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Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence

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Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence

ELIZABETH ADJIN-TETTEY & FREYA KODAR*

This paper examines the broad question of whether the limitation defence as currently constructed and applied in the context of tort actions for historical abuse in Canadian common law jurisdictions leads to unfairness and inequities, and asks whether a more nuanced and contextualised approach which looks at the power imbalances between the parties is needed to do justice in such cases. The paper canvasses the traditional rationales for setting limitation dates and ways in which courts and legislatures avoid or minimise the harshness of their application to plaintiffs' claims. Particular attention is paid to the effects of these approaches in historical abuse cases, noting their inability to ensure all survivors of historical abuse can seek redress. The paper uses two historical abuse cases involving sterilisation—*Muir v Alberta* and *DE (Guardian ad Litem) v British Columbia*—to illustrate the arbitrariness and questionable results of some of the strategies used to circumvent the limitation defence. This paper concludes with some thoughts about a more nuanced and contextualised approach to limitation periods in historical abuse claims. The approach is grounded in the importance of giving meaning to autonomy, security and dignity over one's body and promotes consistency in survivors' ability to seek justice for both sexual and non-sexual abuses.

Cet article a pour objet une question de portée générale touchant la défense de prescription. Il s'agit de savoir si, interprétée et appliquée comme elle l'est actuellement dans le contexte d'actions en responsabilité civile introduites devant des tribunaux canadiens de common law et se rapportant à des mauvais traitements subis dans un passé relativement éloigné, la défense de prescription cause des injustices et des iniquités. Cet article cherche également à déterminer si, pour que justice soit rendue dans de tels cas, il est nécessaire d'appliquer une approche qui soit plus nuancée et contextuelle et qui prenne en compte le déséquilibre du rapport de forces entre les parties. Cet article se penche sur les justifications qui ont traditionnellement été avancées pour fixer des dates de prescription, ainsi que sur les façons dont s'y prennent les tribunaux et les assemblées législatives pour juguler ou atténuer la sévérité de leur application aux poursuites des demandeurs. Une attention particulière est portée aux effets que ces approches ont eus dans des cas de mauvais traitements infligés dans un passé relativement éloigné. Elles ne peuvent assurer que tous les survivants de mauvais traitements infligés dans un passé relativement éloigné puissent demander un redressement. Aux fins de sa démarche pour illustrer le caractère arbitraire et l'absurdité de certaines des stratégies employées pour contourner la défense de prescription, l'article fait appel à deux causes portant sur des mauvais traitements infligés dans un passé relativement éloigné et mettant en jeu la stérilisation : *Muir c Alberta* et *DE (Guardian ad Litem) c British Columbia*. Certaines réflexions sur la teneur que devrait revêtir une approche qui soit plus nuancée et contextuelle lorsqu'il est question de délais de prescription applicables aux poursuites pour mauvais traitements infligés dans un passé relativement éloigné. L'approche repose sur l'importance de donner un sens à l'autonomie, à la sécurité et à la dignité des personnes dans leur rapport à leur propre corps et la nécessité que le système soit empreint de cohérence.

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Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence

ELIZABETH ADJIN-TETTEY & FREYA KODAR

I. INTRODUCTION

Over the last few decades, cases of historical abuse in both institutional and non-institutional settings have come to light. The institutional settings included Indian residential schools, mental institutions, reform schools and other out-of-home care programs such as foster homes and camps.¹ Abuse in non-institutional settings included that perpetrated by family members and others. Abuse took many forms, including physical, sexual, emotional, cultural and spiritual abuse, and often involved abuses of power and breaches of trust. Perpetrators targeted children, women, Aboriginal and other racialized people, immigrants, persons living with mental and physical disabilities and others who were vulnerable because of their socio-economic locations.²

Survivors are increasingly turning to tort law to obtain remedies directly against individual perpetrators or vicariously against their employers.³ The trespass torts in particular, with their focus on the importance of personal autonomy, bodily

1 See especially Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Public Works and Government Services, 2000); *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) ch 10; Margaret Hall, "The Liability of Public Authorities for the Abuse of Children in Institutional Care: Common Law Developments in Canada and the United Kingdom" (2000) 14:3 *Int'l JL Pol'y & Fam* 281 at 281-83.

2 The nature of the institution or program enhanced the vulnerability and hence the risk of abuse. For example, in the context of foster care, the power conferred on foster parents and the trust and intimacy characteristic of the arrangement increases the likelihood of abuse. See *KLB v British Columbia*, 2003 SCC 51 at para 94, [2003] 2 SCR 403, 11 WWR 203, Arbour J, dissenting [KLB]. Similarly, while physical and sexual abuse of Aboriginal children attending Indian residential schools cannot be said to have been mandated by government policy, government policy nevertheless informed the location and operation of the schools. These institutions were in remote locations, which increased the children's vulnerability and hence risk of abuse. See *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60 at paras 89-91, [2005] 3 SCR 45, [2006] 3 WWR 1, Abella J. See also Law Commission of Canada, *supra* note 1 at 59-60; Bruce Feldthusen, "Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It" (2007) 22:1 CJLS, 61 at 62.

3 See generally Law Commission of Canada, *supra* note 1 at 1, 145-92; John McLaren, "The Intentional Torts to the Person Revived? Protecting Autonomy, Dignity and Emotional Welfare in a Pluralist Society" (2002) 17 *Sup Ct L Rev* (2d) 67 at 79-80.

integrity and security, dignity and psychological well-being,⁴ have become important avenues for survivors of historical abuse and systemic discrimination to seek justice. Not only are the trespass torts relatively easy to establish,⁵ they may be the only causes of action open to survivors.⁶

Survivors choose to bring trespass actions for a number of reasons. Although individual perpetrators may be dead or impecunious,⁷ a survivor might also have a claim for direct or vicarious liability against the perpetrator's employer or an institution responsible for her or his care at the time of the abuse, and hence possibly obtain compensation from a solvent defendant that may be of material assistance in the healing process.⁸ Bringing an action may also serve a therapeutic function even if the perpetrator is deceased at the time of the action; this is not uncommon in historical abuse claims. If successful, the perpetrator is held personally responsible and accountable for the abuse, something that may be important for the survivor's healing.⁹ In some cases, public authorities and governments are held directly liable for authorizing tortious interference.¹⁰ In these cases, individuals who were victimized because of their vulnerability and marginalization are able to hold government officials accountable. Findings of liability against the government also help promote the rule of law by demonstrating to survivors and society that governments and their agents must operate within the law.

However, tort litigation can be costly, time-consuming and stressful. A plaintiff has to relive the experience through examination and cross-examination and attacks on her or his credibility, especially where the claim is based on sexual abuse and/or against persons in authority who are often considered credible.¹¹ There are also concerns that if the claimant is unsuccessful this may result in self-blame for the

4 See *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24 at para 15, [2000] 1 SCR 551, 5 WWR 465 [Scalera]; *Collins v Wilcock* (1984), 3 All ER 374 at 377-78, 1 WLR 1172 at 1177. See also John Murphy, *Street on Torts*, 11th ed (London: LexisNexis UK, 2003) at 28-29, 31; Anthony M Dugdale, ed, *Clerk & Lindsell on Torts*, 18th ed (London: Sweet & Maxwell, 2000).

5 A plaintiff alleging battery in Canada only has to prove the defendant caused a direct interference with her or his person. The onus then shifts to the defendant to prove the interference was neither negligent nor intentional, or to establish a valid defence. For a discussion and defence of the Canadian position, see *Scalera*, *supra* note 4, at paras 8-15.

6 See McLaren, *supra* note 3 at 70-72. Negligence claims by survivors against the government and organizations that operated institutions or placed individuals in care have often failed because the standard of care at the time of abuse was not breached, or due to lack of causation.

7 Although there is always the chance, however remote, that the perpetrator's financial situation might change. See e.g. *A v Hoare*, [2008] UKHL 6, 2 All ER 1, 2 WLR 311 [Hoare] (the defendant won £7 million in the lottery while serving a life sentence for the abuse he committed). See also Margaret Fordham, "Sexual Abuse and the Limitation of Actions in Tort—A Case for Greater Flexibility" (2008) Sing JLS 292 at 296.

8 But see Feldthusen, *supra* note 2 ("[i]t is legitimate to ask whether damage of this nature and scope may be beyond the capacity of tort law [to remedy]") at 62. See generally Zoë Oxaal, "Removing that which was Indian from the Plaintiff": Tort Recovery for Loss of Culture and Language in Residential Schools Litigation" (2005) 68 Sask L Rev 367.

9 See Bruce Feldthusen, Olena Hankivsky & Lorraine Greaves, "Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse" (2000) 12 CJWL 66.

10 See e.g. *Muir v Alberta* (1996), 179 AR 321, 4 WWR 177 (QB) [Muir cited to AR].

11 See Feldthusen, *supra* note 2 at 64-69.

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abuse and may also place cost awards at risk.¹² In addition, survivors of historical abuse face one major “technical” barrier in their quest to seek civil remedies that other survivors of abuse do not always face: the limitation defence. Plaintiffs must institute legal proceedings for redress within a specified time or they may lose the right to do so.

Expiration of a limitation period does not necessarily bar the plaintiff’s action; however, it can be raised as a defence and, if successful, will extinguish the claim.¹³ Defendants have vigorously invoked the limitation defence to defeat historical abuse claims. This trend has been particularly worrisome in claims against provincial and the federal governments for abuse of children in their care. Government defendants have gone to great lengths to defend against certain claims, including invoking the limitation defence at considerable expense to taxpayers,¹⁴ and in disregard of the Law Commission of Canada’s recommendations that the federal government take a lead role in redressing institutional child abuse by adopting a policy of not relying on the limitation defence in such claims.¹⁵ While not all allegations of abuse will succeed, a successful pleading of the limitation defence denies the plaintiff an opportunity to have the merits of her or his case determined in court.

This paper examines the broad question of whether the limitation defence as currently constructed and applied in the context of historical abuse cases in Canadian common law jurisdictions leads to unfairness and inequities, and asks whether a more nuanced and contextualized approach, which looks at the power imbalances between the parties, is needed to do justice in such cases. The first part of the paper canvasses the traditional rationales for setting limitation dates. This is followed by a discussion of the current approaches taken by courts and legislatures to avoid or minimize the harshness of limitation dates. We pay particular attention to the effects of these approaches in historical abuse cases. The third part of the paper uses two historical abuse cases involving sterilization—*Muir v Alberta*¹⁶ and *DE (Guardian ad Litem of) v British Columbia*¹⁷—to illustrate the arbitrariness and absurdity of some of the strategies used to circumvent the harshness of the limitation defence. We conclude with some thoughts on what a more nuanced and contextualized approach to limitation periods in historical abuse cases could look like. Our approach seeks to recognize the interests of survivors and broader societal interests in giving meaning to autonomy, security

12 See Law Commission of Canada, *supra* note 1 at 161-69; Elizabeth Adjin-Tettey, “Righting Past Wrongs through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses” (2007) 25:1 Windsor YB Access Just 95 at 108-09 [Adjin-Tettey, “Righting Past Wrongs”].

13 See *Stengel v Mabbott*, 2000 ABQB 629 at para 28, 272 AR 296; *DS Park Waldheim v Epping* (1995) 24 OR (3d) 83 (available on CanLII) (Gen Div).

14 See e.g. *KLB*, *supra* note 2; *DE (Guardian ad litem of) v British Columbia*, 2005 BCCA 134, 5 WWR 204, 37 BCLR (4th) 89 (CA) [DE]; *Arishenkoff v British Columbia*, 2004 BCCA 299, 9 WWR 455, 30 BCLR (4th) 1 [Arishenkoff]; *Smith v Nova Scotia (Attorney General)*, 2009 NSSC 137, 277 NSR (2d) 104 [Smith]; *Milbury v Nova Scotia (Attorney General)*, 2007 NSCA 52, 254 NSR (2d) 181, 283 DLR (4th) 449 [Milbury]; *Ammag v Canada (Attorney General)*, 2006 NUCJ 24 (available on CanLII); *Wieringa v Saskatchewan*, 2008 SKQB 407, 322 Sask R 217.

15 See Law Commission of Canada, *supra* note 1 at 178. See also Feldthusen, *supra* note 2 at 64.

16 *Supra* note 10.

17 *Supra* note 14.

and dignity over one's body, and to ensure consistency in survivors' ability to seek justice for both sexual and non-sexual abuse.

II. WHY LIMITATION PERIODS?

A number of rationales have been advanced in support of limitation periods. The first is an evidentiary one, specifically the need to proceed with claims while defendants and witnesses are alive and the evidence fresh in their minds. As time passes the evidence becomes stale and it might be costly and difficult, if not impossible, to locate records. Limitation periods are also intended to encourage plaintiffs to bring their actions in a timely manner, in part to provide fairness to, and certainty for, defendants. As explained by LaForest J, "[t]here comes a time...when a potential defendant should be secure in his [or her] reasonable expectation that he [or she] will not be held to account for ancient obligations."¹⁸ Defendants should not have the threat of litigation and liability hanging over them, nor should they have to keep records or maintain liability insurance for that reason as this could be prohibitively expensive. Finally, limitation periods help ensure that a defendant's conduct is judged by the prevailing standards at the time of the alleged wrongdoing, rather than the potentially different standards of appropriate conduct existing at the time of a much later trial.¹⁹

In Canada, limitation periods vary across the common law provinces and territories. In British Columbia, for example, a plaintiff must bring a tort action within two years after the right to do so arises.²⁰ The discoverability principle, discussed in greater detail below, postpones commencement of this period so that the time within which to bring an action does not start until the plaintiff knows, or ought to know, of her or his right to bring it.²¹ However, legislation in many jurisdictions creates ultimate limitation periods extinguishing a right of action after a particular period of time. In Canada, this period ranges from ten to 30 years.²²

Ultimate limitation periods are particularly problematic for those who have suffered historical abuse. Survivors may not have been aware of their victimization

18 *M(K) v M(H)*, [1992] 3 SCR 6 at 29, [1993] 96 DLR (4th) 289 at 302 [*M(K)* cited to SCR].

19 See *M(K)*, *ibid* at 29-31; *RARB v British Columbia*, 2001 BCSC 667 at para 141 (available on CanLII) [*RARB*]. See also Ipp Committee, *Review of the Law of Negligence: Final Report* (2002) at 85-86, online: Review of the Law of Negligence <<http://revofneg.treasury.gov.au/content/review2.asp>> [Ipp Report]; Graeme Mew, *The Law of Limitations*, 2nd ed (Markham: Butterworths, 2004) at 12-13; Kent Roach, "Reforming Statutes of Limitations" (2001) 50 UNBLJ 25; Richard W Bauman, "The Discoverability Principle: A Time Bomb in Alberta Limitations Law" (1993) 1 Health LJ 65 at 67-68.

20 *Limitation Act*, RSBC 1996, c 266, s 3(2)(a) [*BC Limitation Act*].

21 See e.g. *BC Limitation Act*, *ibid*, s 6.

22 See e.g. *Limitations Act*, RSA 2000, c L-12, s 3(1)(b) [*Alberta Limitations Act*] (Alberta has a ten-year period); *Limitations Act*, 2002, SO 2002, c 24, Schedule B, s 15 [*Ontario Limitations Act*]; *Limitations Act*, SS 2004, c L-16.1, s 7 [*Saskatchewan Limitations Act*] (both Ontario and Saskatchewan have a 15-year period); *BC Limitation Act*, s 8 (six years for actions based on negligence against hospitals, hospital employees and doctors per s 8(1)(a)); *Limitation of Actions Act*, CCSM c L150, s 7(5) [*Manitoba Limitation of Actions Act*]; *Limitations Act*, SNL 1995 c L-16.1, s 22 [*NF & L Limitations Act*] (British Columbia, Manitoba and Newfoundland and Labrador have a 30-year period); *Uniform Limitations Act* (2005), s 6, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/Uniform_Limitations_Act_En.pdf> [*Uniform Limitations Act*] (the Uniform Law Conference of Canada recommends an ultimate limitation period of 15 years).

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and/or may not have instituted claims before expiration of the relevant limitation period, even with the application of the discoverability principle and postponement of the running of time for persons with a disability. For example, people who were sterilized without their consent or knowledge might have their right of action extinguished before they become aware of their wrongful sterilization.²³

III. AVOIDING THE HARSHNESS OF LIMITATION PERIODS: CURRENT APPROACHES

Courts and legislatures have devised various strategies for avoiding, or at least minimizing, the harshness of the limitation defence, including non-judicial settlements, the discoverability principle, postponement in cases of wilful concealment and the elimination of limitation periods for sexual and physical abuse.

A. Non-Judicial Settlements

In response to the barriers survivors face in obtaining remedies through the judicial system, initiatives such as non-judicial settlement processes have been created for some historical abuse survivors. The benefits of out-of court settlements include not having to relive experiences of abuse as well as avoiding the cost of litigation. Survivors may also avoid denial of their claims based on the limitation defence.²⁴ However, these responses have their own limitations. Survivors may not have a choice in deciding between a judicial and non-judicial settlement and although the non-judicial settlement may be an act of good faith intended to give survivors some redress, it may not necessarily be in their or the public's best interest. A non-judicial settlement will provide survivors with monetary compensation but it may not include an admission of liability nor an apology;²⁵ the amount may be less than what would have been recovered in a court action²⁶ and it might not be the best forum for redress

23 In some cases, survivors were told they were being operated on only for appendectomies and were unaware of their sterilization until well into their adult years.

24 See Goldie Shea, *Redress Programs Relating to Institutional Child Abuse in Canada* (Law Commission of Canada, 1999), online: Dalhousie University <<http://dalspace.library.dal.ca:8080/handle/10222/10443>>; National Administration Committee, *Indian Residential Schools Settlement*, online: <<http://www.residentialschoolsettlement.ca/English.html>>.

25 See The Hon Fred Kaufman, *Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse*, vol 1, Appendix F: Memorandum of Understanding Regarding Compensation for Survivors of Institutional Abuse (Government of Nova Scotia, 2002), online: Kaufman Report <<http://www.gov.ns.ca/just/kaufmanreport/Appendices.pdf>>; Susan Alter, *Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations* (Law Commission of Canada, 1999), online: Dalhousie University <<http://dalspace.library.dal.ca:8080/handle/10222/10273>>. Non-judicial settlements are often considered *ex-gratia* payments not dependent on admission or finding of liability on the part of the alleged wrongdoer.

26 See e.g. *Muir*, *supra* note 10. (Leilani Muir received \$740,000 in damages but the settlement amount offered to other survivors after her case was resolved was capped at \$150,000 with the possibility of the committee recommending payments of up to \$300,000. There was a good chance many of the survivors would receive more than the settlement amount should they choose to go to court, even factoring in legal costs.) Further discussion on this can be found in Part IV, below. See Janelle Holden, "The Final Countdown: Alberta Approaches a Final Reckoning on Sterilization Claims", *Alberta Report* 25:48 (16 November 1998) 10, online: Proquest <<http://proquest.umi.com/pqdweb?did=36772398&sid=4&ft=4&clientId=3916&RQT=309&VName=PQD>>.

for some causes of action. Settlement may be strategic for the defendant who would like to avoid negative publicity, as the facts surrounding the victimization of survivors become public through the litigation process.

However, non-judicial settlement may not be an option for all survivors. Some survivors will still prefer to seek redress in the civil justice system for a variety of reasons, including a wish to publicly tell their story, have a public record of the abuse and hopefully achieve personal satisfaction knowing the perpetrator either admitted liability or was found liable for their victimization.²⁷ The Law Commission of Canada has observed that, given that childhood abuse in institutions was marked by profound powerlessness on the part of survivors, the process of redress should be empowering for them and not be paternalistic. Survivors should have the opportunity to choose the redress option that benefits them as a matter of respect for their autonomy and ability to make self-interested decisions in light of their needs.²⁸ They should also be given the necessary information and support they require to make informed choices about redress options.²⁹ Thus, preserving access to the civil justice system for survivors of historical abuse is an important societal goal.

B. The Discoverability Principle

It must be... unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury (or damage). A law which produces such a result... is harsh and absurd.³⁰

Although potential plaintiffs are required to initiate claims within a specified time, in many cases the relevant time frame will not necessarily commence from the time of the event at issue. Plaintiffs are not expected to initiate their action while they remain incapable of doing so;³¹ there is a rebuttable presumption of incapacity to

27 See Law Commission of Canada, *supra* note 1 at 166-67, 171-73. In a documentary about the *Muir* case, Ms. Muir expresses her preference and satisfaction for a judicial remedy notwithstanding the limited monetary compensation because a settlement could be perceived as "hush money." She was pleased about the admission of liability, which created public awareness about the abuse of vulnerable people in institutions, and hoped it would help prevent such incidents in the future. *The Sterilization of Leilani Muir*, DVD: (Edmonton, AB: National Film Board of Canada, 1996), [*Leilani Muir*].

28 Law Commission of Canada, *supra* note 1 at 72.

29 *Ibid* at 109-10.

30 *Pirelli General CableWorks Ltd v Oscar Faber & Partners (A Firm)* (1982), [1983] 1 All ER 65 at 72, 2 WLR 6 (HL) at 15 Scarman LJ [*Pirelli* cited to WLR]. Although his Lordship was critical of the state of the law that allowed time to run before harm to the plaintiff was discoverable, he ultimately concurred, and deferred to the legislature to amend the law. See also Ipp Report, *supra* note 19 at 88.

31 A person is considered incapable of initiating actions under the following circumstances: while she or he is a minor, is unable to manage his or her affairs or commence action by physical or mental impairment, or is of unsound mind. See *BC Limitation Act*, *supra* note 20, s 7; *NF & L Limitations Act*, *supra* note 22, s 15(5); *Limitation of Actions Act*, SNB 2009, c L-8.5, s 1 [*NB Limitation of Actions Act*]; *Uniform Limitations Act*, *supra* note 22, ss 7, 8(1).

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commence suit earlier in some instances of abuse and/or abuse in certain relationships.³² In these cases, the relevant limitation period will begin after the plaintiff ceases to be “incapable”. The presumption of incapacity is intended to preserve the claims of vulnerable victims and to avoid extinguishing such claims before survivors have had a chance to deal with the abuse. The intended beneficiaries of the presumption are often women, girls, Aboriginal and other racialized females and persons living with physical and mental disabilities, who are the most common victims of domestic violence and sexual abuse.³³ Although well-intended, the presumption could have the indirect effect of pathologizing survivors of domestic violence and sexual wrongdoing and legitimizing stereotypes of victimhood.

As well, according to the “discoverability principle,” the time limit within which the plaintiff has to commence proceedings does not begin to run until: (1) the plaintiff becomes, or ought reasonably to have become, aware of the nature and effect of her or his injuries and their likely causes as attributable to the defendant’s wrongful conduct and the fact that she or he has a right of action against the defendant; and (2) a reasonable person in the plaintiff’s situation would have instituted a claim. It is the awareness of the harms arising from the impugned conduct or incident that triggers the start of the limitation period, not awareness of its occurrence.³⁴

Discoverability operates at both common law³⁵ and under statute as it has been incorporated into legislation in all Canadian common law jurisdictions.³⁶ It calls for a personalized and contextualized determination of the date upon which the limitation period should begin to run; it is said to be premised on principles of

32 Under the Ontario legislation, survivors of assault in intimate or dependency relationships or sexual assault are presumed incapable of initiating suits against their perpetrators sooner than they do. The onus of proving that the plaintiff had capacity to have initiated proceeding sooner rests with the defendant. *Ontario Limitations Act*, *supra* note 22 at s 10. The Uniform Conference of Canada recommends the opposite: a presumption of capacity to initiate suit, leaving the plaintiff to prove incapacity in order to benefit from the postponement of running of the basic or ultimate limitation period due to incapacity. See *Uniform Limitations Act*, *supra* note 22 at s 8(2).

33 Marika Morris et al, “Women’s Experience of Racism: How Race and Gender Interact” (2002), online: Canadian Research Institute for the Advancement of Women <http://www.criaw-icref.ca/factSheets/Race%20and%20Gender/racegender_c.htm>; Robyn Brazeau & Jodi-Anne Brzozowski, “Matter of Fact: Violent Victimization in Canada” Statistics Canada: The General Social Survey, catalogue no 89-630-X, online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-630-x/2008001/article/10643-eng.pdf>>; Jodi-Anne Brzozowski, Andrea Taylor-Butts & Sara Johnson, “Victimization and Offending among the Aboriginal Population in Canada” *Juristat* 26:3, catalogue no 85-002-XIE, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2006003-eng.pdf>>.

34 See *M(K)*, *supra* note 18; *Peixero v Haberman*, [1997] 3 SCR 549, 151 DLR (4th) 429 [*Peixero* cited to SCR]; *TR v Alberta (Criminal Injuries Review Board)*, 2006 ABCA 306, 417 AR 163; *Evans v Sproule*, [2008] OJ No 4518, 2008 CarswellOnt 8753 (ONSC); Ipp Report, *supra* note 19 at 90-91. While discoverability hinges on the plaintiff’s actual or constructive knowledge of their cause of action, this does not include knowledge of the applicable law or the precise extent of their injuries. See *Milbury*, *supra* note 14 at para 27.

35 *Kamloops v Nielsen*, [1984] 2 SCR 2, 5 WWR 1; *Central Trust v Rafuse*, [1986] 2 SCR 147, SCJ no. 104 (available on QL); *M(K)*, *supra* note 18.

36 See e.g. *BC Limitation Act*, *supra* note 20, s 6; *Alberta Limitations Act*, *supra* note 22, s 3(1)(b); *Manitoba Limitation of Actions Act*, *supra* note 22, s14; *Ontario Limitations Act*, *supra* note 22, Schedule B, s 5; *Nova Scotia Limitation of Actions Act*, RSN 1989, c 258, s 2(5)(a) [*Nova Scotia Limitation of Actions Act*]; *NB Limitation of Actions Act*, *supra* note 31, s 5. The discoverability principle is also incorporated in the *Civil Code of Quebec*, Art 2904 CCQ.

equity and seeks to avoid the strict application of limitation periods.³⁷ In the context of incest, the Supreme Court of Canada has held that this realization will likely occur with the commencement of some form of therapy. As a result, there is a presumption that discoverability begins when the plaintiff undergoes therapy.³⁸ For other plaintiffs, time might begin to run when they have acquired sufficient facts about the violation of their rights, learned the identity of the defendant and/or obtained appropriate medical and legal advice about the claim such that a reasonable person would have appreciated that they have suffered a sufficiently serious injury to warrant instituting a legal claim.³⁹

The rationale for the discoverability principle is that it is unfair for the limitation period to begin running when the person is unaware of their right of action against the defendant and could have the action extinguished even before becoming aware of the claim.⁴⁰ The discoverability principle preserves a person's right of action until such time as she or he can appreciate, with the exercise of reasonable diligence, the harm done to her or him and the right of action against the perpetrator. The discoverability principle has been criticized as creating uncertainty in the law and undermining the traditional rationales for limitation periods, including closure for potential defendants and the encouragement of potential plaintiffs to pursue their claims in a timely manner.⁴¹ However, discoverability does not "reward" plaintiffs for lack of due diligence;⁴² the running of the limitation period is suspended only until such time as a reasonable person in the plaintiff's position would have "discovered" their right of action and the plaintiff was capable of instituting the action. The normal limitation period for the action will begin to run from that time provided the cause of action is not extinguished by expiration of the ultimate limitation period.⁴³

37 NH Andrews, "Reform of Limitation of Actions: The Quest for Sound Policy" (1998) 57:3 Cambridge LJ 589 at 595.

38 *M(K)*, *supra* note 18, La Forest J. Sopinka and McLachlin JJ were critical of the therapeutic presumption and the attendant reversal of the normal burden of proof. McLachlin J. worried that it might prejudice survivors who do not discover their cause of action even with commencement of therapy or only after several sessions of therapy with the same or different therapists. See also Graeme Mew & Adrian Lomaga, "Abusive Limits: *M.(K.) v. M.(H.)* and a Comparison of the Limitation Periods for Sexual Assault" (2009) 35:2 *Advocates' Q* 133, at 142-46.

39 See *BC Limitation Act*, *supra* note 20, s 6; *Ontario Limitations Act*, *supra* note 22, s 5(1)(b); *R(J) v W (ES)*, [2001] 52 OR (3d) 353, OJ no 133 (available on QL) (ONSC).

40 See discussion of rationale in *M(K)*, *supra* note 18.

41 *Costigan v Ruzicka* (1984), 54 AR 385, 6 WWR 1 (ABCA); Roach, *supra* note 19; Andrews, *supra* note 37 at 591, 595-96, 599-600; Bauman, *supra* note 19 at 79.

42 Notwithstanding criticisms of the discoverability principle, there appears to be consensus with regard to its desirability. However, its applicability should be limited to certain types of cases such as personal injury and cases involving latent damage claims where it is impossible for the potential plaintiff to have been aware of her or his cause of action at an earlier time. See Roach, *supra* note 19 at 54; Andrews, *supra* note 37 at 600. It is fair not to apply the discoverability principle in relation to protection of economic interests. Economic or business losses will often be immediate and hence arguments about discoverability are unlikely to have an evidential basis. See Andrews, *supra* note 37 at 591, 594, 601-02; *Bowes v Edmonton (City)*, 2007 ABCA 347 at paras 175-78, 425 AR 123 [*Bowes*].

43 For examples of cases where plaintiffs' right of action has been extinguished because a reasonable person would have discovered the claim earlier see *Arishenkoff*, *supra* note 14; *Johnson v Johnson*, 2001 MBCA 203; *Bullen v Hershfield*, [1992] A] No 1212 (QB).

Claims: The Need for a Contextualized Approach to the Limitation Defence

1. *Limits of Discoverability*

Notwithstanding the discoverability principle, limitation periods continue to be a major barrier for some claimants, especially those who allege non-sexual abuse.⁴⁴ The principle does not increase the time within which victims may initiate an action but simply postpones the date upon which time begins to run. Further, a court cannot apply discoverability where the statute explicitly states that time begins to run from the occurrence of the event, regardless of the plaintiff's actual or constructive knowledge of the injury.⁴⁵ The principle is also subject to the ultimate limitation period unless the action is not governed by any limitation period,⁴⁶ or is not affected by the ultimate limitation period.⁴⁷ Unless otherwise stated, the ultimate limitation period begins to run from the date of the event that gave rise to the plaintiff's cause of action regardless of discoverability,⁴⁸ even if the potential plaintiff continues to remain incapable of initiating a lawsuit.

The ultimate limitation period is perceived as balancing the interests of potential plaintiffs to institute claims long after the conduct in question with potential defendants' concerns about stale claims and the need for closure; it avoids "the sword of Damocles hanging over...[defendant's] heads forever."⁴⁹ However, in some cases such as historical abuse claims, the ultimate limitation period appears to benefit potential defendants with no corresponding benefit for the administration of justice

44 Mew & Lomaga, *supra* note 38 at paras 147-48.

45 *Fehr v Jacob and Bethel Hospital* (1993), 85 Man R (2d) 63 at paras 22-23, 5 WWR 1 (available on QL); *Peixeiro*, *supra* note 34 at para 37.

46 The running of the ultimate limitation period may be suspended while the potential plaintiff remains under a disability and is not represented by a litigation guardian or where the defendant conceals the injury, loss or damage from the plaintiff. However, time will start running when those conditions cease to exist, for example when the potential plaintiff reaches the age of majority, regardless of whether the action was discoverable or not. See *Ontario Limitations Act*, *supra* note 22, s 15(4); *Mew*, *supra* note 19 at 106; *Alberta Limitations Act*, *supra* note 22, ss 4-5; *BC Limitation Act*, *supra* note 20, s 8; *Saskatchewan Limitations Act*, *supra* note 22, s 6. In Manitoba, postponement of the running of time due to disability ceases after 30 years from the time of the occurrence; plaintiffs who remain under disability will lose their right of action even though they could not have brought an action within that period. *Manitoba Limitation of Actions Act*, *supra* note 22, ss 7(5), 14(4).

47 In Nova Scotia, the limitation period for bringing tort claims based on sexual and non-sexual abuses is one year from the time of discoverability. However, the one-year limitation period does not begin in respect of claims based on sexual assault "while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse." *Nova Scotia Limitation of Actions Act*, *supra* note 36, ss 2(1)(a), (5). As well, courts in Nova Scotia have discretion to reject the limitation defence where they deem it equitable to do so: s 3(2).

48 *EVN v Alberta*, 2009 ABQB 117, 473 AR 188 [EVN]; *Arishenkoff*, *supra* note 14 at para 87; *KLB v British Columbia*, 1999 BCCA 210, 172 DLR (4th) 1 at para 39 [KLB (CA)]; *MM v Roman Catholic Church of Canada*, 2001 MBCA 148, 205 DLR (4th) 253 [MM].

49 *MM*, *ibid* at para 41. See also *Pirelli*, *supra* note 30 at 14, per Fraser LJ; *Arishenkoff*, *supra* note 14 at para 87; *Bowes*, *supra* note 42, Cote JA; *Roach*, *supra* note 19 at 44-45.

or for plaintiffs' right to seek a remedy.⁵⁰ It does not promote due diligence on the part of potential plaintiffs who are unaware of their rights. For example, in many of the wrongful sterilization cases, victims were unaware of the wrong. In many of the institutional abuse cases, such as those that occurred in Indian residential schools, claimants were not aware the conduct in question was wrongful. In incest cases, survivors were often unable to draw the necessary nexus between the wrong and the consequences of their victimization, until after the ultimate limitation period had expired. For such claimants, ultimate limitation periods are punitive and insensitive to the nature of their injuries or the circumstances of their abuse. There is good reason to treat such claimants differently from those whose injuries would usually become manifest immediately or soon after the event in question, such as victims of motor vehicle accidents.

Further, the ultimate limitation period does not necessarily prevent cases from being litigated long after the impugned conduct. A claimant can pursue her claim many years after the occurrence of the event in question so long as discoverability occurs before expiration of the ultimate limitation period. In addition, there is generally no limitation period in the context of criminal prosecutions.⁵¹ Although both police and Crown Counsel may decide not to prosecute historical abuse claims because the evidence is stale, they can successfully prosecute cases many years after the commission of the offence. The distinction between criminal prosecutions and civil actions means that the state will be able to prosecute perpetrators in historical abuse claims if the suspect is still alive and there are no evidentiary concerns. Meanwhile, victims have no control over criminal proceedings. In fact, they may be, or feel, marginalized in that process and it may not give them any personal and meaningful justice. There is no opportunity to consider whether there is sufficient evidence to allow a civil claim

50 See Julia Werren, "Civil Litigation and Repressed Memory Syndrome: How Does Forgetting Impact on Child Sexual Abuse Cases?" (2007) 15 Tort L Rev 43 at 46. Perhaps there is a distinction to be made between business and personal liability claims. Plaintiffs in the latter group will often be in different situations than those in the former who may have been the type of plaintiff at which ultimate limitation periods were historically aimed. There may be good reasons for ultimate limitation periods in the business context, such as minimizing the transaction costs of having to keep records for long periods, and reducing the costs of liability insurance premiums, costs which would ultimately be passed along to consumers. See Janet Mosher, "Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest" (1994) 44 UTLJ 169.

51 Exceptions to limitation periods for criminal prosecutions include treason (proceeding not to be commenced after three years from the time of the alleged offence: *Criminal Code*, RSC 1985, c-46, s 48(1)) and summary conviction offences (no prosecution after six months from time of impugned conduct subject to an agreement between the prosecutor and defendant: s 786(2)). For a critique of limitation periods for criminal proceedings, see PG Barton, "Why Limitation Periods in the Criminal Code" (1997) 40 Crim LQ 188. For a discussion of rationales for having no limitation period, see Sanjeev S Anand, "Should Parliament Enact Statutory Limitation Periods for Criminal Offences?" (2001) 44 Crim LQ 8.

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for historical abuse to proceed once the limitation defence is successfully pleaded.⁵² This privileges the state or public interest over that of survivors. Further, the different durations of, and causes of action subject to the ultimate limitation period in the various jurisdictions, underscore its arbitrary nature.

C. Wilful Concealment

The running of a limitation period is premised on an assumption that the potential plaintiff has actual or constructive knowledge of the information necessary to initiate a suit against the defendant. The discoverability principle avoids the unfairness of having the time begin before the plaintiff can reasonably discover the action. In *M(K) v M(H)*, La Forest J noted that the running of a limitation period will be suspended or postponed based on fraudulent concealment until the potential plaintiff discovers the cause of action.⁵³ Postponement of the limitation period, based on concealment of the wrong, has been incorporated in limitation statutes in some common law jurisdictions.⁵⁴ This would appear to benefit some historical abuse victims, such as those who were wrongfully sterilized and could not have been aware of the wrong until a health care professional revealed it to them much later.⁵⁵ However, this option is not available in all Canadian jurisdictions. In New Brunswick and Newfoundland and Labrador, there are no provisions pertaining to concealment of material facts of injury in relation to actions for personal injuries. In British Columbia, concealment of material facts relating to the cause of action justifies postponement of the commencement of the limitation period. However the claim may nevertheless be extinguished with expiration of the ultimate limitation period unless it is not governed by any limitation period.⁵⁶

D. Eliminating Limitation Periods: Sexual and Non-Sexual Abuse

Some legislatures have eliminated limitation periods for claims based on misconduct of a sexual nature,⁵⁷ and/or abuses in the context of intimate, trust or dependency

52 For a discussion of the importance of civil actions for survivors, see Elizabeth Adjin-Tettey, "Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery" (2006) 39:1 UBC L Rev 3 at 6-10; Nora West, "Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis" (1992) 50:1 UT Fac L Rev 96 at 103-04, 112-13; Elizabeth A Sheehy, "Compensation for Women Who Have Been Raped" in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 205 at 205-06; Bruce Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993) 25:2 Ottawa L Rev 203 at 218-22; Feldthusen, Hankivsky & Greaves, *supra* note 9; Mosher, *supra* note 50 at 183-84; Werren, *supra* note 50 at 48.

53 *M(K)*, *supra* note 18 at 54.

54 See e.g. *Alberta Limitations Act*, *supra* note 22, s 4; *Manitoba Limitation of Actions Act*, *supra* note 22, s 5; *Ontario Limitations Act*, *supra* note 22, s 15(4)(c). See also *Limitation Act 1980* (UK), c 58, s 28 [UK *Limitation Act*].

55 See *JN v GJK*, 2004 ABCA 394, [2005] 361 AR 177; *EVN*, *supra* note 48 at para 28; *Muir*, *supra* note 10 at paras 50, 79.

56 *BC Limitation Act*, *supra* note 20, ss 6(3)(e), 8.

57 *BC Limitation Act*, *supra* note 20, ss 3(4)(k), (l); *Saskatchewan Limitations Act*, *supra* note 22, s 16(1)(a)(ii); *Manitoba Limitation of Actions Act*, *supra* note 22, s 2.1(2)(a).

relationships.⁵⁸ Some courts have also concluded that there is no limitation period for actions based on breach of fiduciary duty, at least in the context of personal injuries—both sexual and non-sexual in nature—where the legislation does not specifically provide a limitation period for such actions.⁵⁹ This may not be possible where the legislation provides a limitation period for all other causes of action not specifically mentioned in that act or any other statute.⁶⁰ In Ontario, the two-year limitation period does not begin where the plaintiff was incapable of instituting the claim due to her or his physical, mental or psychological condition. There is a presumption of incapacity in claims of assault and sexual assault that occurred in an intimate or dependency relationship.⁶¹ The presumption of incapacity postpones the running of the limitation period. However, claims are still subject to the ultimate limitation period.⁶²

Preserving survivors' right to seek redress against perpetrators has been justified as a matter of fairness to plaintiffs, especially in cases such as childhood sexual abuse, incest and abuse in intimate relationships. These claims often involve breach of trust and it is not always easy for plaintiffs to appreciate the harm done to them; alternatively, they may refuse to seek legal redress for fear of retribution. As well, survivors may suppress their memories about the abuse until much later, for example, when they feel they are in a safe environment or after undergoing therapy.⁶³ Preserving the right of action for these claimants is necessary in order to avoid their re-victimization based on a technical defence, and outweighs defendants' interests in repose, certainty and freshness of evidence.

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- 58 *Manitoba Limitation of Actions Act*, *supra* note 22, s 2.1(2)(b); *Saskatchewan Limitations Act*, *supra* note 22, s 16(1)(a)(2); *NF & L Limitations Act*, *supra* note 21, s 8(2); *Ontario Limitations Act*, *supra* note 22, s 16(1)(h).
- 59 See *M(K)*, *supra* note 18; *AC v YJC*, [2003] 36 RFL (5th) 79 at para 72, 121 ACWS (3d) 117 (ONSC) [AC]; *Milbury*, *supra* note 14 at para 31; *Smith*, *supra* note 14 at para 4; *DK v BD Estate* (2000), 187 NSR (2d) 160 at para 22, 100 ACWS (3d) 492, (NSPC); *Chippewas of Sarnia Band v Canada (Attorney General)*, [1999] 40 RPR (3d) 49 at para 506, 88 ACWS (3d) 728 (ONSC); *Hockley v Riley*, [2005] 144 ACWS (3d) 178, *CarswellOnt* 6958 (available on QL), *aff'd* (2007), 287 DLR (4th) 424, 88 OR (3d) 6 (ONCA). However, as claims based in equity, actions for breach of fiduciary duties are subject to the equitable defence of laches ("delay defeats equity"), although the requirements for a successful defence of laches—acquiescence by plaintiff and prejudice to defendant—are unlikely to be present in historical abuse cases. See *Milbury*, *ibid* at para 31; *AC*, *ibid* at paras 73-74.
- 60 See e.g. *BC Limitation Act*, *supra* note 20, s 3(5): "Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose;" *Ontario Limitations Act*, *supra* note 22, s 4 states "Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered."
- 61 *Ontario Limitations Act*, *ibid*, s 10.
- 62 See e.g. *ibid*, s 10, which specifically exempts these actions from operation of the two-year period in s 4; there is no mention of such an exemption from the running of the ultimate limitation period.
- 63 See *M(K)*, *supra* note 18 at 35; *Kraus v Kraus Estate*, [2008] 168 ACWS (3d) 262, OJ No 2098 at para 10 (available on QL) (ONSC); DP Brown et al, *Memory, Trauma Treatment, and the Law* (New York: WW Norton, 1998); Jocelyn B Lamm, "Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule" (1991) 100:7Yale LJ 2189 at 2194-95; *Werren*, *supra* note 50 at 55.

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1. *Hierarchy of Abuses: The Need for Uniformity*

“[C]hildren are our future. How we treat our children and how we allow them to be treated reveal much about ourselves and about our values as a society.”⁶⁴

Notwithstanding the rationales for general and ultimate limitation periods, limitation periods have been eliminated for certain causes of actions, or claims, arising from certain relationships as a matter of public policy. Further, the running of the ultimate limitation period may be postponed in certain circumstances, for example, where the potential plaintiff remains under disability,⁶⁵ or where the defendant has intentionally concealed material facts relating to the claim. These provisions recognize the importance of not foreclosing survivors’ cause of action before they can reasonably become aware of them, regardless of how long it takes for this to occur. It also reflects respect for equality and protection of victims, who are often members of historically disadvantaged groups.

Whether these public policy and fairness considerations will operate to preserve a plaintiff’s right of action depends on the type of abuse that occurred, and the jurisdiction in which the claim arose. Sexual abuse is considered to be more serious than other forms of abuses, at least in jurisdictions such as British Columbia, Saskatchewan, Manitoba and Newfoundland and Labrador, where there are no limitation periods for sexual abuse claims. However, claims based on other types of trespass to the person are subject to discoverability and can be barred by expiration of the ultimate limitation period.⁶⁶ There is also no limitation period in relation to non-sexual abuse in Saskatchewan and Manitoba. The same holds true in Ontario, if the plaintiff was dependent on the defendant at the time of the abuse or was in an intimate relationship with the defendant. These differences across jurisdictions create unnecessary distinctions among survivors who were all victimized because of their vulnerability or marginalized status, sometimes in the same environment.⁶⁷ They can also parse the abuse in an unrealistic manner, allowing only the sexual abuse claim to proceed, while dismissing the non-sexual aspects of the plaintiff’s claim because they are statute-barred.⁶⁸

Many of the rationales for eliminating limitation periods for sexual abuse are also applicable to non-sexual abuse, especially childhood abuse.⁶⁹ It is not uncommon

64 Law Commission of Canada, *supra* note 1 at 1.

65 See *supra* notes 31-32; see also *UK Limitation Act*, *supra* note 54, s 32.

66 In British Columbia, the postponement of a limitation period in cases where the defendant has wilfully concealed material facts in relation to non-sexual abuses is subject to the ultimate limitation period. *BC Limitation Act*, *supra* note 20, ss 6(3)(e), 8.

67 See *Arishenkoff*, *supra* note 14. The plaintiff was one of many children of members of the Doukhobor religion. The children were apprehended by the province and kept at a residential facility. Some children alleged physical and sexual abuse while in state custody. The plaintiff’s allegation of physical abuse was dismissed for being statute-barred while the actions of those alleging sexual abuse were allowed to proceed.

68 See *Blackwater v Plint*, [2005] 3 SCR 3, 258 DLR (4th) 275 [*Plint* cited to SCR]; *KLB (CA)*, *supra* note 48.

69 See Law Commission of Canada, *supra* note 1 at 45-46.

for childhood non-sexual abuse to be perpetrated by persons in positions of authority and in a fiduciary relationship vis-à-vis the victim. The nature of the relationship may also prevent the victim from reporting the abuse for fear of retribution. Similarly, victims may also experience delayed and long lasting psychological harm, similar to that experienced by sexual abuse survivors.⁷⁰ Furthermore, victims may fail to recognize the wrongfulness of the defendant's conduct or appreciate its consequences until much later. Yet survivors of non-sexual abuse can proceed with claims at any time in some, but not all, Canadian jurisdictions. In *Arishenkoff*, the British Columbia Court of Appeal dismissed the plaintiffs' argument that the elimination of limitation periods in relation to childhood sexual abuse should be extended to childhood non-sexual abuse. The Court acknowledged that serious childhood non-sexual abuse may also result in similar long-lasting physical and psychological effects on its victims, at least in relation to institutional abuse, and as a result both groups of survivors may suffer some disadvantage in adulthood.⁷¹ As well, the Court noted the importance of access to justice for all victims of childhood abuse.⁷² However, the Court held that this did not mean that the two types of survivors should be treated in the same way in relation to limitation periods, because sexual abuse is qualitatively different from non-sexual abuse. Among other things, the Court noted the unique social and psychological factors, including the shame and taboos surrounding sexual abuse, that prevent victims from seeking justice and that do not arise in relation to non-sexual abuse. These factors were seen to justify the elimination of limitation periods for claims based on childhood sexual abuse and in no way to discriminate against survivors of non-sexual abuse. The Court also noted that survivors of non-sexual abuse are not disadvantaged, vis-à-vis the limitation period, because they benefit from the discoverability principle and a long ultimate limitation period.

The privileging of childhood sexual abuse as qualitatively different from other types of abuse is not justifiable in light of the common effects of all childhood abuses. Both types of abuses have been found reprehensible and in need of redress. It is no less difficult for defendants to receive a fair trial in non-sexual abuse claims than in those based on sexual abuse or breach of trust. Nor is the alleged public interest in finality and certainty greater in some historical abuse claims than in others when they all involve the victimization of vulnerable persons. There is societal interest in responding to all forms of abuse, especially those involving vulnerable people, as is evidenced by legislation in jurisdictions that preserve survivors' cause of action for all childhood abuses, abuses in intimate and trust relationships or those involving trespass to the person. As well, the Supreme Court has affirmed the importance of the inviolability of the person, regardless of the type of interference.⁷³

70 See e.g. Ipp Report, *supra* note 19 at 88, where it was recognized that examples of damage with delayed manifestation include "delayed psychological effect of sexual or other physical abuse."

71 See e.g. *Arishenkoff*, *supra* note 14 at paras 112, 124-25, 129.

72 *Ibid* at para 140.

73 See *Scalera*, *supra* note 4. The Court held that all battery actions are to be governed by the same principles and that the evidentiary rules in relation to consent should not differentiate between sexual and non-sexual batteries.

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Jurisdictions that have eliminated limitation periods for all childhood abuse claims appreciate the undifferentiated effect of abuse on all children, especially in the context of trust relationships. In Manitoba, the impetus for eliminating the limitation period for all claims involving childhood abuse by persons in positions of trust and authority vis-à-vis the claimant, came from claims by former Indian residential school students for alleged physical, emotional and cultural harm. Their claims were dismissed because they were found to be statute-barred.⁷⁴ In statements preceding the adoption of the amendment, the province's Attorney General made it clear that it was unacceptable to deny access to justice to survivors of childhood abuse who were victimized because of their vulnerability based on the technical limitation defence. The amendment was intended to give survivors in Manitoba the same opportunity to have their claims heard as was available in jurisdictions such as Saskatchewan, which had already eliminated limitation periods for all childhood abuses in trust or power-dependency relationships.⁷⁵ The effect of the amendment was to eliminate the previous hierarchy between sexual and non-sexual abuse, among other things, because both types of abuse are equally heinous and can result in similar psychological consequences.⁷⁶

The need for similar treatment of childhood sexual and non-sexual abuse is also buttressed by the fact that in many instances survivors have suffered both types of abuse and it seems unfair that they can only proceed with some aspects of their claims and not others. The Court in *Arishenkoff* rightly acknowledged that victims of sexual abuse, especially in institutional settings, will often experience other kinds of abuse.⁷⁷ Separating the sexual and non-sexual abuse, for purposes of a limitation period, presupposes that survivors should have been able to initiate the non-sexual abuse claims earlier but not those aspects of the claim based on sexual abuse. This may be impractical, especially where both types of abuse occurred in the same environment, and their effects may be indistinguishable. Barriers to seeking redress, such as lack of awareness of the wrongfulness of the impugned conduct, inability to draw a link between abuse and current difficulties, lack of financial resources and the courage to face abusers, lack of information about their rights and available legal recourses and inability to articulate their case strongly and convincingly may affect all childhood abuse victims regardless of the type of abuse.⁷⁸

Another difficulty with barring non-sexual abuse claims, but not those arising from sexual misconduct, is that it complicates the assessment of damages. As McLachlin CJC said in *Plint*, the plaintiff is only entitled to be compensated for harms arising from the actions that are not statute-barred. To do otherwise, she said, would amount to providing compensation for unproven allegations, which would be

74 *MM*, *supra* note 48.

75 See Manitoba, Legislative Assembly, *Hansard* 37th Leg, 3d Sess, No 10 (26 November 2001) at Bill 8, online: Legislative Assembly of Manitoba <http://www.gov.mb.ca/legislature/hansard/3rd-37th/vol_010/h010.html#iob>.

76 See Adjin-Tettey, "Righting Past Wrongs," *supra* note 12 at 133-34.

77 *Arishenkoff*, *supra* note 14 at para 123.

78 See Law Commission of Canada, *supra* note 1 at 71.

contrary to the legislative intent.⁷⁹ Meanwhile, the plaintiff may have suffered a single indivisible harm attributable to both sexual and non-sexual abuses. One form of abuse may have made her or him more susceptible to the other, and the effects may also have been exacerbated because of the other type of abuse. Courts are compelled to sort out how much of a plaintiff's injury is attributable to the sexual abuse and limit compensation accordingly. Given that childhood abuse of a non-sexual nature can have similar psychological effects on survivors as childhood abuse of a sexual nature,⁸⁰ it may be difficult to separate the consequences of the two types of victimization, especially when they occur in the same environment and/or contemporaneously.⁸¹ Parties might have to adduce expert evidence about the likely effect of each type of abuse on the plaintiff. Not only will this be an artificial exercise that ignores the cumulative effect of the plaintiff's victimization, but it will also likely be costly and further reduce the often depressed damages awarded to plaintiffs from marginalized backgrounds. Failure to treat all historical abuse claims in a similar way in relation to limitation periods, shows either lack of understanding of the nature and effects of non-sexual abuses, or disregard for survivors' interests in the inviolability of their bodies. This constitutes re-victimization of survivors vis-à-vis their abusers and other authority figures.

E. Summary

Current regimes in Canadian common law jurisdictions that preserve survivors' rights of action long after the impugned conduct do not benefit all survivors of historical abuses and may be arbitrary. Survivors, whose abuse was not of a sexual nature, did not occur in intimate relationships and/or did not constitute breach of trust/fiduciary duty may benefit from the discoverability principle and presumption of incapacity, but are subject to ultimate limitation periods.⁸² Extinguishment of survivors' cause of action for redress based on the limitation defence is particularly draconian for those who have no way of knowing of the abuse until after expiration of the ultimate limitation period, such as those sterilized without their consent or knowledge. Many of the historical abuse claims emanate from the treatment of survivors while in state care and/or committed by persons in positions of trust or authority vis-à-vis the victim. While courts have not hesitated to recognize the existence of a fiduciary relationship between governments or institutions and their charges, they have refused to characterize the abuse as a breach of fiduciary duties, because the fiduciaries did

79 *Supra* note 68 at paras 83-85.

80 For a discussion of the effects of childhood abuse, both sexual and non-sexual, see MJ Chartier, JR Walker & B Naimark, "Childhood Abuse, Adult Health, and Health Care Utilization: Results from a Representative Community Sample" (2007) 165:9 *Am J Epidemiol* 1031; Brian Draper, et al, "Long-Term Effects of Childhood Abuse on the Quality of Life and Health of Older People: Results from the Depression and Early Prevention of Suicide in General Practice Project" (2008) 56:2 *JAGS* 262.

81 See Adjin-Tettey, "Righting Past Wrongs," *supra* note 12 at 117-21; Mew & Lomaga, *supra* note 38 at 150-51.

82 A *Charter* equality challenge of statutory provisions that eliminate limitation periods in relation to sexual abuse but not non-sexual abuse has been unsuccessful. See *Arishenkoff*, *supra* note 14.

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not exploit their charges for their personal benefit, did not put their interests ahead of their charges nor did they act in ways that betrayed the trust of their charges.⁸³

The unfairness to survivors of having their claims barred based on the limitation defence has not gone unnoticed. Courts have sometimes avoided the harshness of the limitation defence by considering claims of sexual and non-sexual abuse as integrated, which allows plaintiffs to proceed with the claim as if it were based on sexual misconduct and therefore not subject to any limitation period.⁸⁴ However, courts have not done so readily, and such a characterization may be arbitrary. In addition, integrated claims have been narrowly construed; only where the sexual and non-sexual abuses were inter-related, and occurred as part of a common experience perpetrated by the same person, have the courts construed an integrated claim. Courts have not considered plaintiffs' experiences to be integrated, where sexual and non-sexual abuse occur in the same coercive environment, but are perpetrated by different people or where sexual abuse is not a significant aspect of the claim.⁸⁵ Thus, like the limitation defence itself, the construction of integrated claims is not sufficiently attentive to the interests or perspectives of survivors, who often see their victimization as inter-related, and it can produce inconsistent results.

Ultimately, despite the principles and legislation in place that temper the harshness of limitation periods, many survivors of historical abuse are at the mercy of defendants who can choose whether or not to raise the limitation defence. Two cases involving sterilization—*Muir v Alberta*⁸⁶ and *DE (Guardian ad Litem of) v British Columbia*⁸⁷—illustrate the limits of the current judicial and legislative approaches regarding the limitation defence in historical abuse cases. They also highlight the arbitrariness of the justice that can result and the unusual strategies used to circumvent the limitation defence in these types of cases.

IV. *MUIR V ALBERTA AND DE (GUARDIAN AD LITEM OF) V BRITISH COLUMBIA*

Both cases arose out of the Eugenics movement. According to this movement, a superior race could be created through selective reproduction by preventing persons with “undesirable” characteristics from procreating. This was intended to ensure that they did not pass on their “disabilities” to future generations. Alberta and British Columbia had statutes that authorized sterilization of people believed to have developmental disabilities that could be passed on to their progeny. In reality, the

83 See *KLB*, *supra* note 2 at para 50; *MB v British Columbia*, 2000 BCSC 735, 97 ACWS (3d) 644 (this aspect of the trial decision was not appealed); *Plint*, *supra* note 68 at para 60; *Aksidan v Henley*, 2008 BCCA 43, 291 DLR (4th) 378; Julie Cassidy, “The Stolen Generations—Canada and Australia: The Legacy of Assimilation” (2006) 11:1 Deakin LR 131.

84 See *BG v British Columbia*, 2003 BCSC 1890 at paras 57-60, 129 ACWS (3d) 426 [BG]; *V(JL) v H(P)* (1997), 31 BCLR (3d) 155 (SC), 69 ACWS (3d) 401, *aff'd* (1998), 109 BCAC 165, 80 ACWS (3d) 413.

85 See *KLB* (CA), *supra* note 48 at para 49, *aff'd* 2003 SCC 51, 2 SCR 403, 230 DLR (4th) 513; *BG*, *supra* note 84 at paras 61-66; *RARB*, *supra* note 19. For a critique of severing sexual and non-sexual abuses that occur in the same environment albeit by different perpetrators, see Adjin-Tettey, “Righting Past Wrongs,” *supra* note 12 at 117-18.

86 *Supra* note 10.

87 *Supra* note 14.

legislation was based on faulty science and was used more for social and political purposes than “scientific” ones. People who lacked social power were much more likely to be sterilized than those who had power. Thus women, poor people, immigrants, Aboriginal and Métis people, people of eastern European heritage and people living in government institutions were much more likely to have the legislation applied to them. Hundreds of people were sterilized without their consent or knowledge pursuant to the legislation while they were in state care. Many were also used as subjects for drug and other medical research.⁸⁸

Muir involved a claim by Leilani Muir against the province of Alberta for battery and false imprisonment for confining her to the Provincial Training School for Mental Defectives⁸⁹ in Red Deer, when she was ten years old, and for sterilizing her without her knowledge or consent at the age of 14, pursuant to the eugenics-based *Sexual Sterilization Act*.⁹⁰ The legislation provided that sterilization was only to be considered when a person was about to be discharged and the procedure was necessary to eliminate the risk of procreation.⁹¹ Ms. Muir was not being considered for discharge at the time of the sterilization.⁹² The province admitted its liability for battery because the provincial Eugenics Board had acted outside of its jurisdiction in ordering her sterilization, and the case proceeded to trial on two issues: Muir’s false imprisonment claim; and the quantum of damages. The Court ruled in Ms. Muir’s favour on all her claims, and assessed damages at close to \$750,000, including aggravated damages. Following the decision, the Alberta government reached an out-of-court settlement with 246 claimants who had also been wrongfully sterilized, and expressed its regret for their treatment.⁹³

On its face, *Muir* is a good illustration of how the trespass torts, with their focus on the importance of personal autonomy, bodily integrity, self-determination and dignity, have increasingly become important avenues for survivors of historical abuse and systemic discrimination to obtain justice. However, on further examination, *Muir* also highlights the way the limitation defence can limit tort law’s ability to respond to historical abuse and discrimination claims. Ms. Muir was only successful because, in admitting liability for the battery and proceeding to trial on her additional claims, the province chose not to invoke the limitation defence that would have been a complete bar to her claim. Although she became aware of her sterilization during her first marriage, she did not initiate her claim until many years later. By this time,

88 See *Muir*, *supra* note 10 at paras 92-101 & Appendix A to the Report of Professor Gerald Robertson; *Leilani Muir*, *supra* note 27; Jana Grekul, Harvey Krahn & Dave Odynak, “Sterilizing the ‘Feeble-minded’: Eugenics in Alberta, Canada, 1929-1972” (2004) 17:4 J Hist Sociol 358; *DE (Guardian ad Litem of) v British Columbia*, 2003 BCSC 1013 at paras 19-69, [2003] BCJ No 1563 [DE (SC)] (available on QL); Angus McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945* (Toronto: McClelland & Stewart, 1990).

89 Subsequently re-named the Michener Centre.

90 RSA 1942, c 194. She was told that she was having an appendectomy, and was never advised that she had been sterilized.

91 *Ibid*, ss 4(1), 6.

92 She was never, in fact, considered such a candidate. She left the Michener Centre of her own accord, and against the Centre’s advice, when she was almost 21 years old. See *Muir*, *supra* note 10 at para 4.

93 The total cost of the settlement was \$82 million. For more discussion of this settlement see *supra* note 26 and accompanying text.

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her claim would have been time-barred, since Alberta's limitations statute provided that she had to initiate her claim within two years of becoming an adult or discovering her wrongful sterilization.⁹⁴ The Court found the province's treatment of Ms. Muir to have been "unlawful, offensive and outrageous,"⁹⁵ but declined to award punitive damages, in part because the government did not invoke the limitation defence. The Court stated that "[a]s a matter of public policy, this and other governments should be encouraged to recognize historical wrongs and to make fair amends for them. They should not be punished for doing so."⁹⁶

In contrast to the Alberta government in *Muir*, the British Columbia government chose to invoke the limitation defence in *DE*, a similar case involving sterilization in a government-run institution. Eighteen former patients of the Provincial Mental Hospital in Essondale,⁹⁷ who had been sterilized under the provincial *Sexual Sterilization Act*⁹⁸ between 1933 and 1968, brought a claim against the province for misfeasance in public office related to the actions of the hospital's medical superintendents. The legislation provided that superintendents of mental health facilities could recommend sterilization of patients who were likely to have children with "a tendency to serious mental disease or mental deficiency" if they were discharged from the institution.⁹⁹ The provincial Eugenics Board then had the authority to order the sterilizations. The province relied on the 30-year ultimate limitation period in the BC legislation to argue that the claimants were out of time to bring their suit.¹⁰⁰ At trial, the plaintiffs were unsuccessful on the substance of their claim, as the Court found that the hospital superintendents had not exceeded their discretion under the legislation in recommending sterilization.¹⁰¹ In addition, the Court ruled that the claim was time-barred.¹⁰²

On appeal, the majority held that nine of the 18 plaintiffs should get a new trial on the merits of their cases because the trial court had incorrectly interpreted the legislation to permit a superintendent to recommend sterilization if "there was no immediate prospect of the patients' discharge from [the] hospital."¹⁰³ The majority found that the legislation only permitted sterilization if there was a reasonable likelihood that the patient would be discharged.¹⁰⁴ The majority also found that in three of the nine cases, it was known at the time that the plaintiffs were unlikely to have children with "a tendency to serious mental disease or mental deficiency."¹⁰⁵ More importantly for our purposes, the majority held that sterilization qualified as a sexual

94 *Limitation of Actions Act*, RSA 1980, c L-15 ss 51(b), 52, 57, 58.

95 *Muir*, *supra* note 10 at para 153.

96 *Ibid.*

97 Subsequently re-named Riverview Hospital.

98 SBC 1933, c 59.

99 *Ibid.*, s 4(1).

100 *BC Limitation Act*, *supra* note 20, s 8(1)(c).

101 *DE (SC)*, *supra* note 88 at para 207.

102 *Ibid.*

103 *DE*, *supra* note 14 at para 7.

104 *Ibid* at paras 25-29.

105 *Ibid* at para 21.

assault within the meaning of section 3(4)(1) of the *Limitation Act*, which provides that there is no limitation period for “action[s] based on sexual assault.”¹⁰⁶ Thus, the actions of these nine plaintiffs were not time-barred. The Court characterized sterilization as constituting sexual assault because it removed the ability to procreate. Saunders JA, in dissent, held that sterilizations were not sexual assault within the meaning of the legislation and dismissed the action as time-barred.¹⁰⁷ The province did not appeal the decision, and instead reached a settlement with the nine plaintiffs who had been successful on appeal.¹⁰⁸

Both *Muir* and *DE* illustrate the arbitrariness and inconsistency of justice in historical abuse cases. In both cases the successful plaintiffs had to rely on the benevolence of the provincial governments in not invoking the limitation defence in *Muir*, and in deciding to reach a settlement rather than appeal in *DE*. In addition, the fact that this altruism in *Muir* led the Court to decline to award punitive damages raises some concerns. Refusing to award punitive damages in cases like this may not be in the plaintiff's or society's interest where the defendant's conduct is indeed reprehensible and deserving of punishment. The availability and quantum of punitive damages are at the court's discretion. However, they are more readily available in cases of deliberate interference with bodily autonomy and integrity, which is usually the basis of historical abuse claims.¹⁰⁹ Punitive damages serve important social functions: punishment, deterrence and denunciation.¹¹⁰ They may be particularly appropriate where the person who committed or authorized the impugned act is not punished criminally.¹¹¹ In *DE*, while the majority's decision may have been influenced by sympathy for the plaintiffs, the reasoning is doctrinally questionable and may not create a precedent for future cases.¹¹² Thus, the decision fails to address the broader issue of the appropriateness of the limitation defence in these types of historical abuse cases.

V. THE NEED FOR A CONTEXTUALIZED APPROACH TO LIMITATION PERIODS IN HISTORICAL ABUSE CLAIMS

Currently, whether a historical abuse claim can proceed depends to a large extent on the jurisdiction in which the claim arises. A consistent approach that eliminates limitation periods for such survivors is needed across all Canadian common law jurisdictions to ensure equal access to justice.

106 See *DE* (SC), *supra* note 88. This argument had been rejected by the trial judge. See *DE* (SC), *supra* note 88 at paras, 193-204, 207.

107 *DE*, *supra* note 14 at paras 80-98.

108 Dave Reynolds, “BC Sterilization Victims Win Settlement” (23 December 2005), online: Inclusion Daily Express <<http://www.inclusiondaily.com/archives/05/12/23/122305bceugenics.htm>>.

109 See Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2d ed (Toronto: Irwin Law, 2008) at 288-89.

110 *Whiten v Pilot Insurance*, 2002 SCC 18 at paras 43, 68, [2002] 1 SCR 595.

111 For example, because it is an institution or government or because the defendant is not prosecuted.

112 The characterization of sterilization as a sexual assault was criticized and rejected in *MSZ v M*, 2008 YKSC 73, 300 DLR (4th) 339 [*MSZ* cited to DLR].

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We do not advocate for a general abolition of limitation periods in all civil cases. Rather, we argue they should not be applicable in some contexts because of the need to protect broader interests beyond stale evidence, due diligence and defendants' interest in closure. These broader interests include the fact that justice requires a contextualized approach to limitation periods in historical abuse claims that recognizes the interests of survivors and society in the law's respect for autonomy, security and dignity over one's body.¹¹³

A. Protecting All Invasions of Personal Autonomy and Security

So far, judicial and legislative initiatives to "modernize" limitation periods have paid attention to concerns about the fairness of the traditional limitation periods. Thus, even where legislatures have introduced shorter limitation periods, this has been offset by the discoverability principle and in some cases, a longer ultimate limitation period. As well, there has been greater attention and sensitivity to the complex ways in which survivors may be affected by their victimization, especially in cases of childhood abuse, sexual wrongdoing and abuse in intimate, dependency or trust relationships, as is evident in the elimination of limitation periods for these kinds of claims, the creation of presumptions of incapacity or the liberal construction of the discoverability principle.¹¹⁴

A common feature underlying these developments is that they provide remedies for interference with bodily integrity and autonomy, whether based on intentional or negligent conduct. This opens the door to arguments for extending the liberal approach to limitations to all jurisdictions so that all invasions of bodily integrity are treated similarly. The distinction between sexual and non-sexual abuse in jurisdictions that maintain such a difference and have eliminated limitation periods for sexual abuse claims should be avoided. Making no distinction between the two forms of abuse would avoid the need to construct sexual and non-sexual abuse as inter-related in order to benefit from the absence of a limitation period for claims based on sexual wrongdoing. This would be particularly beneficial for plaintiffs who experienced sexual and non-sexual abuse in the same environment. Courts would be

113 Some courts have taken a contextualized approach in relation to vicarious liability to enable survivors to obtain compensation from a solvent party. See *Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 45; *Lister v Hesley Hall Ltd*, [2001] UKHL 22, 2 All ER 769.

114 See *M(K)*, *supra* note 18; *Gray v Reeves*, [1992] 64 BCLR (2d) 275, 89 DLR (4th) 315 (SC); *Peixeiro*, *supra* note 34. In this case, the plaintiff suffered soft tissue damage in a motor vehicle accident. The initial diagnosis suggested his injury was not serious and he was expected to make a full recovery. However, subsequent diagnosis showed the plaintiff's injury to be serious and permanent. The plaintiff did not commence action until after expiration of the two-year limitation period under the Ontario *Highway Traffic Act*, RSO 1990, c H.8 [HTA]. The defendant's motion to have the plaintiff's claim dismissed for being statute-barred was rejected. The Court held that the plaintiff could not discover his cause of action until the later diagnosis of "permanent serious impairment" because tort recovery under Ontario's no-fault insurance regime requires serious and permanent physical injury. In justifying application of the discoverability principle in the context of the HTA, the Court noted that the plaintiff's situation was analogous to a home owner who discovers cracks in the wall but does not realize that they could compromise the structural integrity of the building. The Court recognized the potential difficulties for defendants and their insurers for having to investigate and defend claims beyond the two-year limitation period, but concluded that fairness to the plaintiff outweighed potential burdens for the defendant. See also *Novak v Bond*, [1999] 1 SCR 808, 172 DLR (4th) 385.

able to take a holistic view of the effect of abuse on survivors rather than trying to separate the effects of sexual and non-sexual abuse. It would also avoid the need for courts to stretch the meaning of wrongdoing of a sexual nature to encompass forced sterilization as in *DE*—a questionable construction, even if the ultimate decision to not allow the plaintiffs' claims to be statute-barred is commendable.¹¹⁵

This proposal is not intended to deny differences between sexual and non-sexual abuses nor to deny the fact that the former are often used as a means of oppression and exploitation of vulnerable persons such as women, children, Aboriginal and other racialized people and those living with disabilities. Nor is it to suggest that all non-sexual abuses should be treated in the same way as sexual abuses in relation to the operation of limitation periods. Indeed, concerns about claims being statute-barred before reasonable discoverability will rarely arise in other cases. Our proposal is intended to recognize that the types of historical non-sexual abuses that are the focus of this paper—childhood abuse and forced sterilization—are likely to be statute-barred before reasonable discoverability and/or expiration of ultimate limitation periods, and have characteristics that are similar to those of sexual abuse. Both types of abuses often occur in trust or dependency relationships, and victims may be unaware of the wrongfulness of the conduct, or they may fail to report for fear of retribution. As well, both types of abuse leave long-lasting physical and/or emotional scars and deserve to be treated similarly, as has been done in provinces such as Saskatchewan, Manitoba and Ontario.

A defendant might have closure when a limitation period expires, even factoring in discoverability or even when the ultimate limitation period expires, but there is no closure for a survivor. Rather, she or he will likely feel re-victimized if she or he cannot bring a civil suit, especially in instances when the state could successfully prosecute the perpetrator. In our view, there is no reason why an injury to the collective, which warrants prosecuting perpetrators at any time, should be privileged over the right of the individual victim to maintain a civil action. It should be noted that in the context of the forced sterilization cases and some forms of abuse in Indian residential schools, abuses were justified based on broad societal interests and concerns about threats to social order. For plaintiffs whose victimization was in part due to their marginalized status, redress will promote not just healing, but also validate their moral worth as equal persons before and under the law. There can be no argument for a lack of due diligence on the part of potential claimants who were previously unaware of the injury or could not initiate suit due to the impact of the defendants' conduct on their lives.

Concerns about stale claims, false memories and fairness to defendants, which might justify limitation defences and the need for a cautious approach, do not arise where the plaintiff's claim is for inter-related abuses. In addition, these concerns do not arise in claims based on forced sterilizations because the plaintiff's sterilization without her or his consent will not be in doubt. Questions about whether sterilization

orders were properly made should be capable of determination regardless of the passage of time.¹¹⁶

B. Responding to the Harshness of the Limitation Defence in Historical Abuse Claims

Courts and legislatures have recognized the need for flexibility in constructing limitation periods. However, current Canadian approaches to the issue are inadequate, especially in relation to victims of historical non-sexual abuse, and privilege claims of sexual abuse or abuse in trust relationships over other claims. Courts have played a significant role in ameliorating the harshness of traditional limitation periods, but there are limits on judicial discretion and innovation. For example, although courts can extend the date a limitation period begins based on the discoverability principle, they are constrained by statutory provisions, such as ultimate limitation periods, that limit the scope of their discretion. Injustice to survivors of historical abuse is likely to continue so long as these claims are subject to general and ultimate limitation periods.

1. Eliminating Ultimate Limitation Periods in Historical Abuse Claims

One way to address the problem is to eliminate ultimate limitation periods in relation to historical abuse claims. This will allow the requisite limitation period to begin to run from the date the claimant becomes aware of the claim or when the case is reasonably discoverable. Although this will allow discoverability to operate in an open-ended way, the claim can still be statute-barred if the claimant does not initiate proceedings within a certain time. The date of reasonable discoverability is objectively determined rather than based on the claimant's subjective knowledge about the cause of action, and may sometimes require expert testimony.¹¹⁷

2. Giving Judges Discretion to Ignore Limitation Periods in Personal Injury Actions

In addition to extending the date of discovery indefinitely in cases of sexual and non-sexual abuse, courts should also be given the discretion to ignore a limitation period in a particular case if its application would result in injustice. This would allow courts to continue to have significant roles in the construction of limitation periods to ensure fairness in particular cases. In the United Kingdom (UK), the *UK Limitation Act 1980* gives courts such discretion by permitting them to not allow the limitation defence if it is fair and equitable to do so.¹¹⁸ In Canada, the Nova Scotia limitations legislation contains a similar, albeit more restrictive, provision, as courts have the discretion to reject the limitation defence in an action commenced after the limitation period has

116 For example, in both *Muir*, *supra* note 10, and *DE*, *supra* note 14, the courts were able to make such determinations.

117 For a critique of the subjective/objective test of discoverability, see *Hoare*, *supra* note 7 at paras 34-35, Hoffmann LJ.

118 See *UK Limitation Act*, *supra* note 54, s 33. See also Ipp Report, *supra* note 19 at 93; *Limitations of Actions Act 1958*, (Vic), s 27K-M.

expired if it appears equitable to allow the claim to proceed. However, the discretion cannot be exercised where the action is commenced more than four years after the expiration of the limitation period or in relation to causes of action with limitation periods of ten years or more.¹¹⁹

The flexibility in the construction of limitation periods in personal injury claims in the UK evolved in response to industrial diseases that were often latent for long periods of time, and has been extended to all cases of personal injury and death.¹²⁰ The provision applies only to claims based on personal injuries. The onus is on the plaintiff to establish that it is just and equitable to ignore the limitation period in relation to her or his claim. There is no guarantee a court will exercise the discretion in a plaintiff's favour,¹²¹ but it at least allows judges to consider the plaintiff's reasons for delay in commencing the action and whether a fair trial is possible. Specifically, the court considers whether the plaintiff exercised due diligence in seeking medical and legal advice after becoming aware of the cause of action; it also considers the defendant's conduct, including concealment of material facts relating to the plaintiff's injury and whether the limitation period should be ignored in the interest of justice, especially where the nature of the interference is the very reason for the plaintiff's delay in bringing her or his claim. As well, the discretion enables courts to consider whether it is just and equitable to allow the plaintiff's claim to proceed. Specifically, courts must consider potential difficulties in obtaining evidence, the possibility of a fair trial and prejudice to the parties if the claim were to proceed many years after the event in question. It would be easier to exercise the discretion in cases where the basis of the abuse is documented or there is some corroborating evidence.¹²² The likelihood

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- 119 *Nova Scotia Limitation of Actions Act*, *supra* note 36, s 3. Some Australian states also give courts discretion to extend the limitation period after the ultimate limitation period expires. However, courts can extend the time for a limited period of three years after the date of discoverability. This was the recommendation of the Ipp Report and has been adopted by some states: *Limitation Act 1969* (NSW), ss 62A, 62B; *Limitation Act 1974* (Tas), s 5A(5); *Limitation Act 2005* (WA), s 39. The period is even shorter in other Australian states such as Queensland where it is one year: *Limitation of Actions Act 1974* (Qld), s 31. New Zealand has enacted legislation for a new limitations regime replacing the old Act modelled on the English system. There is now a single rule that makes the start date the date upon which the act or omission that gave rise to the claim occurred with a six-year limitation period. "Reasonable discoverability" is to be replaced with "late knowledge," which allows the limitation period to be extended three years beyond the date of first knowledge with a 15-year ultimate limitation period, *Limitation Act 2010* No 110, Public Act, s 11. Fiduciary claims are subject to these same rules rather than the doctrine of laches: s 9. There is a separate discretionary provision, somewhat similar to the UK system, which gives courts discretion to provide relief in childhood sexual and non-sexual claims: s 17. See also NZ, *Explanatory Note: General Policy Statement*, online: New Zealand Legislation: Bills <http://www.parliament.nz/en-NZ/PB/Legislation/Bills/9/2/4/00DBHOH_BILL9236_1-Limitation-Bill.htm> which states that "[t]he court will have a discretion to provide relief in child sexual abuse claims, and a discretion to extend limitation periods in cases of incapacity (for example, incapacity arising at or towards the end of a limitation period). The current law is both simplified and clarified in this Bill."
- 120 See *Hoare*, *supra* note 7 at para 55, Hale LJ; *Johnston v NEI International Combustion Limited* (and conjoined cases), [2007] UKHL 39, (*sub nom* *Rothwell v Chemical & Insulating Co Ltd*) 2 All ER 1047 at para 85, Rodger LJ. See also "Pneumoconiosis and Asbestos Diseases. The Fight to Overcome Time Limit Defences", online: clearanswers <<http://www.clearanswers.co.uk/what-we-do/personal-injury-1960s-highlights.htm>>.
- 121 See *Hoare*, *ibid* at para 86, Brown LJ.
- 122 See *ibid*; *Khairule v North West SHA*, [2008] EWHC 1537, All ER (D) 85 (Jul) (available on QL) (QB) [*Khairule*]; *Raggat v Society of Jesus Trust 1929 for Roman Catholic Purposes*, [2009] EWHC 909 (available on QL) (QB).

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of recovering compensation from the defendant will also be a relevant consideration since it might not be in the public interest to exercise the discretion in a plaintiff's favour if there is no prospect of the defendant satisfying a judgment against him or her.¹²³

The UK statute explicitly excludes the application of this provision in relation to claims based on property damage. This underscores the importance of protecting bodily integrity and autonomy; it also points out that, while plaintiffs may be able to protect themselves in relation to property damage and economic losses by way of insurance, personal injury plaintiffs—especially victims of historical abuse who are often members of marginalized groups—are less likely to be able to do so. It is also worth noting that UK courts have exercised the discretion to not apply the limitation period in claims based on sexual and non-sexual abuses.¹²⁴

If similar legislative provisions existed in Canada, they would have at least allowed courts to have considered whether to accept or reject the limitation defence in relation to non-sexual abuse in cases such as *KLB*, and Ms. Muir might have been awarded punitive damages. The fact that the sexual abuse claim proceeded in cases such as *KLB* may have provided both some corroborative evidence of the abuse and a basis for a fair trial in relation to the non-sexual abuse. Similarly, there was no prejudice to the Government of Alberta in *Muir*, because it was not disputed that the board authorized her sterilization. The exercise of discretion regarding application of the limitation period would have also avoided the questionable construction of sexual misconduct in *DE*.

However, the exercise of discretion may result in uncertainty and uneven results. Hence there is no guarantee that historical abuse victims will have the opportunity to have their claim heard by a court.¹²⁵ No matter how compelling the plaintiff's claim and need for redress, a court will not necessarily exercise the discretion to ignore the limitation period in her or his favour. This is in contrast to causes of action for which limitation periods have been eliminated and the plaintiff's need for a remedy, or at least her or his day in court, is seen to have priority over the interest of defendants or the public interest in legal finality and certainty.¹²⁶ As well, whether the discretion should be exercised in a particular situation will depend on

123 *Hoare, supra note 7* at para 88, Brown LJ. Care must be taken in exercising the discretion partly based on the defendant's ability to satisfy a judgment. This presupposes that the plaintiff's principal goal for initiating action is financial compensation. While this may be true in many cases, it should be recognized that claimants might have equally valid non-financial reasons for wanting their day in court, such as public accountability.

124 See *Khairule, supra note 122*; *AB v Ministry of Defence*, [2009] EWHC 1225, All ER (D) 135 (Sept) (BAILII) (QB).

125 Doubts about courts' willingness to exercise statutory discretion to exempt personal injury victims from the operation of limitation periods has been expressed in the Australian context, where it has been observed that courts are generally reluctant to hear cases initiated after expiration of the ultimate limitation period. See Lisa Sarmas, "Mixed Messages on Sexual Assault and the Statute of Limitations: *Stingel v. Clark*, the Ipp 'Reforms' and an Argument for Change" (2008) 32:2 Melbourne UL Rev 609 at 627-34.

126 See *TCD v Harrow LBC*, [2008] EWHC 3048, [2009] 1 FLR 719 (QB).

the strength of the evidence in relation to the factors that courts have to consider in exercising their discretion, which can add to both the cost and length of litigation.¹²⁷

VI. CONCLUSION

Over the last decades, historical abuse in Canadian institutions, out-of-home care programs and in private homes has come to light. This abuse took many forms, and was directed at children, women, Aboriginal and other racialized people, immigrants, persons living with mental and physical disabilities, and others who were vulnerable because of their socio-economic locations.

As survivors have increasingly turned to tort actions to obtain remedies directly against individual perpetrators or vicariously against their employers, they have run up against a technical barrier to having their claims heard: the limitation defence. Canadian survivors of historical abuse do not have equal access to redress. Despite a number of reforms, both judicial and legislative, to temper the harshness of this defence, a survivor's success in Canadian courts too often depends on the jurisdiction and the legislation governing her or his action. For some this means their actions for non-sexual abuse will be time-barred, but not their claims for sexual abuse, while other survivors in some Canadian provinces will be able to proceed with their claims for non-sexual and sexual abuse. In addition, the claims of some victims will be time-barred because they "discovered" the tortious conduct and its effects after the ultimate limitation period has expired, while others will not face such restrictions.

We have sought to develop a more nuanced and contextualized approach to limitation periods in historical abuse cases; one which recognizes the interests of both survivors and society in giving meaning to the values of autonomy, security and dignity over one's body. It is our view that one way to do this is to reform Canadian limitations legislation to: (1) treat all invasions of bodily integrity—sexual and non-sexual—in a similar manner; (2) eliminate ultimate limitation periods for historical abuse cases; and (3) give judges discretion to ignore limitation periods in personal injury actions where it is fair and just to do so.

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See Roach, *supra* note 19 at 47-48. It is possible that in many cases, the evidence required for the exercise of the discretion may not be onerous and hence will not negatively impact judicial resources through either increases in trial length or cost to the parties. However, this cannot be guaranteed in all cases. It is conceivable that defendants would want to challenge the evidence put forth by the plaintiff and/or the court might demand more from the plaintiff to establish due diligence on the latter's part in initiating suit.

