SEXUAL ABUSE, POST-TRAUMATIC STRESS SYNDROME AND PRESCRIPTION – A COMPARISON BETWEEN THE SOUTH AFRICAN AND DUTCH POSITIONS

1 Breaking the silence

Sexual abuse is not something the victim thereof discloses easily; on the contrary it is likely to give rise to feelings of shame and self-loathing. Facing the perpetrator and accusing him or her in a court of law is even more difficult. It is not surprising that perpetrators of these deeds will hardly ever be faced with criminal or delictual consequences of their vile conduct. When the victims eventually muster the courage to speak, it is often too late, because the sell-by date of the remedy has passed. The crime or delict, depending on what recourse the victim is seeking, has prescribed. The Supreme Court of Appeal recently allowed a claim which to all intents and purposes had prescribed. In the Netherlands the prescription period in the case of sexual abuse likewise makes allowances for the victims of sexual abuse. This note proposes to compare recent case law of the Supreme Court of Appeal and the *Hoge Raad* (Dutch Supreme Court of Appeal) against the background of the different prescription provisions which apply in the two countries.

2 Van Zijl v Hoogenhout 2005 2 SA 93 (SCA)

2 1 Incest – a game families play

The plaintiff instituted an action against the defendant based on assaults committed against her from 1958 to 1967. The defendant was the plaintiff's uncle by marriage. When the plaintiff was a child, she was sent to live with the defendant and his wife, because her brother was suffering from polio and required the undivided attention of his parents. During this time the uncle began assaulting her. The assault began with touching her private parts, and very soon progressed to anal sex and by the time she was eight it had developed into full sexual intercourse. The child was sworn to silence and even threatened. During the daytime, however, she was treated exceptionally kindly even to the point of being given gifts. This persisted until she was fifteen years of age and became pregnant and had to have an abortion. Her parents did not want to accept that her uncle had been abusing her sexually and accused her of having had sexual intercourse with a boy who looked after her brother. However, after the abortion her uncle left her alone. The plaintiff gradually declined into a state of depression which persisted over the next number of decades. In 1973 the plaintiff reached the age of majority. The plaintiff only instituted action in 1999, more than thirty

years after the last assault had taken place. One of the factors which encouraged her to do this was seeing Oprah Winfrey admitting on her television show that she had also been a victim of abuse and her (the victim's) own realisation that she was a victim.

The plaintiff, along with several other co-plaintiffs, instituted her claim in the Cape High Court (*Du Plessis v Hoogenhout* [2003] JOL 11169 (C) at www.lexisnexisbutterworths.co.za). During the course of the trial in the High Court, only the plaintiff's claim remained for determination. The plaintiff pleaded *inter alia* that she had been prevented by superior force from the interruption of the running of prescription (*Du Plessis v Hoogenhout (supra)* 4).

The defendant raised a special plea of prescription, which succeeded. The Cape High Court referred extensively to the treatment of prescription in child sexual abuse cases in other jurisdictions, noting that in every case special allowances were made for these victims. Some jurisdictions, although believing the plaintiff on the merits, and considering similar situations in numerous other jurisdictions where allowances had been made for victims of sexual abuse (see *Du Plessis v Hoogenhout (supra)* 12-16), not only upheld the special defence of prescription, but also refused the plaintiff leave to appeal. The Supreme Court of Appeal however directed that the application for leave for appeal be argued and that the parties be prepared to argue the merits of the case. After having heard the arguments, leave for appeal was granted.

2 2 Sexual abuse – the psychological background

Heher JA found it necessary in this instance to first examine the expert evidence on the nature of child sexual abuse and its effects on victims and in the light thereof to formulate the legal questions (see par 8-15). Referring to the expert witness of the plaintiff and literature cited by her, Heher recognised the four trauma-inducing factors present in abuse victims, namely traumatic sexualisation, betrayal, powerlessness and stigmatisation. Thus these factors are described by Heher with reference to the literature (par 10):

> "*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 ..." (own emphasis).

One of the effects of these factors is self-blame and guilt and it can take victims many years to realise that they are not at fault and eventually to have the courage to confront their victims. Before the victim reaches this stage, it is not possible to confront the abuser, because the victim will somehow think that he or she is to blame and assume the fault of the abuser. In the light of

this "transference" of guilt, the court drew the following important conclusions regarding chronic child sexual abuse, which would have a bearing upon its decision on the law in this case (par 14):

(1) chronic child abuse is *sui generis* with regards to the effects that flow therefrom;

(2) the victim's tendency to transfer responsibility upon him or herself as well as distancing him or herself from reality are well-known psychological consequences of abuse;

(3) in the absence of "some cathartic experience" these consequences can and do persist into middle age even where the abuse has ceased.

2 3 Legal question and decision

Against this background the court formulated the following legal questions:

> "(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 court found that the plaintiff was accommodated by the applicable legislation – the reasoning of the court is set out in the following paragraphs.

2 4 Applicable legislation

The case had been argued before the court *a quo* on the assumption that the Prescription Act 18 of 1969 would be applicable. That act only came into operation on 1 December 1970, by which time the defendant's abuse of the plaintiff had ceased. The court *a quo* thus found that the applicable legislation in this particular instance was the Prescription Act of 1943, a position also adopted by the Supreme Court of Appeal. The relevant provision, section 5(1)(c), provides as follows:

> "(1) Extinctive prescription shall begin to run -
>
> (c) in respect of any 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 ..."

Nel J in the court *a quo* decided that the wrong came "to the knowledge" of the plaintiff on the dates when the assaults were committed, not on the dates when she realised the effects of the assaults. According to this interpretation of "knowledge", prescription had therefore taken place. Heher JA, however recognised that the authority on which the court *a quo* relied referred to the usual cases, and not those instances where a creditor, although aware of the damage, could not, through no fault of his own, attribute the responsibility to the perpetrator as would be the case in child sexual abuse cases.

> "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 par 13. The ascribing of blame to a particular defendant is a necessary element of any claim in delict. *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" (own emphasis).

In this instance prescription cannot even begin to run because even though the creditor (in this case the abused person) has knowledge of the abuse and even knowledge of who committed the wrong, the creditor cannot yet attribute blame to the wrongdoer, and this is a minimum condition for prescription to commence.

3 Prescription in the Netherlands

3 1 Distinction between absolute and relative prescription

Prescription in Dutch law is governed in terms of article 3:310 of the civil code. Article 3:310(1) provides as follows (own translation – original Dutch wording to follow):

> "A legal claim for compensation of damage ... prescribes after the passing of five years after the commencement of the day following that on which the aggrieved party becomes aware of ... the damage ... and with the person who is responsible therefor, and in any case after the passing of twenty years after the event which caused the damage ... became claimable." ["Een rechtsvordering tot vergoeding van schade ... verjaart door verloop van vijf jaren na de aanvang van de dag, volgende op die waarop de benadeelde zowel met de schade ... als met de daarvoor aansprakelijke persoon bekend is geworden, en in ieder geval door verloop van twintig jaren na de gebeurtenis waardoor de schade is veroorzaakt ..."]

A distinction is drawn between relative and absolute prescription. Relative prescription runs for five years and begins to run only once the victim becomes aware of both the damage and the identity of the perpetrator. Relative prescription does not necessarily commence upon the date of the wrongful conduct. The *Hoge Raad* has decided that for a defendant to rely on relative prescription he has to prove subjective knowledge on the part of the plaintiff. The commencement of relative prescription can be precluded by superior force as happened in the *Sexueel Misbruik Arrest* (HR 23 october 1998, *NJ* 2000,15, discussed in 3 2 below) and also in the *Kindermishandelingsarrest* (HR 25 juni 1999, RvdW 1999, 106 – this case dealt with the physical and mental abuse of a child by his father; this case is not discussed here, as it did not deal with sexual abuse). Absolute prescription, on the other hand, runs for twenty years, but commences from the date of the wrongful conduct. It could therefore happen in exceptional circumstances that in terms of relative prescription a specific wrongful act has not prescribed, but that in terms of absolute prescription it has.

3 2 Sexual abuse – incest by association

In 1998 the *Hoge Raad* had to deal with the question of when relative prescription commences in the so-called *Sexueel Misbruik Arrest* (HR 23 october1998, *NJ* 2000,15). In this case one B sued her brother-in-law, M, for sexual abuse. He was married to her sister and was approximately 20 years older than the victim. From the age of ten M systematically started raping her. The victim and her family lived in a small community which was quite religious and conservative and M was a respected member of the community. The abuse continued from 1970 to 1989. In the interim, from 1977 to 1989, the victim also worked for the defendant. Initially the victim kept quiet about the abuse. In 1989, when she was sick and lying in her bed she eventually decided to do something about it and told her father and sisters about the abuse. This led to a criminal prosecution of M and him being found guilty of sexual assault and rape and sentenced to a period of imprisonment.

In 1994 B sued M for damages (for patrimonial and non-patrimonial loss). M submitted that in terms of article 3:310 the claim had prescribed. The claim of prescription was rejected by the court of the first instance (*Rechtbank*, Utrecht), the court of appeal (*Gerechthof*, Amsterdam) and the Supreme Court (*Hoge Raad*).The court of the first instance rejected the claim of prescription and referred the case to a so-called *comparitie*, or settlement to determine the scope of the damages. M appealed against this decision. The court of appeal likewise rejected the claim of prescription on the basis that the five-year prescription could not commence under circumstances where the plaintiff was not in a position to institute a claim. In this case the court held that B was precluded from instituting a claim by virtue of a superior force of a psychological nature. Until 12 December 1990 B was not capable of instituting the claim and therefore prescription could not commence.

The *Hoge Raad* held that the five-year prescription period could not commence until such time as the plaintiff had obtained the necessary knowledge to institute the claim. A claim will in any case prescribe twenty years after the date of the damage-causing event. The purpose of the prescription period is to ensure legal certainty and the court will not easily deviate from this. However, where circumstances exist which prevent the plaintiff from instituting the claim, this becomes unacceptable in terms of individual justice. Where these circumstances are furthermore attributable to the perpetrator, considerations of fairness and equity make it unacceptable that the defendant should rely on this provision to escape liability. In such a case it therefore has to be accepted that the prescription period will only commence once the circumstances which gave rise to the plaintiff's inability to institute the claim are no longer present.

The prescription can only commence when these circumstances are no longer present.

The *Hoge Raad* somewhat tempered the plaintiff's reliance on superior force, in that it was held that the circumstances which caused the superior force had to at least be attributable to the defendant. In the present case, because M had repeatedly raped B, the superior force was attributable to

him – he had caused her such psychological harm that she was, as a result of her psychological condition, not capable of instituting action against him. The impossibility of B to institute her claim cannot be attributed to her but lies wholly at the door of M. The *Hoge Raad* referred the matter back to the court of the first instance to adjudicate it on the facts.

4 Comparison

In both cases the inability of victims to confront their perpetrators was recognised and that fact was factored into the prescription equation. The fact that the victim needs time to come to terms with the fact that a wrong was committed against her, has to be recognised and that time has to be accounted for when the decision as to when prescription commences is made.

The Supreme Court of Appeal recognised the inability of the victim to confront the perpetrator as a consequence of the abuse and interpreted it as non-compliance with the "knowledge" requirement in that the victim could not attribute blame to the perpetrator. The *Hoge Raad*, likewise recognising the debilitating effect of the abuse on the ability of the victim to confront the abuser, interpreted this inability of the victim as superior force of a psychological nature. Furthermore, this "superior force" has to be attributable to the defendant specifically. South African law (s 3(1)(a) of the Prescription Act of 1969) recognises "superior force" as a ground for delaying the completion of prescription; in fact, the plaintiff in the High Court, in her reply to the plea of prescription, relied on superior force. However, for this ground to apply, prescription has to have already commenced. In the present instance the Supreme Court of Appeal found that the lack on the part of the victim to attribute blame meant that the requisite knowledge was not present on the part of the victim and hence prescription could not commence.

The *Hoge Raad's* approach at first blush appears to be more objective than that of the Supreme Court of Appeal, in that the reason for delaying the onset of prescription is sought "outside" the plaintiff in the form of some "superior force". However, this superior force has to be capable of being attributed to the abuser, and it is of a psychological nature and thus directly associated with the plaintiff's own personal experience of the abuse. The formulation of the approach may therefore be in more objective terms, but it nevertheless relates to the victim's personal circumstances and the net effect is the same. The plaintiff is not able to confront her abuser and enforce her rights, and therefore prescription cannot commence.

The prescription laws in the Netherlands allow for further differences. Apart from the fact that the period for relative prescription is five years, which is longer than our three years, in South Africa there is no period of absolute prescription. Had this been the case, Ms van Zijl's claim would, in terms of absolute prescription have prescribed, and no amount of creative interpretation would have assisted her. Although generally absolute prescription could serve a purpose of finality, in cases of abuse where a victim needs time to overcome the psychological trauma of the abuse, absolute prescription could indeed be very unfair towards a victim. This was the case in the *Kindermishandelingsarrest* (HR 25 juni 1999, RvdW 1999,

106), where a part of the victim's claim had prescribed in terms of the absolute prescription rule.

5 The way forward

In the first instance one hopes that Ms van Zijl will get her day in court and that her past suffering will be compensated. Whether an award of damages can truly eradicate the damage that was done to her is of course one of the underlying existential dilemmas of the law of damages.

The prescription cases of future victims will be brought within the ambit of the 1969 Prescription Act. The analogous provision, section 12, reads as follows:

> "(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
> (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."

This provision likewise requires knowledge on the part of the creditor before the claim begins to prescribe. The Supreme Court of Appeal did not regard it as necessary to decide on how this provision should be interpreted under such circumstances. It does seem, however, that the court also seems to regard "knowledge" for the purposes of this Act as not only meaning capability of ascertaining damage, but also capability to appreciate where the responsibility for the damage-causing conduct lies (par 18).

6 Conclusion

The South African Supreme Court of Appeal has done well to interpret the prescription provision in such a way as to allow a victim of child sexual abuse not to be precluded by the debilitating effects of post-traumatic stress syndrome, coupled with the limitations of prescription laws, from eventually facing his or her abuser in court. Although the approach followed was somewhat different to that of the *Hoge Raad*, the court has recognised that circumstances are such that a victim may be precluded from exercising his or her right to claim damages and therefore under the circumstances, prescription cannot commence until these circumstances change. In the light of the fact that sexual abuse, particularly of children, is still so rife in this country, this decision is to be welcomed with open arms, irrespective of whether or not one agrees with the way in which the outcome was brought about.

André Mukheibir
Nelson Mandela Metropolitan University, Port Elizabeth