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# Torts

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# Torts

## Torts; implied indemnity actions and the award of attorneys' fees

Code of Civil Procedure §1021.6 (amended).  
SB 1456 (Davis); STATS. 1982, Ch 1838  
Support: California Product Liability Task Force

Existing law provides that attorneys' fees are not generally recoverable<sup>1</sup> in civil actions unless the fees are determined to be a legal injury and the recovery of fees is specifically authorized by statute.<sup>2</sup> In response to a California Supreme Court decision<sup>3</sup> that refused to allow an award of attorneys' fees in certain cases of implied indemnity,<sup>4</sup> law was enacted to permit a court, upon motion and after reviewing the evidence in the principal case, to award attorneys' fees when a person prevails on an implied indemnity claim.<sup>5</sup> Before the court can grant this award, however, existing law requires that: (1) In protection of the indemnitee's own interests, the indemnitee was required to bring or defend an action against a third party due to the tort of the indemnitor;<sup>6</sup> (2) The indemnitor was properly notified<sup>7</sup> of the demand to bring the action or to provide the defense for the indemnitee, but did not defend

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1. There are several established exceptions to the general rule that attorneys' fees are not usually recoverable in civil actions. *See, e.g.,* *Serrano v. Priest*, 20 Cal. 3d 25, 35-48, 569 P.2d 1303, 1307-16, 141 Cal. Rptr. 315, 318-27 (1977) (common fund, substantial benefit, and private attorney general theories); *Prentice v. North Am. Title Guar. Corp.*, 59 Cal. 2d 618, 620-21, 381 P.2d 645, 647, 30 Cal. Rptr. 821, 823 (1963); 4 B. WITKIN, CALIFORNIA PROCEDURE, *Judgement* §§118, 118A (2d ed. 1971 & Supp. 1981) [hereinafter cited as WITKIN]. *See generally* Pederson v. Kennedy, 128 Cal. App. 3d 976, 180 Cal. Rptr. 740 (1982); *Attorneys' Fees and the Federal Bad Faith Exception*, 29 HAST. L.J. 319 (1978-79) (English and American Rules compared).

2. *See* CAL. CIV. PROC. CODE §1021; 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION, 370, 371 (1980) [hereinafter cited as REVIEW]; WITKIN, *supra* note 1, §§116, 117 (2d ed. 1971); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §882 (8th ed. 1974); *see also, e.g.,* CAL. CIV. PROC. CODE §§871.5, 1021.6, 1021.7; CAL. CIV. CODE §3306(a); CAL. WATER CODE §7003.

3. *See* *Davis v. Air. Tech. Indus. Inc.*, 22 Cal. 3d 1, 582 P.2d 1010, 148 Cal. Rptr. 419 (1978). *See generally* WITKIN, *supra* note 1, §118 (Supp. 1981); REVIEW, *supra* note 2, at 370.

4. *See* 22 Cal. 3d at 4-6, 582 P.2d at 1012-13, 148 Cal. Rptr. at 421-22; REVIEW, *supra* note 2, at 370-71 (definition of implied indemnity). *See generally* *Muth v. Urricelqui*, 251 Cal. App. 2d 901, 60 Cal. Rptr. 166 (1967); WITKIN, *supra* note 1, §118A (Supp. 1981), *Actions* §154A (Supp. 1981); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§57A, 737J, 737K, 737L (Supp. 1982).

5. *See* CAL. CIV. PROC. CODE §1021.6; REVIEW, *supra* note 2, at 370.

6. *See* CAL. CIV. PROC. CODE §1021.6; 59 Cal. 2d at 620, 381 P.2d at 647, 30 Cal. Rptr. at 823; REVIEW, *supra* note 2, at 370.

7. *See* CAL. CIV. PROC. CODE §1021.6; CAL. CIV. CODE §2778(6); *Liberty Mutual Ins. Co. v. Beverly*, 299 F. Supp. 213, 218 (E.D. Wis. 1969).

the action;<sup>8</sup> and, (3) The trier of fact determined that the indemnitee was without fault in the principal case that was the basis for the indemnity action.<sup>9</sup>

Chapter 1383 expands existing law by providing that, in lieu of a no fault determination by the trier of fact,<sup>10</sup> the third prerequisite for the payment of attorneys' fees is satisfied if the indemnitee has a final judgment entered in his or her favor.<sup>11</sup> Finally, Chapter 1383 specifies that the final judgement can be a summary judgement,<sup>12</sup> a nonsuit,<sup>13</sup> or a directed verdict.<sup>14</sup>

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8. See CAL. CIV. PROC. CODE §1021.6; REVIEW, *supra* note 2, at 370-71.

9. See CAL. CIV. PROC. CODE §1021.6; REVIEW, *supra* note 2, at 371; see also, *Mize v. Atchinson, Topeka & Santa Fe Railway*, 46 Cal. App. 3d 436, 457, 120 Cal. Rptr. 787, 801 (1975).

10. See CAL. CIV. PROC. CODE §1021.6.

11. *Id.*

12. *Id.*; WITKIN, *supra* note 1, *Proceedings Without Trial* §§173-200 (2d ed. 1971) (summary judgement).

13. CAL. CIV. PROC. CODE §1021.6; WITKIN, *supra* note 1, *Trials* §§350-365 (2d ed. 1971) (nonsuit).

14. CAL. CIV. PROC. CODE §1021.6; WITKIN, *supra* note 1, *Trials* §§350-369 (2d ed. 1971) (directed verdict).

## Torts; fireman's rule

Civil Code §1714.9 (new); Labor Code §3852 (amended).

AB 2351 (Sher); STATS. 1982, CH 258

(Effective January 1, 1983)\*

Support: Attorney General; California Highway Patrol; California Trial Lawyers Association

Existing law allows an injured employee to collect workers' compensation benefits and to bring an action against a third party when the third party's conduct is the cause of the employee's injuries.<sup>1</sup> The judicially adopted "fireman's rule,"<sup>2</sup> however, has prevented firefighters and police officers from successfully maintaining these third party actions.<sup>3</sup> As originally adopted, the fireman's rule barred personal injury

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\* CAL. STATS. 1982, c. 149, §1, at — (amending CAL. LAB. CODE §3852). Chapter 149 created third party liability for willful or negligent injury-causing conduct when the presence of a peace officer or firefighter was known or should have been known to the third party. That chapter became effective as an urgency statute on April 5, 1982 (AB 2105). The language employed in that bill was similar to the language in this chapter.

1. CAL. LAB. CODE §3852.

2. *Giorgi v. Pacific Gas & Elec. Co.*, 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1968).

3. See *Walters v. Sloan*, 20 Cal. 3d 199, 202, 571 P.2d 609, 610, 142 Cal. Rptr. 152, 153 (1977); 266 Cal. App. 2d at 357, 72 Cal. Rptr. at 121; see also 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §491A (8th ed. 1974 & Supp. 1982).

actions initiated by paid fireman against parties whose negligence caused the injury.<sup>4</sup> Recent decisions have extended the rule to apply to peace officers<sup>5</sup> and to bar liability even when the conduct of the third party is “willful or wanton”<sup>6</sup> or “reckless.”<sup>7</sup> Chapter 258 expressly limits the scope of the fireman’s rule by providing for third party liability when firefighters, peace officers, or *emergency medical personnel* are injured as the result of willful or negligent conduct that (1) occurred after the presence of the firefighters, peace officers, or emergency medical personnel was known or should have been known to the third party;<sup>8</sup> (2) violated existing law intended to prevent the injuries<sup>9</sup> suffered by the peace officers, firefighters or emergency medical personnel and occurred after their presence was known or should have been known;<sup>10</sup> or (3) was intended to cause injuries to the peace officers, firefighters or emergency medical personnel.<sup>11</sup> Chapter 258 further provides that the comparative fault<sup>12</sup> of the injured peace officers or firefighters may be allowed to reduce the amount of recovery from the third party.<sup>13</sup>

Existing law permits an employer to make an independent claim or to bring a separate action against the third party for reimbursement of workers’ compensation benefits paid by the employer or required to be paid by the employer in connection with the employee’s injury.<sup>14</sup> Chapter 258 also provides for employer reimbursement by allowing subrogation of the rights created by its provisions to the extent of workers’ compensation benefits and other required amounts paid to the employee or the employee’s dependents.<sup>15</sup> Furthermore, Chapter 258 specifies that in a wrongful death action, the court will determine the respective rights of the employer and of the heirs of the employee against the third party.<sup>16</sup>

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4. See 266 Cal. App. 2d at 355, 72 Cal. Rptr. at 119; Comment, *An Examination Of The California Fireman’s Rule*, 6 PAC. L.J. 660 (1975).

5. See 20 Cal. 3d at 202, 571 P.2d at 610, 142 Cal. Rptr. at 153.

6. See *Holden v. Chunestudey*, 101 Cal. App. 3d 959, 960, 161 Cal. Rptr. 925, 926 (1980).

7. See *Hubbard v. Boelt*, 28 Cal. 3d 480, 484, 620 P.2d 156, 157, 169 Cal. Rptr. 706, 707 (1980).

8. CAL. CIV. CODE §1714.9(a)(1).

9. CAL. VEH. CODE §§2800.1 (flight from certain peace officers), 2801 (obedience to firemen); CAL. PEN. CODE §§148.2 (interference with firemen or emergency rescue personnel), 834a (resistance to arrest).

10. CAL. CIV. CODE §1714.9(a)(2).

11. *Id.* §1714.9(a)(3).

12. See generally *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975) (damages awarded to injured plaintiff in a negligence action shall be reduced in proportion to the amount of fault attributable to the plaintiff).

13. CAL. CIV. CODE §1714.9(b).

14. CAL. LAB. CODE §3852.

15. CAL. CIV. CODE §1714.9(c).

16. CAL. LAB. CODE §3852.

## Torts; punitive damages—corporate employers

Civil Code §3294 (amended).

SB 600 (Maddy); STATS. 1982, Ch 174

Support: Association for California Tort Reform

Opposition: California Trial Lawyers' Association

Existing law provides that a plaintiff can recover punitive damages for breach of an obligation not arising from a contract when a defendant has been found to have acted in an oppressive, fraudulent, or malicious manner.<sup>1</sup> The purpose of this award is to punish the defendant.<sup>2</sup>

Furthermore, under existing law, an employer can be required to pay punitive damages for the acts of an employee if (1) the employer had advance knowledge of the employee's unfitness and employed the person in conscious disregard for the rights and safety of others; (2) the employer authorized or ratified the wrongful act of the employee; (3) the employer was personally guilty of oppression,<sup>3</sup> fraud,<sup>4</sup> or malice.<sup>5</sup> Existing law provides that *corporate* employers can be held liable for punitive damages if an officer, director, or managing agent of the corporation<sup>6</sup> either personally commits the act, or authorizes or ratifies the wrongful act.<sup>7</sup> Prior law also allowed corporate employers to be held liable for punitive damages if an officer, director, or managing agent had advance knowledge of the employee's act.<sup>8</sup> Chapter 174, however, provides that a corporate employer can only be subject to punitive damages if an officer, director, or managing agent has advance knowledge of the employee's unfitness *and* employs the person with a conscious disregard for the rights and safety of others.<sup>9</sup> This change brought about by Chapter 174 codifies recent case law stating that a

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1. CAL. CIV. CODE §3294(a).

2. *See id.*

3. *Id.* §3294(c)(2) (definition of oppression).

4. *Id.* §3294(c)(3) (definition of fraud).

5. *Id.* §3294(b), (c)(1) (definition of malice).

6. Compare CAL. CIV. CODE §3294 with RESTATEMENT (SECOND) OF TORTS §909 (1979). Chapter 174, however, retains the term "managing agent of the corporation", instead of adopting the Restatement term "agent in a managerial capacity acting in the scope of employment" that has been defined in *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 823, 598 P.2d 452, 459, 157 Cal. Rptr. 482, 489 (1971). The term "managing agent" in Chapter 174 was not meant to change the rule for corporate liability provided for in *Egan*. Letter from Senator David A. Roberti, reprinted in 1980 SEN. DAILY J. 14548.

7. *See* CAL. CIV. CODE §3294(b).

8. *See* CAL. STATS 1980, c. 1242, §1, at 4217 (amending CAL. CIV. CODE §3294).

9. CAL. CIV. CODE §3294. The changes in CAL. CIV. CODE §3294 reflect a view similar to the view taken by the RESTATEMENT (SECOND) OF TORTS §909 (1979) on corporate liability.

“conscious disregard” must be found before an award of punitive damages can be made.<sup>10</sup>

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10. *See* O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 806, 142 Cal. Rptr. 487, 492 (1977); *see also* Nolin v. National Convenience Stores, Inc., 95 Cal. App. 3d 279, 288-89, 157 Cal. Rptr. 32, 37-38 (1979).

## Torts; defamation action for peace officers

Civil Code §47.5 (new).

SB 1025 (Robbins); STATS. 1982, Ch 1588

Support: California Highway Patrol; California Peace Officers Association; Peace Officers Research Association of California

Opposition: American Civil Liberties Union; California Trial Lawyers Association; Democratic Womens Forum; State Bar of California

Under existing law, every person is accorded the statutory right of protection from defamation,<sup>1</sup> and a violation of this right gives rise to an action for libel or slander.<sup>2</sup> Under prior law, however, defamatory complaints made against peace officers<sup>3</sup> were absolutely privileged publications.<sup>4</sup> Chapter 1588 now permits peace officers who suffer injury due to defamatory complaints<sup>5</sup> that are filed with their employing agency alleging either misconduct,<sup>6</sup> criminal conduct,<sup>7</sup> or incompetence<sup>8</sup> to bring an action for defamation.<sup>9</sup> With the enactment of Chapter 1588, a peace officer may bring an action for defamation if the complaint is (1) actually false,<sup>10</sup> (2) made with knowledge of its falsity,<sup>11</sup> and (3) made with spite, hatred, or ill will.<sup>12</sup> Furthermore,

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1. CAL. CIV. CODE §43.

2. *See id.* §§44-48.7. *See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§271-334 (1976 & Supp. 1982).

3. *See* CAL. PENAL CODE §§830, 830.6 (definition of peace officer).

4. *See* Imig v. Ferrar, 70 Cal. App. 3d 48, 54-55, 138 Cal. Rptr. 540, 542-43 (1977); CAL. CIV. CODE §42(2)(b). *See generally* Royer v. Steinberg, 90 Cal. App. 3d 490, 153 Cal. Rptr. 499 (1979); Brody v. Montalbano, 87 Cal. App. 3d 725, 151 Cal. Rptr. 206 (1978), *cert. denied* 444 U.S. 844 (1979) (exercise of the privilege).

5. *But cf.* CAL. PENAL CODE §§832.5, 832.7 (authorizing every police and sheriff's department to set up a procedure for handling citizen's complaints); Brent, *Redress of Alleged Police Misconduct: A New Approach to Citizen's Complaints and Police Disciplinary Procedures*, 11 U.S.F.L. REV. 587, 596-612 (1977).

6. CAL. CIV. CODE §47.5. *See generally* WITKIN, *supra* note 2, §282.

7. CAL. CIV. CODE §47.5. *See generally* WITKIN, *supra* note 2, §281.

8. CAL. CIV. CODE §47.5. *See generally* WITKIN, *supra* note 2, §282.

9. CAL. CIV. CODE §47.5.

10. *See id.* *See generally* Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976) (falsity is an essential element of the action for defamation).

11. CAL. CIV. CODE §47.5.

Chapter 1588 provides that knowledge that the complaint was false may be proved by a showing that the complainant had no reasonable grounds to believe the statement was true<sup>13</sup> and exhibited a reckless disregard for ascertaining the truth.<sup>14</sup>

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12. *Id.*

13. *Id.*; WITKIN, *supra* note 2, §304(d). *See generally* Sanborn v. Chronicle Pub. Co., 18 Cal. 3d 405, 556 P.2d 764, 134 Cal. Rptr. 402 (1976).

14. CAL. CIV. CODE §47.5. *See generally* New York Times v. Sullivan, 376 U.S. 254 (1964) (actual malice must be proved before a public official can recover damages in an action for defamation).