FOR WHOM THE “FOREIGN BODY” TOLLS: TWO KEY ISSUES IN MEDICAL MALPRACTICE “FOREIGN BODY” CASES

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The statute of limitations applicable to medical malpractice cases is set forth under Code of Civil Procedure section 340.5, a Medical Injury Compensation Reform Act (“MICRA”) provision. It contains a one-year limitations period, which runs from the date of discovery of the alleged injury and its negligent cause, and an outer-limit, three-year limitations period triggered by the date of injury, i.e., the first manifestation of appreciable harm.¹ The plaintiff’s Complaint will be time-barred unless he or she satisfies both limitations periods. In other words, the plaintiff will be unable to file suit unless he or she “discovers" the negligent cause of the injury within three years after first experiencing harm from the alleged negligent act or omission.²

Section 340.5 contains three exceptions which can serve to toll the three-year limitations period until the plaintiff discovers his or her claim. Generally, “foreign body” tolling will apply under circumstances involving a “foreign body which has no therapeutic or diagnostic purpose or effect” inside the plaintiff’s body.³ The “foreign body” exception tolls the three-year limitations period until the plaintiff discovers its presence and the plaintiff will have one year from discovery to file suit.⁴

In the typical “foreign body” case, the alleged act of negligence is the insertion of the foreign body, most often a surgical clamp, needle, sponge, drain, etc. In 1975, the California Legislature amended section 340.5 in order to specify that an object does not qualify as a “foreign body” if it possesses a “therapeutic or diagnostic purpose or effect,” thereby attempting to preclude claimants from avoiding the absolute three-year limitations period.⁵

The amendment’s language led to further confusion as to whether a surgical drain or clamp intended to be removed at the end of surgery or shortly thereafter qualified as a “foreign body,” since such an instrument did indeed serve a therapeutic, albeit temporary, purpose. In Ashworth v. Superior Court, 206 Cal.App.3d 1046 (1988), the Court of Appeal concluded that objects serving temporary therapeutic purposes constitute “foreign bodies” for purposes of tolling the statute, once the object’s therapeutic purpose or effect terminates and it represents only the prospect of harm inside the patient’s body.⁶ As a result, the general rule is that an object inserted into a patient’s body and intended to remain there


³ The three exceptions enumerated by section 340.5 include: (1) fraud; (2) misrepresentation; and (3) the presence of a non-therapeutic “foreign body” inside the plaintiff. See Code of Civil Procedure § 340.5.

⁴ Ashworth, supra, 206 Cal.App.3d at 1058.


⁶ Ashworth, supra, 206 Cal.App.3d at 1051, 1057.
permanently and serve a therapeutic or diagnostic purpose or effect is not a “foreign body” for purposes of tolling the three-year limitations period.

There are two important issues an attorney must consider when evaluating a “foreign body” case. The first is to ask whether the type of object recovered from the patient actually qualifies as a “foreign body.” At first blush, one might assume that suture material, surgical staples, screws or some other fixation device might constitute a “foreign body.” However, such fixation devices, if placed for a therapeutic purpose and intended to remain permanently inside the patient, do not constitute “foreign bodies” and will not toll the statute. Similarly, courts have also held that silicone injections, an acrylic implant used to maintain space between vertebrae, or a traumatically-embedded sewing needle, do not qualify as “foreign bodies” for purposes of tolling.

The second issue involves the identity and alleged negligence of the healthcare provider defendant being sued in the underlying matter. Is the plaintiff suing the physician who inserted the “foreign body” and then allowed it negligently to remain in the patient’s body, or is the plaintiff suing a downstream healthcare provider who did not discover the presence of the object during his or her subsequent care and treatment of the patient? Whereas the subsequent physician’s alleged act of negligence in allowing the medically-inserted object to remain in the patient’s body constitutes a failure to remove, that physician’s alleged negligence will be predicated upon his or her diagnostic discretion and judgment in treating the patient and discovering the presence of a “foreign body.”

The “foreign body” exception should not apply against such downstream healthcare providers where (1) the object was present in the patient’s body prior to presentation; and (2) the healthcare provider had no part in the original insertion of the object. The claims against the downstream healthcare provider are essentially based upon professional judgment rather than merely verifying the presence of the “foreign body” alone. As a result, the justifications supporting the “foreign body” doctrine lose their weight against downstream healthcare providers, and all that remains is a traditional medical malpractice action involving failure-to-diagnose allegations.

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9 The three rationales articulated by the California Supreme Court in the seminal case of Huysman v. Kirsch, 6 Cal.2d 302 (1936) are directed towards the healthcare provider who originally inserted the object: (1) “the tort continued until removal of the object;” (2) “the operation was not complete until all equipment used in the operation had been removed;” and (3) “the patient was unaware of the hidden object until it was discovered during the subsequent operation.” Ashworth, supra, 206 Cal.App.3d at 1055, citing Huysman, supra, 6 Cal.2d at 311-313. None of these rationales justifies application of the “foreign body” exception against a physician defendant who did not undertake affirmative steps to insert the surgical object. The first two justifications do not apply to any physician other than the surgeon who originally inserted objects during surgery. The third justification presumes some special knowledge on the part of the inserting physician that the object was at some point inserted (though mistakenly believed to be recovered) during surgery, while the patient and the downstream physicians lack any such actual and/or constructive knowledge.
Therefore, it is essential in “foreign body” cases to identify appropriately both the nature of the recovered object, as well as the identity and conduct of the healthcare provider defendant, prior to concluding that the “foreign body” exception applies and tolls the three-year limitations period.

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