



# Understanding the statute of limitations for a medical malpractice birth trauma case



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Although defendants may be tempted to have a court declare that injuries suffered during labor and delivery are now subject to a six-year limitations period, that is not the law. It has been long settled by the appellate courts that the applicable statute of limitations for medical malpractice birth trauma cases is eight years, as specified in Code of Civil Procedure section 340.5. Despite this established rule of law, some defendants still try to contend that the limitations period is six years. They rely upon an obsolete interpretation of Code of Civil Procedure section 340.4. The Supreme Court resolved the issue long ago, and the Legislature has endorsed the Supreme Court's interpretation by reenacting the same language.

## **Code of Civil Procedure section 340.5 is the correct statute of limitations**

Code of Civil Procedure section 340.5 provides in relevant part:

In an action for injury or death against a healthcare provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. *Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three*

*years or prior to his eighth birthday whichever provides a longer period.*

Section 340.5 includes three specific clauses applicable to medical malpractice cases. First, the statute targets actions against a health care provider. A "health-care provider" includes physicians and acute care hospitals. (Code Civ. Proc., § 340.5 [¶ 2](1).) Second, the last sentence of the first paragraph specifically applies to actions in which minors are plaintiffs.

Finally, within that sentence, there is an even more specific limitations period: For minors who are under six years old when they are injured, they have until their eighth birthday or within three years of the alleged wrongful act, whichever provides the longer period.

## **The California Supreme Court explicitly rejected the argument that section 340.4 applied to medical negligence actions for injuries before or during labor and delivery**

Defendants in medical malpractice birth trauma cases often turn to section 340.4 and try to resurrect an argument that the California Supreme Court explicitly rejected over 20 years ago. An understanding of the flaws of the defendant's position starts with an analysis of former Civil Code section 29, from which Code of Civil Procedure section 340.4 was derived.

Former Civil Code section 29, as enacted in 1872, provided:

A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth. (Civ. Code, § 29 (West Annot. C. (1982), Vol. 6 at 94, "Historical Note").)

Section 29 was a radical change in the common law rule that neither a child nor his parents could maintain an action for damages suffered before he was born. (*Scott v. McPheeters* (1939) 33 Cal.App.2d 629, 632-633)



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In 1941, the Legislature added a limitations period to Civil Code section 29. As amended, the statute provided:

A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of the birth of the minor, and the time such minor is under any disability mentioned in section 352 of the Code of Civil Procedure [The tolling statute for actions by minors.] shall not be excluded in computing the time limited for the commencement of the action. (Civ. Code, § 29 (West Annot. C. (1982), Vol. 6 at 94, “Historical Note”).)

In 1970, the Legislature enacted Code of Civil Procedure section 340.5. As originally written, section 340.5 did not include any specific limitations period for a minor’s actions against a health-care provider. The original statute provided only that the limitations period was “four years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs.” (Code Civ. Proc., § 340.5 (West Annot. C. (2006), Vol. 13C at 194 “Historical and Statutory Notes”).)

In 1975, the Legislature amended section 340.5 to add a limitations period that specifically applied to a minor’s action against a health-care provider. In addition to grammatical modifications of the statute [The Legislature also amended the repose provision of section 340.5, reducing the outside limitation from four years to three, in actions *not* involving a minor under the age of six], the Legislature added this limitations period for actions by minors who were injured when they were less than six years old:

Actions by a minor shall be commenced within three years from the date of the alleged wrongful act

except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period.

With the 1975 amendment to section 340.5, there were two statutes that might apply to injuries caused by medical negligence before or during labor and delivery. Civil Code section 29 specified a six-year limitations period, which would be tolled until the plaintiff discovered or with reasonable diligence could have discovered the injury and wrongful cause (See p. 6:1-5, *infra*.) Code of Civil Procedure section 340.5, which had a specific application to medical negligence cases, had an eight-year limitation period.

In *Segura v. Brundage* (1979) 91 Cal.App.3d 19, 27 n. 4, the major issue in *Segura* was whether the delayed discovery rule applied to Civil Code section 29. (*Segura*, 91 Cal.App.3d at 24-28) The appellate court offered a thorough analysis of that issue and concluded that the common law rule of delayed discovery – that a limitations period does not commence until the plaintiff knew or should have known about the negligent cause of the injury – applied to Civil Code section 29.

In a short footnote, *Segura* remarked that the six-year limitations period of Civil Code section 29 applied to actions by minors for prenatal injuries. The court reasoned that section 340.5 did not mention prenatal injuries. *Segura*’s truncated analysis of the issue can be explained. The parties in that appeal did not dispute that Civil Code section 29 applied and, in any event under the facts of the case, the action was not barred as a matter of law under either statute.

Shortly afterwards, two other appellate courts, which studied the issue more closely than did *Segura*, held that eight-year limitations period Code of Civil Procedure section 340.5 did apply to prenatal injuries of a minor. *Keleman v. Superior Court* (1982) 136 Cal.App.3d

861, exhaustively reviewed the history of Civil Code section 29 and Code of Civil Procedure section 340.5, and concluded that the latter statute supplanted the former in medical malpractice actions.

*Keleman* reasoned that Section 340.5, as amended in 1975, was the later and more specific limitations period, because it was enacted as part of an interrelated legislative scheme to deal with medical malpractice actions [The Medical Injury Compensation Reform Act enacted in 1975]. (*Keleman, supra*, 136 Cal.App.3d at 866-867) *Knox v. Superior Court* (1983) 140 Cal.App.3d 782, considering the same issue, adopted *Keleman*’s reasoning and held that Code of Civil Procedure section 340.5 supplanted Civil Code section 29 (Interestingly, the defendant-hospital in *Knox* urged that Code of Civil Procedure section 340.5 was the correct limitations statute, because it was trying to avoid the delayed-discovery tolling that was applicable to Civil Code section 29 (and which prevented judgment in its favor). It is not clear whether defendants in medical malpractice cases appreciate the full ramifications of their insistence that Code of Civil Procedure section 340.4 (formerly Civil Code section 29), with its open-ended delayed discovery rule and no statute of repose, should apply to actions based on prenatal medical malpractice injuries.)

The Supreme Court resolved the conflict in *Young v. Haines* (1986) 41 Cal.3d 883, holding that in actions for prenatal medical malpractice injuries, Code of Civil Procedure section 340.5 was the applicable limitations period. In *Young*, the defendant physician argued that Code of Civil Procedure section 340.5 applied to bar an action filed in 1981, when the child was born in 1972. The plaintiff sought to apply Civil Code section 29, which had an open-ended delayed discovery rule, to avoid section 340.5’s more stringent limitation (The procedural posture of *Young*, with the health-care provider insisting upon



application of Code of Civil Procedure section 340.5, was similar to that of the hospital in *Knox*. See fn. 8, *ante*.)

The Supreme Court also reviewed the two statutes and their histories, and reached the same conclusion as did *Knox*. The applicable statute for prenatal medical malpractice injuries is Code of Civil Procedure section 340.5:

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the Legislature. . . . section 340.5 is part of an interrelated legislative scheme enacted to deal specifically with all medical malpractice claims. As such, it is the later, more specific statute which must be found controlling over an earlier statute, even though the earlier statute would by its terms cover the present situation. . . . Accordingly, plaintiff's effort to avoid a statutory time bar by invoking section 29 cannot prevail. (*Young, supra*, 41 Cal.3d at 894 (citations omitted).)

### **The Legislature's recodification of the statutes does not change their interpretation**

In 1992, six years after *Young*, the Legislature reorganized Civil Code section 29 by repealing the statute, dividing it and placing its two parts in different codes. The first sentence was re-enacted as Civil Code section 43.1. The second sentence was re-enacted as Code of Civil Procedure section 340.4. See table 1 below.

The Law Revision Commission's comments for Civil Code section 43.1, and for Code of Civil Procedure section 340.4, are identical: "Section 340.4 continues the [first part] [last part] of former Civil Code section 29 *without substantive change*." (Civ. Code § 43.1 (West Annot. C. (1982), Vol. 6, Cum. Pocket Part (2006) at 28, "Law Rev. Comm. Comment"); Code Civ. Proc., § 340.4 (West Annot. C. (2006), Vol. 13C at 192 "Law Rev. Comm. Comment").)

In short, it is manifest that the Legislature did nothing more than

reorganize Civil Code section 29, putting the remedies of a child for prenatal injuries in the code and title that encompassed personal rights, and putting the limitations period in the code and title that encompassed limitations periods. There is nothing in the Legislative history suggesting that the Legislature intended to change the statute or address the Supreme Court's interpretation of Civil Code section 29's limitation period.

Faced with this clear legislative history, and unmistakable judicial construction of the limitations period of Civil Code section 29, defendants often mistakenly perceive a short-term advantage. Disregarding all law on the subject, these defendants insist that the recodification (without any substantive change) of the limitations period as Code of Civil Procedure section 340.4 proves that the Legislature meant to overturn the Supreme Court's decision in *Young*. These defendants' reason that the recodification made no effort to exclude medical malpractice actions from section 340.4, so a court must presume that it applies to all prenatal injuries, including those caused by medical malpractice.

A re-enactment of a statute that has been judicially construed carries a presumption that the Legislature agrees with that construction:

When the Legislature reenacts without change provisions that have been judicially construed, the Legislature is presumed to have been aware of and acquiesced to the previous judicial construction. Accordingly, *reenacted portions of the statutes are given the same construction they received before the amendment*. (*People v. Daan* (1984) 161 Cal.App.3d 22, 30 (emphasis added).)

Even if the Legislature amends a portion of a statute, but leaves other provisions untouched, the Legislature will be presumed to have acquiesced in the previous judicial construction of the unamended portions of the statute:

It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. *Accordingly, reenacted portions of the statute are given the same construction they received before the amendment*. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 (emphasis added).)

The suggestion that the *absence* of amendment signifies disagreement with the Supreme Court's interpretation is

**Table 1**

#### **Former Civil Code section 29:**

A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of the birth of the minor, and the time such minor is under any disability mentioned in Section 352 of the Code of Civil Procedure shall not be excluded in computing the time limited for the commencement of the action.

#### **New Civil Code section 43.1:**

*An action by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth must be commenced within six years after the date of birth, and the time the minor is under any disability mentioned in Section 352 shall not be excluded in computing the time limited for the commencement of the action.*



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simply wrong. As *Marina Point* explained: “Had the Legislature disagreed with the (*In re*) *Cox* (1970) 3 Cal.3d 205 [90 Cal.Rptr. 24],] interpretation of [Civ. Code, § 51], or had it desired to constrict the reach of section 51 in a manner incompatible with *Cox*, it presumably would have altered the preexisting language of the statute so to indicate.” (*Marina Point*, 30 Cal.3d at 735.) In short: If the Legislature disagrees with the Supreme Court, then the Legislature amends the language. Otherwise, it is presumed that the Legislature agrees with the Supreme Court’s interpretation.

If the Legislature disagreed with the Supreme Court’s interpretation of the second part of Civil Code section 29 in *Young*, it would have altered that language when it recodified that provision into Code of Civil Procedure section 340.4. The absence of any alteration shows acquiescence, not disagreement.

Some defendants try to bolster their arguments by suggesting that the recodification of Civil Code section 29, into Code of Civil Procedure section 340.4, was part of MICRA. This is wrong. As explained above, that statute is based

on a 1941 amendment to Civil Code section 29, and the recodification was enacted in 1992. MICRA was adopted in 1975, too late for the 1941 amendment and too early for the 1992 re-enactment. Moreover, the defendants’ position is contrary to the Supreme Court’s explicit holding in *Young*. Section 340.5 is the restriction, for it modifies the common law delayed discovery rule and imposes a repose of three years or the child’s eighth birthday. (*Young*, 41 Cal.3d at 893.) Civil Code section 340.4, with its open-ended delayed discovery rule, would permit more injured patients to seek damages against negligent physicians and hospitals.

### Conclusion

As tempting as it may be to have a court declare that children who have been injured during labor and delivery now have a six-year limitations period – potentially open-ended because of the common law delayed discovery rule – that is not the law. Code of Civil Procedure section 340.5 provides an eight-year limitations period, modified by a three-year repose, for medical malpractice cases based on birth trauma.

The Legislature endorsed the Supreme Court’s construction of both statutes, and the Legislature has done nothing since then to overturn or question that ruling.

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