Continuous treatment doctrine & derivative claims – NY

By Richard E. Lerner & Larissa Wick

There is a conflict among and between New York intermediate appellate courts over an issue that could impact future medical malpractice claims in the state. The issue is whether the continuous-treatment doctrine, a basis for the tolling of the statute of limitations, is applicable to only direct claims or if it is also applicable to derivative claims.

The rule in New York is that claims for medical malpractice accrue on the date of the wrong itself, whether the plaintiff is aware of the wrong or not. Thus, generally, if it is discovered that there was malpractice more than 2½ years after the event, the plaintiff’s claim will be time barred (foreign body left in the patient is treated differently). The continuous-treatment doctrine, however, has been adopted by the courts as a basis for tolling the statute of limitations. Under this doctrine, if the patient remains under the care of the physician after the event giving rise to the claim of malpractice, the patient’s time to institute suit is tolled during the duration of the continuous treatment.

There is a split among New York State intermediate appellate courts whether the toll will inure to the benefit of the derivative claimant, which obviously impacts liability levels. New York’s high court – the Court of Appeals – has yet to rule on this issue. We will be monitoring this issue and will report future developments in this publication.

Background

There is a conflict among the New York intermediate appellate courts as to whether the continuous-treatment doctrine – a basis for tolling of the statute of limitations – is applicable to only direct claims or if it is also applicable to derivative claims.

The rule in New York is that claims for medical malpractice accrue on the date of the wrong itself, whether the plaintiff is aware of the wrong or not. Thus, generally, if it is discovered that there was malpractice more than 2½ years after the event, the plaintiff’s claim will be time barred. The continuous-treatment doctrine, however, has been adopted by the courts as a basis for tolling the statute of limitations. Under this doctrine, if the patient remains under the care of the physician after the event giving rise to the claim of malpractice, the patient’s time to institute suit is tolled during the duration of the continuous treatment.

Issue

There is a split among New York State intermediate appellate courts whether the toll will inure to the benefit of the derivative claimant, which obviously impacts liability levels. New York’s high court – the
Court of Appeals – has yet to rule on this issue. We will be monitoring the issue and will report future developments in this publication.

**Decisions**

The First Department has held that the tolling of the statute of limitations pursuant to the continuous-treatment doctrine “is personal to the recipient of such treatment and does not extend to a derivative claim for loss of services.” *Wojnarowski v. Cherry*, 184 A.D.2d 353, 585 N.Y.S.2d 836 (1st Dep’t 1992); see, also, *Otero v. Presbyterian Hospital*, 240 A.D.2d 279, 658 N.Y.S.2d 624 (1st Dep’t 1997); *Porubic v. Oberlander*, 274 A.D.2d 316, 710 N.Y.S.2d 574 (1st Dep’t 2000).

At present, the Third Department seems to abide by the same rationale, though a 1992 decision held otherwise. In *Miller v. Rivard*, 180 A.D.2d 331, 585 N.Y.S.2d 523 (3d Dep’t 1992), the plaintiffs brought a medical malpractice action alleging wrongful conception. They claimed that the defendant had negligently performed a vasectomy and fertility testing of the husband. The wife also set forth derivative claims for loss of consortium, and direct claims of personal, physical and emotional injuries as a result of the unwanted pregnancy and delivery of the child.

Despite the defendants’ efforts to argue that the wife’s claim is barred by the 2½-year statute of limitations on claims of medical malpractice, the court found that the toll applied to the wife’s derivative claim. The defendants’ duty of care extended to her because the prevention of pregnancy and accuracy of fertility testing was the “end and aim of the transaction” between the defendants and her husband. The court found that all of the policy reasons behind the continuous-treatment doctrine applied to the wife’s derivative claims.

However, two years later the Third Department changed its position. In the 1994 dental malpractice action of *Whipple v. Goldsmith*, 202 A.D.2d 834, 609 N.Y.S.2d 377 (3d Dep’t 1994), the infant-plaintiff and mother sought damages for injuries allegedly sustained during an extraction of the child’s baby teeth. The defendants moved to dismiss as time-barred the mother’s derivative claim. The court found that the “extensions granted by the tolling of the statute of limitations are personal in nature and do not apply to derivative claims.” Since the *Whipple* decision, the Third Department has not addressed whether the toll applies to derivative claims.

At odds with the First and Third Departments, the Second and Fourth Departments have held that derivative claims are subject to the toll. *Cappelluti v. Skolnick*, 207 A.D.2d 763, 616 N.Y.S.2d 398 (2d Dep’t 1994); *Parker v. Jankunas*, 227 A.D.2d 537, 642 N.Y.S.2d 959 (2d Dep’t 1996); *Collum v. N.Y.C. Health & Hospitals Corp.*, 244 A.D.2d 380, 664 N.Y.S.2d 96 (2d Dep’t 1997); *Dolce v. Powalski*, 2004 N.Y. Slip Op. 09960, N.Y. (4th Dep’t 2004). In *Cappelluti*, the defendants appealed an order that denied their motion for summary judgment dismissing the plaintiff-wife’s derivative action. The court found that unlike statutory tolls for insanity or infancy (which deny the benefit of a toll as to derivative claims), derivative claims pursuant to the continuous-treatment doctrine should receive such a benefit. The court found the toll for continuous treatment to be wholly different from the toll for disabilities. The policy that underlies the continuous-treatment doctrine is the promotion of medical care and the preservation of the doctor-patient relationship, a principle that the court found should apply equally to derivative claims.
Comments

Since there is an even divide among the departments, it is difficult to predict how the Court of Appeals will ultimately rule when called upon to decide this issue. However, there is a tendency towards the liberalization of the classes of persons who may bring suit, as manifested by the Court of Appeals’ decision in Broadnax v. Gonzalez, 2 N.Y.3d 148, 777 N.Y.2d 416 (2004). There, the court held that a mother could recover for psychological injuries arising from the death of a fetus. “Because the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes.” It is but a short stretch from the disavowal of such legalistic pigeonholes to the rejection of the distinction between direct claims and derivative claims for purposes of tolling the statute of limitations.