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INSIGHT · CIVIL RIGHTS

Why Plaintiffs Should Pair the Bane Act With Their Section 1983 Claim

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Civil Code section 52.1 was amended by Senate Bill 2, effective January 1, 2022.

California plaintiffs who allege police misconduct commonly plead a federal claim under 42 U.S.C. section 1983 and a state claim under the Tom Bane Civil Rights Act, Civil Code section 52.1. The two claims rest on the same facts. They differ in their defenses, their intent element, their remedies, and their procedural prerequisites. This memorandum sets out those differences as of November 2026.

I. Question Presented

When a plaintiff asserts a section 1983 claim against California peace officers and their employing entity, what does an accompanying Bane Act claim add, and what additional burdens does it carry?

II. Short Answer

The Bane Act claim is not subject to federal qualified immunity, and since January 1, 2022, three Government Code immunities no longer apply to Bane Act claims against peace officers, custodial officers, or the entities that employ them. In exchange, the plaintiff must prove a specific intent to violate the protected right, and, against a local public entity, must first present a timely government claim. The statutory remedies are real but narrower than is often assumed: the $25,000 penalty in section 52.1 may be sought only in an action brought by a public prosecutor, and the treble-damages formula in Civil Code section 52 is written for other statutes.

III. Governing Law

A. Section 1983

42 U.S.C. § 1983 makes liable "[e]very person" who, under color of state law, subjects another to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." A court "may allow the prevailing party" a reasonable attorney's fee under 42 U.S.C. § 1988(b).

B. The Bane Act

Subdivision (b) of Civil Code section 52.1 reaches any person, "whether or not acting under color of law," who "interferes by threat, intimidation, or coercion," or attempts to do so, with rights secured by federal or California law. Subdivision (c) gives the injured individual a civil action "for damages, including, but not limited to, damages under Section 52," plus injunctive and equitable relief. Subdivision (i) provides that the court "may award" reasonable attorney's fees. Subdivision (k) bars liability based on "[s]peech alone" unless the speech threatens violence and the statute's further conditions are met.

Two provisions added by Senate Bill 2 (Stats. 2021, ch. 409, § 3), effective January 1, 2022, matter most in police cases. Subdivision (n) states that the immunities in Government Code sections 821.6, 844.6, and 845.6 "shall not apply" to a Bane Act claim against a peace officer or custodial officer, or "directly against a public entity that employs" one. Subdivision (o) makes the public-employee indemnification provisions of Government Code sections 825 through 825.6 applicable to Bane Act claims against public employees.

C. Judicial Construction

The statute does not require membership in a protected class or discriminatory animus. The California Supreme Court so held in *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, which sustained a Bane Act claim based on unlawful search and detention. Three years later, the Court of Appeal held in *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230 that "the doctrine of qualified immunity does not apply" to a section 52.1 cause of action.

In *Cornell v. City and County of San Francisco* (2017) 17 Cal.App.5th 766, the First District held that, where an unlawful arrest is pleaded and proved, the coercion need not be "independent" of the constitutional violation. The required egregiousness is instead tested by whether the officer "had a specific intent to violate the arrestee's right to freedom from unreasonable seizure." The court adopted the specific-intent standard of *Screws v. United States*, 325 U.S. 91 (1945). The Ninth Circuit followed *Cornell* in *Reese v. County of Sacramento*, 888 F.3d 1030 (9th Cir. 2018), an excessive-force case.

IV. Analysis

A. The Immunity Differential

Under *Venegas* (2007), the federal clearly-established-law inquiry has no role in the Bane Act claim. An officer who prevails on qualified immunity under section 1983 may therefore remain exposed on the parallel state claim arising from the same conduct. Before 2022, defendants could

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also invoke the statutory immunities in Government Code sections 821.6, 844.6, and 845.6. *Venegas* (2007) itself canvassed earlier decisions addressing Government Code immunities in section 52.1 cases. Subdivision (n) now removes those three immunities for peace and custodial officers and their employing entities. The subdivision names only those three sections. Whether other Government Code immunities remain available to a given defendant must be analyzed section by section.

B. The Intent Element

The Bane Act's price for avoiding qualified immunity is a mental-state element that section 1983 excessive-force claims do not require. *Cornell* described a two-part test drawn from *People v. Lashley* (1991) 1 Cal.App.4th 938. The court first decides, as a matter of law, whether the right is "clearly delineated and plainly applicable." The jury then decides whether the defendant acted "with the particular purpose of depriving" the plaintiff of that right. Applying that standard to excessive force, *Reese* explained that the officer need not have been "thinking in constitutional or legal terms," because "a reckless disregard for a person's constitutional rights is evidence of a specific intent to deprive that person of those rights." *Reese* held a Bane Act jury instruction erroneous because it omitted this inquiry into the deputy's intent. The first step resembles the federal clearly-established inquiry, but it operates as an element of liability, not as an immunity.

C. Remedies and Fees

Section 52.1(b) authorizes a $25,000 civil penalty only in actions "brought by the Attorney General, any district attorney, or any city attorney." If assessed, that penalty is awarded to each individual whose rights were violated. Section 52.1(c) authorizes an individual's action for damages "including, but not limited to, damages under Section 52." Civil Code section 52 contains two damages provisions. Subdivision (a), with its trebling formula and $4,000 minimum, applies to violations of "Section 51, 51.5, or 51.6." Subdivision (b) provides actual damages, exemplary damages, a $25,000 civil penalty, and fees, but by its terms addresses denial of rights under "Section 51.7 or 51.9," and its penalty runs to "the person denied the right provided by Section 51.7." Section 52, subdivision (h), defines "actual damages" as "special and general damages." A pleading that seeks a $25,000 award or treble damages on a Bane Act claim should identify the authority that extends those provisions to section 52.1; this memorandum does not rely on one.

Fee recovery differs in form. Section 1988 permits the court to award fees to the "prevailing party." Section 52.1(i) permits a fee award to "the petitioner or plaintiff" in an action under subdivision (c). Both are discretionary on their face.

D. The Claim-Presentation Prerequisite

The Government Claims Act requires presentation of "all claims for money or damages against local public entities" before suit (Gov. Code, § 905, as quoted in *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730). A claim for personal injury must be presented within six months of accrual (Gov. Code, § 911.2, subd. (a)), and no suit for money or damages may be brought until the claim has been acted on or deemed rejected (Gov. Code, § 945.4). A Bane Act damages claim

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against a city or county falls within that text. Where the action against the entity is barred for failure to comply, an action against the employee for an act within the scope of employment is generally barred as well (Gov. Code, § 950.2).

The section 1983 claim is different. In *Felder v. Casey*, 487 U.S. 131 (1988), the Supreme Court held that a state notice-of-claim statute "is pre-empted when the § 1983 action is brought in a state court." A missed claim deadline therefore removes the Bane Act claim against the entity and, ordinarily, its employees, while the federal claim proceeds.

V. Practical Considerations

- **Calendar the claim first.** The six-month presentation period under section 911.2 runs from accrual and is measured in months, not years.
- **Plead intent facts.** Allege facts supporting purpose or reckless disregard as to the specific right, not only the force used. Under *Cornell* and *Reese*, coercion inherent in the violation suffices, but intent does not follow automatically.
- **Request a Bane Act instruction that tracks *Reese*.** An instruction that omits the specific-intent inquiry was held erroneous in that case.
- **Cite subdivision (n) by name.** When a defendant raises section 821.6, 844.6, or 845.6 against a peace or custodial officer, the 2022 amendment answers the defense directly.
- **Do not overstate remedies.** Plead damages under section 52.1(c) and fees under subdivision (i). Treat statutory penalties and multipliers as contested.
- **Remember the speech limit.** Threat-based claims resting on words alone must satisfy subdivision (k).

VI. Authorities Cited

- 42 U.S.C. § 1983
- 42 U.S.C. § 1988
- Civ. Code, § 52.1 (as amended by Stats. 2021, ch. 409, § 3)
- Civ. Code, § 52
- Gov. Code, § 911.2
- Gov. Code, § 945.4
- Gov. Code, § 950.2
- *Felder v. Casey*, 487 U.S. 131 (1988)
- *Reese v. County of Sacramento*, 888 F.3d 1030 (9th Cir. 2018)
- *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820
- *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730
- *Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230
- *Cornell v. City and County of San Francisco* (2017) 17 Cal.App.5th 766

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