BY BARRY M. WOLF

Guidance on Using the Bane Act to Redress Government Misconduct

PLAINTIFFS HAVE FOR DECADES used Section 1983 of Title 42 of the U.S. Code to redress police and other government misconduct. Part of the federal Civil Rights Act of 1871, this statute provides for damages and injunctive relief against anyone acting under the color of law who violates a person's federal constitutional or statutory rights.[1] Attorney fees are also recoverable in Section 1983 actions.[2] The possibility of receiving such fees provides additional incentive for counsel to represent plaintiffs, as well as increased leverage for plaintiffs in settlement negotiations. However, Section 1983 case law poses two serious obstacles for plaintiffs suing individual or public entity defendants. These problems have been exacerbated by the increasingly conservative outlook of the U.S. Supreme Court.

The first obstacle concerns individual defendants in Section 1983 cases who are not absolutely immune and therefore will be granted "'qualified immunity'" even if they acted illegally, so long as the defendant's "'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[3] The Supreme Court has in recent years emphasized that "'clearly established law' should not be defined 'at a high level of generality.' [Citation]…. The clearly established law must be 'particularized' to the facts of the case."[4] The Court has applied this standard to consistently hold defendants qualifiedly immune in Section 1983 actions by distinguishing the facts of the case being considered from those of previous decisions.[5] As one academic put it, "[t]he United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal."[6]

Second, Section 1983 does not provide for vicarious liability. In *Monell v. Department of Social Services of the City of New York*, the Court held that only when "execution of a government's policy or custom…inflicts the injury" can a public entity be held liable.[7] The law that has developed pursuant to *Monell* can be confusing. Supreme Court Justice Stephen G. Breyer has written that "*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply."[8]

Possible Workaround

Perhaps in part as a result of dissatisfaction with Section 1983, California attorneys increasingly have attempted to use Civil Code Section 52.1 to redress government misconduct.[9] This statute is part of the Tom Bane Civil Rights Act,[10] "enacted by the Legislature in 1987 in response to the alarming escalation in the incidence of hate crimes in California and the inadequacy of existing laws to deter and punish them."[11] Section 52.1 provides for damages and injunctive relief when one or more persons, whether or not acting under the color of law, interferes or attempts to interfere by threat, intimidation, or coercion with the exercise of California or federal constitutional or statutory rights.[12]

RICHARD EWING

There are advantages to using Section 52.1 as an alternative to Section 1983. For example, despite the Bane Act's origin as an anti-hate crime measure, plaintiffs suing under Section 52.1 need not show discriminatory intent.[13] Qualified immunity is inapplicable to Section 52.1 actions, and public entity defendants can be held vicariously liable.[14] As in Section 1983 actions, plaintiffs suing under Section 52.1 can potentially recover attorney fees.[15] Moreover, a plaintiff whose Section 52.1 claim is based on the violation of California's constitution or statutes can avoid removal to federal court premised on federal question jurisdiction.

However, Section 52.1 has its own set of requirements. The government claims presentation requirement and state law immunities, though inapplicable to Section 1983 actions,[16] are operative when Section 52.1 is invoked.[17] The claims presentation requirement, which allows maintenance of an action against public entities only if an administrative claim has previously been timely filed, can be "'a trap for the unwary and ignorant claimant.'"[18] If a client has fallen into that trap, no Section 52.1 claim can be brought.

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California's state law immunities apply to numerous types of conduct by government employees, although in some cases, these immunities may be easier to defeat than qualified immunity. For example, a court held a defendant liable for excessive force in a Section 52.1 action despite the fact that he was qualifiedly immune on the plaintiff's corresponding Section 1983 claim.[19] The court reasoned that the relevant California immunity statute—Penal Code Section 820.4—requires a government employee to use "'due care,'" and this standard was not satisfied if the officer's actions violated the Fourth Amendment, even though the officer received qualified immunity because he reasonably believed the actions were lawful.[20]

Difficulty with Section 52.1

The most significant obstacle to successful Section 52.1 actions is that, unlike their Section 1983 counterparts, interference with rights must be accomplished by attempted or actual threat, intimidation, or coercion. California state courts have disagreed regarding what plaintiff must show to satisfy this requirement, and decisions within the last three years have created a split between two principal lines of cases that only the California Supreme Court can resolve.

The first line of cases requires that plaintiffs show threat, intimidation, or coercion other than that inherent in the alleged violation of constitutional or statutory rights. The seminal case in this line is *Shoyoye v. County of Los Angeles*, in which the court concluded that "where coercion is inherent in the constitutional violation alleged, i.e., an overdetention in County jail, the statutory requirement of 'threats, intimidation, or coercion' is not met."[21]

The overdetention in *Shoyoye* was deemed negligent, and the court found that the county's employees took no intentional actions amounting to threat, intimidation, or coercion.[22] Some courts have nonetheless cited *Shoyoye* in holding that even intentional acts will not give rise to Section 52.1 liability when the alleged threats, intimidation, or coercion are inherent in the constitutional violation alleged.[23] However, other courts have found that Section 52.1 liability is possible under the *Shoyoye* standard in cases in which the threat, intimidation, or coercion is sufficiently egregious that it is not deemed inherent in the constitutional or statutory violation alleged.

Thus, a court held that even if the *Shoyoye* standard applied, a defendant was properly found liable under Section 52.1 when he unlawfully arrested the plaintiff and used excessive force.[24] The court concluded that "the Bane Act applies because there was a Fourth Amendment violation—an arrest without probable cause—accompanied by the beating and pepper spraying of an unresisting plaintiff, i.e., coercion that is in no way inherent in an arrest, either lawful or unlawful."[25] The gratuitousness of defendant's violence undoubtably influenced the court, which characterized the use of force as "pure spite."[26]Another court held that even a lawful arrest would not preclude Bane Act liability for excessive force, stating "[w]e need not determine whether a plaintiff can establish Bane Act liability without showing the challenged conduct is separate and independent from inherently coercive underlying conduct (like an arrest)," as the defendants allegedly engaged in "multiple nonconsensual, roadside, physical body cavity searches" constituting "*intentional* conduct that is *separate and independent* from a lawful arrest…."[27]

The second line of cases rejects *Shoyoye*'s conclusion that Section 52.1 is violated only when threats, intimidation, or coercion are not inherent in the constitutional violation alleged. The key case in this line is *Cornell v. City & County of San Francisco,* in which defendants chased and arrested plaintiff without having reasonable suspicion to detain him.[28] In discussing the requirements of Section 52.1, the court stated:

> Nothing in the text of the statute requires that the offending "threat, intimidation or coercion" be "independent" from the constitutional violation alleged. Indeed, if the words of the statute are given their plain meaning, the required "threat, intimidation or coercion" can never be "independent" from the underlying violation or attempted violation of rights, because this element of fear-inducing conduct is simply the means of accomplishing the offending deed (the "interfere[nce]" or "attempted…interfere[nce]").[29]

Cornell instead requires a plaintiff to show that a defendant "had a specific intent to violate" the right in question.[30] *Cornell* derived the "specific intent"requirement from case law interpreting 18 USC Section 241, "the most similar federal civil rights statute to Section 52.1…."[31] To show specific intent, a plaintiff must demonstrate two things.

First, the plaintiff must show that the "right at issue [is] clearly delineated and plainly applicable under the circumstances of the case," a legal question that the court decides.[32] Although "clearly delineated" may sound similar to the "clearly established" standard applied in Section 1983 cases, the *Cornell* court evaluated the claimed right at a much higher level of generality than would be considered permissible in Section 1983 cases, stating that the "'right at issue'" was the "right to be free from arrest without probable cause."[33] The court concluded that "there is nothing vague or novel about that claim under the circumstances of this case."[34] When claims are vague or novel, however, courts might well use a more particularized standard.[35]

Second, the plaintiff must show that the defendant acted "'with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that…right.'"[36] The *Cornell* court found that the jury could have properly concluded that the defendants "acted with the 'particular purpose' of depriving [plaintiff] of his right to be free from arrest without probable cause," as a "rational jury could have concluded not only that [defendants] were unconcerned from the outset with whether there was legal cause to detain or arrest [plaintiff], but that when they realized their error, they doubled-down on it, knowing they were inflicting grievous injury on their prisoner."[37]

Another California state court decision followed *Cornell* in holding that a plaintiff's Section 52.1 claim based on excessive force should have gone to the jury.[38] As in *Cornell*, the court required the plaintiff to "prove the defendant acted with a specific intent to violate the plaintiff's civil rights."[39] The court found that because the plaintiffs' evidence "suggested Defendants *deliberately* subjected [plaintiff] to excessive force beyond that which was necessary to make [an] arrest," summary adjudication had been improperly granted to defendants.[40]

Although the *Shoyoye* and *Cornell* lines of cases use different tests to decide whether Section 52.1 has been violated, the outcomes under both tests are likely to be similar in most cases. Both tests preclude negligence as a basis for Section 52.1 liability.[41] Moreover, even intentional actions will not necessarily result in liability. The decisions cited above make it clear that the defendants' conduct must be at the very least unnecessary to carry out an otherwise justified activity such as an arrest. As a practical matter, the more egregious a defendant's actions appear to be, the likelier it is that a Section 52.1 violation can be established under either *Shoyoye* or *Cornell*. However, until the California Supreme Court clarifies how the "threat, intimidation, or coercion" re-

quirement can be met, plaintiff's counsel in California state courts would be wise to attempt to satisfy both the *Shoyoye* and *Cornell* tests.

In contrast, counsel litigating in federal court probably need only satisfy the *Cornell* test except in cases in which a plaintiff alleges negligent conduct. Although the U.S. Court of Appeals for the Ninth Circuit twice followed *Shoyoye* prior to *Cornell*'s being decided, later panels have adhered to *Cornell*.[42] The first Ninth Circuit decision to follow the latter case stated that "we are now guided by *Cornell* to interpret *Shoyoye*'s holding as limited to cases involving mere negligence…."[43] Ninth Circuit panels are theoretically bound by prior panel decisions subject to limited exceptions, including new state court decisions interpreting a state law.[44] Nevertheless, it is not beyond possibility that another Ninth Circuit panel might disregard as dicta the limitation of *Shoyoye* to negligence cases and adhere to *Shoyoye* even in a case involving intentional conduct, as both Ninth Circuit cases that followed *Shoyoye* involved such conduct.[45] Ultimately, only the California Supreme Court or the Ninth Circuit sitting en banc can settle this issue in that circuit.

At present, it seems likely that most acts that would give rise to a successful Section 52.1 claim also would suffice for Section 1983 liability if government actors are involved. As noted, however, there is at least one case in which a court held a defendant liable under Section 52.1 although the defendant had been deemed qualifiedly immune under Section 1983.[46]

It is also possible that the reverse could be true, with a defendant's being held liable under Section 1983 but not under Section 52.1. For example, a police officer could be subjected to Section 1983 liability for garden variety excessive force, the illegality of which was clearly established by case law, while escaping Section 52.1 liability because the force was not deemed independent of the illegal action (*Shoyoye*) or sufficiently excessive to have been committed with the specific intent to deprive a plaintiff of his civil rights (*Cornell*).

Therefore, even if Section 52.1 liability is possible, plaintiffs' attorneys should seriously consider also asserting a Section 1983 claim against governmental defendants. If counsel deems it strongly desirable to avoid federal court and the parties' citizenship is not diverse, then alleging only a Section 52.1 claim based on the violation of California constitutional or statutory provisions would prevent the defendant from invoking federal question jurisdiction to remove the case to federal court. However, uncertainty in California courts regarding the meaning of Section 52.1's threat, intimidation, or coercion requirement renders this course of action risky. Counsel should therefore weigh the benefits of litigating in state court against the possibility that the plaintiff might prevail under Section 1983 but not under Section 52.1. In this scenario, even if the plaintiff prevails under other state law provisions, the chance to recover attorney fees will be lost unless one or more of the plaintiff's other causes of action provide for attorney fees. ■

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[1] 42 U.S.C. §1983.

[2] 42 U.S.C. §1988(b).

[3] Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam).

[4] White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam).

[5] *See, e.g.*, Kisela, 138 S. Ct. at 1153-54; White, 137 S. Ct. at 551-52; San Francisco v. Sheehan, 135 S. Ct. 1765, 1775-78 (2015).

[6] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017).

[7] Monell v. Dep't of Social Servs. of City of New York, 436 U.S. 658, 694 (1978).

[8] Board of Comm'rs. v. Brown, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting).

[9] A Westlaw search of California and federal cases

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[10] Civ. Code §52.1(a).

[11] In re M.S., 10 Cal. 4th 698, 706-707 n.1 (1995).

[12] Civ. Code §52.1(b), (c).

[13] Venegas v. County of Los Angeles, 32 Cal. 4th 820, 843 (2004).

[14] Venegas v. County of Los Angeles, 153 Cal. App. 4th 1230, 1246 (2007) (qualified immunity unavailable); Gant v. County of Los Angeles, 772 F. 3d 608, 623 (9th Cir. 2014) (vicarious liability possible); Knapps v. City of Oakland, 647 F. Supp. 2d 1129, 1168-69 (N.D. Cal. 2009) (same); Burns v. City of Redwood City, 737 F. Supp. 2d 1047, 1065 (N.D. Cal. (2010) (same).

[15] Civ. Code §52.1(i).

[16] California v. Superior Ct., 32 Cal. 4th 1234, 1240 (2004) ("the claim presentation requirement 'is inoperative in an action brought under' 42 United States Code section 1983"); Martinez v. California, 444 U.S. 277, 284 n.8 (1980) ("'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §2983 or §1985 (3) cannot be immunized by state law.'")

[17] Gatto v. County of Sonoma, 98 Cal. App. 4th 744, 764-65 (2002) (government claims presentation requirement applies in Section 52.1 actions); Towery v. California, 14 Cal. App. 5th 226, 233-36 (2017) (Section 52.1 does not abrogate California statutory immunities).

[18] Leake v. Wu, 64 Cal. App. 3d 668, 673 (1976).

[19] Thomas v. Dillard, 212 F. Supp. 3d 938, 941, 948-49 (S.D. Cal. 2016).

[20] *Id.* at 949.

[21] Shoyoye v. County of Los Angeles, 203 Cal. App. 4th 947, 959 (2012).

[22] *Id.* at 961-62.

[23] Allen v. City of Sacramento, 234 Cal. App. 4th 41, 69 (2015) (no Section 52.1 liability for allegedly unlawful arrest without coercion beyond the coercion inherent in any arrest); Quezada v. City of Los Angeles, 222 Cal. App. 4th 993, 1008 (2014) (Section 52.1 was not violated either by requiring peace officers to take a breathalyzer test, as this was a condition of employment, or by stating that a car could be impounded if consent to a search was not given, as that action is lawful pursuant to a search warrant); Julian v. Mission Cmty. Hosp., 11 Cal. App. 5th 360, 395 (2017) (conclusionary allegations that police "'engaged in tactics to scare'" plaintiff failed to state a Section 52.1 cause of action when the only interference with plaintiff's constitutional rights was that inherent in a justified detention).

[24] Bender v. County of Los Angeles, 217 Cal. App. 4th 968, 978 (2013).

[25] *Id.* at 978.

[26] *Id.* at 979.

[27] Simmons v. Superior Ct., 7 Cal. App. 5th 1113, 1127 (2016) (emphasis in original).

[28] Cornell v. City and County of San Francisco, 17 Cal. App. 5th 766, 781 (2017) .

[29] *Id.* at 800.

[30] *Id.* at 801.

[31] *Id.* at 792.

[32] *Id.* at 803. (Internal quotation marks omitted.)

[33] *Id.*

[34] *Id.*

[35] *See, e.g.*, Sandoval v. County of Sonoma, 912 F. 3d 509, 520 (9th Cir. 2018) (Because it was legally unclear whether 30-day impounds were seizures when the impounds occurred, plaintiffs' right was not clearly delineated, so defendants "could not have had the requisite specific intent to violate the plaintiffs' Fourth Amendment rights.")

[36] Cornell v. City & County of San Francisco, 17 Cal. App. 5th 766, 803 (2017). (Internal quotation marks omitted).

[37] *Id.* at 804.

[38] B.B., et al. v. County of Los Angeles, 25 Cal. App. 5th 115, 128 (2018), *as modified* (July 12, 2018), *reh'g denied* (Aug. 9, 2018), *as modified* (Aug. 9, 2018). The California Supreme Court granted review in this case, but the case has precedential value because the court denied a depublication request. (B.B. v. County of Los Angeles, 428 P. 3d 178 (Mem) (October 10, 2018); *see* Cal. R. Ct. 8.1105(e)(1)(B), 8.1115(e)(2).) The issue the Court will be deciding does not pertain to Section 52.1. *See* B.B., et al. v. County of Los Angeles, *supra*, Answer Brief On the Merits, 2019 WL 574908 *10 (2019).

[39] B.B., 25 Cal. App. 5th at 133.

[40] *Id.* at 134 (emphasis in original).

[41] Shoyoye v. County of Los Angeles, 203 Cal. App. 4th 947, 958 (2012); Cornell, 17 Cal. App. 5th at 802.

[42] *Compare* Lyall v. City of Los Angeles, 807 F. 3d 1178, 1196 (9th Cir. 2015) (following *Shoyoye*) *and* Gant v. County of Los Angeles, 772 F. 3d 608, 623-24 (9th Cir. 2014) (same) *with* Reese v. County of Sacramento, 888 F. 3d 1030, 1043-1045 (9th Cir. 2018) (following *Cornell*); Rodriguez v. County of Los Angeles, 891 F. 3d 776, 800-802 (9th Cir. 2018) (same); Sandoval v. County of Sonoma, *supra*, 912 F. 3d at 519-520 (same); *and* S.R. Nehad v. Browder, 929 F. 3d 1125, 1142 n.15 (9th Cir. 2019) (same).

[43] Reese, 888 F. 3d at 1044 n.5.

[44] *Id.* at 1043, 1044 n.5; *see generally* In re Watts, 298 F. 3d 1077, 1082-83 (9th Cir. 2002).

[45] Lyall, 807 F. 3d at 1181-83 (warrantless entry, search and detention) *and* Gant, 772 F. 3d at 624 (coercion in obtaining an incriminating statement from plaintiff).

[46] Thomas v. Dillard, 212 F. Supp. 3d 938, 941, 948-49 (S.D. Cal. 2016).

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