§ 3.04 Continuing Treatment Rule

[1]—In General

In an attempt to avoid the problem of the injured patient who will not question the propriety of the physician's conduct, some jurisdictions have adopted the continuing treatment rule. Under this rule, when the injurious consequences arise from a course of treatment that has run continuously and is related to the same original condition or complaint, the statute of limitations does not begin to run until the treatment is terminated.\(^1\) The rationale for the rule has been described as follows:

"The continuous treatment exception is premised upon the doctrinal assumption that a patient who has placed his trust and confidence in a hospital's medical staff and is hence in no position to question his physician's techniques, has a right to rely upon the doctor's professional skill without the necessity of interrupting a continuous course of treatment by instituting suit. The exception thus provides the patient with an opportunity to seek corrective treatment from the doctor as well as affording the physician a reasonable chance to identify and correct errors made at a prior stage of treatment."\(^2\)

In addition, a patient under the continuing care of a doctor should not be expected to discover that the doctor's acts are the cause of an injury, since a negligent doctor might conceal important information and the patient might be inhibited from questioning the care given. Moreover, it would be contrary to the patient's own interest to disrupt the course of treatment by suing those who are caring for him or her.\(^3\) The doctor who commits the negligent act may be in the best position to identify and correct any mistakes.\(^3.1\) However, consultation with an attorney does not necessarily

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\(^2\) Langner v. Simpson, 533 N.W.2d 511, 519, 522 (Iowa 1995) (statute of limitations does not begin to run until last date of negligent treatment).


\(^3.1\) South Dakota: Bruske v. Hille, 567 N.W.2d 872, 877-878 (S.D. 1997) (continuing, developing and dependent relationship is not sporadic but involves continuity of professional services from which malpractice stems).


\(^3.1\) Allende v. New York City Health and Hospitals Corp., 90 N.Y.2d 333, 338,
break the continuing treatment and commence the running of the statute.\textsuperscript{3,2}

The continuing treatment rule also reflects the reality that during an ongoing relationship, it may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury. Moreover, the negligence may have consisted of a series of acts or omissions. Thus, it is appropriate to allow the course of treatment to terminate before the statute of limitations starts to run, rather than having the parties argue over the date on which the negligence occurred.\textsuperscript{4}

As with almost all exceptions to any rule, the controversy is over the definition of continuing treatment. The classic case would be where a patient is injured because of negligent or unnecessary exposure to x-ray radiation or the administration of medication over a span of years.\textsuperscript{5} The discussions of continuing treatment generally concern the distinction among three definitions: treatment for a particular condition, duration of the physician-patient relationship and continuing tort.

The continuing treatment exception applies only when the physician’s involvement with the patient following the alleged malpractice is for the performance of the same or related services, and is not merely the continuation of a general professional relationship.\textsuperscript{5,1} Confining the continuing treatment exception to treatment for a particular condition recognizes that one purpose of the rule is to avoid a requirement that the patient interrupt treatment in order to sue the doctor and recognizes that a patient often seeks treatment from one doctor for different ailments.\textsuperscript{6} For example, a physician

\begin{itemize}
\item \textsuperscript{4} Blanchette v. Barrett, 229 Conn. 256, 276-277, 640 A.2d 74, 85 (1994).
\item \textsuperscript{5} Langner v. Simpson, 533 N.W.2d 511, 522 (Iowa 1995).
\item \textit{South Dakota}: Bruske v. Hille, 567 N.W.2d 872, 877-878 (S.D. 1997).
\item \textit{Connecticut}: Blanchette v. Barrett, 229 Conn. 256, 276, 640 A.2d 74, 85 (1995) (doctrine seeks to maintain physician-patient relationship in belief that most efficacious medical care will be obtained when attending physician remains on case from onset to cure).
\end{itemize}
negligently removed a patient's one remaining fallopian tube during surgery for ovarian cysts. Subsequently, the patient returned several times complaining of an inability to get pregnant. The court found that the visits for infertility did not relate to the medical condition for which she originally sought treatment, i.e., ovarian cysts. Consequently, the continuous treatment doctrine did not apply.\footnote{Konstantikis v. Kassapidis, 602 N.Y.S.2d 67 (N.Y. App. Div. 1993).}

The treatment must be continuing and not merely a renewal of treatment following previous services that were discrete and complete.\footnote{Adam v. Park Ridge Hospital, 261 A.D.2d 862, 690 N.Y.S.2d 381 (4th Dept., 1999); Meier v. Huntington Hospital Association, 186 A.D.2d 637, 588 N.Y.S.2d 421 (2nd Dept., 1992).}

Malpractice is a continuing tort, and the statute of limitations in any continuing tort does not begin to run until the end of the period in which the tort continues. Thus if the continuing treatment rule covered only negligent treatment, there would be no reason for an exception to the general statute of limitations.\footnote{Tenth Circuit: Stephenson v. United States of America, 147 F.Supp.2d 1106 (D.N.M. 2001).}

Some courts, however, require that the treatment not only be continuing, but that it continue to be negligent. To support a finding of continuing treatment, the plaintiff must show:

1. that there was a continuous and unbroken course of treatment, and
2. that the treatment was so related as to constitute one continuing wrong.\footnote{State Courts: Delaware: Martin v. Gopez, 674 F. Supp. 1134 (D. Del. 1987) (noting that Delaware does not follow the continuing treatment rule and distinguishing continuing tort from continuing treatment).


But see:

Illinois: Turner v. Nama, 689 N.E.2d 303, 312 (Ill. App. 1997) (continuous treatment only encompasses acts and omissions occurring within context of medical treatment; it does not include physician's failure to notify patient of unfavorable test results).


Eight Circuit: Hicks v. Armstrong, 253 F.3d 1072 (8th Cir, 2001).}
The interrelated concepts of continuing treatment and continuing negligence were interestingly raised in a New York case in which the decedent was seen by the defendant for a number of urinary tract signs and symptoms suggestive of cancer. The decedent continued to be seen on a regular basis complaining of other unrelated symptoms, during which time there was no follow up for the urologic complaints. The court applied the continuous treatment doctrine to toll the statute of limitations, brushing off the two year hiatus where all of the treatments were for unrelated complaints, saying, “Since defendants were plaintiff’s decedent’s regular doctors, it would be surprising if he did not visit them for other unrelated ailments during the course of his cancer.” This decision flies in the face of established doctrine that holds that continuous treatment needs to be related and not merely the continuation of a general professional relationship. What the court meant to say, of course, is that there was continuing negligence.8,1

Furthermore, there must be evidence of the breach of a duty that remained in existence after commission of the original wrong.9 However, the continuing treatment need not be negligent treatment. Some courts recognize a "single act" exception to the continuous treatment doctrine: if there is a single act of malpractice, a physician's subsequent effort over time to merely remedy or cure the injury does not constitute continuous treatment that tolls the statute of limitations. The rationale is that a single act of alleged malpractice may be readily identified by the patient.10 Also, some courts hold that when the plaintiff has knowledge of the malpractice claim prior to the running of the statute, the continuing treatment rule will not allow the patient to extend the time for filing.11 But some courts will allow continuing treatment to toll the statute even though there has been discovery of the injury and the defendant’s possible negligence. The statute would run from the later of the two events, the discovery or the end of the continuous treatment.12 Furthermore,

State Courts:

9 Blanchette v. Barrett, 229 Conn. 256, 275, 640 A.2d 74, 84 (1994) (duty must not have terminated prior to commencement of period allowed for bringing action).

State Courts:

Minnesota: Crenshaw v. St. Paul Ramsey Medical Center, 379 N.W.2d 720 (Minn. 1986).

State Courts:

North Dakota: Wheeler v. Schmid Laboratories, Inc. 451 N.W.2d 133 (N.D.
the infancy toll of the statute of limitations has been interpreted to run not from the end of a period of continuous treatment, but from the time of the act of malpractice.\textsuperscript{13}

The continuing treatment rule has been applied to toll the statute against members of a group practice in an action arising out of claims against other members or against the group and against a hospital arising out of a claim against continuing treating and attending physicians.\textsuperscript{14} However, when the continuing treatment is provided by someone other than the negligent practitioner, there must be some agency or similar relationship between the two health care providers. A physician’s mere affiliation with a hospital, or mere common ownership of two hospitals by the same corporate entity, is not sufficient to create this relationship.\textsuperscript{14.1}

Contemporaneous treatment by other physicians for other conditions or the same condition does not interrupt the continuity of treatment.\textsuperscript{15} However, the patient’s own decision to continue medication, without the advice of the physician, will not support the continuing treatment rule.\textsuperscript{16}

The question of whether treatment is continuous is generally held to be an issue of fact for the injury unless the court decides

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\item Eighth Circuit: Wehrman v. United States, 830 F.2d 1480 (D. Minn. 1987). (Where patient looked to the hospital for treatment rather than any individual doctor, the continuous treatment doctrine would serve to toll the running of the limitations period notwithstanding the fact that the patient received treatment from many different physicians at the hospital.)
\item State Courts:
\textit{New York}: Allende v. New York City Health and Hospitals Corp., 90 N.Y.2d 333, 340, 683 N.E.2d 317, 321-322 (1997). (The court did not foreclose the possibility that under some circumstances, continuous treatment can exist when two hospitals are owned by the same entity. However, since the only factor showing a relationship between the health care providers was their joint ownership, the court declined to apply the continuing treatment doctrine.)
\item But cf: Phillips v. Gehrke, 2002 WL 531503 (Iowa App.).
\end{enumerate}
that a jury could not find any other way, in which case it is a question of law.\footnote{18}

[2]—Effect of Gap in Treatment

Under the continuous treatment doctrine, the statute of limitations is not necessarily tolled until cessation of the physician-patient relationship, which often is later than termination of treatment for the condition out of which the claim arises. This limitation of the continuing treatment rule is based upon the theory that the “air of trustfulness” between a patient and the physician no longer exists after termination of treatment and patients should then make any claims in a timely manner. This result appears equitable when there is a gap in contact between the patient and the physician from the last examination and the next contact which is a request for medical records.\footnote{19} However, one would think that the trust between a physician and patient still exists when the patient returns to have stitches removed.\footnote{20} In light of these considerations, the issue in most continuing treatment cases is when the treatment ended.

The passage of time between contacts can render determining when treatment ended difficult. No particular amount of time must pass before there is a break in the continuity which prevents the use of the continuing treatment rule.\footnote{21} In fact, gaps longer than the statute of limitations period do not necessarily break the continuity.\footnote{22} Nonetheless, the continuing treatment rule presupposes that further treatment is anticipated by both the physician and the patient, as indicated by periodic and regularly scheduled appointments.\footnote{22.1} Thus, in New York, the continuing treatment rule has been interpreted so as not to toll the statute when treatment is spread out longer than the applicable statute of limitations.\footnote{23} Short

of the statutory period, however, the length of time between treat-
ments is not controlling in New York. The reported cases seem to
indicate that the determination as to whether the gap is too long to
support continuity is founded upon "timeliness" by the patient
which is essence is "fairness" to the physician. In justifying its de-
nial of the continuing treatment rule to a plaintiff, one court went
so far as to state that the particular plaintiff should have realized
that continuity of treatment was necessary to control his condi-

The substance of the last contact between the patient and physi-
cian often comes under scrutiny in determining when treatment
ended. For example, summary judgment has been denied to a
physician on the limitations issue when an appointment was sched-
uled but not kept and suit was filed beyond the limitations period if
the period were deemed to have commenced with the last kept ap-
pointment. The court reasoned:

"In light of the parties having scheduled a future appointment
for further treatment on December 4, 1974, and their undisputed
intention at the time that defendant's care of plaintiff continue at
least until that date, defendant's argument that the continuous
course of treatment ended on October 8, 1974 [last kept ap-
pointment] must fail. . . ."

The determination of whether treatment has ended is more diffi-
cult when the physician instructs the patient to set up an appoint-
ment but the patient fails to do so. In general, courts have held that
there is no continuing treatment in such cases. Additionally,

exceeded two and one-half year statute of limitations, made continuous treatment
document inapplicable); Benin v. Ramapo General Hospital, 72 A.D.2d 736, 421
26 Sherry v. Queens Kidney Center, 117 A.D.2d 663, 498 N.Y.S.2d 401
(1986).
(the continuous treatment doctrine did not toll the limitations period beyond the
date of plaintiffs letter to the defendant discharging him as her treating physician
where there was no evidence that her trust in him continued beyond that point).
sent by physician to patient eight years after patient's last appointment notifying
her of problems with implant did not revive an otherwise concluded medical
relationship).
29 Minnesota: Krause v. Farber, 379 N.W.2d 93 (Minn. App. 1986).
New York: Bellmund v. Beth Israel Hospital, 131 A.D.2d 796, 517 N.Y.S.2d
where a patient showed up without an appointment and did not stay to be examined, the continuing treatment rule has been held not to apply. However, it has been held that where the physician requested that the patient schedule an appointment and the patient said she would but did not, the limitations period did not start to run until sometime after the conversations about scheduling appointments.

When the last contact was a telephone conversation in which the patient requested that the physician write a note stating that he released the patient from his care on an earlier date, the court held that the continuing treatment rule could not apply. In so holding, the court noted that there was no discussion of medication or treatment or medical advice and thus as a matter of law did not involve treatment.

[3]—Continuing Course of Conduct

A patient who is no longer being treated by the defendant physician may nonetheless be able to show that the physician breached a duty that remained in existence after the commission of the original wrong. Under the “continuing course of conduct” doctrine, the statute of limitations is tolled when the physician:

(1) committed a wrong on the patient;
(2) owed a continuing duty to the patient that was related to the original wrong; and
(3) breached that duty.

The breach may consist of either affirmative misconduct or an act of omission.

32 Giles v. Sanford Memorial Hospital & Nursing Home, 371 N.W.2d 635, 637 (Minn. App. 1985).