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## Torts

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# Torts

## Torts; physicians and surgeons—breast cancer, notice of alternative treatments

Health and Safety Code §1704.5 (new).

SB 1893 (Roberti); STATS 1980, Ch 916

Support: California Nurses Association; Department of Finance; Department of Health Services; National Organization for Women

Opposition: California Medical Association

In *Cobbs v. Grant*<sup>1</sup> the California Supreme Court held that physicians and surgeons have a duty of reasonable disclosure regarding all the choices of therapy available for the treatment of a patient's illness, including information concerning the inherent and potential dangers involved.<sup>2</sup> The court excluded from this duty of disclosure relatively minor risks inherent in common medical procedures.<sup>3</sup> Chapter 916 applies this same rationale specifically to the treatment of patients with breast cancer.<sup>4</sup>

With the enactment of Chapter 916, the failure of a physician or surgeon who is treating a patient with breast cancer to inform the patient in writing of all the effective alternative methods of treatment that may be medically viable, including surgery, radiology, and chemotherapy, constitutes unprofessional conduct.<sup>5</sup> A physician or surgeon can comply with Chapter 916 by providing the patient with a standardized written summary of all the alternative treatments for breast cancer.<sup>6</sup> This summary, to be developed by the Department of Health Services with the aid of the Cancer Advisory Council, is to be written in layman's language and in a language that can be understood by the patient, and must include information about the advantages, disadvantages, risks, and descriptions of the procedures for each of the alternative treatments for breast cancer.<sup>7</sup> The Board of Medical Quality Assurance is responsible for printing and distributing the summary to all physicians

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1. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

2. *See id.* at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514.

3. *See id.* at 244, 502 P.2d at 11, 104 Cal. Rptr. at 515.

4. *Compare id.* with CAL. HEALTH & SAFETY CODE §1704.5.

5. *See* CAL. BUS. & PROF. CODE §2361 (definition of unprofessional conduct); CAL. HEALTH & SAFETY CODE §1704.5.

6. *See* CAL. HEALTH & SAFETY CODE §1704.5.

7. *See id.*

and surgeons.<sup>8</sup>

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8. *See id.*

## Torts; punitive damages

Civil Code §§3294, 3295 (amended).

SB 1989 (Maddy); STATS 1980, Ch 1242

Support: California Manufacturers Association; Office of the Governor, Legal Affairs Unit

Opposition: California Trial Lawyers Association

Existing law provides that a plaintiff may recover exemplary and punitive damages in civil actions for the breach of a noncontractual obligation when the defendant has been guilty of oppression, fraud, or malice.<sup>1</sup> Prior to the enactment of Chapter 1242, malice was defined as "a motive and willingness to vex, harass, annoy or injure another person,"<sup>2</sup> and *oppression* meant subjecting a person to cruel or unjust hardship in conscious disregard of his or her rights.<sup>3</sup> Also under prior nonstatutory law, *fraud* was defined as "an act of trickery or deceit, intentional misrepresentation, concealment or nondisclosure committed for the purpose of causing injury or of depriving a person of his or her property or legal rights."<sup>4</sup> The crucial element that must be established, regardless of whether one attempts to prove oppression, fraud, or malice, is an evil motive or *animus malus* on the part of the defendant.<sup>5</sup> California case law, however, has provided no consistent criteria for determining *animus malus*.<sup>6</sup> A common area of disagreement is centered on whether the court must assess the defendant's *state of mind* to determine if there in fact existed an ill will towards the plaintiff, or if the *acts* of the defendant justify a finding of malice by showing a conscious disregard of safety.<sup>7</sup>

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1. *See* CAL. CIV. CODE §3294. *See also* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts §848 (8th ed. 1974), (Supp. 1980).

2. *Haun v. Hyman*, 223 Cal. App. 2d 615, 620, 36 Cal. Rptr. 84, 87 (1963); BAJI No. 14.71 (5th ed. 1969); *see Kendall Yacht Corp. v. United Cal. Bank*, 50 Cal. App. 3d 949, 958, 123 Cal. Rptr. 848, 854 (1975); *cf.* CAL. PENAL CODE §7.

3. *See Roth v. Shell Oil Co.*, 185 Cal. App. 2d 676, 681-82, 8 Cal. Rptr. 514, 517 (1960).

4. BAJI No. 14.71 (5th ed. 1969).

5. *Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 29-30, 122 Cal. Rptr. 218, 223 (1975); *see* CAL. CIV. CODE §3294.

6. *See* 49 Cal. App. 3d at 29-32, 122 Cal. Rptr. at 223-25; 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts §850 (Supp. 1980).

7. *See* 49 Cal. App. 3d at 29-32, 122 Cal. Rptr. at 223-25. *Compare Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462-63, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974) and *Mason v. Mercury Gas Co.*, 64 Cal. App. 3d 471, 474-75, 134 Cal. Rptr. 545, 547 (1977) with *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 65-66, 529 P.2d 608, 624-25, 118 Cal. Rptr. 184, 200-01 (1974).

Chapter 1242 amends the Civil Code to set forth specific definitions of malice, oppression, and fraud.<sup>8</sup> Under Chapter 1242, malice is now defined as “conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.”<sup>9</sup> Chapter 1242 retains the definition of oppression “as subjecting a person to cruel and unjust hardship in conscious disregard of that person’s rights.”<sup>10</sup> Moreover, fraud is now defined as “an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.”<sup>11</sup> These definitions would seem to do away with the previous divergent interpretations of the requirements for the assessment of punitive damages by replacing inquiry into the defendant’s state of mind with specific criteria for finding an evil motive or *animus malus*.<sup>12</sup>

In addition, Chapter 1242 amends the Civil Code to expressly specify the circumstances in which liability may be vicariously assessed against an employer for punitive damages.<sup>13</sup> Under prior law, an employer could be held liable for punitive damages based on the acts of his or her agent if the employer authorized or ratified the agent’s acts.<sup>14</sup> Chapter 1242 provides that an employer will be liable for punitive damages resulting from the acts of an employee only if the employer (1) had advance knowledge of the unfitness of the employee and (2) employed the person with a conscious disregard of the rights and safety of others, or authorized or ratified the wrongful conduct of the employee.<sup>15</sup> With respect to a corporate employer, Chapter 1242 requires that the advance knowledge, ratification, or act of oppression, fraud, or malice be on the part of an officer, director, or managing agent of the corporation.<sup>16</sup>

Chapter 1242 also places limitations on pretrial discovery relating to punitive damages.<sup>17</sup> Existing law allows the court to grant a protective

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8. See CAL. CIV. CODE §3294(c).

9. Compare *id.* §3294(c)(1) with BAJI No. 14.71 (5th ed. 1969).

10. Compare CAL. CIV. CODE §3294(c)(2) with *Roth v. Shell Oil Co.*, 185 Cal. App. 2d 676, 681-82, 8 Cal. Rptr. 514, 517 (1960).

11. Compare CAL. CIV. CODE §3294(c)(3) with BAJI No. 14.71 (5th ed. 1969).

12. Compare CAL. CIV. CODE §3294(c) with *Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 29-32, 122 Cal. Rptr. 223-25 and 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §850 (Supp. 1980).

13. See CAL. CIV. CODE §3294(b).

14. See 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §855 (8th ed. 1974), (Supp. 1980).

15. See CAL. CIV. CODE §3294(b).

16. *Id.*

17. See *id.* §3295(c).

order requiring the plaintiff to produce evidence of a prima facie case of liability for punitive damages prior to the introduction of evidence of either the defendant's financial condition or of profits gained by wrongful conduct.<sup>18</sup> Chapter 1242 prohibits pretrial discovery by the plaintiff of the defendant's financial condition or of wrongful profits unless the court, upon motion by the plaintiff supported by appropriate affidavits,<sup>19</sup> determines that there is a substantial probability that the plaintiff will prevail in the claim and specifically enters an order allowing the pretrial discovery.<sup>20</sup> The plaintiff, however, is still entitled to subpoena documents or witnesses to be available at the trial for the purpose of establishing the defendant's financial condition or wrongful profits.<sup>21</sup>

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18. *See id.* §3295(a).

19. *See id.* §3294(c) (the court has discretion to order a hearing on the plaintiff's probability of success).

20. *See id.* §3295(c).

21. *See id.*

### Torts; indemnity—construction contracts

Civil Code §§2782, 2782.5 (amended).

SB 2000 (Beverly); STATS 1980, Ch 211

Support: Associated General Contractors; Office of the Governor, Legal Affairs Unit

Prior to the enactment of Chapter 211, indemnity<sup>1</sup> provisions contained in a construction contract<sup>2</sup> that purported to shield the promisee against liability for losses caused solely<sup>3</sup> by that party's own negligence, *including* losses caused by design defects,<sup>4</sup> were held to be void and unenforceable as against public policy.<sup>5</sup> A statutory exception, however, provides that a party to a construction contract and the owner or other party for whose account the contract is being performed can, between themselves, agree to allocate or limit liability for design defects.<sup>6</sup> Because of the broad statutory definition previously given to indemnity, the possibility existed that the "no fault" provisions allocating lia-

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1. *See* CAL. CIV. CODE §2772 (definition of indemnity).

2. *See id.* §2783.

3. *See* Conley & Sayne, *Indemnity Revisited: Insurance of the Shifting Risk*, 22 HASTINGS L.J. 1201, 1211-13 (1971).

4. *See* CAL. CIV. CODE §2784.

5. *See* CAL. STATS. 1967, c. 1327, §1, at 3158 (enacting CAL. CIV. CODE §2782). *See also* CAL. BUS. & PROF. CODE §7034 (prohibiting licensed contractors from inserting such clauses into any contract or being a party with another licensed subcontractor to any contract containing such clauses).

6. *See* CAL. CIV. CODE §2782.5.

bility regardless of fault, often negotiated by the parties to commercial construction contracts,<sup>7</sup> might be construed as indemnity provisions and thus be held invalid.<sup>8</sup> Chapter 211 prevents this possible frustration of the true intent of the contracting parties by expanding the existing statutory exception permitting allocation of liability for design defects to specifically include those allocations of liability arising out of or relating to the construction contract that have been negotiated and expressly agreed to by the parties.<sup>9</sup> In addition, Chapter 211 now provides that all provisions in a construction contract purporting to indemnify the promisee for liability for design defects will be void and unenforceable, whether or not they are caused by the sole negligence of the promisee.<sup>10</sup>

7. See Letter from Senator Robert G. Beverly to Governor Edmund G. Brown, Jr., June 10, 1980 (copy on file at the *Pacific Law Journal*).

8. See *id.*

9. Compare CAL. CIV. CODE §2782.5 with CAL. STATS. 1967, c. 1327, §2, at 3159.

10. Compare CAL. CIV. CODE §2782 with CAL. STATS. 1967, c. 1327, §1, at 3158.

## Torts; premises liability—recreational purposes immunity

Civil Code §846 (amended).

AB 1966 (McAlister); STATS 1980, Ch 408

Support: California Cattlemen's Association; California Forest Protective Association; Department of Fish and Game; Office of the Governor, Legal Affairs Unit

Existing law provides that the owner of an *estate* in real property has no duty to keep the premises safe for entry or use, or to give a warning of hazardous conditions, to persons entering for recreational purposes.<sup>1</sup> The courts, however, have applied this recreational purposes immunity to a limited group of real property owners.<sup>2</sup> The term "owner of an estate" was defined by the courts as an interest in real property that is or may become possessory.<sup>3</sup> Real property interests that are nonposses-

1. See CAL. CIV. CODE §846. Although *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) has generally abrogated the common law emphasis on plaintiff status, Section 846 is still viewed as a statutory exception providing that recreational users will be owed the duty of care owed to a trespasser. See generally *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 730, 136 Cal. Rptr. 224, 228 (1977); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts §§579-580 (general discussion of the duty owed to trespassers before and after *Rowland*) (8th ed. 1974); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §58 (4th ed. 1971); 38 CAL. ST. B.J. 647 (1963) (Selected 1963 Legislation).

2. See *O'Shea v. Claude C. Wood Co.*, 97 Cal. App. 3d 903, 910-11, 159 Cal. Rptr. 125, 129 (1979); *Darr v. Lone Star Indus., Inc.*, 94 Cal. App. 3d 895, 901, 157 Cal. Rptr. 90, 93-94 (1979); *Smith v. Scrap Disposal Corp.*, 96 Cal. App. 3d 523, 528-29, 158 Cal. Rptr. 134, 136-37 (1979).

3. See 94 Cal. App. 3d at 901, 157 Cal. Rptr. at 93-94. See generally RESTATEMENT OF PROPERTY §9 (1936); R. POWELL, 2 POWELL ON REAL PROPERTY §172 (1977).

sory interests, therefore, did not receive the protection.<sup>4</sup>

Chapter 408, in an apparent response to these court decisions, applies recreational purpose immunity to an owner of any estate *or any other interest* in real property, including both possessory and nonpossessory estates.<sup>5</sup> Under current law, however, an owner of an estate or any interest in real property who gives permission to a person to enter or use the land does not (1) constitute that person a licensee or invitee, (2) extend assurance that the premises are safe, or (3) assume responsibility for any injury to person or property caused by an act of the person given permission to enter or use the land.<sup>6</sup> The owner will be liable only if he acts with malice, has received consideration for his permission, or expressly invites the person onto his land.<sup>7</sup>

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4. *See* 94 Cal. App. 3d at 901, 157 Cal. Rptr. at 93-94.

5. *See* CAL. CIV. CODE §846.

6. *See id.*

7. *See id.*