

Recent decision CACI form instructions on medical battery (Nos. 530A and 530B)

In the published portion of its opinion in Dennis v. Southard (May 29, 2009) 09 C.D.O.S. 6625, the Third Appellate District of the Court of Appeal held that the CACI form instructions on medical battery—CACI Nos. 530A and 530B—“correctly state the intent requirement for medical battery.”

In Dennis, the plaintiff consented to knee replacement surgery on her left knee in June 2004, as long as the orthopedic surgeon, Dr. Southard, did not use Johnson & Johnson prosthesis. He used a Biomed prosthetic device and the surgery was a success.

In October 2004, the hospital where Dr. Southard performed surgeries switched from using Biomed devices to Johnson & Johnson devices. When Ms. Dennis had right knee replacement surgery by Dr. Southard that month, a Johnson & Johnson device was used. During the surgery, the patient’s medial collateral ligament was transected. She sued for medical negligence and medical battery.

Dr. Southard made and won a motion for summary judgment on the medical negligence claim. The medical battery claim went to the jury, who also found for Dr. Southard. Dennis appealed. In the published portion of the opinion the court addressed Dennis’ appeal on the ground that the jury was incorrectly instructed on medical battery. The Dennis trial court used instruction No. 530B rather than No. 530A over plaintiff’s objection. On appeal, Dennis contended this was error because the “intent element ‘add[ed]’ in CACI No. 530B is ‘misleading at best and incorrect at worst.’” The appellate court pointedly said she was “mistaken” and affirmed.

In so doing, the Court distinguished the two CACI instructions on medical battery. CACI No. 530A “is to be used when it is alleged the defendant performed a medical procedure without the plaintiff’s consent.” By contrast, No. 530B “is to be used when a plaintiff gave a conditional consent to a medical procedure and when it is alleged that the defendant proceeded without the condition having been satisfied.”

The court explained why the intent element in each instruction is different:

The intent requirement in CACI No. 530B is correct. It requires “inten[t] to perform the procedure with knowledge that the condition has not occurred.” (CACI No. 530B.) Inclusion of intent and knowledge as elements of medical battery is consistent with well-established principles of civil battery. (See, *e.g.* Piedra v. Dugan (2004) 123 Cal.App.4th 1483, 1496 [nonsuit for medical battery cause of action proper where the defendant ‘could not have *intentionally* deviated from the scope of the consent because he was unaware of any condition on the consent.’].) Thus, while Dennis is correct that the intent does not need to be malicious, or need to be an intent to inflict actual damage, she is wrong in arguing that the only intent required is intent to perform the procedure.

Moreover, the reason why CACI No. 530B has an explicit intent and knowledge requirement and CACI No. 530A does not is clear. The law presumes that “[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.” (*Piedra v. Dugan*, supra, 123 Cal.App.4th at p. 1496.) That situation is covered by CACI No. 530A. On the other hand, in a case involving conditional consent, the requisite element of deliberate intent to deviate from the consent given cannot be presumed simply from the act itself. This is because if the intent element is not explicitly stated in the instruction, it would be possible for a jury (incorrectly) to find a doctor liable for medical battery even if it believed the doctor negligently forgot about the condition precedent.

This is a favorable case for medical negligence defendants in situations where the consent to treatment was conditional and it is contended the defendant went forward with the treatment without satisfying the condition.

However, the court’s observations about CACI No. 530A, and that intent is “presumed” when a patient gives permission for the doctor to perform one type of treatment but another is actually performed, is still problematic in those cases where a physician negligently performs a procedure different from the one to which the patient consented. For example, in *Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637 (which I summarized on June 11, 2008) the surgeon twice performed surgery on the wrong thoracic disk. The appellate court held that the question of whether the wrong surgery was negligent or was a substantially different procedure that could constitute battery is a question of fact for the trier of fact and “not capable of being decided on demurrer.”