**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**REPORTABLE**

**Case no: 348/03**

In the matter between

**E VAN ZIJL** **APPELLANT**

**and**

**I M HOOGENHOUT** **RESPONDENT**

**Coram:** **MPATI DP, CAMERON, NUGENT, HEHER and VAN HEERDEN JJA**

**Heard:** **30 AUGUST 2004**

**Delivered:** **27 SEPTEMBER 2004**

**Summary: Prescription – Act 18 of 1943 s 5(1)(c) - claim by adult survivor of child abuse against perpetrator – assaults committed between 1958 and 1967 – plaintiff attaining majority in 1973 – effect of abuse on ability to attribute blame to abuser – plaintiff not having knowledge of the wrong until able to do so.**

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**JUDGMENT**

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**HEHER JA:**

**[1]** Abused children have a right of recourse against their abusers. Until the nineteen-eighties the right was seldom invoked and, in South Africa, probably not at all. Major reasons were cultural or societal taboos (many abusers are close family members) and ignorance. Since then the boundaries of understanding of the psyche of survivors of child abuse have been pushed back by expert studies of the problem and the true nature and extent of the effects of such abuse have been become better appreciated. As survivors have become more informed about their condition and rights and have received support from public interest groups there has been an upsurge in claims, many by adults who initiated proceedings years after the actual incidents of abuse. This, in turn, has given rise to a spate of cases, particularly in the United States, in which defendants have invoked limitations statutes. A considerable body of judicial precedent has been built up in which the balance between the rights of victims and the protection of their assailants against stale claims has been discussed and resolved in the particular context of the common or statute law of the states concerned. See eg the comprehensive treatment of the subject in the American context by R G Donaldson 'Running of Limitations against Action for Civil Damages for Sexual Abuse of Child' 9 *ALR* 5th 321; and further, *Carney v Roman Catholic Archbishop of Boston* 16 Mass LR 3; *M.(K.) v M.(H.)* 96 DLR (4th) 289 (SCC); *Stubbings v United Kingdom* (1996) 23 EHHR 213; *W v Attorney-General* [1999] 2

NZLR 709; *KR and others v Bryn Alyn Community (Holdings) Ltd* (*in liquidation*) *and another* [2003] QB 1441 (CA); see also *Dube v Banana* 1999 (1) BCLR 44 (ZH).

**[2]** This is the first case of the kind in South Africa of which I am aware. It commenced in the Cape High Court before Nel J. The learned judge heard evidence from the side of the plaintiff only. The defendant had raised a special plea of prescription and denied the merits of the claim. However he at first elected not to participate in the trial citing ill-health and lack of funds. The evidence was consequently untested by cross-examination.

**[3]** With the leave of the learned judge the defendant appeared through counsel for the limited purpose of arguing the special plea. The judge believed the plaintiff and her witnesses and accepted the expert psychological evidence of Ms Fredman on her behalf. He nevertheless upheld the special plea and dismissed the action. He decided that the wrongs first came to the knowledge of the plaintiff within the meaning of s 5(1)(*c*) of the Prescription Act 18 of 1943 on 'the dates upon which the assaults were committed and not the dates upon which their effects were realised'.

**[4]** The assaults were committed between November 1958 and 1967. The plaintiff attained her majority in 1973. She instituted action in August 1999. The learned judge held that the plaintiff's evidence that she first realised in 1997 that it was not she but rather the defendant who bore responsibility for the physical, psychological and emotional damage which she had suffered since 1958 was accordingly of no assistance to her. Nor, so the learned judge found, was the plaintiff 'a disabled person'; she was therefore unable to rely on s 7(1)(*b*) of the 1943 Act which provides

that prescription shall be suspended 'during the period of disability of the creditor'. According to Nel J, the plaintiff's claim against the defendant prescribed three years after she reached majority, in terms of s 3(2)(*c*)(vi) read together with s 9 of the 1943 Act. No order for costs was made, the court *a quo* holding that both parties had wrongly relied on the Prescription Act 68 of 1969.

**[5]** The learned judge refused the plaintiff leave to appeal. We, however, directed that her application to this court for leave to appeal be argued and that the parties be prepared to deal with the merits of the case. The application was heard on that basis.

**[6]** The principal difficulties in this appeal are the interpretation of the relevant legislative provisions and the determination of whether the evidence of the plaintiff and her expert witness brought her within those provisions.

**[7]** Before considering either aspect certain general observations are necessary. The psychological studies that have been undertaken into the sexual abuse of children have revealed effects on the victims which are very different from those suffered by the usual plaintiff in a delictual action. (I will discuss these effects in greater detail below.) Of course, the prescription statutes in force in this country were drafted in ignorance of and without consideration for the special problems afflicting such survivors. Moreover, society as a whole was, during the period prior to 1980 (and certainly during the minority of the plaintiff) more conservative in matters involving sexual mores than it is now and considerably less willing to confront sexual matters. More people have become attuned in the last fifteen years or so to acknowledging the existence of child sexual abuse and to taking steps to eradicate it. The situation of a

victim during the childhood of the plaintiff and a substantial part of her adult life was not conducive to disclosure. All these factors call for a peculiar sensitivity when applying statutory time limits to proceedings arising from sexual abuse committed against a child during the period in question. As Thomas J put it in *W v Attorney-General*, *supra* (at 720):

'Approaching the question whether [the appellant] made the connection between her sexual abuse and adult behaviour, or ought to have discovered that connection, as if it were an exercise akin to that of discovering cracks in a house foundation, does not demonstrate any great understanding of the subject or sensitivity to the psychological and emotional problems suffered by a woman in Ms W's position.'

In addition the plaintiff is entitled to the benefits of a constitutional dispensation that promotes rather than inhibits access to courts of law.

**The nature of child sexual abuse and its effects on the victim**

**[8]** The more common route in writing a judgment is to begin with the law and, having identified the legal hurdles, to assess the evidence, determining whether the facts proved enable the plaintiff to surmount those obstacles. In this instance, however, I intend to start by summarising the uncontested evidence about child abuse and its effects so that the reader comes to the law with an understanding of the problem.

**[9]** Ms Fredman is a practising clinical psychologist who specializes in the area of sexual abuse. She spent about 20 hours consulting with the plaintiff prior to giving evidence at the trial and about the same length of time attending consultations

between the plaintiff and the defendant's experts. She compiled a report in which she set out the factual information derived during the consultations, described the development of post-traumatic stress disorder and so-called traumagenic states in child-abuse survivors, identified the characteristics of such a condition and matched it to the idiosyncrasies displayed by the plaintiff as a child and in her adult years up to the time that she instituted action against the defendant. She recognised that the plaintiff had always been aware of the fact that the defendant had abused her between the ages of 6 and fifteen years. It was her opinion that the plaintiff's realisation that the defendant was responsible for the abuse was a gradual process which probably commenced in late 1996 and that she could not be said to have acquired knowledge that it was not she but the defendant who was responsible until some time in 1997. Ms Fredman referred to published learning on the subject of child abuse and its effects on survivors and particularly to 'The Traumatic Impact of Child Sexual Abuse: A Conceptualization', by David Finkelhor and Angela Browne of the Family Violence Research Programme of the University of New Hampshire, Durham, published in the *American Journal of Orthopsychiatry* in October 1985, and to *Trauma and Recovery, The aftermath of violence - from domestic abuse to political terror*, (Ch 5, 'Child Abuse'), by Judith Lewis Herman, New York, 1992.

**[10]** Finkelhor and Browne analyze sexual abuse in terms of four trauma-inducing factors ('traumagenic dynamics') – traumatic sexualization, betrayal, powerlessness and stigmatization. All of these distort a child's cognitive and emotional relationship with the world. Traumatic sexualization is a process in which a child's sexuality is

developed and shaped inappropriately and dysfunctionally at an interpersonal level. Betrayal involves the discovery by a child that someone on whom he or she is vitally dependent has caused the child harm. It can be experienced at the hands of an abuser or a family member who is unable or unwilling to protect or believe the child or who has a changed attitude to the child after disclosure of the abuse. Powerlessness develops through the repeated contravention of a child's will, desires and sense of efficacy. It is reinforced when children see their attempts to halt the abuse frustrated and is increased by fear and an inability either to make adults understand or believe what is happening or to realize how conditions of dependency have trapped them in the situation. Stigmatization refers to the negative connotations – badness, shame, guilt – that are communicated to the child and become incorporated into the child's self-image:

'These negative meanings are communicated in many ways. They can come directly from the abuser, who may blame the victim for the activity, demean the victim, or furtively convey a sense of shame about the behaviour. Pressure for secrecy from the offender can also convey powerful messages of shame and guilt. But stigmatization is also reinforced by attitudes that the victim infers or hears from other persons in the family or community. Stigmatization may thus grow out of the child's prior knowledge or sense that the activity is considered deviant and taboo, and it is certainly reinforced if, after disclosure, people react with shock or hysteria, or blame the child for what has transpired. Children may be additionally stigmatized by people in their environment who now impute other negative characteristics to the victim (loose morals, "spoiled goods") as a result of the molestation.'

Further the authors report:

'The sexual problems of adult victims of sexual abuse have been among the most researched and best established effects. Clinicians have reported that victimized clients often have an aversion to sex, flashbacks to the molestation experience, difficulty with arousal and orgasm, and vaginismus, as well as negative attitudes towards their sexuality and their bodies.'

**[11]** Finkelhor and Browne make the following remarks about the process of stigmatization which are pertinent to this case:

'Other effects of sexual abuse seem naturally grouped in relation to the dynamic of stigmatization. Child victims often feel isolated, and may gravitate to various stigmatized levels of society. Thus they may get involved in drug or alcohol abuse, in criminal activity, or in prostitution. The effects of stigmatization may also reach extremes in forms of self-destructive behaviour and suicide attempts.

The psychological impact of these problems has a number of related components. Many sexual abuse victims experience considerable guilt and shame as a result of their abuse. The guilt and shame seem logically associated with the dynamic of stigmatization, since they are a response to being blamed and encountering negative reactions from others regarding the abuse. Low self-esteem is another part of the pattern, as the victim concludes from the negative attitudes toward abuse victims that they are "spoiled merchandise". Stigmatization also results in a sense of being different based on the (incorrect) belief that no one else has had such an experience and that others would reject a person who had.'

**[12]** Dr Herman is particularly enlightening on the aspects of self-knowledge, insight into responsibility for the acts of abuse and disclosure:

'The child victim prefers to believe that the abuse did not occur. In the service of this wish, she tries to keep the abuse a secret from herself . . . Not all abused children have the ability to alter reality through dissociation. And even those who do have this ability cannot rely upon it all the time. When it is impossible to avoid the reality of abuse, the child must construct some system of meaning that

justifies it. Inevitably the child concludes that her innate badness is the cause. The child seizes upon this explanation early and clings to it tenaciously, for it enables her to preserve a sense of meaning, hope and power. . .

'Self-blame is congruent with normal forms of thought in early childhood in which the self is taken as the reference point for all events. It is congruent with the thought processes of traumatized people of all ages, who search for faults in their own behaviour in an effort to make sense out of what has happened to them. In the environment of chronic abuse, however, neither time nor experience provide any corrective for this tendency towards self-blame; rather it is continually reinforced. . .

'By developing a contaminated, stigmatized identity, the child victim takes the evil of the abuser into herself and thereby preserves her primary attachments to her parents. Because the inner sense of badness preserves a relationship, it is not readily given up even after the abuse has stopped; rather it becomes a stable part of the child's personality structure. Protective workers who intervene in discovered cases of abuse routinely assure child victims that they are not at fault. Just as routinely the children refuse to be absolved of blame. Similarly, adult survivors who have escaped from the abusive situation continue to view themselves with contempt and to take upon themselves the shame and guilt of their abusers. The profound sense of inner badness becomes the core around which the abused child's identity is formed, and persists into adult life. . .

'As survivors attempt to negotiate adult relationships, the psychological defences formed in childhood become increasingly maladaptive. Double-think and a double self are ingenious childhood adaptations to a familial climate of coercive control, but they are worse than useless in a climate of freedom and adult responsibility. They prevent the development of mutual intimate relationships or an integrated identity. As the survivor struggles with the tasks of adult life, the legacy of her childhood becomes increasingly burdensome. Eventually, often in the third or fourth decade of life, the defensive structure may begin to break down. Often the precipitant is a change in the equilibrium of close relationships: the failure of a marriage, the birth of a child, the illness or

death of a parent. The façade can hold no longer, and the underlying fragmentation becomes manifest. When and if a breakdown occurs it can do so in symptomatic forms that mimic virtually every category of psychiatric disorder.'

**[13]** Taking cognizance of the views expressed by these writers, supplemented by her own professional experience, Ms Fredman testified that only when a survivor of child sexual abuse is capable of realising that he or she is not responsible for his or her damaged condition, can it be expected that steps will be initiated to redress the injustice done. Before that, deeply-embedded psychological restraints must be overcome.

**[14]** In short, the expert evidence demonstrates that

(1) chronic child abuse is *sui generis* in the *sequelae* that flow from it;

(2) distancing of the victim from reality and transference of responsibility by the victim on to himself or herself are known psychological consequences;

(3) in the absence of some cathartic experience, such consequences can and often do persist into middle age despite the cessation of the abuse during childhood.

**[15]** The questions that call for an answer in this appeal are:

(a) Does the applicable prescription statute accommodate a victim who manifests such *sequelae*, by either staying or suspending the running of prescription, if the victim is prevented or seriously inhibited by reason of his or her psychological condition from instituting action?

(b) If so, how does it provide the accommodation?

(c) Does the evidence bring the plaintiff within the scope of the protection?

**The appropriate legislation**

**[16]** The case was argued in the court *a quo* on the assumption that the 1969 Act, which came into operation on 1 December 1970, was of application to the plaintiff's claim. Section 16(2)(*a*)of that Act provides that 'the provisions of any law which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement . . . shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation'. The court *a quo* held that the debts that are now in issue arose before that date and accordingly the 1943 Act determines whether they have prescribed. That finding is clearly correct. The question before us is whether prescription began to run as provided for in s 5(1)(*c*) of the 1943 Act in respect of those debts more than three years before the action was instituted.

**The interpretation of s 5(1)(c) of Act 18 of 1943**

**[17]** The section provides that:

'(1) Extinctive prescription shall begin to run –

. . . (*c*) in respect of an action for damages, other than for defamation, from the date when the wrong upon which the claim for damages is based was first brought to the knowledge of the creditor, or from the date on which the creditor might reasonably have been expected to have knowledge of such wrong, whichever is the earlier date;'.

**[18]** I have referred in paragraph [3] to the interpretation which Nel J placed on 'the

date when the wrong . . . was first brought to the knowledge of the creditor'. He relied on the judgments in *Oslo Land Co. Ltd v The Union Government* 1938 AD 584 and *Administrator of the Transvaal v Crocodile Valley Citrus Estates (Pty) Ltd* 1942 TPD 109. In the first-mentioned case it was held (at 592) that in negligence cases the cause of action arises when an unlawful act is committed and damage caused, and as soon as damage has occurred all the damage flowing from the unlawful act can be recovered, including prospective damage and depreciation in market value; further losses do not give rise to further causes of action. The *Administrator of the Transvaal* case is to similar effect (at 111): 'a claim for damages does not arise when the person who says he was damaged discovers the damage [but] . . . at the time of the tortious act'. Both these cases were decided on the premise that a wrongful act results in some damage (however minimal) that the creditor is capable of ascertaining. That is the usual case. It was unnecessary to consider the effect on a creditor who, although aware of the facts, did not or could not, at the date of the delict, through no fault of his or her own, appreciate where responsibility for the act lies and thus has no appreciation that he or she is entitled to civil redress against the person who inflicted the harm. That is an unusual case. But it is one which arises squarely in claims based on the sexual abuse of children where the victim is a 'creditor' under the 1943 Act. Although unnecessary to decide for the determination of this case, the same appears to hold true for s 12 of the 1969 Act which provides:

'(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have

such knowledge if he could have acquired it by exercising reasonable care.'

The knowledge which is required is the minimum necessary to enable a creditor to institute action: *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA) at para 13. The ascribing of blame to a particular defendant is a necessary element of any claim in delict.

**[19]** Prescription penalizes unreasonable inaction not inability to act. Where, therefore, the statute speaks of prescription beginning to run when a wrong is 'first brought to the knowledge of the creditor', it presupposes a creditor who is capable of appreciating that a wrong has been done to him or her by another: cf *Wulfes v Commercial Union Assurance Co of SA Ltd* 1969 (2) SA 31 (N) at 37A and *SA Mutual Fire and General Insurance Co Ltd v Mapipa* 1973 (3) SA 603 (E) at 608F-609D. The existence of s 7 (which suspends prescription in five specific instances) does not detract from this conclusion. In the first place suspension can only take place if the running of prescription has commenced. Perhaps more important is the fact that there exists a category of creditor (the person abused as a child who has reached adulthood before commencing the action) who does not necessarily fall into any of the categories of suspension and who should be accommodated within the legislative framework if that can be achieved without doing violence to the language. Such a person is not *non compos mentis*. Nor is he or she incapable of rational thought. What the evidence shows is that the process of reasoning and the development of insight have been distorted in the child's psyche when it comes to an appreciation of where responsibility lies. (I assume in this regard that the legislature used the expression

'during the disability of the creditor' in s 7(1)(b) in a sense consistent with the definition of 'person under disability' in s 1. See *Wulfes v Commercial Union Assurance Co of SA Ltd supra* at 38B-D, *sed contra South African Mutual Fire and General Insurance Co Ltd v Mapipa supra* at 607C.)

**The plaintiff's history**

**[20]** The plaintiff was born in 1952. The defendant, her uncle by marriage, is about 36 years older than she is. The plaintiff's immediate family seems to have lived in relatively modest circumstances. The defendant, an apparently successful businessman, played an influential role in the family as a figure of status and respect. He and his wife were childless but they frequently had the appellant and her siblings to stay in their home.

**[21]** The plaintiff's brother, Jaco, suffered from polio. In November 1958 he was hospitalized. His parents, who were desirous of giving him their undivided attention, sent the plaintiff to stay with her maternal aunt, the defendant's wife. She was six. (The plaintiff was able to pinpoint the date in evidence because she had kept a letter her brother wrote to her from hospital.)

**[22]** One night the defendant came to her bedroom, ostensibly to say goodnight to her. He touched her private parts. Thus began a long series of assaults on the child that before long progressed to anal penetration and, by the age of eight, forcible sexual intercourse. The defendant mystified these dark encounters as 'a secret between us', warned her not to talk about them and threatened her in various ways particularly vexing to a child. By contrast, during the day the defendant treated the

plaintiff with outward kindness, made her feel special, bought her treats that her parents could not afford and bribed her with presents such as postage stamps and geological specimens for her collections.

**[23]** The plaintiff begged not to be sent to the defendant's home. For her pains her mother called her ''n regte klein blêddie stoutgat'[1] and sent her anyway. The abuse continued. The plaintiff tried to relieve the trauma she experienced during the assaults by concentrating her thoughts on pleasant visions of the future or by working her mind into a dissociative state in which she viewed all that was happening to her from outside of herself.

**[24]** What could not be concealed was the state of her underclothes. According to the plaintiff her mother complained that she already had enough trouble with Jaco and 'nou is ek nog 'n vuilgat ook'[2]. That was also sufficient to attract a beating on various occasions. The plaintiff began to wet her bed. She tried to explain to her mother 'oom Maree doen dinge met my'[3]. Her mother reacted strongly: 'Ek behoort my voor God te skaam want hy is 'n goeie mens vir ons almal'[4]. Another hiding followed. On other occasions her mother would refer to her as 'moedswillig'[5] and 'stout'[6] and express the wish that she had never been born. The culture of the plaintiff's family was such that sexual matters were not spoken of. In any event the plaintiff had great difficulty in expressing herself. She attempted to tell her father. His response was 'Maree is a very

1 'naughty brat'
2 'now I am a dirty tramp as well'
3 'uncle Maree is doing things to me'
4 'I should feel ashamed before God because he is good to us all'
5 'wanton'
6 'naughty'

good man and you must respect that'.

**[25]** The abuse continued. When the plaintiff was 8 or 9 her mother thought she had begun to menstruate. The general practitioner whose advice she sought informed her that the plaintiff was regularly engaging in sexual intercourse. Her mother called her ''n klein hoer'[7]. After that it seemed to the plaintiff that the beatings increased. On one occasion her mother accused her of being 'stout'[6] with a boy who helped with looking after Jaco.

**[26]** The plaintiff developed suicidal feelings and tendencies which persist to this day. She was friendless and aggressive and suffered from sleeplessness and nightmares. Indeed, she has needed sleeping tablets for most of her adult life. As a child she masturbated compulsively.

**[27]** The plaintiff also tried to disclose the abuse to her cousin, Lynn Erwee, whose comment was 'Ag, hy speel met my ook'[8]. The plaintiff, although doubting that 'play' rightly described what was happening to her, found herself unable to pursue the matter.

**[28]** While in primary school she also told her brother, who advised her to swear at the defendant ('vloek die donner'[9]). She followed his advice but 'he kept on coming, it didn't stop, he laughed at me'.

**[29]** From about the age of 13 or 14 the plaintiff resorted to self-mutilation, hoping thereby to distract her mind from the emotional agony brought on by recollection of

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6 'naughty'
7 'a little whore'
8 'Oh, he plays with me too'

the abuse. She has returned to this practice from time to time throughout her life.

**[30]** The plaintiff had no sexual contact with anyone other than the defendant. When

9 'curse the wretch'

she was about fifteen she complained of nausea in the mornings. Her mother had her admitted to hospital where her appendix was removed. After the operation she was discovered to be pregnant and an abortion was carried out. The nurse told her she had been 'very naughty'. Despite years of enforced sexual experience the plaintiff had no knowledge of how conception took place.

**[31]** At that time the plaintiff was in standard 7 at school. She once again tried to tell her father that the defendant was responsible but it seemed to the plaintiff that he did not want to talk about it: 'I don't think he believed me'.

**[32]** Although the defendant never touched the plaintiff again after the abortion and she ceased to stay over at his home, her life started to deteriorate. She lost interest in trying to succeed and, for the first time, failed at school. Her parents moved her to a new school. Having eventually progressed to standard 8, she failed that too. She passed at the second attempt and then left. She obtained employment in various menial positions but could not keep any job for long.

**[33]** By the age of 21 the plaintiff was drinking heavily (and persisted in so doing until the year 2000). She had difficulty in getting on with others. About that age she began her first relationship. There were about three further relationships before she became the partner of Ms Potgieter. Despite some serious problems this association has endured for twenty years. All her relationships have been marred by alcohol and drug abuse and some degree of violence.

**[34]** Her sexual relations with her various partners have always been inhibited and unsatisfying. Out of an unspoken fear of further abuse the plaintiff has made a

deliberate effort to minimize her femininity by cultivating a masculine appearance in her physique and dress. She finds feminine odour repugnant and from her childhood has felt a need constantly to wash her hands. She is still very afraid of the dark.

**[35]** About 1980, for reasons not explained in evidence, the plaintiff studied for and passed standards 9 and 10 and attended classes at P E Technikon where she qualified as an architectural technician. She has since supported herself as a draughtswoman.

**[36]** During 1991 the plaintiff's mother became seriously ill. The plaintiff was brought once more into social contact with the defendant. When he spoke to her she swore at him 'dat dit bars'[10]. Her counsel asked her in evidence to describe the substance of what she had said to him to which she responded, 'Wat jy alles aan my gedoen het, moenie nog met my praat nie, moet niks met my te doen hê nie, los my net uit'[11]. What this exchange was said to have revealed became a key aspect in the submissions of the defendant's counsel during the appeal that the plaintiff was by then, at least, fully cognizant of where responsibility for her childhood abuse lay. I shall return to his submissions at an appropriate stage.

**[37]** At a certain point in the plaintiff's relationship with Ms Potgieter, in the course of an alcohol-induced argument about the plaintiff's reluctance to engage in sexual relations, the plaintiff retorted (in substance), 'I wish [the defendant] had done things to you, then you would understand how I feel'. She placed this conversation as having

10 'profusely'
11 'Because of all that you've done to me, you mustn't talk to me, you mustn't have anything to do with me, just leave me alone.'

occurred ‘’n paar jaar terug’[12]. It was also relied on by the defendant’s counsel as evidence of the plaintiff’s awareness that his client was responsible for the troubles that beset her.

**[38]** Towards the end of 1996 the appellant watched the Oprah Winfrey Show on television. The subject was child sexual abuse. The hostess confessed that she was a victim ‘and look where I am today’. According to the plaintiff such openness was a revelation to her. As she put it, ‘I thought, Good grief, she can say it, she actually said it. . . I couldn’t believe that a person is prepared to say that. Dis of daar – of dit moontlik is om nie so bang te wees om dit te sê of sy is nie skaam nie. Sy was nie skaam om dit te sê nie en dit het al vir my gevoel of miskien dit is nie so erg as wat – as ‘n mens dit sê nie’[13]. She told Ms Potgieter, ‘Possibly I can say what happened . . .I don’t need to keep it inside me anymore because it’s finishing me off’. Potgieter said, ‘There must be something you can do about him’. ‘[I said] “I can’t. I don’t have money and I’m alone.” I got very drunk. . . Ek kan nie nou gaan en gaan praat of doen iets nie, ek gaan net as – weereens soos my ma as ‘n leuenaar uitgemaak word.[14]’

**[39]** Shortly thereafter the plaintiff caused a disturbance at the home of friends. When she went to apologize, one of them, Jay, a final year psychology student, invited her to talk about things that were worrying her. That led the plaintiff to disclose to Jay

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12 ‘a few years ago’

13 ‘It’s as if – as if it’s possible not to be so scared to say that she is not ashamed. She was not ashamed to say it and I felt that it is perhaps not so serious as that – if one says it.’

14 ‘I can’t go now and talk (about it) or do anything, I would be made out to be a liar just as my mother did.’

some of her experiences at the hands of the defendant. Eventually, seeing that the plaintiff was incapable of expressing herself or unwilling to do so, Jay suggested that she write her story down and they would meet again to talk things over. With difficulty the plaintiff followed the suggestion. She showed the statement to Ms Potgieter. Far from alienating her as the plaintiff had feared, it had the effect of drawing them closer together. The plaintiff was asked by her counsel '[On] the day you gave her what you had written for her to read whose fault did you think it was, what had happened between you and Mr Hoogenhout?' To which she replied, 'Mine'. Asked by the court why, she answered, 'I sometimes until today still feel I must have done something wrong because why did he do these things to me? I don't know why I think that and then I blame him for my wretched life, but then again I – it is quite confusing for me because I feel sorry for his wife, he did these things, it was painful and sometimes I think couldn't I have done something that it wouldn't have happened . . . Ek – miskien kon ek gesê het ek wil nie naweke gaan nie. Dit maal vandag nog in my kop. Miskien as ek vir my ma presies in detail vertel het. . . Toe Rita [Ms Potgieter] dit vir my gesê het sy is baie lief vir my het my antwoord gekom dat miskien is ek nie skuldig daaraan nie, miskien het ek nie – ek het nie skuld hieraan nie.' Court: Kan ek dit anders stel, vandag as u hierso in die hof sit, dink u dat dit nog steeds u skuld is of nie? – 'Nie meer nie.' Court: Wanneer het u houding verander? – '1997'[15].

15 'I – maybe I could have said I won't go over the weekends. It is still going round in my head. Maybe if I had told my mother in detail . . . When Rita told me she loves me very much I answered that perhaps I wasn't guilty, perhaps I didn't – I'm not at fault'. Court: 'Let me put it another way, as you sit here in court

**[40]** Later the plaintiff's brother Jaco phoned her one evening threatening suicide. He told her that just as the defendant had behaved with her so had the defendant abused him. The plaintiff was paradoxically encouraged by this disclosure: she no longer felt on her own, there was someone she could tell what had happened and people would not be able to say that she lied about things the respondent had done.

**The reconciliation between the expert evidence and the facts**

**[41]** Where prescription is raised as a defence it is the defendant who bears the onus of establishing as a matter of probability that prescription commenced to run and had expired before the action was instituted, and he or she is not relieved of that burden only because the material facts might be within the exclusive knowledge of the plaintiff (*Gericke v Sack* 1978 (1) SA 821 (A) at 827B-828A). It might be, in a case like the present, in which the plaintiff alleges that mere knowledge of the external facts was not enough, that the plaintiff bears at least an evidential burden of placing some material before the court that raises the issue. (That is not a question we are called upon to decide). But in this case there is evidence that indicates *prima facie* that the plaintiff was not aware until recently that it was not she who was the cause of,

or

who bore responsibility for, what occurred but rather that the responsibility was that of the defendant. There was no evidence to controvert it in any substantial way. In my view, the court should have found that the defendant failed to establish as a matter of probability that prescription commenced to run before 1997.

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today do you still think you are to blame or not?' – Not any more.' – Court: When did you change your mind?'

– ‘1997’.

**[42]** The evidence that the plaintiff gave about her voyage of self-discovery is not fairly described as her '*ipse dixit*' (as the learned judge did) since there is ample corroboration to be found in a comparison between the experiences of the plaintiff and the professionally described *sequelae* of an abuse victim with a history like that of the plaintiff. What is to be set against her evidence? Counsel referred to the several attempts made by the plaintiff as a child to expose the defendant. He pointed out that by the age of 21 the plaintiff had left home and was making her own way in the world. Whatever threat the defendant had posed was long gone and his influence dissipated. It was unlikely, he submitted, that the plaintiff had remained in ignorance of the facts for nearly thirty years. He relied on the incident during her mother's illness as leaving no doubt that she not only blamed the defendant for wrecking her life but was also willing to say so openly. Finally he pointed to the plaintiff's bitter comment to Ms Potgieter that she wished the defendant had done things to her so that she could understand the plaintiff's feelings. (The evidence as to when this incident took place is unclear but I will assume that it may assist the defendant to discharge the onus.)

**[43]** In the accumulation of such evidence, counsel submitted, the likelihood was to be discovered that the plaintiff was in truth aware of the defendant's fault and blamed him for the abuse and its disastrous consequences. He did not suggest that the plaintiff consciously concealed the fact that she possessed insight long before 1997. Such a submission would require a credibility finding against her which is not justified by a reading of the record.

**[44]** In such circumstances the room for the inference that counsel would have us draw must be very limited. The plaintiff obviously knew at all material times that the defendant was the physical agent of the abuse. Her expert witness expressly disavowed any possibility of suppression of her memory of the events. That of course does not mean that in adult life she was able to confront them willingly or with adequate comprehension. Nor does it prove that she knew or accepted that responsibility for the abuse lay with the defendant. The incidents in adulthood which counsel has cited are consistent with the plaintiff's knowledge that the defendant had abused her, but they were visceral reactions falling short of rational appreciation that he rather than herself was the culpable party. It is more likely that the plaintiff developed insight, and with it the meaningful knowledge of the wrong that sets the prescriptive process in motion, only when the progressive course of self-discovery finally removed the blindfold she had worn since the malign influences which I have described took over her psyche. On the probabilities that did not occur until some time in 1997. The defendant's counsel did not submit, correctly given the facts, that (to use the language of s 5(1)(*c*)) the plaintiff might reasonably have been expected to have had knowledge of the wrong before she acquired actual knowledge.

**[45]** In the result the trial judge should have dismissed the special plea of prescription and proceeded to a consideration of the merits. It accordingly becomes unnecessary to consider the submissions of the plaintiff's counsel that the plaintiff was disabled (within the meaning of s 7(1)(*b*) of the 1943 Act) from pursuing her claim until 1997 or was immune to the running of prescription because of common

law protection afforded to those ignorant of their rights.

**[46]** The following order is made:

1. The application for leave to appeal is granted.

2. The appeal succeeds with costs, including the costs of the application for leave to appeal.

3. The order of the court *a quo* is set aside and replaced with an order dismissing the defendant's special plea of prescription.

4. The matter is remitted to the trial court to consider the remaining issues.

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***J A HEHER***
***JUDGE OF APPEAL***

**MPATI DP** **)Concur**
**CAMERON JA** **)**
**NUGENT JA** **)**
**VAN HEERDEN JA** **)**