Once Bitten, Twice Bitten: The Minnesota Court of Appeals Limits the Recovery of Sex Abuse Victims in *Oelschlager v. Magnuson*

By Douglas McGhee*

Introduction

David Oelschlager, a member of Redeemer Covenant Church (Redeemer), was sexually abused by Redeemer pastor Albert Magnuson from September 1972 until June 1982.[1] Magnuson abused Oelschlager while providing religious and emotional counseling to him.[2] In 1991, Oelschlager used Minnesota's delayed discovery statute to file a personal injury action against Magnuson in Hennepin County District Court.[3] Under the theory of respondeat superior, he also brought claims against Redeemer and two of its governing bodies, the Northwest Conference of the Evangelical Church of America and the Evangelical Covenant Church of America.[4] At trial, the jury found Magnuson liable. Redeemer was therefore liable for Magnuson's actions under respondeat superior because his actions were found to be within the scope of his employment.[5] Redeemer appealed the decision, and the Minnesota Court of Appeals held that respondeat superior claims are not within the scope of Minnesota's delayed discovery statute.[6] Accordingly, Oelschlager's claim against Redeemer was untimely, and the Court of Appeals reversed the trial court's decision.[7]

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1. Oelschlager v. Magnuson, 528 N.W.2d 895, 897 (Minn. Ct. App. 1995).
2. *Id.*
3. *Id.* at 898.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 903.

Minnesota's delayed discovery statute extends the statute of limitations for survivors of sex abuse who have repressed their memories of the abuse. The doctrine of respondeat superior imputes liability to employers of tortfeasors. After the *Oelschlager* decision, however, sex abuse victims who could ordinarily sue employers using both the delayed discovery statute and respondeat superior are denied use of the doctrine.[8]

This Comment reveals the infirmities in the *Oelschlager* court's decision to exclude respondeat superior claims from the scope of the delayed discovery statute. It then offers a more equitable answer to the *Oelschlager* court's concerns regarding respondeat superior under the delayed discovery statute than the outright exclusion of such claims. Part I describes the problem which caused the Minnesota legislature to enact the delayed discovery statute, the legislative intent behind the statute, Minnesota case law restricting the application of the statute and the alternative causes of action available to sex abuse victims after the *Oelschlager* decision. Part II describes the *Oelschlager* decision and reveals its inherent problems, while Part III proposes a more equitable approach. This Comment concludes that the *Oelschlager* court's exclusion of respondeat superior claims is both contrary to the meaning and intent of the delayed discovery statute and against public policy. As such, it should be overturned.

I. Historical Background

A. The Origins and Purpose of Minnesota's Delayed Discovery Statute

1. Purpose of the Statute

In 1989, the Minnesota legislature enacted a law designed to extend the time in which victims of sexual abuse could bring claims against the parties liable for that abuse.[9] The statute provides:

> **Actions for damages due to sexual abuse; special provisions**
>
> Subdivision 1. **Definition.** As used in this section, "sexual abuse" means conduct described in sections 609.342 to 609.345.
>
> Subd. 2. **Limitations period.** (a) An action for damages based on personal injury caused by sexual abuse must be

8. *Id.* at 901.
9. MINN. STAT. § 541.073 (1996).

> commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.
>
> (b) The plaintiff need not establish which act in a continuous series of sexual abuse acts by the defendant caused the injury.
>
> (c) The knowledge of a parent or guardian may not be imputed to a minor.
>
> (d) This section does not affect the suspension of the statute of limitations during a period of disability under section 541.15.
>
> Subd. 3. **Applicability.** This section applies to an action for damages commenced against a person who caused the plaintiff's personal injury either by (1) committing sexual abuse against the plaintiff, or (2) negligently permitting sexual abuse against the plaintiff to occur.[10]

In essence, the statute provides a victim of sexual abuse with a six year window in which to file suit from the time that the victim knew or should have known that the sexual abuse suffered by the victim caused the victim's injuries.[11]

Minnesota's delayed discovery statute was enacted to assist survivors of sexual abuse.[12] The harm endured by survivors of sexual abuse is severe, as victims often experience feelings of guilt, shame, depression, anxiety and low self-esteem.[13] Memories of the abuse are often dealt with through memory repression[14] and denial.[15] Alcohol abuse,[16] suicidal ideation,[17] sexual dysfunction,[18]

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10. *Id.*

11. *Id.*

12. *Hearings on H.F. 461 Before the Subcomm. on Criminal Justice of the House Judiciary Comm.* (Feb. 28, 1989); *Hearings on H.F. 461 Before the House Judiciary Comm.* (Mar. 6, 1989); *Hearings on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm.* (Feb. 17, 1989); *Hearings on S.F. 315 Before the Senate Judiciary Comm.* (Feb. 10, 1989) (available on tape at the Minnesota Legislative Library).

13. Ann Marie Hagen, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 359 (1991) (arguing that both law and policy favor allowing adult survivors of childhood sexual abuse to toll the statute of limitations when bringing suit for latent injuries).

14. Memory repression is a situation in which "victims . . . forget . . . events because the feelings or meanings associated with them are unbearable." Deborah Petersen, *Recollecting Sexual Abuse Is Often a Gradual, Difficult Process; Too Horrible to Remember; Recollecting Childhood Sexual Abuse Is Like Re-collecting Pieces of a Broken Vase: Sometimes It's Difficult to Find All the Pieces*, HARTFORD COURANT, Sept. 17, 1992, at E1.

15. Denial is "'accomplished by withholding conscious understanding of the meaning and implications of what is perceived.'" Rebecca L. Thomas, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call For Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1254 n.74 (1991) (quoting Mardi J. Horowitz et al., *A Classification Theory of Defense*, *in* REPRESSION & DISSOCIATION 80 (Jerome L. Singer ed., 1990)).

depression[19] and a tendency to have personal relationships with abusive partners are common among sex abuse survivors.[20] Regardless of the time of the injury or nature of the defense, the survivor loses his or her appreciation of the connection between the sexual abuse and any resulting problems.[21] Repressed or denied memories may not, however, remain submerged forever.[22] Later events may cause the memories of the abuse to reemerge.[23]

The frequency of memory repression episodes is still a point of contention among those who study sexual abuse.[24] In drafting the delayed discovery statute, however, the Minnesota legislature used the existence of memory repression as the base-line for its debate.[25] Because the Minnesota legislature acknowledged that memory repression exists, the academic controversy over the theory's validity has no place in the debate on the delayed discovery statute.

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16. Multiple studies have shown that alcohol and drug abuse occur in approximately 20% of the survivors of sexual abuse. *See, e.g.*, JUDITH LEWIS HERMAN, FATHER-DAUGHTER INCEST 93, 99 (1981) (finding alcohol abuse occurring in 20% of the incest victims studied); DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 162 (1981) (showing 17% of victimized women abused alcohol and 27% abused a drug in one study; in another study, 27% of the victims abused alcohol and 21% had a drug addiction; a third study showed 35% of victims abused drugs and alcohol).

17. HERMAN, *supra* note 16, at 99.

18. *See generally* DIANA SULLIVAN EVERSTINE & LOUIS EVERSTINE, SEXUAL TRAUMA IN CHILDREN AND ADOLESCENTS: DYNAMICS AND TREATMENT (1989) (discussing effects of sexual abuse on children); JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR (1992) (discussing disorders caused by trauma and recovery therefrom); MIC HUNTER, THE SEXUALLY ABUSED MALE, VOLUME 1: PREVALENCE, IMPACT, AND TREATMENT (1990) (discussing problems and treatment of sexual abuse among men); ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (1988) (discussing treatment of child sexual abuse among women).

19. Sandra Conroy, *The Delayed Discovery Rule and* Roe v. Archdiocese, 13 LAW & INEQ. J. 253, 256 (1995).

20. HERMAN, *supra* note 16, at 101.

21. Conroy, *supra* note 19, at 259.

22. *Id.* at 257-58.

23. Hagen, *supra* note 13, at 362-63.

24. *See, e.g.*, Elizabeth F. Loftus et al., *Memories of Childhood Sexual Abuse: Remembering and Repressing*, 18 PSYCHOL. WOMEN Q. 67, 68 (1994) (finding memory repression in 19% of substance-abusing women who reported a history of childhood sexual abuse); Steven N. Gold et al., *Degrees of Repression of Sexual Abuse Memories*, 1994 AM. PSYCHOLOGIST 441 (noting that a therapist's belief that repressed memories exist may influence a client's determination of whether he or she has repressed memories).

25. *See generally, Hearings on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm.* (Feb. 17, 1989) (available on tape at the Minnesota Legislative Library, Tape 2).

2. Legislative History

Debates in the Minnesota legislature on the purpose of the statute do not contain explicit statements that the delayed discovery statute is designed to encompass respondeat superior claims, nor any statements specifically excluding the doctrine.[26] The legislature recognized the potential applicability of delayed discovery to employers, and while some legislators voiced concerns over the broad reach of the provision, attempts to reduce the scope of the statute failed.[27]

3. Historical Antecedent of the Minnesota Delayed Discovery Statute

The state of Washington enacted a delayed discovery statute for sex abuse cases one year before Minnesota.[28] The Minnesota

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26. *See generally* tapes of legislative hearings, *supra* note 12.

27. Remarks made during the consideration of Minnesota Statute § 541.073 reveal the legislature's awareness of the statute's applicability to respondeat superior claims. At a meeting of the Minnesota Senate Judiciary Committee, Criminal Law Division, Senator Roger Moe stated: "[This is a] very, very, open-ended provision . . . I'm not sure what to think about it." *Hearings on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm.* (Feb. 17, 1989) (available on tape at the Minnesota Legislative Library, Tape 2). In the House, concerns centered on the broad reach of the delayed discovery statute were assuaged by the idea of a "reasonableness" standard. *Hearings on H.F. 461 Before the Subcomm. on Criminal Justice of the House Judiciary Comm.* (Feb. 28, 1989) (available on tape at the Minnesota Legislative Library, Tape 1). At a later meeting of the same subcommittee, a suggestion was made to limit the scope of the statute by the addition of a requirement that the circumstances alleged by the victim to warrant application of the delayed discovery statute be "reasonable." *Id.* This amendment was rejected, indicating the legislature's tacit acceptance of a broad application of the delayed discovery statute.

28. WASH. REV. CODE ANN. § 4.16.340 (West 1996). The statute states:

Actions based on childhood sexual abuse

(1) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:

(a) Within three years of the act alleged to have caused the injury or condition;

(b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or

(c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought:

Provided, That the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen years.

(2) The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation.

legislature used Washington's statute as a model when drafting its own delayed discovery statute.[29] The small number of cases interpreting the Washington statute do not eliminate respondeat superior as a potential cause of action under the statute.[30]

The Minnesota and Washington delayed discovery statutes are identical in all critical respects. The primary difference between the two laws is that the Minnesota statute grants victims a cause of action against the tortfeasor and any party that negligently permits the tort to occur,[31] while the Washington statute covers "[a]ll claims or causes of action based on intentional conduct."[32] Second, the Minnesota statute also eliminates some of the redundancies in the Washington statute.[33] A third difference is

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(3) The knowledge of a custodial parent or guardian shall not be imputed to a person under the age of eighteen years.

(4) For purposes of this section, "child" means a person under the age of eighteen years.

(5) As used in this section, "childhood sexual abuse" means any act committed by the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed.

Id.

29. *Hearings on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm.* (Feb. 17, 1989) (available on tape at the Minnesota Legislative Library, Tape 2).

30. The question of whether respondeat superior applies to delayed discovery in Washington remains open. *See, e.g., Hansen v. Bremerton Sch. Dist. No. 100-C*, 48 F.3d 1228, 1995 WL 74777 (9th Cir. Feb. 23, 1995) (unpublished memorandum decision not reaching the question of whether respondeat superior applied in delayed discovery lawsuit). In *Hansen*, the plaintiff filed suit in 1992 against her former high school gym teacher and former high school for sexual abuse which occurred when she was between the ages of 15 and 18 and which ended no later than 1975. *Id.* at **1. The Ninth Circuit Court of Appeals affirmed summary judgment for the defendants on grounds that the plaintiff knew that the sexual abuse she endured caused her injuries more than three years before she filed suit, noting that the plaintiff had discussed the abuse in psychotherapy even while she was in high school. *Id.* at **2-3. The court did not reach the school district's alternative reason for summary judgment, that the school had not perpetrated the sexual abuse. *Id.* at **2.

31. MINN. STAT. § 541.073 (1996); see text accompanying note 10 for full statutory text.

32. WASH. REV. CODE ANN. § 4.16.340 (West 1996). *See supra* note 28 for full statutory text.

33. The Minnesota legislature consolidated the Washington statute's options of three years from either the date of the injury, the date of discovery of injury, or the date of awareness that the abuse caused the injury. *Hearings on S.F. 315 Before the Criminal Law Div. of the Senate Judiciary Comm.* (Feb. 17, 1989) (available on tape at the Minnesota Legislative Library, Tape 2). The legislature consolidated these options into the "abuse caused the injury" standard in recognition of the fact that the date the "abuse caused the injury" would inevitably be the last of the three dates. *Id.* The other statutory provisions are substantially similar.

that the Washington statute is limited to childhood sexual abuse,[34] while Minnesota's law extends to all instances of sexual abuse, regardless of the victim's age.[35] This expansion stems from the fact that the primary impetus for the Minnesota bill came from the Attorney General's Task Force on Violence Against Women.[36]

B. *Judicial Restriction of the Delayed Discovery Statute Prior to* Oelschlager

Oelschlager is one of several cases narrowing the scope of the delayed discovery statute in Minnesota.[37] One of its predecessors was *Roe v. Archdiocese of St. Paul.*[38] In *Roe*, the Minnesota Court of Appeals held that once the running of the delayed discovery statute of limitations has begun, it cannot be tolled during subse-

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34. The Washington legislature took pains to ensure that only childhood sexual abuse claims were aided by the bill:

> The [Washington] legislature finds that:
>
> (1) Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.
>
> (2) Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.
>
> (3) The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.
>
> (4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.
>
> (5) Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.
>
> (6) The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. . . .

Finding—Intent—Laws 1991, ch. 212, WASH. REV. CODE ANN. § 4.16.340 (West 1996).

In an unpublished decision, the Ninth Circuit Court of Appeals has recognized the limitation of the Washington statute to claims based on childhood sexual abuse. *Mansfield v. Watson*, 990 F.2d 1258, 1993 WL 74374 (9th Cir. Mar. 17, 1993). *Mansfield* was primarily a choice of law case, with the plaintiff arguing for the application of Washington law so that she could take advantage of Washington's delayed discovery statute. *Id.* at **1. The court wrote that plaintiff's "argument fails because Mansfield has conceded that she was over eighteen years old when the rape occurred. By its own terms, the Washington statute of limitations does not apply to her claims." *Id.* at **2. The court held for the defendant before reaching the applicability of the delayed discovery statute. *Id.*

35. *Hearings on H.F. 461 Before the Subcomm. on Criminal Justice of the House Judiciary Comm.* (Feb. 28, 1989) (available on tape at the Minnesota Legislative Library, Tape 1). One of the two co-chairs of that task force also sat on the House Judiciary Committee's Subcommittee on Criminal Justice, which heard the debate on the bill. *Id.*

36. *Id.*

37. For a discussion of cases limiting the scope of the delayed discovery statute, see *infra* notes 38-65 and accompanying text.

38. *Roe*, 518 N.W.2d 629.

quent periods of post-abuse memory repression.[39] The teenaged plaintiff in *Roe* alleged that a priest sexually abused her from 1982 until 1984.[40] Roe attempted suicide in February 1985.[41] A few months later, she moved to Arizona in order to get away from the priest.[42] While in Arizona, Roe repressed her memory of the abuse.[43] She remembered nothing of the abuse until she returned to Minnesota in August 1988.[44] She did not file suit against the priest and the Archdiocese of St. Paul and Minneapolis until realizing that she was the victim of sexual abuse following a 1992 television program.[45]

The Minnesota Court of Appeals dismissed Roe's claim because, according to the court, Roe should have known prior to repressing her experience that "[her] injuries were caused by sexual abuse."[46] The court noted that periods of memory repression subsequent to actual knowledge of the abuse are insufficient to suspend the continued running of the statute of limitations.[47]

Roe limited the usefulness of the delayed discovery statute to victims of sex abuse by holding that in order to fit within the statute, repression must occur during the abuse.[48] Under the *Roe* standard, repression that occurs after the abuse ends constitutes "subsequent" memory repression, which does not toll the statute of limitations. The *Roe* standard precludes the use of the delayed discovery statute to any sex abuse victim who has repressed his or her memories of the abuse after the abuse is over.

The Minnesota Supreme Court gave the delayed discovery statute an even more restrictive reading in *Blackowiak v. Kemp.*[49] Blackowiak was eleven years old when he was allegedly abused by his high school guidance counselor.[50] Blackowiak further alleged the existence of other abusive episodes, the details of which he

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39. *Id.* at 632.
40. *Id.* at 630-31.
41. *Id.* at 630.
42. *Id.* at 631.
43. *Id.*
44. *Id.*
45. *Id.* The television program discussed sexual misconduct by members of the clergy. *Id.*
46. *Id.* at 630.
47. *Id.* at 633. Judge Amundson noted in his concurring opinion in *Roe* that eliminating subsequent repression renders delayed discovery almost useless. *Id.* at 633 (Admunson, J., concurring). *See generally* Conroy, *supra* note 19 (discussing the limitations imposed by *Roe* on delayed discovery litigation).
48. Conroy, *supra* note 19, at 266.
49. 546 N.W.2d 1 (Minn. 1996).
50. *Id.* at 2.

could not recall due to traumatic amnesia.[51] The Minnesota Supreme Court concluded that Blackowiak knew he was sexually abused prior to 1986, the earliest year in which he could file suit under the delayed discovery statute.[52] The basis for this decision was that Blackowiak knew his guidance counselor was doing something "wrong" to him.[53] As a result, he "freaked out" when, eleven years after the abuse, he saw Kemp in the company of another young boy. Therefore, he never completely repressed his memory of the abuse.[54] Until 1991, however, Blackowiak did not discuss the abuse with a therapist or connect the abuse with his subsequent injuries, which included drug abuse and psychological problems resulting in a propensity to engage in criminal activity.[55] Blackowiak finally established the connection between the abuse and his injuries in 1991 when a close friend informed him of the causal link between sexual abuse and the injuries Blackowiak sustained.[56]

In overturning the trial court's summary judgment order for the defendants, the Minnesota Court of Appeals held that the evidence "did not conclusively establish that the plaintiff knew or should have known prior to 1986 that the defendant's sexual abuse caused his psychological injuries."[57]

The Minnesota Supreme Court overturned the Court of Appeals' decision in a holding that went far beyond finding that the evidence was insufficient to establish causation.[58] Relying on a criminal sexual conduct case from 1982,[59] the Minnesota Supreme Court held that, since "the nature of criminal sexual conduct is such that an intention to inflict injury can be inferred as a matter of law,"[60] a victim is injured if he or she is sexually abused.[61] Accordingly, the delayed discovery statute of limitations begins to run as soon as the abuse occurs.[62] In the view of the *Blackowiak*

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51. *Id.*
52. *Id.* at 3.
53. *Id.*
54. *Id.* at 2.
55. *Id.*
56. *Id.*
57. *Id.* (citing Blackowiak v. Kemp, 528 N.W.2d 247 (Minn. Ct. App. 1995)).
58. *Id.*
59. Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982).
60. Blackowiak v. Kemp, 546 N.W.2d 1, 3 (Minn. 1996).
61. *Id.*
62. *See* Gibbons v. Krowech, No. C4-95-2435, 1996 WL 422513, at *2 (Minn. Ct. App. July 30, 1996) (summarizing the *Blackowiak* holding: "The supreme court ruled that evidence a plaintiff knows he or she was abused is equivalent to evidence that the plaintiff knows the abuse caused injury.").

court, subdivision 2 of the delayed discovery statute is only intended to provide a six-year statute of limitations running from the date of the abuse, rather than a six-year statute of limitations running from the date that the victim realized that the abuse caused his or her injury.[63] By ignoring the fact that the six-year statute of limitations runs "from the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse,"[64] the *Blackowiak* decision effectively removes the knowledge of causation element from the requirements for invocation of the delayed discovery statute.[65]

C. *Theories of Employer Liability*

1. Respondeat Superior

The English translation of respondeat superior is "let the master answer."[66] In modern legal parlance, the phrase means that "a master is liable in certain cases for the wrongful acts of his servant. . . ."[67] Legal historians do not agree on the origins of the doctrine,[68] but plausible theories have dated it from Roman times to seventeenth century England.[69]

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63. *Blackowiak*, 546 N.W.2d at 3. The court noted that to interpret the statute any other way "is to inject a wholly subjective inquiry into an individual's unique circumstances." *Id.*

64. MINN. STAT. § 541.073 (1996).

65. *Id.*

66. BLACK'S LAW DICTIONARY 1311 (6th ed. 1990).

67. *Id.* at 1311-12.

68. *See* James Fleming, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161, 164 (1954).

69. Justice Holmes stated that vicarious liability stemmed from ancient law which imposed liability on the head of a family for the acts of family members or slaves. Oliver Wendell Holmes, *Agency*, 4 HARV. L. REV. 345, 350-351 (1891). Holmes showed that the Roman praetor created liability on the part of masters because "the act of the servant was the act of the master." *Id.* at 351. Holmes goes on to show that public policy was a more significant force behind the praetor's decision than logic, noting "the special confidence necessarily reposed in innkeepers." *Id.* After its inception, the doctrine assumed a momentum of its own:

> And the mere habit of using these phrases, where the master is bound or benefited by his servant's act, makes it likely that other cases will be brought within the penumbra of the same thought on no more substantial ground than the way of thinking which the words have brought about.

Id.

Professor Wigmore wrote that vicarious liability descended from "the primitive Germanic idea . . . that the master was to be held liable absolutely for harm done by his slaves or servants." John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 383, 383 (1894). The requirement of the master's command or consent did not appear until the early Anglo-Norman period. *Id.* at 383 n.2.

Lord Holt was primarily responsible for the transition of vicarious liability to a

At the heart of respondeat superior claims is the "scope of employment" test, that is, whether the employee's actions were within the scope of his or her employment.[70] Every commentator on the origins of vicarious liability agrees that Lord Holt is the party responsible for the formalization of the scope of employment test.[71]

Under the scope of employment test, liability is only imputed to the employer if the employee's tortious actions were within the scope of his or her employment.[72] The definition of "scope of employment," however, varies from jurisdiction to jurisdiction.[73] This

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doctrine based on public policy. *Id.* at 398 (noting in Wayland's case that "[i]t is more reasonable that [the master] should suffer for the cheats of his servant than strangers and tradesmen").

Holdsworth traced the idea of "noxal surrender" to early Anglo-Saxon law. 2 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 46 (4th ed. 1936). Noxal surrender is the idea that a "guilty thing must be given up; and it is only if the owner declines to give it up that he can be made liable." *Id.* This idea transformed into a policy-based system of vicarious liability at the end of the seventeenth century. Fleming, *supra* note 68, at 165 (interpreting Holdsworth).

Baty described vicarious liability as "a veritable upas-tree . . . [u]nknown to the classical jurisprudence of Rome [and] unfamiliar to the mediaeval jurisprudence of England, it has attained its luxuriant growth through carelessness and false analogy." T. BATY, VICARIOUS LIABILITY 7 (1916). Even he, however, acknowledges the formalization of the scope of employment test by Lord Holt. *Id.* at 9.

70. *See infra* note 72 and accompanying text.

71. *See* Fleming, *supra* note 68, at 165. The "scope of employment" test was promulgated in *Hern v. Nichols*, 1 Salk. 289 (1709). BATY, *supra* note 69, at 9.

72. The Second Restatement of Torts supports the "scope of employment" test:

> § 317. Duty of Master to Control Conduct of Servant
>
> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
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> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 317 (1965).

73. The elements of vicarious liability in the various states are similar to the requirements of the Restatement. For example, in Utah, "there are three criteria for imposing liability: the employee's conduct must be of the general kind the employee was hired to perform, it must occur within the hours and the spatial boundaries of the employment, and it must be motivated, at least in part, to serve the employer's interest." *Id.* (citing Birkner v. Salt Lake County, 771 P.2d 1053, 1056-57 (Utah 1989)). *See* RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

variation is perhaps in part due to the numerous theories on the doctrine's origin.[74]

One main aspect of respondeat superior sets it apart from other doctrines creating employer liability. This aspect is that intent or negligence on the part of the employer need not be proven to find liability.[75] Not all employee actions create employer liability under respondeat superior, however, because not all employee actions fall within the parameters of the employment relationship.[76] In Minnesota, for example, liability is only found when the "source of the attack is related to the duties of the employee and the assault occurs within work-related limits of time and place."[77] Thus, if an employee's actions occur outside of the workplace, or at a time when the employee is not working, liability under respondeat superior will not be found.[78] This test of employer liability has been utilized in the context of sexual assault crimes.[79]

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74. *See supra* note 69.

75. *See supra* note 72 and accompanying text.

76. *Id.*

77. Lange v. National Biscuit Co., 211 N.W.2d 783 (Minn. 1973). The plaintiff in *Lange* was a grocery store manager who got into an argument with a cookie salesman over the salesman's servicing of the manager's store. *Id.* at 784. The cookie salesman took umbrage and assaulted the store manager. *Id.* In holding for the store manager, the Minnesota Supreme Court rejected the established test for employer liability under respondeat superior, which required a showing that the employee's acts were motivated by a desire to further the employer's business. *Id.* The traditional criteria for respondeat superior would have precluded employer liability in *Lange*. *Id.* The court noted that liability for the employee's assault in such cases could only be found "in those rare instances where the master actually requested the servant to so perform, or the servant's duties were such that that motivation was implied in law." *Id.* In the place of the established respondeat superior test, the court held that an employer is liable when the "source of the attack is related to the duties of the employee and the assault occurs within work-related limits of time and place." *Id.* at 783. Since the cookie salesman's attack was related to his duties and the assault occurred within work-related time and place limits, the employer, National Biscuit Company, was found liable. *Id.*

78. *See, e.g.*, Oslin v. State, 543 N.W.2d 408 (Minn. Ct. App. 1996). In *Oslin*, an employee assaulted two of his co-workers at a Christmas party. *Id.* at 411. The party was advertised at the workplace but was held at a local saloon. *Id.* at 414. Noting that the employer did not contribute to the party in any manner, the Minnesota Court of Appeals affirmed the trial court's decision that the party "did not occur within the 'work-related limits of time and space.'" *Id.* (citing *Lange*, 211 N.W.2d at 783). Accordingly, the employer was not liable for the acts of its employee. *Id.* at 413-14.

79. *See* Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306 (Minn. 1982). In *Marston*, a psychiatrist used his position of authority to kiss, fondle and massage one of his patients. *Id.* at 307. The Minnesota Supreme Court ruled that whether the psychiatrist's actions were within the scope of his employment was a question of fact. *Id.* at 311.

The modern rationale for respondeat superior frames the doctrine as a form of enterprise liability.[80] The enterprise liability theory "allocates the risk of the servant's negligence to the master, not because he is at fault, but because he is normally in a better position than the servant to respond in damages."[81] In addition, the employer "is better able than the victim to spread the risk by treating third-party liability as a cost of doing business."[82] In effect, respondeat superior marks a conscious determination to transfer the financial burden of a tort to the employer.[83]

Numerous justifications have been posited for this transfer.[84] One of the most important reasons is that respondeat superior provides an increased chance of adequate compensation for victims by providing an additional source of funding.[85] In addition, respondeat superior ensures that losses will be equitably distributed among the beneficiaries of the enterprises which incur them.[86] While these rationales are different, they have a common characteristic: liability exists not because of fault, but because it is justified by public policy.

2. Other Theories of Employer Liability

In situations where the employer's negligence can be proven, Minnesota allows liability to be imputed to the employer through three doctrines other than respondeat superior: negligent hiring,[87]

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80. *See, e.g.*, South Carolina Ins. Co. v. James C. Greene & Co., 348 S.E.2d 617, 623 (S.C. Ct. App. 1986).

81. *Id.*

82. *Id.* at 623-24.

83. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 500 (5th ed. 1984).

84. Rhett B. Franklin, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an Employer Under Respondeat Superior*, 39 S.D. L. REV. 575-76 (1994).

85. *Id.* at 575.

86. *Id.* at 575-76.

87. Minnesota recognizes the tort of negligent hiring. *See, e.g.*, Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 (Minn. 1983) (holding that an employer is liable for negligent hiring if the employer places "a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others."). *Id.* In *Ponticas*, a resident manager of an apartment complex who was on parole for aggravated robbery, burglary and theft used a passkey to enter a tenant's apartment and rape her at knife point. *Id.* at 909. The Minnesota Court of Appeals held that "the scope of the duty is commensurate with the risks of the situation." *Id.* at 912. The high degree of public contact inherent in the resident manager position, by dint of the passkey, warranted a high degree of care in selecting individuals to fulfill that position. *Id.* at 913. The apartment complex managers violated that duty by failing to adequately investigate the em-

negligent supervision[88] and negligent retention.[89] Negligent hiring imputes liability to an employer who fails to conduct a background check appropriate to the level of public contact a job involves.[90] Liability for negligent retention arises when the employer becomes aware of "dangerous factors" in a person's employment and fails to take appropriate remedial action.[91] Negligent supervision is de-

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ployee's criminal background before giving him the job. *Id.* at 914.

88. Negligent supervision is derived from respondeat superior and was first discussed in Minnesota in *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992). Plaintiff based this cause of action on the "Duty of Master to Control Conduct of Servant," RESTATEMENT (SECOND) OF TORTS § 317 (1965). *Id.* In *Semrad*, a group of investors sued Edina Realty to recover money lost through dealings with one of its sales associates. *Id.* at 529. The Minnesota Supreme Court held that negligent supervision could not be applied to investment situations because

> the entire thrust of section 317 is directed at an employer's duty to control his or her employee's physical conduct while on the employer's premises or while using the employer's chattels, even when the employee is acting outside the scope of the employment, in order to prevent intentional or negligent infliction of personal injury.

Id. at 534. In dicta, however, the court went further to limit the use of negligent supervision to "a duty to prevent an employee from inflicting personal injury upon a third person on the master's premises or to prevent the infliction of bodily harm by use or misuse of the employer's chattels." *Id.* Section 317 creates a three-element test for negligent supervision: (1) the servant must either be on the premises or using a chattel of the master, (2) the master must know or have reason to know that he has the ability to control the servant and (3) the master knows or should know of the need and opportunity to exercise control. *Id.*

89. Minnesota recognized the tort of negligent retention in *Yunker v. Honeywell*, 496 N.W.2d 419 (Minn. Ct. App. 1993). Honeywell employed Randy Landin from 1977 to 1979 and from 1984 to 1988. *Id.* at 421. Landin's employment was interrupted by a prison sentence which he incurred for strangling one of his co-workers to death. *Id.* at 420-21. Upon his release, Landin was rehired by Honeywell in a custodial capacity and was transferred twice because of workplace confrontations. *Id.* at 421. Landin began to threaten and harass a co-worker, Nesser, after she did not reciprocate his romantic interest. *Id.* These threats reached their apex when Landin scratched the message "one more day and you're dead" onto Nesser's locker door. *Id.* at 421, 424. Using a shotgun fired at close range, Landin carried out his threat less than three weeks after he made it. *Id.* at 421.

Recognizing that Nesser's heirs did not have a cause of action under either negligent hiring or respondeat superior, the Minnesota Court of Appeals promulgated the tort of negligent retention. *Id.* at 423. The court accepted the following description: "[n]egligent retention . . . occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment." *Id.* (quoting Garcia v. Duffy, 492 So. 2d 435, 438-39 (Fla. Dist. Ct. App. 1986)).

90. *Ponticas*, 331 N.W.2d at 911.

91. *Yunker*, 496 N.W.2d at 423. *Yunker* is the most recent in a line of Minnesota cases beginning with *Dean v. St. Paul Union Depot Co.*, 43 N.W. 54 (Minn. 1889). *Dean* was a negligence action by a plaintiff who was beaten by the defendant's ill-tempered employee. *Id.* at 55. In holding for the plaintiff, the Minnesota Supreme Court reasoned that the employer "had no more right . . . to knowingly and advisedly employ . . . a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog." *Id.*

rived from respondeat superior[92] and imposes liability on the employer for the actions of employees when they occur on the employer's property and the employer knows or should know of the offense.[93] Unlike some jurisdictions, Minnesota has refused to merge negligent hiring and negligent retention into a single tort.[94]

Negligent hiring, retention and supervision differ from respondeat superior in that liability under respondeat superior is not contingent upon a finding of negligence.[95] Instead, respondeat superior liability is based primarily on the existence of an employment relationship.[96] In contrast, negligent hiring, retention and supervision all require a showing of negligence on the part of the employer.[97] For the victim of sex abuse who does not become aware of an injury until years after it occurred, this showing may be difficult or impossible to make.[98] Therefore, respondeat superior is a better cause of action for victims of sexual abuse.

II. The *Oelschlager* Decision

While *Roe* and *Blackowiak* limit the amount of time in which the delayed discovery statute may be used, the *Oelschlager* decision limits the reach of the delayed discovery statute by eliminating delayed discovery respondeat superior claims.[99] Redeemer, Magnuson's employer, argued in *Oelschlager* that it was not liable for Magnuson's conduct because the statute of limitations had run on the appellant's respondeat superior claim, and because Magnuson was acting outside the scope of his employment as a matter of law when he abused Oelschlager.[100] The trial court rejected these arguments and found liability under respondeat superior.[101] Redeemer appealed the decision,[102] and the Minnesota Court of Appeals reversed, reasoning that respondeat superior claims fell outside the scope of the delayed discovery statute.[103] Accordingly,

92. *See* M.L. v. Magnuson, 531 N.W.2d 849, 853 (Minn. Ct. App. 1995).
93. *See supra* note 88 and accompanying text.
94. *See, e.g.*, Ponticas v. K.M.S. Investments, 331 N.W.2d at 910.
95. *See supra* note 72.
96. *Id.*
97. *See supra* notes 87-89.
98. Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 141 (recognizing the difficulty of obtaining reliable evidence after the passage of time).
99. Oelschlager v. Magnuson, 528 N.W.2d 895, 901 (Minn. Ct. App. 1995).
100. *Id.* at 898.
101. *Id.*
102. *Id.*
103. *Id.* at 903.

Oelschlager's claim was barred by the six year statute of limitations in subdivision 3 of the delayed discovery statute.[104]

In interpreting the delayed discovery statute, the Court of Appeals noted that although the goal of statutory interpretation is to "ascertain and effectuate the intent of the legislature,"[105] the plain meaning of the statute cannot be disregarded.[106] The court found that the plain meaning of subdivision 3 of the statute, which states that delayed discovery only applies against those who commit sexual abuse and those who negligently permit sexual abuse to occur, meant that the delayed discovery statute does not apply to respondeat superior claims.[107] This holding was based on the fact that liability under respondeat superior is not predicated on a finding of negligence.[108]

The court rejected the trial court's determination that subdivision 3 can be read to mean "'but is not limited to' the enumerated causes of action" by reasoning that subdivision 2(a) encompasses all "action[s] for damages based on personal injury caused by sexual abuse."[109] This holding forced the Court of Appeals to disregard its own precedent establishing that the statute of limitations for a respondeat superior claim is usually the same as that for the primary cause of action.[110] Oelschlager's respondeat superior claim was then rejected as untimely under Minnesota's standard statute of limitations for personal injury actions.[111]

The Minnesota Court of Appeals clarified the rationale behind the *Oelschlager* decision in *Sarafolean v. Kauffman*.[112] The trial court in *Sarafolean* granted summary judgment to a defendant employer based on *Oelschlager's* holding that the delayed discovery statute does not apply to respondeat superior claims.[113] On appeal, the court noted that: "[p]olicy supports such an interpretation, under which the actual perpetrators and facilitators of sexual abuse are more easily held liable, but institutions, which are not directly responsible for the abuse, remain protected by the normal limitations period."[114]

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104. *Id.* at 901.

105. MINN. STAT. § 645.16 (1996).

106. *Oelschlager*, 528 N.W.2d at 901.

107. *Id.*

108. *See supra* note 72 and accompanying text.

109. *Id.*

110. *See* Kaiser v. Memorial Blood Ctr. of Minneapolis, 486 N.W.2d 762, 767 (Minn. 1992) (citing Grondahl v. Bulluck, 318 N.W.2d 240, 244 (Minn. 1982)).

111. *Oelschlager*, 528 N.W.2d at 902.

112. 547 N.W.2d 417, 422 (Minn. Ct. App. 1996).

113. *Id.*

114. *Id.*

III. The *Oelschlager* Court Should Have Interpreted the Delayed Discovery Statute to Include Respondeat Superior Claims

The *Oelschlager* court used a plain-meaning argument to show that the delayed discovery statute was not designed to extend the statute of limitations for respondeat superior claims.[115] Examination of the *Oelschlager* court's logic, however, reveals that its interpretation is not dictated by the plain meaning of the delayed discovery statute, and is contrary to legislative intent. Public policy is not served by the *Oelschlager* decision. In addition, inclusion of respondeat superior within the causes of action affected by the delayed discovery statute creates a more logically consistent system under the delayed discovery statute than the scheme created by *Oelschlager*. Finally, the inclusion of respondeat superior aligns the interpretation of the delayed discovery statute with the similarly phrased Washington delayed discovery statute.

A. The Delayed Discovery Statute May Be Interpreted to Include Respondeat Superior Claims

The Minnesota Court of Appeals found that subdivision 3 of the delayed discovery statute does not encompass respondeat superior claims.[116] The rationale behind this holding was that "reading subdivision 3 as merely illustrative [of section 2(a)] . . . would make the subdivision redundant."[117] Under Minn. Stat. § 645.16, courts are required to eliminate redundancy by construing statutes, when possible, to give effect to all of their provisions.[118]

While the goal of efficient statutory interpretation is laudable, the *Oelschlager* court's holding that subdivision 3's application of the delayed discovery statute controls subdivision 2(a)'s six-year limitation period does not achieve that aspiration. The court's solution only serves to modify the redundancy. Instead of subdivision 3 being subordinate to subdivision 2(a), the *Oelschlager* decision causes subdivision 2(a) to subordinate subdivision 3. This result is every bit as confusing as the interpretive situation prior to *Oelschlager*. This highlights the real problem with the delayed discovery statute: the intended scope of the statute cannot be determined only from its text.

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115. *Oelschlager*, 528 N.W.2d at 901.
116. *Id.* at 901-02.
117. *Id.*
118. MINN. STAT. § 645.16 (1996).

The *Oelschlager* court failed to recognize this problem. Where there is an obvious contradiction within a statute, as is the case with the delayed discovery statute, legislative intent should be examined to determine how the statute should be interpreted. The *Oelschlager* court did not examine legislative intent. Instead, the court held that the plain meaning of the statute excluded respondeat superior claims from the scope of the delayed discovery statute.[119]

If the *Oelschlager* court had examined legislative intent, it would have discovered that the intent of the legislature was to provide victims using the delayed discovery statute with the use of respondeat superior.[120] The substantial similarity between the text of the Minnesota and Washington delayed discovery statutes suggests that the intent of the Minnesota legislature was to make the same causes of action available under the Minnesota statute.[121] In addition, the statute of limitations for respondeat superior is typically the same as the statute of limitations for the underlying cause of action.[122] The Minnesota legislature expressed no intention to vary from this principle.[123]

B. Public Policy Requires the Admission of Respondeat Superior

The *Oelschlager* decision is also contrary to public policy. In excluding respondeat superior from the scope of the delayed discovery statute, the *Oelschlager* court shielded employers from damage and settlement payments which might otherwise have resulted from delayed discovery litigation. This decision by the court all but ignored the modern justification for respondeat superior.

The modern doctrine of respondeat superior compensates victims for the wrongs perpetrated against them.[124] Liability is im-

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119. *Oelschlager*, 528 N.W.2d at 901.

120. *See supra* notes 26-27 and accompanying text.

121. *See supra* note 29 and accompanying text.

122. Other Minnesota cases have held that, usually, the statute of limitations for a respondeat superior claim is the same as that for the underlying cause of action. *See* Kaiser v. Memorial Blood Ctr. of Minneapolis, 486 N.W.2d 762, 767 (Minn. 1992) (citing Grondahl v. Bulluck, 318 N.W.2d 240, 244 (Minn. 1982)). The Minnesota Court of Appeals took note of this fact in *Oelschlager*, but did not find that information dispositive. *Oelschlager*, 528 N.W.2d at 902. Respondeat superior claims are permitted when a sexual abuse claim is brought under Minnesota's two-year statute of limitations. *See, e.g.*, Winkler v. Magnuson, 539 N.W.2d 821 (Minn. Ct. App. 1995) (holding that a sexual abuse victim's claim was time-barred under the two-year statute of limitations governing battery claims).

123. *See supra* notes 26-27 and accompanying text.

124. *See supra* note 81 and accompanying text.

puted for two principal reasons: the tortfeasor is often unable to adequately compensate the victim,[125] and employer liability is an efficient mechanism through which to transfer the cost of the tort to society at large.[126] In the case of Oelschlager, it is extremely unlikely that any meaningful financial recovery would ever be had from Magnuson, who was the target of numerous published sex abuse cases and an untold number of settlements.[127] Employer liability allows a victim who would otherwise go uncompensated to receive financial compensation.[128] Through insurance, the price of this compensation is borne by society as a whole.[129]

Although these policy reasons suggest that respondeat superior should be included in the scope of the delayed discovery statute, the *Oelschlager* court refused to do so. The court did not posit a countervailing policy reason for its refusal to allow sex abuse victims to recover under respondeat superior.[130] Accordingly, public policy requires that respondeat superior be included within the scope of the delayed discovery statute.

The need to include respondeat superior claims under the delayed discovery statute is apparent from the inadequacy of the remaining causes of action available to sex abuse victims. Negligent hiring, negligent retention and negligent supervision are all useful causes of action in their own right,[131] but they do not provide compensation to the sex abuse victim who is unable to prove employer negligence or intent.

Problems of proof are especially prevalent within the context of delayed discovery.[132] Because of the amount of time required for the consequences of sexual abuse to manifest, delayed discovery actions are always brought at least two years after the last inci-

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125. *See supra* note 85 and accompanying text.

126. *See supra* notes 82-86 and accompanying text.

127. *E.g., Winkler*, 539 N.W.2d at 821; M.L. v. Magnuson, 531 N.W.2d 849 (Minn. Ct. App. 1995).

128. The ease by which the liability of employers under respondeat superior can be transferred to society at large is readily seen in the availability of sex abuse litigation indemnification policies offered to churches and other institutions likely to employ sex abusers. *See, e.g.*, Diocese of Winona v. Interstate Fire and Cas. Co., 841 F. Supp. 894 (D. Minn. 1992) (describing the Diocese's three-layer insurance program for protection against sex abuse claims).

129. Franklin, *supra* note 84, at 575 n.40.

130. The justification of the court in *Sarafolean v. Kauffman*, 547 N.W.2d 417 (Minn. Ct. App. 1996), that only the direct perpetrators of sexual abuse should be subject to an extended statute of limitations was not posited by the *Oelschlager* court and has no basis in the legislative history of the delayed discovery statute. *See supra* notes 26-27 and accompanying text.

131. *See supra* notes 87-89.

132. Ernsdorff & Loftus, *supra* note 98, at 141.

dent of sexual abuse.[133] In the intervening time, the recollections and records needed to prove negligence grow dim and are misplaced.[134] Only respondeat superior, which imputes liability without proof of negligence, is likely to be capable of overcoming the hurdles posed by the lengthy passage of time.

As further proof that public policy requires respondeat superior to be included within the scope of delayed discovery, the Minnesota Supreme Court's recent *Blackowiak* decision alleviates the *Oelschlager* court's concern that permitting respondeat superior claims allows plaintiffs an unlimited number of years to pursue a claim. Under *Blackowiak*, the maximum interval between the time that a victim becomes aware that they were sexually abused and the time they file suit is six years.[135] Six years is a relatively short span of time, and it seems unlikely that evidence will become so distorted during that time that defendants need the further protection of respondeat superior exclusion.

C *Including Respondeat Superior Within the Scope of the Delayed Discovery Statute Increases Its Ideological Consistency*

1. By the *Oelschlager* Standard of Review, Negligent Hiring, Negligent Retention and Negligent Supervision Should Be Excluded from the Scope of the Delayed Discovery Statute

In excluding respondeat superior, the *Oelschlager* court noted that negligence claims were still available to the plaintiff under the delayed discovery statute.[136] These causes of action are permitted under the delayed discovery statute, despite the fact that they are not specifically mentioned in the statute and that the "plain meaning" of subdivision 3 would seem to allow only a common-law negligence claim.[137] Adherence to the standard of statutory interpretation used to reject respondeat superior, however,

133. Plaintiffs who bring suit within two years use a standard personal injury claim. MINN. STAT. § 541.07 (1996) (providing two year statute of limitations for personal injury claims).

134. Ernsdorff & Loftus, *supra* note 98, at 141.

135. Blackowiak v. Kemp, 546 N.W.2d 1, 3 (Minn. 1996).

136. Oelschlager v. Magnuson, 528 N.W.2d 895, 902 (Minn. Ct. App. 1995) ("Eliminating Redeemer's liability under respondeat superior leaves negligence as Redeemer's sole source of liability.").

137. MINN. STAT. § 541.073 (1996). *See, e.g.*, M.L. v. Magnuson, 531 N.W.2d 849 (Minn. Ct. App. 1995) (rejecting the use of a general negligence jury instruction, and forcing the substitution of instructions on negligent supervision, hiring and retention).

results in a similar exclusion of these three torts. The operative language of subdivision 3 of the delayed discovery statute provides a cause of action only against parties charged with "negligently permitting sexual abuse."[138] To maintain a consistent level of judicial scrutiny, this phrase should be read to permit a general negligence claim. "Negligently permitting sexual abuse"[139] is not a catch-all phrase for the separate torts of negligent hiring, negligent retention, and negligent supervision. By the *Oelschlager* court's own logic, if the legislature wished to extend negligent hiring, negligent retention and negligent supervision to the delayed discovery arena, it would have explicitly listed those causes of action.

The legislature did not, however, specifically list these causes of action. If the Minnesota Court of Appeals is to maintain its status as an interpreter of legislative intent and not a creator of legislation, the same level of judicial scrutiny should be maintained throughout a single statutory interpretation. There are two possibilities for consistent interpretations: respondeat superior can be included along with negligent hiring, retention and supervision, or all four causes of action can be excluded. Obviously, the latter choice renders the delayed discovery statute devoid of meaning. Accordingly, only the inclusion of respondeat superior is a valid interpretation.

2. The Curious Case of Negligent Supervision

The *Oelschlager* decision is also inconsistent because the Court of Appeals failed to address whether negligent supervision claims should be excluded from the context of delayed discovery when it excluded claims based on respondeat superior.[140] In fact, the court affirmatively allowed a negligent supervision claim in a follow-up case.[141] These decisions are remarkable because negli-

138. MINN. STAT. § 541.073 (3) (1996).

139. MINN. STAT. § 541.073 (3).

140. *Oelschlager*, 528 N.W.2d at 902.

141. *M.L.*, 531 N.W.2d at 856-58. The Minnesota Court of Appeals wrote that "[n]egligent supervision derives from the doctrine of respondeat superior so the claimant must prove that the employee's actions occurred within the scope of employment in order to succeed on this claim." *Id.* at 858 (citing Cook v. Greyhound Lines, Inc., 847 F. Supp. 725, 732 (D. Minn. 1994)). This assertion is an incorrect interpretation of the Minnesota respondeat superior test as promulgated in *Lange v. National Biscuit Co.*, 211 N.W.2d 783 (Minn. 1973). The *Lange* court stated that a respondeat superior claim in Minnesota need only be related to employment duties and occur "within work-related limits of time and place." 211 N.W.2d at 783. *See supra* note 77.

gent supervision is derived from respondeat superior.[142] By permitting negligent supervision while excluding its predecessor, the Court of Appeals has created a manifest doctrinal inconsistency.

There is no simple way for the Court of Appeals to reconcile its holdings on respondeat superior in *Oelschlager* and negligent supervision in *Semrad*. In order to make the decisions consistent, the court's first option is simply to ban negligent supervision along with respondeat superior. Excluding negligent supervision, however, is patently inconsistent with other Court of Appeals cases and the plain meaning of the delayed discovery statute, which specifically states that it "applies to an action for damages commenced against a person who caused the plaintiff's personal injury [by] negligently permitting sexual abuse . . . ."[143] The court's second option, and clearly the better one, is to reverse the *Oelschlager* decision.

3. Including Respondeat Superior Within the Scope of Minnesota's Delayed Discovery Statute Aligns It with Washington's Delayed Discovery Statute

The Minnesota legislature based its delayed discovery statute on the text of the Washington delayed discovery statute.[144] While no Washington case specifically endorsed the use of respondeat superior within the context of delayed discovery,[145] this absence is best explained by the inclusive language of the Washington delayed discovery statute, which includes "[a]ll claims or causes of action based on intentional conduct . . . ."[146] In the context of sexual abuse, respondeat superior claims, which are based on the tortious conduct of the defendant's employee, are clearly "based on intentional conduct."[147]

The Minnesota House and Senate subcommittees which undertook the task of drafting the delayed discovery statute made no mention of the fact that the Washington statute encompasses respondeat superior claims.[148] Where one statute borrows most of its language from another, the statutes should be interpreted in a

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142. *See supra* note 88.

143. MINN. STAT. § 541.073 (1996). For the full statutory text, see *supra* text accompanying note 10.

144. *See supra* notes 28-29 and accompanying text.

145. *See supra* note 30 and accompanying text.

146. WASH. REV. CODE ANN. § 4.16.340 (West 1996).

147. A question of redundancy is raised in Washington's use of the phrase "intentional conduct" in the context of childhood sexual abuse, as it is hard to imagine a scenario where sexual abuse of a child was negligent.

148. *See supra* notes 28-29 and accompanying text.

similar manner. This is especially true when there is no specific mention of a change by the drafters of the second statute. Accordingly, the two laws should endorse the same causes of action. The *Oelschlager* court's decision to exclude respondeat superior causes Minnesota's delayed discovery statute to encompass very different causes of action from those encompassed by the similarly worded Washington statute.

IV. Respondeat Superior Inclusion Is a Better Solution

In *Oelschlager*, the Minnesota Court of Appeals treats the issue of whether to include respondeat superior within the scope of the delayed discovery statute as if it were the final determinant of liability. That is not the case. Allowing respondeat superior claims under the delayed discovery statute allows the claim to be determined on its merits. This determination can be made by following the *Lange-Marston* test for respondeat superior liability.[149] Simply put, liability is assigned to the employer only if the employee/intentional tortfeasor was "within work-related limits of time and place," and the tortious action was related to but not necessarily in furtherance of the employee's employment.[150] This standard is far from strict liability for all sex abusers.

After the *Oelschlager* trial court found that Magnuson acted within the scope of his employment, the respondent in *Oelschlager* raised the issue of whether Magnuson was outside the scope of his employment according to the *Marston* test.[151] This defense was not considered because relevant sections of the trial transcript were not filed.[152] Consequently, whether Magnuson acted within the limits established by *Marston* cannot be determined. It is safe to state, however, that if the *Marston* test is adopted by the Court of Appeals within the context of delayed discovery, the liability of Magnuson's employer would be determined on its merits and not by judicial fiat.

Conclusion

The Minnesota Court of Appeals committed an injustice in refusing to include the doctrine of respondeat superior within the scope of the delayed discovery statute. The Court's decision was not dictated by statutory text and is contrary to both legislative in-

149. For description of the tests, see *supra* notes 77, 79.
150. *Id.*
151. Oelschlager v. Magnuson, 528 N.W.2d 895, 902 (Minn. Ct. App. 1995).
152. *Id.* at 903.

tent and public policy. Because of the *Oelschlager* decision, survivors of sexual abuse whom the delayed discovery statute was designed to assist are routinely deprived of financial recovery. By barring recovery, the financial cost of the abuse is borne by the party least deserving the burden: the victim.

This assessment of the jurisprudence surrounding the delayed discovery statute is hardly sensationalist, as can be seen by the divisions within the Court of Appeals caused by delayed discovery. In *K.B. v. Evangelical Lutheran Church*,[153] one of the most recent in the line of cases rejecting the claims of sex abuse victims without reaching their merits, a dissenting Judge Amundson[154] was inspired to quote Martin Luther:

> [I]t is conscience which calls me to dissent. And I recall vividly being taught the virtues of fidelity to conscience. Perhaps these parties will understand that better than any others. My lesson comes from a 16th century monk who truculently defied all known religious and secular authorities of the time when he declared:
>
> > Unless I am proved wrong . . . by right reason I cannot recant. To do so would require me to offend my conscience, and to do that is neither wise nor safe. Here I stand; I cannot do otherwise.[155]

The Court of Appeals would do well to take note of Judge Amundson's dissent and consider the practical implications of the *Oelschlager* decision on the survivors of sexual abuse.

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153. 538 N.W.2d 152 (Minn. Ct. App. 1995).

154. Judge Amundson was also the only judge to realize that the Court of Appeals' plain language interpretation of § 541.073 in *Roe v. Archdiocese of St. Paul*, 518 N.W.2d 629 (Minn. Ct. App. 1994) (Amundson, J., concurring), *rev. denied* (Minn. Aug. 24, 1994), would effectively destroy the usefulness of the statute. *Id.*

155. *K.B.*, 538 N.W.2d at 158 (Amundson, J., dissenting) (quoting MARTIN LUTHER, DIET OF WORMS, April 18, 1521).