REPRESSED MEMORY AND THE PERSONAL INJURY STATUTE OF LIMITATIONS

by Mark A. Lienhoop

There has recently been an increase in lawsuits seeking damages for wrongs allegedly suffered by the plaintiff as a child. *E.g., Schultz-Lewis v. Doe*, 614 N.E.2d 559 (Ind. 1993). Often the plaintiff seeks to avoid the statute of limitations by relying on the theory of repressed memory. According to that theory, a person may unconsciously represses the memory of an emotionally distressing event as a form of self-protection. Years later, usually through therapy, the memory which was supposedly repressed is brought back and the person "remembers" what happened. The suit is then filed within the statutory period after the person first "remembered" the wrong suffered so many years ago.

For many years the standard used to determine the admissibility of such scientific theories was the *Frye* test. This was from the case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In excluding evidence of a lie detector, the court in *Frye* held that before admitting scientific principles into evidence:

> [T]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, at 1014. The *Frye* test has been adopted in Indiana. *See e.g., K-Mart Corp. v. Morrison*, 609 N.E.2d 17, 23 (Ind. Ct. App. 1993).

To say that the theory of repressed memory does not meet the *Frye* test as generally accepted in the applicable field is perhaps an understatement. *See e.g.s, Wesson, Historical Truth, Narrative Truth, and Expert Testimony*, 60 Wash.L.Rev. 331 (1985); McHugh, *Psychiatric Misadventures*, 61 American Scholar 497-510 (Autumn, 1992); E. Loftus, *The*

Reality of Repressed Memories, 48 American Psychologist #5, pp. 518-537 (May, 1993); Yuille, *The Systematic Assessment of Children's Testimony*, Canadian Psychology 29: 3, (1988); Holmes, *The Evidence for Repression: An Examination of Sixty Years of Research*, in Singer (Ed.), *Repression and Dissociation*, Univ. of Chicago Press (1990).

However, the *Frye* test is probably no longer the law in Indiana. The United States Supreme Court did away with the *Frye* test in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S.Ct. 2786 (1993). By a unanimous decision, the court in *Daubert* held that the Federal Rules of Evidence displaced the seventy-year old standard.

The Federal Rules of Evidence on which the court in *Daubert* based its decision are virtually the same as the new Indiana Rules of Evidence which became effective January 1, 1994. Indiana Rules of Evidence, Rule 702(b) states that expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which it is based are reliable.

The scientific validity and resulting admissibility of the very controversial theory of repressed memory remains to be decided in Indiana. It remains to be seen whether the Indiana Supreme Court will consider repressed memory to be like DNA samples, which are reliable, or like voice spectrography, which is not.

If the theory of repressed memory is later recognized by the Indiana Supreme Court as scientifically reliable, how would that affect the statute of limitations that applies to most of the personal injury claims filed in Indiana?

Different statutes of limitation apply to different personal injury claims. For instance, a claim for medical malpractice must be brought within two (2) years after the day of the alleged

act or omission, except that a minor less than six (6) years old has until the minor's eighth (8th) birthday to file. I.C. 27-12-7-1. This statute of limitations clearly states that the time for bringing suit is measured from the date of the occurrence, which may be before the plaintiff had reason to believe there had been malpractice.

The general statute of limitations for most other personal injuries is also two (2) years. I.C. 34-1-2-2(1). However, this general statute states that a plaintiff has two (2) years from the date of cause of action accrues, which is not necessarily from the date of the occurrence.

By enacting IC 34-1-2-2, "... the legislature designated the reasonable time for bringing an action and left to the courts the responsibility of determining when the cause of action accrues." *Burks v. Rushmore*, 534 N.E.2d 1101, 1103 (Ind. 1989).

Historically, the courts in Indiana had developed two rules for determining when a cause of action accrued under I.C. 34-1-2-2. There was the general rule and there was the discovery rule.

The general rule was that the statute of limitations began to run when damage from an act was ascertainable or by due diligence could have been ascertained. *See Burks v. Rushmore*, 534 N.E.2d 1101, 1104 (Ind. 1989).

The discovery rule was that the statute of limitations began to run when the plaintiff knew or should have discovered that the plaintiff suffered an injury and that it was caused by the product or act of another. *Barnes v. A. H. Robins Co., Inc.*, 476 N.E.2d 84, 87 (Ind. 1985).

As was noted by a Federal District Court, "... At first glance, the difference between Indiana's general rule and the discovery rule seems semantic rather than substantive. * * * What separates the two rules is the causality prong of the discovery rule." *Hilderbrand v. Hilderbrand,*

736 F. Supp. 1512, 1518 (SD. IN 1990). In other words, the discovery rule unlike the general rule, applied when the plaintiff knew or should have known of the injury *and its cause. Allied Resin Corp. v. Waltz*, 574 N.E.2d 913, 915 (Ind. 1991) (emphasis added).

The Indiana Supreme Court expressly declined to apply the discovery rule to all tort claims in *Barnes*, *supra*, at 87. In fact, the court refused to extend the discovery rule beyond product liability cases where the injury was caused by a disease which may have resulted from protracted exposure to a foreign substance. *E.g.s., Allied Resin Corp, supra* (various chemicals); *Covalt v. Carey Canada, Inc.*, 543 N.E.2d 382, 384 (Ind. 1989)(asbestos); *Barnes, supra* (Dalkon Shield). For example, in *Burks, supra*, the Indiana Supreme Court vacated the Court of Appeals' use of the discovery rule and applied the general rule in an action alleging defamation.

The only Indiana case which appeared to extend the discovery rule beyond these extremely limited circumstances is *Groen v. Elkins*, 551 N.E.2d 876 (Ind. Ct. App. 1990). However, while the court in *Groen* said it was applying the discovery rule, a close reading of the definition it used shows that it really applied the general rule. *Id*., at 879.

The dual existence in Indiana of the general rule and the discovery rule was recognized by the Indiana Supreme Court as recently as December 1991, in *Havens v. Ritchey*, 582 N.E.2d 792, 794 fn. 1 (Ind. 1991).

The Indiana Supreme Court ended the general rule/discovery rule dichotomy on February 14, 1992 in *Wehling v. Citizens Nat. Bank*, 586 N.E.2d 840 (Ind. 1992). The court held:

> We now complete the merging of the "discovery" and "ascertainment" rules. We hold that the cause of action of a tort begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another.

Id., at 843.

This new rule was promptly reaffirmed in *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559, 564 (Ind. 1992) (personal property) and in *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) (alleged negligent notarization).

Against this background the Indiana Supreme Court decided *Fager v. Hundt*, 610 N.E.2d 246 (Ind. 1993). In *Fager*, the plaintiff alleged severe emotional distress from repeated sexual abuse by her father during her minority. She filed her complaint about twenty-two (22) years after the last of the alleged abuse and about fifteen (15) years after attaining her majority. The complaint alleged that emotional trauma had suppressed her memory of the abuse until about six (6) months before she filed suit. *Id*., at 248.

The court acknowledged that the *Wehling* rule, set forth above, applied to this tort claim, as did the special limitation grace period for minors. *Id*., at 250. Calculation of the grace period begins with I.C. 34-1-67-1(6). That statute provides that persons under the age of eighteen (18) are considered under a legal disability. A person under a legal disability when their personal injury cause of action accrues may bring their action within two (2) years after the disability is removed. I.C. 34-1-2-5.

The *Fager* Court declined to apply the discovery rule subjectively based on the plaintiff's actual knowledge. *Id*., at 251. It felt that to do so would obviate the legitimate role of the statute of limitations in cases of childhood injuries. *Id*., at 250. Instead, the court held that "discovery" of a cause of action by a child's parent or legal guardian shall be imputed to the child to satisfy the rule of *Wehling*. However, the court went on to immediately announce an exception to this rule when a plaintiff asserts a childhood injury from the "intentional felonious act of a parent." *Id*., at 251.

Under such circumstances the court held that the doctrine of fraudulent concealment applies. *Id*. That doctrine prevents a defendant from asserting the statute of limitations when the defendant has, either by deception or by violation of a duty, concealed material facts from the plaintiff which prevented the plaintiff from discovering their cause of action. *Id*. The exception ends when the plaintiff becomes an adult and knows or should have discovered that a childhood injury was caused by the defendant's tortious conduct. *Id*. Note that what causes the exception to end is essentially the same rule as set forth in *Wehling*, above.

Unfortunately, the court in *Fager* did not specifically rule on the reliability of the theory of repressed memory. It did note that in other states where a plaintiff is aware of childhood sexual abuse but simply unaware of the full extent of the resulting injuries, the statute of limitations bars the action, even in states which apply a discovery rule. *Id*., at 249 fn. 1. However, in *Fager* the plaintiff had alleged that *all* memory of the abuse had been repressed. The court conceded that "... repressed memory presents a phenomenon of human behavior that has recently received considerable scientific attention, although its existence and validity is not without dispute." *Id*., at 252.

In *Fager*, the court did seem to suggest that a plaintiff relying on repressed memory must present expert testimony to support its scientific validity and to establish that the plaintiff's memory had been repressed as a result of the defendant's conduct. *Id*., at 252. This would seem to indicate that if the theory of repressed memory is found to be scientifically reliable, then whether it has occurred in a particular case would be a question of fact.

If the theory of repressed memory is recognized in Indiana as scientifically reliable, then it will become impossible to know with certainty when the statute of limitations for a personal

injury has run. If so recognized, then wherever the theory of repressed memory is relied on and supported with an expert's affidavit, the issue of whether the statute of limitations has run will always be a question of fact.

Undoubtedly, this issue will eventually arise. It will be interesting to see what the Indiana Supreme Court does with the theory of repressed memory in light of the general personal injury statute of limitations.

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