23

reporting of sexual offences and the secrecy surrounding such cases, it is deemed to be in the public interest to provide for specific exclusions in the Prescription Act in order to remedy the untenable situation in relation to sexual offences.

Before considering the recommendations by the Law Commission regard should be had to the position in other jurisdictions.

4. COMPARATIVE LEGISLATION AND CASE-LAW:

In this section I do not propose repeating what is contained in the Explanatory Chapter dealing with Prescription and will instead highlight some cases and scenario's not considered by the Law Commission in the said Chapter.

United States Of America: Arizona

In the case of **Doe v Roe**[6] the Arizona Supreme Court considered "repressed memory" within the context of child sexual abuse and specifically in relation to the Statute of Limitations. Repressed memory generally refers to a psychological condition whereby a victim of a traumatic event represses memory of the event in his or her subconscious. Memory repression is often referred to as selective amnesia, traumatic amnesia, and dissociative amnesia.

The Plaintiff in Doe represented with a typical pattern of memory recollection and responses to her memory. She began to have recovered memories, did not believe them and was "in denial" that the abuse had occurred. She did not confront her parents with the abuse until several years after she began to recollect the events from her childhood. As a result she did not act upon her recovered memories until after the two-year period dating back to the first "discovery" had expired.

The Court rationalised the delay, reasoning that the victim "did not recover a sufficient quantum of memories to establish a claim until the majority of her memories had surfaced. In this regard the Court held that:

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[6] 266 Ariz. Adv. Rep. 19 (April 7, 1988)

"determining the time when the quantum of the knowledge was sufficient is a task reserved exclusively to the jury.[7]"

The Court accepted *"the possibility that a victim of severe stress such as childhood sexual abuse might repress memory of the trauma and later experience recall of those events.[8]"* The Court thus found that "realisation/delayed discovery" doctrines will delay the expiration of the Statute of Limitation until such time as the victim discovers the injury and/or the fact that the injury or illness suffered by the victim was caused by abuse.

By so doing the Court realised that discovery periods which begin to run from the first instance of a flashback or fragmented memory allow claims to be lost before claimants have a meaningful realisation of what they have experienced and the fact that they may have a claim.

The Court in the above decision commented that *"the purpose of the statute of limitations is to protect defendants and courts from stale claims where plaintiff's have slept on their rights."* Similarly the Court commented that one does not sleep on his / her rights with respect to an unknown cause of action. This is similar to the rationale as accepted by the South African Courts[9] to the effect that the underlying objective of the Act is to ensure that negligent rather than innocent, inaction is penalised. Similarly in South African law a plaintiff cannot be expected to commence action until such time as he / she is has a reasonable basis for believing that a claim exists.

The Arizona Supreme Court held in this regard that the Plaintiff must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury.

In the more recent decision of **Logerquist v Danforth**[10] the Arizona Supreme Court was requested to preclude all evidence of "repressed memory" on the basis that it

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[7] Supra at 34-36
[8] Supra at 27
[9] Administrator, Cape v Olpin 1996 (1) SA 569 (C) at 758A-B
[10] 320 Ariz. Adv. Rep. 15 (April 2000)

was not sufficiently scientific. The Court rejected this argument and held that the weight and credibility of the evidence would be decided by the jury ultimately and that same could not be excluded on this basis alone.

Utah

By contrast in the State of Utah, the Utah Supreme Court[11] reversed a jury verdict and ruled that "repressed memory testimony" should not have been admitted at trial because its scientific reliability was not established in the trial Court. It appears though that the Utah Court would be willing to accept evidence of same in situations where there is scientific or expert evidence.

The Utah Code[12] provides that civil action is to be brought within four years of the age of 18, alternatively, within four years of "discovery."

There are in turn three situations when the discovery rule applies as set out in the decision of **Warren v Provo City Corp**[13]

In this case it was held that the discovery rule applies:

- in situations where discovery is mandated by statute;
- where the plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and
- where the case presents "exceptional circumstances" and the application of the rule would be irrational or unjust.

In the earlier decision of **Olsen v Hooley**[14] the Supreme Court held that in a "totally repressed" memory case the "exceptional circumstances" provision in the state discovery rule could be applied, thus extending the period concerned.

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[11] Franklin v Stevenson, 1999 Utah LEXIS 95, 1999 UT 61
[12] Utah Code Ann. 78-12-25.1
[13] 838 P.2d 1125 (Utah 1992)
[14] 865 P.2d 1345 (Utah 1993)

Washington D.C.

In order to reverse the untenable decision of **Tyson v Tyson**[15] the Washington Legislature enacted legislation[16] to clarify the application of statutory limitations in relation to child sexual abuse.

The statute provides that all claims or causes of action brought by any person for recovery of damages for injury suffered as a result of child sexual abuse shall be commenced within the later of the following periods:

a) within three years of the act alleged to have caused the injury / condition;
b) within three years of the time the victim discovered or reasonably discovered that the injury or condition was caused by the said act; or
c) within three years of the time the victim discovered that the act caused injury for which the claim is brought.

A proviso is attached stating that the time limit for commencing of an action is suspended for a child until the child reaches the age of eighteen years.

The Statute, more importantly goes further to provide in section 2 that:

> "the victim need not establish which act in a series of continuing abuse or exploitation incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation."

From the aforegoing it is clear that the statute aims to toll[17] the statute of limitations until the survivor of childhood abuse discovers the true cause and extent of injuries. The legislature made its intent explicit in the findings that accompany the statute. The legislature finds that:

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[15] 107 Wn.2d 72, 727 P.2d 226 (1986)
[16] RCW 4.16.340 – "Washington Special Statute of Limitations for Survivors of Childhood Sexual Abuse"
[17] A tolling doctrine is a rule that postpones the date from which a statutory period is counted.

- Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens;
- Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage;
- The victim of child sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitation has run its course;
- The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm until many years after the abuse occurs.

Canada

In the case of **M. (K) v M. (H)**[18] the appellant sued her father for damages arising from incest which began at the age of ten or eleven and continued until she reached the age of sixteen. She instituted action at the age of twenty-eight after attending meetings held by a self-help group for incest survivors in 1984. It was only then that she could make the connection between the history and her psychological and emotional problems.

The Canadian Supreme Court found per La Forest J that:

> "The close connection between therapy and the shifting of responsibility [from the victim to the person who assaulted her] is typical in most incest cases. In my view, this observed phenomenon is sufficient to create a presumption that certain incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy. I base this on the scientific evidence presented at trial and to this Court which confirms a post-incest syndrome amongst incest survivors. If the evidence in a particular case is consistent with the typical features of this syndrome, then the presumption will arise. Of course, it will be open to the defendant to refute the presumption by leading evidence showing that the Plaintiff appreciated the causal link between the harm and its origin without the benefit of therapy.[19]"

The court referred to this as the delayed-discovery presumption and explained it as follows:

> "Aside from the presumption available to the appellant, the evidence overwhelmingly indicates that she did not make a causative link between her injuries and childhood history until she received therapeutic assistance, and the evidence proffered to the contrary was entirely speculative. In any event there was no direct evidence to overcome the presumption that the appellant's therapy was the triggering event for discovering her cause of action. As such, the statute of limitations did not begin to run against her until that time, and this action was commenced within all statutory limitation periods.[20]"

In writing the judgment for the majority Court La Forest J reviewed academic studies in recent years on "post-incest syndrome." He accepted (as did the majority Court) that a typical incest survivor will often exhibit classical psychological responses that impede her recognition of the nature and extent of the injuries she has suffered.

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[18] [1992] 3 S.C.R. 6
[19] At p. 47-48
[20] At p.49

In later decisions[21] it has been held that this principle is not only limited to incest and thus these principles should be endorsed in relation all sexual offences and even to other offences where a victim of a violent crime is too afraid to take action for fear of reprisals (in the prisoner context for example or in relation to war crimes).

In the case of **Beaudouin v Conley**[22] the Canadian Court of Appeal in Manitoba considered the position. In this case three plaintiffs instituted action against their maternal uncle alleging sexual assaults upon them in the years 1978-1983. The three plaintiffs all attained majority prior to instituting action in 1994, with them attaining majority in 1983, 1985 and 1988 respectively.

As a result McInnes J, in the court a quo, ordered that the action be dismissed on the ground that it was statute-barred pursuant to the Limitation Act.

The plaintiff's appealed, alleging that it was only when they sought counselling and commenced therapy in 1993 that they were able to make the connection between the abuse and the consequences. At that time they were diagnosed as suffering from post-traumatic stress disorder.

The Court of appeal allowed the appeal (but on limited grounds in relation to whether it amounted to tort v breach of a fiduciary duty).

In the case of **F. (L) v F. (J.R.)**[23] the Ontario Court of Appeal was faced with a situation where the appellant sued the respondent for damages for historical sexually asaultative behaviour on 25 June 1998. The respondent raised that the appellant sued long after the event and was accordingly time-barred and that the trial judge had erred in not finding this.

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[21] B. (K.L) v British Columbia (1999), 172 D.L.R. (4th) 1 (B.C.C.A) where Esson J.A writing for the majority applied the principles enunciated by La Forest J and considered its application to non-incestual sexual assaults.
[22] Judgment handed down on 20 September 2000
[23] (2001), 105 A.C.W.S. (3d) 154

On appeal it was found that by applying the decision of **M. (K.) v M. (H.)**[24] the trial judge had been correct in his finding as time only begins to run when the causal connection between the harm suffered and the assault is made. In this regard it was acknowledged that whilst the appellant knew that her father was harming her and even though she reported same to the police, it was only after intensive therapy that she realised the causal connection between the injuries caused to her by her father and the devastating effects these injuries had on her.

5. ANALYSIS

Based on the aforegoing it is apparent that in foreign jurisdictions the Courts have attempted to interpret prescriptive provisions so as to allow some lee-way in sexual offence cases, specifically in the context of child sexual abuse and psychological evidence as to the knowledge and causal links between the abuse and the effects thereof.

However, the writer is of the view that perhaps the provisions and judgment do not go far enough as many adult victims of childhood sexual abuse have always remembered some or all of the abuse, but only realise, at some later time the extent or nature of damage they have suffered as a result of the abuse.

For example legislation should provide for the situation where a child who has been abused by her father may well know that the abuse is a bad thing and that it causes shame and hurt but she may have no idea of the role that the abuse plays in problems she has with school, peers, relationships, employment, substance abuse, intimacy issues, depression etc. Often it is only as an adult that she discovers the true impact of the abuse when she seeks help later in life from a mental health professional. This usually happens when she reaches a crisis point in her life (which may seemingly appear to be unrelated – such as a divorce / sudden retrenchment) and is forced to face up to issues which have affected her entire life.

[24] supra at n. 13

The so-called "discovery date" needs to be ascertained before the enquiry can go any further according to the current position in foreign jurisprudence. Whilst this provides some relief it may prove to be problematic specifically in relation to the onus of proof and the Plaintiff's disclosure of intimate psychological records. Such disclosure would be necessary in order for a court to assess and examine when the "discovery" or realisation took place. It is unrealistic to pinpoint the "discovery" or realisation to a specific date especially within the context of psychotherapy. Thus, a careful scrutiny of the psychologist's reports and notes would be called for as part of the discovery process.

This will in turn prove to be disempowering, breach confidentiality and subject the complainant to levels of stress, which in the final instance will militate against her proceeding with the civil claim.[25]

Other remedies therefore need to be considered and perhaps the answer lies in creating a set of rebuttable presumptions.

The writer proposes that it is not only appropriate but also necessary to provide for legislative reform in the context of prescription and that this would be in accordance with the South African constitutional imperative with its primary aim to give effect to rights contained in the Bill of Rights.

6. RECOMMENDATIONS WITHIN THE SOUTH-AFRICAN CONTEXT

Notwithstanding the constitutional entrenchment to the right to freedom from violence[26], the South African government has likewise committed itself to the protection of the rights of rape victims through policies operating at a national level[27] and also from international human rights documents.

At a national level there has been recognition that a legal framework for addressing sexual offences needs to be developed in terms of which the substantive and

[25] This may in turn also create further avenue for secondary victimisation of complainants.
[26] Section 12(1)(c) of the Constitution
[27] For example the National Crime Prevention Strategy which includes Victim Empowerment Programs

evidential laws on sexual violence will be reviewed as well as the legal procedures relating to sexual violence. Justice for victims has also been a focus area of law reform.

This accords with our international obligations in terms of the CEDAW[28], which commits states to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women.[29] CEDAW also sets out specific recommendations regarding duties resting on states. It should be noted that one of the duties set out is that:

> "States should take all legal and other measures that are necessary to provide women with effective protection against gender-based violence, including effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence."[30] [My emphasis]

This means that measures should be put in place in order to give effect to the right to be protected from gender-based violence, one of which is a civil remedy. Prescription, as set out above limits this right and also impacts on the right to access to courts and justice. It is then context that an exception to normal prescription rules should be created, which will be able to withstand constitutional scrutiny.

Our Constitutional Court has already in certain instances accepted that prescription periods unduly burden individuals and impact on their right to have access to Courts[31]. The Court has, however, always considered this by analysing the rationale and aim of prescription laws within the context of the right to access the courts. In the Moise decision the court highlighted that *"untrammelled access to the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom. In the absence of such right the justiciability of the rights enshrined in the Bill of Rights would be defective; and absent true justiciability, individual rights may become illusory.[32]"*

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[28] Convention on the Elimination of All Forms of Violence Against Women [UN Doc A/ROES/34/180 (1980)]. South Africa ratified the Convention on 15 December 1995.
[29] Article 2
[30] Para 24 (t)
[31] Moise v Greater Germiston Transitional Council Minister of Justice and Constitutional Development 2001 (4) SA 491 (CC)
[32] at 499G-H

Within the context of sexual violence, prescription periods need to be assessed, not only in terms of the right to access to Courts but also in terms of the right to freedom from violence and the international and national obligation of the state in relation to sexual offences.

It is therefore recommended that an express exception be created in the Prescription Act, by the insertion of the provision suggested by the Law Commission to the effect that three subsections should be included in order to provide for situations where victims of child abuse have difficulty instituting action. The proposal recommends that:

a) *"the basic limitation period does not run while a person who has a claim is incapable of commencing proceedings because of his/her physical, mental or psychological condition;*
b) *a person who has a claim is presumed to be incapable of proceeding earlier because of his/her dependence on or intimate relationship with the defendant;*
c) *a person who has a claim is presumed to have been incapable of commencing proceedings earlier than it was committed."*

I would argue that the same should apply in situations where a rape victim (who is not a victim of child abuse) has been prevented from instituting action by virtue of her physical, mental or psychological condition. The same arguments should apply as set out hereinabove in relation to post-traumatic stress and repression of memories. It has been found that not only child survivors but often adults also repress / block out memories of abuse or fail to appreciate the consequences of the rape until some time thereafter and often when a process of counselling and psychotherapy commences. Often a victim will not feel emotionally strong enough to commence litigation and until such time as she has dealt with the effects and has knowledge of the impact it has had on her, she will be unable to proceed with a civil claim. The use of the physical, mental and psychological condition of the complainant as the criterion is useful as it focuses on the ability of the complainant to institute proceedings rather than the pegging of an artificial time period. The creation of this exception then circumvents the need for an extension of the time period to twenty / thirty years.

Since the proposal creates a presumption, there would of course be an opportunity for a defendant to attempt to rebut same and here the Court should have regard to the purpose of the amendment and the mischief which the amendment aims to remedy. Evidence would need to be led in relation to the mental / physical state of the victim but it is important that in these circumstances the onus should not be on the victim but instead on the defendant.

Providing for an extension to all victims of sexual offences also then addresses the issue of gang-related violence where a victim is too afraid to come forward as she fears for her life / her family's life in relation to threats received. The provision would allow for situations whereby the victim may "after the fact" (when she has managed to overcome her fear or has moved out of that community) still proceed civilly.

Therefore, in conclusion, the amendments proposed by the Law Commission to the Prescription Act, should be endorsed *in toto*. A further aspect which has not been given consideration is the issue of retrospectivity. It is suggested that this aspect be dealt with specifically in order to allow for the exceptions created to be retrospective, in order to prevent an artificial time line being set to the effect that a complainant has only become equipped to commence proceedings since the amendment has come into effect.

This aspect requires further investigation by the Law Commission.