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OPINION	:	No. 06-307
	:	
of	:	July 30, 2007
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THE HONORABLE ROD PACHECO, DISTRICT ATTORNEY, COUNTY OF RIVERSIDE, has requested an opinion on the following questions:

1. Does a sheriff's gift of an honorary badge to a private citizen violate California law?
2. Does a sheriff's gift of an honorary badge to a private citizen confer peace officer status on the recipient or give him or her the powers of a peace officer?
3. If a sheriff's gift of an honorary badge to a private citizen violates California law, would the sheriff or the county be subject to civil liability for an injury resulting from the recipient's subsequent misuse of the badge?

CONCLUSIONS

1. A sheriff's gift of an honorary badge to a private citizen violates California law if (1) the badge falsely purports to be authorized, or would deceive an ordinary reasonable person into believing that it is authorized, for use by a peace officer or (2) the badge indicates membership in an organization whose name would reasonably be understood to imply that the organization is composed of law enforcement personnel when, in fact, less than 80 percent of the members of the organization are law enforcement personnel, active or retired, and the sheriff has knowledge of such fact.

2. A sheriff's gift of an honorary badge to a private citizen does not confer peace officer status on the recipient or give him or her the powers of a peace officer.

3. If a sheriff's gift of an honorary badge to a private citizen violates California law, the sheriff would be subject to civil liability for an injury resulting from the recipient's subsequent misuse of the badge if the injury was proximately caused by the sheriff's own negligent or wrongful act in providing the badge; the county would be subject to civil liability if the sheriff's negligent or wrongful act occurred within the scope of his or her employment.

ANALYSIS

Peace officers are provided badges by their employing agencies so that they may identify themselves to the public and show their law enforcement authority. (See Gov. Code, § 26690 [sheriff and deputy sheriff]; Pen. Code, § 830.10 [uniformed peace officer]; Veh. Code, § 2257 [California Highway Patrol officer].)¹ We have previously concluded that a person who is not a peace officer, such as a county public defender's investigator, "may not display a peace officer's badge, a badge which falsely purports to be a peace officer's badge, or a badge which so resembles a peace officer's badge as would deceive an ordinary reasonable person into believing that it is being used by one who by law is given the authority of a peace officer." (68 Ops.Cal.Atty.Gen. 11, 15 (1985).) We have also recognized that a law enforcement official is not barred from creating "purely honorary positions, so long as no official status is sought to be conferred and no official or official-looking identification is authorized." (59 Ops.Cal.Atty.Gen. 97, 102 (1976).)

¹ All further references to the Penal Code are by section number only.

Here, we are informed that a sheriff has distributed honorary badges to private citizens. We are asked three questions in connection with this practice: under what circumstances, if any, does the practice violate California law, would the recipients have peace officer status or powers, and would the sheriff or the county be civilly liable for any subsequent misuse of an honorary badge by a recipient?

1. Violation of California Law

In addressing the first question, we examine the provisions of two statutes. Subdivision (c) of section 538d provides:

Any person who willfully wears, exhibits, or uses, or who willfully makes, sells, loans, gives, or transfers to another, any badge, insignia, emblem, device, or any label, certificate, card, or writing, which falsely purports to be authorized for the use of one who by law is given the authority of a peace officer, or which so resembles the authorized badge, insignia, emblem, device, label, certificate, card, or writing of a peace officer as would deceive an ordinary reasonable person into believing that it is authorized for the use of one who by law is given the authority of a peace officer, is guilty of a misdemeanor, except that any person who makes or sells any badge under the circumstances described in this subdivision is subject to a fine not to exceed fifteen thousand dollars (\$15,000).²

Section 146c states in part:

Every person who designates any nongovernmental organization by any name, including, but not limited to any name that incorporates the term “peace officer,” “police,” or “law enforcement,” that would reasonably be understood to imply that the organization is composed of law enforcement personnel, when, in fact, less than 80 percent of the voting members of the organization are law enforcement personnel or firefighters, active or retired, is guilty of a misdemeanor.

Every person who solicits another to become a member of any organization so named, of which less than 80 percent of the voting members are law enforcement personnel or firefighters, or to make a contribution

² Subdivision (c) of section 538e contains a similar prohibition with respect to badges that resemble those worn by “an officer or member of a fire department or a deputy state fire marshal.”

thereto or subscribe to or advertise in a publication of the organization, or who sells or gives to another any badge, pin, membership card, or other article indicating membership in the organization, knowing that less than 80 percent of the voting members are law enforcement personnel or firefighters, active or retired, is guilty of a misdemeanor.

In our 1985 opinion, 68 Ops.Cal.Atty.Gen. 11, *supra*, we focused upon whether a county public defender's investigator, a person who was not a peace officer, could display a badge in light of the prohibition of section 538d. While we were not concerned with the legality of the furnishing of the badge to the investigator, our prior discussion is helpful here in examining the scope of a sheriff's authority in giving honorary badges to private citizens. We stated that section 538d prohibited:

. . . (1) the display of a badge which "falsely purports to be authorized for the use of one who by law is given the authority of a peace officer" or (2) the display of a badge which "so resembles the authorized badge" of a peace officer "as would deceive an ordinary reasonable person into believing that it is authorized for the use of one who by law is given the authority of a peace officer." This paragraph would forbid a person who is not a peace officer from using a badge designed or inscribed in such a manner that it "falsely purports" to be the genuine article, e.g., a badge with the words "Police Officer." This paragraph also would prohibit the use of a badge which "resembles" an authorized peace officer's badge, e.g., a badge shaped or inscribed similarly to that of the sheriff's department's badge. Under this last provision the ultimate test is whether an "ordinary reasonable person" would be deceived by the use of the similar badge.

A county public defender's investigator may not display a peace officer's badge or a badge which on its face purports to be a peace officer's badge. We turn then to the question of when a badge "resembles" a peace officer's badge thus making its display illegal under section 538d.

The purpose of the prohibition is to prevent confusion among members of the general public as to the identity or authority of a person exhibiting a badge. In 27 Ops.Cal.Atty.Gen. 213, 214 (1956) we concluded that a private patrolman may wear a badge and cautioned that "it should be as distinguishable from those of the authorized peace officers as is possible so as not to cause confusion." [Citation.]

Peace officer badges are usually designed in the shapes of shields or stars or combinations of both such forms. The general public associates these

designs with police officers, sheriff's deputies and other law enforcement officers. County public defender's investigators' badges similarly fashioned would resemble peace officers' badges and would likely deceive an ordinary reasonable person into believing that the investigators have the authority of peace officers. In our view a county public investigator's badge should not be in the form of a shield or a star. It has been suggested that the inscription "Public Defender's Investigator" upon the face of a shield or star badge would preclude any possible misunderstanding on the part of an ordinary person. This, of course, would be a question of fact depending upon the opportunity or ability of the ordinary reasonable person to see or read the badge and to comprehend its function. Badges are often "flashed," i.e., briefly exhibited, and persons may react to a badge "through fear or respect." [Citation.] The circumstance under which it is displayed or any statements made by the person showing it will be factors in deciding whether such badge deceives someone into believing the one exhibiting it is indeed a peace officer.

(*Id.* at pp. 13-14, fns. omitted.)

Here, we presume that a sheriff would *not* provide to a private citizen an actual deputy sheriff's badge or an honorary badge that falsely purports to be authorized for peace officer use. Instead, we address whether an honorary badge may so resemble a genuine badge that an ordinary reasonable person would believe it is authorized for use by a peace officer. The factors we enumerated in our 1985 opinion are pertinent to that inquiry, i.e., whether the badge is in the shape of a shield or a star or similar design commonly associated with peace officer badges and whether the words on the badge indicate or disclaim official peace officer identity. Since the prohibition is designed "to prevent confusion among members of the general public as to the identity or authority of a person exhibiting a badge," we reaffirm our earlier view that an honorary badge should be "as distinguishable as possible" from badges used by peace officers. (68 Ops.Cal.Atty.Gen., *supra*, at p. 14; see 27 Ops.Cal.Atty.Gen., *supra*, at p. 214.) Stated differently, the more an honorary badge resembles an authorized peace officer badge in shape, markings, and other indicia that connote genuineness, the more likely the badge will deceive an ordinary reasonable person, and the more likely that a person furnishing or displaying the badge will be found to have violated section 538d.

It bears noting that, as we observed in our earlier opinion, "[t]he circumstance under which [the badge] is displayed or any statements made by the person showing it will be factors in deciding whether such badge deceives someone into believing the one exhibiting it is indeed a peace officer." (68 Ops.Cal.Atty.Gen., *supra*, at p. 14.) Here, because a sheriff who provides an honorary badge will not in most cases participate in its display by the recipient, we believe that, depending upon the circumstances, a recipient may

violate California law while the sheriff may not. For example, if the badge, when viewed in isolation, is of a shape and design that could not reasonably be mistaken for an authentic peace officer badge, the sheriff would not run afoul of section 538d, even if the recipient later were to display the badge for an improper purpose and did so in such a way, i.e., quickly and with an assertion of authority, that would deceive a member of the public into believing that the badge was authentic. We note that in the latter circumstances, the recipient would, in all likelihood, also be guilty of a misdemeanor under section 538d, subdivision (b)(2), which prohibits any person from wearing or using a false or misleading badge “for the purpose of fraudulently impersonating a peace officer or fraudulently inducing the belief that he or she is a peace officer.”

As for section 538d’s requirement that the person furnishing the badge must do so “willfully,” we find here that the sheriff need not intend to defraud or deceive for this element of the offense to be satisfied. “The word ‘willfully’ when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. The word ‘willfully’ does not require any intent to violate the law, or to injure another, or to acquire any advantage.” (§ 7, subd. (1).) In *People v. Johnson* (1998) 67 Cal.App.4th 67, 72, the court observed:

As a general rule, a statute proscribing willful behavior is a general intent offense. [Citations.] A statute which includes “willfully” language may nevertheless define a specific intent offense if the statute includes other language requiring a specific intent. [Citations.] However, “willfully” language without any additional specific intent language denotes a general intent offense. [Citations.] The only intent required for a general intent offense is the purpose or willingness to do the act or omission. [Citation.] The term “willful” requires that the prohibited act or omission occur intentionally. [Citation.]

As relevant to our question, section 538d prohibits any person from “willfully” providing a false or misleading badge to another but contains no other intent language. It thus describes a general intent offense; no specific intent or other mental state is required.

As for the word “falsely,” as used in section 538d, we find that it does not impose a requirement that the sheriff intend that the badge be used by the recipient in a manner similar to how a peace officer would use the badge. Rather than modifying or qualifying the sheriff’s intent, the word “falsely” describes one type of badge that would violate the statute – i.e., one that falsely purports to be authorized for peace officer use. As discussed above, one may violate the law by willfully providing a badge that so resembles a genuine badge that it would deceive an ordinary reasonable person. Given our assumption that a sheriff would not knowingly provide a genuine badge or one that falsely purports to

be authorized for peace officer use, our focus in this analysis is upon whether a sheriff may be subject to criminal liability for providing an honorary badge that is deceptive because of its resemblance to an official badge. Of course, if the honorary badge *did* falsely purport to be authorized, the gift of such a badge would violate the terms of section 538d.

We also find that the standard “as would deceive an ordinary reasonable person into believing that it is authorized,” as used in section 538d, is sufficiently definite to satisfy the applicable constitutional requirements. (See *Tobe v. City of Santa Ana* (1994) 9 Cal.4th 1069, 1106-1107 [penal statute must provide adequate notice of the conduct proscribed and not invite “arbitrary or discriminatory enforcement”].) In *Davis v. Municipal Court* (1966) 243 Cal.App.2d 55, the court rejected a vagueness challenge to section 146c, discussed below, that prohibits the designation of a nongovernmental organization by a name “including, but not limited to any name which incorporates the term ‘peace officer,’ ‘police,’ or ‘law enforcement,’ which would reasonably be understood to imply” that the organization was composed of peace officers. The court observed:

We do not agree that the phrase “reasonably be understood to imply” fails to meet the constitutional standard required. The rule is well established that although the words of a particular statute may not mean “the same thing to all people, all the time, everywhere,” they do not offend the requirements of due process if they “give adequate warning of the conduct proscribed and mark ‘ . . . boundaries sufficiently distinct for judges and juries fairly to administer the law That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense’” [Citations.] The language complained of does give adequate warning of the conduct proscribed and does furnish a sufficiently distinct standard for the administration of the statute.

(*Id.* at p. 58.)

Similarly, here, we believe that the phrase “as would deceive an ordinary reasonable person into believing that it is authorized,” as used in section 538d, is sufficiently descriptive since it directly follows and refers to a badge “which so resembles” an authorized badge. This deception requirement may be understood to encompass the physical characteristics of the badge in question, such as its similarity to an authorized badge in shape, size, design, coloring, and markings. Thus, we find that the statutory language provides adequate notice of the conduct prohibited – i.e., providing or displaying an unauthorized badge that is likely to deceive – and does not invite arbitrary or discriminatory enforcement. (See *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1107.)

Turning next to the requirements of section 146c, quoted above and as further analyzed in *Davis v. Municipal Court*, *supra*, 243 Cal.App.2d 55, we find that an honorary badge would come within the scope of this statute if the badge indicated membership in an organization designated by any name “that would reasonably be understood to imply that the organization was composed of law enforcement personnel, when, in fact, less than 80 percent of the voting members of the organization were law enforcement personnel or firefighters, active or retired.” The statute subjects “every person” to criminal liability who sells or gives to another such a badge, provided the person giving the badge does so with knowledge that the designated organization is not composed of the requisite number of law enforcement personnel. And consistent with our analysis of a similar standard used in section 538d, we do not find the “reasonably be understood to imply” standard to be so vague as to render the statute void for failure to provide adequate notice of the conduct it proscribes. (See *Davis v. Municipal Court*, *supra*, 243 Cal.App.2d at p. 58.)

We thus conclude in answer to the first question that a sheriff’s gift of an honorary badge to a private citizen violates California law if (1) the badge falsely purports to be authorized, or would deceive an ordinary reasonable person into believing that it is authorized, for use by a peace officer or (2) the badge indicates membership in an organization whose name would reasonably be understood to imply that the organization is composed of law enforcement personnel when, in fact, less than 80 percent of the organization are law enforcement personnel, active or retired, and the sheriff has knowledge of such fact.

2. Peace Officer Status and Powers

We next consider whether a sheriff’s gift of an honorary badge to a private citizen confers peace officer status on the recipient or gives him or her the powers of a peace officer. We conclude that such a gift would not confer such status or powers.

Attaining the status of a “peace officer” depends upon a lawful appointment to a statutorily designated peace officer position. (See, e.g., 86 Ops.Cal.Atty.Gen. 112, 113, 117 (2002).) In this regard, section 830 provides:

Any person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer is a peace officer, and notwithstanding any other provision of law, no person other than those designated in this chapter is a peace officer. The restriction of peace officer functions of any public officer or employee shall not affect his or her status for purposes of retirement.

“This chapter” (§§ 830-832.9) includes specific references to various full-time and reserve law enforcement officers, but a private citizen’s possession of an honorary badge does not make the person a holder of any of those enumerated positions.³

Section 830 also specifies that a person appointed as a peace officer, whatever the particular classification, must meet all applicable “standards imposed by law.” For example, Government Code section 1031 requires peace officer candidates to meet certain “minimum standards,” including the possession of “good moral character as determined by a thorough background investigation” *before* attaining peace officer status. (See *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 806 [“If the minimum standards are to have any real meaning, a candidate has to meet the standards *prior to* becoming a peace officer”].) The mere receipt of an honorary badge would not satisfy such legal standards.

Nor would an individual possessing an honorary badge have the authority to exercise peace officer powers, such as the powers to arrest, serve a search warrant, or carry a concealed weapon. As we have previously observed, the proper exercise of such powers depends upon, among other things, whether the officer has satisfied applicable training requirements. (See 86 Ops.Cal.Atty.Gen. 112, 113-115 (2003); 85 Ops.Cal.Atty.Gen. 203, 207 (2002); 80 Ops.Cal.Atty.Gen. 293, 294-295 (1997); see also 51 Ops.Cal.Atty.Gen. 110, 112 (1968).) Significantly, section 832 provides in relevant part:

(a) Every person described in this chapter as a peace officer shall satisfactorily complete an introductory course of training prescribed by the Commission on Peace Officer Standards and Training. On or after July 1, 1989, satisfactory completion of the course shall be demonstrated by passage of an appropriate examination developed or approved by the commission. Training in the carrying and use of firearms shall not be required of any peace officer whose employing agency prohibits the use of firearms.

(b)(1) Every peace officer described in this chapter, prior to the exercise of the powers of a peace officer, shall have satisfactorily completed the course of training described in subdivision (a).

³ Because we are concerned with the gift of an honorary badge, we may assume that a sheriff who provides such a badge to a private citizen would not intend to appoint the recipient to an actual peace officer position or classification or bestow upon the recipient any sort of official status. (Cf. 59 Ops.Cal.Atty.Gen., *supra*, at pp. 101-103 [appointment of reserve or special deputy sheriffs]; see also 56 Ops.Cal.Atty.Gen. 390, 391-394 (1973); 31 Ops.Cal.Atty.Gen. 121, 122-125 (1958).)

(2) Every peace officer described in Section 13510 or in subdivision (a) of Section 830.2 may satisfactorily complete the training required by this section as part of the training prescribed pursuant to Section 13510.

(c) Persons described in this chapter as peace officers who have not satisfactorily completed the course described in subdivision (a), as specified in subdivision (b), shall not have the powers of a peace officer until they satisfactorily complete the course.

The receipt of an honorary badge would not constitute compliance with these specified training prerequisites for exercising peace officer powers.

We thus conclude in answer to the second question that a sheriff's gift of an honorary badge to a private citizen does not confer peace officer status on the recipient or give him or her the powers of a peace officer.

3. Civil Liability

As discussed above, we presume for purposes of this opinion that a sheriff who provides an honorary badge to a private citizen would not *intend* for it to be used in an unlawful manner, i.e., to impersonate a peace officer, and likewise would not intend that it be displayed in a manner that results in injury to another person. The final question to be resolved is whether a sheriff or the county, as the employing agency, would be subject to civil liability for an injury resulting from a private citizen's subsequent misuse of an honorary badge that is unlawfully deceptive within the meaning of section 538d or section 146c. For example, may civil liability be imposed if the recipient uses the badge to falsely imprison another person? We conclude that the sheriff would be subject to civil liability for an injury suffered in connection with a recipient's subsequent misuse of the badge if the injury is proximately caused by the sheriff's own negligent or wrongful act in providing the badge; the county's civil liability would depend upon whether the sheriff's negligent or wrongful act occurred within the scope of his or her employment.

The tort liability of public officials, such as a sheriff, and the agencies that employ them, such as a county, is governed by the California Tort Claims Act (Gov. Code, §§ 810-998.3; "Act"), which "confine[s] potential governmental liability to rigidly delineated circumstances." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127-1128, quoting *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829.) Except as otherwise provided by statute, a public employee is liable for injuries caused by his or her acts or omissions to the same extent as a private person. (Gov. Code, § 820, subd. (a).) "To

establish liability in negligence, it is a fundamental principle of tort law that there must be a legal duty owed to the person injured and a breach of that duty which is the proximate cause of the resulting injury. [Citation.]” (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 114.)

“Although a statute that provides solely for a criminal penalty does not *create* a civil liability, the significance of the statute in a civil suit for negligence involves its formulation of a standard of conduct that the court then adopts in the determination of such liability. [Citation.]” (*Michael R. v. Jeffrey B.* (1984) 158 Cal.App.3d 1059, 1067.) Stated differently, while the violation of a criminal statute does not, in itself, establish that a person alleged to have been negligent actually owed a duty to the person ultimately injured, or that the person’s actions were the proximate cause of the injury ultimately suffered (see, e.g., *Richards v. Stanley* (1954) 43 Cal.2d 60, 62-63; *Hyde v. Avalon Air Transport, Inc.* (1966) 243 Cal.App.2d 88, 92), such a violation may give rise to a presumption of negligence if, under the circumstances, the person’s injuries resulted from an act that the criminal statute was designed to prevent and the person was within the class for whose protection the statute was adopted (Evid. Code, § 669; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285-1286; *Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420). As we have previously concluded, the purpose of the prohibition of section 538d is “to prevent confusion among members of the general public as to the identity or authority of a person exhibiting a badge” (68 Ops.Cal.Atty.Gen., *supra*, at p. 14), and we believe that a similar purpose is evident from the text of section 146c.

While the Act provides immunity for a public employee’s discretionary acts (Gov. Code, § 820.2), a sheriff would clearly lack the discretion to provide a deceptive badge to a private citizen in violation of California law.⁴ Of course, to prevail on a claim for damages here, the injured party must also establish that the sheriff’s negligence or other wrongful action was a proximate cause of the injury. (See *Talbott v. Csakany* (1988) 199 Cal.App.3d 700, 706-707 [proximate cause required entrusting another with means of causing injury that was not otherwise available].) Assuming proximate cause is established, however, the immunity generally provided to public employees from liability for the actions of third parties is unavailable. (Gov. Code, § 820.8 [“Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury

⁴ And, although this discussion concerns private citizen recipients of honorary badges, we note that even law enforcement personnel are not immune from liability for false arrest or false imprisonment. (See Gov. Code, § 820.4; *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 752-753; *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 719.)

proximately caused by his own negligent or wrongful act or omission.”].⁵ In other words, while the sheriff would be immunized from liability for the acts of the badge recipient for actions brought against the sheriff under a theory of vicarious liability, he or she would be potentially liable based upon his or her own negligent conduct in providing the badge.

As for the potential vicarious liability of the county as the sheriff’s employing governmental agency, “[a] public entity is liable for injury proximately caused by an act or omission of an employee . . . within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee” (Gov. Code, § 815.2, subd. (a); see *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296; *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 717; *Ross v. San Francisco Bay Area Rapid Transit Dist.* (2007) 146 Cal.App.4th 1507, 1514; *Hoblitzell v. City of Ione* (2003) 110 Cal.App.4th 675, 680-681; 59 Ops.Cal.Atty.Gen., *supra*, at pp. 103-104.) Thus, if the sheriff’s negligence were shown, the determination of the county’s liability would depend upon whether, in the particular circumstances, the sheriff had acted within the scope of his or her employment in giving the honorary badge to the private citizen. An employee’s act or omission is “within the scope of his employment” if it is “typical of or broadly incidental to” or “a generally foreseeable consequence of” the public entity’s work or enterprise. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital*, *supra*, 12 Cal.4th at pp. 297-301; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1003-1007; *Hoblitzell v. City of Ione*, *supra*, 110 Cal.App.4th at pp. 681-686.)

We thus conclude in answer to the third question that if a sheriff’s gift of an honorary badge to a private citizen violates California law, the sheriff would be subject to civil liability for an injury resulting from the recipient’s subsequent misuse of the badge if the injury was proximately caused by the sheriff’s own negligent or wrongful act in providing the badge; the county would be subject to civil liability if the sheriff’s negligent or wrongful act occurred within the scope of his or her employment.

⁵ Whether this or other Act immunities or defenses might apply, or whether any legal duty or proximate cause could conceivably be shown, in the situation where a *non-deceptive* honorary badge is furnished, which the recipient later uses to cause an injury, is beyond the scope of this opinion.