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Personal Injury

How distinct limitations apply to assault claims



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Legislatures have relaxed the application of limitations defences to claims of sexual assault since the Supreme Court of Canada's landmark decision in the incest case, *M. (K.) v. M. (H.)*, [1992] S.C.J.

No. 85, in recognition of the unique nature of the wrongful conduct and the resulting harms that often delay victims from coming forward to claim compensation.

As a result, unique statutory limitations schemes now apply in virtually every province and territory, most of which render basic and ultimate limitation periods inapplicable to sexual assault claims.

Quebec and P.E.I. stand alone in having no limitations provi-

sions specific to sexual assault. However, as the Supreme Court of Canada demonstrated in *Christensen v. Roman Catholic Archbishop of Québec*, [2010] S.C.J. No. 44, courts will intervene to mitigate the effects of potentially harsh limitations provisions. In *Christensen*, the court allowed an appeal from a successful motion to dismiss a clergy abuse claim as time-barred on the basis that a more subtle and contextual consideration at trial of the facts was

necessary to determine questions of postponement and suspension of Quebec's limitations period.

The array of differences between limitations statutes means each statute and the case law interpreting it have to be specifically considered. This is illustrated by Ontario's *Limitations Act, 2002*, which came into force in 2004. This Act introduced a set of exceptions and rules that apply exclusively to sexual and physical assault claims. In the last two

years, we have seen a number of first-level decisions interpreting Ontario's new provisions.

The starting points for Ontario's *Limitations Act* are subs. 16(1)(h) and (4), which provide for no limitation period, including no ultimate limitation period, where the parties to a sexual assault were in a power-dependency relationship at the time of the assault. The courts have so far interpreted the requirements of trust, authority and

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Defendant must be alive, or if dead, not for more than two years

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dependency to be akin to those of a fiduciary relationship, and have not shied away from finding s. 16(1)(h) does not apply where age or employment position were all that separated the parties (see *Morgan v. Kent*, [2008] O.J. No. 972 (S.C.J.) and *J.R. v. Vickery*, [2010] O.J. No. 1006).

The only apparent limitation to a plaintiff's indefinite right to sue where s. 16(1)(h)'s criteria are satisfied is the requirement that the alleged wrongdoer, if intended to be a defendant, be alive or, if dead, not for more than two years. While not yet resolved in the jurisprudence, the two-year limitation period under Ontario's *Trustee Act*, which: 1) runs from the date of death, 2) is not subject to discoverability and 3) is expressly preserved under ss. 19(1) and (4) of the *Limitations Act*, likely prevails (see *P.T.B.L. v. P.B. Estate*, [2010] O.J. No. 531, leave to appeal denied [2010] O.J. No. 3275). This means plaintiffs' lawyers must be vigilant with respect to the unforgiving limitations rules that apply where there has been or may be a death.

The next set of relevant provisions in Ontario's *Limitations Act* are in s. 10, which exempts physical and sexual assault claims from the Act's basic two-year limitations period by creating a rebuttable presumption of incapacity during "any time" the claimant is incapable of commencing a proceeding because of a "physical, mental or psychological condition." For physical assault, incapacity is presumed up to the time the proceeding was commenced, but only if the parties were in an intimate or dependent relationship, suggesting the provision was primarily intended to apply to domestic abuse situations.

For sexual assault, incapacity is presumed without limitation. These provisions have received considerable attention from the courts thus far. Although restrictive interpretations of what constitutes a dependent relationship, which the statute defines in terms of "financial or otherwise," have been applied (see, for example, *Vickery*), the threshold for finding "incapacity" has been quite low (see, for example, *Bruce v. Bruce*, [2008] O.J. No. 5708 (S.C.J.), *Vickery*, and *C.S. v. Nigro*, [2010] O.J. No. 2486).

The transition provisions in s. 24 of Ontario's *Limitations Act* which deal with historical-based claims started after 2004, and rely

heavily on discoverability, apply with equal force to claims premised on assault. These can yield different results depending on the cause of action. For instance, a claim based on the tort of assault may be barred because it was discovered before 2004 and the old limitation period expired, but if framed as a breach of fiduciary duty, no limitation period will apply (see s. 24(3) and 24(6)2).

Section 24(7), however, operates in relation to a subset of sexual and physical assault claims only, and, where it applies, is a powerful tool that serves to retroactively revive expired claims. For s. 24(7) to apply, the defendant must either have "committed the assault" (i.e.

the direct perpetrator of the assault must be a party to the action), or knowingly aided, encouraged or permitted the commission of the assault (a difficult threshold to meet, but one most likely to apply to employers and institutional defendants which are directly, as opposed to vicariously, liable).

Once the otherwise expired claim is revived, the parties are directed into one of two streams — either the "no limitation period" stream of s. 16(1)(h), or failing that, the s. 10 incapacity stream. There are now several examples of courts reviving claims under s. 24(7), and then proceeding to apply s. 6(1)(h) and/or s. 10, with the result that

some actions have been allowed and others dismissed.

What is evident from the spate of recent decisions in Ontario is not only that defendants are more emboldened in asserting limitations defences, but also that there is a need for creativity, even ingenuity, on the part of plaintiffs' lawyers. We can expect more decisions in the near future as litigants, their lawyers and the courts grapple with these unique statutory provisions. ■

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