THE TWIN CLAIMS: MEDICAL BATTERY AND LACK OF INFORMED CONSENT LOOK ALIKE, BUT THEY ARE SO VERY DIFFERENT

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Distinguishing medical battery from lack of informed consent could mean the difference between general damages that either are uncapped or else capped at $250,000, as well as the difference between punitive damages or none at all. Knowing the difference between the two claims changes how the defendant prepares and defends their case.

The most often cited case in this line of jurisprudence is *Cobbs v. Grant*,[1] a California Supreme Court case which stands for the proposition that medical battery arises when a healthcare provider performs a procedure to which the patient has not consented. Lack of informed consent arises when a patient consents to a certain treatment, but the healthcare provider fails to disclose all inherent risks and complications; there is no intentional deviation from the consent given, "rather the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence."[2]

This distinction was clarified further by the California Court of Appeal in *Saxena v. Goffney*:[3] According to that case, it is clear that medical battery and lack of informed consent are separate causes of action. An action should be pleaded in negligence when the healthcare provider performs a procedure on the patient without disclosing sufficient information about the inherent risks and possible complications. When that is the case, the proper cause of action is lack of informed consent, whereas the "battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented."

Additionally, lack of informed consent is separate and different than lack of consent.[4] Lack of informed consent is when the medical provider obtains consent for a procedure, and performs the exact procedure for which he/she obtained consent, but fails to warn the patient about certain inherent risks or complications. In those situations the patient's consent is predicated on a lack of information. This is what gives rise to a medical negligence claim: the medical provider's negligence in failing to warn the patient of those risks.

In contrast, a medical battery claim is simply a lack of consent. Battery is the offensive and intentional touching without the victim's consent.[5] In the medical context, "a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent. A medical battery is predicated on the concept that a patient has the right to refuse medical treatment.[6] In the medical context, when a patient

[1] *Cobbs v. Grant*, 8 Cal.3d 229 (1972).
[2] *Cobbs*, supra 8 Cal.3d at 240-241.
[3] *Saxena v. Goffney*, 159 Cal.App.4th 316, 324 (2008).
[4] *Saxena*, supra 159 Cal.App.4th at 328.
[5] *Kaplan v. Mamelak*, 162 Cal. App. 4th 637, 645 (2008).
[6] *Thor v. Superior Court*, 5 Cal. 4th 725, 735-36 (1993).

refuses to consent to a medical procedure, or when a patient only gives conditional consent, and the medical provider exceeds the bounds of that consent, a battery occurs.

Within the medical context there is further distinction between common law battery and technical battery. "The common law has long recognized this principle: A physician who performs any medical procedure without the patient's consent commits a battery."[7] In contrast, "[w]hen an action is based upon the theory of battery beyond consent, the … theory … [is] technical battery.[8]

Regardless of whether the theory of battery is common law battery or technical battery, the plaintiff must prove intent. In a claim alleging medical battery, the intent requirement is satisfied by showing intent to deviate from the consent given.[9] This can be manifested by deviating from the conditional consent given in a technical battery or by deviating from the lack of consent in a common law battery.

Determining whether a cause of action is for medical battery as opposed to lack of informed consent (i.e. negligence) is vital. As the California Supreme Court noted in *Cobbs*:

> [T]there are significant differences between the two theories, including the evidentiary burdens, the availability of punitive damages, and the applicable limitations period: "[M]ost jurisdictions have permitted a doctor in an informed consent [negligence] action to interpose a defense that the disclosure he omitted to make was not required within his medical community. However, expert opinion as to community standard is not required in a battery count, in which the patient must merely prove failure to give informed consent and a mere touching absent consent. Moreover, a doctor could be held liable for punitive damages under a battery count, and if held liable for the intentional tort of battery he might not be covered by his malpractice insurance."[10]

While Cobbs was decided a few years before MICRA took effect, it has been held subsequently that MICRA explicitly covers only injury or death which occurs as a result of professional negligence. Because medical battery is an intentional act and not a negligent one, medical battery claims are not subject to MICRA.[11] Therefore, medical battery claims are not subject to either the statute of limitation or the delayed discovery rule set forth in California Code of Civil Procedure Section 340.5, but rather the two-year statute of limitation for a common law battery cause of action in California Code of Civil Procedure Section 335.1. Additionally, a medical battery cause of action is not subject to the 90-day tolling provisions of California Code of Civil Procedure Section 364.

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[7] *Thor*, supra 5 Cal.4th at 735.
[8] *Pedesky v. Bleiberg*, 251 Cal.App.2d 119, 123 (1967).
[9] *Cobbs*, supra 8 Cal.3d at 240; *Ashcraft v. King*, 228 Cal. App. 3d 604, 613 (1991); *Conte v. Girard Orthopaedic Surgeons Med. Grp., Inc.*, 107 Cal.App.4th 1260, 1267 (2003).
[10] *Cobbs* supra 8 Cal.3d at 229.
[11] *Noble v. Superior Court*, 191 Cal.App.3d 1189 (1987); *Perry v. Shaw,* 88 Cal. App. 4th 658 (2001).

This proposition is stated explicitly in two California Court of Appeal cases. In the first case, *Noble v. Superior Court*,[12] the Court held that California Code of Civil Procedure Sections 364 and 340.5[13] apply to actions based on professional negligence and not to actions based on a battery theory. The Court reasoned that the Legislature explicitly used the term "medical negligence" when constructing both Section 364 and 340.5. If the Legislature intended the statute of limitation in Section 340.5 and the tolling provision of Section 364 to include actions for battery, then presumably the Legislature would have used different terminology.

For instance, in California Code of Civil Procedure Section 1295, which governs arbitration, the Legislature used the term "medical malpractice," which includes both medical services that are rendered negligently *and* those medical services which are "unnecessary or unauthorized" (the traditional grounds for a battery cause of action). The language of Section 1295 goes beyond mere negligence and encompasses all theories which might be included in a medical malpractice action.

MICRA uses more restrictive terms, such as "professional negligence" and "negligent act or omission to act." The *Noble* court viewed this as a deliberate choice by the Legislature to exclude actions not based on a negligence theory of liability. The Court concluded that:

> The distinction between negligence and battery was not lost on our Supreme Court, and we do not believe it was lost on the Legislature when it enacted section 364 as a *limited* exception to the statute of limitations for "professional negligence." Had the Legislature intended section 364, subdivision (d), to extend to causes of action based upon other theories which the plaintiff might wish to include in the complaint, it could have used language which reflected that intent. It did not.[14]

In the second case, *Perry v. Shaw*,[15] the Court of Appeal upheld the findings in *Noble* and concluded that the 90-day tolling provision of section 364 only applies to negligence causes of action. The *Perry* Court agreed with the *Noble* Court's narrow interpretation of "professional negligence" as stated in California Code of Civil Procedure Section 364. The Court reasoned that this narrow interpretation, which excludes actions for battery, is supported by analysis of the legislative intent underlying Section 364.

Distinguishing between the two theories of liability can be crucial, not just in litigated matters which result in trial, but also in the early stages of claim evaluation. There are instances where a Plaintiff alleges lack of informed consent, for example, but also alleges such phrases as "willfully and intentionally". Such phrases are inconsistent with a negligence-based claim based upon lack of informed consent. Such pleading may be subject to an early Demurrer or Motion to Strike in order to clarify the Plaintiff's legal theory at the outset of litigation.

CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.

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[12] *Noble v. Superior Court,* supra 191 Cal. App. 3d 1189.

[13] The *Noble* opinion references California Code of Civil Procedure § 340.6 and not § 340.5. This might be an inadvertent error because the court discussed MICRA and medical professional negligence, which is controlled by §340.5, and not attorneys' professional negligence, which is controlled by §340.6.

[14] *Noble*, supra 191 Cal.App.3d at 1194.

[15] *Perry v. Shaw*, 88 Cal.App.4th 658 (2001).