Ontario’s New Limitations Act and its Impact on Health Industry Clients

Bill 213, the Ontario government’s Justice Statute Law Amendment Act, 2002, received Royal Assent on December 9, 2002. This omnibus legislation enacts the Limitations Act, 2002 and repeals many of the specialized limitation periods found in the various pieces of legislation that affect the health industry. The Act becomes law on January 1, 2004.

What are limitation periods?

Limitation periods are statutory time limits for starting legal proceedings in civil court. Once the prescribed time period has expired, no legal action can be brought regardless of whether any cause of action ever existed. From a policy perspective, it is recognized that after time memories fade, documentary evidence may cease to exist and fairness requires a limit to a potential defendant’s exposure to possible lawsuits.

The current hodge-podge of limitation periods is quite confusing as there are different time periods and rules depending upon the legal entity and applicable legislation. For example, the Mental Health Act (MHA), Public Hospitals Act (PHA) and Regulated Health Professions Act, 1991 (RHPA) are subject to three different time limitations and apply three different tests (see attached Schedule). Other health facilities such as nursing homes are not subject to a special limitation period, and accordingly, the general limitation periods found in the Limitations Act are applicable (i.e. 6 years for negligence and breach of contract actions).
Overview of Limitations Act, 2002

Two-year general limitation period

Under the new legislation, there is a general limitation period of two years for most civil litigation proceedings. The limitation period starts from the date the person “knew or ought to have known” about the injury, loss or damage suffered and identity of the individual who allegedly caused or contributed to this loss. Because time starts to run from the date of discovery of the loss, this is called the discoverability principle.

The basic limitation period replaces the general limitation periods found in the existing Limitations Act and most of the special limitation periods found in individual statutes. For example, the limitation periods contained in the following statutes have been repealed:

- Ambulance Act
- Limitations Act
- Mental Health Act
- Mental Hospitals Act
- Negligence Act
- Ontario Mental Health Foundation Act
- Public Hospitals Act
- Regulated Health Professions Act, 1991

Exceptions

The basic limitation period does not run during the time the person with the claim is under disability. That includes an individual who is a minor, or is incapable of commencing a proceeding because of his or her physical, mental, or psychological condition. When a person with a claim is represented by a litigation guardian who acts on his or her behalf in relation to the claim, the discovery rules apply to the litigation guardian. Thus, if a potential plaintiff is under disability, a potential defendant may make an application to have a litigation guardian appointed for the potential plaintiff so as to end the postponement of the limitation period.

There are special rules established for some types of claims, for example, those based on assault and sexual assault. There are also a variety of proceedings for which there is no limitation period, for example, those with respect to undiscovered environmental claims.
**Ultimate Limitation Period – 15 years**

The *Limitations Act, 2002* establishes an ultimate limitation period of 15 years after which a claim may be barred, irrespective of when the claim was discovered. The ultimate limitation period does not run during the incapacity of the person with the claim, during the person’s minority or during any time in which the person against whom the claim is made willfully concealed essential facts or misled the person with the claim.

**Implications for Health Industry Clients**

From a risk management perspective, it is important to pay heed to limitation periods imposed by statute and at common law. Unlike the fixed limitation periods currently found in the MHA and PHA (i.e. time starts to run from a fixed event such as discharge), psychiatric facilities and public hospitals will now be subject to the discoverability principle. In other words, the limitation period for negligence does not begin to run until such time as the person discovers, or reasonably ought to have discovered, the cause of his or her injuries. This can have the effect of extending the period for bringing a claim considerably.

Health industry clients should review their risk and claims management programs and policies and procedures prior to January 1, 2004 to ensure that they are adequately protected.

**Obstetrical Malpractice Alert!**

Hospitals and health professionals performing (or previously performing) obstetrics or other high risk activities should be aware that there has been a dramatic increase in the number of obstetrical malpractice claims commenced many years after the event. As limitation periods do not begin to run for a minor until the minor reaches the age of 18, the individual may be approaching adulthood before a claim is brought. Further, in the case of an incapable person such as a brain damaged infant a limitation period may potentially be extended indefinitely. (As stated above, once the Limitations Act, 2002 is in force, there is a mechanism for potential defendants to effectively stop the clock from running by seeking the appointment of a litigation guardian).
With the passage of time, it can be very difficult to defend against this type of claim. Memories fade, policies and procedures are often not properly archived and patient records may have been destroyed. This is especially the case since legislative requirements for retention and destruction of records have changed over time. In fact, not so long ago, ‘nursing notes’ were not considered part of the patient record under the PHA and thus the retention provisions were not applicable.

Not only is it difficult to demonstrate that the health professionals exercised an appropriate standard of care when records have been destroyed, but health facilities may find themselves subject to “spoiliation” claims. Essentially, this is a doctrine of evidence that provides that a negative inference may be made against a defendant to a lawsuit for the intentional destruction (or “spoilation”) of evidence. For this reason, it is essential that hospitals and other health facilities have board-approved policies for the retention and destruction of records. These must comply with applicable legislation and demonstrate that appropriate systems are in place.

In light of the above, we suggest that for high risk cases in which litigation may be contemplated, that the original records (including fetal monitoring strips and diagnostic materials) be maintained indefinitely. Where the hospital receives notice of a potential lawsuit, inquest, investigation or inquiry within the statutory retention period, it is incumbent upon the hospital to retain the original records until the matter has been finally disposed of.

We would be pleased to assist you with development and/or review of your retention/destruction policies and procedures.

Schedule

Mental Health Act

S.78  All actions, prosecutions or other proceedings against any person or psychiatric facility for anything done or omitted to be done in pursuance or intended pursuance of this Act or the regulations shall be commenced within six months after the act or omission complained of occurred and not afterwards.  R.S.O. 1980, c. 262, s. 62
Public Hospitals Act

s.31 Any action against a hospital or any nurse or person employed therein for damages for injury caused by negligence in the admission, care, treatment or discharge of a patient shall be brought within two years after the patient is discharged from or ceases to receive treatment at the hospital and not afterwards. R.S.O. 1980, c.410, s.28

Regulated Health Professions Act

s.89(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 the 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.

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