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## **PUBLIC SAFETY**

### **Fact or Fiction?**

"Do you believe that law enforcement officers have a duty to protect you from harm?"  
Ask yourself that question, and, your answer is . . . . ?

That is a question I have frequently asked. The overwhelming majority of answers have been affirmative; ranging from "Yes." to "That's what they are paid to do!" The next logical question is "How can we be certain we know the correct answer?".

The correct answer is found in Appellate Court decisions. The following summaries of a few Appellate Court decisions will provide some insight into this area of the law.

The administrator of the estate of Ruth Bunnell who had been killed by her estranged husband brought a wrongful death action against the city whose police department refused to respond to her call for protection some 45 minutes before her death. Mrs. Bunnell had called the police to report that Mack Bunnell had called saying he was on his way to her home to kill her. She was told to call back when Mack Bunnell arrived. The police had responded 20 times to her calls in the past year, and on one occasion, arrested her estranged husband for assaulting her.

The Court of Appeal held that the police department and its employees enjoyed absolute immunity for failure to provide sufficient police protection. The allegations that the police had responded 20 times to her calls did not indicate that the police department had assumed any special relationship or duty toward her such as would remove its immunity.

Hartzler v. City of San Jose (1975) 46 Cal.App.3d 6, 120 Cal.Rptr. 5

A husband and wife who were assaulted in a laundromat while the assailant was under surveillance by officers, brought legal action against the city and the officers for intentional and negligent infliction of emotional distress and for negligent investigation, failure to protect and failure to warn. The Supreme Court held that: (1) the mere fact that the officers had previously recognized the assailant from a distance as potential assailant because of his resemblance to persons suspected of perpetrating a prior assault did not establish a "special relationship" between officers and assailant under which a duty would be imposed on officers to control assailant's conduct; (2) factors consisting of officer's prior recognition of assailant as likely perpetrator of previous assault and officer's

surveillance of assailant in a Laundromat in which victim was present did not give rise to special relationship between officers and victim so as to impose duty on officers to protect victim from assailant; and (3) victim could not maintain cause of action for intentional or reckless infliction of emotional distress, in view of fact that it was not alleged that officers failed to act for the purpose of causing emotional injury, and that in the absence of such an intent to injure, officer's inaction was not extreme or outrageous conduct.

Davidson v. City of Westminster (1982) 32 Cal.3d 197, 185 Cal.Rptr. 252

The widow and sons of a motorist who drove into the void where a collapsed bridge had been, brought action against the State, county, and county deputy sheriff. The California Department of Transportation (Cal Trans) was aware that a violent storm with heavy rains had caused a bridge on State route 118 to collapse. A county deputy sheriff had observed the beginning of the collapse, reported it and requested assistance from Cal Trans. A jury award of \$ 1,300,00 was reversed in part by the Court of Appeal which held: (1) the county deputy sheriff had no duty to warn drivers that the state highway bridge had collapsed during the storm, and his efforts to warn drivers did not in any way increase the risk of harm to users of the highway, and therefore the county was not liable to motorist's wife and children; and (2) the judgment was upheld against the state because the Cal Trans was notified at 1:52 a.m. and at 2:35 a.m., but no Cal Trans personnel nor CHP officer appeared at the scene until 5:45 a.m., and that such delay was unreasonable.

Westbrooks v. State (1985) 173 Cal.App.3d 1203, 219 Cal.Rptr. 674

In an action against police officers and city for personal injuries sustained by Kathryn Ne Casek when she was knocked down on a sidewalk by two suspects who had been arrested by the officers, the Court of Appeal held the amount of force or method used by a police officer in attempting to keep an arrested person or persons in custody is a discretionary act for purpose of application of doctrine of immunity of government officials from civil liability for their discretionary acts, and therefore Ms. Ne Casek who was injured by two escaped suspects who had been handcuffed together could not maintain an action against the arresting officers based on the officer's alleged negligence in using insufficient force to keep the prisoners in custody.

Ne Casek v. City of Los Angeles (1965) 233 Cal.App.2d 131, 43 Cal.Rptr. 294-

An action was brought by several landowners against the City of Los Angeles and the State pleading eleven separate causes of action for damages arising out of the 'Watts' Riots' of 1965. The Court of Appeal held that none of the allegations presented was sufficient to show any duty owed by any of the officials named as defendants to act to prevent or avoid the harm suffered by the plaintiffs.

Susman v. City of Los Angeles, et al (1969) 269 Cal.App.2d 803, 75 Cal.Rptr. 240

A silent burglar alarm installed on the premises of the store operated by the plaintiff was, during the course of a robbery by two armed men, activated at 3:32 p.m. and the alert message was relayed to the police department. The dispatch message to the units in the field was at 3 :4-3 P-m., and a police unit arrived at the scene of the robbery at 3 :4-4 p.m. The delay in the transmission of the dispatch enabled the robbers to complete the robbery and escape with jewelry and merchandise in the amount of \$49,000. The Court of Appeal held that Govt. Code section 84-6 provides for immunity if no police protection is provided; or, if police protection is provided, but that protection is not sufficient.. "The statutory scheme makes it clear that failure to provide adequate police protection will not result in governmental liability, nor will a public entity be liable for failure to arrest a person who is violating the law. The statutory scheme shows legislative intent to immunize the police function from tort liability from the inception of its exercise to the point of arrest, regardless of whether the action be labeled 'discretionary' or 'ministerial.'"

Antique Arts Corp. v. City of Torrence (1974) 39 Cal.App.3d 588, 1 14- Cal.Rptr. 332

I believe that an accurate statement of the law regarding whether or not law enforcement officers have a duty to protect an individual from harm is: Law enforcement officers do not have a duty to protect an individual from harm, unless a special relationship exists between the law enforcement agency and the individual. Most of the cases in which a special relationship was found to exist involved a person suffering an injury while in custody; or, shortly after being released from custody by officers who knew, or should have known, that the person was unable to exercise ordinary care. If a law enforcement officer, or other public employee, does go to the aid of a person in jeopardy or distress, they are performing an act outside the scope of their official duties, and they assume the duty of using reasonable care.

The six cases listed above are only a few of the California cases dealing with this subject. Those cases were chosen as examples because of the differences in the fact patterns on which each case was based. Anyone can go to a law library and ask a librarian to assist them in locating the published opinions of these cases. Each opinion will include citations to the cases and statutes relied upon by the appellate court justices in their reasoning process which was the basis for reaching their opinion.

If you are not already familiar with the way law book publishers print the appellate court opinions, ask the librarian to show you the case summary, and the "head notes", all of which are added by the publisher, and where the Court's opinion that was written by the court begins. Only the language in the Court's opinion is "official", the case summary and the "head notes" are not. Not all opinions of the courts ate unanimous decisions, and some opinions include dissenting opinions.

California is not the only jurisdiction following that general rule of law. Here are some citations to appellate court decisions from other jurisdictions, but the list is by no means complete. Your law librarian can assist you in locating these cases, and the cases and statutes cited in them.

- DeShaney v. Winnebago County Social Services (1989) 489 US 189
- Bower v. DeVito (1982) 686 F.2d 616
- Calgorides v. Mobile (1985) 475 So.2d 560
- Warren v. District of Columbia (1983) 444- A.2d 1
- Morgan v. District of Columbia (1983) 4-69 A.2d 1306
- Sapp v. Tallahassee (1977) 34-8 So.2d 363, cert.denied 354 So.2d 985
- Keanev. Chicago (1968) 98 Ill.App.2d 460, 24-0 N.E.2d 321
- Jamison v. Chicago (1977) 48 Ill.3d 567
- Simpson's Food Fair v. Evansville 272 N.E. 2d 87
- Silver v. Minneapolis (1969)) 170 N.W.2d 206
- Wuetrich v. Delia (1978) 155 N.J.Super. 324, 382 A.2d 929
- Chapman v. Philadelphia (1981) 290 Pa.Super. 324, 382 A.2d 753
- Morris v. Musser (1984) 84- Pa.Cmwvth. 170, 4-78 A.2d 937
- Weiner v. Metropolitan Authority, and Shernov v. New York Transit Authority (1982) 55 N.Y.2d 175, 948 N.Y.S. 141

Who does have a duty to protect a person from harm? Parents have a duty to protect their children, but other than that, the short answer is no one has that duty. The ultimate responsibility for your protection is self protection, should you care to undertake that responsibility. Is there any legal authority to justify exercising the right of self protection in California? Please consider the following:

Article I, Section 1 of the Constitution of the State of California clearly states that you have that right:

*All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing safety, happiness and privacy.* (The present language was adopted November 5, 1974, and changed the original version, which was adopted in 1849, by substituting the word "people" in place of "men," and by adding the word "privacy" at the end of the sentence.)

California Civil Code, section 50 provides:

*Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, aster or guest.* (Enacted in 1872. Amended by Code Am. 1873-74, extending the right to use force to protect a relative without reference to degree, a member of one's family, and a guest.)

California Penal Code, section 692 provides:

*Lawful resistance to the commission of a public offense may be made:*

1. By the party about to be injured.
2. By other parties.

(Enacted in 1872.)

California Penal Code, section 693 provides:

*Resistance sufficient to prevent the offense may be made by the party about to be injured:*

1. To prevent an offense against his person, or his family, or some member thereof.
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

(Enacted in 1872.)

California Penal Code, section 694 provides:

*Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent that offense.*

(Enacted in 1872.)

Civil Code section 50, and Penal Code sections 692, 693 and 694 as quoted above are still in effect. I find those code sections, enacted in the early 1870's, to be straight forward and easy to understand. They recognize the realities of life. Not all people are law abiding; and, law abiding people have the right to protect themselves and their property, and to come to the aid of others in need of assistance and protection from individuals committing the public offenses.

Today, unfortunately, that is not the current state of the law. Thousands of laws have been enacted since 1872 that have effectively denied any truly effective means of exercising the "inalienable rights" recognized in Article I, Section 1 of the Constitution of the State of California, outside of the persons home. The identified "need" for those laws has been "crime control", but we have a much larger percentage of our population in jails and prisons now than ever before. A vastly larger percentage than in 1872, which is evidence that as government makes it more difficult for the law abiding individuals to protect themselves, they become victims of crime.

There are some people that advocate the philosophy of pacifism, and who are unwilling to accept the responsibility for protecting themselves from harm or injury. However, pacifism has never been shown to deter crime. Exercise of your inalienable rights in

Article I, Section 1, is not mandatory. You may refuse to defend yourself and exercise your right to be a victim.

I believe the correct answer to my original question is: **Law enforcement officers do not have a duty to protect an individual from harm.** That raises more questions that should be considered. Why is the public so misinformed about such a fundamental issue involving public safety? What can be done to educate the public to the true facts on this issue to enable them to make informed decisions about their personal protection? The writer invites ideas from the readers regarding this article.

Should you have any questions or comments, please send them to the writer's address.

John D. Brophy

Note: My great friend and a wonderful American, John D. Brophy, passed away on January 19, 2004 at the age of 78. He never stopped fighting for our Second Amendment rights.

Devy Kidd  
March 20, 2005