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Torts

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Torts

Torts; governmental dog bite immunity

Civil Code § 3342 (amended).

AB 2973 (O'Connell); 1988 STAT. Ch. 298

Existing law provides that the owner of a dog that bites a person who is in a public place or lawfully in a private place is strictly liable for the resulting damages.¹ Chapter 298 precludes claims against any governmental agency using a dog in police or military work if a dog bite occurs while the dog is assisting an employee of the agency,² or while the dog is defending against an annoying, harassing, or provoking act.³

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1. CAL. CIV. CODE § 3342(a). *See* *Chandler v. Vaccaro*, 167 Cal. App. 2d 786, 789, 334 P.2d 998, 1000 (1959) (the legislature enacted Civil Code section 3342 to avoid the injustice of the common law rule that immunizes a dog's first bite); *Gomes v. Byrne*, 51 Cal. 2d 418, 420, 333 P.2d 754, 755 (1959) (in adopting Civil Code section 3342, the legislature did not intend to abolish the defenses of assumption of the risk or wilfully invited injury).

2. *See* CAL. CIV. CODE § 3342(b) (the dog must be assisting: (1) The reasonable apprehension or holding of a suspect; (2) the investigation of a crime or possible crime; (3) the execution of a warrant; or (4) the defense of a peace officer or another person). *See also* *Starstead v. City of Superior*, 533 F.Supp. 1365, 1368 (W.D. Wis. 1982) (repeated attacks by police dogs without reasonable cause for their use is excessive force and a violation of the victims' Fourteenth Amendment due process rights for which recovery is available under 42 U.S.C. § 1983).

3. CAL. CIV. CODE § 3342(b). Chapter 298 does not apply where the victim was not a party, participant, or suspect in the acts giving rise to the use of the dogs. *Id.* § 3342(c). Chapter 298 further requires the government agency to have a written policy for appropriate use of a dog in military or police work. *Id.* § 3342(d).

Torts; health care review committees—immunity

Health and Safety Code §§ 1370, 1370.1 (amended); Insurance Code § 11512.09 (new).

SB 2244 (Beverly); 1988 STAT. Ch. 828

Sponsor: Maxicare Health Plus, Inc.

Support: California Association of Hospitals and Health Systems; California Vision Service Plan; California Dental Association; Kaiser Permanente; Health Net

Under existing law, providers of health care service plans¹ are required to monitor the quality of care, personnel, services, facilities, and costs through peer review committees and subcommittees.² Existing law also declares that: (1) Persons participating in these peer review committees³ have qualified immunities;⁴ (2) neither the review nor the review records of the committee are subject to discovery; and (3) no person attending the review will be required to testify.⁵ Chapter 828 renames peer review committees as plan or provider peer review committees.⁶ Chapter 828 also extends the requirements and protections of existing law to nonprofit hospital service plans⁷ and their plan or provider peer review committees.⁸ Finally, Chapter

1. CAL. HEALTH & SAFETY CODE §§ 1345(f) (definition of a health care service plan); 1346.5 (determination of a health care plan); *cf.* CAL. CORP. CODE § 10820 (definition of health care service plan). *See generally*, Welch, *The New Structure of Individual Practice Associations*, 12 J. HEALTH POL. POL'Y & L. 723 (1987) (defining and evaluating the Health Maintenance Organizations and the new Individual Practice Associations); Ferrari & Sponsler, *Health Maintenance Organizations and the Spector of Antitrust Laws*, 31 LOY. L. REV. 797 (1986) (defining Health Maintenance Organizations, their uses, and needs).

2. CAL. HEALTH & SAFETY CODE §§ 1370, 1370.1. *See* *Elam v. College Park Hospital*, 132 Cal. App. 3d 332, 341, 183 Cal. Rptr. 156, 159 (1982) (a hospital has the duty to insure the competency of the medical staff through: (1) Prudent selection; (2) review; and (3) continuing evaluation of the physicians who are granted staff privileges).

3. CAL. HEALTH & SAFETY CODE §§ 1370 (committees are composed chiefly of physicians, surgeons, dentists, or optometrists); 1370.1 (subcommittees may have a majority of nonphysicians health care providers licensed pursuant to the Business and Professions Code).

4. *See id.* §§ 1370 (prohibiting monetary liability or causes of action against a committee participant who acts without malice, who has made a reasonable effort to obtain the facts, and who believes the action taken is necessary); 1370.1 (the immunity attaches to subcommittee members only if the plan controls the scope of delegated authority and has the ability to revoke the subcommittee's power).

5. *Id.* § 1370 (the immunity does not apply to a person who has requested staff privileges, a party to the action, the subject of the review, or in any action against an insurance carrier alleging bad faith in settlement proceedings). *See* CAL. EVID. CODE § 1157 (proceedings and records of medical review committees must not be subject to discovery, and no person in attendance may be required to testify).

6. CAL. HEALTH & SAFETY CODE § 1370; CAL. INS. CODE § 11512.09.

7. CAL. CORP. CODE § 10840 (definition of a hospital service plan). *See* CAL. INS. CODE § 11512.09 (the contract must be issued under Insurance Code section 11493(e)).

8. CAL. HEALTH & SAFETY CODE § 1370; CAL. INS. CODE § 11512.09 (extends the

828 provides that disclosure of proceedings or records to any person or entity designated to govern or review the committee will not alter the privileged status of the communication.⁹

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privileges to qualified nonprofit hospitals); CAL. HEALTH & SAFETY CODE § 1370.1 (extends the immunities to subcommittees). As long as the review committees have the responsibility of evaluation and improvement of the quality of care rendered, they are eligible for immunity from discovery. *Matchett v. Yuba County*, 40 Cal. App. 3d 623, 115 Cal. Rptr. 317 (1974).

9. CAL. INS. CODE § 11512.09; CAL. HEALTH & SAFETY CODE §§ 1370, 1370.1. See generally J. Blum, P. Gertman, & J. Rabinow, *PROs and the Law*, (1977) (the development and legal aspects of Professional Standards Review Organizations).

Torts; landowner liability—limited immunity for personal injury to persons on land

Civil Code § 846.2 (new); § 846 (amended).

AB 3177 (Bradley); 1988 STAT. Ch. 129

AB 3224 (N. Waters); 1988 STAT. Ch. 1062

Under existing law, a landowner is generally liable for negligently causing injuries to users of the property.¹ However, when a landowner² gratuitously permits a recreational³ user on the property, the landowner is liable only for injuries caused by a willful or malicious failure to guard or warn against a dangerous condition or risk.⁴

1. CAL. CIV. CODE § 1714. See *Rowland v. Christian*, 69 Cal. 2d 108, 118-119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (abolishing the common-law distinctions between invitee, licensee, and trespasser; holding that a landowner's liability for injury to property users is based on the foreseeability of injury under the circumstances, which may include, but is not determined by, the plaintiff's reason for being on the property).

2. See generally CAL. CIV. CODE § 846 (owners of any estate or interest in real property, whether possessory or non-possessory have limited immunity for injuries to recreational users).

3. *Id.* § 846 (recreational purposes include activities such as: Fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleanings, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites).

4. *Id.* § 846. Additionally, the limited immunity does not apply if the landlord received a fee for use of the property or the landlord expressly invited the user onto the premises. *Id.* Except as provided by Civil Code section 846, landowners who permit recreational users on their land do not: (1) Assure the users the premises are safe for the use; (2) elevate the user to the legal status of an invitee or licensee; or (3) incur liability for injury to the user. *Id.* But see Note, *Tort Liability of Agricultural Landowners to Recreational Entrants: A Critical Analysis*, 11 U.C. DAVIS L. REV. 367, 374-377 (1978) (arguing that statutory immunity is not necessary because a court could use a *Rowland* analysis to reach a similar result and the statute may involve an equal guest protection claim similar to that which resulted in the abolition of California's automobile guest statute). See also *Brown v. Merlo*, 8 Cal. 3d 855, 882, 506

Chapter 129 expands the enumerated recreational activities to include hang gliding.⁵

Under existing law, gleanng is considered a recreational use, and a landowner has limited liability for injuries to people gratuitously permitted on the property to glean agricultural or farm products.⁶ Chapter 1062 provides that an owner, tenant, or lessee of land or premises who expressly invites people on the property to glean for charitable purposes is only liable for injuries caused by gross negligence or willful and wanton misconduct.⁷

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P.2d 212, 231, 106 Cal. Rptr. 388, 407 (1973) (statutes limiting liability for injuries to non-paying automobile guests denied those passengers the equal protection of the laws, and the state's interests in encouraging hospitable hosts was insufficient to justify the unequal treatment). See generally *Selected 1963 Legislation* 38 CAL. ST. B.J. 647 (1963) (explaining the background and general effect of Civil Code section 846).

5. CAL. CIV CODE § 846.

6. *Id.*

7. *Id.* (the immunity is not applicable if the owner, tenant, or lessee receives consideration for permitting the gleanng activity).

Torts; nonprofit corporations and associations—officers and directors limited immunity

Code of Civil Procedure § 425.15 (new); §§ 425.13, 425.15 (amended); Corporations Code §§ 5239, 7231.5, 9247 (repealed); §§ 5047.5, 24001.5 (new); §§ 5047.5, 5239, 7231.5, 9247, 24001.5 (amended).

SB 1420 (Lockyer); 1988 STAT. Ch. 1205

SB 1755 (Lockyer); 1988 STAT. Ch. 1204

Support: California Business Properties Association; California Painting and Decorating Contractors; Humane Society (West/East Region); California Legislative Council of Professional Engineers; California Association of Hospitals and Health Systems; Western Liquid Gas Association; Precision Founders, Inc.; Marin United Taxpayers Association; California Chamber of Commerce; California Optometric Association; Sacramento Blood Center; California Dental Association

Opposition: California Trial Lawyers Association

Existing law imposes limited liability upon a volunteer directors or executive committee officers for negligent actions committed within

their capacities as directors or officers of corporations incorporated pursuant to nonprofit public benefit, nonprofit mutual benefit, or nonprofit religious corporation laws.¹ Chapter 1204 extends this limited liability to directors and officers of corporations and associations subject to the general provisions and definitions governing nonprofit corporations and associations.²

The legislature, in enacting Chapter 1205, announces a public policy to encourage volunteer directors and officers to participate in nonprofit corporations³ and nonprofit medical associations,⁴ and to protect these volunteers from personal liability arising from their negligence.⁵ Under Chapter 1205, if a nonprofit⁶ Public Benefit, Mutual Benefit, Religious Corporation, or medical association maintains the required liability insurance,⁷ its volunteer⁸ directors and officers have limited immunity⁹ from any negligent act or omission occurring: (1) Within the scope of that person's duties or official capacity; (2) in good faith; (3) in the best interest of the corporation as defined by the director or officer; and (4) while the director or officer is exercising policy making judgment.¹⁰

1. CAL. CORP. CODE §§ 5239, 7231.5, 9247.

2. *Id.*

3. *Id.* § 5047.5(b) (the corporations must be incorporated under sections 5110-6910 (public benefit corporation), 7110-8910 (mutual benefit corporation), or 9110-9690 (religious corporation)).

4. *Id.* § 21200 (the association can be any unincorporated association organized as a medical association that limits membership to licensed medical doctors and whose members comprise a majority of the doctors in the area where the association functions).

5. *Id.* §§ 5047.5(a); 24001.5(a). These corporations and associations have been unable to procure adequate insurance to protect the personal assets of their volunteer decisionmakers, and thus the volunteers are unwilling to offer their services. *Id.*

6. The corporation must be organized to provide charitable, educational, social or public services, and the corporation must be exempt from federal income taxes under Internal Revenue Code sections 501(c)(3) and 501(c)(6). *Id.* §§ 5047.5(d), 24001.5(d).

7. Chapter 1205 applies only if, at the time of the injury and when the claim is made, the corporation or association maintained a general liability insurance policy of units at least: (1) \$500,000 if the corporation's annual budget is less than \$50,000; or (2) \$1,000,000 if the budget equals or exceeds \$50,000. *Id.* §§ 5047.5(e), 24001.5(e).

8. *Id.* §§ 5047.5(f); 24001.5(f) (the payment of actual expenses incurred to fulfill the persons duties is not compensation); 5047.5(i); 24001.5(i) (Chapter 1205 does not apply to any volunteer who receives compensation in any other capacity, including payment for work).

9. *Id.* §§ 5047.5(b), 24001.5(b) (no cause of action for monetary damages); 5047.5(c), 24001.5(c) (volunteer officers and directors are still personally liable for: (1) Self-dealing transactions; (2) conflicts of interests; (3) guarantees, distributions, and loans; (4) actions by a trust beneficiary; (5) actions by the Attorney General; (6) actions based on fraud, oppression, malice, or gross negligence, or intentional, wanton, or reckless acts; or (7) any restraint of trade).

10. *Id.* §§ 5047.5(b), 24001.5(b). *See id.* §§ 309(a) (defining the standard of care for directors), 309(b) (a director may rely on information the director believes to be reliable from officers, employees, counsel, and board of directors), 5047.5(g), 24001.5(g) (the nonprofit corporation remains liable for any negligent act or omission by the officer or director). *See also* Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 785, 598 P.2d 45, 52, 157 Cal. Rptr.

Existing law provides that a court order is required before a pleading or complaint can contain a claim for punitive damages against a health care provider.¹¹ Chapter 1205 clarifies this provision by limiting the special pleading requirement to actions that arise out of a health care provider's¹² professional negligence.¹³ In addition, Chapter 1205 expands the scope of the special pleading requirement to include causes of action against uncompensated¹⁴ directors or officers of a nonprofit corporation¹⁵ for a negligent act or omission occurring within the scope of their duties and acting within their capacity as directors or officers.¹⁶ The claimant must file a verified petition and supporting affidavits¹⁷ with the proposed pleading.¹⁸ The court must then order the petition served on the opposing party and permit the filing of affidavits in opposition.¹⁹ The court may grant the petition if the court determines there is evidence to substantiate the claim.²⁰

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392, 399 (1979) (directors or officers do not incur personal liability merely because of their position; they must also direct, authorize, or participate in the wrong); *United State Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 594, 463 P.2d 774, 778, 83 Cal. Rptr. 418, 422 (1970) (an error of judgment does not incur liability unless the error results from lack of care or diligence). See generally J. Fishman, *Standards of Conduct for Directors of Nonprofit Corporations*, 7 PACE L. REV. 389 (1987) (explaining nonprofit corporations, directors, and the required duty of care). But see CAL. CORP. CODE §§ 5047.5(h), 24001.5(h) (Chapter 1205 does not apply to any corporation or association that unlawfully discriminates on the basis of race, religion, color, nationality, ancestry, sex, marital status, disability, age, or political affiliation).

11. CAL. CIV. PROC. CODE § 425.13. The court may allow an amended pleading based on supporting and opposing affidavits which show there is a substantial probability that the plaintiff will prevail on the claim. *Id.* The motion to amend the pleading must be filed within two years of the filing of the original complaint or pleading, or not less than nine months prior to the trial date. *Id.*

12. *Id.* § 425.13(b) (definition of health care provider which includes the health care provider's legal representative).

13. *Id.*

14. *Id.* § 425.15(d) (payment of actual expenses incurred in the performance of duties is not compensation).

15. *Id.* § 425.15(e). The nonprofit corporations must be: (1) Incorporated under Corporations Code sections 5110-6910, 7110-8910, or 9110-10015; (2) organized for charitable, educational, scientific, social or other public service; and (3) exempt from federal income tax under the Internal Revenue Code section 501(c)(1). *Id.* Chapter 1205 does not apply to any credit union or corporations organized under Internal Revenue Code sections 501(c)(4), (5), (7), (19). *Id.*

16. *Id.* § 425.15(a). See *id.* §§ 425.15(b) (discovery for evidence of damages is not effected by Chapter 1205); 425.15(c) (Chapter 1205 does not affect any action against the nonprofit corporation based on a negligent act or omission by the directors and officers); 425.15(e)(2) (Chapter 1205 does not apply to any corporation that unlawfully discriminates).

17. CAL. CIV. PROC. CODE § 425.15(a) (the facts providing the basis of liability must be included in the affidavit).

18. *Id.*

19. *Id.*

20. *Id.*

Torts; poison control center limited immunity

Health and Safety Code § 1799.105 (new).

AB 4587 (Leslie); 1988 STAT. Ch. 1192

Sponsor: California Emergency Medical Services Authority

Support: California Hospital and Healthcare Systems; American Academy of Pediatrics; Health Officer's Association of California; California Medical Association; Northern California Emergency Medical Services Administrators Association

Opposition: California Trial Lawyers Association

Existing law generally provides emergency medical services personnel with immunity from damages except for actions performed in bad faith or in a grossly negligent manner.¹ Chapter 1192 extends to a regional poison control center,² established by the Emergency Medical Services Authority (Authority),³ limited immunity from civil damages resulting from negligent acts of the center's medical director, poison information specialist, or provider of information when disseminating gratuitous emergency advice or information.⁴ Under Chapter 1192, the medical director of a poison control center is liable only for acts or omissions performed in bad faith or in a grossly

1. See CAL. HEALTH & SAFETY CODE §§ 1799.100 (immunity for certification organizations), 1799.102 (immunity for persons rendering emergency care at the scene for no compensation), 1799.104 (immunity for physicians, nurses, paramedics, and emergency medical technicians), 1799.106 (immunity for firefighters, law enforcement officers, emergency medical technicians, and employing agencies), 1799.107 (qualified immunity for providing emergency services for public entities and emergency rescue personnel), 1799.108 (qualified immunity for persons certified for prehospital emergency care), 1799.110 (standard for negligence action against physicians and surgeons providing emergency services in general acute care hospitals). See also CAL. GOV'T CODE § 50086 (immunity for good faith rendering of emergency services by trained volunteer search and rescue).

2. Regional poison control center means a hospital-based or other facility which provides information and advice to individuals exposed to poisonous or toxic substances according to the Emergency Medical Services Authority standards. CAL. HEALTH & SAFETY CODE § 1797.97.

3. See *id.* § 1797.1. The Authority is responsible for the coordination and integration of all state activities concerning emergency medical services. *Id.* The Authority must establish geographical service areas and criteria for regional poison control centers. *Id.* § 1798.180(b). A person, business, agency, organization, or any other public or private entity providing poison advice service, using the term "poison control center" or "poison advice center," or using any term implying the qualifications to provide advice on the treatment or handling of poisons, must be designated as a poison control center by the Authority, or provide the information as a service for products or chemicals they manufacture or distribute. *Id.* § 1798.180(c). A qualified health care professional may give advice regarding poisoning or poisons to patients upon request, using professional discretion, or as otherwise allowed by law. *Id.* § 1798.180(d).

4. *Id.* § 1799.105(a). The regional poison control center must: (1) Meet the minimum standards established by the Authority; (2) be designated a regional poison control center by the Authority; and (3) provide information and advice on the management of exposure to poisonous and toxic substances at no charge. *Id.*

negligent manner⁵ when providing emergency information or advice *not* covered by an approved protocol.⁶ A poison information specialist or provider is liable only for civil damages for acts or omissions performed in a grossly negligent manner or in bad faith when providing emergency information in accordance with established protocols.⁷

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5. Gross negligence is "the want of even scant care or an extreme departure from the ordinary standard of conduct." *Van Meter v. Bent Construction Co.*, 46 Cal. 2d 588, 594, 297 P.2d 644, 648 (1956).

6. CAL. HEALTH & SAFETY CODE § 1799.105(c). The negligent failure to adopt adequate protocols, or the negligent adoption of a protocol is not immunized. *Id.* The medical director will not be liable for failure to develop or adopt a protocol if development of an approved protocol for a specific situation is not practical or the situation could not reasonably be foreseen. *Id.*

7. *Id.* § 1799.105(b).

Torts; punitive damages—religious organizations

Code of Civil Procedure § 425.14 (new).
SB 1 (Doolittle); 1988 STAT. Ch. 1410

Existing law provides that a claim for punitive damages may be included when a complaint is initially filed unless the complaint is against a health care provider.¹ Chapter 1410 requires a plaintiff seeking punitive or exemplary² damages from a religious corporation or a religious corporation sole to file a complaint and then file a motion to amend the complaint or pleading to include punitive damages.³ The court may allow the amendment if plaintiff establishes evidence that the plaintiff will meet the burden of proof.⁴

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1. CAL. CIV. PROC. CODE § 425.13. Under existing law the plaintiff may not include a claim for punitive damages against a health care provider without first obtaining leave of the court. The plaintiff must file an amended pleading within two years after filing the complaint or at least nine months before the date the matter is first set for trial, whichever is earlier. *Id.* If there is evidence supporting a claim for punitive or exemplary damages and there is concealment through fraud, misrepresentation, or mistake, then the time limits do not apply. CAL. CIVIL CODE § 3294 (special pleading requirements for suing health care providers). See generally R. WEIL & I. BROWN, CALIFORNIA PRACTICE GUIDE § 6:101.13—6:101.19 (1988) (requirements for claiming punitive damages against a health care provider).

2. CAL. CIV. PROC. CODE § 3294 (definition of exemplary damages).

3. *Id.* § 425.14. The legislature does not intend to restrict plaintiff's right to discover evidence on the issue of punitive or exemplary damages. *Id.*

4. *Id.* Plaintiff must meet the clear and convincing standard of proof under section 3294(a) of the Civil Code. *Id.*