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Developments in the Law

New York Court of Appeals excludes the failure to establish a course of treatment from the continuous treatment doctrine

Generally, in New York, the statute of limitations for a medical malpractice claim is two years and six months from the date of the malpractice. To this general rule, the Legislature has carved out an exception known as the “continuous treatment doctrine,”

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1 See Black's Law Dictionary 927 (6th ed. 1990). Statutes of limitations are “[s]tatutes . . . setting maximum time periods during which certain actions can be brought or rights enforced.” Id. “After the time period . . . has run, no legal action can be brought regardless of whether any cause of action ever existed.” Id. The purpose of a statute of limitations is to protect the defendant from defending a claim after memories have faded, witnesses have died or disappeared, and evidence has been lost. See United States v. Kubrick, 444 U.S. 111, 117 (1979); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944).


An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure. . . . For the purpose of this section the term “continuous treatment” shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient’s condition.

CPLR 214-a (McKinney 1990).

3 See McDermott v. Torre, 56 N.Y.2d 399, 405-07, 437 N.E.2d 1108, 1110-11, 452 N.Y.S.2d 351, 353-55 (1982). New York first applied the continuous treatment doctrine in Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962), a case involving an infant who suffered permanent brain damage as a result of the negligence of a New York City hospital. Id. at 155, 187 N.E.2d at 778, 237 N.Y.S.2d at 321. In Borgia, the infant was admitted to the hospital for treatment of burns on October 10, 1956, and as a result of the negligence committed by hospital personnel, became permanently brain damaged on October 11, 1956. Id. at 156, 187 N.E.2d at 779, 237 N.Y.S.2d at 322. Thereafter, on three subsequent occasions (April 22, May 5, and November 25, 1957), “the infant was a victim of neglect amounting to malpractice.” Id. On February 14, 1958, the infant was discharged from the hospital. Id. at 155, 187 N.E.2d at 778, 237 N.Y.S.2d at 320. In an effort to comply with GML § 50-e, requiring service of a notice of claim within ninety days of accrual of a claim against a municipality, a notice of claim was filed on behalf of the infant on April 18, 1958, 63 days after the discharge. Id. The defendant argued that the last negligent act occurred on November 25, 1957, 144 days before service of the notice of claim, rendering the
under which the limitations period does not begin to run until a particular medical condition's course of treatment ends. The doc-
trine "salvages causes of action which otherwise would be time-barred because of the latent nature of the injury." In applying the continuous treatment doctrine, courts have struggled to determine what constitutes a "continuous" course of treatment.6 Recently, in Nykorchuck v. Henriques,7 the New York Court of Appeals held that in order for the continuous treatment doctrine to apply, the plaintiff must establish that the defendant engaged in an actual course of treatment as to the condition on which the claim of malpractice turns.8

In Nykorchuck, the plaintiff, Diane Nykorchuck, consulted the defendant gynecologist in 1974 for infertility problems which

6 See Barrella, 88 A.D.2d at 384, 453 N.Y.S.2d at 447 (applicability to specific factual circumstances remains unclear); 2 Steven E. Pegalis and H. F. Wachsmian, American Law of Medical Malpractice § 6:10, at 35 (Supp. 1990) (courts have struggled in applying doctrine to various fact patterns); Dana D. Peck, Comment, The Continuous Treatment Doctrine: A Toll on the Statute of Limitations for Medical Malpractice in New York, 49 Alb. L. Rev. 64, 72 (1984) ("Courts have struggled to define boundaries of this perplexing doctrine."). For example, some courts have held that the continuous treatment doctrine is inapplicable when the period between treatments exceeds the statute of limitations. See, e.g., Curcio v. Ippolito, 97 A.D.2d 497, 497, 467 N.Y.S.2d 692, 693 (2d Dep't 1983), aff'd, 63 N.Y.2d 967, 473 N.E.2d 239, 483 N.Y.S.2d 889 (1984); Bennin v. Ramapo Gen. Hosp., 72 A.D.2d 736, 736, 421 N.Y.S.2d 243, 244 (2d Dep't 1979). Others have held that the "length of time between treatments should not be the controlling factor." Lomber v. Farrow, 91 A.D.2d 725, 726, 457 N.Y.S.2d 638, 640 (2d Dep't 1982); accord Shumway v. Delaus, 152 A.D.2d 951, 951, 543 N.Y.S.2d 777, 777 (4th Dep't 1989).


8 Id. at 258-59, 577 N.E.2d at 1028, 573 N.Y.S.2d at 436.
were diagnosed as being associated with endometriosis. The defendant treated the condition for several years and eventually performed a hysterectomy on the plaintiff in April 1982. However, during an office visit in July 1979, the plaintiff complained of a lump in her right breast. Henriques examined the breast and allegedly explained to Nykorchuck that the lump was caused by non-cancerous fibrocystic disease and stated that "we will have to keep an eye on it." While the plaintiff was in the hospital for the hysterectomy, an unidentified person examined the plaintiff and noted lumps in both breasts, but no further evaluation was undertaken at that time. Following the surgery, the plaintiff saw the defendant three times, the last visit occurring in September 1983. In addition, the defendant renewed the plaintiff's estrogen prescriptions by telephone throughout 1984 and until June 1985. By December 1985, the mass in the plaintiff's right breast had become so enlarged that she requested the defendant to perform another examination. After examining the plaintiff in January 1986, the defendant immediately referred her to an oncologist, who diagnosed the condition as breast cancer and subsequently performed a mastectomy.

The plaintiff commenced a malpractice action against the defendant in December 1987, within two years and six months of the last visit to the defendant, yet more than eight years after the defendant performed the initial examination of the plaintiff's

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9 Id. at 258, 577 N.E.2d at 1027, 573 N.Y.S.2d at 435. Endometriosis is a "condition in which tissue more or less perfectly resembling the uterine mucous membrane (endometrium) and containing typical endometrial granular and stromal elements occurs aberrantly in various locations in the pelvic cavity." Richard Sloane, The Sloane-Dorlan Annotated Medical Legal Dictionary 252 (1987).

10 See Nykorchuck, 78 N.Y.2d at 260, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437 (Kaye, J., dissenting).

11 Id. at 258, 577 N.E.2d at 1027, 573 N.Y.S.2d at 435.


14 Id. at 258, 577 N.E.2d at 1028, 573 N.Y.S.2d at 436.

15 Id. The plaintiff was seen by the defendant several times for post-operative care and medication adjustments in May 1982, January 1983, and finally September 1983. See Nykorchuck, 153 A.D.2d at 317, 550 N.Y.S.2d at 512.

16 Nykorchuck, 78 N.Y.2d at 258, 577 N.E.2d at 1028, 573 N.Y.S.2d at 436.

17 Id.

18 Id.

19 Id. at 260, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437 (Kaye, J., dissenting).
breasts. The defendant moved to dismiss the complaint on the ground that the action was time-barred. The supreme court denied the defendant's motion, stating that a question of fact existed as to whether the continuous treatment doctrine was applicable. The Appellate Division, Third Department reversed, holding that the continuous treatment doctrine was inapplicable because the plaintiff's allegations had not established that the defendant had provided a continuous course of treatment for the breast condition.

On appeal, the New York Court of Appeals affirmed the Appellate Division's decision. Writing for the majority, Chief Judge Wachtler stated that it is "essential to the application of the [continuous treatment] doctrine that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit." While the court found that the plaintiff had alleged facts sufficient to establish that she had been under the continuous and uninterrupted care of the defendant with regard to the endometriosis, the court characterized the breast examinations conducted by the defendant as "discrete and complete." Finally, although the court noted that the failure to treat a condition may

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21 See Nykorchuck, 153 A.D.2d at 317, 550 N.Y.S.2d at 511. After issue was joined, all the defendants moved to dismiss the complaint on statute of limitations grounds. Id.
22 Nykorchuck, 78 N.Y.2d at 257, 577 N.E.2d at 1027, 573 N.Y.S.2d at 435.
24 See Nykorchuck, 78 N.Y.2d at 257, 577 N.E.2d at 1027, 573 N.Y.S.2d at 435.
25 Id. at 259, 577 N.E.2d at 1028, 573 N.Y.S.2d at 436. 
26 Id. at 259, 577 N.E.2d at 1028, 573 N.Y.S.2d at 436. In support of his position, Judge Wachtler stated that the continuous treatment doctrine rests on the premise that it is in the patient's best interest that an ongoing course of treatment be continued, rather than interrupted by a lawsuit, because "the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so."
27 Id. at 258, 577 N.E.2d at 1027, 573 N.Y.S.2d at 435 (quoting McDermott v. Torre, 56 N.Y.2d 399, 408, 437 N.E.2d 1108, 1112, 452 N.Y.S.2d 351, 355 (1982)).
28 Id. at 259, 577 N.E.2d at 1028, 573 N.Y.S.2d at 436.
27 Id. Relying on the language set forth in Davis v. City of New York, 38 N.Y.2d 257, 260, 342 N.E.2d 516, 517, 379 N.Y.S.2d 721, 724 (1975) (per curiam), in which the court held that "two diagnostic examinations, conducted a year apart, were 'discrete and complete' and did not constitute continuous treatment," the Nykorchuck court determined that Dr. Henries' examinations "were equally 'discrete and complete' and were separated by an even greater period of time." Nykorchuck, 78 N.Y.2d at 259, 577 N.E.2d at 1028, 573 N.Y.S.2d at 436.
establish negligence, it refused to accept the "self-contradictory proposition that the failure to establish a course of treatment is a course of treatment" under the continuous treatment doctrine.\(^2\)

Dissenting, Judge Kaye argued that an issue of fact existed as to the defendant's continuous treatment of the plaintiff's breast condition, warranting denial of the defendant's motion to dismiss.\(^2\) Faulting the majority for ignoring the evidence, Judge Kaye believed that the "defendant's diagnosis of breast disease, his assertion that he would monitor the disease, the later consultation for a breast lump, and the hysterectomy" was "clearly" enough to raise an issue of fact regarding satisfaction of the continuous treatment doctrine.\(^3\) Because the defendant lulled the plaintiff "into a false sense of security by an apparent lack of concern about her breast mass," Judge Kaye "would not deny the plaintiff her day in court."\(^3\)

It is submitted that the *Nykorchuck* court erred in its interpretation of the facts, and that the facts supported the application of the continuous treatment doctrine, thus warranting a toll of the statute of limitations until the last treatment by the defendant in January 1986. Although the Legislature has failed to affirmatively define "continuous,"\(^2\) the judiciary has developed its own notion

\(^2\) *Nykorchuck*, 78 N.Y.2d at 259, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437. "A holding that the continuous treatment doctrine is applicable to these facts would fundamentally extend and alter the doctrine." *Id.* at 259, 577 N.E.2d at 1028-29, 573 N.Y.S.2d at 436-37.

\(^2\) *Id.* at 260, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437 (Kaye, J., dissenting). Judge Kaye argued that the plaintiff had alleged "at least an issue of fact as to the timeliness of [her] suit commenced in December 1987, less than two years after the diagnosis of breast cancer and well within the Statute of Limitations." *Id.* In light of the defendant's awareness of breast lumps in 1979, 1980, and 1982, and his failure to recommend any further testing, evaluation, or consultation, Judge Kaye believed that "these acts of alleged negligence, combined with wrongful omissions, may constitute a continuous course of treatment, separate and apart from any treatment for endometriosis." *Id.* at 261, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437 (Kaye, J., dissenting).

\(^3\) *Id.* at 261, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437 (Kaye, J., dissenting). "[T]he majority's pivotal assumption ... that plaintiff was being treated ... for the separate condition of endometriosis ignores the evidence of additional gynecological treatment ... ."

\(^{32}\) *Id.* at 261, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437 (Kaye, J., dissenting) ("[T]he majority's pivotal assumption ... that plaintiff was being treated ... for the separate condition of endometriosis ignores the evidence of additional gynecological treatment ... .") In support of her position, Judge Kaye stated that "[w]here the physician and patient reasonably intend the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress, the requirements of the continuous treatment doctrine are satisfied." *Id.* at 261, 577 N.E.2d at 1029-30, 573 N.Y.S.2d at 437-38 (Kaye, J., dissenting) (quoting *Richardson v. Orentreich*, 64 N.Y.2d 896, 899, 477 N.E.2d 210, 211, 487 N.Y.S.2d 731, 732 (1985)).

\(^{33}\) *Id.* at 260-61, 577 N.E.2d at 1029-30, 573 N.Y.S.2d at 437-38 (Kaye, J., dissenting).

\(^{34}\) See supra note 2 (setting forth relevant text of CPLR 214-a).
of what it does not consider to be "continuous" within the context of the continuous treatment doctrine. For example, treatments characterized as "intermittent," or "discrete and complete," will not suffice as continuous treatments warranting a toll of the limitations period. "Intermittent" treatment occurs when the interval between the malpractice and the return visit exceeds the general two and one-half year limitations period. "Discrete and complete" treatment refers to treatments and diagnoses conducted by individual physicians or institutions where the nature of the relationship is such that each treatment, in and of itself, is complete.

"[i]t is the plaintiff's burden to establish the continuous nature of treatments which take place after the date of the alleged negligence." See Grellet v. City of New York, 118 A.D.2d 141, 145, 504 N.Y.S.2d 671, 674 (2d Dep't 1986); see also Fonda v. Paulsen, 46 A.D.2d 540, 543, 363 N.Y.S.2d 841, 844-45 (3d Dep't 1975) ("There is no New York case which supplies an adequate definition of the term 'continuous' as it applies to treatment in a malpractice case."). In his commentary to CPLR 214-a, Judge Joseph M. McLaughlin suggests that whether a particular "treatment is 'continuous' may depend upon the state of mind of both the doctor and the patient." See CPLR 214-a commentary at 598 (McKinney 1990).

See infra notes 34-35.

See Curcio v. Ippolito, 97 A.D.2d 497, 497, 467 N.Y.S.2d 692, 693 (2d Dep't 1983) (continuous course of treatment rule does not contemplate intermittent treatment); aff'd, 63 N.Y.2d 967, 473 N.E.2d 239, 483 N.Y.S.2d 989 (1984); Renda v. Frazer, 75 A.D.2d 490, 492, 429 N.Y.S.2d 944, 945 (4th Dep't 1980) (same); Davis, 38 N.Y.2d at 259-60, 342 N.E.2d at 517, 379 N.Y.S.2d at 724 (two yearly examinations were "intermittent" rather than continuous).


See Kearney v. Genessee Valley Group Health Ass'n, 125 Misc. 2d 716, 723, 480 N.Y.S.2d 435, 440 (Sup. Ct. Monroe County 1984), aff'd, 115 A.D.2d 960, 497 N.Y.S.2d 1010 (4th Dep't 1985); Peck, supra note 6, at 76. A diagnostic procedure company, for example, maintains no contact with a patient aside from performing procedures and taking a brief history from the patient. See Noack, 132 A.D.2d at 969, 518 N.Y.S.2d at 496 ("Under these circumstances, the performance of each bone scan was complete and discrete and did not
In *Nykorchuck*, the plaintiff's return visits never exceeded two and one-half years and thus could not be considered intermittent. Moreover, in *Nykorchuck*, the plaintiff's treatment for her breast condition could not have been discrete or complete because the defendant assured her that he "would keep an eye on it."

The treatment also must be provided for the same medical condition that triggered the initial examination by the physician. Thus, the Legislature has indicated that "examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition" do not constitute continuous treatment. In *Nykorchuck*, the initial examination of the plaintiff's breasts took place in July 1979 when the plaintiff first complained of a lump in her right breast. At that time, the defendant became aware of the problem, and because he lulled the plaintiff into placing her "trust and confidence" in him to monitor her condition, the defendant assumed a duty to evaluate the condition that triggered the initial examination by the physician.

Section 323 of the *Restatement* states, in pertinent part:

One who undertakes gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(b) the harm is suffered because of the other's reliance upon the undertaking.

This section applies . . . [when] the harm to the other . . . results from the defendants . . . failure to exercise reasonable care to complete [performance] or to protect the other when he discontinues it.

*Id.* § 323 cmt. a. Because the plaintiff in *Nykorchuck* relied on the defendant's assurance that he would monitor her breast condition, it is submitted that the aforementioned *Restatement* section is applicable.

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38 See *Nykorchuck*, 78 N.Y.2d at 258, 577 N.E.2d at 1027, 573 N.Y.S.2d at 435.
39 Id. at 258, 577 N.E.2d at 1029, 573 N.Y.S.2d at 435; cf. *Restatement (Second)* of Torts § 323 (1965).
40 See *Nykorchuck*, 78 N.Y.2d at 258, 577 N.E.2d at 1029, 573 N.Y.S.2d at 435.
41 See *Nykorchuck*, 78 N.Y.2d at 258, 577 N.E.2d at 1029, 573 N.Y.S.2d at 435.
42 See CPLR 214-a commentary at 600 (McKinney 1990).
43 See CPLR 214-a (McKinney 1990). This provision is aimed at closing a potential loophole where an attorney might direct the patient-client to return to the physician for an examination in order to create the illusion that the course of treatment continued until the date of the last visit. See *Farrell*, *supra* note 3, at 67; see also *Peck*, *supra* note 6, at 77 (setting forth boundaries regarding what is not continuous).
44 See *Nykorchuck*, 78 N.Y.2d at 258, 577 N.E.2d at 1029, 573 N.Y.S.2d at 435.
45 See *id.* at 260-61, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437 (Kaye, J., dissenting). The underlying rationale for the continuous treatment doctrine is the existence of a patient's continuing trust and confidence in a physician which necessitates a toll of the limitations
dition of the plaintiff's breasts every time he examined her. Yet, despite the defendant's assurance and subsequent prescription of estrogen to treat the endometriosis, the effects of which could have been adverse to what he diagnosed as non-cancerous fibrocystic disease, the Nykorchuck court held that the breast treatments conducted by the defendant did not constitute a continuous course of treatment.

It is submitted that the plaintiff in Nykorchuck properly relied on the defendant and should not have been penalized procedurally for failing to bring suit earlier. The facts of Nykorchuck illustrate precisely the type of uninterrupted reliance on a physician that forms the basis for the continuous treatment doctrine. Diane Nykorchuck's plight also symbolizes the reason for the development of the judicial policy of "maintain[ing] the physician-period. See Richardson v. Orentreich, 64 N.Y.2d 896, 898, 477 N.E.2d 210, 211, 487 N.Y.S.2d 731, 732 (1985) (citing Coyne v. Bersani, 61 N.Y.2d 939, 940, 463 N.E.2d 371, 372, 474 N.Y.S.2d 970, 971 (1984)). Such trust and confidence can often put the patient at a disadvantage because the patient will not likely question the physician's techniques. See Barrella v. Richmond Memorial Hosp., 88 A.D.2d 379, 383, 463 N.Y.S.2d 444, 447 (2d Dep't 1982). It also allows the patient to rely upon the doctor's professional skill without having to interrupt a continuous course of treatment in order to commence a lawsuit. Id.; see also Bobrow v. DePalo, 655 F. Supp. 685, 687 (S.D.N.Y. 1987) (doctrine gives physician reasonable opportunity to correct errors); Ward v. Kaufman, 120 A.D.2d 929, 930, 502 N.Y.S.2d 883, 884 (4th Dep't 1986) ("A determination as to whether there is continuous treatment should be based upon whether there exists a relationship of continuing trust and confidence between the patient and physician.") (citing Coyne, 61 N.Y.2d at 940, 463 N.E.2d at 372, 474 N.Y.S.2d at 971); Watkins v. Fromm, 108 A.D.2d 233, 238, 488 N.Y.S.2d 768, 772 (2d Dep't 1985) (allows patient to rely on doctor's skill). This physician-patient relationship can depend on several factors, including "the nature of the problem for which the patient is being treated, the treatment in the past, and the need for further administration of care." Ward, 120 A.D.2d at 930, 502 N.Y.S.2d at 884; see also Watkins, 108 A.D.2d at 240, 488 N.Y.S.2d at 774 (after undergoing brain surgery, plaintiff placed trust and confidence in defendants and expected to continue to rely on defendants to monitor his condition).

See RESTATEMENT (SECOND) OF TORTS § 323 cmt. c (1965). "Where the actor's assistance has put the other in a worse position than he was in before . . . because the other, in reliance upon the undertaking has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services . . . ." Id.

Nykorchuck, 78 N.Y.2d at 258, 577 N.E.2d at 1027, 573 N.Y.S.2d at 435. In her dissent, Judge Kaye emphasized the defendant's examination of the plaintiff's breasts and his assurance to monitor the lump on the plaintiff's right breast while failing to refer her to other physicians for additional tests. Id. at 261, 577 N.E.2d at 1029-30, 573 N.Y.S.2d at 437-38 (Kaye, J., dissenting) (both plaintiff and defendant intended plaintiff to rely on defendant's observations).

Id.

Id. at 259, 577 N.E.2d at 1029, 573 N.Y.S.2d at 437; see also supra note 27.

See Richardson v. Orentreich, 64 N.Y.2d 896, 898, 477 N.E.2d 210, 211, 487 N.Y.S.2d 731, 732 (1985); see also supra note 4 (setting forth several rationales articulated by New York courts for continuous treatment doctrine).
patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure. The reasoning employed by the Nykorchuck majority, however, seemingly requires Diane Nykorchuck to distrust and question her doctor and to make separate appointments with him for the sole purpose of examining her breasts, instead of requesting the breast examinations while visiting him for the treatment of endometriosis, to establish continuous treatment as to her breast condition. Thus, negligence committed by a physician in the form of an omission to act or failure to undertake a proper course of medical treatment may now be shielded from a plaintiff's invocation of the continuous treatment doctrine even if the physician is aware of the medical problem, assures the patient that the condition will be monitored, yet fails to take further steps to ensure that the patient receives proper care for that condition.

Richard J. Hoffman

Supreme Court, New York County declares state medical funding program which funds childbirth, but not medically necessary abortions, unconstitutional

In 1973, the United States Supreme Court in Roe v. Wade

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Cf. CPLR 214-a commentary at 29-30 (McKinney Supp. 1992). In his commentary to CPLR 214-a, Professor Vincent C. Alexander notes that Jorge v. New York City of Health & Hosps. Corp., 164 A.D.2d 650, 563 N.Y.S.2d 411 (1st Dep't 1991), an Appellate Division, First Department case addressing the issue of continuous treatment seven months before Nykorchuck, is now questionable authority after the Court of Appeal's decision. Id. at 29. In an attempt to distinguish Jorge from Nykorchuck, however, Professor Alexander asserts, There may be a closer medical relationship between prenatal counseling and genetic testing [Jorge] than between endometriosis and breast cancer [Nykorchuck], so that “treatment” for one is essentially treatment for the other. Another distinguishing fact is that the Jorge plaintiff, unlike the Nykorchuck plaintiff, continued to express concern to her doctor about the condition that gave rise to the original act of malpractice, i.e., her genetic make-up and that of the child's father. If she indicated lack of confidence in the accuracy of the original test results, arguably she was continuing to seek corrective treatment. Id. at 30.

1 410 U.S. 113 (1973). In Roe v. Wade, a pregnant woman brought a class action chal-