The "Continuous Representation" Toll for Claims of Professional Malpractice

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Background

Under New York law, a professional malpractice claim “accrues” – that is, the statute of limitations clock begins to tick – at the moment of the act of malpractice. It does not wait for the victim to suffer any injury as a result of the malpractice, or to discover the malpractice. It is therefore possible – indeed, it frequently occurs – that a client does not discover that any injury has been suffered until it is already too late to sue.

The New York Court of Appeals has created a toll to help ameliorate the perceived harsh effects of this rule, first articulated in a 1962 medical malpractice case, *Borgia v. City of New York.* The Court ruled that when a patient continues to be treated by the doctor or hospital, for the same condition that gives rise to the claim, the statute of limitations is tolled until that “continuous treatment” ends.

Although the Court of Appeals recognized early on that this doctrine had application to non-medical professional malpractice as well, the non-medical analog, “continuous representation,” did not receive full-blown attention from the Court until 2001, when it decided the first major case applying the doctrine to legal malpractice. And it was not until 2007, in *Williamson v. PricewaterhouseCoopers,* that the Court found its “first opportunity to determine the applicability of the continuous representation doctrine in an accounting context.” On both occasions, the Court relied heavily upon its medical malpractice jurisprudence.

But the analogies between medical malpractice and other professional malpractice often break down. In the wake of these landmark decisions applying the continuous representation doctrine to legal and accounting malpractice situations, lower courts will struggle to fit the sometimes round peg of medical malpractice doctrine into the square hole of attorney and accountant malpractice cases. To fully understand the Court of Appeals’ analysis of the continuous representation doctrine, it is first necessary to analyze, as the Court itself did, the history of “continuous treatment” in the medical malpractice context.

Medical Malpractice and “Continuous Treatment”

In *Borgia,* the Court of Appeals squarely faced the question whether the statute of limitations for medical malpractice would run against a hospital from “the last date of malpractice,” or from “the end of continuous treatment or hospital-patient or physician-patient relationship.” The Court opted for the latter, holding that “at least when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the ‘accrual’ comes only at the end of the treatment.” The Court observed that “it would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent.” It warned, however, that “the ‘continuous treatment’ we mean is treatment for the same or related illnesses or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship.”

Subsequently, in *Young v. New York City Health and Hospitals Corporation,* the Court held that application of the continuous treatment doctrine must focus on the patient. The reason for the rule
is to protect the patient from having to “interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action.” So, “because a patient who is not aware of the need for further treatment of a condition is not faced with the dilemma that the doctrine is designed to prevent, the primary focus in determining whether the doctrine applies in a given case must remain on the patient.”

In Young, plaintiff presented at one of defendant’s clinics, complaining of breast pain. She was sent for a mammogram, and was told that she would be informed of the results. The test revealed nodule densities, and the radiologist recommended a biopsy. But those results were not promptly communicated to plaintiff, even when plaintiff visited the clinic for unrelated conditions. Finally, after seven months, the clinic called plaintiff with the mammogram results. Only then was her breast cancer discovered. Plaintiff ultimately testified at her deposition that the clinic’s silence, “led her to ‘conclude that her mammography was negative.’”

Plaintiff did not get the benefit of the continuous treatment doctrine, because on these facts, she did not face the “dilemma” that the doctrine was created to avoid. She had no “awareness of a condition warranting further treatment,” and thus, no anticipation of further treatment with respect to the breast issue.

In other cases, the Courts, in attempting to apply the continuous treatment doctrine, have focused attention on defining what “continuous” means, and what “treatment” means.

“Continuity”

“Continuity” requires regular sessions between doctor and patient, for the same condition. Thus, for example, when a doctor’s misreading of his pregnant patient’s “RH” test resulted in each of her subsequent pregnancies ending in stillbirths, the patient did not get the benefit of the continuous treatment rule, even though each pregnancy was treated by defendant, because each pregnancy was a separate event, and there was no “continuity of treatment.”

Courts also have wrestled with the question of when continuous treatment ends. First, how much of a gap between treatments will result in a finding that continuity has been lost? One appellate Court has held that in no event will there be continuity when the time between treatments exceeds the 2 1/2 year statute of limitations. However, another appellate Court has held that even when the period between treatments exceeds the 2 1/2 year statutory period, that does not, of itself, preclude application of the doctrine, so long as the facts show anticipation of further treatment.

Second, what acts constitute a termination of continuous treatment? Certainly, ending the course of treatment by defendant, and commencing treatment with a different doctor, will mark the end of continuous treatment, unless the circumstances demonstrate that the patient did not intend to sever the continuing relationship with defendant. However, merely consulting a medical malpractice lawyer will not suffice to terminate continuous treatment.

In Richardson v. Orentreich, defendant doctor regularly treated plaintiff beginning in August 1973. Plaintiff’s last actual appointment with defendant was October 8, 1974. At the end of that treatment, plaintiff scheduled her regular next appointment for December 4, 1974, but failed to keep that appointment and never made another. The Court of Appeals held that continuous treatment ended on December 4, because “a patient remains under the ‘continuous treatment or care’ of a physician between the time of the last visit and the next scheduled one where the latter’s purpose is to administer ongoing corrective efforts for the same or a related condition.”

Of course, where the patient leaves the last treatment without making another appointment, although the treatment to that point had been regular and continuous, the toll of the statute of limitations ends with the last actual appointment. And the Court of Appeals has held that when,
at the last appointment, defendant doctor prescribed medication to be taken in the future, continuous treatment ends with the last actual appointment, not with the later date of the completion of taking the medication.\textsuperscript{17}

In sum, to meet the “continuity” test for continuous treatment, the patient’s treatment for the condition at issue must be regular, and not merely episodic. The time between treatments is certainly one measure of continuity. But patient and physician expectations are key. Similarly, patient and physician expectations are key to the question of when continuity has ended.

\textit{“Treatment”}

To qualify for the continuous treatment exception to the general rule that the statute of limitations begins to run from the moment of the malpractice, plaintiff must demonstrate that what the defendant doctor or hospital was providing was “treatment,” not merely a series of well-patient physical examinations or other normal diagnostic services.\textsuperscript{18}

Perhaps the most significant decision of the Court of Appeals on the question of what constitutes treatment is \textit{Nykorchuck v. Henriques}.\textsuperscript{19} Defendant was continuously treating plaintiff for endometriosis. On one occasion, plaintiff showed defendant a lump in her breast. Defendant, concluding that the lump was an indication of non-cancerous fibrocystic disease, responded that “we will have to keep an eye on it.” He did nothing more with respect to the breast, although he continued to treat plaintiff for endometriosis. In so doing, he missed the onset of breast cancer.\textsuperscript{20} The Court of Appeals majority held that the continuous treatment doctrine was inapplicable because “essential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit.” The Court held that “in the absence of continuing efforts by a doctor to treat a particular condition, none of the policy reasons underlying the continuous treatment doctrine justify the patient’s delay.” In sum, plaintiff’s claim was not that “treatment” was negligently performed, but that the negligence was the failure to treat. The Court concluded that “we cannot accept the self-contradictory proposition that the failure to establish a course of treatment is a course of treatment.” It did not help plaintiff that defendant continued to treat her endometriosis, for that was not the “same condition” that gave rise to the claim.

The dissenters argued that “monitoring” was a form of treatment. By telling plaintiff that he would “keep an eye on” the fibrocystic disease he had diagnosed, defendant had lulled her into a false sense of security, and she continued to rely upon him for treatment separate from his treatment of the endometriosis.

Thus, as the Court’s approach to continuous treatment in the medical malpractice arena makes plain, the doctrine will apply only when the doctor and patient perceive the need for further treatment, when the treatment is continuous rather than episodic, and when it is actual treatment, as opposed to a failure to treat or a misdiagnosis. The toll will end when no further treatment is anticipated, or when the patient fails to present for further treatment.

Let us see how comfortably these concepts apply in the non-medical professional malpractice world, particularly attorney or accountant malpractice.

\textit{Legal Malpractice and “Continuous Representation”}

The Court of Appeals first suggested by a brief statement in its 1973 decision in \textit{Gilbert Properties v. Millstein} that its medical malpractice “continuous treatment” doctrine would be applicable in legal malpractice cases.\textsuperscript{21} In that case, the Court cited its \textit{Borgia} opinion for the proposition that “plaintiff client’s cause of action against defendant attorney for malpractice accrued, at the latest, when the attorney-client relationship between them ended in 1966.”
Almost a decade later, in *Greene v. Greene*, the Court expanded upon the. The Court quoted from *Borgia*'s explanation of the rule in medical malpractice cases – stating that it was “prompted by the practical concern that the plaintiff’s cause of action for malpractice might expire 'while he was still a patient receiving care and treatment related to the conditions produced by the earlier wrongful acts and omissions'” – and held that “in a broader sense the rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional’s ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.” The Court stated that it is “on this basis,” that the rule applies in legal malpractice cases.

But other aspects of the medical malpractice doctrine do not fit so easily into legal malpractice. For example, how is continuity to be measured? Clients do not present at lawyers’ offices on a regular basis for “treatment.” Assume an attorney retained to defend a foreign client in an action brought in New York fails to timely preserve a personal jurisdiction defense, and thereby waives it. But, after some initial desultory activity, plaintiff ceases to push the action, and it lays dormant. Defendant's lawyer has neither seen nor spoken to the client for years. Is there still “continuous representation”? Unlike in the medical malpractice world, the answer is likely “yes.” The action, although moribund, is still open, and the attorney still represents the client. It is only when “that relationship ends, for whatever reason, [that] the purpose for applying the continuous representation rule no longer exists.”

The key to application of the rule, it has been held, is “clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney.” And, “critically, it must be established that there is 'continuing trust and confidence in the relationship between the parties.'”

The loss of trust and confidence may often signal the end of the continuing representation, although it is difficult to apply the standards created for medical malpractice cases to the determination of when continuous representation ends. For example, in medical malpractice, continuous treatment ends when the doctor or patient perceives that no further treatment is necessary, such as when the patient fails to return for further treatment, or begins treatment with another physician. Is there a similar bright-line date of termination for continuous representation? Does it end when the attorney formally withdraws from a matter, or is formally substituted for by new counsel?

In *Piliero v. Adler & Stavros*, plaintiff retained new counsel and directed defendant to take no further action in the matter in which defendant was representing her. But the stipulation substituting the new lawyer was not signed and filed for months. The Court, noting the need for “clear indicia” of the ongoing relationship, “often involving an attempt by the attorney to rectify an alleged act of malpractice” [emphasis added], held that “one of the predicates is the client’s continuing trust and confidence.” Therefore, from the moment the client directed the attorney to take no further action, the necessary trust and confidence had ended, and the statute of limitations began to run.

Would the outcome be different if the attorney, during the period between the clear breakdown in the relationship and the formal substitution, had, as attorney of record, performed some ministerial act? In *Aaron v. Roemer, Wallens & Mineaux, L.L.P.*, the attorney sought to withdraw as counsel, because of a rupture in the relationship, and the client agreed, in a letter to the Court, that the attorney should be permitted to withdraw. But, between that time, and the time of formal withdrawal and substitution, counsel signed a stipulation extending the adversary's time to produce documents. That act, said the Court, did not affect the analysis. Continuous representation ended, and the statute of limitations began to run on the client’s malpractice claim, at the time the client agreed that the attorney should be permitted to withdraw.

But what if the attorney acts for the client in a more than ministerial way, between the time it is plain that trust and confidence has been lost, and the formal cutting of ties between attorney and
In *Deutsch v. Polly N. Passonneau, P.C.*, counsel moved to be relieved after trial, but before the Court had rendered a decision. Although recognizing that the attorney-client relationship had fractured, the Court denied the motion, explaining that "plaintiff should not be left on her own to deal with the ‘final winding up of the technical details in this complex matter.’" So, counsel, unwillingly, remained attorney of record, and, at the Court’s direction, prepared the complicated judgment that terminated the underlying action. In the subsequent malpractice action, the Court concluded that “plaintiff could not be reasonably expected to sue defendant for malpractice until such winding up had occurred,” and that continuous representation did not end until the judgment in the underlying action was filed.

Thus, on the issue of “continuity,” the analysis for application of the “continuous representation” doctrine in legal malpractice cases differs from the “continuous treatment” doctrine in the medical malpractice world. Continuity is not measured by appointments. And the end of continuity, and, hence, the commencement of the running of the statute of limitations, is not nearly as simple to determine. In the legal malpractice cases, the loss of trust and confidence is a critical element for the termination of the toll. But, if the client is required to continue to rely on the lawyer, however reluctant both may be, then the continuous representation continues.

Continuity is not the only concept that is difficult to apply to legal malpractice. The medical malpractice concept of “treatment” can be very different as well. In legal malpractice, there is no differentiation between “treatment” and mere “diagnosis.” But what if the attorney, retained to commence an action, fails to do so. Is that similar to the physician who fails to treat? Is a lawyer who fails to commence an action similar to a physician who, as in *Nykorchuck*, fails to treat? That was the issue presented to the Court of Appeals in its first major decision on continuous representation’s application to legal malpractice.

**Shumsky v. Eisenstein**

Plaintiffs retained defendant attorney to commence an action. Defendant failed to provide information to plaintiffs as to the status of the matter and, indeed, avoided all of plaintiffs’ inquiries. Finally, after defendant refused to respond to a written demand for information, plaintiffs complained to the Grievance Committee. Defendant then admitted that he had never commenced the action, and a legal malpractice action was commenced. But, without application of the “continuous representation” doctrine, plaintiffs’ action against the lawyer would be untimely.

The Appellate Division concluded that “the defendant’s failure to take action necessary to protect the plaintiffs’ interest does not, itself constitute a course of representation.”

The Court of Appeals reversed the Appellate Division, finding that “defendant was continuously representing plaintiffs at least until, after his extended failure to return their telephone inquiries.” In concluding that there was continuous representation, the Court acknowledged that “this Court and others have held that a professional’s failure to take action or provide services necessary to protect a client’s or patient’s interests does not, standing alone, constitute representation or treatment for purposes of tolling the *Statute of Limitations*.” But the Court distinguished its medical malpractice decision in *Young*, noting that there “the plaintiffs were unaware of any need for further legal services or medical treatment, and there was no mutual understanding with the professional that further services were needed in connection with the specific subject matter out of which the malpractice arose.” Here, plaintiffs “were acutely aware of such need for further representation on the specific subject matter underlying the malpractice claim and there was a mutual understanding to that effect.” And, “plaintiffs were left with the reasonable impression that defendant was, in fact, actively addressing their legal needs.”

It is difficult to challenge the Court’s analysis of *Young*. But what about *Nykorchuck*? Weren’t the doctor and patient there “acutely aware” of the need for further monitoring of her breast condition? Didn’t the doctor’s assurances leave the “reasonable impression that defendant was,
in fact, actively addressing her medical needs? But in *Shumsky*, the Court made no effort to distinguish its *Nykorchuck* decision.

Although one may question the Court’s logical consistency, in the aftermath of *Shumsky* it seems clear that the “continuous representation” doctrine – at least with respect to lawyers – is in many ways broader than the “continuous treatment” doctrine applicable to doctors. Apparently, so long as an attorney has agreed to represent a client, the statute of limitations for any malpractice by the attorney will be tolled – regardless of how little the lawyer does in the course of that representation, or how long it continues without any action at all – until by some word or deed, it becomes clear that the relationship, with respect to that matter, is at some sort of formal end.

The application of the “continuous representation” doctrine to claims of accounting malpractice raises further issues, some different from its application to legal malpractice.

*Williamson v. PricewaterhouseCoopers LLP*

This lawsuit arose out of the collapse of a hedge fund. When the fund’s portfolio manager resigned, the fund conducted an investigation, and determined that the manager had, for years, overstated the value of its holdings, resulting in increasingly inflated assets, capital and profits. PricewaterhouseCoopers had been the fund’s auditors during the relevant period, and the fund’s liquidating trustee commenced this action for malpractice.

The relationship between the fund and defendant was based upon annual engagement letters. Each year, the fund would retain defendant to conduct an audit of its financial statements for the prior year. Defendant would conduct its audit and issue a report. The following year, the parties would execute a new engagement letter.

Defendant moved to dismiss the complaint with respect to any claimed malpractice that occurred more than three years before the lawsuit was commenced. Plaintiff argued that each audit was “merely one step” in a continuous service provided until the relationship was terminated.

*Appellate Division Decision*

The Appellate Division, split 3-2, found sufficient issues of fact with respect to the claim of continuous representation to deny summary judgment. The majority agreed that “the mere recurrence of professional services does not alone constitute continuous representation where the later services performed were not related to the original services.” But, here, there was a relationship “between the earlier and later services.”

The majority also concluded that “where the same accounting firm performs a variety of related services for an entity year after year, the true nature of and connection between the various services should be clear before we rely upon mere form agreements and bare assertions to hold that each year’s service was separate and discrete from the other years’ services.” Thus, the majority found sufficient allegations of continuity in the claim that defendant’s errors, “year after year,” formed “the basis for the subsequent year’s calculations.” For, “each year’s audit allegedly took as its starting point the improper valuations and inflated asset figures the firm had certified in the previous year, rather than reviewing those statements for accuracy as a new auditor could be expected to do.”

The dissenters argued that each annual audit was “discrete,” and “conducted on a year-to-year basis,” and that the continuous representation doctrine therefore was inapplicable.

*Court of Appeals Unanimously Reverses*

The Court of Appeals unanimously reversed. The Court did not focus upon the fact that each year’s audit was conducted pursuant to a separate contract. Rather, the Court looked to the
nature of the services provided each year, and was “guided, in part, by our ‘continuous treatment’
jurisprudence.” For, “contrary to plaintiff’s suggestion, the basic principles that inform the
continuous treatment doctrine apply to the rule of continuous representation.”

The Court, citing Borgia and Young, described the “continuous treatment” toll as enforcing “the
view that a patient should not be required to interrupt corrective medical treatment by a physician
and undermine the continuing trust in the physician-patient relationship.” And, again citing Young,
reminded that “a patient who is not aware of the need for further treatment of a condition is not
faced with the dilemma that the doctrine is designed to prevent.”

Applying these principles, the Court found that “plaintiff’s allegations make clear that for the years
in question, the Funds entered into annual engagements with defendant for the provision of
separate and discrete audit services for the Funds’ year-end financial statements, and once
defendant performed the services for a particular year, no further work as to that year was
undertaken.” Accordingly, there was no “course of representation as to the particular problems
(conditions) that gave rise to plaintiff’s malpractice claims.” Neither was there any showing that
the parties contemplated further representation regarding the audits. “Specifically, the Funds
never engaged defendant to provide corrective or remedial services.” Nor “were the Funds aware
of the need for further representation as to the audits.” Therefore, “the purpose underlying”
continuous representation would not be served by applying it here.

Because the scope of retention did not include fixing the prior years’ misstatements, indeed,
because the plaintiff did not even know there had been misstatements, it did not face the
“dilemma” the doctrine was designed to prevent. The Court did not distinguish its decision in
Shumsky – indeed it cited it with approval – although there the Court applied the continuous
representation doctrine to a case in which the attorney made no efforts to “correct” or “remedy”
his act of malpractice, nor did the client know that there had been any such malpractice.

Post-Williamson Application of the Doctrine in Accounting Cases

In the aftermath of Williamson, it will be difficult for a client to obtain the benefit of the continuous
representation doctrine in cases involving auditing malpractice. It would be a very unusual
auditing retention that would include “corrective” services with respect to the accountants’ own
prior work. An audit will not likely involve “remedial” efforts by the accountant.

Consequently, in Apple Bank for Savings v. PricewaterhouseCoopers, LLP, the first of the
reported cases struggling to apply Williamson, the focus is on the scope of the work outlined in
the engagement letter between the accountant and the client. Where “each letter indicates that
once PWC performed the work outlined in the engagement letter for a particular year, no further
audit work was contemplated as a result of that specific engagement,” the Court, relying on
Williamson, holds that continuous representation is inapplicable.34 However, in Tayebi v. KPMG
LLP, when the engagement letter is more ambiguous, and contains language “indicating that the
parties may have contemplated further services,” the Court holds that issues of fact exist as to
continuous representation, precluding pre-answer dismissal. For the test is “not whether [there] is
a ‘new engagement,’ but whether the later services performed were related to the original
services.”35

Williamson dealt with auditing malpractice. Case law will have to continue developing with respect
to the application of the continuous representation doctrine to claims of tax accounting
malpractice. The First Department has held that the mere annual repetition of the same tax error
does not permit application of the doctrine. In Booth v. Kriegel,36 defendant prepared plaintiff’s
federal income taxes every year. And every year, he made the same mistake, resulting in plaintiff
losing a credit for overpaying social security taxes. There was no showing that each year’s error
was the result of the prior year’s error. It was made afresh each year. Accordingly, “the record
contains no evidence that the tax returns were anything other than ‘a series of discrete and
severable transactions.’"
In attempting to apply the Court of Appeals decision in *Williamson* to a tax accounting malpractice case, one Supreme Court Justice again looked to whether any engagement letter limited the accountant’s scope of services to only a particular year’s tax return.

Unlike the audit engagement letters that state that additional services will be subject to a ‘separate written agreement,’ the estimate letters merely state that ‘our fee does not include other special services such as responding to inquiries or tax examinations by the IRS. We will provide you with a separate fee estimate for such services.’ Thus, it appears that in the ‘estimate letters’ need for additional services was contemplated, albeit for an increased fee. * * * These ‘estimate letters’ are insufficient to establish the PWC’s tax services were subject to separate, discrete agreements for each year and that once PWC delivered the returns no further services were contemplated.

Thus, an issue of fact existed with respect to the application of the continuous representation doctrine.37

**Conclusion**

The Court of Appeals’ well-developed jurisprudence on the application of the “continuous treatment” doctrine in medical malpractice cases is obviously an important touchstone predicting the application of the related “continuous representation” doctrine. But the analogy fails at several points, and is sometimes applied in different ways. Thus, in its principal attorney malpractice case, the Court of Appeals ignored its “failure to treat” precedents, and applied continuous representation to a lawyer who failed to represent the client at all, on the theory that the client anticipated that the lawyer would do something. In its “first opportunity” to apply the doctrine in an accountant malpractice case, the Court focused its attention on the absence of a showing that the accountants’ annual audits had any element of “remedial” efforts with regard to past mistakes, despite the fact that the representation was, in most other respects, continuous.

Of course, the breadth of case law in the legal and accounting malpractice arenas is not nearly as rich as the almost 50 years of case law in the medical malpractice context. How the lower Courts will apply the two now-seminal cases, and how the Court of Appeals may ultimately expand and refine its approach, remains for further development.

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2 12 N.Y. 2d 151 (1962).
3 The “continuous treatment” doctrine has since been enshrined in CPLR 214-a. That provision, enacted in 1975 under the banner of “tort reform,” also shortened the statute of limitations with respect to “medical, dental and podiatric” malpractice, from 3 years to 2 1/2 years. With respect to other forms of professional malpractice, as to which the statute of limitations remains 3 years [CPLR 214(6)], the analogous “continuous representation” doctrine, discussed below, remains a matter of common law.
6 *Williamson v. PricewaterhouseCoopers*, 9 N.Y. 3d at 8.
10 *Matter of Bulger v. Nassau County Medical Center*, 266 A.D. 2d 212 (2d Dep’t 1999).
Aulita v. Chang, 44 A.D. 3d 1206 (3d Dep't 2007); see, also, Rudolph v. Lynn, 16 A.D. 3d 261 (1st Dep't 2005).


Gomez v. Katz, 2009 BL 30322 (2d Dep't 2009).


64 N.Y. 2d 896 (1985).


A large percentage, indeed, an obscene percentage, of failure to diagnose cases are breast cancer cases.

Inexplicably, to this day, too many doctors continue to inform patients that they are "too young" to be concerned that a detected lump could be cancerous, or that a cloudy area detected by mammography does not require further testing. For a particularly awful example, see, Chulla v. DiStefano, 242 A.D. 2d 657 (2d Dep't 1997). In 2008, 41,000 American women died of breast cancer; a significant number were under 40. Early detection saves lives.

See, n.5.

56 N.Y. 2d 86 (1982).

See, CPLR 3211(e); Gager v. White, 53 N.Y. 2d 475 (1981).

Glamm v. Allen, supra, n. 29.


282 A.D. 2d 511 (2d Dep't 2001).

272 A.D. 2d 752 (3d Dep't 2000).

297 A.D. 2d 571 (1st Dep't 2002).

Recently, the Appellate Division, Third Department, in a case presenting nearly identical facts, cited Deutsch with approval, and reached the same conclusion. See, Deep v. Boies, 53 A.D. 3d 948 (3d Dep't 2008).

270 A.D. 2d 245 (2d Dep't 2000).

See, supra, n.8 and discussion in the text.

32 A.D. 3d 179 (1st Dep't 2006).

See, n.2


36 A.D. 3d 312 (1st Dep't 2006).