By Peter Zablotsky and Sa'id Vakili

Section 51 Actions against Private Racial Profiling

Litigators can find two recent cases to show that police reports are not privileged

Our nation is currently undergoing a painful examination of racial profiling by law enforcement. At the same time, racial profiling practiced by private individuals remains largely unaddressed. Too often, businesses make police reports falsely accusing minority group members of engaging in criminal activity, such as shoplifting, or bar them from entry on the mere suspicion of criminal activity.[1]

These wrongs may be remedied by civil actions that apply two interpretations of the law regarding the immunity that attaches to private citizens who file police reports. In specific terms, a victim of private racial profiling may be able to claim a civil rights violation under Civil Code Section 51 (the Unruh Civil Rights Act) or a cause of action for defamation under common law.[2] In either case, a civil action is possible because filing a police report bestows only a qualified privilege on the accuser. For public policy reasons, someone who mistakenly suspects another of shoplifting and makes a police report is shielded from a civil rights or defamation action, but only so long as the report is made without malice. If malice is present—for example, if the report is filed for the purpose of harassing or excluding a shopper or patron because of his or her race—the privilege is lost in most states and as a result a civil rights or defamation action lies.

Peter Zablotsky is a professor of law at Touro College Jacob D. Fuchsberg Law Center in New York, and Sa'id Vakili is a partner with the Los Angeles law firm of Vakili & Leus, LLP.

This situation is complicated in California, however, by Civil Code Section 47(b), which provides that a communication made during an "official proceeding" is absolutely privileged.[3] It has long been an issue in California whether filing a police report is an official proceeding, which bestows an absolute privilege on a private individual who files the report.[4] The California Supreme Court has never ruled on this issue. This unresolved conflict becomes acute when private businesses file police reports that discriminate against shoppers or patrons based on race and then claim that Section 47(b) provides immunity from a Section 51 action.

Attorneys seeking to challenge a Section 47(b) immunity claim can now apply the line of analysis that is found in two fairly recent California appellate court cases—*Randall* v. *Scovis* and *Devis* v. *Bank of America*.[5] The cases employ two different approaches, either of which has the potential to resolve the conflict between Section 51 and Section 47(b). The facts behind cases resulting from private racial profiling also illustrate the clear need to challenge the practice.

In a typical private racial profiling case, a retail or other service establishment identifies a patron as a shoplifter, check forger, or other criminal posing a threat to the business for little or no reason apart from the patron's race or national origin. Once profiled, the patron may be subject to blatant surveillance, aggressive security measures, or denial of service. The patron may even be asked to leave or be barred from entering the establishment. Worse still, the establishment may call the police and falsely report that the racially profiled individual committed or was about to commit a crime, with the result that the police question, detain, threaten with arrest, or arrest the patron.[6]

Examples of Profiling

In one case, for example, the operators of a 7-Eleven called the police to enforce a policy of refusing African American shoppers at all times "because the store had recently experienced a problem with blacks shoplifting."[7] In another, the operators of a T. J. Maxx clothing store called the police to remove a "suspicious" black couple from the store, the suspicious conduct being limited to trying on and removing one sweater.[8] In a third case, employees at a Kmart store, after being told to be on the lookout for a shoplifting band of gypsies, called the police when a family of Syrian nationals entered.[9] Sadly, these three examples of private racial profiling, all of which are actionable under Section 51, are not out of the ordinary.

The clarity with which the California legislature has condemned racial discrimination, and the totality of that condemnation, is beyond dispute. The language of Civil Code Section 51 is absolute and unequivocal:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatever.[10]

The language prevents any manifestation of discrimination based on race by any business whatsoever. This prohibition was reaffirmed in the 2000 amendments to the Unruh Civil Rights Act.[11] Moreover, Civil Code Section 52 makes available to the victim of discrimination every remedy in the civil justice system, including equitable remedies, statutory penalties, actual damages, punitive damages, treble damages, and attorney's fees. Section 52 also preserves other independent remedies available to the victim. The 2000 amendments to Section 52 are also utterly decisive.[12]

California courts have been equally clear in their condemnation of racial discrimination. They have held that the language of the Unruh Act is "clear and unambiguous," that the act "is to be given a liberal construction with a view to effectuating its pur-

poses," and that all manner of discriminatory acts by businesses, especially those that discriminate based on race, are prohibited.[13] The only recognized defenses to Section 51 and 52 are exceptions that are related to the nature of the business, particularly when the discrimination involved furthers a strong public policy, as in, for example, affirmative action programs or refusing to sell alcohol to minors.[14]

Despite the unmistakable clarity of the legislature and courts in their condemnation of racial discrimination, defendants in private racial profiling cases have availed themselves of a legal conflict that the California Supreme Court has yet to specifically address. These defendants have cited Civil Code Section 47, which confers privileges on publications that would otherwise be actionable. Section 47(b), in particular, confers an absolute privilege upon a publication made in any 1) legislative proceeding, 2) judicial proceeding, or 3) other official proceeding authorized by law.[15] Ample precedent in a variety of contexts establishes that "official proceedings" as used in Section 47(b) means those that resemble judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings.[16]

A three-prong test has been articulated in numerous cases to assess whether a governmental agency possesses the quasi-judicial or legislative powers that qualify its proceedings for immunity under Section 47(b). The test considers whether the administrative body 1) is vested with discretion based upon investigation and consideration of evidentiary facts, 2) is entitled to hold hearings regarding the ascertained facts, and 3) has power that affects the rights of private persons.[17]

In addition, the statement "authorized by law" in Section 47 indicates that the absolute privilege under Section 47(b) is available only if an express statutory authorization exists for an administrative agency to exercise its official or quasi-judicial powers. The courts have been consistently vigilant in heeding the language of 47(b), including the phrase "authorized by law."[18] The making of a complaint to police authorities is clearly not within the bounds of the first or second prongs of the test, because they relate to legislative or judicial proceedings. Courts are virtually unanimous in categorizing police reports under the third part of the test.[19]

Unanimity is lacking, however, regarding how this third clause is to be applied. In the context of private racial profiling, the open question of whether Section 47(b) applies to police reports in turn affects whether a victim can bring a civil rights or related tort action against the business for the profiling. If police reports are absolutely privileged, all actions, including Section 51 actions, are arguably barred. If, on the other hand, police reports receive only a qualified privilege then the action can go forward, with the plaintiff having the burden of establishing the intent or malice of the defendant in connection with filing a false report. Both *Randall* v. *Scovis* and *Devis* v. *Bank of America* offer important insight on the limitations on the privilege that Section 47 grants.

Randall and Applicability

The argument in *Randall* begins with the premise that the applicability of the Section 47(b) privilege must be interpreted with reference to the entire Civil Code and the torts that flow from violations of the code.[20] This means that Section 47(b) must be interpreted with reference to the prohibition against racial discrimination central to Sections 51 and 52, and the torts that flow from that discrimination.[21] While the relationship between Section 47(b) and Section 51 appears to be an issue of first impression, California courts have held that Section 47(b) does not operate to nullify other statutory and common law causes of action.[22]

One of the first cases to hold that the Section 47(b) privilege does not nullify rights granted elsewhere by the legislature is *ITT Telecom Products Corporation* v. *Dooley.*[23] The court held that a defendant employee who violated the plaintiff employer's right to protect trade secrets under Evidence Code Section 1060 was not protected by the Section 47(b) privilege in a subsequent action brought by the employer for breach of an express confidentiality agreement.[24]

ITT is cited in another case, *Begier* v. *Strom,*[25] in which the plaintiff alleged that the defendant filed a police report that falsely accused him of child abuse and brought a civil action for intentional infliction of emotional distress. The defendant argued that because the abuse allegations were contained in a police report, they were absolutely privileged. The trial court granted summary judgment for the defendant on the claim of intentional infliction of emotional distress. The appellate court reversed the trial court and held that the defendant could be liable under the statutory action and the tort that flowed from it. In allowing the intentional infliction of emotional distress claim to go forward, the appellate court stated that applying Section 47(b) to the Child Abuse and Reporting Act "would essentially nullify the Legislature's determination that liability should attach." The court further held that "[o]ur task is to read statutes with reference to the whole system of law and to avoid rendering a statute meaningless.…"[26]

In March 2001, in the most expansive application of this line of analysis to date, the court in *Randall* reiterated the principles articulated in *Begier* and extended them to a civil action for invasion of privacy under Civil Code Section 1798.53 (Information Practices Act of 1977) for the unauthorized possession and dissemination of confidential criminal records in a guardianship proceeding. Although the *Randall* decision was depublished in June 2001, the principles it articulated remain sound; a cause of action for invasion of privacy by the unauthorized possession and disclosure of criminal records in violation of Penal Code Sections 11143 and 13300 survives the litigation privilege. The court held that an application of the Section 47(b) privilege would strip Section 1798.53 of meaning, that Section 1798.53 creates a civil cause of action for invasion of privacy even though the litigation privilege might otherwise preclude redress for such disclosures under certain circumstances, and that, therefore, a claim for invasion of privacy survives a motion for summary judgment premised on the Section 47(b) privilege.[27]

Randall implies an interpretation of Section 47(b) that is consistent with Section 51 and the resolution of the statutory conflict. When a defendant uses a maliciously filed false police report to discriminate against a patron, a limited exception to the Section 47(b) privilege must lie, and the defendant is not insulated from liability in a Section 51 action or the torts that flow from it. A contrary conclusion would mean that an act of racial discrimination is privileged when the mechanism to carry out the discrimination is a maliciously filed false police report. This conclusion would nullify the legislature's determination that racial discrimination is unlawful. It would, in effect, put a racially discriminatory action by a business beyond the reach of Section 51.[28] This directly contravenes the line of analysis developed in *ITT, Begier,* and *Randall*.

Recent Amendments to Unruh

In addition, the 2000 amendments to the Unruh Act contain language that is consistent with the approach that *Randall* takes toward resolving conflicts between Section 47(b) and other laws. The amendments make no specific mention of Section 47(b), but they reaffirm the California Legislature's total commitment to the prohibition of racial discrimination. In particular, the act's precatory language declares that the intent of the legislature is that actions stemming from the Unruh bill must be "independent of any other provision of law.…"[29] A plaintiff in a private racial profiling case thus has, in *ITT, Begier,* and *Randall*, an argument that strongly con-

travenes a defense based on Section 47(b)—namely, that the section cannot be construed to effectively nullify other statutes. In addition, another line of interpretation can be found in *Devis* v. *Bank of America*.

Devis and Common Law

The second recent argument for resolving the conflict between Section 47(b) and Section 51 is found in *Devis.* The decision applies California common law to Section 47(b). While the California Supreme Court has long recognized that common law is relevant in interpreting Section 47(b) generally, *Devis* is the first case to apply common law to support the conclusion that police reports in particular receive a qualified privilege rather than an absolute one.

Devis begins with a premise that has withstood the test of time: Common law is relevant to interpreting Section 47(b). California courts, including the supreme court, have been relying on common law for this purpose for many decades. For example, in *Silberg* v. *Anderson* in 1990, when discussing the scope of and policies furthered by Section 47(b), the supreme court relied on an analysis of common law found in an article that was published in 1909.[30] And in *Oren Royal Oaks Venture* v. *Greenberg,*[31] the supreme court, relying in part on the same article, states that Section 47(b) "derives from common law principles.…"[32]

Devis, in turn, cites a line of cases that have established that the common law rule in California has been and continues to be that private citizens who file police reports deserve a qualified privilege. This line includes a 1901 case, *Miller* v. *Faro*,[33] which involved a plaintiff who was arrested by the police after having been mistakenly identified as a seller of stolen railroad tickets by the defendant. The court held that the defendant could not be liable for the mistaken identification because in identifying the plaintiff he had acted in good faith and added that "[n]o doubt, if a person should willfully identify the wrong man as being the criminal, for the purpose of having him arrested and prosecuted, and on such identification he should be arrested, such person [would be liable]."[34]

A number of cases follow *Miller,* including *Gogue* v. *MacDonald,*[35] in which the plaintiff alleged that the defendant reported certain facts to a justice of the peace, who then issued a warrant for the plaintiff's arrest. In holding that the plaintiff's complaint failed to state a cause of action, the court emphasized that "[t]here is no allegation of bad faith, such as willful falsity or malice, in the defendant's statement of the facts to the justice of the peace."[36] *Gogue* was followed by *Du Lac* v. *Perma Trans Products, Inc,*[37] in which a plaintiff alleged that the defendants, who were business competitors, had had him arrested and that the defendants knew that the accusations they made to the police were false. Based on the allegedly false statements in the police report, the plaintiff brought an action for false imprisonment. The trial court dismissed the complaint, but the appellate court reversed the dismissal and, relying on case law, held:

> In our view, a different rule controls when an arrest occurs because the defendant knowingly gave the police false or materially incomplete information, of a character that could be expected to stimulate an arrest. Such conduct instigates, encourages, and invites the arrest that follows; hence, such conduct can be a basis for imposing liability for false imprisonment.[38]

Devis, an appellate court decision from the Fifth Division of the Second Appellate District,[39] is a recent application of this long-standing interpretation of the qualified immunity of police reports. *Devis* concerns a plaintiff patron who sued a defendant bank for negligence and defamation based on an erroneous report by the bank to the police that the plaintiff was trying to cash a stolen check. The report lead to the defendant's arrest and jailing. The court dismissed the action in part because the "appellants have not alleged that the Bank acted without good faith."[40] However, in addressing the specific issue of what type of privilege Section 47 grants to police reports, *Devis* (relying, inter alia, upon *Du Lac*) holds that "controlling authority establishes that the privilege applies only if the erroneous report to the police is made in good faith."[41]

Ample Precedent

In the course of its analysis, *Devis* appears to apply precedent accurately. Correctly concluding that Section 47 applies a qualified privilege to police reports, *Devis* relies on precedent dating back 100 years. The California Supreme Court has also recognized that the similarities between Section 47 and common law make the common law authorities relevant to understanding and applying the section.[42] In addition, the holding in *Devis* is reinforced by the fact that even though Section 47(b) has been amended 10 times since its enactment in 1872, the legislature has never amended the section to overrule the century-old rule that police reports receive a qualified privilege.

A brief review of these precedents illuminates a critical point: The absolute privileges codified in Section 47(b) for legislative, judicial, and official proceedings have a different common law source from the privilege to communicate to the police. The *Devis* analysis of Section 47(b) is consistent with the earlier English and American precedents that developed the privileges that were codified in Section 47.

The legislative privilege, and particularly the judicial and official or quasi-judicial privileges, have their source in the English rules that sought to protect lawyers, judges, and witnesses involved in the judicial process.[43] The privilege was deemed absolute because the judge on the bench needed to be free to administer the law without fear of consequences; this independence could not exist if judges were in daily apprehension of having actions brought against them. For the same reason, a similar absolute privilege was extended to grand and petit jurors in the performance of their functions, to witnesses (whether they testified voluntarily or not and whether their testimony was by affidavit or deposition), to counsel in the conduct of cases, to parties to private litigation, and to defendants and prosecutors in criminal cases. The privilege covers anything that is said in relation to the matter at issue, whether in the pleadings, affidavits, or open court.[44]

This judicial privilege is, in turn, the source of the official proceeding privilege. The proceedings to which the absolute privilege attaches include any hearing before a tribunal that performs a judicial function, ex parte or otherwise, and regardless of whether the hearing is public or not. This privilege extends also to the proceedings of many administrative officers, such as boards and commissions, if they have judicial or quasi-judicial powers of discretion in applying the law to the facts.[45]

In contrast, publication in police reports has only a qualified privilege extended "to one who may act in the public interest."[46] The protection is sometimes called the public interest privilege and applies to communications made to those who may be expected to take official action of some kind for the protection of a public interest. This privilege specifically includes private citizens who give information to proper authorities for the prevention or detection of crimes.[47]

The privilege protects false statements that the defendant makes in good faith but not those made with malice. The public interest involved in the privilege is critical, but the qualified privilege is sufficient to encourage citizens to volunteer information concerning criminal activity.[48] As explained in Gatley's *Libel and Slander:*

> Only those who act out of malice, rather than public interest, need hesitate before speaking. It is in these latter instances that "[p]roof of such indirect motive will defeat the privilege

which would otherwise have attached, for it is not to the convenience and welfare of society that false and injurious communications as to the reputation of others would be made, not for the furtherance of some good object, but for the gratification of an evil and malicious disposition or for any other object than that which gave rise to the privilege."[49]

This longstanding common law precedent, however, may be subject to obfuscation during a court proceeding. Specifically, the absolute legislative, judicial, and official privilege on the one hand, and the qualified public interest privilege on the other, can become confused when applied to statements at the beginning of judicial or official proceedings—i.e., complaints to police. However, common law avoids this confusion by extending the absolute privilege only to those complaints to entities that can perform judicial functions and extend judicial protections. Thus, according to Prosser and Keeton's *Torts,* while the immunity extends to "every step in the proceeding," the absolute privilege is limited to complaints made before entities that have judicial or quasi-judicial authority. Only "an informal complaint to a prosecuting attorney or a magistrate" is to be regarded as an initial step in a judicial proceeding.[50] By contrast, the qualified privilege applies to complaints to entities that are neither judicial nor quasi-judicial, such as "information to proper authorities for the prevention and detection of crime,"[51] and, specifically, complaints to police officers.[52]

After considering the common law origins of and policies behind these privileges, authorities in a majority of other jurisdictions that have analyzed this issue[53] have concluded, like the court in *Devis,* that police reports receive a qualified privilege.

As clear as common law is, and as logical as it appears that Section 47(b) does not nullify other statutes, including Section 51, defendants in private racial profiling cases may continue to argue that citizen reports to police enjoy unqualified immunity. Additionally, with no applicable case on the California Supreme Court's docket, the dispute over the type of privilege bestowed by Section 47 on a private individual who files a police report will probably not be resolved definitively in the near future. In any case, attorneys have no reason to believe that private racial profiling will soon cease or that suits challenging this unlawful practice will soon put an end to it. Fortunately for litigators, *Randall* and *Devis* offer two clear interpretations of the language of Section 47(b). *Randall* does so by recognizing an exception to 47(b) when other significant legislation is in conflict, and *Devis*

by bringing to bear common law that is the source of the Section 47(b) privileges. Under either analysis, a cause of action for discrimination based on the malicious filing of a false police report is preserved. ■

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[1] *See, e.g.*, Stephen E. Haydon, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207 (1997); Comment, *New Jersey Law and Police Response to the Exclusion of Minority Patrons from Retail Stores Based on the Mere Suspicion of Shoplifting*, 9 SETON HALL CONST. L. J. 549 (1999) [hereinafter Comment].

[2] Unruh Civil Rights Act, CIV. CODE §§51 *et seq.*

[3] CIV. CODE §47(b).

[4] *Id. See* Williams v. Taylor, 129 Cal. App. 3d 745, 181 Cal. Rptr. 423 (1982); Fenelon v. Superior Court, 34 Cal. App. 4th 607, 40 Cal. Rptr. 2d 291 (1990); Hunsucker v. Sunnyvale Hilton Inn, 23 Cal. App. 4th 1498, 28 Cal. Rptr. 2d 722 (1994); Fremont Comp. Ins. Co. v. Superior Court, 52 Cal. Rptr. 2d 211 (1996); Passman v. Torkan, 34 Cal. App. 4th 607 (1995); Devis v. Bank of Am., 65 Cal. App. 4th 1002, 77 Cal. Rptr. 2d 238 (1998).

[5] Randall v. Scovis, 87 Cal. App. 4th 631, 105 Cal. Rptr. 2d 32 (2001) (certified for publication Mar. 5, 2001, depublished June 13, 2001); Devis, 65 Cal. App. 4th 1002.

[6] *See* Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, UTAH L. REV. 147 (1994); Comment, *supra* note 1, at 549; *ABC News 20/20: Under Suspicion, Security Guards Unfairly Target Black Shoppers* (ABC television broadcast, June 8, 1998), available at 1998 WL 5433617.

[7] Lewis v. Doll, 765 P. 2d 1341, 1342 (Wash. Ct. App. 1989).

[8] Robinson v. Town of Colonie, 878 F. Supp. 387, 392 (N.D. N.Y. 1995).

[9] K-Mart Corp. v. West Virginia Human Rights Comm'n, 383 S. E. 2d 277, 278 (W. Va. 1989).

[10] The Unruh Civil Rights Act, CIV. CODE §§51 *et seq.*

[11] The Unruh Civil Rights Act, CIV. CODE §§51 *et seq.* (amended 2000).

[12] The Unruh Civil Rights Act, CIV. CODE §52 (amended 2000).

[13] *See* Koire v. Metro Car Wash, 219 Cal. Rptr. 133, 134-35, 40 Cal. 3d 24 (1985).

[14] Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 180 Cal. Rptr. 496 (1982).

[15] CIV. CODE §47(b).

[16] *See* Tiedemann v. Superior Court, 83 Cal. App. 3d 918, 148 Cal. Rptr. 242 (1978); Martin v. Kearney, 51 Cal. App. 3d 309, 124 Cal. Rptr. 281 (1975); Imig v. Ferrar, 70 Cal. App. 3d 48, 138 Cal. Rptr. 540 (1977); Kings v. Borges, 28 Cal. App. 3d 27, 104 Cal. Rptr. 414 (1992); Fenelon v. Superior Court, 34 Cal. App. 4th 607, 40 Cal. Rptr. 2d 291 (1990); Picton v. Anderson Union High Sch., 50 Cal. App. 4th 726, 57 Cal. Rptr. 2d 829 (1996).

[17] *See id.*

[18] *Id.*

[19] *See* CIV. CODE §47(b); Williams v. Taylor, 129 Cal. App. 3d 745, 181 Cal. Rptr. 423 (1982); Fenelon, 34 Cal. App. 4th 607; Hunsucker v. Sunnyvale Hilton Inn, 23 Cal. App. 4th 1498, 28 Cal. Rptr. 2d 722 (1994); Fremont Comp. Ins. Co. v. Superior Court, 52 Cal. Rptr. 2d 211 (1996); Passman v. Torkan, 34 Cal. App. 4th 607 (1995); Devis v. Bank of Am., 65 Cal. App. 4th 1002, 77 Cal. Rptr. 2d 238 (1998).

[20] *See* Begier v. Strom, 46 Cal. App. 4th 877, 885, 54 Cal. Rptr. 2d 158 (1996); Randall v. Scovis, 87 Cal. App. 4th 631, 105 Cal. Rptr. 2d 32 (2001).

[21] *See* Legislative Counsel's Digest, AB 2719 (Wesson): Civil Rights: Causes of Action: Enforcement (ch. 98,

2000).

[22] *See* Begier, 46 Cal. App. 4th 877; Randall, 87 Cal. App. 4th 631; Mattco Forge, Inc. v. Arthur Young & Co., 5 Cal. App. 4th 392, 6 Cal. Rptr. 2d 781 (1992); ITT Telecom Prods. Corp. v. Dooley, 214 Cal. App. 3d 307, 262 Cal. Rptr. 773 (1986).

[23] *See* ITT, 214 Cal. App. 3d 307.

[24] *Id.*

[25] *See* Begier, 46 Cal. App. 4th 877.

[26] *Id.* at 886; *see also* Roe v. Superior Court, 229 Cal. App. 3d 832, 280 Cal. Rptr. 380 (1991).

[27] *See* Randall, 87 Cal. App. 4th 631.

[28] *See* Begier, 46 Cal. App. 4th 877; Randall, 87 Cal. App. 4th 631.

[29] Legislative Counsel's Digest, AB 2719 (Wesson): Civil Rights: Causes of Action: Enforcement (ch. 98, 2000).

[30] *See* Silberg v. Anderson, 50 Cal. 3d 205, 214, 266 Cal. Rptr. 638 (1990); Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings,* 9 COLUM. L. REV. 463-91 (1909).

[31] Oren Royal Oaks Venture v. Greenberg, 42 Cal. 3d 1157, 232 Cal. Rptr. 567 (1986).

[32] *Id.* at 1164. *See also* ITT Telecom Prods. Corp. v. Dooley, 214 Cal. App. 3d 307, 262 Cal. Rptr. 773 (1986) (citing RESTATEMENT OF TORTS in a discussion of CIV. CODE §47(b)).

[33] Miller v. Faro, 134 Cal. 103, 66 P. 183 (1901).

[34] *Id.* at 107.

[35] Gogue v. MacDonald, 35 Cal. 2d 482, 218 P. 2d 542 (1950).

[36] *Id.* at 484, 218 P. 2d at 543; *accord* Hughes v. Oreb, 36 Cal. 2d 854, 859, 228 P. 2d 550 (1951) ("[I]t would be unjust to compose liability for an honest mistake in identification.…"); Turner v. Mellon, 41 Cal. 2d 45, 257 P. 2d 15 (1953).

[37] Du Lac v. Perma Trans Prods., Inc., 103 Cal. App. 3d 937, 163 Cal. Rptr. 335 (1980).

[38] *Id.* at 337.

[39] *See* Devis v. Bank of Am., 65 Cal. App. 4th 1002, 77 Cal. Rptr. 2d 238 (1998).

[40] *Id.* at 1008.

[41] *Id.*

[42] *See* Legislative Counsel's Digest, AB 2719 (Wesson): Civil Rights: Causes of Action: Enforcement (ch. 98, 2000); Begier v. Strom, 46 Cal. App. 4th 877, 54 Cal. Rptr. 2d 158 (1996); Randall v. Scovis, 87 Cal. App. 4th 631, 105 Cal. Rptr. 2d 32 (2001).

[43] PROSSER & KEETON, TORTS 817-18 (5th ed. 1984) [hereinafter PROSSER & KEETON].

[44] *Id.*

[45] *Id.*

[46] *Id.* at 830.

[47] *Id.* at 819, 830.

[48] *See id.* at 817-18; Fenelon v. Superior Court, 34 Cal. App. 4th 607, 40 Cal. Rptr. 2d 291 (1990); Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992).

[49] Toker v. Pollak, 44 N.Y. 2d 211, 221, 376 N.E. 2d 163, 168 (1978) (quoting GATLEY, LIBEL & SLANDER 216 (3d ed.)).

[50] PROSSER & KEETON, *supra* note 43, at 819.

[51] *Id.* at 830.

[52] *Id.* at 830 n.69. *Accord* 50 AM. JUR. 2d *Libel & Slander* §214 (2000) ("[A] communication to a law enforcement officer is generally held to be a qualified privilege."); Annotation, *Libel and Slander: Privilege Regarding Communications to Police or Other Officer Respecting Commission of Crime,* 140 A.L.R. 1466-78 (1942) (The "majority of cases expressly dealing with [communications to the police] hold that the privilege is qualified or conditional, not absolute.").

[53] *See, e.g.,* Fridovich v. Fridovich, 598 So. 2d 65 (Fla. 1992). For a compilation of authorities by a California appellate court, *see* Fenelon v. Superior Court, 34 Cal. App. 4th 607 n.8 (1990).