

**RESOLUTION 07-04-2008**

**DIGEST**

Damages: Victims of Torture

Adds Civil Code section 52.6 to allow monetary damages for victims of torture.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

**DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution adds Civil Code section 52.6 to allow monetary damages for victims of torture. This resolution should be disapproved because it targets government agents and employees who are immunized from such claims while serving in their official capacities, it is overly broad in its scope and reach, and it fails to address properly the idea of providing a civil remedy for criminal conduct.

This resolution focuses on the “consent or acquiescence of a public official or other person acting in an official capacity” in “an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining [ ] information or a confession....” In doing so, the resolution fails to provide a realistic civil remedy related to criminal conduct. The resolution does not take into account the immunity of such employees of the government. Moreover, the breadth and scope of the resolution make it unmanageable. By defining the tortious conduct so broadly, the proponent’s effort to target agents of the Central Intelligence Agency and other government officials misses its objective and may be interpreted also to include local, state and federal law enforcement and agency personnel, subjecting potentially hundreds of thousands of people to the risk of being sued under this resolution.

While the idea of providing a civil remedy born of criminal conduct is consistent with California jurisprudence, this resolution is not crafted to likely accomplish that purpose.

**TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Civil Code section 52.6 to read as follows:

- 1    §52.6
- 2           (a) A victim of torture, as defined as any act by which severe pain or suffering,
- 3    whether physical or mental, is intentionally inflicted on a person for such purposes as
- 4    obtaining from him or her or a third person information or a confession, punishing him for
- 5    an act he or she or a third person has committed or is suspected of having committed, or
- 6    intimidating or coercing him or a third person, or for any reason based on discrimination of
- 7    any kind, when such pain or suffering is inflicted by or at the instigation of or with the
- 8    consent or acquiescence of a public official or other person acting in an official capacity,

9 may bring a civil action for actual damages, compensatory damages, punitive damages,  
10 injunctive relief, any combination of those, or any other appropriate relief. A prevailing  
11 plaintiff may also be awarded attorney's fees and costs.

12 (b) In addition to the remedies specified herein, in any action under subdivision (a),  
13 the plaintiff may be awarded up to three times his or her actual damages or twenty-five  
14 thousand dollars (\$25,000) per act of torture, whichever is greater. In addition, punitive  
15 damages may also be awarded upon proof of the defendant's malice, oppression, fraud, or  
16 duress in committing the act of torture.

17 (c) An action brought pursuant to this section shall be commenced within seven  
18 years of the date of the last act of torture, or if the victim was a minor when the last act of  
19 torture against the victim occurred, within eight years after the date the plaintiff attains the  
20 age of majority.

21 (d) If a person entitled to sue is under a disability at the time the cause of action  
22 accrues, so that it is impossible or impracticable for him or her to bring an action, then the  
23 time of the disability is not part of the time limited for the commencement of the action.  
24 Disability will toll the running of the statute of limitation for this action.

25 (1) Disability includes being a minor, insanity, imprisonment, or other incapacity or  
26 incompetence.

27 (2) The statute of limitations shall not run against an incompetent or minor plaintiff  
28 simply because a guardian ad litem has been appointed. A guardian ad litem's failure to  
29 bring a plaintiff's action within the applicable limitation period will not prejudice the  
30 plaintiff's right to do so after his or her disability ceases.

31 (3) A defendant is estopped to assert a defense of the statute of limitations when the  
32 expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay  
33 the filing of the action, or due to threats made by the defendant causing duress upon the  
34 plaintiff.

35 (4) The suspension of the statute of limitations due to disability, lack of knowledge,  
36 or estoppel applies to all other related claims arising out of the torture situation.

37 (5) The running of the statute of limitations is postponed during the pendency of  
38 any criminal proceedings against the victim.

39 (e) The running of the statute of limitations may be suspended where a person  
40 entitled to sue could not have reasonably discovered the cause of action due to  
41 circumstances resulting from the torture, such as psychological trauma, cultural and  
42 linguistic isolation, and the inability to access services.

43 (f) A prevailing plaintiff may also be awarded reasonable attorney's fees and  
44 litigation costs including, but not limited to, expert witness fees and expenses as part of the  
45 costs.

46 (g) Any restitution paid by the defendant to the victim shall be credited against any  
47 judgment, award, or settlement obtained pursuant to this section. Any judgment, award, or  
48 settlement obtained pursuant to an action under this section shall be subject to the  
49 provisions of Section 13963 of the Government Code.

50 (h) Any civil action filed under this section shall be stayed during the pendency of  
51 any criminal action arising out of the same occurrence in which the claimant is the victim.  
52 As used in this section, a "criminal action" includes investigation and prosecution, and is  
53 pending until a final adjudication in the trial court, or dismissal.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Bar Association of San Francisco

**STATEMENT OF REASONS:**

Existing Law: Currently, a victim of torture may only bring traditionally common law causes of action, such as battery, assault, or false imprisonment. There is no cause of action specifically addressing torture nor is there any cause of action which provides specific damages in a situation where damages will often be difficult, if not impossible to quantify.

Additionally, the current definition of torture, as set forth in CA Penal Code § 206, is under inclusive. It is inadequate in that it requires “great bodily injury” which means “a substantial *physical* injury and ignores the mental and emotional suffering that may be inflicted on victims of torture. The definition of torture included in this statute conforms to the definition used in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In other words, this definition conforms to international law.

This Resolution: Would create a private cause of action in California against any individual who participates in torturing any person

The Problem: This statute is necessary because it has become apparent that agents of the Central Intelligence Agency and other government officials have engaged in the torture of foreign detainees and others through the use of “waterboarding” and similar intolerable and horrific methods. The Department of Justice and even the President of the United States have refused to categorize this conduct as illegal activity or, for that matter, take any action to address or remedy this embarrassment to our nation. We are a society of laws and when an intolerable situation such as this arises, we, as lawyers, must act to create legislation which will prevent and remedy these atrocities.

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment forbids torture under any circumstances and does not allow the prohibition to be derogated even in conditions of national emergency. The United States is a signatory to this Convention and it has been ratified by the US Senate. Under the United States Constitution, treaties ratified by the Senate are considered law.

Individuals have a duty to refuse to engage in any illegal activity, even if they are agents of the government and ordered by a superior to do so. This statute will hold those individuals liable for a breach of this fundamentally important duty to refuse to participate in activity that is both illegal and shocking to the national conscience. It will provide these individuals a financial deterrent to participating in the torturing of another human being, which may prove to be effective where a criminal deterrent has not been.

**IMPACT STATEMENT**

This resolution will not affect any other law, statute or rule.

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**RESPONSIBLE FLOOR DELEGATE:** Lawrence A. Organ

## **COUNTERARGUMENTS**

### **ORANGE COUNTY BAR ASSOCIATION**

Simply put, this resolution would impose treble damages up to twenty-five thousand dollars (\$25,000) against a public official in his/her individual capacity if the official obtained a “confession” by the use of “severe pain or suffering whether physical or mental”. This resolution makes no attempt to define “severe pain or suffering” but makes it clear that the pain can be exclusively “mental” pain. On this basis alone it should be rejected.

The author of this resolution states that it “will not affect any other law, statute or rule.” However, it seems clear that this resolution will affect the laws and rules regarding the interrogation of suspects by local law enforcement. Local law enforcement routinely questions suspects during the course of the investigation. The law allows police officers to “trick” the suspects into making a confession. These tricks often take the form of representations that they have been identified by witnesses as the perpetrator, that scientific evidence links them to the crime, and that it will go easier on them if they confess. If this resolution were enacted it would be ripe for all prisoners who confessed to bring civil suits against the interrogating officers. The proposed penalty of treble damages up to twenty five thousand dollars (\$25,000), along with the prospect of having to hire their own counsel, realistically may have a chilling effect on legitimate law enforcement efforts.

### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution should be disapproved because it is vague and overbroad both as to what constitutes torture and who may enforce the remedies included in the statute. Read literally, the resolution authorizes the remedy to be pursued for actual and punitive damages in the California courts, even though those actions have no relationship to the State of California. It also purports to include a wide range of claims that are not torture, and are more appropriately addressed through existing remedies, *i.e.*, assault and battery. Not only would the proposed resolution impose a substantial economic burden upon the California courts, but it may well discourage companies or individuals from entering California or doing business in the State, for fear of becoming subject to this ambiguous statute.

### **SANTA CLARA COUNTY BAR ASSOCIATION**

Although our delegation certainly does not condone torture, neither can it support this proposed addition to the Civil Code, for the following reasons:

Proposed Section 52.6 is vague: The proposed statute does not define what would constitute “severe mental pain or suffering.” It is unclear whether this would be equivalent to the “severe emotional distress” required for an intentional infliction of emotional distress claim, or whether some other standard is contemplated. Because the conduct that will violate the statute has not been carefully defined, treble damages or a \$25,000.00 penalty is too harsh.

Proposed Section 52.6 is duplicative of existing law that provides for civil penalties: To the extent the proposed statute attempts to redress discriminatory violence or threats, this is already covered by other civil rights statutes (Civil Code sections 51.7 and 52.1), as is interference with constitutionally protected rights through threats, intimidation, or coercion (Civil Code section 52.1).

The seven-year statute of limitations is unnecessary: It is unclear why the seven-year limitations period is needed, since the Tort Claims Act would often control, as most cases would proceed against public entity or public employee defendants.

Proposed Section 52.6 would not allow suits against federal agents, as the Statement of Reasons seems to suggest: Federal employees are generally immune from state tort liability for torts committed within the scope of their employment. *See* 28 U.S.C. § 2679(b)(1). Thus, the proposed statute would not provide a financial deterrent to individual federal agents.