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Torts Review of Selected 1972 California Legislation

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Torts

Torts; receiving stolen property—civil damages

Penal Code §496 (amended).

SB 1068 (Zenovich); STATS 1972, Ch 963

Support: California Trucking Association

Section 496(1) of the Penal Code provides that anyone who buys, receives, conceals, sells, or withholds property which has been stolen, knowing the property to have been stolen, is guilty of receiving stolen property which may be a felony or a misdemeanor depending on the value of the property involved.

Chapter 963 amends Section 496 to provide that any person who is injured by a violation of Section 496(1) may bring a civil action for three times the amount of actual damages sustained, plus the costs of suit and reasonable attorney's fees.

COMMENT

According to the bill's sponsor, SB 1068 was in response to an upsurge of incidents where vans containing electronics gear, bicycles and similar items were stolen and the property sold at "flea markets". Apparently, it is intended as a deterrent to merchants from engaging in such practices and to give a person who buys such stolen property, and thereafter becomes involved in a legal dispute, a statutory right to sue the merchant for damages [Interview with William T. Meinhold, California Trucking Association, Sacramento, California, November 30, 1972].

Chapter 963, however, grants a civil action to *anyone* who has been injured by a violation of Section 496(1). It is not clear whether this language limits the cause of action to a person who, without knowledge, buys stolen property, or whether it might include all persons who are collaterally injured by the offense, such as the victim of the theft.

Under existing common law, the victim of a theft which results in a violation of §496(1) could bring a civil action for conversion against the merchant to recover damages [2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §143 (7th ed. 1960)]. Conceivably, he could

also recover punitive damages where the necessary malice or oppression is shown [2 WITKIN, *supra*, §§394, 395(b)]. Chapter 963 then, adds to this law by setting the amount of damages recoverable by the plaintiff at three times the amount of actual damages sustained, plus the costs of suit and reasonable attorney's fees.

See Generally:

- 1) 1 WITKIN, CALIFORNIA CRIMES, *Crimes Against Property* §§422-429 (1963).
- 2) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§143, 394, 395B (7th ed. 1960).

Torts; medical malpractice actions

Code of Civil Procedure §1029.6 (amended).

SB 941 (Song); STATS 1972, Ch 653

Support: California Medical Association

Opposition: California Trial Lawyer's Association

Section 405.8 was added to the Code of Civil Procedure in 1969 [CAL. STATS. 1969, c. 608, §1, at 1246] and renumbered §1029.6 in 1970 [CAL. STATS. 1970, c. 910, §1 at 1652]. This section allows a defendant in a medical malpractice suit to move the court for an order requiring plaintiff to post security for the costs of the defense. The court will issue such an order only after a hearing in which the defendant shows to the satisfaction of the court that: (1) the plaintiff would not suffer undue economic hardship in posting such security, and (2) there is no reasonable possibility that plaintiff has a cause of action. This section applies whenever there is a complaint for damages for personal injuries against a physician and surgeon, dentist, registered nurse, dispensing optician, optometrist, pharmacist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or veterinarian licensed by the state, or a licensed hospital. The maximum security deposit is \$500 per defendant with a \$1,000 maximum.

Chapter 653 adds a new provision to §1029.6. This provision requires plaintiff to post security of no less than \$2,500 in the event plaintiff is seeking exemplary damages. All defendant need do is move the court for an *ex parte* order and the court *must* require plaintiff to post security, either in cash or by corporate surety bond. Should the plaintiff fail to make the deposit or post the bond within 30 days after the order is entered, the defendant may then move the court to strike the request for exemplary damages from the com-

plaint. If, at trial, the plaintiff fails to recover any exemplary damages, the bond or cash deposit shall be conditioned on payment by the plaintiff of all costs and reasonable attorney's fees incurred by the defendant in defending against the request for the award of exemplary damages.

COMMENT

Section 1029.6 of the Code of Civil Procedure was originally enacted to protect licensed members of health professions, and the hospitals which employ them, from frivolous law suits for personal injuries [CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 65]. Chapter 653 amends this section to further protect this class of persons from frivolous claims for exemplary damages.

Arguing before the Senate Judiciary Committee, the California Medical Association, proponents of the legislation, stated that many plaintiffs in medical malpractice actions make frivolous allegations of punitive damages as a lever to force the defendant doctor into a settlement on the compensatory damages [Los Angeles Daily Journal, p. 20, May 18, 1972]. Since malpractice insurance policies do not generally provide coverage for any exemplary damages for which the doctor may be liable [CAL. INS. CODE §533; CAL. CIV. CODE §§1668, 3294], the defendant is faced with a potential personal liability and many will prevail on their insurance carriers to make a prompt settlement of the claim. According to Senator Alfred Song, the author of the legislation, the requirement that security be posted will serve to deter many frivolous claims for punitive damages [Los Angeles Daily Journal, p. 1, July 6, 1972].

The legislation does however, contain questions of constitutionality. The *ex parte* nature of the proceeding denies the plaintiff the right to be present at the hearing and to present his position. Additionally, the court is denied any discretion in granting or denying the motion since Section 1029.6(e) specifies that, "upon filing of the motion, the court shall require the plaintiff to file the bond or make the deposit." Thus, should a plaintiff with a meritorious claim for exemplary damages be unable to post the security deposit, that portion of the complaint will be struck and he will be denied access to court for the settlement of that portion of his law suit. It was a similar denial of access to court that led the United States Supreme Court to invalidate two Connecticut statutes requiring a \$30 filing fee and a \$15 service-of-process

fee in order to obtain a divorce [*Boddie v. Connecticut*, 401 U.S. 371 (1971)]. Holding that such statutes constituted a denial of due process, the Court was careful to limit its ruling [401 U.S. 371, 381 (1971)], but the logic of the case may be applicable to the security requirement of Section 1029.6(e). In addition, the Court discussed the statutes as they affected Equal Protection, for the Connecticut statute, like the security requirement, does not deny access to court to all, but only to those who cannot afford the fees.

See Generally:

- 1) 2 WITKIN, CALIFORNIA PROCEDURE, *Actions* §196 (2d ed. 1970).
- 2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 65.

Torts; navigation—rescuer's liability and accident reports

Harbors and Navigation Code §656 (amended).

AB 432 (Stull); STATS 1972, Ch 797

Pursuant to Harbors and Navigation Code §656(a), any operator of a vessel involved in a collision, accident, or other casualty is required to render such assistance as may be practicable to other persons affected by the accident to the extent he can do so without seriously endangering his own vessel, crew, or passengers. Chapter 797 amends §656 to provide that any person who complies with the duty imposed by §656(a) or who gratuitously and in good faith renders assistance at the scene of a vessel collision, accident, or other casualty without objection by any person assisted, shall not be held liable for any civil damages sought as a result of the rendering of assistance or for any act or omission in providing or arranging salvage, towage, medical treatment, or other assistance, *where the assisting person has acted as an ordinary, reasonably prudent man would have acted under the same or similar circumstances.*

Additionally, Section 656 has been amended to provide that the operator or owner of an undocumented vessel (any vessel which is not required to have, and does not have, a valid marine document issued by the U. S. Bureau of Customs or any federal agency successor thereto [CAL. HARB. & NAV. CODE §651], must file an accident report when such vessel is involved in a collision, accident, or other casualty which results in death or injury to a person or property damage in excess of \$100. Chapter 797 further amends §656 to provide that: (1) the Department of Navigation shall prescribe the date by which such accident report is to be submitted; and (2) that a peace

officer, harbor policeman, or others having knowledge of the accident, may file a report, but such filing does not remove the requirement for filing by the operator or owner.

COMMENT

Chapter 797 brings California law into conformity with the Federal Boat Safety Act of 1971 [46 U.S.C. §1451 *et seq.* (Supp. 1972)].

The addition to §656 regarding the liability of one rendering assistance to a victim of a boating accident has the appearance of a *good samaritan* statute. However, presently existing good samaritan statutes regarding aid rendered in an emergency by a professional [CAL. BUS. & PROF. CODE §1627.5 (dentists), §2144 (physicians), §2727.5 (registered nurses)] exempt a person who in good faith renders aid from civil liability for *any* acts or omissions (§2727.5 does not exempt registered nurses from liability for gross negligence). Section 656(b), by its language, still requires the assisting person to use reasonable care to avoid exposure to liability. Therefore it seems that the assisting person will still be liable for ordinary negligence and that §656, as amended, does not relieve such person from any previously existing liability.

See Generally:

- 1) Federal Boat Safety Act of 1971, 46 U.S.C. §1451 *et seq.* (Supp. 1972).

Torts; parental liability for child's tort

Civil Code §1714.1 (amended).

AB 1088 (Biddle); STATS 1972, Ch 442

Support: California Attorney General

Section 1714.1 of the Civil Code was enacted in 1955 to make parents liable for willful misconduct of their children up to an amount of \$300 [CAL. STATS. 1955, c. 820, §1, at 1438]. At common law, parents were not liable for the conduct of their child, and with the child usually quite irresponsible financially, the result was a rather serious problem of uncompensated juvenile depredation [PROSSER, *Torts* §123 (4th ed. 1971)]. Chapter 442 amends §1714.1 to raise the maximum liability of the parents from \$1000 [CAL. STATS. 1970, c. 640, at 1258] to \$2000 for each tort of the minor.

See Generally:

- 1) 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §308 (7th ed. 1960), (Supp. 1969).

- 2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 56.
- 3) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 464 (1971).

Torts; landowner's liability

Civil Code §846 (amended); Government Code §831.4 (amended).
SB 1450 (Bradley); STATS 1972, Ch 1200

Section 846 limits the liability of a landowner for injuries caused by conditions on the premises to persons using the land for various recreational purposes. This immunity does not apply when: (1) there is a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity; (2) a fee is charged for using the property; or (3) the person injured is expressly invited rather than merely permitted to come upon the premises by the landowner. One of the recreational uses covered by this section is riding. The section has been amended to include animal and all types of vehicular riding within the definition of riding.

Section 831.4 of the Government Code provides that a public entity, public employee, or a grantor of a public easement to a public entity is not liable for an injury caused by a condition of an unpaved road or any trail used for various recreational purposes. This section has also been amended to include within the definition of riding, animal and all types of vehicular riding.

See Generally:

- 1) Comment, *Selected 1963 Legislation*, 38 CAL. S.B.J. 647 (1963).
- 2) 2 PAC. L.J., REVIEW OF SELECTED CALIFORNIA LEGISLATION 465 (1971).

Torts; pedestrian right-of-way

Vehicle Code §21953 (amended).
AB 977 (McAlister); STATS 1972, Ch 680
Support: California Trial Lawyers Association

Section 21953 of the Vehicle Code has been amended to provide that any pedestrian who crosses a roadway other than by means of a pedestrian tunnel or overhead pedestrian crossing, if such tunnel or crossing serves the place where the pedestrian is crossing the roadway, shall yield the right-of-way to all vehicles on the highway *so near as to constitute an immediate hazard*, rather than yield to all vehicles on the highway (as provided prior to amendment). This section shall not be construed to mean that a marked crosswalk, with or without a signal device, cannot be installed where a pedestrian tunnel or overhead crossing exists.

COMMENT

Section 21953, as amended by Chapter 680, conforms the standard of care required of a pedestrian crossing a roadway other than by means of an available pedestrian tunnel or overhead walkway to the standard of care required of a pedestrian crossing a roadway not within a marked crosswalk or at an intersection [§21954, *as amended*, CAL. STATS. 1971, c. 1015, §1, at 1955]. Sections 21953 and 21954 now conform with the similar standard of care imposed upon a vehicle operator crossing at an intersection marked by a stop sign or approaching a right-of-way sign (as provided by §§21802, 21803).

Prior to Chapter 680, a violation of §21953 would amount to negligence per se, thus operating as a bar to recovery by an injured pedestrian against a motorist as a matter of contributory negligence [a violation of §21954, prior to its amendment in 1971, was considered negligence per se in *Ferner v. Castalegno*, 141 Cal. App. 2d 467, 297 P.2d 91 (1956)]. Therefore, with respect to contributory negligence, the apparent effect of Chapter 680 is to enable the pedestrian, who is injured while crossing a roadway where a pedestrian tunnel or overhead walkway is available, to litigate the matter of whether the vehicle which struck him was so near as to constitute an immediate hazard when the pedestrian ventured into the roadway.

It should be noted that §21953, as amended by Chapter 680, does not include a provision similar to §21954(b) which provides that §21954 shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway.

See Generally:

- 1) 2 WITKIN, *SUMMARY OF CALIFORNIA LAW, Torts* §335 (7th ed. 1963).
- 2) CALIFORNIA JURY INSTRUCTIONS—CIVIL, (B.A.J.I.), §§5.52, 5.53 (5th ed. 1969).
- 3) 3 PAC. L.J., *REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION* 377 (1972).

Torts; fire protection immunity

Public Utilities Code §774 (new).

SB 780 (Collier); STATS 1972, Ch 663

Support: Public Utilities Commission

Section 774 has been added to the Public Utilities Code to provide that no water corporation which has undertaken to provide fire protection service, nor any employee of such corporation acting in the course and scope of his employment, shall be liable for any death or injury to a person or damage to or loss of property resulting from a failure to provide or maintain an adequate water supply or pressure, or

any equipment or other fire protection facility or service. However, such immunity from liability shall not exceed that of a public agency or any of its employees, as the case may be, under similar circumstances.

Section 774 further states that nothing in this section shall preclude the enforcement of any rule, regulation or order of the Public Utilities Commission.

COMMENT

The immunity granted to private water companies under §774 cannot exceed that of a public agency under similar circumstances. Public agency immunity from liability relating to fire protection is prescribed in §§850, 850.2 and 850.4 of the Business and Professions Code. Section 850 provides that neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service. Section 850.2 provides that neither a public entity that has undertaken to provide fire protection service, nor an employee of such an entity, is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment or other fire protection facilities. Section 850.4 states that neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, except as provided in article 1 (commencing with §17000), Chapter 1, Division 9 of the Vehicle Code (public agencies' civil liability as owners or operators of vehicles), for any injury caused in fighting fires.

See Generally:

- 1) *Heieck and Moran v. City of Modesto*, 64 Cal. 2d 229, 411 P.2d 105, 49 Cal. Rptr. 377 (1966); *Heieck and Moran v. City of Modesto*, 237 A.C.A. 348, 46 Cal. Rptr. 692 (1965).
- 2) *Town of Ukiah v. Ukiah Water and Improvement Co.*, 142 Cal. 173, 75 P. 773 (1904); *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928).