Meeting the Deadline: Checklist for Statutes of Limitations and Repose in Medical Negligence Cases

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Introduction and a Note about Rule 9(j)

It seems simple enough at first: the statute of limitations for medical negligence actions in North Carolina is three years and the statute of repose is four. Why then would you need a checklist?

Well, besides the notion that using a checklist is always a good idea, upon any level of scrutiny the law of these time-barring statutes is nuanced, complex, and different from any other type of tort claim in North Carolina. These differences are mostly based on “tort reform” statutes that generally make it harder for people injured by medical errors to get justice in our courts. One notable example of these “reforms” that is conspicuously absent from the checklist below is Rule 9(j) of the North Carolina Rules of Civil Procedure, which can be used to extend the statute of limitations period by 120 days but also requires unreasonably strict pre-filing expert review and pleading requirements. Rule 9(j)’s interpretive case law is vast and fraught with peril. As it could be (and probably has been) the subject of multiple Trial Briefs articles on its own, it is not included in this one.

The idea for a statutes of limitations and repose checklist was born out of our own confusion over when we had to file medical malpractice cases in our practice, and the universal desire (and fear) to always meet these dispositive deadlines.

The two arguably most confusing aspects of this checklist, the “discovery rule” and the “continuing course of treatment doctrine,” have also been expressed in a colorful timeline graph that shows these concepts visually to aid fellow practitioners. We hope this helps.

Checklist

Last Negligent Act—The Key Question Throughout the Entire Analysis

1. What is the “last act of the defendant giving rise to the cause of action?” Another way to word this is: “what is the last negligent act of the defendant?” If it has been less than three years, then the claim is timely. If it has been longer than three years, then the claim is barred by the statute of limitations unless one of the special rules below applies. If it has been longer than four years, then the claim is barred by the statute of repose unless one of the special rules below applies.

Discovery Rule

2. When was the “injury, loss, defect or damage” discovered by the claimant or when should it reasonably have been discovered? This is also known as the “discovery rule,” and it can provide up to one extra year for a patient to file a claim of medical malpractice, starting from the date of discovery.
However, the discovery rule for medical malpractice actions in North Carolina only applies when the negligence is discovered **two years after the last negligent act of the defendant.** Only in those cases does the plaintiff have up to one year from the date of discovery to file the claim.

A common pitfall arises when the negligence or injury is not immediately apparent to the patient, but is discovered less than two years after the last negligent act of the defendant. In any other type of personal injury claim or in many other tort claims, the statute of limitations clock would not start until the date of discovery by the plaintiff; however, in a medical malpractice claim the statute of limitations period still expires three years from the last negligent act of the defendant regardless of the later discovery. Therefore, even if the patient-plaintiff did not discover the negligence for a year and a half after the defendant’s last negligent act, she would not get any additional time to file her complaint.4

Also, importantly, claims where the discovery rule applies to extend the limitations period are still subject to the four year statute of repose. Accordingly, if the plaintiff discovers the defendant’s negligence four years or more after the last negligent act, then the claim is time barred. If the plaintiff discovers the negligence of the defendant more than three, but less than four, years after the last negligent act, then the plaintiff does not get a full year from the date of discovery to file her complaint.4

- Another way to phrase the relevant question is: **was the negligence discovered at least two years, but no more than four years, after the last negligent act of the defendant?** If so, then up to one extra year for filing is available to the claimant, but in no event can the claim be filed more than four years after the last negligent act of the defendant.

### Continuing Course of Treatment Doctrine

3. **Does the “continuing course of treatment doctrine” (hereinafter “CCTD”) apply?** When applicable, the CCTD tolls the accrual of the action for both the statute of limitations and statute of repose;5 and the three year limitations period does not begin to run until the earlier of either:

   i. The time of termination of the defendant-physician’s treatment of the plaintiff-patient;6 or

   ii. When the patient knew or should have known of the negligent act of the defendant physician and the resultant injury.7

For the CCTD to apply and extend the time for filing a claim, our case law has held that the plaintiff must prove all of the following things:

A. After the last negligent act of the defendant, the plaintiff had a continuing relationship with the defendant and received continuing treatment from the defendant, his practice or health care provides (nurses, residents etc.) who he supervised.8

B. The subsequent continuing treatment consisted of either an affirmative act or omission which was related to the alleged negligence by the defendant.9

C. During the subsequent treatment, the defendant physician could have taken further action to remedy the alleged injury caused by the original negligence.10 AND

D. The plaintiff did not know or should not have known about the negligence of the defendant that caused his injury.11 (If all the other elements of the CCTD are met, then the limitations period will begin to run when the plaintiff knows or should have known about the negligence and injury, even if the treatment from the defendant physician continues.)

### Special Rules for Minors

4. Did the time limitations for filing a claim expire before claimant turned 10 years old? If so, then the claimant must file a claim before they turn 10 years old or the claim is barred.12 However, there are two narrow statutory exceptions:

- “If the time limitations in G.S. 1-15(c) have expired and before a minor reaches the full age of 18 years a court has entered judgment or consent order under the provisions of Chapter 7B of the General Statutes finding that said minor is an abused or neglected juvenile as defined in G.S. 7B-101, the medical malpractice action shall be commenced within three years from the date of such judgment or consent order, or before the minor attains the full age of 18 years, whichever is later.”13

- “If the time limitations in G.S. 1-15(c) have expired and a minor is in legal custody of the State, a county, or an approved child placing agency as defined in G.S. 131D-10.2, the medical malpractice action shall be commenced within one year after the minor is no longer in
such legal custody, or before the minor attains the full age of 10 years, whichever is later.14

5. Did the time limitations for filing a claim expire after the claimant turned 10 years old, but before claimant turned 19 years old? If so, then the claimant must file a claim before they turn 19 years old or the claim is barred.15

Foreign Objects

6. Are damages sought due to a foreign object being left in the body? If so, then “an action may be brought within one year after discovery . . ., but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.”16

Wrongful Death

7. Has it been more than two years since the patient’s death or, even if it has not been two years, would the claim otherwise be barred by the statute of limitations or repose? Under N.C. Gen. Stat. § 1-53(4), an action for wrongful death by medical malpractice must be brought within two years of the patient’s death and within the limitations and repose periods of N.C. Gen. Stat. § 1-15(c) (three and four years from last negligent act of the defendant, respectively).17

Timeline Graph

The graph below illustrates how the discovery rule and the continuing course of treatment doctrine operate with the statutes of limitations and repose for North Carolina medical malpractice claims.❖

Timeline Chart Showing Discovery Rule and Continuing Course of Treatment Doctrine (CCTD) for the Statutes of Limitations and Repose in NC Medical Malpractice Claims

2. N.C. Gen. Stat § 1-15 (c), provides:
   Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

3. Id.
5. Stallings v. Gunter, 99 N.C. App. 710, 715, 394 S.E.2d 212, 216 (1990) (“Because the ‘continuing course of treatment’ doctrine affects determination of the accrual date, and the accrual date under § 1-15(c) is the starting date for the running of the statute of limitation and statute of repose, it is correct to use the ‘continuing course of treatment’ doctrine to determine the start date for running of the statute of repose. It is only by using the doctrine that a court can determine defendant’s relevant ‘last act.’”).


8. *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996); see also *Locklear v. Lanuti*, 176 N.C. App. 380, 626 S.E.2d 711 (2006) (plaintiff need not show that the subsequent treatment was also negligent, as long as the defendant physician continued to treat the patient for the particular condition created or augmented by the original act of negligence); *Rissolo v. Sloop*, 135 N.C. App. 194, 196, 519 S.E.2d 766, 768 (1999).


15. N.C. Gen. Stat. § 1-17(b).


17. N.C. Gen. Stat. § 1-53(4) (“Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought.”).