NUTS 'N' BOLTS

Limitation Periods for Medical Negligence Claims

by Matthew K. Dale

Patients in Canada who have suffered harm as a result of the alleged medical negligence of a physician must be conscious of limitation periods which may frustrate their claims. In Ontario, the limitation period for such claims is generally one year from the date when the negligence was discovered, but recent cases indicate that there may be a two year limitation period for *Family Law Act* claimants and for wrongful death claims.

The two relevant statutory provisions are:

Regulated Health Professions Act[1]

> *No person who is or was a member is liable to any action arising out of negligence or malpractice in respect of professional services requested of or rendered by the person unless such action is commenced within one year after the date when the person commencing the action knew or ought to have known the fact or facts upon which the negligence or malpractice is alleged.*

Family Law Act[2]
Dependents' Claim for Damages

> *61. Right of dependents to sue in tort. -(1) If a person is injured or killed by the fault of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III Support Obligations),same-sex partner, as defined in PIII (Support Obligations) children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.*

> *(4) No action shall be brought under subsection (1) after the expiration of two years from the time the cause of action arose.*

The coexistence of a one year limitation prescribed by the *Regulated Health Professions Act,* and a two year limitation set out in the *Family Law Act,* presents the obvious possibility of conflict. A very recent Alberta Court of Appeal decision, *Tardif (Estate* of) v. *Wong*[3], addressed the issue of conflicting limitation periods with respect to legislation in that province akin to Ontario's *Regulated Health Professions Act,* and *Family Law Act.* Largely relying on the Supreme Court of Canada decisions in *Ordon Estate* v. *Grail*[4] and *Novak* v. *Bond*[5], the court held that where conflicting limitation periods coexist, the principle of statutory construction ought to be applied, and that any ambiguities should be resolved "by allowing the plaintiffs to rely on the longer period." The court also considered whether there were any reasons not to construe the conflicting legislation in favour of the plaintiffs, holding that "absent any valid reasons to justify applying the shorter limitation period, which would have the effect of barring the plaintiffs' claims, the plaintiffs should have the more favourable limitation period."

The Discoverability Rule

Under *s.89* of the *Regulated Health Professions Act,* the limitation period for medical negligence claims does not commence until the party bringing the action knows or ought to know the facts upon which the negligence is alleged. Legislators in drafting the section thus incorporated a "discoverability" rule. The Ontario Court of Appeal in *Smyth* v. *Waterfall*[6], relying on the Supreme Court of Canada's decision in *Peixeiro* v. *Haberman*[7], described the discoverability rule as *"a rule of fairness which provides that a limitation period does not begin to run against a plaintiff until he or she knows, or ought reasonably to know by the exercise of due diligence, the fact, or facts, upon which his or her claim is based."*

It is also noteworthy, as alluded to in *Legal Liability of Doctors and Hospitals in Canada*[8], that although the *Family Law Act,* does not expressly incorporate the discoverability rule,

> *"... the common law discoverability principle enunciated by the Supreme Court of Canada will be implied, because it is a rule of general application."*

An Ontario Court of Appeal decision, *McSween* v. *Louis*[9], provides useful insights regarding when the limitation period governing medical negligence claims begins. The Court canvassed numerous relevant authorities, consolidated many of the leading principles, and held that the plaintiff need not know the precise cause of the injury in order to commence an action in negligence. It is sufficient that the plaintiff possess the minimal factual knowledge required to base a claim for negligence, in order for the limitation period to begin. The court, relying on its earlier decision in *Soper v. Southcott*[10], emphasized that the limitation period may begin to run before the plaintiff has received a medical opinion, where it is possible to know material facts without the benefit of such an opinion.

In some cases, a medical opinion will be necessary to know whether to institute an action. In other cases, it will be possible to know material facts without a medical opinion, and the medical opinion itself will simply be required as evidence in the litigation. In the latter instances, the time of the receipt of the medical opinion is immaterial to the commencement of the running of the limitation period.

Due Diligence

In *Soper,* the Ontario Court of Appeal held that there is a duty on the plaintiff to exercise due diligence in ascertaining the facts upon which a claim will be based. The court specified that this includes acting with due diligence in requesting and receiving a medical opinion, if required, so as not to delay the commencement of the limitation period.

Onus

In *McSween,* the Ontario Court of Appeal held that "where a defendant raises the issue that the action was commenced beyond the limitation period, the onus is on the plaintiff to show that it was commenced in a timely manner."

Summary

- The *Regulated Health Professions Act* imposes a one-year limitation period on the commencement of medical negligence actions.
- The *Family Law Act* prescribes a two-year limitation period for the commencement of medical negligence actions brought by dependants.
- The Alberta Court of Appeal has recently held that where there are conflicting limitation periods, plaintiffs should have the benefit of the more favourable limitation period.
- The limitation period for medical negligence claims commences when the person bringing the action knows, or ought reasonably to know by the exercise of due diligence, the facts upon which his or her claim is based. The Plaintiff need not know the precise cause of injury, and even reasonable factual knowledge may be sufficient to trigger the limitation.
- Where a defendant raises the issue that the action was commenced beyond the limitation period, the onus is on the plaintiff to show that it was commenced in a timely manner.

Ed. note: Bill 213 has incorporated into the legislation an expansion of s. 89 of the *Regulated Health Provisions Act,* that a plaintiff has *"2 years from when he or she knew or ought to have known of the facts"* upon which the alleged act of negligence is based, to commence an action subject always to an exception if the plaintiff is a minor not represented by a litigation guardian.

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Notes

[1] *Regulated Health Professions Act,* S. O. 1991, c.18, s.89
[2] *Family Law Act*, R. S.O. 1990, c.F.3
[3] *Tardif (Estate* of) v. *Wong*, 2206-027
[4] *Ordon Estate* v. *Grail* [1998] 3 S.C.R. 437
[5] *Novak* v. *Bond* [1999] 1 S.C.R. 108
[6] *Smyth* v. *Waterfall* (2000); 50 O.R. (3 d) 481
[7] *Peixeiro* v. *Haberman* [1997] 3 S.C.R. 549
[8] *Legal Liability of Doctors and Hospitals in Canada,* 3rd ed. (Carswell, 1990)
[9] *McSween* v. *Louis* [2000] 132 O. A. C. 304
[10] *Soper* v. *Southcott* (1998), 39 O.R. (3d) 737