INTERESTING AND TROUBLIN DECISION ON TOLLING OF THE ONE-YEAR MEDICAL NEGLIGENCE STATUTE OF LIMITATIONS AND ON MEDICAL BATTERY

By Reneé A. Richards
Date June 11, 2008

In Kaplan v. Mamelak (April 29, 2008) 08 C.D.O.S. 5149, the Second Appellate District, Division Eight, held that 1) the general tolling provision found at CCP section 351, "Absence of a Defendant," applies to the one-year statute of limitations for medical negligence actions embodied in CCP section 340.5, and 2) it was error for a court to sustain a defendant physician's demurrer without leave to amend on the cause of action for medical battery where the physician operated on the wrong disk level on two separate occasions. Defendant Mamelak had succeeded in getting the battery cause of action dismissed following a demurrer; the statute of limitations issue was tried to a jury and defendant prevailed and judgment was entered in his favor. The court of appeal reversed on both issues.

Plaintiff Larry Kaplan sought treatment for back pain from neurosurgeon Adam Mamelak. Mamelak intended to excise a portion of a herniated disc from plaintiff's T8-9 vertebral space. Unfortunately, on two separate occasions he operated on the wrong level—first on T6-7, and then on T7-8. The first surgery occurred in July 2002. When the patient continued to experience pain, Mamelak ordered a MRI of plaintiff's spine which showed the herniation at T8-9 remained because Mamelak had operated on the wrong level. On September 11, 2002, Mamelak met with Kaplan to tell him about the mistake and to discuss Kaplan's treatment options. Kaplan agreed to go forward with a second surgery, which Mamelak performed in September 2002. Unfortunately, Mamelak again operated on the wrong level. Thereafter, Kaplan sought treatment from a second neurosurgeon who operated on the correct disk level.

On September 17, 2003, a year and six days after the September 11 conversation between Kaplan and Mamelak, Kaplan served Mamelak with a 90-day notice of intent to sue under CCP 364. Because he thought his 90-day notice was timely, he also believed the complaint for malpractice and battery he filed on December 15, 2003 was timely. Mamelak's demurrer to the battery cause of action was sustained without leave to amend; he later answered the complaint for negligence and asserted the affirmative defense that the one-year statute of limitations barred plaintiff's complaint because he had known of the surgical error no later than September 11, 2002. Mamelak argued (and the jury later agreed) that Kaplan's 90-day notice was six days late and did not afford him any extension of time within which to file his complaint, so his complaint was filed three months too late.

Over no objection, the court granted Mamelak's motion to bifurcate the trial on the statue of limitations issue, after which the jury returned a special verdict in Mamelak's favor. The unanimous jury answered "yes" to the question: "Was the plaintiff on notice of wrongdoing on the part of defendant by September 11, 2002?" Following that special verdict, the trial court entered judgment in favor of Mamelak on the grounds that plaintiff's complaint was filed beyond the one-year statute of limitations for medical malpractice and was therefore barred. Kaplan appealed.

The record showed that during pretrial discovery, Kaplan sought to obtain information about whether Mamelak had travelled "outside California anytime between the first operation in July 2202 and the one-year anniversary in 2003 of their September 11 conversation. Appellant's theory was section 351 tolled the one-year statute of limitations during any days respondent was out of the state."

Until I read this case, I was unaware of CCP section 351, and had never seen it applied to toll the one-year statute of limitations of section 340.5. It is worth knowing about after this decision. Section 351 says, in pertinent part: "[I]f,…after the cause of action accrues, [the defendant] departs from the state, the time of his absence is not part of the time limited for the commencement of the action." The trial court denied plaintiff's motion to compel out-of-state travel information from Mamelak, because if agreed with Mamelak that this general tolling provision did not apply to the medical malpractice statute of limitations, as all the bases for tolling med mal cases are contained in section 340.5.The court of appeal disagreed and ruled this was error.

In so holding, the court said the general tolling provision of CCP section 351 should apply to the one-year statute of limitations for medical negligence cases and followed the reasoning used by the Supreme Court in Belton v. Bowers Ambulance Service (1999) 20 Cal.4th 928. There, the court ruled the general tolling provision of section 352.1, "Tolling Statue—Imprisonment" applied to the one-year provision of CCP 340.5. In applying the general tolling provision for imprisonment to the one-year medical negligence statute in Belton, the Supreme Court noted that section 340.5 has two components—the one-year limitations period from the date of discovery and the three-year period from the date of the injury. The Belton court said the tolling provisions contained in section 340.5 (e.g. fraud, intentional concealment, foreign object) serve only to extend the three-year outside limit and have nothing to do with the one-year limitations provision. The Supreme Court emphasized that no tolling provision outside 340.5 can extend the three-year limitations period, but there is no such prohibition on the application of the general tolling provisions (e.g. CCP sections 351, et seq.) to the one-year limitations period of section 340.5.

Another perhaps more troubling aspect of the Kaplan decision was the appellate court's reversal of the trial court's ruling on defendant's demurrer to the battery cause of action.

Two Embarcadero Center, #1800, San Francisco, CA 94111, 415.288.9800
www.hassard.com

The appellate court found the trial court erred when it sustained defendant's demurrer without leave to amend because defendant argued he did not intend to operate beyond the patient's consent. The appellate court went through a brief analysis of what the scope of the consent was in this case, and what the permissible scope of consent is, generally. The court said that Cobbs v. Grant supports a finding of medical battery "if the physician performs a 'substantially different treatment' from that covered by the patient's expressed consent". The Kaplan court observed that non-California courts have "reached opposite conclusions whether battery occurred" in situations involving back surgeries on the wrong disk level similar to Kaplan's. In a statement that almost begs for Supreme Court review, the Kaplan court stated: "In the absence of any definitive case law establishing whether operating on the wrong disk within inches of the correct disk is a 'substantially different procedure,' we conclude the matter is a factual question for a finder of fact to decide and at least in this instance, not one capable of being decided on demurrer."

The appellate court reversed and remanded and the court was "directed to (1) vacate its orders sustaining the demurrers to the battery causes of action and denying the motion to compel discovery, and (2) to overrule the demurrers and grant the motion to compel." Interestingly, the court did "not disturb the jury's special verdict finding appellant was on notice of wrongdoing by respondent on September 11, 2002." It will be up to plaintiff, on remand, to try to establish through discovery whether there is a basis for the statute to be tolled, or for a cause of action for battery.

On the tolling issue, the Kaplan decision is contrary to several other decisions, and will likely lead the Supreme Court to accept review. Both Hanooka v. Pivko (1994) 22 Cal.App.4th 1553, 1560, fn. 5, and Bennett v. Shahhal (1999) 75 Cal.App.4th 384, 392 contain language that suggests that the general tolling provisions found at CCP section 351, et seq. do not apply to the one-year statute of limitations found at section 340.5. Given the direction the Supreme Court went in Belton, though, if review of Kaplan is granted, it is likely the court will rule similarly and hold that the general tolling provision of CCP section 351 applies to the one-year limitations period in medical negligence cases. Application of section 351 to medical negligence cases is guaranteed to be time consuming and may lead to greater uncertainty as to the precise date on which the statute of limitations in a med mal case has actually run.

On the battery issue, the Kaplan decision just seems plain wrong. Granted, operating on the wrong disk level twice in a row is regrettable. But is it battery? I would argue that it was certainly within the scope of the consent, and that a mistake like this is within the realm of professional negligence, not an intentional tort. This is one more illustration of a well-intended demurrer gone wrong on appeal because the issue decided by the trial court begs for factual support, in the eyes of the reviewing justices.

Two Embarcadero Center, #1800, San Francisco, CA 94111, 415.288.9800
www.hassard.com

It will be interesting to see what happens with this decision. Mamelak filed a petition for review on June 5, 2008, but until and unless it's granted, this decision can (and likely will) be cited by plaintiffs seeking discovery on whether a physician (or other health care provider) was out of state during the relevant time period when the statute of limitations is an issue, or in support of a battery claim in cases where surgery was performed on the wrong disk level.

Two Embarcadero Center, #1800, San Francisco, CA 94111, 415.288.9800
www.hassard.com