



PO Box 1327 • Madison WI 53701-1327
608-268-5074 (Madison) • 866-849-2536 (toll-free) • 608-256-3370 (fax)
Email: info@wifamilyaction.org
Web site: www.wifamilyaction.org
Blog: www.wisconsinfamilyvoice.wordpress.com

Testimony in Opposition to Senate Bill 319
Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing
Julaine K. Appling, WFA President
January 12, 2010

Thank you, Chairwoman Taylor and committee members, for the opportunity to testify today on Senate Bill 319. My name is Julaine Appling, and I am testifying today as president of Wisconsin Family Action, a statewide organization that represents tens of thousands of Wisconsin individuals and families, as well as thousands of churches, who are concerned about strengthening and preserving marriage, family, life and liberty in our state.

The bill before us today is a very difficult bill to testify against, as I am sure you are aware. It directly pits our deep concern for the welfare of innocent children against our deep concern for religious liberty and the protection of our churches and ministries, as well as our respect for the rule of law in this state and country.

Any abuse of a child by an adult is horrific. Sexual abuse is particularly heinous because it violates every aspect of a precious child. Persons who commit such abuse should be prosecuted and punished to the full extent of the law. Beyond that, any institution, be it public or private, that knows about such abuse and fosters it or even simply ignores it, hoping it will go away or is negligent in any way about knowing or recognizing warning signs or establishing safeguards or properly educating those working with children, should also be liable and prosecutable. No school, church, camp, organization or business, whether a government agency or a private entity, should be able to hide such atrocities with impunity.

Additionally, it is vitally important that victims of such abuse find help and healing, as they work through the trauma and the damage they have experienced. While we must admit that sexual abuse of children, sadly has taken place in the confines of churches and other church-related ministries, including parochial schools, those situations are the exceptions, not the rule. Churches and religious ministries are generally the very places where victims of such abuse can find help and healing. Many will testify to that truth. Jeopardizing these institutions will ultimately work against the problem this legislation purports to fix.

However, as with virtually all other crimes cases involving sexual abuse of a child must have a reasonable and prudent statute of limitations, as a safeguard to all concerned. The bill we are considering today bears all the earmarks of being what I refer to as a “knee-jerk” proposal. This type of bill typically comes about because of a particular case legislators hear about in which a person alleges he or she was abused by a trusted leader, perhaps, even a member of the clergy, but could not file a civil lawsuit because he or she was over the age of 35, as Wisconsin’s current statute of limitations requires in this situation. It has been my experience time and again that when legislators try to legislate for a specific incident, we get bad legislation—legislation that is far too broad, is over-reaching, and in general has disastrous intended or unintended consequences.

Whether intentional or not, this bill could significantly and directly affect churches of all faiths, whether protestant, Catholic, Jewish, or other, private and parochial schools, camps, youth ministries, day cares, and organizations such as the Boy Scouts and Girl Scouts. SB 319 proposes to completely remove the statute of limitations for civil lawsuits involving childhood sexual abuse cases and opens a three-year window of opportunity for cases to be filed in situations where the statutes of limitations have already expired.

Wisconsin Family Action is opposed to this proposal for several reasons.

1) Removing the statutes of limitations sets a precedence. In Wisconsin, murder and first degree sexual assault of a minor are the only crimes that have no statute of limitations. Lawsuits for all other crimes must be engaged within prescribed time limits—and for good reason. Appropriate statutes of limitation ensure that prosecution and civil litigation proceed in a timely fashion, while evidence and witnesses are available and fresh. If the statutes of limitation were lifted in civil cases involving child sexual assault, as heinous as it is, what will be next in line to follow suit? More importantly, allowing lawsuits involving situations that happened 30 or 40, or even more years ago absolutely invites tainted evidence, often relying on the very suspect "repressed memory" counseling technique (see **attached document**).

2) The bill targets the entity with which the perpetrator was associated, not the perpetrator. For purposes of the legislation, a "person" against whom damages are sought is extremely broadly defined to include an "individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency or instrumentality; public corporation; or any other legal or commercial entity." While the authors insist that this bill is not targeting any particular group, that it is the perpetrator they are seeking to punish, the unique, breathtakingly broad definition of *person* belies this. It appears that the target, while perhaps not one particular group or church, is certainly not the perpetrator but the organization with which he/she was associated.

Proponents have mentioned how hard it is to try old cases. They've decried the lack of good evidence and the lack of witnesses and described how difficult it would be to find an attorney who would take such a case. Supporters are trying to convince us that few lawsuits would be brought. If that is the case, then why are they even considering such an open-ended law? The truth is we have no idea how many lawsuits might be brought if the statutes of limitation were removed and a three-year window of opportunity was opened for situations where the statutes have already run. If the scope of the bill were limited to an individual, rather than an all-encompassing definition of *person*, this argument might have some credibility. However, such is not the case.

3) The current statute of limitations is generous and a "window" is likely unconstitutional. Several years ago, this legislature decided to increase the statutes of limitation from three years after a victim of child abuse turns 18 to when the victim is 35 years of age. This change put Wisconsin among the short list of states with very generous statutes of limitations in cases involving child sexual assault. Additionally, in 2004, former Wisconsin Attorney General Peg Lautenschlager told legislators that opening a window of opportunity for cases in which the statutes of limitation had expired was likely unconstitutional. Since nothing has changed, it is reasonable to assume that advice is as good now as it was then.

4) All institutions named in the bills will not be treated equally. On the face of it, because public and private entities are mentioned in the definition of "person," one could assume they would be treated the same. However, public and private entities will be treated significantly differently. Current law caps the liability of municipal bodies, such as school districts, at \$50,000 per person. The liability of private or not-for-profit entities, such as Christian schools or private day care centers, is not capped. Additionally, the law limits the amount of punitive damages against government entities, while no such limit or exemption exists for private entities, including churches.

This means a single law suit filed against a private school or a church, some 40 or more years after the fact, could result in the church or school paying hundreds of thousands of dollars in liability and damages, while a public school, for instance, would be liable for significantly less. Obviously, this inequity means different amounts being awarded to victims, creating yet another blatant discrimination. It also sets up a scenario where private entities become more likely targets for such lawsuits than government entities.

This legislation essentially holds churches and ministries hostage indefinitely, sometimes for situations long past that those currently involved in the ministry know absolutely nothing about. A single large damage award could completely devastate a church, private school, day care, ministry or service organization such as the Boy

Scouts. Those presently involved with these organizations should not be subject to and burdened by the liability for the actions of others long since gone from the organization or perhaps even deceased.

In summary, this bill goes entirely too far and will do far more harm than good in the long run. Suspending the statute of limitations and leaving unsuspecting churches, schools, and other civic groups vulnerable ad infinitum to crippling liability and punitive damages will not take care of the problem. Rather, such actions will most assuredly create more and greater problems.

I urge you to vote against Senate Bill 319.

Thank you for your time today.



PO Box 1327 • Madison WI 53701-1327
608-268-5074 (Madison) • 866-849-2536 (toll-free) • 608-256-3370 (fax)
Email: info@wifamilyaction.org
Web site: www.wifamilyaction.org
Blog: www.wisconsinfamilyvoice.wordpress.com

Childhood Sexual Abuse Civil Statute of Limitations

Memory Repression

Introduction

During the 1990s, a wave of memory repression cases flooded state and federal courts in the form of childhood sexual abuse lawsuits. Americans were appalled by stories of trusted members of the clergy and family members—even parents—sexually abusing innocent children. According to the developing memory repression theory, the childhood sexual abuse experience(s) was so traumatic and disturbing for the victim that he/she had suppressed all memory of it until adulthood, when a psychiatrist helped the victim remember the abuse.

Memory repression cases constitute an entirely different category than the more familiar childhood sexual abuse case. In those cases the victim knows he/she was being abused, has remembered the traumatic experience throughout his/her life, and was too scared to tell anyone at the time and/or no one believed the story. In the typical memory repression case, the alleged victim started therapy—usually for depression or an eating disorder—and was informed by his/her psychiatrist that the symptoms were typical for victims of childhood sexual abuse. After numerous therapy sessions, usually including hypnosis, the alleged victim would develop dreams and memories of childhood sexual abuse that the psychiatrist would interpret as solid evidence of abuse. Eventually, and often through suggestive questioning on the part of the therapist, the alleged victim decided on an alleged abuser—usually one or both parents, a close family member, a neighbor or a member of the clergy. The alleged victim would then confront and accuse the alleged abuser(s) privately and publicly and eventually bring a civil lawsuit against them.¹

The reason for a civil lawsuit is simple: the time lapse between the alleged abuse and the accusation and the dearth of evidence. Because of the significant time lapse, anywhere from 10 to 40 years, even civil statute of limitation laws were typically not generous enough for memory repression cases.² Civil statute of limitation laws for childhood sexual abuse usually require claims to be brought within a particular number of years after the incident occurred or the victim came of age (anywhere from 2-10 years). Otherwise, the case is moot for lack of substantial evidence.

Repressed Memories in the Courts

A legal survey, conducted by the False Memory Syndrome Foundation (FMSF) during the 1990's, documents the litigation of childhood sexual abuse cases based on memory repression evidence.³ The report indicates that those states with the most lenient statute of limitations laws for civil and criminal cases have had the largest number of filings. In order to admit repressed memory evidence, decades after the alleged abuse, in civil lawsuits, judges have applied various versions of the Discovery Rule and the Disability Exception, effectively extending the applicable statute of limitations.⁴

As of 1999, the year this report was published, nine state supreme courts, including Wisconsin's, have refused to consider whether the discovery rule applied to repressed memory claims because of the lack of substantial evidence behind the theory. In 1997, Maryland's highest court, the Maryland Court of Appeals, said, "[T]he studies purporting

¹ <http://www.fmsfonline.org/retract1.html>, accessed 01/10/08.

² The FMSF survey was conducted using records of litigation from over 1800 repressed memory claims. Most of the claimants were between the ages of 25-45 and 90% were female. The plaintiffs usually claimed the alleged sexual abuse took place at an early age but that they didn't remember the abuse until three to five decades later. (<http://www.fmsfonline.org/lipton.html#over>, accessed 01/16/08)

³ <http://www.fmsfonline.org/lipton.html#over>, accessed 01/10/08.

⁴ In childhood sexual abuse cases, the Discovery Rule is used to extend the statute of limitations to the time the victim discovered the abuse, or the emotional or psychological ramifications of the abuse. Courts used the Disability Exception to toll the statute of limitations during a period of disability (resulting from repression, dissociation, denial, post traumatic stress disorder (PTSD), multiple personality disorder (MPD), psychogenic amnesia, etc. (<http://www.fmsfonline.org/lipton.html#rise>, accessed 01/16/08)

to validate repression theory are justly criticized as unscientific, unrepresentative and biased.”⁵ Civil cases require a preponderance of evidence but repressed memory claims are based entirely upon the alleged victim’s repressed memory of the incident(s). Because childhood sexual abuse is such a serious crime and accusation, it should necessitate a high standard of examination, even in a civil lawsuit. However, the repressed memory of the alleged victim and the testimony of the therapist have been enough to slap the accused with huge damages, a ruined reputation and a destroyed family and life.

In some states (e.g., Arizona, Missouri, South Carolina), courts have left to the jury the question of whether to admit repressed memory evidence to the jury.⁶ Due to the subjective nature of the supposedly expert testimony delivered in memory repression cases, some courts have established an “objective person standard” or instituted procedures to help protect against fraudulent claims. Childhood sexual abuse cases, especially, are so fraught with emotional overtones that it is difficult to retain a stringent standard of litigation. Once a state high court opens the floodgates for repressed memory cases by applying exceptions, however, only comprehensive legislation can stem the tide of lawsuits.

Repressed Memories in the Legislature

Tolling (extending) the statute of limitations for childhood sexual abuse cases brings up a number of additional issues: 1) Informed consent policies for therapists, 2) Therapy licensing, 3) Level of evidence for civil cases. Even in states where informed consent is an established practice and a high standard exists for both therapy licensing and levels of evidence, the three are rarely consistently enforced.

Informed consent means the therapist obtained consent from their patient for certain therapeutic procedures after informing them of the risks—including the capability of generating false memories—involved in the therapy. Expert testimony should also include therapy disclosures, so that the judge and/or jury are fully aware of the types of therapy that helped “recover” childhood sexual abuse memories.

Most repressed memory cases are filed after the alleged victim has undergone therapy—sometimes from unlicensed or poorly-licensed therapists.⁷ Since memory repression theory is a relatively new phenomenon, and a highly controversial topic, therapists who practice it need to be highly regulated. Appropriately stringent licensing laws would allow legislators to monitor therapists and give the courts a standard to apply to expert testimony in repressed memory cases.

Sometimes the victim’s repressed memories, and the therapist’s testimony, were the only evidence used to condemn a defendant. So-called “second-generation” statutes, enacted in 1994 and 1995 in some states after the deluge of memory repression cases, include provisions making it more difficult to bring fraudulent cases and establishing more stringent rules for applying evidence. The courts apparently need to be held to an appropriate, objective standard for admitting evidence in repressed memory cases.

Conclusion

Repressed memory cases caught the judicial and legislative arena unawares and the subsequent legislation and court decisions show it. Notwithstanding the dearth of substantial scientific research on memory repression, judges and legislators bought into the theory and fashioned their legislation and legal decisions accordingly. As a result, they have departed from established procedure and precedent on statute of limitations laws and permissible evidence, opening the floodgates for memory repression lawsuits.

Revised January 2010

⁵ <http://www.fmsfonline.org/lipton.html#over>, accessed 12/17/2007.

⁶ http://www.smith-lawfirm.com/sol_Missouri.html, accessed 01/14/08.

⁷ <http://www.fmsfonline.org/lipton.html#over>, accessed 01/14/08.