

In the service of justice – *Dora Leon v. County of Riverside*

In which the California Supreme Court rejected the doctrine of "investigative immunity"

By Ali Taheripour & Les Zador

The recent decision by the California Supreme Court in *Dora Leon v. County of Riverside* (2023) __ Cal.5th __, corrects an injustice that had been perpetuated by the Courts of Appeal for more than 40 years. That injustice had been directed against those who had sought redress, i.e., just compensation, for harm perpetrated by the wrongful conduct of law enforcement while conducting official investigations and where the efforts of the victims of such misconduct to obtain justice had been thwarted by the artificial, false, and pernicious doctrine of "investigative immunity" embraced by the Courts of Appeal.

Government Code section 821.6

The right to sue for damages has long been recognized as a civil right, subject, however, to certain limitations. Government Code section 821.6 is one such limitation in that it immunizes public employees from lawsuits based on injuries suffered because of wrongful prosecution. The rationale for this is that society at large would suffer if any criminal defendant who had been found "not guilty" could then turn around and sue for malicious prosecution. Included within the orbit of those who could then sue would be those whose guilt had been a high probability but who were acquitted because the requisite proof required for a conviction had not met the "beyond a reasonable doubt" threshold.

While there is arguably a good reason to insulate those involved in prosecutions from lawsuits, *Dora Leon* makes clear that extending such immunization to claims based on injuries inflicted in the course of law enforcement investigations – as well as over a dozen decisions from the Courts of Appeal had done – is contrary to both the express wording of section 821.6 and prior decisions from the California Supreme Court, which the Courts of Appeal failed to follow. "While other provisions of the Government Claims Act may confer immunity for certain investigatory actions, section 821.6 does not broadly immunize police officers or other public employees for any and all harmful actions they may take in the course of investigating crime." (*Dora Leon* at p.1 of the typed opinion.)

Government Code section 821.6 contains a mere 33 words: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding



within the scope of his employment, even if he acts maliciously and without probable cause."

The departures of the Courts of Appeal from *Sullivan v. County of Los Angeles*

In *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 712, the Court stated that its interpretation of Government Code section 821.6's immunity was "narrow . . . confining its reach to malicious prosecution actions" Notwithstanding that "an investigation . . . is not [a] prosecution," many decisions from the Courts of Appeal failed to recognize that distinction. Those decisions invariably conflated investigations with prosecutions and held that the same immunity from civil liability should apply to both on the theory that the two are intertwined because all prosecutions begin with investigations.

That argument, however, is "at odds with the plain meaning of the statutory language, not to mention this court's explication of that very same language in *Sullivan* and the substantial body of common law distinguishing the investigation of crime from the wrongful prosecution of a legal action. It likewise ignores the simple reality that investigations need not, and often do not, lead to the institution or prosecution of any proceedings – a fact that ought to serve as a tipoff that the two things are not the same and cannot plausibly be treated as though they were." (*Dora Leon, supra*, at 13 and 14 of the typed opinion.)

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Treating investigations and prosecutions as though they were the same for no greater reason than the first is a precursor to the latter is also at war with common sense. If, for example, I intend to compete in the Daytona 500, my doing so will necessarily be preceded by my presence at the racetrack. But just because the law permits me to drive in excess of 100 miles per hour during the race does not mean I shouldn't be subject to the speed limit laws while en route to the racecourse. There is nothing wrong or inconsistent with subjecting different endeavors, even if intertwined, to different sets of rules.

Amylou R. v. County of Riverside

In *Dora Leon*, the Supreme Court properly affirms that the protection of Government Code section 821.6 immunity is limited to government-initiated prosecutions (and administrative proceedings) and does not extend to the wrongful conduct of law enforcement in connection with investigations. But while the Supreme Court's opinion never touches upon the unfairness of the opinions from the Courts of Appeal that had protected the careless and/or cruel behavior of bullies with badges, what is probably of greatest interest to most fair-minded people is that *Dora Leon* rights a wrong that had been ongoing for far too long.

A good example of the injustice that *Dora Leon* corrects is described in *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205. Two high school girls had been picked up, assaulted, and raped by the same assailant, who had also murdered one of them. The survivor, age 15, was slandered by two Riverside detectives in the course of their investigation of the crimes. Dissatisfied with the information she had provided to them, one of the detectives told Amylou that he knew she was lying, that he wanted the truth, the whole story, and that if she refused, he would tell everyone she knew she was lying, and she would end up having no friends. The detectives later told neighbors that Amylou was, in fact, a liar and that "there was more to her involvement than meets the eye"; and one of the detectives even "told the mother of another girl at Amylou's school that she knew the man who committed the crimes, that she was not the victim she presented herself to be, and that she was involved in the crimes." (*Amylou R., supra,* 28 Cal.App.4th at 1210-1211.)

As it turned out, however, Amylou had in fact told the police all she knew; and they had no justification for threatening her and were, as a jury later determined, lying when they accused her. No charges were ever brought against her; and she subsequently sued the police for the intentional and negligent infliction of emotional distress. The jury awarded her $300,000 in compensation for the wrong inflicted upon her. But when the County of Riverside challenged the jury's verdict before the Court of Appeal for the Fourth District, the court reversed on behalf of the county, asserting that the police had enjoyed immunity for their conduct undertaken during the course of an official investigation even if that conduct had been malicious. Why? Because, the court reasoned, placing any limits on the efforts of the police to investigate crime would curtail their zeal as they would be subjected to the "constant dread of retaliation." "To eliminate that fear of litigation and to prevent the officers from being harassed in the performance of their duties, law enforcement officers are granted immunity from civil liability, even for the malicious abuse of their power." (*Amylou R., supra,* 28 Cal.App.4th at 1213.)

At this point we might pause for a moment and just think about what the *Amylou* court said. Essentially that there should be no limitation on what law enforcement officers and detectives can get by with as long as their malevolent actions are undertaken in connection with an investigation. It follows, therefore, that everything they did to diminish this 15-year-old girl was OK; and to place any limitation on their right to defame and isolate her and otherwise make Amylou's life hell could not be tolerated as it would have subjected the two detectives to the "constant dread of retaliation."

Since the Supreme Court's decision in *Dora Leon v. County of Riverside*, the *Amylou R.* rationale excusing police misconduct – the pernicious and false doctrine of investigative immunity, which is more at home in a police state than in a free society – is no longer the law. And it's about time. Forty-one years of bad decisions from this state's Courts of Appeal, all of which are at variance with the Supreme Court's guidance in *Sullivan* and *Dora Leon*, is long enough.

The Civil Rights Act of 1871

Further, this pernicious and false doctrine under which law enforcement has immunity from civil liability for malicious conduct undertaken in connection with its investigations would likely not have survived as long as it did had it not been for the alternative forum available to California victims of law enforcement and embodied within the Civil Rights Act of Act of 1871, aka section 1983 of title 42 of the United States Code.

The act permits an individual to maintain a lawsuit under federal law against a person acting "under color of state law" who violates that individual's constitutional or other federally protected rights. The full text of section 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

The Civil Rights Act came about during reconstruction as a means by which persons, most especially African Americans, would have another means by which their rights could be vindicated, which vindication would have been otherwise denied to them within the states in which they resided. Thus, while

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the most recently defunct doctrine of investigative immunity would immunize a law enforcement officer from civil liability for deliberately, i.e., maliciously, shooting a suspect or an innocent bystander during the course of that officer's official investigation, that officer could be sued and monetary compensation awarded under the Civil Rights Act.

Had it not been for the availability of an alternative forum for the redress of claims of assault, battery, and death perpetrated by law enforcement, it is more probable than not that the doctrine of "investigative immunity" would have been dismembered long before now by the recognition throughout our court system of the weight of the doctrine's silliness and cruelty.

The limitations of the Civil Rights Act

Even so, the Civil Rights Act was never, nor could it be, an alternative that could ameliorate all of the wrongs perpetuated by the Courts of Appeal's skewed take on Government Code section 821.6. Since its enactment, lawsuits pursuant to the Civil Rights Act were typically stated against local law enforcement for use of excessive force (*Scott v. Harris* (2007) 550 U.S. 372; *Graham v. Connor* (1989) 490 U.S. 386; and *Tennessee v. Garner* (1985) 471 U.S. 1); but claims for injury to reputation, defamation, or mere negligent conduct were not included within the ambit of its protection. (*Johnson v. Barker* (9th Cir. 1986) 799 F2d 1396.)

The Civil Rights Act, therefore, could not have been of any use to either Amylou R. or Dora Leon, both of whom had asserted claims for emotional distress. Nor could the Civil Rights Act be used where the loss of or injury to life, liberty, or property for which law enforcement was to blame came about as a result of an officer's negligence as distinguished from that officer's intentional conduct. (*Daniels v. Williams* (1986) 474 U.S. 327.)

Finally, the best reason to celebrate the demise of investigative immunity is that it restores to this state's court system the right to protect Californians from the excesses of law enforcement where such protection is consistent with commonly held views of fairness and justice. Police may not give anyone the third degree without risking liability under the Civil Rights Act even though beating a suspect to a pulp might in some cases help law enforcement catch criminals. They are required to give suspects their *Miranda* warnings, though the jobs of at least some officers would arguably be easier if they could avoid having to do that. Law enforcement must respect the constitutional rights of the people even when inconvenient.

After *Dora Leon*, civil liability may attach for:

- Injury to reputation – for which law enforcement had previously enjoyed civil immunity (*Amylou R. v. County of Riverside, supra*, and *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048);
- Injury to someone's financial well-being – for which law enforcement had previously enjoyed civil immunity (*Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1430, 1435-1437);
- Negligent destruction of property – for which law enforcement had previously enjoyed civil immunity (*Baughman v. State of California* (1995) 38 Cal.App.4th 182, 186, 191-192);
- Negligence and the negligent and intentional infliction of emotional distress – for which law enforcement had previously enjoyed civil immunity (*Jenkins v. County of Orange* (2012) 278 Cal.App.3d 278, 282, 287); and
- Negligently causing serious bodily injury – for which law enforcement had previously enjoyed civil immunity. (See *MCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, in which the liability of Defendant City of Los Angeles for negligently injuring a motorist during its freeway accident investigation was affirmed in 1969 but which liability would not have withstood the subsequently adopted investigative immunity fiction attached to law enforcement in connection with its traffic accident investigations: *Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1460-1461).

Conclusion

Until the Supreme Court vitiated 41 years of misguided decisions of the state's Courts of Appeal with its holding in *Dora Leon*, those living within California's borders could, but only if they were lucky, vindicate their rights against the depredations of law enforcement committed during official investigations by invoking federal law. But if they were unlucky and the Civil Rights Act did not apply to the tortious conduct that had been directed against them, they had nowhere to go. The prior unfortunate decisions from the Courts of Appeal notwithstanding, California is not thought by most as a state with a reputation for denying its residents their civil rights. Since the Supreme Court's decision in *Dora Leon*, those rights have become more secure; and the cause of justice has been served.



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Ali and Les were invited by the California Supreme Court to submit an amicus brief and to participate in oral argument in *Dora Leon*.

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