RISK NOTE

SUBJECT: Limitation Period in Medical Malpractice Cases

The *Limitations Act* is the main authority governing the application of limitation periods, although case law has also clarified several rules. The amount of time in which an action for personal injury may be brought against a hospital, hospital employees, or a physician is two years from the date on which the right to bring the action arose (usually this is the date of the injury but may be different if the injury was not immediately apparent).

However, in certain circumstances, the running of this two year period may be postponed for up to six years, referred to as the “ultimate limitation period”.

The Supreme Court of Canada ("SCC") in the case of *Novak v. Bond* held that the running of the two year limitation period may be postponed in cases involving allegations of professional negligence or malpractice until a properly advised reasonable person would consider that the plaintiff "*ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action".* The SCC clarified that an extension of the limitation period beyond the two years may only occur if the plaintiff *could not have* brought an action within that time frame because his/her own interests and circumstances were serious, significant, and compelling. People should not be compelled to bring a legal action when to do so runs counter to the need to maintain health in the face of a life-threatening disease.

Statutory provisions for this are found in s. 6(4) of the *Limitations Act*, which stipulate that a person must have knowledge of the identity of the potential defendant and the facts of the situation, and that they would have known that there was reasonable chance of success in their claims. There is a requirement on the plaintiff to act reasonably in discovering the facts available and in consulting with professional advisors on the aspects of the facts (i.e. physicians, lawyers, etc.). The test to determine whether a plaintiff may delay bringing an action is not whether the plaintiff acted reasonably in the circumstance but rather whether a reasonable person would say the plaintiff *could have* brought the lawsuit sooner, after considering the plaintiff's interests and circumstances. The two year limitation period will commence to run at the point in time that the plaintiff could have commenced the action. The plaintiff bears the Burden of

Proof as to whether their circumstances warrant a suspension of the limitation period.

While more recent cases have affirmed this principle, there is also a need for closure and certainty on the part of potential defendants. Even with the postponement of the two year limitation period, the ultimate limitation period to commence proceedings for professional negligence or malpractice will continue to be six years. Upon the expiration of a six year period, health care professionals can be assured that a potential adult plaintiff can no longer bring a professional negligence or malpractice action against him or her except in connection with sexual abuse/assault or sexual misconduct, where no limitation period applies.

If the person is a minor or incapable (i.e. substantially unable to manage their own affairs), the applicable limitation period does not start to run while the person is "under a disability." In the case of minors, the running of the limitation period therefore begins at the age of majority (i.e. nineteen (19) years plus two or six years). **This means, in the case of infants, the limitation period may last as long as twenty five years**. If the person has a disability which renders him or her "incapable" this suspension continues while they are under the disability, therefore it could be indefinite.

The *Limitation Act* does not bar counterclaims or the addition of new and third parties where proceedings have already started, even if the prescribed period has elapsed.

As the determination of limitation periods is contingent on a variety of considerations, including the actions of both potential parties, we recommend that a facility contact HCCP if there is any concern about potential litigation.

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