THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

No. [redacted] (Hillsborough County, Northern District)
[redacted] v. Gordon MacRae, et al.

No. [redacted] (Hillsborough County, Northern District)
[redacted] v. Gordon MacRae, et al.

[redacted] (Cheshire County)
John Doe v. Gordon MacRae, et al.

[redacted] (Cheshire County)
v. Roman Catholic Bishop, et al.

[redacted] (Rockingham County)
v. Gordon MacRae, et al.

ORDER ON STATUTE OF LIMITATIONS DEFENSE

Pursuant to the Court's May 22, 1996 Order on Defendant's Motions to Dismiss, the Court conducted an evidentiary hearing on the statute of limitations defense raised in all of the above-captioned cases except [redacted] (Cheshire County) (See Order of March 5, 1992, in which the Court (Sullivan, J.) found that none of the plaintiff's claims are time-barred because the plaintiff was a minor at the time suit was instituted.) The hearing occurred over six days, commencing July 11, 1996 and concluding July 23, 1996. All parties were represented, except Gordon MacRae, who did not appear, notwithstanding a pro se appearance. The Court received testimony from twelve witnesses, including each of the plaintiffs, their therapists, the mother of the three [redacted] plaintiffs, and two additional experts--one appearing on behalf of the plaintiffs, and one on behalf of the defendants The Roman Catholic Bishop of Manchester, Inc. and Father Gerard Boucher (hereafter referred to collectively as "the Church.")

The defendants have alleged that all four cases are barred by the statute of limitations. Each of the plaintiffs alleges that because the discovery rule applies, his action is not time-barred.

For the reasons stated herein, the Court finds that the statute of limitations does not bar [redacted], and [redacted] claims. Therefore, the Court denies the defendants' motions to dismiss those actions. As to [redacted], the Court finds that his claims are time-barred and accordingly grants the defendants' motion to dismiss his action.

THE LAW

Standard of Review

The statute of limitations constitutes an affirmative defense, and the defendant bears the burden of proving that it applies in a given case. Glines v. Bruk, 140 N.H. 180, 181 (1995). The defendant's burden is met by a showing that the action was not brought within the time-limit established by the applicable statute of limitations. Id. "Once the defendant has established that the statute of limitations would bar the action, the burden shifts to the plaintiff who has the burden of raising and proving that the discovery rule is applicable to an action otherwise barred . . . ." Id. (citations omitted).

In ruling on the defendants' motion to dismiss [redacted] and [redacted] actions (construing the facts in the light most favorable to the plaintiffs), the Court found that while the defendants had met their initial burden of proof, "the plaintiffs alleged facts sufficient to permit application of the discovery rule so as to preclude dismissal." (May 22, 1996 Order at 10-11, 17.) Accordingly, the Court scheduled an evidentiary hearing to make the requisite factual findings regarding the applicability of the discovery rule to the statute of limitations defense. See Black Bear Lodge v. Trillium Corp., 136 N.H. 635, 638 (1993). Subsequently, the parties agreed to expand the scope of the evidentiary hearing to include [redacted] and [redacted] actions.

Applicable Statute of Limitations

RSA § 508:4, I is the statute of limitations applicable to these actions. Under this statute, tort actions which "arose" before July 1, 1986 are subject to a six-year limitations period; tort actions which "arise" after that date are subject to a three-year limitations period. RSA §508:4 I; Conrad v. Hazen, 140 N.H. 249, 252 (1995); see Dennis T. Ducharme, The Statute of Limitations and The Discovery Rule Under RSA 508:4, 28:3 N.H.B.J. 239, 239-43 (1987). A cause of action "arises"

> once all the necessary elements are present. . . . A plaintiff who alleges an injury based on a defendant's conduct that occurred prior to July 1, 1986, but where either the injury or its cause was not discovered until sometime after that date, would have the benefit of the six-year statute of limitations and the common law discovery rule.

Conrad v. Hazen, 140 N.H. 249, 252 (1995).

The parties agree that the six-year limitations period applies to the [redacted] and [redacted] cases. At the conclusion of the evidentiary hearing, the Church asserted that plaintiffs [redacted] are subject to a three-year limitations period. See Def. Proposed Rulings of Law in Action No. 94-C-737 at 4; Def. Proposed Rulings of Law in Action No. 93-C-1243 at 3. The Church bases its argument on the theory that MacRae's conduct toward [redacted] and [redacted] constituted a "continuing wrong" which began before July 1, 1986 and continued after July 1, 1986. It asserts that because some of the conduct occurred after July 1, 1986, all of the conduct is subject to the three-year limitations period. To support its position, the Church relies on the following case language: "Under the continuing wrong tolling doctrine, the cause of action accrues at the time of the final act in a series of events or course of conduct." Fletcher v. State of Florida, 858 F. Supp. 169, 171 (M.D. Fla. 1994).

The "continuing wrong" doctrine is one of several judicial doctrines initially adopted to avoid harsh application of the statute of limitations to malpractice cases in which a statute may have run before the patient or client discovers he has suffered injury. See Shillady v. Elliot Community Hosp., 114 N.H. 321, 323-324 (1974); Prosser and Keeton On Torts, ch. 5, § 30 at 165-167, 167 n. 17. (5th ed. 1984) 167 n.17 (Supp. 1988) (hereinafter Prosser). The doctrine is intended to expand, for a plaintiff's benefit, the date the cause of action accrues. To apply the doctrine to narrow a plaintiff's opportunity for recovery turns the doctrine on its head. This the Court declines to do. See Fletcher, 858 F. Supp. at 171; Prosser, ch. 5, § 30 at 165-17. Both [redacted] and [redacted] were subjected to abusive conduct well before July 1, 1986. The fact that the conduct continued after July 1, 1986 does not vitiate the applicability of the six-year limitations period, pursuant to the holding in Conrad. 140 N.H. at 252. I find that the claims of [redacted] and [redacted] are subject to the six-year limitations period.

I find that the defendants have met their initial burden of proof on the statute of limitations issue regarding all four cases. Therefore, with respect to each, unless the plaintiff

meets his burden of proof under the discovery rule, his claim is barred.

The Discovery Rule and its Application

> Under the common law discovery rule:
> [a] cause of action will not accrue . . . until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's wrongful conduct.

Brown v. Mary Hitchcock Memorial Hosp., 117 N.H. 739, 742-43 (1977) (emphasis added) (rule applies when plaintiff should have discovered, not when she could have discovered, her injury); see Rowe v. John Deere, 130 N.H. 18, 21 (1987). The common law discovery rule may be applied in civil sexual assault cases. McCollum v. D'Arcy, 138 N.H. 285, 286-88 (1994). The plaintiffs urge the Court to adopt a standard whereby "no existing statute of limitations applies to bar the action of an adult survivor of child sexual abuse when it is shown by clear and convincing evidence that the plaintiff has in fact been sexually abused during minority by the named defendant." Petersen v. Bruen, 792 P.2d 18 , 25 (Nev. 1990). On the opposite end of the spectrum, the defendant Church urges the Court to adopt a standard whereby "as a matter of law one is 'injured' [so as to preclude application of the discovery rule] if one is sexually abused." Blackowiak v. Kemp, 546 N.W. 2d 1, 3 (Minn. 1996). Neither of these positions is tenable, because the New Hampshire Supreme Court has held that the discovery rule is applicable in civil sexual assault cases. McCollum, 138 N.H. at 288. The sweeping policy changes which each party proposes must be left to the legislature, if they are to be implemented at all.

Whether a plaintiff exercised "reasonable diligence" in the discovery of his cause of action must be determined based upon when a reasonable person--who was subject to the plaintiff's experience--should have discovered his cause of action. Conrad v. Hazen, No. 93-C-01210 (Rockingham County Super. Ct., June 25, 1996) at 8 (McHugh, J.) (applying modified objective standard); Jacobi v. Rechberger, No. 94-C-482 (Merrimack County Super., Ct. April 12, 1996) (McGuire, J.) at 13-14 (applying modified objective standard); see Flanagan v. Grant, No. 95-1962, slip. op. at 3 n.3 (1st Cir. April 1, 1996); Riley v. Presnell, 565 N.E.2d 780, 785-86 (1991); Phinney v. Morgan, 654 N.E.2d 77, 81 (Mass. App. 1995), review denied, 656 N.E.2d 1258 (1995).

The issues in each of the four cases are as follows:

> 1. Was plaintiff's original injury sufficiently serious to apprise him that a possible violation of his rights had taken place? If so, the statute of limitations bars his suit.

Jacobi, supra, at 1; see Conrad, supra, at 21-23; Rowe, 130 N.H. at 22.

> 2. If the answer to question #1 is "no," when did the plaintiff discover, or in the exercise of reasonable diligence, should he have discovered, both the fact of his injury and the causal relationship between the injury and defendant MacRae's acts? If the relevant date is prior to six years before institution of suit, the statute of limitations bars his suit.

Jacobi, supra at 1; see Conrad, supra, at 22-24; McCollum, 138 N.H. at 286-88.

THE FACTS

[redacted] was born on [redacted]. His lawsuit was instituted on September 10, 1993, when he was age 28. He alleges sexual abuse at the hands of Gordon MacRae (initially when MacRae was a seminarian and later when MacRae was a Roman Catholic priest) during the period of approximately 1979/1980 through 1983, with the last sexual contact occurring no later than December 31, 1983 (when [redacted] was age 18), nearly 10 years prior to institution of suit.

[redacted]