

Summer 2017

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Recommended Citation

Ruggieri, Brandon (2017) "A Major Change for Minor Victims: A Call to Amend Rhode Island's Statute of Limitations for Children's Medical Malpractice Suits," *Roger Williams University Law Review*: Vol. 22 : Iss. 3 , Article 5.
Available at: http://docs.rwu.edu/rwu_LR/vol22/iss3/5

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A Major Change for Minor Victims: A Call to Amend Rhode Island's Statute of Limitations for Children's Medical Malpractice Suits

Brandon Ruggieri*

INTRODUCTION

In Rhode Island the statute of limitations for medical malpractice suits, codified at Section 9-1-14.1(1) of the Rhode Island General Laws, mandates that a plaintiff's medical malpractice action be brought within three years from the time of the plaintiff's alleged injury.¹ However, if the plaintiff is a minor and such an action has not been brought on her behalf within the three year time period, then the plaintiff must bring the action within three years of reaching the age of the majority.² Thus,

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1. 9 R.I. GEN. LAWS ANN. § 9-1-14.1 (West, Westlaw through Ch. 542 of Jan. 2016 Sess.).

2. Section 9-1-14.1 provides, in relevant part, that:

[A]n action for medical . . . malpractice shall be commenced within three (3) years from the time of the occurrence of the incident which gave rise to the action; provided, however, that: (1) One who is under disability by reason of age . . . and on whose behalf no action is brought within the period of three (3) years from the time of the occurrence of the incident, shall bring the action within three (3) years from the removal of the disability.

Id.

Section 9-1-14.1(1) offers a minor plaintiff “two windows” in which to bring her claim: (1) a claim that may be brought on her behalf by a parent or guardian within three years of the injury or reasonable discovery of the injury; or (2) a claim that the minor may bring on her own behalf anytime from the ages of eighteen to twenty-one.³ Nevertheless, in spite of these two windows, minor victims of medical malpractice are often not provided with a fair opportunity to have their claims adjudicated in the courts.

In 2015, the Rhode Island Supreme Court reaffirmed the meaning and purpose of Section 9-1-14.1(1). In *Ho-Rath v. Rhode Island Hospital*, the court held, as a matter of first impression, that medical malpractice claims seeking to recover for injuries sustained by a minor may be brought by the minor’s parents or guardians either within three years from the date of the alleged malpractice incident, or by the minor on her own behalf within three years of reaching the age of majority.⁴ The majority’s “landmark decision”⁵ was countered by Justice Flaherty’s dissent; he argued that the better interpretation of the statute would be to “provide minors on whose behalf no suit has been filed within three years of an act of negligence the benefit of the tolling provision inherent in Section 9-1-14.1(1) and allow them to file suit at *any time up until three years after they attain the age of majority*.”⁶

In 2010, Jean and Bunsan Ho-Rath (Plaintiffs) sued Rhode Island Hospital, Miriam Hospital, Women and Infants’ Hospital of Rhode Island, and numerous associated medical professionals⁷ (Defendants) on behalf of their minor daughter Yendee Ho-Rath, who was born on January 9, 1998.⁸ Plaintiffs claimed that Defendants were negligent in the diagnosis and treatment of

3. *See id.*

4. 115 A.3d 938, 948 (R.I. 2015).

5. MELISSA D. BERRY ET AL., MEDICAL MALPRACTICE AND TORT REFORM 34 (2016), Westlaw HPTSIB 09-26-16.10.

6. *Ho-Rath*, 115 A.3d at 955 (emphasis added).

7. These medical professionals included Lewis Glasser, M.D., William Ferguson, M.D., Fred Schiffman, M.D., and B.E. Barker, Ph.D., who were all associated with Rhode Island Hospital and Miriam Hospital; and Calvin E. Oyer, M.D., Jami Star, M.D., and Marsha Sverdup, M.S. f/k/a Marsha Pagnotto, M.S., who were all associated with Women and Infants’ Hospital of Rhode Island. *Id.* at 941 nn.2–3.

8. *Id.* at 941.

Yendee's genetic blood disorder, alpha thalassemia, and "also asserted individual claims against each of the Defendants for the loss of consortium of Yendee."⁹ Specifically, "[P]laintiffs alleged that, although genetic testing for thalassemia was conducted on Jean, Bunsan, and Yendee's older brother as early as 1993, [D]efendants had failed to correctly test, diagnose, and treat [P]laintiffs, resulting in Yendee being born with a debilitating genetic disorder."¹⁰ In 2011, the trial court dismissed the case on the grounds that the statute of limitations had run since Plaintiffs waited twelve years to initiate their claims on behalf of Yendee.¹¹ The Rhode Island Supreme Court affirmed this decision and held that Section 9-1-14.1(1) permitted Yendee to sue on her own behalf when she reached the age of eighteen.¹² The court also held that Plaintiffs' derivative loss-of-consortium claims may be brought alongside Yendee's claim when she turns eighteen.¹³

In the lone dissenting opinion, Justice Flaherty found that the proper interpretation of Section 9-1-14.1(1) would allow the minor to bring suit at any time up until three years after she turns eighteen.¹⁴ Justice Flaherty argued that this interpretation would achieve the legislative purpose of Section 9-1-14.1(1) because it would "eliminate[e] drawn-out litigation, which can, and does, occur in personal injury suits brought under Section 9-1-19, while not abrogating a minor's right to relief or mandating that her claim grow stale in the intervening years before she reaches the age of majority."¹⁵

This Comment will not challenge the court's interpretation of the statute, but rather will examine *Ho-Rath*, along with its relevant precedent, to determine if Section 9-1-14.1(1) provides minor medical malpractice victims with a fair opportunity to have their claims adjudicated. Using Justice Flaherty's dissenting opinion in *Ho-Rath* as a preliminary base, this Comment will argue that the statute should be changed because it forces a

9. *Id.*

10. *Id.*

11. *See id.* at 942. The facts provided failed to identify when Yendee's genetic condition was discovered by Plaintiffs, and did not explain the reason for the twelve-year delay in Plaintiffs' action. *See id.* at 941-42.

12. *Id.* at 948.

13. *Id.* at 951.

14. *Id.* at 952 (Flaherty, J., dissenting).

15. *Id.* at 956.

blameless minor to wait years before she can bring suit, and in the most extreme circumstances up to fifteen years.¹⁶ As Justice Flaherty argues, “during this period, doctors may relocate, retire, or die; hospitals may close or merge; and records may become misplaced or lost.”¹⁷ In order to avoid these potential risks, this Comment will propose an amendment to Section 9-1-14.1(1) that would allow minors to bring suit at any time up until they turn twenty-one, and thus would provide minor victims of medical malpractice in Rhode Island with a better opportunity to have their claims adjudicated.

This Comment examines both arguments in favor of and against Section 9-1-14.1(1) and concludes that the statute does not provide minor victims of medical malpractice with a fair opportunity to have their claims adjudicated. Part I outlines the relevant history of Section 9-1-14.1(1) and discusses three important cases predating *Ho-Rath*, which have addressed minor medical malpractice actions. Part II analyzes the arguments in support of and against Section 9-1-14.1(1), explaining why this statute does not provide minor victims with a fair opportunity to have their claims adjudicated and proposes an amendment to the statute. Part III compares Section 9-1-14.1(1) to other states’ statutes of limitation. This Comment concludes by arguing in favor of changing the law in order to allow minors to bring a medical malpractice suit anytime up until they reach the age of twenty-one.

I. THE HISTORY OF RHODE ISLAND’S MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

Under state law, the statute of limitations for a plaintiff’s claim may be “tolled” until some event, specified by law, takes place.¹⁸ Tolling provisions in state law are intended to benefit a plaintiff by extending the time period in which he or she is permitted to bring suit.¹⁹ Characteristically, a statute of limitations is tolled because of some supposed impediment to the

16. *Id.* at 955.

17. *Id.*

18. 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 246, Westlaw (database updated June 2016).

19. *See id.*

plaintiff's pursuit of his or her claim.²⁰ These impediments that trigger the tolling of a statute of limitations may vary from state to state, but often include minority, mental disability, imprisonment, or service in the armed forces.²¹

In Rhode Island, the general provision for the tolling of the statute of limitations for personal injury claims of minors is Section 9-1-19 of the Rhode Island General Laws.²² This provision, "which has been in existence[] without significant change[] for over one hundred years,"²³ provides in pertinent part:

If any person at the time any such cause of action shall accrue to him or her shall be under the age of eighteen (18) years, or of unsound mind, or beyond the limits of the United States, the person may bring the cause of action, within the time limited under this chapter, after the impediment is removed.²⁴

Section 9-1-19 of the Rhode Island General Laws operates for the protection of a minor.²⁵ Pursuant to this provision, "a suit may be brought on behalf of a minor plaintiff in a personal injury action at any time until the minor reaches the age of majority, after which time the minor has three years to file suit on his or her own behalf."²⁶ When read alone, this general tolling provision provides minors with a significant opportunity to have their personal injury claims adjudicated because their suit may be brought at any time up until they turn twenty-one years old. However, during the 1970s, this general tolling provision was viewed as giving minors too broad of a protection in medical malpractice actions; thus, Rhode Island General Assembly enacted Section 9-1-14.1(1).²⁷

20. *Id.*

21. *Id.*

22. 9 R.I. GEN. LAWS ANN. § 9-1-19 (West, Westlaw through Ch. 542 of Jan. 2016 Sess.).

23. *Ho-Rath v. R.I. Hosp.*, 115 A.3d 938, 944 (R.I. 2015).

24. § 9-1-19 (Westlaw).

25. *See id.*

26. *Ho-Rath*, 115 A.3d at 944 (citing *Bishop v. Jaworski*, 524 A.2d 1102, 1102–03 (R.I. 1987)); *Bliven v. Wheeler*, 50 A. 644, 644 (1901)).

27. *See infra* Section I.A.1.

A. *Rhode Island's Limitation on Minors' Medical Malpractice Claims*

1. *The 1970s Medical Malpractice Crisis: Purpose and Historical Context of Section 9-1-14.1(1)*

During the 1970s, the United States faced a medical malpractice crisis, which resulted in “huge increases in insurance premiums and the departure of some insurance carriers from malpractice underwriting.”²⁸ In 1976, the Rhode Island General Assembly enacted Section 9-1-14.1,

[A]s a legislative response to a medical malpractice crisis in the state. Faced with the crisis, the Legislature had legitimate interests in limiting the number of medical malpractice suits but, at the same time, in providing victims of medical malpractice with a fair opportunity to have their claims adjudicated in the courts.²⁹

Accordingly, Section 9-1-14.1(1) was intended to streamline the litigation of medical malpractice cases involving minors, while at the same time acting as a limitation on the general tolling provision for minors set forth in Section 9-1-19.³⁰ While this statute has succeeded in its intended purpose of limiting the number of medical malpractice suits in Rhode Island, questions remain whether this limitation gives minor victims a fair opportunity to have their claims adjudicated.

2. *Malpractice Statute of Limitations in the Rhode Island Courts Pre-Ho-Rath*

Ho-Rath was not the Rhode Island Supreme Court's first encounter with minor medical malpractice actions. Three cases are of particular importance: *Bakalakis v. Women & Infants' Hospital*,³¹ *Dowd v. Rayner*,³² and *Rachal v. O'Neil*.³³ Together

28. Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, LAW AND CONTEMP. PROBS., Spring 1986, at 5.

29. *Ho-Rath*, 115 A.3d at 946 (quoting *Dowd v. Rayner*, 655 A.2d 679, 681 (R.I. 1995)).

30. *Id.*

31. 619 A.2d 1105 (R.I. 1993).

32. 655 A.2d 679 (R.I. 1995).

33. 925 A.2d 920 (R.I. 2007).

these cases have helped to shape the law that governs minor medical malpractice and personal injury actions in Rhode Island. In *Bakalakis*, the court held that Section 9-1-14.1(1) is the only statute of limitations applicable to medical malpractice actions and thus is not superseded by Section 9-1-19.³⁴ In this case, the parents of a minor victim filed suit against numerous medical professionals, alleging negligent care at the time of birth of their son.³⁵ The suit was filed within three years of the son's birth.³⁶ Subsequently, more than three years after their son's birth, the minor's parents moved to amend their complaint to add two additional doctors as defendants.³⁷ The court rejected the parents' amended complaint and concluded that if parents file suit on behalf of a minor within three years of the alleged occurrence of malpractice, the parents cannot add new defendants after the three-year window has expired.³⁸

In 1995, the *Dowd* court held that Section 9-1-14.1(1) did not violate equal protection or the Rhode Island State Constitution.³⁹ Like *Bakalakis*, the plaintiffs in *Dowd* sought to amend their complaint in order to add additional medical professionals as defendants, but waited over seven years to do so.⁴⁰ In this case, the court took the opportunity to comment on the legislative purpose of Section 9-1-14.1(1), and concluded that this provision restricts "multiple suits or amended complaints filed against additional defendants on a serial or piecemeal basis."⁴¹ According to the court, this statute ensured that minors were not disadvantaged by their disability during their minority, while at the same time protecting possible defendants from stale claims.⁴²

Finally, in 2007, the court held in *Rachal* that Section 9-1-14.1(1) is a legislatively carved out exception to the general tolling provision for minors in Section 9-1-19.⁴³ In *Rachal*, a minor's parents filed a personal injury suit on his behalf against the

34. *Bakalakis*, 619 A.2d at 1107.

35. *Id.* at 1106.

36. *See id.*

37. *Id.*

38. *Id.* at 1107.

39. *Dowd v. Rayner*, 655 A.2d 679, 680 (R.I. 1995).

40. *See id.*

41. *Id.* at 682.

42. *Id.*

43. *Rachal v. O'Neil*, 925 A.2d 920, 927 (R.I. 2007).

owner of a skate park, requesting damages for skateboarding injuries sustained on a half pipe at the park.⁴⁴ More than a year later, the parents sought to amend their complaint to add the skate park as a defendant, but the lower court denied their motion.⁴⁵ The court affirmed this decision and concluded that under Section 9-1-14.1(1) “a parent[’s] . . . suit on behalf of a child for certain types of professional malpractice removes that child’s malpractice claims from the protection a tolling statute would otherwise offer.”⁴⁶

3. Ho-Rath

In *Ho-Rath*, the Rhode Island Supreme Court was obligated to apply the plain meaning of Section 9-1-14.1(1).⁴⁷ According to the statute, “[o]ne who is under disability by reason of age . . . and on whose behalf no action is brought within the period of three (3) years from the time of the occurrence of the incident, shall bring the action within three (3) years from the removal of the disability.”⁴⁸ Even though the *Ho-Rath* majority correctly applied the plain meaning of Section 9-1-14.1(1),⁴⁹ Justice Flaherty’s dissent highlights the tension between what the law requires and the unfortunate results that can harm “blameless” children.⁵⁰ To afford minor victims of medical malpractice a fair opportunity to have their claims adjudicated, Rhode Island’s statute must be amended.

II. ARGUMENTS FOR AND AGAINST THE AMENDMENT

Section 9-1-14.1(1) of the Rhode Island General Laws does not provide minors with a fair opportunity to have their claims adjudicated because the statute sometimes forces the minor to wait years before they can bring suit if the minor’s parents have failed to bring a claim on the minor’s behalf.⁵¹ This statute

44. *Id.* at 922.

45. *Id.* at 922–23.

46. *Id.* at 925.

47. *Ho-Rath v. R.I. Hosp.*, 115 A.3d 938, 943 (R.I. 2015).

48. 9 R.I. GEN. LAWS ANN. § 9-1-14.1 (West, Westlaw through Ch. 542 of Jan. 2016 Sess.).

49. *See* 115 A.3d at 944, 946–47.

50. *See id.* at 955 (Flaherty, J., dissenting).

51. *See* § 9-1-14.1.

currently creates a serious conflict between the interests of the child and the interests of the State of Rhode Island. On the one hand, both the minor and the minor's family have an interest in seeking relief in a timely manner to compensate for the alleged harm that the minor suffered. On the other hand, Rhode Island has an interest in streamlining medical malpractice litigation and in protecting possible defendants from stale claims.⁵² Although there are strong arguments on both sides, in order to properly protect the minor victim and provide the minor with a fair opportunity to have their claims adjudicated, Section 9-1-14.1(1) must be amended to allow a minor's claim to be brought at any time up until the minor reaches the age of twenty-one.

A. Arguments in Support of the Amendment

1. The Prolonged Period of Exposure and a Minor Victim's Right to Relief

Section 9-1-14.1(1) of the Rhode Island General Laws must be amended to better protect a minor's right to relief and to ensure that minors are afforded a fair opportunity to have their claims adjudicated within a reasonable time period. By enacting Section 9-1-14.1(1), the Legislature sought to limit the number of medical malpractice claims and eliminate drawn-out medical malpractice litigation.⁵³ Although Section 9-1-14.1(1) has largely succeeded in its intended purpose, its success has come at a high cost to minor victims. As Justice Flaherty described in *Ho-Rath*, if a minor's parent is not diligent in bringing suit on behalf of the minor, then Section 9-1-14.1(1) will "abrogate[e] a minor's right to relief or mandate[e] that [a minor's] claim grow[s] stale in the intervening years before [they] reach[] the age of majority."⁵⁴ Accordingly, Section 9-1-14.1(1) must be amended to prevent this abrogation of a minor's right to relief.⁵⁵

Section 9-1-14.1(1) "prolongs the period of exposure to malpractice suits, and thus is inconsistent with [its] purpose of

52. See *Ho-Rath*, 115 A.3d at 947 (majority opinion); *Dowd v. Rayner*, 655 A.2d 679, 681–82 (R.I. 1995).

53. See *Ho-Rath*, 115 A.3d at 946.

54. *Id.* at 956 (Flaherty, J., dissenting).

55. See *id.* at 955–56.

limiting malpractice litigation.”⁵⁶ In fact, amending the statute might speed up litigation because missing the first three-year window would not necessitate that the minor wait until she reaches the age of majority to bring the action. Additionally, the intervening years before the minor reaches the age of eighteen could affect a minor’s right to relief. While some changes in circumstances may be beneficial—such as recovering from the alleged injury—many run the risk of being detrimental to the minor and their future claim. As Justice Flaherty described in *Ho-Rath*, a minor’s doctor “may relocate, retire, or die; hospitals may close or merge; [or] records may become misplaced or lost.”⁵⁷ In some circumstances, a minor may even die from her injuries (or other causes) without ever having the opportunity to bring suit.⁵⁸ To protect minors from these potential risks, they should be allowed to bring their claim at *any time* before they turn twenty-one.

The risks that may occur during the intervening years before the minor turns eighteen undermine the minor’s fair opportunity to have the minor’s claims adjudicated. Time is of the essence in a minor’s medical malpractice suit. With each passing year, the potential harms that a minor may face grow in number and in likelihood, adding unnecessary obstacles to the minor’s suit and ultimately hurting the minor’s possibility of success in her future legal action. For example, consider Yendee’s case in *Ho-Rath*: although she may bring suit when she turns eighteen, many things can occur during the six intervening years.⁵⁹ First, if her doctor, who allegedly misdiagnosed and improperly treated her blood disorder at birth, were to relocate or retire, she may have a difficult time locating and bringing suit against that doctor.⁶⁰ Second, if her doctor were to die during that time, she could lose

56. William Jordan, *Minors’ Medical Malpractice Claims May Be Brought by Parents Within Three Years of Date of Malpractice, or by Minors Within Three Years of Date of Majority*, PROF’L LIAB. REPORTER (Thomson Reuters), July 2015, at NL 25, Westlaw 40 No. 7 Professional Liability Reporter NL 25.

57. *Ho-Rath*, 115 A.3d at 955 (Flaherty, J., dissenting).

58. See, e.g., Gretchen R. Fuhr, *Civil Procedure/Tort Law—Better Off Dead?: Minority Tolling Provision Cannot Save Deceased Child’s Claim*, 31 W. NEW ENG. L. REV. 491, 491 (2009) (child admitted to hospital for pain caused by sickle cell anemia and died next day from morphine overdose).

59. See *Ho-Rath*, 115 A.3d at 955 (Flaherty, J., dissenting).

60. See *id.*

the ability to bring any possible claims against him.⁶¹ Finally, if the hospital where her alleged injury took place closed or burned down, she may lose her medical records.⁶² Thus, Section 9-1-14.1(1) could force the minor's claim to "grow stale" and may result in a loss of evidence.⁶³ By forcing a minor to wait years before she may bring her claim—in the most extreme cases up to fifteen years—Section 9-1-14.1(1) prolongs a minor's period of exposure to malpractice suits, potentially nullifies a minor's right to relief, and diminishes a minor's chances of success in her future litigation.⁶⁴

2. *Birth Injuries and "Dormant" Symptoms*

Section 9-1-14.1(1) must be amended to better protect a minor who has suffered an injury at birth and a minor whose symptoms do not arise until later in the minor's life. A birth injury is "an impairment of the neonate's body function or structure due to an adverse event that occurred at birth."⁶⁵ During the birthing process there is an increased risk of injury to not only the mother, but the infant as well.⁶⁶ Some injuries cannot be avoided due to complications during the mother's pregnancy or at birth, while others occur as a result of a medical professional's negligence.⁶⁷ For example, during delivery, an infant may become oxygen deprived or suffer "broken bones, lacerations, or skull fractures" due to the malpractice of a medical professional.⁶⁸ Similarly, as seen in *Ho-Rath*, the improper diagnosis and treatment of a blood

61. *See id.*

62. *See id.*

63. *See id.*; Jordan, *supra* note 56.

64. *See Ho-Rath*, 115 A.3d at 955 (Flaherty, J., dissenting).

65. Tiffany M. McKee-Garrett, *Neonatal Birth Injuries*, WOLTERS KLUWER (Sept. 21, 2015), <http://www.uptodate.com/contents/neonatal-birth-injuries>.

66. "The 10 most common birth injuries include: Brachial Plexus Palsy (Erb's Palsy . . .), bone fractures, cephalohematoma, caput succedaneum . . . , perinatal asphyxia, intracranial hemorrhage, subconjunctival hemorrhage, facial paralysis; spinal cord injuries; and cerebral palsy" *Birth Injury Statistics*, BIRTH INJURY GUIDE, <http://www.birthinjuryguide.org/birth-injury/statistics/> (last visited Apr. 7, 2017).

67. *See id.*

68. *Birth Injury Types*, BIRTH INJURY GUIDE, <http://www.birthinjuryguide.org/birth-injury/types/> (last visited Apr. 7, 2017).

disorder may also result in an injury to the child.⁶⁹ As discussed below, these injuries and their symptoms vary from one infant to another. Accordingly, Section 9-1-14.1(1) must be amended in order to protect all minors who suffer from birth injuries and to account for the many differences in their injury-related symptoms.

Section 9-1-14.1(1) must also be amended to shield those minors whose birth injury symptoms remain dormant for several years into a minor's life. A minor's birth injury may be temporary, while others may result in "permanent disabilities and disfigurement."⁷⁰ The related symptoms of these birth injuries range in severity and differ in time of emergence.⁷¹ Often times the symptoms for certain birth injuries are immediate and can be recognized—possibly even treated—while the infant remains in the hospital.⁷² However, sometimes a child and her parents do not become aware of the child's birth injuries until later in the child's life.⁷³ These dormant symptoms may take years to surface and "signs of birth injuries [may not be] seen until [the] child develops through growth stages or begins school."⁷⁴ Consequently, if a child's symptoms do not emerge within the first three years of a child's life or do not become "reasonab[ly] discover[able,]" then the child's parents may be barred from filing a claim pursuant to Section 9-1-14.1(1).⁷⁵

Under Section 9-1-14.1(1), children who have suffered a birth injury may be forced to wait years before they can file a claim due to their dormant symptoms.⁷⁶ For example, consider these two situations: (1) an infant suffers a birth-related injury due to a medical professional's malpractice, but her symptoms do not develop until the child is four years old; and (2) a medical professional fails to adequately diagnose and treat an infant's disorder, but symptoms of that disorder do not arise until the child is twelve years old. In each of these circumstances, if the child's parents fail to bring a claim within three years of the discovery of

69. *Ho-Rath*, 115 A.3d at 941 (majority opinion).

70. *Birth Injury Symptoms*, BIRTH INJURY GUIDE, <http://www.birthinjuryguide.org/birth-injury/symptoms/> (last visited Apr. 7, 2017).

71. *See id.*

72. *See id.*

73. *See id.*

74. *Id.*

75. *Ho-Rath v. R.I. Hosp.*, 115 A.3d 938, 946 (R.I. 2015).

76. *See, e.g., id.*

the child's symptoms then Section 9-1-14.1(1) will bar the child's parents from ever bringing a claim on their child's behalf. Though both children will be given the opportunity to bring suit upon turning eighteen, they must wait years in order to do so.

Although birth injuries have become increasingly rare due in part to modern advancements in medical technology, such injuries will continue to occur both naturally and at the hands of medical professionals. Today, "[o]f every 1,000 infants born in the United States, 6 to 8 of them are born with a birth injury. That means that approximately 1 in every 9,714 people in the U.S. are born with a birth injury."⁷⁷ To respond to this ongoing issue, it is imperative that the Legislature amend Section 9-1-14.1(1). A child's claim should not be mandated to "grow stale" as a result of a delayed emergence in the child's symptoms.⁷⁸ It is unacceptable to force a child to wait years to bring their own claim due to such circumstances, which are outside of the child's control. Rather, children should be granted a longer period of time in which to bring their claim, so that their lawsuit is not unnecessarily delayed. Amending Section 9-1-14.1(1) will safeguard young victims and afford them a better chance of procuring damages for their injuries by granting them this extended period of time.

3. *Reduce the Burdens Placed on Minors and Their Families*

Amending Section 9-1-14.1(1) would protect minor victims from unforeseeable circumstances which are outside of their control. Medical malpractice litigation involving minors is often burdensome on all parties involved. However, such litigation can be especially burdensome on minors and their families.⁷⁹ One burden which arises from Section 9-1-14.1(1) is that a minor is powerless under the law until she reaches the age of eighteen.⁸⁰ Until that time, the minor must rely on her parent to bring a claim on her behalf, and if her parent fails to do so, then the minor

77. *Birth Injury Statistics*, *supra* note 66 ("Based on this information, 28,000 per year are born with a birth injury, which is 2,333 per month, 538 per week, 76 per day, and 3 per hour.").

78. *See Ho-Rath*, 115 A.3d at 956 (Flaherty, J., dissenting).

79. In addition to financial burdens from having to wait years without compensation for damages, there may also be emotional burdens on the minor and the family due to the highly sensitive information in the case.

80. *See* 9 R.I. GEN. LAWS ANN. § 9-1-14.1 (West, Westlaw through Ch. 542 of Jan. 2016 Sess.).

is forced to wait to bring her own claim.⁸¹ By forcing a minor to wait, this statute punishes a minor for her parent's failure to bring suit within three years of the minor's alleged injury.

Amending Section 9-1-14.1(1) will free minors from punishment and lighten the burden that the statute currently places on minors and their families. Under Section 9-1-14.1(1), a parent's failure to bring suit may be the result of: (1) a lack of diligence;⁸² (2) a lack of knowledge;⁸³ or (3) the inability to bring suit.⁸⁴ Although the causes of a parent's failure may differ, a minor's punishment remains the same—she will be forced to wait for years before having the opportunity to bring her own claim. Currently, Section 9-1-14.1(1) does not distinguish between a parent's mistake, inability, or decision, but instead focuses on the mere fact that a claim was not brought within three years of the alleged injury.⁸⁵ However, by amending Section 9-1-14.1(1), minors will no longer be punished for their parent's failure to sue on their behalf. Rather, this amendment will combat these causes and grant a minor a better opportunity to seek relief.

Allowing a minor's claim to be brought at *any time* until she turns twenty-one will benefit all parties involved in the litigation. This amendment would give minors a better opportunity to be heard in court, and may even lead to more timely litigation, as parents will no longer be barred from bringing claims on their children's behalf. Amending Section 9-1-14.1(1) could actually speed up litigation because if the minor's parent misses the first window, the minor would not have to wait until reaching the age of majority to bring the claim. Moreover, allowing a minor's parent to bring a claim at any time will preserve evidence,⁸⁶ which

81. *See id.*

82. As discussed *supra* Section II.A.1, this occurs when a parent knows of a minor's injury, but does not bring a timely suit in court within three years of the alleged injury. *See, e.g., Dowd v. Rayner*, 655 A.2d 679, 680 (R.I. 1995).

83. As discussed *supra* Section II.A.2, this occurs when a parent is unaware of the minor's injury, and may not become aware of the injury until after three years have passed from the time the alleged injury took place.

84. Parents of the minor may not have the financial means to fund a lawsuit, or the physical or legal ability to bring a claim within three years of the alleged injury.

85. *See* § 9-1-14.1(1) (Westlaw).

86. The theories in support of this argument are: (1) if suits are permitted to be brought at any time up until a minor turns twenty-one it will

would assist both parties in support of their arguments and aid the courts in making their rulings. However, critics of amendment argue that forcing a defendant (hospital, doctor, or other medical professional) to defend a claim at any time, for potentially twenty-one years, is burdensome on the defendant.⁸⁷ While this may be a valid concern, it may be more acceptable to place this greater burden on possible defendants, rather than on a minor. Defendants, such as doctors, hold themselves to a high professional standard: they keep detailed medical records of patients and often have the means to hire defense counsel. Overall, these defendants, as compared to minor victims, are much better equipped to handle the rigors associated with litigation. Minors, on the other hand, must rely on their parents to bring a claim on their behalf, hire an attorney, and obtain evidence that is not readily available to them. Although amending Section 9-1-14.1(1) may place a greater burden on defendants, it will ultimately benefit both parties involved in the litigation by permitting lawsuits to be brought earlier and encouraging the preservation of evidence.

B. Arguments Against the Amendment

1. The Children's Medical Malpractice Crisis

Opponents to the amendment would argue that this change could result in a children's medical malpractice crisis, similar to what occurred in Rhode Island during the 1970s.⁸⁸ They would fear that the amendment will: (1) cause an increase in medical

result in plaintiffs, and possible defendants, preserving evidence (i.e. medical records) that may be necessary to support their positions in future litigation; and (2) if there are less intervening years between the alleged injury and the suit, there will most likely be more evidence to preserve. *See Ho-Rath*, 115 A.3d at 955–56 (Flaherty, J., dissenting).

87. *See, e.g., id.* at 947 (majority opinion).

88. *See* Robinson, *supra* note 28, at 6 (footnotes omitted) (“For health care providers the immediate crisis was essentially twofold: a sudden and substantial increase in malpractice insurance premium rates and, worse, the threat that liability coverage would become unavailable at any price as a consequence of carrier withdrawal from the field. For the carriers themselves, the crisis was an unanticipated increase in both the number of claims filed for negligent injuries and the amounts recovered. Rising underwriting costs were compounded by investment losses that a nationwide recession inflicted on insurance companies along with other investors.”).

malpractice litigation in Rhode Island; and (2) lead to “huge increases in insurance premiums” for children’s medical coverage.⁸⁹ First, opponents will likely argue that such an amendment would directly conflict with the purpose of Section 9-1-14.1(1), which was to limit the number of medical malpractice suits in the state.⁹⁰ By allowing a minor’s claim to be brought at any time, the Legislature would not only encourage, but also enable more suits to be brought in the courts. While an increased ability to sue may be beneficial for minor plaintiffs, the resultant influx of litigation may tie up the courts and, in turn, slow down the state’s judicial processes. Second, as a result of this influx, the cost of insuring children may increase, making it expensive for families to pay for medical coverage. Moreover, hospitals and medical professionals, fearful of being sued, would most likely charge higher prices for children’s care. Nonetheless, these fears are unfounded because today’s society is very different when compared to the 1970’s due to advancements in technology, health insurance, and medical malpractice law. As of now, opponents have offered no evidence that an amendment to Section 9-1-14.1(1) will result in increased litigation or that today’s legal and healthcare systems could not withstand such an increase if it occurred.

2. *Protecting Defendants and Encouraging Reasonable Diligence*

Opponents would argue that amending Section 9-1-14.1(1) fails to protect defendants from stale claims.⁹¹ As previously discussed, one intended purpose of Section 9-1-14.1(1) was to protect defendants from long, drawn-out litigation.⁹² This statute sought to encourage parents of minor victims “to act diligently in bringing claims on behalf of minors” within three years of the minor’s injury.⁹³ Moreover, as seen in *Dowd* and *Bakalakis*, by limiting litigation to two distinct windows of opportunity, the Legislature wanted to protect possible defendants who could be added to ongoing suits.⁹⁴ This limitation “restrict[s] . . . multiple

89. *Id.* at 5.

90. *See Dowd v. Rayner*, 655 A.2d 679, 682 (R.I. 1995).

91. *See Ho-Rath*, 115 A.3d at 948.

92. *See Dowd*, 655 A.2d at 682.

93. *Jordan*, *supra* note 56.

94. *Dowd*, 655 A.2d at 681–82; *Bakalakis*, 619 A.2d 1105, 1107 (R.I.

suits or amended complaints filed against additional defendants on a serial or piecemeal basis.”⁹⁵ Thus, opponents argue that the amendment would force defendants to be subject to stale claims and leave other potential defendants vulnerable to being included in a minor’s ongoing or future litigation.⁹⁶ Although these are reasonable concerns for defendants, it is the current statute that mandates that claims grow stale by forcing the minor to wait years before bringing her claim. An amendment to Section 9-1-14.1(1), on the other hand, seeks to limit stale claims and speed up litigation by eliminating the waiting period to allow a minor to bring a claim at any time until her twenty-first birthday.

3. *Safeguarding a Minor’s Right to Relief*

Opponents to the amendment argue that Section 9-1-14.1(1) does not abrogate a minor’s right to relief because it affords a minor two windows of opportunity.⁹⁷ As previously discussed, this statute: (1) permits a parent to bring suit on the minor’s behalf; and (2) protects the minor “if [her] parents or guardians fail to act diligently” in bringing suit.⁹⁸ Although the minor may be exposed for a longer period of time, her parents’ failure to bring suit will not bar her own personal action. Upon turning eighteen, the minor will be given the opportunity to seek relief on her own behalf no matter how many years have passed since the time of her injury. The only burden placed on the minor is that she personally will have to wait until she reaches eighteen to file a claim.⁹⁹ Therefore, opponents argue that Section 9-1-14.1(1) should stand because it safeguards a minor’s right to relief by granting her two opportunities to bring a claim. However, because the current statute subjects the minor to a longer period of exposure, she is not given a fair opportunity to seek relief. Amending Section 9-1-14.1(1)’s provides minors with a better opportunity because it limits the period of exposure by allowing their claims to be brought earlier.

1993).

95. *Dowd*, 655 A.2d at 682.

96. *See, e.g., Ho-Rath*, 115 A.3d at 950.

97. *See id.* at 950–51.

98. *Jordan*, *supra* note 56.

99. *See Ho-Rath*, 115 A.3d at 950.

C. Proposed Amendment

In light of these concerns, this Comment proposes that Section 9-1-14.1(1) be amended as follows: an action for medical malpractice involving an alleged minor victim shall be commenced at any time up until three (3) years after she has attained the age of the majority. One who is under disability by reason of age, and on whose behalf no action is brought, shall bring the action within three (3) years from the removal of the disability.

III. RHODE ISLAND'S STATUTE OF LIMITATIONS COMPARED TO OTHER STATES

Across the United States, states have statutes of limitation that govern medical malpractice claims, and “[t]he majority of the states have special provisions regarding the time limits for minors to file medical malpractice claims.”¹⁰⁰ The purpose of a state’s statute of limitations is not only to protect defendants from long-dormant claims, but also to encourage plaintiffs to bring an action with reasonable diligence.¹⁰¹ However, each state’s statute seeks to accomplish this purpose in different ways. States’ statutes of limitation for medical malpractice claims generally fall within four broad categories: (1) those that do not have special provisions for minor victims; (2) those that have special provisions for minor victims; (3) those that provide “two windows” of opportunity; and (4) those that do not count the time period before a minor’s eighteenth birthday as part of the time limit imposed by the state’s general statute of limitations.¹⁰²

A. States Without Special Provisions for Minors

State statutes that fall within the first category are the most restrictive on a minor’s claim. While the majority of states have special provisions regarding the time limits for minors to file

100. See Heather Morton, *Medical Liability/Malpractice Statutes of Limitation*, NAT’L CONF. ST. LEGISLATURES (Mar. 20, 2014), <http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-statutes-of-limitation.aspx>.

101. Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453, 488 (1997).

102. See Morton, *supra* note 100 (providing comprehensive list of state statutes dealing with statutes of limitation for medical malpractice claims).

medical malpractice claims, there are some states that do not. For example, in Connecticut and Louisiana, an action brought on behalf of the minor must adhere to the same general statute of limitations governing medical malpractice claims.¹⁰³ Unlike Rhode Island, these states do not provide minor victims with additional time in which to bring their claim, but rather mandate that a claim on the minor's behalf be brought within one to three years after the date of the alleged injury or discovery.¹⁰⁴ Thus, state statutes such as those found in Connecticut and Louisiana, which do not have special provisions for minor victims, are considered to be among the most restrictive on a minor's claim.

B. States with Special Provisions for Minor Victims of Medical Malpractice

State statutes that fall within this second category are more restrictive on a minor's claim than Rhode's Island's current (and amended) statute. Some states have special provisions for minor victims under a certain age that limit the time in which an action

103. CONN. GEN. STAT. ANN. § 52-584 (Westlaw through Jan. 1, 2017 Legis. Sess.) ("No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed."); LA. STAT. ANN. § 9:5628 (Westlaw through 2016 First Extraordinary, Regular, and Second Extraordinary Sess.) ("No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank . . . whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect. *The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.*") (emphasis added).

104. See CONN. GEN. STAT. ANN. § 52-584 (Westlaw); LA. STAT. ANN. § 9:5628 (Westlaw).

may be brought on their behalf. For example, in Massachusetts, the statute of limitations provides that minors under the age of six have only until their ninth birthday for a claim to be brought on their behalf or else they will be barred from bringing suit.¹⁰⁵ Unlike Rhode Island's statute, Massachusetts's statute fails to provide minors with a second "window" of opportunity when they reach the age of majority. Although statutes within this category provide minor victims with some additional protection, children are left without a second chance at relief if their parents fail to bring a claim on their behalf within the designated time period.

C. States that Provide "Two Windows" of Opportunity

Similar to Rhode Island, there are a number of states that provide minor victims of medical malpractice with "two windows" of opportunity. For example, in New Hampshire and Ohio, a medical malpractice action involving a minor victim may: (1) be brought on behalf of the minor after the injury or reasonable discovery of the injury;¹⁰⁶ or (2) be brought by the victim when

105. MASS. GEN. LAWS ANN. ch. 231, § 60D (Westlaw through 2016 2nd Annual Sess. and ch. 1 of 2017 1st Annual Sess.) ("[M]inor[s] under the full age of six years shall have until his ninth birthday in which the action may be commenced, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body.").

106. N.H. REV. STAT. ANN. § 508:4(1) (Westlaw through ch. 1 of 2017 Reg. Sess.) ("[A]ll personal actions . . . may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of."); OHIO REV. CODE ANN. § 2305.113(C)–(D) (Westlaw through 2017–2018 Legis. Sess.) ("No action upon a medical . . . claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical . . . claim. If an action upon a medical . . . claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical . . . claim, then, any action upon that claim is barred. If a person making a medical claim . . . could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within three years after the occurrence of the act or omission, but, in the exercise of reasonable care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-

reaching eighteen.¹⁰⁷ While the time limits for each window vary from state to state, what is common within this category is that minors are provided with two chances to seek relief.¹⁰⁸

It is evident from this comparison that Rhode Island's Section 9-1-14.1(1) is liberal as compared to several other state statutes that fall within sections A and B; however, it is more restrictive than states in section D discussed below. Opponents to amending Section 9-1-14.1(1) will argue that there is no need to go further because Rhode Island provides minor victims of medical malpractice with two fair opportunities for relief, while some states have no special provisions for minors or place greater restrictions upon them. However, as previously discussed, there are issues that can arise when a state chooses to adopt a "two window" statute. To this point, Rhode Island has taken necessary steps to ensure that minor victims have a better chance at relief, but more can be done. Rhode Island should commit to making the process as accessible as possible to minors by adopting amended Section 9-1-14.1(1).

year period . . . , the person may commence an action upon the claim not later than one year after the person discovers the injury resulting from that act or omission. If the alleged basis of a medical claim . . . is the occurrence of an act or omission that involves a foreign object that is left in the body of the person making the claim, the person may commence an action upon the claim not later than one year after the person discovered the foreign object or not later than one year after the person, with reasonable care and diligence, should have discovered the foreign object. A person who commences an action upon a medical claim . . . under the circumstances described in . . . this section has the affirmative burden of proving, by clear and convincing evidence, that the person, with reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within the [stated] period[s] described in . . . this section").

107. N.H. REV. STAT. ANN. § 508:8 (Westlaw) ("An infant or mentally incompetent person may bring a personal action within 2 years after such disability is removed."); OHIO REV. CODE ANN. § 2305.16 (Westlaw) ("[I]f a person entitled to bring an[] action mentioned in [section 2305:113] . . . is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by [section 2305:113], after the disability is removed.").

108. Today, there are approximately thirteen states that have adopted a similar version of this "two window" statute: Kansas, Kentucky, Maine, Minnesota, Nebraska, New Hampshire, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, and Vermont. See Morton, *supra* note 100.

D. States that Do Not Count the Time Period Before a Minor's Eighteenth Birthday

Some states have already implemented statutes similar to amended Section 9-1-14.1(1) that are less restrictive on a minor's claim than Rhode's Island's current statute. These states do not count the time period before a person's eighteenth birthday as part of the time limit imposed by the state's general statute of limitations. For example, in Arizona and the District of Columbia, the time restriction placed on a minor does not begin to run until after the minor reaches the age of eighteen.¹⁰⁹ Unlike in Rhode Island, a claim that is brought on behalf of a minor is not subject to the general statute and may be brought at any time until the minor turns eighteen.¹¹⁰ However, when the minor reaches eighteen the statute of limitations will begin to run, and they must bring a claim within the designated time.¹¹¹ Other states including New York and North Dakota have passed similar statutes, but have added an additional time restriction that limits how long the extension of the statute lasts.¹¹² For example, in North Dakota, "the extension of the limitation due to infancy is limited to twelve years[,]" meaning that the period within which the action must be brought cannot exceed twelve years after the minor's injury occurred.¹¹³ Thus, these statutes are considered to

109. ARIZ. REV. STAT. ANN. § 12-502 (Westlaw through 2017 First Reg. Legis. Sess.) ("If a person . . . is at the time the cause of action accrues either under eighteen years of age or of unsound mind, the period of such disability shall not be deemed a portion of the period limited for commencement of the action. Such person shall have the same time after removal of the disability which is allowed to others."); D.C. Code Ann. § 12-302 (Westlaw through Mar. 12, 2017) ("[W]hen a person entitled to maintain an action is, at the time the right of action accrues . . . under 18 years of age . . . he or his proper representative may bring action within the time limited after the disability is removed.")

110. See, e.g., ARIZ. REV. STAT. ANN. § 12-502 (Westlaw); D.C. Code Ann. § 12-302 (Westlaw).

111. See, e.g., ARIZ. REV. STAT. ANN. § 12-502 (Westlaw); D.C. Code Ann. § 12-302 (Westlaw).

112. See N.Y. C.P.L.R. 208 (MCKINNEY Westlaw through 2017 Legis. Sess.); N.D. CENT. CODE ANN. § 28-01-25 (Westlaw through 2017 Reg. Sess.).

113. N.D. CENT. CODE ANN. § 28-01-25 (Westlaw); see also N.Y. C.P.L.R. 208 (MCKINNEY Westlaw) ("The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues . . .").

be among the most lenient in the country because the time period before the minor's eighteenth birthday is not counted as part of the statute's time limit.

CONCLUSION

Rhode Island General Laws Section 9-1-14.1(1) does not provide minor victims of medical malpractice with a fair opportunity to have their claims adjudicated. Under Section 9-1-14.1(1), if a minor's parents fail to bring a claim her behalf, then she is forced to wait years before she may bring her own claim. As *Ho-Rath* illustrates, by mandating a minor's claim to "grow stale," it subjects the minor to a long period of exposure and, ultimately, "abrogat[es] a minor's right to relief."¹¹⁴ To afford minors a better opportunity to have their claims adjudicated, Section 9-1-14.1(1) must be amended to permit a minor's claim to be brought at *any time* up until the minor reaches the age of twenty-one.¹¹⁵

"Minority tolling provisions, [like amended Section 9-1-14.1(1),] enable minors to realize the full scope of the harm inflicted on them before filing suit."¹¹⁶ This amendment seeks to minimize harm to a minor by shortening the period of exposure and enabling a minor's claim to be brought at any time, rather than restricting it to two windows of opportunity under the current statute. By permitting lawsuits to be brought earlier, the Rhode Island General Assembly would encourage the preservation of evidence, reduce the number of potential risks that threaten minor victims' claims, and ultimately increase minors' likelihood of success in their litigation.¹¹⁷ Moreover, amending Section 9-1-14.1(1) would further the goals of the tort system as minor plaintiffs will have "an opportunity to be heard and can be compensated for their losses while physicians [will be] deterred from wrongdoing."¹¹⁸ This major change for minor victims will help to ensure that a defendant's negligence does not go overlooked or unpunished in the State of Rhode Island.

114. *Ho-Rath v. R.I. Hosp.*, 115 A.3d 938, 956 (R.I. 2015) (Flaherty, J., dissenting).

115. *Id.* at 955.

116. Fuhr, *supra* note 58, at 533.

117. *See Ho-Rath*, 115 A.3d at 955–56.

118. Fuhr, *supra* note 58, at 533.