Damages in Wildfire Litigation

Phillip Shaverdian and Robert Wright

Phillip Shaverdian is an appellate fellow at Horvitz & Levy LLP, where he works alongside the firm's attorneys on a variety of projects, including drafting briefs filed in both state and federal appellate courts. He received his B.A. from the University of California, Los Angeles in 2015 and his J.D. from the UCLA School of Law in 2019.

Robert H. Wright is one of Horvitz & Levy LLP's managing partners. He has been counsel of record in closely-watched appeals raising issues of statewide importance and has presented over 30 arguments before the state and federal appellate courts, including arguments before the United States Court of Appeals for the Ninth Circuit and each of the districts of the California Court of Appeal.

As wildfires have grown ever more destructive in California, wildfire litigation has grown ever more important. Central to this litigation are statutes that have dramatic impacts on the remedies available in these cases. California enacted these statutes in decades past to protect agrarian interests. The statutes preceded California's current challenges of urbanization, weather volatility, and climate change. As wildfires increasingly threaten California, the resulting litigation has challenged courts in applying these agrarian statutes to the California of today.

This article analyzes key appellate decisions impacting wildfire litigation, with focus on the construction of statutory remedies. The article analyzes several issues that have vexed the appellate courts in recent times, such as: to what extent can a plaintiff in wildfire litigation recover noneconomic damages for harm to property, a multiplier for fire damage to trees, and costs for fire suppression and investigation, and to what extent do these principles apply differently to public entities?

The Destructive Growth of California Wildfires

In just the past few years, California has suffered through the deadliest and most destructive wildfires in its history.[1] The size and area burned and the length of the fire season are growing dramatically.[2] In the final months of 2017, California experienced over 9,000 wildfires that burned 1.2 million acres of land and destroyed nearly 11,000 structures.[3] The total economic loss of those fires is estimated at about $13 billion.[4] Some of the principal contributing factors have been climate change, weather volatility, and California's urbanization.[5] Indeed, some experts project a future even more dire, with wildfires raging more frequently and causing destruction up to six times as great.[6] This increase in wildfires has sparked an increase in lawsuits across the state. And the increasing destruction of California's wildfires has upped the litigation stakes.

Recovery of Noneconomic Damages for Annoyance and Discomfort

In the middle of the last century, the California Supreme Court, in *Kornoff v. Kingsburg Cotton Oil Co.,* recognized that "an occupant of land" may recover "damages for annoyance and discomfort" for the tort of nuisance or trespass.[7] Recoverable damages include distress arising out of physical discomfort, irritation, or inconvenience, even if the trespass or nuisance caused no physical injury.[8] Annoyance and discomfort damages are intended to compensate for the loss of "peaceful occupation and enjoyment of the property."[9] Compensable injury thus depended on occupation of the land. But California courts have struggled in addressing the recoverability of such harms to plaintiffs asserting only a tenuous claim to having occupied the property.

In *Kelly v. CB&I Constructors, Inc.*, the defendant was found to have negligently sparked a brush fire that spread and damaged a ranch owned by plaintiff Martin

Kelly.[10] The ranch contained three houses and various storage buildings.[11] Although Mr. Kelly had resided at the property for over two decades, he had moved out and rented all three houses to tenants prior to the 2002 fire that sparked the lawsuit.[12] Kelly continued to store tools and equipment onsite.[13]

The court of appeal held that "a nonresident property owner who merely stores personal property on the premises is not entitled to recover annoyance and discomfort damages from a trespass."[14] It was immaterial that Kelly retained some use of the ranch as storage. Annoyance and discomfort damages required "some personal effect that arises from the plaintiff's personal, physical presence on the premises."[15] Thus, a plaintiff can recover annoyance and discomfort damages only if the plaintiff qualified as an *occupant*—one who is "in immediate possession of the property."[16]

Eight years later, in *Hensley v. San Diego Gas & Electric Co.*, the court of appeal addressed similar issues. William and Linda Hensley sued San Diego Gas & Electric Company, alleging causes of action for negligence and trespass, after a wildfire burned their San Diego home and property.[17] The Hensleys were not at home when their property burned. Instead, as the wildfire approached, they evacuated their home and drove to a nearby location where they watched the fire's path of destruction.[18]

The question on appeal was whether plaintiffs could recover annoyance and discomfort damages.[19] The court of appeal answered that question in the affirmative. Mr. Hensley could recover damages for annoyance and discomfort "even though he was not physically present to see the fire ravage his house and land."[20] The court stated that annoyance and discomfort "naturally ensue when a fire damages a family home and destroys unique and valued property features."[21]

The *Hensley* court rejected defendant's argument that an owner or occupant must be personally or physically present when the invasion occurs to recover annoyance and discomfort damages: "*Kelly* stands only for the proposition that legal occupancy is required to recover damages for annoyance and discomfort in a trespass case, and that standard requires immediate and personal possession, as a resident or commercial tenant would have."[22] In *Hensley*, plaintiffs both owned and resided on their property, and thus met the legal standard of occupancy necessary to claim annoyance and discomfort damages.[23]

Under *Hensley*, for a plaintiff to recover annoyance and discomfort damages for a claim of nuisance or trespass by fire, the plaintiff, at the time of the fire, must be in immediate possession of the property but need not be physically present. In place of physical presence, *Hensley* requires only "immediate and personal possession."[24] Less clear is how courts will apply that standard to plaintiffs who, unlike the Hensleys, assert strained claims that they occupied property at the time of a loss, such as a plaintiff who owns a timeshare property or vacation property that is rented out for much of the year.[25]

Multiplier for Damage to Trees

Interesting questions also arise when considering potential recovery for damages to trees caused by wildfires. California has two statutes authorizing damages multipliers for trespass causing injury to trees: California Civil Code section 3346 and California Code of Civil Procedure section 733.

Civil Code section 3346 provides that for "wrongful injuries to . . . trees . . . upon the land of another, . . . the measure of damages is *three* times such sum as would compensate for the actual detriment, except . . . where the *trespass* was casual or involuntary."[26] For casual or involuntary trespass, or when the defendant had probable cause to believe there was no trespass, a double multiplier applies.[27] Code of Civil Procedure section 733 provides that any person who cuts down a tree, carries off timber, "or otherwise injures any tree or timber on the land of another person, . . . or public grounds . . . , without lawful authority, is liable to the owner of such land . . . for *treble* the amount of damages which may be assessed therefor."[28]

The California courts of appeal issued conflicting decisions on the question whether these multipliers applied to tree damage from wildfires. In *Gould v. Madonna*, the court of appeal construed the statutory scheme to demonstrate "a legislative intention that only *actual* damages be recoverable for injury caused by negligently set fires."[29] The court concluded that the legislative history showed "the Legislature ha[d] set up a statutory scheme concerning timber fires completely separate from the scheme to meet the situation of the cutting or other type of injury to timber."[30]

But in *Kelly*, the court of appeal affirmed a multiplier for fire damage to trees.[31] The court of appeal focused on what it described as the "plain language" of section 3346 and declined to consider legislative history.[32] The court held that, under any reasonable interpretation of section 3346, fire damage constitutes a wrongful injury to a tree.[33] The court thus concluded that "the plain language of section 3346 mandates the recovery of double tree damages in this case."[34] The *Kelly* court distinguished *Gould* on the ground it preceded California authority recognizing the "spread of a negligently set fire to the land of another constitutes a trespass."[35]

But the *Kelly* court did not have the last word. In *Scholes v. Lambirth Trucking Co.*, the court of appeal agreed with *Gould*, disagreed with *Kelly* and held that Civil Code section 3346 does "not apply to damage to property resulting from fires negligently set."[36] That case involved a fire that the defendant negligently allowed to spread from its property to plaintiff's, burning some of plaintiff's walnut trees. The court of appeal relied on the legislative history in concluding that a plaintiff could recover only actual damages for negligently set fires.[37] Section 3346 is thus aimed at those who personally enter onto another's property and cause damage to the trees there: "the purpose of the statute is to educate blunderers (persons who mistake location of boundary lines) and to discourage rogues (persons who ignore boundary lines), to protect timber from being cut by others than the owner."[38]

The California Supreme Court granted review in *Scholes* to resolve the conflict and answer whether Civil Code section 3346 applies to fire damage. The supreme court described the multiplier statute as intended to address the types of intentional acts "involved in timber trespass," i.e., someone entering the land of another to take timber.[39] The court looked at the section's language, structure, and historical context to conclude that the legislative purpose of the provision was to create a timber trespass law that would deter misappropriation of natural resources.[40] The supreme court thus affirmed the court of appeal's decision, holding that section 3346 applies to "direct, intentional injury to trees on the property of another that would be perpetrated by actions such as cutting down a neighbor's trees."[41] The section does not apply to damage caused from "negligently escaping fires."[42] The supreme court expressly disapproved the inconsistent analysis in *Kelly*.[43]

Costs for Fire Suppression and Investigation

California has two statutes authorizing recovery of fire suppression and investigation costs. Both apply when a person "negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property."[44] In those situations, Health and Safety Code sections 13009 and 13009.1 authorize recovery of "fire suppression costs incurred in fighting the fire" and the "cost of investigating and making any reports with respect to the fire." However, the California courts of appeal have issued conflicting opinions on the question of vicarious liability for such costs.

In *Department of Forestry & Fire Protection v. Howell*, plaintiffs filed suit against multiple defendants and sought recovery of fire suppression and investigation costs on theories that included vicarious liability.[45] An investigation of the fire determined that two employees of a corporation had negligently sparked the fire and allowed it to spread.[46] The Third District Court of Appeal turned to the legislative history for guidance.[47]

The Third District explained that enactment of the "Fire Liability Law" in 1931[48] (later codified as Health and Safety Code sections 13007, 13008, and 13009) made liability for suppression costs coextensive with liability for compensation to fire victims.[49] Specifically, the liability to fire victims for their property and personal losses extended under section 13007 to any person "who personally *or through another*" was responsible for wrongfully setting a fire or allowing a fire to be set or to spread.[50] And, under section 13009, any person made liable by section 13007 was also liable to reimburse public agencies for their firefighting expenses. In this way, section 13009 incorporated by reference the words "personally *or through another*" in section 13007 to describe who could also be responsible for fire suppression costs.[51]

However, the Legislature deleted this incorporation by reference when it substantially revised section 13009 in 1971. Specifically, the revision removed the cross-reference to section 13007. In its place, the Legislature added a new first sentence to section 13009 that omitted the words "personally or through another" to

describe who might be liable for suppression costs. As reworded, liability under section 13009 reached to "[a]ny person." This 1971 change persisted through subsequent amendments to section 13009 and the enactment of its companion section 13009.1 in 1984, which authorizes reimbursement for an agency's costs to investigate fires.

In *Howell*, the Third District held that the 1971 changes to section 13009 eliminated the vicarious liability for fire suppression costs that had previously existed.[52] The court determined that the Legislature in 1971 continued the liability for suppression costs for those persons who are directly responsible for the fires but ended it for the employers of such persons who, under the rule of respondeat superior, are wholly innocent. Meanwhile, the Legislature maintained vicarious liability for compensation of fire victims in section 13007.

The Third District in *Howell* reasoned that sound policy supported treating compensation to fire victims differently from reimbursement for public agencies' costs. In the context of tort law, the rule of respondeat superior imposes vicarious liability on an otherwise wholly innocent employer to (among other things) assure that injured victims are compensated for losses caused by the employer's negligent employees or agents. Thus, section 13007 places the responsibility to compensate fire victims on persons who act "personally or through another."[53]

There is arguably less justification for imposing the burden of vicarious liability for public firefighting expenditures on the innocent employer who may have already helped fund the public agencies through its taxes. The common law goal of spreading the burden of loss does not apply because the agencies providing such a basic governmental service are not victims needing compensation for injuries. As the Third District observed, it is not "incongruous that the Legislature may have afforded a longer reach in recovery efforts to an owner whose property was damaged than it afforded those who expended funds fighting or investigating the fire."[54]

Two years after *Howell*, the Second District, in *Presbyterian Camp and Conference Centers, Inc. v. Superior Court* ("*PCCC*"), reached the opposite conclusion. In *PCCC*, the Department of Forestry and Fire Protection ("Cal Fire") brought an action against a corporation for fire suppression and investigation costs from a fire negligently started by the corporation's alleged employee.[55] The Second District upheld the trial court's ruling that the corporation could be held vicariously liable for Cal Fire's costs.[56]

The premise underlying the Second District's decision was that the liability of a corporation is *always* "vicarious." As a result, the court reasoned, *Howell*'s result meant that corporations could *never* be held responsible for costs under section 13009.[57] However, the issue of vicarious liability under section 13009 has implications for *any* "person"—corporate or natural—who may choose to act through agents or employees. Moreover, total immunity from liability for the fire-related costs incurred by public agencies is arguably not what *Howell* sanctioned *for anyone*. Instead, under *Howell's* construction of section 13009, all persons remain directly liable for their own wrongful acts or omissions.

The California Supreme Court has since granted review to resolve the conflict.[58]

Considerations Unique to Public Entity Plaintiffs

Finally, the law governing wildfire damages contains some considerations unique to public entity plaintiffs.

First, under particular circumstances, the federal government has successfully recovered noneconomic damages in wildfire litigation. In *United States v. CB & I Constructors, Inc.*, the defendant negligently caused a wildfire that burned roughly 18,000 acres of the Angeles National Forest.[59] The issue on appeal was whether the government could recover "intangible environmental damages" for the loss of the nature and character of the forest that had burned.[60]

The Ninth Circuit looked to state law, which governed the federal government's recovery of damages for harm caused by fires in "National Forests."[61] The court concluded that in "suits alleging harm to property," California law "plainly contemplates that noneconomic damages are compensable."[62] The court cited as support California Health and Safety Code section 13007, which provides that anyone who negligently sets fire to "the property of another, whether privately or publicly owned, is liable to the owner of such property for *any damages* to the property caused by the fire."[63] The court also looked to California Civil Code section 1431.2(a), which addresses several liability for noneconomic damages and refers generally to noneconomic damages as recoverable

in actions "for personal injury, *property damage*, or wrongful death."[64]

The Ninth Circuit acknowledged that California law precluded the recovery of a sentimental or subjective value for harm to property, but nonetheless concluded that the government had produced sufficient evidence to detail the nature and character of the environmental harm.[65] The Ninth Circuit thus affirmed the jury's award of intangible, noneconomic environmental damages for the negligently set fire.[66]

After the Ninth Circuit's decision in *CB & I*, the California Legislature passed Health and Safety Code section 13009.2. That section applies to civil actions brought by public agencies seeking damages caused by fire and bars an enhancement for environmental damages.[67] In *United States v. Kernen Construction*, the United States challenged the statute's constitutionality.[68] The United States District Court for the Eastern District of California sided with the United States, holding that section 13009.2(d) "discriminates against the federal government by preventing it from seeking damage enhancements where it seeks environmental damages."[69] Private plaintiffs can recover enhanced damages for any damages to trees, whereas section 13009.2(d) "absolutely eliminates that possibility for public agencies."[70] Thus, this "disparate treatment of equally situated plaintiffs violates the [Supremacy Clause's] doctrine of intergovernmental immunities" and is unconstitutional as to claims brought by the United States.[71]

As California continues to face the challenges of urbanization, weather volatility, and climate change, and wildfires remain a destructive threat, California courts will continue to wrestle with these wildfire damages issues.

Endnotes

1 *See* 2019 Fire Season, Cal Fire, https://www.fire.ca.gov/incidents/2019/10/23/ (last visited Apr. 21, 2020).

2 *See* Allianz Glob. Corp. & Specialty, Burning Issues: California Wildfire Review 2 (2018), https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/reports/AGCS-california-wildfire-review.pdf.

3 *See id.* at 3.

4 *Id.*

5 *See id.* at 2, 7.

6 *Id.* at 8.

7 Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 272(1955) (citation omitted).

8 *Id.*; Kelly v. CB&I Constructors, 179 Cal. App. 4th 442 (2009).

9 *Kelly,* 179 Cal. App. 4th at 456.

10 *Id.* at 446.

11 *Id.* at 447.

12 *Id* at 448.

13 *Id.*

14 *Id.* at 459.

15 *Id.*

16 *Id.* at 458-59.

17 Hensley v. San Diego Gas & Elec. Co., 7 Cal. App. 5th 1337, 1340 (2017).

18 *Id.* at 1347.

19 *Id* at 1346.

20 *Id.* at 1351.

21 *Id* at 1352.

22 *Id.* at 1354.

23 *Id.*

24 *Id.* at 1354-55; *see also* Fulle v. Kanani, 7 Cal. App. 5th 1305 (2017) (clarifying that plaintiffs may recover annoyance and discomfort damages only if "in immediate and personal possession of the property at the time of the trespass").

25 A question for another day is whether the theories of liability raised in *Kelly* and *Hensley* are subsumed by California Health and Safety Code section 13007 in light of the California Supreme Court's decision in *Scholes v. Lambirth Trucking Co.*, 8 Cal. 5th 1094 (2020) (holding that the fire liability statutory scheme, including section 13007, allows recovery of only actual damages from an escaping fire).

26 Cal. Civ. Code § 3346(a) (West 2016) (emphasis added).

27 *Id*. (emphasis added).

28 Cal. Civ. Proc. Code § 733 (West 2015) (emphasis added).

29 Gould v. Madonna, 5 Cal. App. 3d 404, 407 (1970) (emphasis added).

30 *Id*.

31 Kelly v. CB&I Constructors, 179 Cal. App. 4th 442, 459-463 (2009).

32 *Id*. at 462 n.6.

33 *Id.* at 463.

34 *Id*. at 460.

35 *Id*.

36 Scholes v. Lambirth Trucking Co., 10 Cal. App. 5th 590, 601 (2017), *aff'd*, 8 Cal. 5th 1094 (2020).

37 *Id* at 602.

38 *Id*. (citation omitted).

39 Scholes v. Lambirth Trucking Co., 8 Cal. 5th at 1105.

40 *Id.* at 1117.

41 *Id.* at 1100.

42 *Id* at 1117.

43 *Id*.

44 Cal. Health & Safety Code § 13009 (West 2006).

45 Dep't of Forestry & Fire Prot. v. Howell, 18 Cal. App. 5th 154 (2017).

46 *Id.* at 164.

47 *Id.* at 177.

48 1931 Cal. Stat. 1644.

49 *Howell*, 18 Cal. App. 5th at 177-180.

50 Cal. Health & Safety Code § 13007 (West 2006) (emphasis added).

51 1953 Cal. Stat. 682 (emphasis added).

52 *Howell*, 18 Cal. App. 5th at 178-179.

53 Cal. Health & Safety Code § 13007.

54 *Howell*, 18 Cal. App. 5th at 179.

55 Presbyterian Camp & Conference Ctrs., v. Super. Ct., 42 Cal. App. 5th 154 (2017).

56 *Id.* at 163.

57 *Id.*

58 Presbyterian Camp & Conference Ctrs. v. Super. Ct., 456 P.3d 415 (Cal. 2020), *review granted*.

59 United States v. CB & I Constructors, 685 F.3d 827, 829 (9th Cir. 2012).

60 *Id.*

61 *Id.* at 833; *see also* United States v. California, 655 F.2d 914, 917, 920 (9th Cir. 1980).

62 *CB & I*, 685 F.3d at 835.

63 Cal. Health & Safety Code § 13007 (West 2006) (emphasis added); *see CB & I*, 685 F.3d at 834.

64 Cal. Civ. Code § 1431.2(a) (West 2007) (emphasis added); *see CB & I*, 685 F.3d at 835.

65 *CB & I*, 685 F.3d at 838-39.

66 *Id.* at 837.

67 Cal. Health & Safety Code § 13009.2.

68 United States v. Kernen Constr., 349 F. Supp. 3d 988, 991-93 (E.D. Cal. 2018).

69 *Id.* at 995.

70 *Id.*

71 *Id.* at 995-96.