

# Liability & Legal Aspects

Module II.D

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Study Guide

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# Introduction

*Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice.*

**- Abraham Lincoln (Jan. 27, 1838)**

Even though our legal system is often criticized, it still provides the best form of justice in the world. As a security officer, you should have a good understanding of both our criminal justice and our civil legal systems. By understanding the basic principles and applying your knowledge to your everyday responsibilities when necessary, you will help contribute to making our society a little safer.

As you know, many businesses, hospitals and schools in this country have experienced the sad effects of criminal acts against their patrons, employees and visitors. These crimes range from theft of company and personal property, to violent rapes, assaults, and even murders.

Security officers are often the "first responders" to these incidents. As such, not only are you responsible for ensuring proper practices are followed (usually to assist law enforcement), you should also be aware of the potential effect your actions may have in the event of a civil lawsuit. Your organization, including its officers, has likely become the targets of civil lawsuits brought by the victims. These cases are increasing at an alarming rate.

Security personnel have additional exposure to liability based upon the nature of their job. Allegations of excessive use of force, inadequate training of security officers, negligent hiring and improper supervision are often made against security officers and their employers. Allegations of false arrest, assault and illegal detention are also quite prolific in the legal world.

It is not the goal of this course to make you lawyers (there are already enough of us!). Rather, the purpose of this training module is to provide you

with an overview of the California legal system, the difference between criminal actions and civil actions, and the particular crimes and actions most applicable to the security officer professional. This knowledge will not only help you in being a security officer who follows the law, but hopefully will act as an aid in reducing your chances of being involved in a lawsuit.

**Notes:**

# California's Legal System: The Three Branches

The California legal system is modeled upon the Federal legal system and is comprised of three branches of government: the Legislative Branch, the Judicial Branch, and the Executive Branch. Each section of the government has a specific purpose, and no section can be successful without the other branches' input or assistance.

## Legislative Branch

The legislature is responsible for making and enacting laws. California has two legislative bodies: the State Senate and the State Assembly. There are forty state senators and eighty state assembly members. The Senate and the Assembly work together to pass laws.

Once laws are passed, they are written into our codes to be enforced. These are called "statutes." Statutes become the "law of the land" in California. Although most common criminal statutes are found in the Penal Code, statutes concerning criminal conduct are also found in the Health & Safety Code (e.g., illegal drugs), the Vehicle Code (e.g., driving under the influence, hit and run), and Business & Professions Code (e.g., governing illegal activity by professionals, such as security officers under the "Private Security Services Act"). There are many other codes in California, but most do not apply to your everyday activities.

## Judicial Branch

The judicial branch is our court system. We have three levels of courts: the trial courts (known as the Superior Court), the intermediate appellate courts (known as the Court of Appeal), and the court with the final say, our Supreme Court of California. [Note that our State court system is identical to the Federal Court System, which also has a trial court level, an intermediate appellate court level and the U.S. Supreme Court. Federal courts usually deal only with federal statutes passed by our Senators and Congress in Washington D.C.]

Our California courts interpret the laws passed by the state legislature. The

judiciary also imposes sentences for particular offenses. In both civil and criminal matters, cases begin in Superior Court in the geographical area where the crime or action arose.

## Juries

Our jury system is what makes our form of justice superior to any other form of law in the world. It is typically comprised of twelve of our “peers”, is presumably unbiased, and as its goal it seeks to determine the truth. Clearly, exceptions exist, but for the most part our system works well.

The jury listens to all of the testimony of witnesses, reviews all of the documents and other evidence, and determines what actually happened. The jury is the “finder of fact.” Whatever the jury determines actually happened will ultimately determine the outcome of the case.

In criminal matters, all twelve jurors must unanimously agree if they want to find a criminal defendant guilty or not guilty. Anything other than a unanimous verdict (e.g., 11-1) is what we call a “hung jury,” which often results in a re-trial.

In civil matters (which will be explained below), eight out of twelve jurors must agree on the verdict. [The reason that a unanimous verdict is not required is because we tend to believe that if a mistake is made, the wronged person will not be in custody since the civil system does not incarcerate people. Since no loss of liberty is at stake, we give a bit more leeway to the jury in their decision- making process.]

At the trial court level, the defendant in a criminal matter has the right to a jury in all misdemeanors and felonies. A judge may preside over a criminal infraction (which is less than a misdemeanor), where there is no right to a jury.

In a civil action, if a jury is not demanded (or requested) in a timely manner, the parties’ right to a trial before a jury may be waived and a judge will preside over the trial. In the trial court, the jury (or judge if there is no jury),

decides the facts that are in dispute based on the evidence presented in the case. The trial court judge tells the jury the law that applies to the case.

## Appeal

Criminal defendants, and in civil matters any party, may choose to file an appeal following a trial. An appeal asks a higher court to determine whether the trial court committed prejudicial error - for example by applying the wrong laws, or whether the verdict supported the evidence. Generally, an appeal is made to the California Court of Appeal.

The Court of Appeal is made up of many justices. However, on any given case, a three-justice panel is assigned to resolve the appeal. These justices typically started as trial court judges and were elevated based upon their merit. The Court of Appeal reviews what happened at trial and determines whether the trial judge properly interpreted the law, whether the jury's verdict was properly supported by admissible evidence, or whether any other serious irregularity occurred. The Court of Appeal can reverse or affirm the trial court result.

Finally, if a party is not satisfied with the ruling by the Court of Appeal, an appeal to the California Supreme Court may be filed. The California Supreme Court is the supreme governing body for the State of California. Seven justices preside over this court for the entire State of California.

In criminal death penalty cases, the Supreme Court has no choice but to hear an appeal brought by a person sentenced to death. In most other instances, however, they have the right to reject a request for hearing. (In fact, according to the Judicial Council of California, only about 3% of criminal petitions and 5% of civil petitions are "granted", that is, accepted to be heard by the Supreme Court.)

## Executive Branch

While the Legislative Branch passes the laws and the Judicial Branch interprets and applies the laws, it is up to our State's Executive Branch to enforce the laws.

The Governor of the State of California presides over the Executive Branch. Law enforcement and prosecutors work within the Executive Branch to ensure the laws are enforced.

## Law Enforcement

Local police, county sheriffs, and State police (including the California Highway Patrol) are all comprised of sworn peace officers. These officers have all undergone rigorous training in police academies and have achieved a state certification (known as POST, or Peace Officer's Standards and Training). Receipt of the POST certificate indicates an officer's strong knowledge of the law.

You have no doubt heard this before, but it is worth repeating: as a security officer, your job is NOT to act as a police officer, but to apply your skills and knowledge as, perhaps, a more informed citizen than the average Joe or Jane. In California, the Bureau of Security and Investigative Services (BSIS), which is part of the California Department of Consumer Affairs, licenses security officers and is under the ultimate direction of the Governor. Thus, your security officer licensing is under the executive branch of our government.

On a criminal level, the law enforcement officer is the first person to determine whether or not the criminal justice system will be used. Law enforcement personnel decide whether to arrest someone for suspicion of committing a crime. If they decide to charge a person with a crime, the case is then presented to a prosecutor.

## Prosecution

Prosecutors are attorneys working for the government who must determine whether or not a suspect should be prosecuted in the Superior Court for the crime alleged by the police. Prosecutors can be local City Attorneys, who enforce misdemeanors and other local ordinances, County District Attorneys, who enforce both misdemeanors and felonies, or State Attorneys General, who are responsible for handling all appeals on behalf of the prosecution and enforcing State regulations. An example of enforcement of State regulations is when a state license, such as a security officer license, is being revoked. This administrative matter is handled by the Attorney General's office.

When a case is presented to the prosecutor by the police for filing, the prosecutor must then determine whether there is sufficient evidence to

support a conviction of the suspect. If not, the case ends there and no further prosecution takes place. However, if charges are filed, then the case is presented to the Superior Court for trial. Of course, most cases are resolved by a plea bargain (a settlement) due to the high volume and overload of cases in our courts.

The prosecutor will represent the People of the State of California in the trial court and try to obtain a conviction of a criminal defendant. In the trial, a jury will hear evidence and testimony and decide whether the defendant is guilty or not guilty.

As a security officer, if you were involved in an arrest of a criminal suspect, you will likely be called upon by the prosecution as a witness on behalf of the People. Your testimony may be crucial in obtaining a conviction. You will have

the opportunity to learn more about how to testify in future training modules that have been deemed to be electives by the Bureau of Security and Investigative Services.

# Criminal Law and Civil Law: The Differences

Our California justice system is really two separate and distinct systems. One is our criminal justice system, and the other is our civil justice system. The criminal justice system involves the loss of liberty if the defendant loses in court. A civil defendant usually must pay monetary damages if they lose.

Although the two systems are different, they work out of the same court system described earlier in this module. In fact, a trial judge might hear criminal matters in the morning and civil cases in the afternoon.

It is important for you to understand the distinction between the criminal and civil justice systems. As a security officer, it is possible that you will encounter both.

Administrative law is separate from both the criminal and civil law systems. Administrative laws regulate licensees. For example, the question as to whether a security officer's license is valid or should be renewed is a decision determined by an Administrative Law Judge. An Administrative Law Judge presides over regulatory matters.

## Criminal Law

As previously stated, criminal law involves the loss of liberty. Crimes are punished by fines and/or incarceration. There are two major categories of crimes: felonies and misdemeanors. Felonies are crimes punishable by a year or more in the State prison. Misdemeanors are crimes punishable up to a maximum of one year in the county jail. Some crimes can be charged as either a misdemeanor or a felony. These are referred to as "wobblers".

## Penal Code

The law for the majority of crimes in California is set forth in the California Penal Code. The Penal Code establishes the categories of crimes, the elements for each crime, and the maximum or mandatory sentencing for each crime. However, other codes also establish crimes. These include: the Health & Safety Code (e.g., illegal drugs), the Vehicle Code (e.g., driving under

the influence, hit and run), and Business & Professions Code (e.g., governing illegal activity by professionals, such as security officers under the “Private Security Services Act”).

## **City or County Ordinances**

In addition to the California Penal Code, there are certain crimes in California that arise by violation of local City or County Ordinances. For example, a building code violation may be charged as a misdemeanor if the City or County ordinance provides the authority to do so. Loitering or ordinances prohibiting skateboarding or bicycling in certain areas are examples of crimes that may be designated by local ordinances.

## **Civil Law**

As opposed to criminal law, which involves the loss of liberty or criminally imposed fines, civil law involves the loss of money from either a “tortfeasor” (one who commits a tort), or an individual, group, or corporate entity that may have breached an obligation or contract with another. The categories of civil law that are most applicable to the security officer profession are intentional torts (such as assault and battery) and unintentional torts (such as negligence).

A “tort” is simply a Latin word meaning a “wrong.” If someone has committed the tort of negligence, then they have “wronged” the other person by being negligent. (This will be discussed later in the Unintentional Torts section.) The party claiming a wrong is the Plaintiff.

## Common Crimes: The Elements

There are two different areas of our legal system: Criminal Law and Civil Law. In California, crimes are usually defined by the California Penal Code. The prosecutor has the burden of proving all elements of a crime. A conviction for a crime requires that the prosecutor prove all elements beyond a reasonable doubt.

Crimes are offenses against the People of the State of California and are prosecuted by a governmental agency such as the District Attorney's office, the Attorney General's office, or a local City office. Crimes are punishable by death, imprisonment, fine, removal from office, or disqualification to hold an office of honor, trust or profit in the State. (Cal. Penal Code Section 15.)

## Anatomy of a Criminal Proceeding

Although discussed above, a brief overview of what leads to a criminal conviction, from inception through verdict, is worth detailing. A criminal proceeding starts with an arrest by law enforcement personnel. After the arrest, the government agency (the District Attorney, the Attorney General or the City Prosecutor) decides whether a criminal complaint should be filed against the person. The criminal complaint sets forth the criminal charge and the basic facts to support the charge. The prosecutor then conducts a preliminary hearing in felony matters. The prosecutor must present sufficient evidence to establish the basic elements of the crime. If the judge determines there is enough evidence to require the Defendant to "answer" for the crime, the case proceeds to a jury trial. The jury decides the facts of the case. The judge applies the law in the case and a verdict is rendered.

Although many crimes occur every day, the security professional will only encounter a few different types of criminal activity. Each crime has certain elements that must be met in order to establish the crime that has been committed. The elements are like a cookbook recipe. All elements must be present to establish that the crime occurred. The security officer must know what elements are required for the crimes he/she encounters before a proper arrest may be made.

Some of the more common crimes a security officer are likely to encounter

involve crimes to land and crimes against a person or their property.

## Crimes to Land

### Vandalism

Vandalism is defined in California Penal Code Section 594(a) as:

Every person who maliciously commits any of the following acts with respect to any real or personal property that is not his or her own, in cases other than those specified by state law, is guilty of vandalism: (1) Defaces with graffiti or other inscribed material. (2) Damages. (3) Destroys.

California Jury Instructions lists the elements for a vandalism charge.

**In order to prove this crime, each of the following elements must be proved:**

1. A person defaced with graffiti or other inscribed material, damaged or destroyed any real or personal property belonging to another person; and
2. The person acted maliciously in doing so."

The amount of damage to the property determines if the vandalism will be charged as a felony (over \$400 in damage) or a misdemeanor.

### Trespass

Trespass is the unlawful entry onto property without the permission of the owner. It is also unlawful to loiter in an area specifically posted with a no loitering sign. Both trespass and loitering are misdemeanors.

California Criminal Jury Instruction (CALJIC) 16.350 lists the elements for a trespass charge.

***"Every person who enters or remains in any noncommercial dwelling house, apartment, or other residential place without the consent of the owner or his or her agent or person in lawful possession thereof is guilty of a violation of Penal Code Section 602.5 , subdivision (a), a misdemeanor. "***

**In order to prove this crime, each of the following elements must be proved:**

1. A person willfully entered or remained in a noncommercial dwelling house, apartment or other residential place belonging to another; and
2. That person entered or remained without the consent of the (owner, etc.)."

## **Crimes against a Person or a Person's Property**

### **False Imprisonment**

False imprisonment is the intentional unlawful confinement or restraint of another person.

California Penal Code Section 236 defines false imprisonment as: "The unlawful violation of the personal liberty of another." If a person is falsely imprisoned by means of violence, menace, fraud, or deceit, the crime of false imprisonment is considered a felony and is punishable by imprisonment in state prison.

### **Kidnapping**

California Penal Code Section 207 defines kidnapping as: " Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." Kidnapping is a felony. (Note, a person may be "kidnapped" by moving the person only a few feet, for example, into a building or into another room in a building.)

### **Burglary**

Every person who enters any building with the specific intent to steal, take,

and carry away the personal property of another of any value and with the further specific intent to deprive the owner permanently of that property is guilty of the crime of burglary in violation of Penal Code Section 459. (California Jury Instructions Criminal Section 14.50.)

## **Robbery**

Robbery is the taking of personal property from another person, while in their immediate presence, and with intent to permanently deprive thereof by force or threats.

## **Theft Crimes: Larceny, Grand Theft, &**

### **Embezzlement**

#### **Larceny**

One type of theft is larceny. Larceny is simply the taking of property from the possession of another person who has a superior right to its possession, and with the intent to permanently deprive. We commonly refer to this as theft.

There are different classifications of theft and larceny, depending, in part, on the value of the item stolen. Grand theft is committed when the money, labor, or real or personal property taken is of a value exceeding nine hundred and fifty dollars (\$950). (Penal Code Section 487)

Petty theft is theft, in all cases other than grand theft, (theft with value less than \$950.)

#### **Embezzlement**

Embezzlement is another type of theft. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted. Embezzlement requires the transfer of ownership of the property. The defendant in an embezzlement case has the rightful possession of the property, but then unlawfully transfers ownership of the property. For example, a valet driver has the rightful possession of a car from a restaurant patron. However, if the valet then uses the car for his own personal use, the valet has embezzled the vehicle from the owner. Similarly, a cashier has the

lawful possession of the business's money. But, when the cashier pockets that money, embezzlement occurs.

## **Assault**

California Penal Code Section 240 states: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Note, an assault does not require an actual touching or use of force upon another. The mere attempt to injure another is an assault.

## **Battery**

Section 242 of the California Penal Code defines battery: "A battery is any willful and unlawful use of force or violence upon the person of another." Excessive use of force, even in a situation when force is allowed, can be a battery upon a person.

As a security officer, you know that you have a right to use reasonable force to overcome resistance in order to make a lawful arrest or to defend yourself or others. However, if you use more force than is reasonable, then it is deemed to be "excessive force." Use of excessive force can be charged as a battery.

## **Disorderly Conduct Crimes**

Health and Safety Code Section 11350 and the sections following, prohibit the possession or sale of controlled substances. In addition, a person may be violating Penal Code Section 647(f) if the individual is "found in a public place under the influence of intoxicating liquor, any drug, [or] controlled substance . . . in such a condition that her or she is unable to exercise care for his or her own safety or the safety of others . . ."

## **Local Ordinances**

The security professional must also be aware of local ordinances. Local ordinances may be very specific and can involve prohibitions of various activities such as skateboarding, loitering, bicycling and trespass. The ordinances are fully enforceable, just as those laws passed by our State Legislators. This subject is covered in detail in the Powers to Arrest course.

## Civil Laws

In the course of your role as a security officer, you should be aware that much of what you do will be the enforcement of rules. Most people, thankfully, are both law abiding and rule obeying. Unfortunately, the tough times happen when someone does not want to follow the rules.

This can sometimes result in contact, verbal confrontation, or even physical confrontation. People are detained and arrested. Police are called. People who believe they were wrongfully detained or dealt with often turn to the civil court system to seek “justice” in the form of money.

In addition to enforcing rules, the law places the responsibility upon you to make sure you do your job skillfully and reasonably. This may include something as simple as properly documenting the patrol rounds that you are making, even on foot, at your client’s business or building.

When people suffer an injury due to your actions, the criminal actions of third parties, or even your failure to act, the result can be a civil lawsuit. By understanding what is expected of you, you can reduce the likelihood of a lawsuit against your company and you.

Torts (i.e. “wrongs”) can be unintentional (such as negligence), or intentional (such as assault and battery, false imprisonment, harassment, etc.). Both unintentional and intentional torts are actionable in the civil court system.

The purpose of this section is to educate you on the more common reasons you might get sued. By learning, you can avoid the pitfalls!

### Anatomy of a Civil Litigation

A civil lawsuit starts with an incident. Typically, someone suffers injury. This party is the Plaintiff. Sometimes a claim is submitted immediately upon the injury occurring. This provides the defendant with notice as to what transpired, who was involved, and what the facts are regarding the injury. However, an injured party does not need to submit any type of claim or notice. The first notice of an injury may be the filing of a lawsuit!

With a two-year statute of limitations period for most civil actions, it is imperative that the officer take notes, prepare an incident report, and

document the circumstances for all injuries during or immediately following the incident. (Code of Civil Procedure Section 335.2.) It is very difficult to recall specific facts two years after an incident without these aids.

After the lawsuit is filed, the parties may participate in discovery. Discovery allows both sides the opportunity to learn additional facts of the case.

Discovery may be written or oral. Oral discovery is in the form of a deposition. The deponent is placed under oath and the questions and answers are transcribed by a court reporter. Written discovery may request written answers to questions and production of documents. The security officer may be asked to have his or her deposition taken and to answer written questions under oath.

Upon completion of discovery, a civil lawsuit may proceed through mediation or arbitration or straight to trial. The trial may be a court trial, with a judge deciding the questions of fact, or more likely, will be a jury trial with a jury determining the facts of the case.

## **The Most Common Unintentional Tort:**

### **Negligence**

#### **Negligence Defined**

The cause of action (i.e., civil “charge”) for negligence is best defined by the current California jury instruction:

***Negligence is the failure to use reasonable care to prevent harm to oneself or to others.***

***A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. (CACI 401.)***

Basically, negligence occurs when you did something you should not have done, or didn’t do something you should have done.

#### **Elements of Negligence**

Individuals may be liable for their acts of negligence. To be found responsible

for damage or injury to another, all of the elements of negligence must exist. The elements of a cause of action for negligence are: (1) a legal duty to use due care, (2) a breach of that duty, (3) causation between that breach and the Plaintiff's resulting injury, and (4) actual loss or damage to the Plaintiff. (Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal. 4th 666.)

## **Duty**

The first element of negligence is duty. Everyone has a duty to use ordinary care in conducting activities from which harm might reasonably be anticipated. [Witkin, 6 Summary (9th), Torts, §732] Duty is often referred to as the standard of care.

To determine whether or not a duty exists, the relationship of the parties is examined and the foreseeability of harm is analyzed. For example, an owner of property has an affirmative duty to use ordinary care to remove a reasonably anticipated hazard or to give warnings. *Williams vs. Carl Karcher Enterprises*, (1986) 182 Cal.App.3d 479; *Tuttle v. Crawford* (1936) 8 Cal.2d 126.

As a security officer, if you are assigned a post in an office building lobby, you would have a duty to ensure that the lobby area is safe for the public's use. For example, if you notice a pile of ice cream on the floor in the lobby during your regular rounds, common sense tells you that a hazard exists because someone could slip and fall on the ice cream. You have an obligation to notify the building management as quickly as possible so that it can be cleaned up. It would also be prudent to either stand there until the mess is cleaned, or to mark it with a warning cone until it is cleaned.

### **Breach of Duty**

If a duty exists, the next step in determining liability is analyzing whether or not the duty, or standard of care was breached. The standard of care may be established by contract or by the generally accepted practices within the security industry using a "reasonable person" standard.

### **Standards of Care**

For example, if the client requires you to make regular foot patrol rounds every hour and you fail to do so, you have violated the standard of care imposed upon you by the contract (these requirements are usually reflected in the post orders). Assuming that someone slipped on the ice cream pile

because you failed to see it due to your failure to make your regular rounds, you have violated the standard of care and have thus breached your duty.

Similarly, if someone was attacked in the parking lot as they were going out to their car, and the allegation is that the security officer failed to see a “menacing looking individual” hanging around the parking lot for over an hour, a failure to make regular rounds could be a basis for showing negligence. That is, the officer breached the standard of care by failing to make the regular rounds.

[Note: If the officer did, in fact, make regular rounds, which can be proven by their paperwork or through an electronic tour verification system, this will go a long way to show that the officer did act reasonably. It also shows that the “menacing individual” probably was not there during the rounds or they would have been contacted by the security officer, or the police would have been called. In such a case, there would be no breach of the standard of care – no breach of a duty.]

In the California case of *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal. App. 4th 1225, the plaintiff, a hiring manager, was shot by a former employee at the place of business. The security company knew of the fired employee’s rage and his intent to return to the office, but the security company did nothing to stop the former employee from repeatedly entering the premises. The terminated employee drove his car into the employee parking lot and successfully shot his former manager. The Court of Appeal affirmed the jury verdict against the security company. The security company not only had a duty to protect against this known danger, but also was the proximate cause of the Plaintiff’s injury because it failed to take reasonable steps to prevent the fired employee from gaining access to the employee parking lot.

California law supports the proposition that security officers cannot prevent all criminal actions and the officer’s actions are not necessarily the cause of the Plaintiff’s injury. *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal. 4th 666; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal. 4th 1181, *Saelzler v. Advanced Group 400* (2001) 25 Cal. 4th 763. However, the determination of liability in the *Rosh* case highlights the necessity for the security officer to take action when there is a known danger.

## **Special Relationship May Give Rise to a Duty**

If a person has a special relationship to another, there is usually a greater duty to the individual. If a special relationship exists, the party may be liable not only for his or her actions but also for failure to act. For example, a security officer may be found to be in a special relationship with an individual(s) for whom the officer is hired to protect. Although the officer cannot prevent all criminal activity, the officer's special relationship requires the officer to take action to protect those individuals. A regular citizen would have no duty to protect another from harm, but due to the special relationship of the officer, the officer has a duty to take action to protect others.

## **Causation**

In addition to the elements of duty and breach of duty, a negligence action must establish the causation between the actions of the one who allegedly committed the tort and the injury sustained by Plaintiff. A connection between the injury and the action must exist. Did the hazard cause the injury or would the injury have occurred independent of the hazard? Did the actions (or inactions) of the security officer cause the injury?

The current California jury instruction defining causation looks to whether the action (or inaction) was a "substantial factor" in bringing about the plaintiff's harm: A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. (CACI 430.)

Generally, a security officer is not expected to prevent an unexpected drive-by shooting because there is nothing that a security officer could do to foresee or prevent it. Thus, such a situation would not give rise to liability.

Similarly, assume that a security officer's post orders require him or her to make foot patrol rounds at an open air shopping mall, where the businesses include a grocery market and several clothing stores. The parking lot is very large and only one security officer is assigned to the post.

Assume that the security officer did make regular rounds (which can also be

documented). Assume also that two motorists fight over a parking space and in the course of 30 seconds, a verbal quarrel turns into a physical assault. The security officer who had made a round just three minutes earlier did not see anything unusual (as the confrontation between the motorists had not yet even occurred).

In this example, the security officer's actions or inactions had nothing to do with the physical assault. The officer could not have prevented it since it was not foreseeable and it happened so quickly.

However, if the security officer observed the motorists having the verbal quarrel, but did nothing further, a jury may determine the security officer failed to act with ordinary care. If one of the motorists is injured as a direct result of the security officer's inaction, then the officer is indeed a "substantial factor" in bringing about the harm. The element of causation would be satisfied.

Referencing the ice cream example again is also helpful here. Assume the security officer failed to make rounds and thus failed to see the hazardous ice cream spill on the ground. If the patron of the premises slips and falls on the ice cream, which likely would not have occurred if the security officer had diligently done his/her job, then the officer's failure to make rounds would likely be a direct cause of the plaintiff's injuries. That is, it was a "substantial factor" in bringing about the harm.

## **Damages**

The last element of a negligence action is damages, which means the Plaintiff must have suffered actual injury as a result of another's actions. There are different types of damages. Economic damages are the actual, dollar amount of damages one incurs. For example, medical bills, repair invoices and loss of earnings are economic damages.

Non-economic damages are damages awarded for the pain and suffering of the injured party. These damages are not tied to any specific dollar amount, but must be reasonably tied to the injury alleged. [Note: Damages are discussed in further detail later in this module.]

## **A Word about Terrorist Acts and Negligence**

The most common legal and liability concerns involving a security officer are wrongful detention, excessive use of force, unreasonable search, and failure to act reasonably in the performance of the duties. Unfortunately, now there is another category of concerns for the security professional arising from terrorist acts.

The security officer must now also be concerned about terrorist attacks in public locations: office buildings, shopping malls, airports, rail stations and other places where members of the general public congregate. Although the security officer cannot be liable for unforeseen criminal acts, Acts of War, or unprecedented terrorist attacks, the officer must be aware of such possibilities.

The possibility of a terrorist attack brings a new role for the security professional. There is heightened access control into buildings, diligent sign-in and sign-out sheets, careful checking of identification and access cards, a closer look at visitors and heightened requirements regarding escorting visitors.

The access control also requires thorough searches of personal property and the use of metal detectors. Security officers involved with parking access control must be aware of low riding vehicles and diligently tow abandoned vehicles. Watching for potential car and truck bombs or unattended packages are a concern for the patrolling officer. If your employer provides those types of security services, you must be sure that these tasks be done properly. This duty requires proper training for each task. Failure to do so could be deemed negligent.

## Intentional Torts

In addition to negligent actions, an individual may be liable for his or her intentional acts that cause injury to another. Recovery for intentional torts is not limited to economic and non-economic damages listed above. Intentional torts also give rise to liability for punitive damages. Punitive damages are damages awarded by the jury to punish the Defendant for their actions. An insurance policy does not cover for punitive damages. An employer is not required to pay for punitive damages alleged against its employee.

In summary, a security officer needs to be aware of intentional torts in order to avoid actions that may meet the elements of an intentional tort. The most common intentional torts are assault, battery, libel, slander, false imprisonment and detention. You will note these civil torts closely resemble crimes discussed in the earlier section. The elements are often identical. Be aware then that your actions can result in both criminal and civil liability. Not only can you be prosecuted for an act, but also sued for money!

## Assault and Battery

Assault and battery are often grouped together, but the two actions are separate and distinct offenses. Assault is the apprehension of an offensive or harmful contact. Raising one's hand to strike another, putting the person in fear of being hit, is an assault. Battery requires the actual touching to occur. Battery is an offensive or harmful touching or contact. [Restatement 2d of Torts Section 21, 21(1).]

Obviously, if a person is being placed under arrest, the touching required to place the person under arrest may be an offensive contact. Also, removing an unauthorized person from the premises may be an offensive touching. How can a security officer perform his or her duties if the officer cannot touch or have contact with others?

## Reasonable Force

California allows the use of reasonable force to make an arrest. Reasonable force is the "minimum amount of force reasonably necessary under the circumstances to overcome resistance to effectuate a lawful arrest." (See California Penal Code Section 836.1.) However, some force may be used to

place an individual under arrest.

One of the most important actions a security officer must take in cases of any force, is to document the actions! This is imperative. The officer's actions and the other individual's actions must be set forth in a concise, clear, factual manner. A chronological series of events may be helpful. What first drew the officer's attention to this person? What happened next? Where did it take place? When? Who was involved? Who else was present? Why were actions taken? When did the action start? When did it end? Was the officer placed in fear for his or her safety?

## **False Arrest/Detention or Imprisonment**

False Arrest is defined as the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short. A person is falsely imprisoned if he or she is wrongfully deprived of his or her freedom to leave a particular place by the conduct of another.

Generally, private security personnel do not possess powers any greater than the average citizen. As you know, their authority to detain and arrest suspected criminals is more limited than that of a police officer.

A private security officer may detain a person based on probable cause. Probable cause is defined as: "A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime." (Black's Law Dictionary 1239 (8th Ed., 2004). The licensed security officer must be aware of what constitutes probable cause and be able to identify and articulate in the incident report or daily log the specific facts which led the officer to believe probable cause existed.

### **For example, standards to establish probable cause in a shoplifting/theft case:**

1. See Person Take Property.
2. See Person Conceal Property.
3. Constant Observation.
4. Observe Person Pass Checkouts.

## Immunity for Illegal Detention/False Imprisonment/ False Arrest

Fortunately, the legislature enacted Civil Code section 47 and the California Supreme Court has interpreted the section to provide for a complete immunity (i.e., an “absolute privilege”) from civil lawsuits where the person detained is reported to the police, even if the report was erroneous and the criminal conduct did not occur! Even if the mistake leads to a false arrest, there is immunity from a lawsuit.

In one case, *Hagberg v. California Federal Bank* (2004) 32 Cal. 4th 39, plaintiff, Lydia Ortiz Hagberg, a Latina, visited a California Federal Bank to cash a check from Smith Barney. She presented her California driver’s license, Cal Fed ATM card, the Smith Barney check, and her Smith Barney account summary to the teller, who was also a Latina. The teller suspected that the check was counterfeit and reported it to her supervisor who immediately telephoned both Smith Barney and the Cal Fed Security manager. She was instructed to contact the police.

The supervisor then contacted the police and when asked about the identity of the plaintiff, the supervisor responded that she appeared “white – maybe Hispanic.” The police immediately arrived, took the plaintiff away from the teller window, had the plaintiff spread her legs for a pat down search, handcuffed her, and placed her under arrest. It was only then learned from Smith Barney that the check was not counterfeit. Plaintiff was released after being detained 20 minutes.

Plaintiff sued Cal Fed for false imprisonment, false arrest, slander, invasion of privacy, intentional infliction of emotional distress, negligence, and race discrimination in violation of the Unruh Civil Rights Act (Civil Code section 51). Cal Fed filed a summary judgment motion arguing that Civil Code section 47(b) provides persons who report suspected criminal activity to law enforcement with absolute immunity from tort liability. (Cal Fed also argued a Federal Statute provided it with immunity, but the court did not address this issue.) The trial court granted summary judgment in favor of Cal Fed,

holding that the statutory privilege applied. The plaintiff appealed.

The Court of Appeal affirmed, holding that the reporting of criminal conduct to the police constitutes an official proceeding and Section 47(b) serves the important public policy of assuring free access to the courts. It is intended to “assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing.” The absolute privilege protects individuals from liability for reporting criminal conduct. Otherwise, there would be a “chilling effect” on such communication, which would not be in the public’s best interest.

The Court of Appeal reasoned Civil Code section 47(b) provides an absolute privilege to a communication “concerning possible wrongdoing, made to an official governmental agency, such as a local police department, ... if the communication is designed to prompt action by that entity.” With regard to the cause of action for false imprisonment, the court held that plaintiff’s claim was based on defendants’ privileged communications with the police rather than any noncommunicative conduct on defendants’ part (i.e., defendants did not physically detain or falsely imprison plaintiff).

[See, also, *Mulder vs. Pilot Air Freight* (2004) 32 Cal. 4th 34. Here, plaintiff was a commercial dealer in salvage material, who claimed that he was arrested by the LAPD after defendant, an employee of an air freight company, mistakenly reported to the LAPD that plaintiff was in possession of a flight recorder that had been stolen from the air freight company. Plaintiff was arrested and had to appear in criminal court numerous times until the case was dismissed. The Supreme Court held that the reporting of the case to the police entitled defendants absolute immunity from the civil lawsuit.]

IN ORDER FOR YOU TO OBTAIN IMMUNITY USING THIS PRIVILEGE, THE POLICE MUST ACTUALLY BE CALLED! In both cases, the police were called and the suspect was arrested, albeit on mistaken beliefs. Note also that you are not entitled to immunity from illegal detention and arrest if the police are not called or if the report to the police is knowingly made with malice, knowing it to be a false accusation.

THE IMMUNITY DOES NOT APPLY TO CITIZEN’S ARRESTS. In *Kesmodel v. Rand* (2004 DJ DAR 7730), — Cal.App.4th —, a tenant of an apartment building sued two other tenants for false imprisonment after they falsely

claimed he was a “Peeping Tom” and placed him under citizen’s arrest. This followed a deputy sheriff having been called and who refused to make an arrest as the alleged misdemeanor was not committed in her presence.

The citizen tenants demanded a citizen’s arrest of the other tenant. He was then taken into custody by the deputy and jailed for 12 hours. The district attorney refused to prosecute and the case was dismissed. In the civil lawsuit that followed, a jury awarded the wronged tenant \$3,500 in economic damages, \$27,000 in general damages (i.e., mental anguish), and \$2,000 in punitive damages.

The Court of Appeal affirmed the verdict finding that a citizen’s arrest is “conduct,” not “communication in an official proceeding,” thus providing no immunity for false imprisonment.

The lesson here is that when you make a report to the police and that results in a person’s arrest (for a felony), you are completely immune. If, however, the police do not arrest (either for lack of probable cause for a felony, or a misdemeanor was not committed in their presence), then placing a person under citizen’s arrest is done at your own peril. In other words, you are not entitled to the immunity afforded by Civil Code section 47.

## **Shopkeeper’s Privilege/Detaining a Suspect**

In California, there is a specific Penal Code Section which provides the rules regarding when and how a shopkeeper or the shopkeeper’s agents may stop and detain a person suspected of shoplifting. This area of the law is of utmost importance to the security officer professional. What actions are allowed and what are prohibited must be understood and memorized by the officer.

A security officer and merchant who comply with the shopkeeper’s privilege are entitled to an immunity from civil liability!

California Penal Code section 490.5 allows for a retailer and/or their agents to stop and detain persons reasonably suspected of shoplifting for the purpose of investigation, reclaiming the property, and to prevent escape. A security officer assigned to a retail post is an “agent” of the business, and thus comes within the protection of the section.

**Specifically, the Section 490.5 states in part:** “(f) (1) A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant’s premises.” This one paragraph instills quite a few requirements on the security officer. 1. **Reasonable Time.** The officer may only detain for a reasonable amount of time. The start of the detention and end of detention should be placed in the report or logs kept by the security officer.

2. **Reasonable Purpose.** The security officer must have a purpose for the detention. This officer must be able to articulate the actual purpose for the detention with specificity. For example, a specific purpose may be, “I saw the person take two packages of batteries from the shelf in aisle three. I saw the person place the batteries in his coat pocket. I watched the person as he walked past the checkouts and exit the store.”

3. **Articulated Purpose.** There is a specific, articulated, identifiable purpose of the detention. If the person is detained because, “I thought they looked suspicious and I did not like the way they dressed. I decided to detain the person to see if he had any items they did not pay for in his possession,” this is NOT a specific, identifiable purpose for the detention.

This description also does not provide probable cause for the detention.

**Reasonable Investigation and Manner.** Investigation must be conducted in a reasonable manner. Penal Code Section 490.5 (f) (3) allows the security officer to examine any items “in plain view” to determine the ownership of the property. Penal Code Section 490.5(f)(4) allows the officer to request the person detained to surrender the suspected stolen item. If the person refuses to surrender the item(s), the officer may conduct a “limited and reasonable search” to recover the item(s). The Code section is very specific in what is allowed during this search. First, the search is always governed by reasonableness. If the security officer believes an action would

be unreasonable, the action should not be taken! Specifically, the code section allows the security officer to search “packages, shopping bags, handbags or other property in the immediate possession of the person detained.” The security officer may NOT search any clothing worn by the person. This action is best left for the police.

Upon surrender or discovery of the item, the person detained may also be requested, but may not be required, to provide adequate proof of his or her true identity.

### **Summary of Shopkeeper’s Privilege**

In summary, the shopkeeper’s privilege allows a security officer or shopkeeper to detain a person if two requirements are met. First, the officer must have probable cause to believe the person has stolen or attempted to steal merchandise. Second, the officer must act reasonably under all circumstances.

If the above two items are not met, the security officer may be liable for false arrest, detention or imprisonment. If the two requirements are met, however, the security office may be entitled to immunity.

### **False Imprisonment**

A person may be liable both civilly and criminally for an offense. A person who has been falsely imprisoned may file an action against the alleged person committing the offense and seek monetary damages against both the person committing the imprisonment and possibly the person’s employer.

In a civil action, a wrongful confinement requires the following elements: The person was in custody, there was an unnecessary delay in releasing the person, the individual did not consent to the delay, the individual was harmed and the person conducting the confinement’s actions was a substantial factor in causing harm to the individual. (CACI 1407)

When a person is detained for even a short period of time, when that person reasonably believes that he or she is not free to go, a false imprisonment can occur. Remember, every time you stop a person and question him or her for an appreciable length of time and the person reasonably believes he or she is

not free to leave, the stop and questioning could be deemed false imprisonment. Of course, the person would have to show he or she suffered “harm” as a result of your actions. The “harm” could be physical or psychological in nature.

Usually, this tort arises when a person is detained by a security officer and is taken into a back office and questioned against his or her will. That is, they did not “consent” to being detained and questioned.

Here, it is absolutely critical that your documents articulate in extreme detail the reasons for your inquiry, the detention, the method of questioning, and the exact length of the detention. Witnesses are always helpful to establish the reasonableness of your actions. For example, people claiming false arrest often also claim they were beaten, tortured or unmercifully interrogated during the back office detention — claims that are almost always patently untrue! A witness can corroborate your report and help justify your actions.

## **Malicious Prosecution**

If a security officer causes an individual to be arrested and prosecuted knowing there was no probable cause to have the person arrested, the officer could be liable for the tort of malicious prosecution.

### **The elements for a malicious prosecution action are:**

1. That the defendant was actively involved in causing plaintiff to be prosecuted or in causing the continuation of the prosecution;
2. That the criminal proceeding ended in plaintiff’s favor;
3. That Defendant did not reasonably believe facts supporting probable cause existed;
4. That defendant acted primarily for a purpose other than that of bringing Plaintiff to justice;
5. That plaintiff was harmed; and
6. That defendant’s conduct was a substantial factor in causing plaintiff’s harm.

If the criminal defendant (who is the Plaintiff in the civil action) wins his case

and can prove he was falsely accused, the security officer might be liable. Thus, it is important to look at all of the facts carefully before calling the police.

## Defamation

There are two types of defamation: libel and slander. Civil Code Section 45 defines libel. Libel is written and slander is spoken. "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. (Civil Code section 45a.)

Slander is established in Civil Code Section 46.

### **Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:**

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotence or a want of chastity; or
5. Which, by natural consequence, causes actual damage.

Truth is always a defense to any defamation action. Thus, if the horrible statement, though injurious, happens to be true, then there is no liability for defamation.

## Electronic Eavesdropping

“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” (Rest.2d, Torts §625B.)

It is unlawful to eavesdrop by means of a listening device on a private communication. (Penal Code Section 630) Furthermore, it is unlawful to record a private communication without consent. (Penal Code Section 632) “Private communication” and “expectation of privacy” are open to interpretation. For example, if a person is in a public place such as the public area of a store, the individual may not have an expectation of privacy. However, if the person is in an office, there may be an expectation of privacy and the communication cannot be recorded. It is unlawful to record a telephone conversation without consent.

Furthermore, it is unlawful to videotape an individual when there is an expectation of privacy. Obviously, there is an expectation of privacy in a changing room or restroom. However, in a public area, there is no expectation of privacy.

## Sexual Harassment

Security officers must be aware that their actions could lead to a sexual harassment lawsuit. Sexual harassment is another intentional tort giving rise to liability on the part of both the officer and the employer. There are many forms of sexual harassment. The basics of this expansive topic involve unwelcome sexual conduct, hostile work environment, and retaliation.

A supervisor is prohibited from forcing a subordinate to tolerate “unwelcome sexual conduct.” This results in strict liability. The corporation is liable regardless of whether or not the corporation had knowledge of the supervisor’s conduct.

Hostile work environment is another area the individual officer or the company may be susceptible to a sexual harassment action. A hostile work environment exists when unwelcome sexual conduct interferes with an employee’s job performance by creating an intimidating, hostile, or offensive work environment. Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 106 S.

Ct. 2399.

Also, under Title VII a cause of action exists for discharges or other forms of retaliation which result from employee complaints about sexual harassment. Courts have been known to respond severely to retaliatory behavior. Victims of retaliatory behavior include relatives, friends, witnesses, and even victims of the sexual harassment itself.

All standards turn on "Unwelcome" Conduct [EEOC Compliance Manual (1990), §615; Henson v. City of Dundee (11th Cir.1982) 682 F.2d 897, 903].

Two standards that may be utilized to determine if the conduct was "unwelcome" are the "Reasonable Woman Standard" and the "Reasonable Fatherhood Standard." The alleged conduct is viewed through the eyes of the "average reasonable woman," or through the eyes of the "reasonable father." If your wife or child, or for that matter your husband, came home with a story regarding how they were treated at work, how would you react? If you find the conduct offensive or upsetting, then it likely qualifies as actionable sexual harassment.

## Civil Rights Liability

Citizens have a right in California, and indeed in every state, to freely exercise their Constitutional Rights. For example, the right to freedom of expression and freedom of speech, the right to vote, the right to engage in commerce, the right to be free from unreasonable searches and seizures, and to be free from unreasonable detentions.

When a Constitutional Right is violated, it can give way to civil rights violations. These are actionable in both California State courts and, sometimes, in Federal courts. The penalties are stiff and drastic!

### The Unruh Act

In California, our Unruh Civil Rights Act is set forth in Civil Code section 51. It was first enacted in 1959, and was regularly amended, most recently in 2000. It provides in part:

***"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 blindness or other physical disability are entitled to the full and equal accommodations,***

***facilities, privileges, or services in all business establishments of every kind whatsoever.”***

The primary purpose of the Unruh Act is to compel recognition of the equality of all persons in the right to the particular service offered by an organization or entity covered by the act. (See, *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 C.A.3d 712, 733.) The protection afforded by the Act applies to “all persons,” and is not confined to a limited category of protected classes.

As a security officer, you cannot discriminate or act in a way to prevent certain classes of people from enjoying their Constitutionally protected rights. The classes of people protected are those based upon: race, sex, religion, national origin, gender identification and any type of handicap. Violence is dealt with even more broadly. Where the interference (or even the attempted interference) of the enjoyment of civil rights is done by threats, intimidation, or coercion, the person so interfered with need not be a member of any of the “classes” of persons above.

For example, at a shopping mall, a person might be arrested for trying to speak out against a public policy (e.g., a war or other political action). That person could be a perfectly healthy white heterosexual male in his twenties who was threatened or physically removed from the premises while being placed under private person’s arrest by the security officer who was ordered to do so by the shopping mall management. That person has a good cause of action against both the mall management company and the security officer and his company.

The Unruh Act applies, essentially, to “all business establishments of every kind whatsoever.” The following are illustrations of businesses held subject to the Act: real estate offices (must provide housing regardless of race, gender, etc.), shopping centers, financing agencies, medical offices, multi-unit apartment complexes, banks, and even country clubs.

Be aware that a single remark by a security officer to a person trying to use a business establishment could give rise to liability. For example, using any type of racial epithet, or a derogatory word aimed at a homosexual in the course of carrying out your duty, would trigger a presumption that the officer

was acting to discriminate. As such, the Unruh Act would be invoked.

**Notes:**

## **Damages for Unruh Act Violations**

The Unruh Act authorizes a private action for actual damages, punitive damages (up to three times actual damages, but not less than \$4,000), and attorneys' fees for each violation. Actual damages include loss of earnings, medical expenses (including psychological expenses), as well as mental anguish, and pain and suffering. Punitive damages can be used as a way of punishing the wrongdoer.

The very expensive part here is the right to attorney's fees if the plaintiff prevails. If the plaintiff only wins a nominal amount at trial, say \$500, he is still deemed to have "prevailed." As such, the plaintiff is still entitled to attorney's fees. (This can run up to tens, if not hundreds of thousands of dollars!) In addition, a 2001 amendment increased the minimum amount of punitive damages to amount to \$4,000.

## **Federal Civil Rights Violations**

Much like the California's Unruh Act, those rights that are protected by the United States Constitution are also actionable when violated. Federal civil rights violations are only actionable in court if the tortious act is committed by a person acting under "color of law." That is, they are government employees or agents. Typically, these are police officers who might engage in excessive use of force or illegally detain a person for the wrong reasons.

However, you should be aware that if a security officer is "acting in concert" with law enforcement officers, they can be deemed to be "acting under color of law." As such, they are state actors and may be liable under the federal civil rights statute, 42 U.S.C. §1983. Accordingly, just because you might be instructed by a police officer to take action, if that action proves to be discriminatory or a violation of the person's civil rights, you and your employer could be dragged into court as a defendant in such a lawsuit, along with the police officer.

# Right to Privacy Searches

Many of the rules regarding searches are set forth in the area of the Shopkeeper's Privilege. Remember, reasonableness rules! The number one rule to follow is reasonableness. If the search may not be considered reasonable, don't do it!

## Search for weapons

California Penal Code Section 846 governs the rights of private persons to search for weapons after making a lawful arrest. "Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken."

This code section is narrowly construed and does not allow the search to be expanded. For example, in the case of *People v. Sjosten* (1968) 262 Cal.App.2d 539, the court explained only offensive weapons may be taken from a person pursuant to a lawful citizen's arrest. A search for contraband incidental to arrest or a search of premises is not allowed.

Generally, a security officer has only the authority to conduct a search that is specifically allowed. Namely, a security officer may search the specific items set forth in the shopkeeper's privilege and search for weapons pursuant to an arrest. Both searches must be reasonable. A weapons search should be limited to a "pat down" on the outside of the clothing only.

Also, the security officer must be aware of how the timing affects the ability to search. Note that the search for weapons is made after an arrest. A security officer cannot search for weapons during the investigation into whether a crime has been committed.

### **Example of a sequence regarding a shoplifting incident allowing for weapons search**

The sequence of events must be as follows:

1. Security officer observes unlawful activity.
2. Security officer has probable cause to detain.
3. Security officer detains individual.
4. Security officer continues investigation.
5. Security officer may search shopping bags, packages, purses, etc. pursuant to Shopkeeper's Privilege.
6. Security officer finds stolen item(s).
7. Security officer arrests individual pursuant to citizen's arrest.
8. Now, the security officer may search for weapons.
9. Care and safety of all those in the vicinity must be taken into account in the search for weapons.

## **Miranda Warnings**

The general rule is that Miranda warnings are not required before a private security officer questions another individual. Miranda warnings are applicable to a custodial interrogation by a police officer. A security officer is not a police officer, and as such, the Miranda requirements do not apply. Any confessions or incriminating statements made to security officer may be admitted in a trial. Consequently, any statements made by the individual should be set forth in the report or logs.

# Vicarious Liability

## Respondent Superior -Liability for Acts of Employees

Your actions can directly cause a lawsuit not only against you, but also against your employer. The term respondent superior literally means “the superior shall respond”. Under the doctrine, the innocent principal or employer is liable for the torts of the agent or employee committed while acting within the scope of his employment. It is immaterial that he acts in excess of his authority or contrary to instructions. (See, Rest.2d, Agency §§219, 243 et seq.; also, Calif. Civil Code 2338.)

### Course and Scope of Employment

To impose liability on the principal or employer, it is essential that the agent or employee be acting for the principal within the scope of his employment (i.e., engaged in work he was employed to perform, during his working hours). (See Rest.2d, Agency §§228, 229, 235).

The question as to whether or not an employee is acting within the course and scope of employment depends upon whether the act was: (1) either required by, or incident to, the employee’s duties, or (2) could be reasonably foreseen as an outgrowth of the employee’s duties. (Borg-Warner Protective Services Corporation dba Wells Fargo Guard Services v. Superior Court (1999) 75 Cal.App.4th 1203.)

The reasons for holding the employer responsible for the actions of the employee, if the employee is acting in the course and scope of employment, are to prevent recurrence of the tortious conduct, to give greater assurance of compensation for the victim, and to ensure that the victim’s losses will be equitably borne by those who benefit from the enterprise that give rise to the injury.” (Mary M.

v. Los Angeles (1991) 54 Cal.3d 202, 209, 285 Cal.Rptr. 99, 814 P.2d 1341.)

## **Vicarious Liability and Intentional Torts**

Liability under the doctrine of respondent superior extends to malicious acts and other intentional torts of an employee committed within the scope of his employment. (See Rest.2d, Agency §§231, 244 et seq.; 17 Cal. L. Rev. 185; 82 Harv. L. Rev. 1568; 12 So. Cal. L. Rev. 196; 1942 A.S. 495.)

## Workplace Violence

As a security officer, you might well be involved in trying to prevent violence that occurs in the workplace. Often, this involves nothing more than being aware of your surroundings and listening to your clients when they describe issues about which you should be aware.

For example, if you are working in the lobby of an office building, and are required to check identification of employees and visitors, you might be asked to make sure a certain individual is not allowed up due to a restraining order in place against him due to acts of violence. Hopefully, you will be given a photograph to accompany a copy of the valid restraining order.

Under such circumstances, if the person shows up they are immediately “arrestable” and can either be placed under private persons arrest or the police may be called. More importantly, the person (usually an employee of a tenant in the building) who is the intended victim of the violence should IMMEDIATELY be notified and affirmative steps taken to protect that person until the police can arrive to take the violator into custody.

Similarly, simply observing situations can often prevent an incident from occurring. For example, if two employees are seen arguing, simply approaching and inquiring whether everything is all right might be enough to allow individuals a chance to think about what they’re doing and to simply cool down.

If your post duties require specific duties pertaining to the prevention of workplace violence, you should be sure to request additional training to ensure that you understand what to do and how to act.

## Two Types of Restraining Orders

Both a corporation and an individual may obtain a restraining order from the court. Unfortunately, there are situations where an employee is being stalked or harassed. The stalker may be a serious threat not only to the employee, but if the harassment occurs at the place of employment, others in the company may also become victims.

Code of Civil Procedure Section § 527.8 allows an employer to obtain a

restraining order on behalf of one of its employees. Section 527.8 states in part:

***“(a) Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee prohibiting further unlawful violence or threats of violence by that individual.”***

The officers on duty, at the place of employment, must have knowledge of the restraining order. The officers should know the identity and be familiar with the appearance of the person(s) restrained. A photograph of the person is helpful.

It is a crime for a person to knowingly violate a restraining order.

Consequently, the laws and duties of the officer with respect to detention and arrest apply when a person is found to have violated a restraining order.

## DAMAGES

As discussed briefly in the negligence section, there are different types of damages. An injured party may recover economic damages, non-economic damages, and punitive damages. Economic damages are “objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business opportunities.” (California Jury Instruction 14.01.)

Non-economic damages are subjective, non-monetary losses including, but not limited to pain and suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, humiliation, and injury to reputation.

Punitive damages are damages that are not necessarily related to the injury. Punitive damages are damages awarded by the jury to punish the Defendant for their actions. Such damages are not allowed in a negligence case.

However, punitive damages are allowed in actions that allege intentional torts, such as assault or false imprisonment or possibly in actions where the party knew of a prior accident and failed to fix the hazard. An insurance policy does not cover punitive damages. An employer is not required to pay

for punitive damages awarded against its employee.

**Notes:**

# Private Security Services Act

In California, the Private Security Services Act (starting with Business and Professions Code Section 7580), requires that private security companies and their security officer employees be properly licensed. These licenses are issued and regulated by the Bureau of Security and Investigative Services (BSIS).

## Business and Professions Code

Business and Professions Code §7582.1(e), defines a “security guard or security officer” as a person who furnishes a service, the purpose of which is:

***“ . . . to protect persons or property or to prevent the theft, unlawful taking, loss, embezzlement, misappropriation, or concealment of any goods, wares, merchandise, money, bonds, stocks, notes, documents, papers, or property of any kind . . . .”***

Section 7582.8 of the Business and Professions Code establishes the requirements for a person to successfully apply for a security officer license.

The code requires that the applicant:

1. Must be at least 18 years of age.
2. Must not have been convicted of a crime or have performed an act involving dishonesty, fraud, or deceit.
3. Must comply with requirements regarding licensing (must pass the Powers of Arrest Test examination with 100% accuracy).

## Background Checks

Before receiving a license, a security officer must pass a criminal background check. The individual’s criminal history will be investigated by the State Department of Justice using a national database.

## Training

Effective July 1, 2004 the minimum training requirements for a newly licensed security officer are 40 hours of training (no doubt you are aware of this since you are reading this module!). The Powers to Arrest examination provides

detailed information for the security officer. Each security officer must complete a training course of approximately eight hours in length. (Bus. & Prof. Code Section 7583.7) After passing the test and the background check, the security officer is ready to be licensed.

If the officer will be required to carry a firearm or baton in the performance of the security duties, the officer will also need to undergo additional training.

## **Expiration and Renewal of License**

A security officer license shall be renewed every two years. If the license is renewed prior to its expiration, the officer must simply apply and pay the renewal fee. However, if the license expires, the officer must also pay a delinquency fee. A person may not act as a security officer if the officer's license has been suspended for any reason.

## **The Relationship between a Security Officer and a Private Patrol Operator**

A Private Patrol Operator is a security firm. It must have a license from the Bureau of Investigative Services. The PPO shall require any employee hired as a licensed security officer to have a valid license.

## **Other Laws and Regulations Governing Private Security**

### **Uniform: Badge Regulations.**

A security officer's badge and patch must be approved by the Chief of the BSIS. Unapproved badges and patches are not to be worn.

### **Firearms: Weapons Regulations**

A security officer may not carry a firearm or replica firearm unless the officer possesses a firearm's qualification card. To obtain a firearm qualification card, the applicant must be a licensed officer or PPO and file a completed application with the Bureau. The application must include proof of payment of the fee and proof of successful completion of a training course for a fi

rearm, including passage of a written examination and proof of qualifying on an approved firearm's range. The Bureau must also determine that the carrying of a firearm presents no apparent threat to the public safety.

### **Authorized Defense Weapons**

To carry a baton on the job, a licensed security officer must pass an eight hour training course from a certified instructor. (Bus. & Prof. Code 7585.9) A two hour training course is required for a officer to carry tear gas on duty.

### **Mandatory Reporting to BSIS for Violent Incidents**

The Bureau of Security and Investigative Services requires a written report of an incident involving any physical altercation or use of a deadly weapon while a security officer is on duty. The report must be prepared within seven days of the incident. (Business and Professions Code Sections 752.15(b), 7583.2(h) and 7583.4.)

A deadly weapon includes any instrument or weapon commonly known as a blackjack, slingshot, billy club, sandclub, sandbag, metal knuckles, any dirk or dagger, any firearm, any knife with a blade longer than five inches, any razor with an unguarded blade and any metal pipe or bar used or intended to be used as a club. (BSIS Report of Incident form revised 03/2002)

### **Role of the Security Officer**

The security officer's role is typically defined by the contract with the client and the approved post orders. The security officer is usually required to observe and report, provide a visual deterrent and at times act as a liaison between the public and the client. Although the security officer's actions may assist in deterring criminal activity, the officer may reduce but not prevent risk of injury to persons or damage to or loss of property. The officer reports suspicious activity. The officer acts in self-defense and defense of others, if required. The officer's role is not normally to detain or arrest, but will assist in de-escalating situations and managing aggressive behavior.

Since your role may change from post to post, it is best you refer to your company's policies and post orders.

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*“Laws can embody standards; governments can enforce laws— —but the final task is not a task for government. It is a task for each and every one of us. Every time we turn our heads the other way when we see the law flouted —when we tolerate what we know to be wrong—when we close our eyes and ears to the corrupt because we are too busy, or too frightened—when we fail to speak up and speak out—we strike a blow against freedom and decency and justice.”*

- **Robert F. Kennedy** U. S. Attorney General (b. 1928 - 1968)