

Invitation to Comment

Title	Civil Jury Instructions (CACI) Revisions
Summary	New and revised instructions and verdict forms reflecting recent developments in the law.
Source	Advisory Committee on Civil Jury Instructions Hon. H. Walter Croskey, Chair
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	Attachment

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103. Multiple Parties

[There are *[number]* plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of his or her own claim(s). ~~Unless I tell you otherwise, all instructions apply to each plaintiff.~~]

[There are *[number]* defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of his or her own defenses. ~~Unless I tell you otherwise, all instructions apply to each defendant.~~]

[Different aspects of this case involve different parties (plaintiffs and defendants). Each instruction will identify the parties to whom it applies. Pay particular attention to the parties named in each instruction.]

[or]

[Unless I tell you otherwise, all instructions apply to each plaintiff and defendant.]

New September 2003; Revised April 2009

Directions for Use

The CACI instructions require the use of party names rather than party status words like “plaintiff” and “defendant.” In multiparty cases, it is important to name only the parties in each instruction to whom the instruction applies. For example, an instruction on loss of consortium (See CACI No. 3920) will not apply to all plaintiffs. Instructions on vicarious liability (See CACI Nos. 3700 et seq.) will not apply to all defendants. Unless all or nearly all of the instructions will apply to all of the parties, give the first option for the last paragraph.

Sources and Authority

- “We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant.” (*Campbell v. S. Pac. Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)

112. Questions From Jurors

If, during the trial, you have a question **that** you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. **Do not discuss your question with other jurors until after deliberations begin.** I will share your question with the attorneys **and decide whether it may be asked.**

Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons, including that the question may call for an answer that is not allowed for legal reasons. There may be legal reasons why a suggested question is not asked of a witness. Also, You you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

Remember that you are not an advocate for one side or the other. You are impartial judges of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss your question with other jurors until after deliberations begin.

New February 2005; Revised April 2007, April 2009

Directions for Use

This instruction may need to be modified to account for an individual judge's practice.

Sources and Authority

- Rule 2.1033 of the California Rules of Court provides: "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury."
- "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)
- "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)
- "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected

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thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other.” (*Maris v. H. Crummev, Inc.* (1921) 55 Cal.App. 573, 578–579 [204 P. 259].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 85

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.01–91.03 (Matthew Bender)

408. Primary Assumption of Risk

[Name of plaintiff] claims [he/she] was harmed while participating in [~~a sporting activity/specify other activity~~specify sport or other activity, e.g., touch football] and that [name of defendant] is responsible for that harm. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] either intentionally injured [name of plaintiff] or acted so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in ~~the~~ [~~sport/activity~~e.g., touch football];
2. That [name of plaintiff] was harmed; and
3. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

Conduct is entirely outside the range of ordinary activity involved in [~~a sport/the activity~~e.g., touch football] if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].

[Name of defendant] is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent.

New September 2003; Revised April 2004, October 2008, April 2009

Sources and Authority

- “Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell [v. Japanese-American Religions & Cultural Center]*, 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient]).” (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citation omitted.)
- “Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks.” (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)
- “A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent.” (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342

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[11 Cal.Rptr.2d 30, 834 P.2d 724].)

- “[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.” (*Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)
- “The *Knight* rule, however, ‘does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that “it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.” Thus, even though “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,” they may not increase the likelihood of injury above that which is inherent.’ ” (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)
- “In *Freeman v. Hale*, the Court of Appeal advanced a test ... for determining what risks are inherent in a sport: ‘[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.’ ” (*Distefano, supra*, 85 Cal.App.4th at p. 1261.)
- “[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is ‘so reckless as to be totally outside the range of the ordinary activity involved in the sport.’ ” (*Shin v. Ahn* (2007) 42 Cal.4th 482, 497 [64 Cal.Rptr.3d 803, 165 P.3d 581].)
- ~~“[T]he existence and scope of a defendant’s duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties’ general relationship to the activity, and is an issue to be decided by the court, rather than the jury.’ Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty.” (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted.)~~
- ~~“The existence of a duty of care is a separate issue from the question whether (on the basis of foreseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter.” (*Koekelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)~~
- “[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was ‘so reckless as to be totally outside the range of the ordinary activity involved in [golf]’ depends on resolution of disputed material facts. Thus, defendant's summary judgment motion was properly denied.” (*Shin, supra*, 42 Cal.4th at p. 486, internal citation omitted.)
- “Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]’s duty, which

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would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co.*, *supra*, 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co.*, *supra*, 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal. Rptr. 2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball ‘is issue of fact to be resolved at trial’]; but see *Huff v. Wilkins*, *supra*, 138 Cal.App.4th at p. 745 [‘it is the trial court’s province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury’]; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal. Rptr. 2d 683] [‘it is for the court to decide ... whether the defendant has increased the risks of the activity beyond the risks inherent in the sport’]; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal. Rptr. 2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) ¶ Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court’s most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn*, *supra*, 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve.” (*Luna v. Vela* (2008) 69 Cal.App.4th 102, 113 [-- Cal.Rptr.3d --].)

- “Primary assumption of the risk is an objective test. It does not depend on a particular plaintiff’s subjective knowledge or appreciation of the potential for risk.” (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 866 [36 Cal.Rptr.3d 515].)
- “A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury.” (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)
- “[T]he doctrine [of primary assumption of risk] is not limited to sports, as the Supreme Court recognized in *Knight*: Whether a duty exists ‘does not turn on the reasonableness or unreasonableness of the plaintiff’s conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.’ It is the ‘nature of the activity’ and the parties’ relationship to it that determines whether the doctrine applies—not its characterization as a sporting event.” (*McGarry*, *supra*, 158 Cal.App.4th at p. 999, internal citations omitted.)
- “[T]o the extent that ‘ ’ a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence,’ ’ he or she is subject to the defense of comparative negligence but not to an absolute defense. This type of comparative negligence has been referred to as ‘ ’secondary assumption of risk.’ ’ Assumption of risk that is based upon the absence of a defendant's

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duty of care is called “primary assumption of risk.”’ ‘First, in “primary assumption of risk” cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff’s conduct in undertaking the activity was reasonable or unreasonable. Second, in “secondary assumption of risk” cases—involving instances in which the defendant has breached the duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff’s conduct in encountering the risk of such an injury was reasonable rather than unreasonable.’” (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1259 [84 Cal.Rptr.3d 824], internal citations omitted.)

- “Even were we to conclude that [plaintiff]’s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal. Rptr. 858, 532 P.2d 1226], only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an ‘active sport.’ That was not the case here; plaintiff was merely the passenger on a boat. Under *Li*, he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled.” (*Kindrich, supra*, 167 Cal.App.4th at p. 1258.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03, Ch. 15, *General Premises Liability*, § 15.21 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.30 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.172 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 (Matthew Bender)

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455. Statute of Limitations—Delayed Discovery

If [name of defendant] proves that [name of plaintiff]’s claimed harm occurred before [insert date from applicable statute of limitations], [name of plaintiff]’s lawsuit was still filed on time if [name of plaintiff] proves that before that date,

[[name of plaintiff] did not discover, and did not know of, facts that would have caused a reasonable person to suspect, that [he/she/it] had suffered harm that was caused by someone's wrongful conduct.]

[or]

[[name of plaintiff] did not discover, and a reasonable and diligent investigation would not have disclosed, that [specify factual basis for cause of action, e.g., “a medical device” or “inadequate medical treatment”] contributed to [name of plaintiff]’s harm.]

| *New April 2007; Revised December 2007, April 2009*

Directions for Use

Read this instruction with the first option after CACI No. 454, *Affirmative Defense—Statute of Limitations*, if the plaintiff seeks to overcome the statute-of-limitations defense by asserting the “delayed-discovery rule” or “discovery rule.” The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its negligent cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

If the facts suggest that even if the plaintiff had conducted a timely and reasonable investigation, it would not have disclosed the limitation-triggering information, read the second option. (See *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797 [27 Cal.Rptr.3d 661, 110 P.3d 914] [fact that plaintiff suspected her injury was caused by surgeon’s negligence and timely filed action for medical negligence against health care provider did not preclude “discovery rule” from delaying accrual of limitations period on products liability cause of action against medical staple manufacturer whose role in causing injury was not known and could not have been reasonably discovered within the applicable limitations period commencing from date of injury].)

See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts*.

Do not use this instruction for attorney malpractice (see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*) or if the case was timely but a fictitiously named defendant was identified and substituted in after the limitation period expired. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [63 Cal.Rptr.3d

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615] [if lawsuit is initiated within the applicable period of limitations against one party and the plaintiff has complied with Code Civ. Proc., § 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed].)

“Claimed harm” refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slatteback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

Sources and Authority

- “An exception to the general rule for defining the accrual of a cause of action—indeed, the ‘most important’ one—is the discovery rule. ... It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [¶] ... [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least ‘suspects ... that someone has done something wrong’ to him, ‘wrong’ being used, not in any technical sense, but rather in accordance with its ‘lay understanding.’ He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. He has reason to suspect when he has ‘notice or information of circumstances to put a reasonable person on *inquiry*’; he need not know the ‘specific “facts” necessary to establish’ the cause of action; rather, he may seek to learn such facts through the ‘process contemplated by pretrial discovery’; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place—he ‘cannot wait for’ them to ‘find him’ and ‘sit on’ his ‘rights’; he ‘must go find’ them himself if he can and ‘file suit’ if he does.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397–398 [87 Cal.Rptr.2d 453, 981 P.2d 79], original italics, internal citations and footnote omitted.)
- “[I]t is the discovery of facts, not their legal significance, that starts the statute.” (*Jolly, supra*, 44 Cal.3d at p. 1113.)
- “While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute.” (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal.Rptr.2d 440, 873 P.2d 613].)
- “[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis.” (*Fox, supra*, 35 Cal.4th at p. 803.)

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- “[A]s *Fox* teaches, claims based on two independent legal theories against two separate defendants can accrue at different times.” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1323 [64 Cal.Rptr.3d 9].)
- “A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action.” (*Glue-Fold, Inc, supra*, 82 Cal.App.4th at p. 1029, internal citations omitted.)
- “[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. ‘Although never fully articulated, the rationale for distinguishing between ignorance’ of the defendant and ‘ignorance’ of the cause of action itself ‘appears to be premised on the commonsense assumption that once the plaintiff is aware of’ the latter, he ‘normally’ has ‘sufficient opportunity,’ within the ‘applicable limitations period,’ ‘to discover the identity’ of the former. He may ‘often effectively extend[]’ the limitations period in question ‘by the filing’ and amendment ‘of a Doe complaint’ and invocation of the relation-back doctrine. ‘Where’ he knows the ‘identity of at least one defendant ... , [he] must’ proceed thus.” (*Norgart, supra*, 21 Cal.4th at p. 399, internal citations and footnote omitted.)
- “The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ‘ “ ‘information of circumstances to put [them] on inquiry’ ” ’ or if they have ‘ “ ‘the opportunity to obtain knowledge from sources open to [their] investigation.’ ” ’ In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.” (*Fox, supra*, 35 Cal.4th at pp. 807–808, internal citations omitted.)
- There is no doctrine of constructive or imputed suspicion arising from media coverage. “[Defendant]’s argument amounts to a contention that, having taken a prescription drug, [plaintiff] had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation.” (*Nelson v. Indevus Pharmaceuticals, Inc.* (2006) 142 Cal.App.4th 1202, 1206 [48 Cal.Rptr.3d 668].)
- “The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only ‘[o]nce the plaintiff *has* a suspicion of wrongdoing.’ ” (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146], original italics.)

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- “When it is apparent from the face of the complaint that, but for the delayed discovery rule, the action would be time barred, it is the plaintiff’s burden to show diligence.” (*McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645].)
- “ ‘[R]esolution of the statute of limitations issue is normally a question of fact’ ” (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

Secondary Sources

3 Witkin, *California Procedure* (4th ed. 1996) Actions, §§ 459–473, 517–545

Flahavan et al., *California Practice Guide: Personal Injury* (The Rutter Group) ¶¶ 5:108–5:111.6

5 Levy et al., *California Torts*, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, § 71.03[3] (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 345, *Limitation of Actions*, § 345.19[3] (Matthew Bender)

14 *California Points and Authorities*, Ch. 143, *Limitation of Actions*, §§ 143.47, 143.52–143.64 (Matthew Bender)

1 *Matthew Bender Practice Guide: California Pretrial Civil Procedure*, Ch. 4, *Limitation of Actions*, 4.15

VF-403. ~~Coparticipant in a Sports Activity~~ Primary Assumption of Risk

We answer the questions submitted to us as follows:

1. Did [name of defendant] either intentionally injure [name of plaintiff] or act so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in the [sport/specify activity]?
 ___ Yes ___ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?
 ___ Yes ___ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

[d. Future noneconomic loss, including [physical

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pain/mental suffering:]

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

| *New September 2003; Revised April 2004, April 2007, April 2009*

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 408, *Primary Assumption of Risk*.

If specificity is not required, users do not have to itemize all the damages listed in question 3 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

555. Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit (Code Civ. Proc., § 340.5)

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] must prove that before [*insert date one year before date of filing*] [*name of plaintiff*] discovered, or knew of facts that would have caused a reasonable person to suspect, that [*he/she/it*] had suffered harm that was caused by someone's wrongful conduct.

[If [*name of plaintiff*] proves [*Insert tolling provision(s) of general applicability, e.g., Code Civ. Proc., §§ 351 [absence from California], 352 [insanity], 352.1 [prisoners], 352.5 [restitution orders], 353.1 [court's assumption of attorney's practice], 354 [war], 356 [injunction]*], the period within which [*name of plaintiff*] had to file the lawsuit is extended for the amount of time that [*Insert tolling provision, e.g., [name of defendant] was absent from California*].]

New April 2009

Directions for Use

Use CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*, if the three-year limitation provision is at issue.

If the notice of intent to sue required by Code of Civil Procedure section 364 is filed within 90 days of the date on which the statute of limitations will run, the statute of limitations is extended 90 days from the date of service of the notice. (See Code Civ. Proc., § 364(d).) For example, if the notice is served thirty days before the statute runs, the statute is extended for 60 days. Adjust the “date one year before the date of filing” in the instruction accordingly. If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

Give the last optional paragraph if a tolling provision from the Code of Civil Procedure is at issue.

Contrary to the otherwise applicable rule (see CACI No. 455, *Statute of Limitations—Delayed Discovery*), the defendant has been given the burden of proving that the plaintiff discovered or should have discovered the facts alleged to constitute the defendant’s wrongdoing more than one year before filing the action. (See *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing structurally similar Code Civ. Proc., § 340.6 on legal malpractice to place burden regarding delayed discovery on the defendant and disapproving *Burgon v. Kaiser Foundations Hospitals* (1979) 93 Cal.App.3d 813 [155 Cal.Rptr. 763], which had reached the opposite result under Code Civ. Proc., § 340.5].) See also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*.

Sources and Authority

- Code of Civil Procedure section 340.5 provides:

In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

For the purposes of this section:

- (1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;
 - (2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.
- Code of Civil Procedure section 364 provides in part:
 - (a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.
 - (b), (c) omitted
 - (d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.
 - (e), (f) omitted
 - "[T]he *Jolly* [*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923]] analysis applies to section 340.5: The one-year period [section 340.5] commences when the plaintiff

is aware of both the physical manifestation of the injury and its negligent cause. [¶] ‘Our Supreme Court has often discussed the one-year rule’s requirement of discovery of the negligent cause of injury. When a plaintiff has information which would put a reasonable person on inquiry, when a plaintiff’s “reasonably founded suspicions [have been] aroused” and the plaintiff has “become alerted to the necessity for investigation and pursuit of her remedies,” the one-year period commences. “Possession of ‘presumptive’ as well as ‘actual’ knowledge will commence the running of the statute.” ‘ “ (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823 [16 Cal.Rptr.2d 714], internal citations omitted.)

- “We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language.” (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [Code Civ. Proc., § 352.1, which tolls statutes of limitation for prisoners, applies to extend one-year period of Code Civ. Proc., § 340.5].)
- “The implications of *Belton’s* analysis for our case here is inescapable. Like tolling the statute of limitations for confined prisoners under section 352.1, tolling under section 351 for a defendant’s absence from California is of general applicability [and therefore extends the one-year period of Code of Civil Procedure section 340.5]. (For other general tolling provisions, see § 352 [minors or insanity]; § 352.5 [restitution orders]; § 353.1 [court’s assumption of attorney’s practice]; § 354 [war]; § 356 [injunction].)” (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 643 [75 Cal.Rptr.3d 861].)
- “[A] plaintiff’s minority as such does not toll the limitations period of section 340.5. When the Legislature added the separate statute of limitations for minors to section 340.5 in 1975, it clearly intended that the general provision for tolling of statutes of limitation during a person’s minority (§ 352, subd. (a)(1)) should no longer apply to medical malpractice actions.” (*Steketee v. Lintz* (1985) 38 Cal.3d 46, 53 [210 Cal.Rptr 781, 694 P.2d 1153], internal citations omitted.)
- “Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first ‘discovers’ the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not ‘discover’ the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury.” (*Ashworth v. Mem’l Hosp.* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67-9.72

4 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

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17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice* (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.27

1 California Medical Malpractice: Law and Practice (Thomson West) §§ 7:1-7:7

556. Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit (Code Civ. Proc., § 340.5)

[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [name of plaintiff]’s alleged injury occurred before [insert date three years before date of filing].

[If [name of plaintiff] proves:

[Choose one or more of the following options:]

[that [he/she/it] did not discover the alleged wrongful act or omission because [name of defendant] acted fraudulently[,/; or]]

[that [name of defendant] intentionally concealed facts constituting the wrongful act or omission[,/; or]]

[that the alleged wrongful act or omission involved the presence in [name of plaintiff]’s body of an object that had no therapeutic or diagnostic purpose or effect[,/;]

the period within which [name of plaintiff] had to file the lawsuit is extended for the amount of time that [Insert tolling provision, e.g., [name of defendant] intentionally concealed the facts].]

New April 2009

Directions for Use

Use CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.5 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if a tolling provision is at issue.

Sources and Authority

- Code of Civil Procedure section 340.5 provides:

In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that

actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

For the purposes of this section:

- (1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;
 - (2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.
- "No tolling provision outside of MICRA can extend the three-year maximum time period that section 340.5 establishes." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 931 [86 Cal.Rptr.2d 107, 978 P.2d 591]; see also *Fogerty v. Superior Court* (1981) 117 Cal.App.3d 316, 319–321 [172 Cal.Rptr. 594] [Code Civ. Proc., § 352 does not toll statute for insanity].)
 - "The three-year limitations period of section 340.5 provides an outer limit which terminates all malpractice liability and it commences to run when the patient is aware of the physical manifestation of her injury without regard to awareness of the negligent cause." (*Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 760 [199 Cal.Rptr. 816].)
 - "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Mem'l Hosp.* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67-9.72

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4 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice* (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.27

1 California Medical Malpractice: Law and Practice (Thomson West) §§ 7:1-7:7

606. Legal Malpractice Causing Criminal Conviction—Actual Innocence

[Name of plaintiff] alleges that *[name of defendant]* was negligent in defending *[him/her]* in a criminal case, and as a result, *[he/she]* was wrongly convicted. To establish this claim, *[name of plaintiff]* must first prove that *[he/she]* was actually innocent of the charges for which *[he/she]* was convicted.

New April 2009

Directions for Use

Give this instruction after CACI No. 400, *Essential Factual Elements*, and CACI No. 600, *Standard of Care*, in a legal malpractice action arising from an underlying criminal case.

To prove actual innocence, the plaintiff must first prove legal exoneration. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201 [108 Cal.Rptr.2d 471, 25 P.3d 670].) Presumably, exoneration will be decided by the court as a matter of law. If there is a question of fact regarding exoneration, this instruction should be modified accordingly.

However, one may be exonerated without actually being innocent of the charges, for example by the People's decision not to retry the case on remand because of insufficient evidence. (See *Coscia, supra*, 25 Cal.4th at p. 1205 [exoneration is *prerequisite* to proving actual innocence (emphasis added)].) Do not give this instruction if the court determines as a matter of law that the exoneration does establish actual innocence, for example, perhaps, if later-discovered DNA evidence conclusively proved that the plaintiff could not have committed the offense.

The exoneration requirement can lead to statute of limitations difficulties if the statutory period (See Code Civ. Proc., § 340.6) runs before exoneration is obtained. (See *Coscia, supra*, 25 Cal.4th at pp. 1210–1211.) See CACI Nos. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*.

Sources and Authority

- “In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence.” (*Wilkinson v. Zelen* (2008) 167 Cal.App.4th 37, 45 [83 Cal.Rptr.3d 779], internal citations omitted.)
- “If the defendant has in fact committed a crime, the remedy of a new trial or other relief is sufficient reparation in light of the countervailing public policies and considering the purpose and function of constitutional guaranties.” *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 543

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[79 Cal.Rptr.2d 672, 966 P.2d 983].)

- “The question of actual innocence is inherently factual. While proof of the government's inability to prove guilt may involve technical defenses and evidentiary rules, proof of actual innocence obliges the malpractice plaintiff ‘to convince the civil jurors of his innocence.’ Thus, the determination of actual innocence is rooted in the goal of reliable factfinding.” (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764–765 [31 Cal.Rptr.3d 831], internal citations omitted.)
- “[A]n individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action. ... [P]ublic policy considerations require that only an innocent person wrongly convicted be deemed to have suffered a legally compensable harm. Unless a person convicted of a criminal offense is successful in obtaining postconviction relief, the policies reviewed in *Wiley* [*supra*] preclude recovery in a legal malpractice action.” (*Coscia, supra*, 25 Cal.4th at p. 1201.)
- “A plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case--for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief--as a prerequisite to proving actual innocence in a malpractice action against former criminal defense counsel. (*Coscia, supra*, 25 Cal.4th at p. 1205.)
- “[T]he rationale of *Wiley* and *Coscia* requires a plaintiff in a criminal legal malpractice case to show actual innocence and postconviction exoneration on any guilty finding for a lesser included offense, even though the plaintiff alleges he received negligent representation only on the greater offense.” (*Sangha v. LaBarbera* (2006) 146 Cal.App.4th 79, 87 [52 Cal.Rptr.3d 640].)
- “[Plaintiff] must be exonerated of all transactionally related offenses in order to satisfy the holding in *Coscia*. Because the judicially noticed facts unequivocally demonstrate that [plaintiff] plead no contest to two offenses transactionally related to the felony charge of battery on a custodial officer in order to settle the criminal action, and she was placed on probation for those offenses, she cannot in good faith plead exoneration. (*Wilkinson, supra*, 167 Cal.App.4th at p. 48.)

Secondary Sources

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**610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit
(Code Civ. Proc., § 340.6)**

[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. ~~[Name of plaintiff]’s lawsuit was filed too late if~~ **To succeed on this defense,** [name of defendant] **must prove** that before [insert date one year before date of filing] [name of plaintiff] knew, or with reasonable diligence should have discovered, the facts of [name of defendant]’s alleged wrongful act or omission.

[If,

unless [name of plaintiff] proves

[Choose one or more of the following three options:]

[that [he/she/it] did not sustain actual injury until after [insert date one year before date of filing][./; or]]

[that after [insert date one year before date of filing] [name of defendant] continued to represent [name of plaintiff] regarding the specific subject matter in which the wrongful act or omission occurred[./; or]]

[that after [insert date one year before date of filing] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit.];]

the period within which [name of plaintiff] had to file the lawsuit is extended for the amount of time that [Insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]].]

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*, if the four-year limitation provision is at issue.

The court may need to define the term “actual injury” depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if a tolling provision is at issue.

Sources and Authority

- Code of Civil Procedure section 340.6 provides:

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(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

- Code of Civil Procedure section 352 provides:

(a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.

(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

- “Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- “[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the

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provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor.” (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- “[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations.” (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- “[D]efendant, if he is to avail himself of the statute’s one-year-from-discovery limitation defense, has the burden of proving, under the ‘traditional allocation of the burden of proof’ that plaintiff discovered or should have discovered the facts alleged to constitute defendant’s wrongdoing more than one year prior to filing this action.” (*Samuels, supra*, 22 Cal.4th at pp. 8–9, internal citations omitted.)
- “In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff’s ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client.” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- “We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action.” (*Neel, supra*, 6 Cal.3d at p. 194.)
- “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney’s negligence, the client cannot establish a cause of action for malpractice.” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- “[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term ‘attorney’ in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm.” (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)
- “ ‘Ordinarily, an attorney’s representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for

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withdrawal.’ ‘The rule is that, for purposes of the statute of limitations, the attorney’s representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.’ ‘Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.’ ” (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- “Section 340.6, subdivision (a), states that ‘in no event’ shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute.” (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)
- “We conclude that the two-track approach adopted in [cases from Pennsylvania and Maryland] is most consistent with the requirements of Code of Civil Procedure section 340.6, subdivision (a), and the interests of fairness to both plaintiffs and defendants in criminal malpractice actions. Thus, the plaintiff must file a malpractice claim within the one-year or four-year limitations period set forth in Code of Civil Procedure section 340.6, subdivision (a). Although such an action is subject to demurrer or summary judgment while a plaintiff’s conviction remains intact, the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies. ‘... [T]rial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation.’ By this means, courts can ensure that the plaintiff’s claim will not be barred prematurely by the statute of limitations. This approach at the same time will protect the interest of defendants in attorney malpractice actions in receiving timely notice and avoiding stale claims.” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1210–1211 [108 Cal.Rptr.2d 471, 25 P.3d 670], internal citations omitted.) [See CACI No. 606, *Legal Malpractice Causing Criminal Conviction—Actual Innocence*.]

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577–595

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

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**611. Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit
(Code Civ. Proc., § 340.6)**

[Name of defendant] contends that [name of plaintiff]'s lawsuit was not filed within the time set by law. ~~[Name of plaintiff]'s lawsuit was filed too late if~~ **To succeed on this defense,** [name of defendant] **must prove** that [his/her/its] alleged wrongful act or omission occurred before [insert date four years before date of filing].~~;~~**]**

[If unless [name of plaintiff] **proves:**

[Choose one or more of the following four options:]

[that [he/she/it] did not sustain actual injury until after [insert date four years before date of filing]].~~;~~ **or]]**

[that after [insert date four years before date of filing] [name of defendant] continued to represent [name of plaintiff] regarding the specific subject matter in which the wrongful act or omission occurred].~~;~~ **or]]**

[that after [insert date four years before date of filing] [name of defendant] knowingly concealed the facts constituting the wrongful act or omission. ~~;~~ **or]]**

[that after [insert date four years before date of filing] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit.~~;~~**]]**

the period within which [name of plaintiff] had to file the lawsuit is extended for the amount of time that [Insert tolling provision, e.g., [name of defendant] knowingly concealed the facts].]

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if a tolling provision is at issue.

The court may need to define the term “actual injury” depending on the facts and circumstances of the particular case.

Sources and Authority

- Code of Civil Procedure section 340.6 provides:

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(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

- (1) The plaintiff has not sustained actual injury;
- (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
- (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
- (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

- Code of Civil Procedure section 352 provides:

(a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.

(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

- “Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- “[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the

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provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor.” (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- “[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations.” (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- “In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff’s ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client.” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- “We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action.” (*Neel, supra*, 6 Cal.3d at p. 194.)
- “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney’s negligence, the client cannot establish a cause of action for malpractice.” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- “[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term ‘attorney’ in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm.” (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)
- “ ‘Ordinarily, an attorney’s representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.’ ‘The rule is that, for purposes of the statute of limitations, the attorney’s representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.’ ‘Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.’ ” (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

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- “We conclude that the two-track approach adopted in [cases from Pennsylvania and Maryland] is most consistent with the requirements of Code of Civil Procedure section 340.6, subdivision (a), and the interests of fairness to both plaintiffs and defendants in criminal malpractice actions. Thus, the plaintiff must file a malpractice claim within the one-year or four-year limitations period set forth in Code of Civil Procedure section 340.6, subdivision (a). Although such an action is subject to demurrer or summary judgment while a plaintiff’s conviction remains intact, the court should stay the malpractice action during the period in which such a plaintiff timely and diligently pursues postconviction remedies. ‘... [T]rial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation.’ By this means, courts can ensure that the plaintiff’s claim will not be barred prematurely by the statute of limitations. This approach at the same time will protect the interest of defendants in attorney malpractice actions in receiving timely notice and avoiding stale claims.” (Coscia v. McKenna & Cuneo (2001) 25 Cal.4th 1194, 1210–1211 [108 Cal.Rptr.2d 471, 25 P.3d 670], internal citations omitted.) [See CACI No. 606, *Legal Malpractice Causing Criminal Conviction—Actual Innocence*].)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 577–595

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

1006. Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or upon renewal of a lease] **[or after retaking possession from a tenant]**, a landlord must conduct a reasonable inspection of the property for unsafe conditions and correct ~~any such~~ **those** conditions discovered in that process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must use reasonable care to correct an unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must use reasonable care to correct an unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009

Directions for Use

Give this instruction with CACI No. 1000, *Essential Factual Elements*, and CACI No. 1001, *Basic Duty of Care*, **and CACI No. 1003, Unsafe Conditions** if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Sources and Authority

- “A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This duty of care also extends to the general public. ‘A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises ... cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.’ [¶] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. ‘Although liability might easily be found where the landowner has actual knowledge of the dangerous condition “[t]he landowner’s lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable.” ’ ” (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755], internal citations omitted.)

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- “Historically, the public policy of this state generally has precluded a landlord’s liability for injuries to his tenant or his tenant’s invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession. This is true even though by the exercise of reasonable diligence the landlord might have discovered the condition. [¶] The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: ‘In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.’ ” (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511 [118 Cal.Rptr. 741], internal citations omitted.)
- “To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act.” (*Uccello, supra*, 44 Cal.App.3d at p. 511, internal citations omitted.)
- “[W]here a landlord has relinquished control of property to a tenant, a ‘bright line’ rule has developed to moderate the landlord’s duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. ‘Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party’s injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition.’ [¶] Limiting a landlord’s obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.’ “(*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735], internal citations omitted.)
- ~~“Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party’s injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition.” (*Mata v. Mata* (2003) 105 Cal.App.4th 1121, 1131–1132 [130 Cal.Rptr.2d 141.]~~

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- “[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger.” (*Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669], internal citations omitted.)
- “[T]he landlord’s responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor ‘only with those matters which would have been disclosed by a reasonable inspection.’ The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord’s obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation.” (*Mora, supra*, 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)
- “It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant’s possible neglect of property. Neglected property endangers the public, and a landlord’s detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]’s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter.” (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556].)
- “[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control.” (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1142, 1143

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.02 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

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36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, §§ 421.01–421.121 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 16:12–16:16

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1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control ~~or Defective Equipment~~

[Name of plaintiff] claims that [he/she] was harmed by an unsafe condition while employed by [name of plaintiff's employer] and working on [name of defendant]'s property. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [owned/leased/occupied/controlled] the property;
2. ~~[Insert either or both of the following:]~~
~~[That [name of defendant] retained control over safety conditions at the worksite;~~
3. ~~That [name of defendant] negligently exercised its retained control over safety conditions by [specify alleged negligent acts or omissions];~~
~~, and [his/her/its] acts [or failure to take actions that [he/she/it] was required to take] contributed to [name of plaintiff]'s injuries; [or]~~
~~[That [name of defendant] negligently provided unsafe equipment that contributed to [name of plaintiff]'s injuries;]~~
34. That [name of plaintiff] was harmed; and
45. That [name of defendant]'s negligent exercise of its retained control over safety conditions ~~[name of defendant]'s conduct~~ was a substantial factor in causing [name of plaintiff]'s harm.

Derived from former CACI No. 1009, April 2007; Revised April 2009

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant ~~either~~ retained control over the safety conditions at the worksite ~~or provided defective equipment, or both~~. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe ~~Concealed~~ Conditions*. For an instruction for injuries based on unsafe ~~concealed~~ conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on a nondelegable duty, see CACI No. 1009C, *Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

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See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

~~In the first option for element 2, include the bracketed language in cases involving alleged omissions that constitute “affirmative contributions” under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 212 fn. 3 [115 Cal.Rptr.2d 853, 38 P.3d 1081].~~

Sources and Authority

- “We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer’s exercise of retained control *affirmatively contributed* to the employee’s injuries.” (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081]~~*Hooker, supra*, 27 Cal.4th at p. 202~~, original italics.)
- “Imposing tort liability on a hirer of an independent contractor when the hirer’s conduct has affirmatively contributed to the injuries of the contractor’s employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is not “in essence ‘vicarious’ or ‘derivative’ in the sense that it derives from the ‘act or omission’ of the hired contractor.” To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term.” (*Hooker, supra*, 27 Cal.4th at pp. 211-212, original italics, internal citations and footnote omitted.)
- “Such affirmative contribution need not always be in the form of actively directing a contractor or contractor’s employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer’s negligent failure to do so should result in liability if such negligence leads to an employee injury.” (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.)
- ~~“[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must negligently exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor.” (*McCarty v. Department of Transportation* (2008), 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777].)~~
- Section 414 of the Restatement Second of Torts provides: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.”
- ~~“[W]e hold that a hirer is liable to an employee of an independent contractor insofar as the hirer’s provision of unsafe equipment affirmatively contributes to the employee’s injury.” (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222 [115 Cal.Rptr.2d 868, 38 P.3d 1094].)~~

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- ~~“‘[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party’s own negligence that renders it liable, not that of the contractor.’” (McKown, supra, 27 Cal.4th at p. 225, internal citation omitted.)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1117

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

1009D. Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment

[Name of plaintiff] claims that [he/she] was harmed by an unsafe condition while employed by [name of plaintiff's employer] and working on [name of defendant]'s property. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [owned/leased/occupied/controlled] the property;
 2. That [name of defendant] negligently provided unsafe equipment that contributed to [name of plaintiff]'s injuries;
 3. That [name of plaintiff] was harmed; and
 4. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.
-

Derived from former CACI No. 1009B, April 2009

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant provided defective equipment. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe concealed conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner's retained control over the property, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*. For an instruction for injuries based on a nondelegable duty, see CACI No. 1009C, *Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty*.

See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

Sources and Authority

- “[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence.” (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 937 [22 Cal.Rptr.3d 530, 102 P.3d 915].)
- “ ‘[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party’s own negligence that renders it liable, not that of the contractor.’ ” (*McKown v.*

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Wal-Mart Stores, Inc. (2002) 27 Cal.4th 219, 225 [115 Cal.Rptr.2d 868, 38 P.3d 1094], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1117

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability* (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

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1201. Strict Liability—Manufacturing Defect—Essential Factual Elements

[Name of plaintiff] claims that the [product] contained a manufacturing defect. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [manufactured/distributed/sold] the [product];
 2. That the [product] contained a manufacturing defect when it left [name of defendant]'s possession;
 - ~~3. That the [product] was used [or misused] in a way that was reasonably foreseeable to [name of defendant];~~
 - ~~43. That [name of plaintiff] was harmed while using the [product] in a reasonably foreseeable way; and~~
 - ~~54. That the [product]'s defect was a substantial factor in causing [name of plaintiff]'s harm.~~
-

New September 2003; Revised April 2009

Directions for Use

~~Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Unforeseeable misuse or modification that was a substantial factor, but not the sole cause, of plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.~~

~~The following may be added as an additional element after element #2 in cases where it is alleged that the product was changed after it left the defendant's possession but in a manner that was foreseeable:~~

~~That any changes made to the [product] after it left [name of defendant]'s possession were reasonably foreseeable to [name of defendant];~~

~~Some cases state that product misuse must be pleaded as an affirmative defense. (See, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the advisory committee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:~~

- ~~• “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole~~

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~~reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)~~

- ~~• “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)~~

Sources and Authority

- “ ‘Regardless of the theory which liability is predicated upon ... it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product’ ” (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 874 [148 Cal.Rptr. 843], internal citation omitted.)
- “[W]here a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury *caused by the defect.*” (*Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 855 [266 Cal.Rptr. 106], original italics.)
- In California, there is no requirement that the plaintiff prove that the defect made the product “unreasonably dangerous.” (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 134-135 [104 Cal.Rptr. 433, 501 P.2d 1153].) Also, the plaintiff does not have to prove that he or she was unaware of the defect. (*Luque v. McLean* (1972) 8 Cal.3d 136, 146 [104 Cal.Rptr. 443, 501 P.2d 1163].)
- ~~• “We agree that strict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable. Although a collision may not be the ‘normal’ or intended use of a motor vehicle, vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products.” (*Cronin, supra*, 8 Cal.3d at p. 126, internal citations omitted.)~~
- ~~• “[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse.” (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].)~~
- ~~• “[A] manufacturer may be held liable where the alteration of the machine or its misuse by the customer was reasonably foreseeable. ... It has been held repeatedly that the foreseeability of the misuse of a product is a question for the trier of the facts.” (*Thompson v. Package Machinery Co.* (1972) 22 Cal.App.3d 188, 196 [99 Cal.Rptr. 281], internal citations omitted.)~~
- “A manufacturer is liable only when a defect in its product was a legal cause of injury. A tort is a legal cause of injury only when it is a substantial factor in producing the injury.” (*Soule, supra*, 8 Cal.4th at p. 572, internal citations omitted.)

Secondary Sources

Preliminary Draft Only -- Not Approved by Judicial Council

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1428–1437

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.30 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

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1203. Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements

[Name of plaintiff] claims the [product]’s design was defective because the [product] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [manufactured/distributed/sold] the [product];
 - ~~2. [That, at the time of the use, the [product] was substantially the same as when it left [name of defendant]’s possession;]~~
 - ~~_____ [or]~~
 - ~~_____ [That any changes made to the [product] after it left [name of defendant]’s possession—~~
 - ~~_____ were reasonably foreseeable to [name of defendant];]~~
 - ~~32.~~ That the [product] did not perform as safely as an ordinary consumer would have expected at the time of use;
 - ~~4. [That the [product] was used [or misused] in a way that was reasonably foreseeable to [name of defendant];]~~
 - ~~53.~~ That [name of plaintiff] was harmed while using the [product] in a reasonably foreseeable way; and
 - ~~64.~~ That the [product]’s failure to perform safely was a substantial factor in causing [name of plaintiff]’s harm.
-

New September 2003; Revised December 2005; April 2009

Directions for Use

If both tests (the consumer expectation test and the risk-benefit test) for design defect are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431].)

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Unforeseeable misuse or modification that was a substantial factor, but not the sole cause, of plaintiff’s harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

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~~Some cases state that product misuse must be pleaded as an affirmative defense. (See, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the advisory committee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:~~

- ~~• “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121], internal citation omitted.)~~
- ~~• “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)~~

Sources and Authority

- “A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way.” (*Soule v. GM Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- In *Barker v. Lull Engineering* (1978) 20 Cal.3d 413 [143 Cal.Rptr. 225, 573 P.2d 443], the court established two alternative tests for determining whether a product is defectively designed. Under the first test, a product may be found defective in design if the plaintiff demonstrates that the product “failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.” (*Id.* at p. 429.) Under the second test, a product is defective if the risk of danger inherent in the design outweighs the benefits of such design. (*Id.* at p. 430.)
- “[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be.” (*Barker, supra*, 20 Cal.3d at p. 418.)
- The consumer expectation test “acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product’s presence on the market includes an implied representation ‘that it [will] safely do the jobs for which it was built.’” (*Soule v. GM Corp.* (1994) 8 Cal.4th 548, 562 [34 Cal.Rptr.2d 607, 882 P.2d 298], internal citations omitted.)
- Use of this instruction is limited by the following principles: “[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product’s performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required.” (*Soule, supra*, 8 Cal.4th

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at p. 568.)

- “[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product’s users permits a conclusion that the product’s design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design.*” (*Soule, supra*, 8 Cal.4th at p. 567, original italics.)
- “In determining whether a product’s safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case.” (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6 [184 Cal.Rptr. 891, 649 P.2d 224].)
- State-of-the-art evidence is not relevant when the plaintiff relies on a consumer expectation theory of design defect. (*Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22].)
- ~~“[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse.” (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule, supra*, 8 Cal.4th at p. 580.)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449–1467

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

[Name of plaintiff] claims that the [product]’s design caused harm to [name of plaintiff]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [manufactured/distributed/sold] the [product];
- ~~2. [That, at the time of the use, the [product] was substantially the same as when it left [name of defendant]’s possession;]~~
- ~~—[or]~~
- ~~—[That any changes made to the [product] after it left [name of defendant]’s possession were reasonably foreseeable to [name of defendant];]~~
- ~~3. That the [product] was used [or misused] in a way that was reasonably foreseeable to [name of defendant]; and~~
2. That [name of plaintiff] was harmed while using the [product] in a reasonably foreseeable way; and
43. That the [product]’s design was a substantial factor in causing harm to [name of plaintiff].

If [name of plaintiff] has proved these ~~four~~ three facts, then your decision on this claim must be for [name of plaintiff] unless [name of defendant] proves that the benefits of the design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:

- (a) The gravity of the potential harm resulting from the use of the [product];
- (b) The likelihood that this harm would occur;
- (c) The feasibility of an alternative safer design at the time of manufacture;
- (d) The cost of an alternative design; [and]
- (e) The disadvantages of an alternative design; [and]
- (f) [Other relevant factor(s)].

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Directions for Use

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If the plaintiff asserts both tests for design defect (the consumer expectation test and the risk-benefit test), the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].)

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Unforeseeable misuse or modification that was a substantial factor, but not the sole cause, of plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

~~Some cases state that product misuse must be pleaded as an affirmative defense. (See, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the advisory committee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:~~

- ~~• “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)~~
- ~~• “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)~~

Sources and Authority

- Under the risk-benefit test, the plaintiff does not have to prove the presence of a defect. Rather, once the plaintiff makes a prima facie showing that the product's design caused the injury, the burden shifts to the defendant to prove the design was not defective. A jury instruction stating that the plaintiff had the burden of proving that a design was defective in a case based on the risk-benefit test was held to be error in *Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487], and in *Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 498 [200 Cal.Rptr. 387].
- “ [I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative

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design.’ [O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product’s design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.’ ” (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- “Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]’s argument that ‘[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.’ Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component.” (*Gonzalez, supra*, 154 Cal.App.4th at pp. 789–790.)
- The plaintiff does not have to prove the existence of a feasible alternative design. (*Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1335 [272 Cal.Rptr. 41], disapproved and overruled on another point in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- This instruction should not be used in connection with the consumer expectation test for design defect: “Risk-benefit weighing is not a formal part of, nor may it serve as a ‘defense’ to, the consumer expectations test.” (*Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1569 [38 Cal.Rptr.2d 446], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449–1467

California Products Liability Actions, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.110, 190.118–190.122 (Matthew Bender)

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1205. Strict Liability—Failure to Warn—Essential Factual Elements

[Name of plaintiff] claims that the *[product]* lacked sufficient **[instructions]** **[or]** **[warning of potential risks/side effects/allergic reactions]**. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* **[manufactured/distributed/sold]** the *[product]*;
2. That the *[product]* had potential **[risks/side effects/allergic reactions]** that were **[known]** **[or]** **[knowable by the use of scientific knowledge available]** at the time of **[manufacture/distribution/sale]**;
3. That the potential **[risks/side effects/allergic reactions]** presented a substantial danger to users of the *[product]*;
4. That ordinary consumers would not have recognized the potential **[risks/side effects/allergic reactions]**;
5. That *[name of defendant]* failed to adequately warn **[or instruct]** of the potential **[risks/side effects/allergic reactions]**;
- ~~6. That the *[product]* was used **[or misused]** in a way that was reasonably foreseeable to *[name of defendant]*;~~
- 76.** That *[name of plaintiff]* was harmed while using the *[product]* in a reasonably foreseeable way; and
- 87.** That the lack of sufficient **[instructions]** **[or]** **[warnings]** was a substantial factor in causing *[name of plaintiff]*'s harm.

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. *[Name of defendant]* had a continuing duty to warn physicians as long as the product was in use.]

New September 2003

Directions for Use

A fuller definition of “scientific knowledge” may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was “knowable in light of the generally recognized and prevailing best scientific and medical knowledge available.” (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347].)

The last bracketed paragraph should be read only in prescription product cases: “In the case of

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prescription drugs and implants, the physician stands in the shoes of the ‘ordinary user’ because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient.” (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483 [81 Cal.Rptr.2d 252].)

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Unforeseeable misuse or modification that was a substantial factor, but not the sole cause, of plaintiff’s harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

~~Some cases state that product misuse must be pleaded as an affirmative defense. (See, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the advisory committee feels that absence of unforeseeable misuse is an element of plaintiff’s claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:~~

- ~~• “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)~~
- ~~• “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)~~

Sources and Authority

- “[A] manufacturer or a supplier of a product is required to give warnings of any dangerous propensities in the product, or in its use, of which he knows, or should know, and which the user of the product would not ordinarily discover.” (*Groll v. Shell Oil Co.* (1983) 148 Cal.App.3d 444, 448 [196 Cal.Rptr. 52], internal citations omitted.)
- “Even though the product is flawlessly designed and manufactured, it may be found defective within the general strict liability rule and its manufacturer or supplier held strictly liable because of the failure to provide an adequate warning.” (*Persons v. Salomon N. Am.* (1990) 217 Cal.App.3d 168, 174 [265 Cal.Rptr. 773], internal citations omitted.)
- “Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury.” (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

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- “[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer’s conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. ... [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product.” (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002-1003 [281 Cal.Rptr. 528, 810 P.2d 549].)
- “The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances.” (*Carlin, supra*, 13 Cal.4th at p. 1113, fn. 3 [56 Cal.Rptr.2d 162, 920 P.2d 1347].)
- “[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution.” (*Anderson, supra*, 53 Cal.3d at p. 1004.)
- “[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger.” (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)
- “A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects.” (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867], internal citation omitted.)
- “... California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn” (*Anderson, supra*, 53 Cal.3d at p. 1000.)
- “[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product.” (*Midgley v. S. S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)
- Under *Cronin*, plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case “did not preclude weighing the degree of dangerousness in the failure to warn cases.” (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)
- “[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products.

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Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective.” (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal.Rptr. 18], original italics.)

- “In most cases, ... the adequacy of a warning is a question of fact for the jury.” (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)
- “[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community.” (*Carlin, supra*, 13 Cal.4th at p. 1116.)
- ~~“We are aware of no authority which requires a manufacturer to warn of a risk which is readily known and apparent to the consumer, in this case the physician.” (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362 [13 Cal.Rptr.2d 811].)~~
- “[A] manufacturer’s liability to the ultimate consumer may be extinguished by ‘intervening cause’ where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer.” (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359].)
- “ ‘A manufacturer’s duty to warn is a continuous duty which lasts as long as the product is in use.’ ... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product.” (*Valentine, supra*, 68 Cal.App.4th at p. 1482.)
- “[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse.” (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467–1479

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.194 (Matthew Bender)

1207A. Strict Liability—Comparative Fault of Plaintiff

[Name of defendant] **claims that** *[[name of plaintiff]]*'s own negligence contributed to *[his/her]* harm. **To succeed on this claim, *[name of defendant]* must prove both of the following:**

1. *[insert one or more of the following:]*

[That *[name of plaintiff]* negligently [used/misused/modified] the [product];] [or]
[[That *[name of plaintiff]* was [otherwise] negligent;]

and
2. **That this negligence was a substantial factor in causing *[name of plaintiff]*'s harm.**

If *[name of defendant]* proves the above, *[name of plaintiff]*'s damages are reduced by your determination of the percentage of *[name of plaintiff]*'s responsibility. I will calculate the actual reduction.

Derived from CACI No. 1207 April 2009

Directions for Use

Give this instruction if the defendant alleges that the plaintiff's own negligence contributed to his or her harm. See also CACI No. 405, *Plaintiff's Contributory Negligence*. For an instruction on the comparative fault of a third person, see CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Unforeseeable misuse or subsequent modification may be considered in determining contributory or comparative negligence if it was a substantial factor in causing the plaintiff's injury. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455].). It can be a complete defense if it is the sole cause of the plaintiff's harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. The plaintiff's foreseeable misuse or modification of the product may also be raised as comparative fault.

Sources and Authority

- In *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737 [144 Cal.Rptr. 380, 575 P.2d 1162], the California Supreme Court held that comparative fault applies to strict products liability actions. The court explained: "[W]e do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should, following *Li*, be borne by others."

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- “[A] petitioner’s recovery may accordingly be reduced, but not barred, where his lack of reasonable care is shown to have contributed to his injury.” (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172].)
- “The record does not support [defendant]’s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]’s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]’s failure to wear protective clothing; [third party]’s failure to furnish the correct replacement bracket for the valve; [third party]’s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident.” (*Torres, supra*, 49 Cal.App.4th at p. 17.)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

1207B. Strict Liability—Comparative Fault of Third Person

[Name of defendant] **claims that the negligence of [name of third person] [also] contributed to [name of plaintiff]’s harm. To succeed on this claim, [name of defendant] must prove both of the following:**

1. [insert one or both of the following:]
 - [That [name of third person] **negligently modified the [product];**] [or]
 - [That [name of third person] **was [otherwise] negligent;**]

and
2. **That this negligence was a substantial factor in causing [name of plaintiff]’s harm.**

If you find that the [negligence/fault] of more than one person including [name of defendant] [and] [[name of plaintiff]/ [and] [name(s) or description(s) of nonparty tortfeasor(s)]] was a substantial factor in causing [name of plaintiff]’s harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.

You will make a separate finding of [name of plaintiff]’s total damages, if any. In determining an amount of damages, you should not consider any person’s assigned percentage of responsibility.

[“Person” can mean an individual or a business entity.]

Derived from former CACI No. 1207 April 2009

Directions for Use

Give this instruction if the defendant has raised the issue of the comparative fault of a third person who is not also a defendant at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (See *Dafonte v. Up-Right* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140]; see also CACI No. 406, *Apportionment of Responsibility*.) For an instruction on the comparative fault of the plaintiff, see CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*.

In the first sentence, include “also” if the defendant concedes some degree of liability. In the second paragraph, select “fault” unless the only basis for liability at issue is negligence. Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff’s harm are not individuals.

Unforeseeable misuse or subsequent modification may be considered in determining contributory or comparative negligence if it was a substantial factor in causing the plaintiff’s injury. (See *Torres v.*

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Xomox Corp. (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455].). It can be a complete defense if it is the sole cause of the plaintiff’s harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. The plaintiff’s foreseeable misuse or modification or a third party’s foreseeable modification may also be raised as comparative fault.

Sources and Authority

- In *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 737 [144 Cal.Rptr. 380, 575 P.2d 1162], the California Supreme Court held that comparative fault applies to strict products liability actions. The court explained: “[W]e do not permit plaintiff’s own conduct relative to the product to escape unexamined, and as to that share of plaintiff’s damages which flows from his own fault we discern no reason of policy why it should, following *Li*, be borne by others.”
- “[A] petitioner’s recovery may accordingly be reduced, but not barred, where his lack of reasonable care is shown to have contributed to his injury.” (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172].)
- “The record does not support [defendant]’s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]’s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]’s failure to wear protective clothing; [third party]’s failure to furnish the correct replacement bracket for the valve; [third party]’s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident.” (*Torres, supra*, 49 Cal.App.4th at p. 17.)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

1245. Affirmative Defense—Product Misuse or Modification

[Name of defendant] claims that [he/she/it] is not responsible for [name of plaintiff]’s claimed harm because the [product] was [misused/ [or] modified] after it left [name of defendant]’s possession. To succeed on this defense, [name of defendant] must prove that:

- 1. The [product] was [misused/ [or] modified] after it left [name of defendant]’s possession;**
 - 2. That the [misuse/ [or] modification] was not reasonably foreseeable to [name of defendant]; and**
 - 3. That the [misuse/ [or] modification] was the sole cause of [name of plaintiff]’s harm.**
-

New April 2009

Directions for Use

Give this instruction if the defendant claims a complete defense to strict product liability because the product was misused or modified after it left the defendant’s possession and control, and the subsequent misuse or modification was so unforeseeable that it should be deemed the sole or superseding cause. If unforeseeable misuse or modification was a substantial factor contributing to, but not the sole or superseding cause of, plaintiff’s harm, there is no complete defense, but the conduct of the plaintiff or of third parties may be considered under principles of comparative negligence or fault. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 15–21 [56 Cal.Rptr.2d 455].) See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- “[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. . . . [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. . . . [A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.” (*Wright v. Stang Mfg. Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)
- “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the *sole* reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121], original italics, internal citations omitted.)
- “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand*

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(1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

- “[Defendant] further contends that [plaintiff]'s injuries arose not from a defective product, but rather, from his parents' modification of the product or their negligent supervision of its use. These arguments cannot be advanced by demurrer. Creation of an unreasonable risk of harm through product modification or negligent supervision is not clearly established on the face of [plaintiff]'s complaint. Instead, these theories must be pled as affirmative defenses.” (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].)
- “[T]here are cases in which the modification of a product has been determined to be so substantial and unforeseeable as to constitute a superseding cause of an injury as a matter of law. However, foreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion. Thus, the issue of superseding cause is generally one of fact. Superseding cause has been viewed as an issue of fact even in cases where ‘safety neglect’ by an employer has increased the risk of injury, or modification of the product has made it more dangerous.” (*Torres, supra*, 49 Cal.App.4th at p. 19, internal citations omitted.)

Secondary Sources

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VF-1200. Strict Products Liability—Manufacturing Defect—Comparative Negligence at Issue

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* [manufacture/distribute/sell] the *[product]*?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the *[product]* contain a manufacturing defect when it left *[name of defendant]*'s possession?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the *[product]* used ~~for~~ *misused* in a way that was reasonably foreseeable to *[name of defendant]*?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the manufacturing defect a substantial factor in causing harm to *[name of plaintiff]*?
 Yes No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are *[name of plaintiff]*'s damages? Do not reduce the damages based on the fault, if any, of *[name of plaintiff]* or *[name/description of other person]*.

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

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[b. **Future economic loss**

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]

Total Future Economic Damages: \$ _____]

[c. **Past noneconomic loss, including [physical pain/mental suffering:]**

\$ _____]

[d. **Future noneconomic loss, including [physical pain/mental suffering:]**

\$ _____]

TOTAL \$ _____

If [name of plaintiff] has proved any damages, answer question 6. If [name of plaintiff] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [name of plaintiff] negligent?
 ___ Yes ___ No

If your answer to question 6 is yes, then answer question 7. If you answered no, insert the number zero next to [name of plaintiff]'s name in question 10 and answer question 8.

7. Was [name of plaintiff]'s negligence a substantial factor in causing [his/her] harm?
 ___ Yes ___ No

If your answer to question 7 is yes, then answer question 8. If you answered no, insert the number zero next to [name of plaintiff]'s name in question 10 and answer question 8.

8. Was [name/description of other person] negligent?
 ___ Yes ___ No

If your answer to question 8 is yes, then answer question 9. If you answered no, insert the number zero next to [name/description of other person]'s name in question 10 and answer question 10.

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9. Was [name/description of other person]'s negligence a substantial factor in causing harm to [name of plaintiff]?
 ___ Yes ___ No

If your answer to question 9 is yes, then answer question 10. If you answered no, insert the number zero next to [name/description of other person]'s name in question 10 and answer question 10.

10. What percentage of responsibility for [name of plaintiff]'s harm do you assign to:

[Name of defendant]:	___%
[Name of plaintiff]:	___%
[Name/description of other person]:	___%
TOTAL	100%

Signed: _____
 Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI Nos. 1201, *Strict Liability—Manufacturing Defect—Essential Factual Elements*, ~~and CACI No. 1207 A, *Strict Liability—Comparative Fault of Plaintiff—Contributory Negligence*, and 1207 B, *Strict Liability—Comparative Fault of Third Person*~~. If product misuse or modification is alleged as a complete defense, questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*, may be included after question 1.

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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VF-1201. Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification

We answer the questions submitted to us as follows:

1. Did [name of defendant] [manufacture/distribute/sell] the [product]?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was the [product] [misused/ [or] modified] after it left [name of defendant]'s possession in a way that was not reasonably foreseeable to [him/her/it]?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Was the [misuse/ [or] modification] the sole cause of [name of plaintiff]'s harm?
 Yes No

If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

- ~~2. At the time the [product] was used, was it substantially the same as when it left [name of defendant]'s possession?~~
 Yes No

~~If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.~~

34. Did the [product] fail to perform as safely as an ordinary consumer would have expected?
 Yes No

If your answer to question ~~3~~4 is yes, then answer question ~~4~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

45. Was the [product] used ~~for misused~~ in a way that was reasonably foreseeable to [name of defendant]?
 Yes No

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If your answer to question **4-5** is yes, then answer question **56**. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

56. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?
 ____ Yes ____ No

If your answer to question **5-6** is yes, then answer question **67**. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

67. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

Signed: _____
 Presiding Juror

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Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised October 2004; April 2007, April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements* and CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Negligence at Issue*, may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1202, *Strict Products Liability—Design Defect—Risk-Benefit Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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[medical expenses \$ _____]
 [other past economic loss \$ _____]
Total Past Economic Damages: \$ _____]

[b. **Future economic loss**
 [lost earnings \$ _____]
 [lost profits \$ _____]
 [medical expenses \$ _____]
 [other future economic loss \$ _____]
Total Future Economic Damages: \$ _____]

[c. **Past noneconomic loss, including [physical pain/mental suffering:]**
 \$ _____]

[d. **Future noneconomic loss, including [physical pain/mental suffering:]**
 \$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*. If product misuse or modification is alleged as a complete defense, questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*, may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions

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6 through 10 of VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Negligence at Issue*, may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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VF-1203. Strict Products Liability—Failure to Warn

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the [*product*] have potential [risks/side effects/allergic reactions] that were [known] [or] [knowable through the use of scientific knowledge available] at the time of [manufacture/distribution/sale]?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the potential [risks/side effects/allergic reactions] present a substantial danger to users of the [*product*]?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would ordinary consumers have recognized the potential [risks/side effects/allergic reactions]?
 Yes No

If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] fail to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions]?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was the [*product*] used ~~for misused~~ in a way that was reasonably foreseeable to [*name of defendant*]?
 Yes No

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If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was the lack of sufficient [instructions] [or] [warnings] a substantial factor in causing harm to [name of plaintiff]?
- ___ Yes ___ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

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Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*. If product misuse or modification is alleged as a complete defense, questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*, may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Negligence at Issue*, may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question 8. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

1724. Affirmative Defense—Statute of Limitations—Defamation

[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [name of plaintiff]’s claimed harm occurred before [insert date one year before date of filing]. [Name of plaintiff]’s claimed harm is considered to have occurred when [name of defendant] first communicated the allegedly defamatory statement to a person other than [name of plaintiff]. [For statements made in a [book/newspaper/magazine], the claimed harm occurred when the [book/newspaper/magazine] was first generally distributed to the public.]

[If [name of defendant] proves that [name of plaintiff]’s claimed harm occurred before [insert date one year before date of filing], [name of plaintiff]’s lawsuit was still filed on time if [name of plaintiff] proves that before that date, [he/she/it] did not discover facts constituting the defamation, and with reasonable diligence could not have discovered those facts.]

New April 2009

Directions for Use

This instruction is for use if the defendant claims that the plaintiff’s action was not filed within the applicable one -year period for defamation. (See Code Civ. Proc., § 340(c).)

If the defamation was published in a book, newspaper, or magazine, include the last sentence of the first paragraph and do not include the second paragraph. The delayed-discovery rule does not apply to these statements. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250–1251 [7 Cal.Rptr.3d 576, 80 P.3d 676].) Otherwise, include the second paragraph if the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense.

The plaintiff bears the burden of pleading and proving delayed discovery. (See *McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr. 645].) See also the Sources and Authority to CACI No. 455, *Statute of Limitations—Delayed Discovery*.

Sources and Authority

- Code of Civil Procedure section 340 provides in part:

Within one year:

(c) An action for libel, slander, false imprisonment, seduction of a person below the age of legal consent, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for that person’s neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding the animal or fowl or in the course of the practice of veterinary medicine on that animal or

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fowl.

- “In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues. ... [A] cause of action for defamation accrues at the time the defamatory statement is ‘published’ (using the term ‘published’ in its technical sense). [¶] [I]n defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. As also has been noted, with respect to books and newspapers, publication occurs (and the cause of action accrues) when the book or newspaper is first generally distributed to the public.” (*Shively, supra*, 31 Cal.4th at pp. 1246–1247, internal citations omitted.)
- “This court and other courts in California and elsewhere have recognized that in certain circumstances it may be appropriate to apply the discovery rule to delay the accrual of a cause of action for defamation or to impose an equitable estoppel against defendants who assert the defense after the limitations period has expired.” (*Shively, supra*, 31 Cal.4th at pp. 1248–1249.)
- “[A]pplication of the discovery rule to statements contained in books and newspapers would undermine the single-publication rule and reinstate the indefinite tolling of the statute of limitations intended to be cured by the adoption of the single-publication rule. If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book ... on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark. Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule. Nor is adoption of the rule proposed by plaintiff appropriate simply because the originator of a privately communicated defamatory statement may, together with the author and the publisher of a book, be liable for the defamation contained in the book. Under the rationale for the single-publication rule, the originator, who is jointly responsible along with the author and the publisher, should not be liable for millions of causes of action for a single edition of the book. Similarly, consistent with that rationale, the originator, like the author or the publisher, should not be subject to suit many years after the edition is published.” (*Shively, supra*, 31 Cal.4th at p. 1251.)

Secondary Sources

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2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[Name of plaintiff] claims that *[name of defendant]* failed to reasonably accommodate *[his/her]* *[physical/mental]* *[condition/disease/disorder/[describe health condition]]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* was **[an employer/[other covered entity]]**;
2. That *[name of plaintiff]* **[was an employee of [name of defendant]/applied to [name of defendant] for a job/[describe other covered relationship to defendant]]**;
3. That **[[name of defendant] thought that] [name of plaintiff] had a [physical/mental] [condition/disease/disorder/[describe health condition]] that limited [insert major life activity]**;
4. That *[name of defendant]* **knew of [name of plaintiff]’s [physical/mental] [condition/disease/disorder/[describe health condition]] that limited [insert major life activity]**;
- 5. That [name of plaintiff] was able to perform the essential job duties with reasonable accommodation for [his/her] [condition/disease/disorder/[describe health condition]]:**
- ~~4/56.~~ That [name of defendant] failed to provide reasonable accommodation for [name of plaintiff]’s [physical/mental] [condition/disease/disorder/[describe health condition]];**
- ~~5/67.~~ That [name of plaintiff] was harmed; and**
- ~~6/78.~~ That [name of defendant]’s failure to provide reasonable accommodation was a substantial factor in causing [name of plaintiff]’s harm.**

[In determining whether *[name of plaintiff]’s [condition/disease/disorder/[describe health condition]]* limits *[insert major life activity]*, you must consider the *[condition/disease/disorder/[describe health condition]]* **[in its unmedicated state/without assistive devices/[describe mitigating measures]].]**

New September 2003; Revised April 2007, December 2007, April 2009

Directions for Use

If element 1 is given, the court may need to instruct the jury on the statutory definition of “employer” under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)-(d).)

In a case of perceived disability, include “[name of defendant] thought that” in element 3, and delete

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optional element 4. In a case of actual disability, do not include “[name of defendant] thought that” in element 3, and give element 4.

~~If the existence of a qualifying disability is disputed, the court must tailor an instruction to the evidence in the case.~~

~~It is now settled~~The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P3d 118].) There is perhaps some uncertainty as to whether this rule applies to cases under Government Code section 12940(m), and if so, which party bears the burden of proof. (See: *Green, supra*, 42 Cal.4th at p. 265; compare *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190] with *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360–363 [118 Cal.Rptr.2d 443].) If the court decides that the plaintiff does not bear the burden of proof, omit element 5.

~~If the plaintiff bears the burden of proof, there is also an issue of how far the employee must go with regard to whether a reasonable accommodation was possible. It has been held that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-951 [62 Cal.Rptr.2d 142].) In contrast, another court has said that it is the employee’s burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation. (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at p. 978.) It would seem that the question of whether the employee has to present evidence of other suitable job descriptions at the employer and prove that a vacancy existed for a position that the employee could do with reasonable accommodation is not resolved.~~

~~No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require the employee to request reasonable accommodation; only that the employer know of the disability. (See *Prilliman, supra*, 53 Cal.App.4th at pp. 950–951; but see *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252 [82 Cal.Rptr.3d 440] [employee must request an accommodation].)~~

Sources and Authority

- Government Code section 12940(m) provides that it is an unlawful employment practice “[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.”

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- “Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship.” (Cal. Code Regs., tit. 2, § 7293.9.)

- Government Code section 12926(n) provides:

“Reasonable accommodation” may include either of the following:

- (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
- (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- Government Code section 12940(n) provides that it is an unlawful employment practice “[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.”

- For a definition of “mental disability,” see Government Code section 12926(i).

- For a definition of “physical disability,” see Government Code section 12926(k).

- Government Code section 12926.1(c) provides, in part: “[T]he Legislature has determined that the definitions of ‘physical disability’ and ‘mental disability’ under the law of this state require a ‘limitation’ upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a ‘substantial limitation.’ This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, ‘working’ is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”

- “The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with

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accommodation should be placed on the plaintiff under this statute as well. First, ..., an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, ... it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff.” (Nadaf-Rahrov, supra, 166 Cal.App.4th at p. 978, internal citations omitted.)

- “Although no particular form of request is required, ‘ “[t]he duty of an employer reasonably to accommodate an employee’s handicap does not arise until the employer is ‘aware of respondent's disability and physical limitations.’ ... ” ’ “ “[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. ...” ... ” (Avila, supra, 165 Cal.App.4th at pp. 1252–1253, internal citations omitted.)
- “Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an ‘undue hardship.’ ” ((Prilliman, supra, 53 Cal.App.4th at p. Prilliman v. United Air Lines, Inc. (1997) 53 Cal.App.4th 935, 947 [62 Cal.Rptr.2d 142].)
- ~~“[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees.” (Prilliman, supra, 53 Cal.App.4th at pp. 950–951.)~~
- “ ‘Ordinarily the reasonableness of an accommodation is an issue for the jury.’ ” (Prilliman, supra, 53 Cal.App.4th at p. 954, internal citation omitted.)
- “[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA.” (Bagatti, supra, 97 Cal.App.4th at p. 362.)
- “Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an ‘undue hardship’ on its operations or if there is no vacant position for which the employee is qualified.” (Spitzer v. Good Guys, Inc. (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)
- “On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined ‘disabilities,’ including those ‘regarded as’ disabled, and must engage in an informal, interactive process to determine any effective accommodations.” (Gelfo v. Lockheed Martin Corp. (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 762

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2250–9:2285, [9:2345–9:2347](#)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3][a]–[b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:50

2542. Disability Discrimination—“Reasonable Accommodation” Explained

A reasonable accommodation is a reasonable change to the workplace that *[choose one or more of the following]*

[gives a qualified applicant with a disability an equal opportunity in the job application process;]

[allows an employee with a disability to perform the essential duties of the job;] [or]

[allows an employee with a disability to enjoy the same benefits and privileges of employment that are available to employees without disabilities.]

Reasonable accommodations may include the following:

- a. Making the workplace readily accessible to and usable by employees with disabilities;
- b. Changing job responsibilities or work schedules;
- c. Reassigning the employee to a vacant position;
- d. Modifying or providing equipment or devices;
- e. Modifying tests or training materials;
- f. Providing qualified interpreters or readers; or
- g. Providing other similar accommodations for an individual with a disability.

If more than one accommodation is reasonable, an employer ~~satisfies its obligation to make~~ a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised April 2009

Directions for Use

Give this instruction to explain “reasonable accommodation” as used in CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. Note that there is not complete accord in the cases as to who bears the burden of proof on reasonable accommodation, and if the plaintiff bears the burden, how extensive that burden is. See the Directions for Use to CACI No. 2541.

Sources and Authority

- Government Code section 12940(m) provides that it is an unlawful employment practice “[f]or an

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employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.”

- Government Code section 12926(n) provides:
 - “Reasonable accommodation” may include either of the following:
 - (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
 - (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- The California Fair Employment and Housing Commission’s regulations provide:
 - Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as:
 - (1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
 - (2) Job Restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions.” (Cal. Code Regs., tit. 2, § 7293.9(a).)

- Government Code section 12926.1(c) provides, in part: “[T]he Legislature has determined that the definitions of ‘physical disability’ and ‘mental disability’ under the law of this state require a ‘limitation’ upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a ‘substantial limitation.’ This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, ‘working’ is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”

- “[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA.” (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 362 [118 Cal.Rptr.2d 443].)

- “[A]n employer who knows of the disability of an employee has an affirmative duty to make known

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to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees.” (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950-951 [62 Cal.Rptr.2d 142].)

- “The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well.” (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 978 [83 Cal.Rptr.3d 190], internal citations omitted.)
- “Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an ‘undue hardship’ on its operations or if there is no vacant position for which the employee is qualified.” (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:213, 9:2091, 9:2093–9:2095, 9:2197, 9:2252, 9:2265, 9:2366

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][a]-[b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:50

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2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code § 12940(n))

[Name of plaintiff] contends that [name of defendant] failed to engage in a good faith, interactive process with [him/her] to determine whether it would be possible to implement effective reasonable accommodations so that [name of plaintiff] [insert job requirements requiring accommodation]. In order to establish this claim, [name of plaintiff] must prove the following:

- 1. That [name of defendant] was [an employer/[other covered entity]];**
 - 2. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/[describe other covered relationship to defendant]];**
 - 3. That [name of plaintiff] had a [physical disability/mental disability/medical condition] that was known to [name of defendant];**
 - 4. That [name of plaintiff] requested that [name of defendant] make reasonable accommodation for [his/her] [disability/condition] so that [he/she] would be able to perform the essential job requirements;**
 - 5. That [name of plaintiff] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she] would be able to perform the essential job requirements;**
 - 6. That [name of defendant] failed to participate in a timely good-faith interactive process with [name of plaintiff] to determine whether reasonable accommodation could be made;**
 - 7. That [name of plaintiff] was harmed; and**
 - 8. That [name of defendant]’s failure to engage in a good-faith interactive process was a substantial factor in causing [name of plaintiff]’s harm.**
-

| *New December 2007; Revised April 2009*

Directions for Use

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No.

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2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining “reasonable accommodation,” see CACI No. 2542, *Disability Discrimination—“Reasonable Accommodation” Explained*.

There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1 [jury’s finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] with *Nadav-Rahrov v. The Nieman Marcus Group Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute].)

Sources and Authority

- Government Code section 12940(n) provides that it is an unlawful employment practice, unless based on a bona fide occupational qualification or on applicable security regulations established by the United States or the State of California, “[f]or an employer or other entity covered by [the FEHA] to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.”
- Government Code section 12926.1(e) provides that the Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990.
- The Interpretive Guidance on Title I of the Americans With Disabilities Act, Title 29 Code of Federal Regulations Part 1630 Appendix, provides, in part:

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) Consider the preference of the individual to be accommodated and select and

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implement the accommodation that is most appropriate for both the employee and the employer.

- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837].)
- “Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other.” (*Gelfo, supra*, 140 Cal.App.4th at p. 54, internal citations omitted.)
- “FEHA's reference to a ‘known’ disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability. (*Gelfo, supra*, 140 Cal.App.4th at p. 61, fn. 21.)
- “[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. ‘If anything,’ it argues, ‘it was [employee] who failed to engage in a good faith interactive process.’ [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties’ efforts and good faith is factual, the claim is properly left for the jury's consideration.” (*Gelfo, supra*, 140 Cal.App.4th at p. 62, fn. 23.)
- “[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. ‘An employee may file a civil action based on the employer’s failure to engage in the interactive process.’ Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, ‘it cannot be known whether an alternative job would have been found.’ The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned.” (*Wysinger, supra, v. Automobile Club of Southern California* (2007) 157 Cal.App.4th at pp. 413, 424–425 [69 Cal.Rptr.3d 1], internal citations omitted.)
- “We disagree ... with *Wysinger's* construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is

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necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green, supra*, 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee.” (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 984–985.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 936(2)

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2280–9:2285, 9:2345–9:2347

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

1 California Civil Practice: Employment Litigation (Thomson West) Discrimination in Employment, § 2:50

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VF-2509. Disability Discrimination—Reasonable Accommodation (Gov. Code, § 12940(m))

We answer the questions submitted to us as follows:

1. Was *[name of defendant]* **[an employer/*[other covered entity]*]**?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was *[name of plaintiff]* **[an employee of *[name of defendant]*/an applicant to *[name of defendant]* for a job/*[other covered relationship to defendant]*]**?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did *[name of plaintiff]* have a **[physical/mental] [condition/disease/disorder/*[describe health condition]*]** that limited *[insert major life activity]*?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did *[name of defendant]* know of *[name of plaintiff]*'s **[physical/mental] [condition/disease/disorder/*[describe health condition]*]** that limited *[insert major life activity]*?
 Yes No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 5. Was *[name of plaintiff]* able to perform the essential job duties with reasonable accommodation for *[his/her]* **[condition/disease/disorder/*[describe health condition]*]**?**
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 56. Did *[name of defendant]* fail to provide reasonable accommodation for *[name of***

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plaintiff]'s [physical/mental] [condition/disease/disorder/[describe health condition]]?
 ____ Yes ____ No

If your answer to question **5-6** is yes, then answer question **67**. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

67. Was [*name of defendant*]'s failure to provide reasonable accommodation a substantial factor in causing harm to [*name of plaintiff*]?
 ____ Yes ____ No

If your answer to question **6-7** is yes, then answer question **78**. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

78. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
 \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]
 \$ _____]

TOTAL \$ _____

Signed: _____

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Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

| *New September 2003; Revised April 2007, April 2009*

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*.

| If specificity is not required, users do not have to itemize all the damages listed in question 7-8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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**VF-2510. Disability Discrimination—Reasonable Accommodation ~~(Gov. Code, § 12940(m))~~—
Affirmative Defense—Undue Hardship (Gov. Code, § 12940(m))**

We answer the questions submitted to us as follows:

1. Was *[name of defendant]* **[an employer/*[other covered entity]*]**?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was *[name of plaintiff]* **[an employee of *[name of defendant]*/an applicant to *[name of defendant]* for a job/*[other covered relationship to defendant]*]**?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did *[name of plaintiff]* have a **[physical/mental] [condition/disease/disorder/*[describe health condition]*]** that limited *[insert major life activity]*?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did *[name of defendant]* know of *[name of plaintiff]*'s **[physical/mental] [condition/disease/disorder/*[describe health condition]*]** that limited *[insert major life activity]*?
 Yes No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 5. Was *[name of plaintiff]* able to perform the essential job duties with reasonable accommodation for *[his/her]* **[condition/disease/disorder/*[describe health condition]*]**?**
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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56. Did [name of defendant] fail to provide reasonable accommodation for [name of plaintiff]'s [physical/mental] [condition/disease/disorder/[describe health condition]]?
 ___ Yes ___ No

If your answer to question **5-6** is yes, then answer question **67**. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

67. Would [name of plaintiff]'s proposed accommodations have created an undue hardship to the operation of [name of defendant]'s business?
 ___ Yes ___ No

If your answer to question **6-7** is no, then answer question **78**. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

78. Was [name of defendant]'s failure to provide a reasonable accommodation a substantial factor in causing harm to [name of plaintiff]?
 ___ Yes ___ No

If your answer to question **7-8** is yes, then answer question **89**. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

89. What are [name of plaintiff]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]
 \$ _____]

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[d. **Future noneconomic loss, including [physical pain/mental suffering:]**
\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

| *New September 2003; Revised April 2007, April 2009*

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*, and CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*. If a different affirmative defense is at issue, this form should be tailored accordingly.

| If specificity is not required, users do not have to itemize all the damages listed in question 8-9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VF-2513. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

We answer the questions submitted to us as follows:

1. Was *[name of defendant]* **[an employer/*[other covered entity]*]**?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was *[name of plaintiff]* **[an employee of *[name of defendant]*/an applicant to *[name of defendant]* for a job/*[other covered relationship to defendant]*]**?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did *[name of plaintiff]* have a **[physical/mental] [condition/disease/disorder/*[describe health condition]*]** that limited *[insert major life activity]*?
 Yes No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did *[name of plaintiff]* request that *[name of defendant]* make reasonable accommodation for **[his/her] [disability/condition]** so that **[he/she]** would be able to perform the essential job requirements?
 Yes No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was *[name of plaintiff]* willing to participate in an interactive process to determine whether reasonable accommodation could be made so that **[he/she]** would be able to perform the essential job requirements?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [name of defendant] fail to participate in a timely good-faith interactive process with [name of plaintiff] to determine whether reasonable accommodation could be made?

___ Yes ___ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [name of defendant]'s failure to participate in a good-faith interactive process a substantial factor in causing harm to [name of plaintiff]?

___ Yes ___ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. What are [name of plaintiff]'s damages?

- [a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

- [b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

- [c. Past noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

- [d. Future noneconomic loss, including [physical pain/mental suffering:]

\$ _____]

TOTAL \$ _____]

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New April 2009

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*.

Do not include the transitional language following question 7 and question 8 if the only damages claimed are also claimed under Government Code section 12940(m) on reasonable accommodation. Use CACI No. VF-2509, *Disability Discrimination—Reasonable Accommodation*, or CACI No. VF-2510, *Disability Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*, to claim these damages.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1 [jury’s finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] with *Nadav-Rahrov v. The Nieman Marcus Group Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute].)

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3005. Affirmative Defense—Consent to Search

[Name of defendant] claims that the search was reasonable and that a search warrant was not required **because [name of plaintiff/third person] consented to the search.** To succeed, [name of defendant] must prove both of the following:

1. That [[name of plaintiff]/[name of third person], ~~a person~~ who controlled or reasonably appeared to have control of the area,¹] knowingly and voluntarily consented to the search; and
2. That the search was reasonable under **all of** the circumstances.

[[Name of third person]'s consent is insufficient if [name of plaintiff] was physically present and expressly refused to consent to the search.]

In deciding whether the search was reasonable, you should consider, among other factors, the following:

- (a) The extent of the particular intrusion;
 - (b) The place in which the search was conducted; [and]
 - (c) The manner in which the search was conducted; [and]
 - (d) [*insert other applicable factor(s)*].
-

New September 2003; Revised April 2009

Directions for Use

Give the optional paragraph after element 2 if the defendant relied on the consent of someone other than the plaintiff to initiate the search. (See *Georgia v. Randolph* (2006) 547 U.S. 103, 106 [126 S.Ct. 1515, 164 L.Ed.2d 208].)

Sources and Authority

- “The Fourth Amendment generally prohibits the warrantless entry of a person’s home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises.” (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [110 S.Ct. 2793, 111 L.Ed.2d 148], internal citations omitted.)
- “ ‘[C]ommon authority’ rests ‘on mutual use of the property by persons generally having joint access or control for most purposes’ The burden of establishing that common authority rests upon the

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State.” (*Illinois v. Rodriguez*, *supra*, 497 U.S. at p. 181, internal citation omitted.)

- “The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.” (*Georgia*, *supra*, 547 U.S. at p. 106, internal citations omitted.)
- ~~“Where the subject property is a premises occupied by more than one person, a search will be reasonable if consent is given by one of the joint occupants ‘who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.’ This is so, even where the defendant has not consented to the search. Further, even if the consenting cotenant, in fact, lacks authority, officers may rely on his or her apparent authority.”~~ (*People v. Oldham* (2000) 81 Cal.App.4th 1, 9-10 [96 Cal.Rptr.2d 343], internal citations omitted.)
- “Where consent is relied upon to justify the lawfulness of a search, the government ‘has the burden of proving that the consent was, in fact, freely and voluntarily given.’ ‘The issue of whether or not consent to search was freely and voluntarily given is one of fact to be determined on the basis of the totality of the circumstances.’ ” (*U.S. v. Henry* (9th Cir. 1980) 615 F.2d 1223, 1230, internal citations omitted.)
- “Whether consent was voluntarily given ‘is to be determined from the totality of all the circumstances.’ We consider the following factors to assess whether the consent was voluntary: (1) whether the person was in custody; (2) whether the officers had their guns drawn; (3) whether a Miranda warning had been given; (4) whether the person was told that he had the right not to consent; and (5) whether the person was told that a search warrant could be obtained. Although no one factor is determinative in the equation, ‘many of this court’s decisions upholding consent as voluntary are supported by at least several of the factors.’ ” (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1026–1027, internal citations omitted.)
- “ ‘The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.’ ” (*Sacramento County Deputy Sheriffs’ Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)
- “The Fourth Amendment proscribes only ‘unreasonable’ searches and seizures. However, the reasonableness of a search or a seizure depends ‘not only on *when* it is made, but also on *how* it is carried out.’ In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an *unreasonable* fashion.” (*Franklin v. Foxworth* (9th Cir. 1994) 31 F.3d 873, 875, internal citation omitted, original italics.)

Preliminary Draft Only -- Not Approved by Judicial Council***Secondary Sources***

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3014. Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[Name of plaintiff] claims that *[name of defendant]* wrongfully arrested *[him/her]* [because *[he/she]* did not have a warrant. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* arrested *[name of plaintiff]* without a warrant;
 2. That *[name of defendant]* was acting or purporting to act in the performance of *[his/her]* official duties;
 3. That *[name of plaintiff]* was harmed; and
 4. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
-

New April 2009

Directions for Use

Give this instruction in a false arrest case brought under 42 United States Code section 1983. For an instruction for false arrest under California law, see CACI No. 1401, *Essential Factual Elements—False Arrest Without a Warrant by Peace Officer*.

The “official duties” referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

Sources and Authority

- “The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: ‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’ ” (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)
- “The Supreme Court has interpreted the phrase ‘under “color” of law’ to mean ‘under “pretense” of law.’ A police officer’s actions are under pretense of law only if they are ‘in some way “related to the performance of his official duties.” ’ By contrast, an officer who is ‘pursuing his own goals and is not in any way subject to control by [his public employer],’ ’ does not act under color of law, unless he ‘purports or pretends’ to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not ‘purport[] or pretend[]’ to be officers, do not act under color of law.” (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations

omitted.)

Secondary Sources

3015. Arrest by Peace Officer Without a Warrant—Affirmative Defense—Probable Cause to Arrest (42 U.S.C. § 1983)

[Name of defendant] claims the arrest was not wrongful because *[he/she]* had probable cause to arrest *[name of plaintiff]* without a warrant.

To succeed on this defense, *[name of defendant]* must prove that at the time of the arrest, *[he/she]* knew or had reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that *[name of plaintiff]* had committed or was in the process of committing a crime.

Conclusive evidence of guilt is not necessary to establish probable cause. However, mere suspicion, common rumor, or even a strong reason to suspect is not enough. Nor is evidence that the officer acted in good faith. There must be some objective evidence that would allow a reasonable officer to conclude that a particular individual has committed or is in the process of committing a criminal offense.

New April 2009

Directions for Use

Give this instruction in a false arrest case brought under 42 United States Code section 1983 in which the defendant asserts that there was probable cause to support the warrantless arrest. For an instruction for probable cause under California law, see CACI No. 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest*.

There is perhaps some difference between the federal standard and the California standard with regard to the respective roles of judge and jury in determining probable cause to arrest. Under federal law construing section 1983, probable cause is usually a question for the jury. Summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest. (*McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1007–1008.) Under California law, the court makes the final determination on probable cause as a matter of law. However, the jury may be called on to resolve any disputed facts before the court makes its determination. (See *Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018–1019 [70 Cal.Rptr.3d 535].)

There appears to be little or no actual difference in the two standards, both call for the jury to resolve disputed facts and for the court to decide the issue if there are none. Presumably, the case would not have made it to trial under either standard if there were no disputed facts, and probable cause could be found as a matter of law. The distinction is that under the federal standard, once the case makes it to trial, the jury is told to make the final determination on probable cause. Under the California standard, the jury is told only to find specified particular facts and must leave the conclusion to be drawn from those facts to the court. This is perhaps a distinction without a difference. If the plaintiff alleges counts under both section 1983 and California law, consider combining this instruction with CACI No. 1402.

Sources and Authority

- “Our task in determining whether probable cause to arrest existed as a matter of law in this § 1983 action is slightly different from a similar determination in the context of a direct review of a criminal arrest. In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. ... By contrast, in a § 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury, ...; and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest.” (*McKenzie, supra*, 738 F.2d at pp. 1007–1008, internal citations omitted.)
- “In reviewing the grant of a motion for judgment as a matter of law, we must determine whether a reasonable jury could have concluded that the detectives lacked probable cause to arrest [plaintiff].” (*Torres v. City of L.A.* (9th Cir. 2008) 540 F.3d 1031, 1042.)
- “ ‘Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.’ ‘While conclusive evidence of guilt is of course not necessary under this standard to establish probable cause, “[m]ere suspicion, common rumor, or even strong reason to suspect are not enough.” ‘ Under the collective knowledge doctrine, in determining whether probable cause exists for arrest, we look to ‘the collective knowledge of all the officers involved in the criminal investigation[.]’ ” (*Torres, supra*, 540 F.3d at pp. 1040–1041, internal citations omitted.)
- “There must be some objective evidence which would allow a reasonable officer to deduce that a particular individual has committed or is in the process of committing a criminal offense. (*McKenzie, supra*, 738 F.2d at p. 1008.)
- “The Fourth Amendment protects ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.” (*Devenpeck v. Alford* (2004) 543 U.S. 146, 152 [125 S.Ct. 588, 160 L.Ed 2d 537], internal citations omitted.)
- “[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, ‘ “the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.” ‘ ‘[T]he Fourth Amendment's concern with “reasonableness” allows certain actions to be taken in certain circumstances, whatever the subjective intent.’ ‘[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.’ ” (*Davenpeck, supra*, 543 U.S. at p. 153, internal citations omitted.)

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- “We may assume that the officers acted in good faith in arresting the petitioner. But ‘good faith on the part of the arresting officers is not enough.’ If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.” (*Beck v. Ohio* (1964) 379 U.S. 89, 97 [85 S.Ct. 223, 13 L.Ed.2d 142], internal citation omitted.)

Secondary Sources

3028. Harassment in Educational Institution (Educ. Code, § 220)

[Name of plaintiff] claims that [he/she] was harmed by being subjected to harassment at school because of [his/her] [specify characteristic, e.g., sexual orientation] and that [name of defendant] is responsible for that harm. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] suffered harassment that was so severe, pervasive, and offensive that it effectively deprived [him/her] of the right of equal access to educational benefits and opportunities;**
- 2. That [name of defendant] had actual knowledge of that harassment; and**
- 3. That [name of defendant] acted with deliberate indifference in the face of that knowledge.**

[Name of defendant] acted with deliberate indifference if its response to the harassment was clearly unreasonable in light of all the known circumstances.

New April 2009

Directions for Use

No language is included to elaborate on what does or does not constitute “deliberate indifference” beyond the broad standard of “clearly unreasonable in light of all the known circumstances.” In *Donovan v. Poway Unified School Dist.*, the court noted that “deliberate indifference” will often be a fact-based question, for which bright line rules are ill-suited. However, the court noted numerous examples from federal cases in which the standard was applied. The failure of school officials to undertake a timely investigation of a complaint of discrimination may amount to deliberate indifference. School officials also must take timely and reasonable measures to end the known harassment. A response may be clearly unreasonable if a school official ignores a complaint of discrimination or if the initial measures chosen to respond to the harassment are ineffective. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 611 [-- Cal.Rptr.3d --].) Any of these factors may be added at the end of the instruction if applicable to the facts of the case.

Sources and Authority

- Education Code section 201 provides:
 - (a) All pupils have the right to participate fully in the educational process, free from discrimination and harassment.
 - (b) California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity.

(c) Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity as guaranteed by the California Constitution and the United States Constitution.

(d) There is an urgent need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools.

(e) There is an urgent need to teach and inform pupils in the public schools about their rights, as guaranteed by the federal and state constitutions, in order to increase pupils' awareness and understanding of their rights and the rights of others, with the intention of promoting tolerance and sensitivity in public schools and in society as a means of responding to potential harassment and hate violence.

(f) It is the intent of the Legislature that each public school undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity.

(g) It is the intent of the Legislature that this chapter shall be interpreted as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et seq.), the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900), Div. 3, Gov. C.), except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes.

- Education Code section 220 provides: “No person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.”
- Education Code section 262.3(b) provides: “Persons who have filed a complaint, pursuant to this chapter, with an educational institution shall be advised by the educational institution that civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders may also be available to complainants. The educational institution shall make this information available by publication in appropriate informational materials.”
- “We conclude that to prevail on a claim under section 220 for peer sexual orientation harassment,

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a plaintiff must show (1) he or she suffered “severe, pervasive and offensive” harassment that effectively deprived the plaintiff of the right of equal access to educational benefits and opportunities; (2) the school district had ‘actual knowledge’ of that harassment; and (3) the school district acted with ‘deliberate indifference’ in the face of such knowledge. We further conclude that from the words of section 262.3, subdivision (b), as well as from other markers of legislative intent, money damages are available in a private enforcement action under section 220.” (*Donovan, supra*, 167 Cal.App.4th at p. 579.)

- “Like Title IX, ... enforcement of the Education Code's antidiscrimination law rests on the assumption of ‘actual notice’ to the funding recipient. ... [¶¶] We decline to adopt a liability standard for damages under section 220 based on principles of respondeat superior and/or constructive notice, particularly in light of the circumstances presented here when the claim of discrimination is not, for example, based on an official policy of the District, but is instead the result of peer sexual orientation harassment and the District's response (or lack thereof) to such harassment. ... [N]egligence principles should not apply to impose liability under a statutory scheme when administrative enforcement of that scheme contemplates actual notice to the funding recipient, with an opportunity to take corrective action before a private action may lie. By requiring actual notice, we ensure liability for money damages under section 220 is based on a funding recipient's own misconduct, determined by its own deliberate indifference to known acts of harassment.” (*Donovan, supra*, 167 Cal.App.4th at pp. 604-605, internal citations omitted.)
- “The decisions of federal courts interpreting Title IX provide a meaningful starting point to determine whether the response of defendants here amounted to deliberate indifference under section 220. Under federal law, deliberate indifference is a ‘ “very high standard.” ‘ Actions that in hindsight are ‘unfortunate’ or even ‘imprudent’ will not suffice.” (*Donovan, supra*, 167 Cal.App.4th at p. 610, internal citations omitted.)

Secondary Sources

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3100. Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

[Name of plaintiff] **claims that** *[[name of individual defendant]/ [and] [name of employer defendant]]* **violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [him/her/[name of decedent]]. To establish this claim, [name of plaintiff] must prove that all of the following are more likely to be true than not true:**

1. **That** *[[name of individual defendant]/[name of employer defendant]’s employee]* *[insert one of the following:]*

[[took/hid/appropriated/obtained/ [or] retained] *[name of plaintiff/decedent]’s property;*

[or]

[[assisted in [taking/hiding/appropriating/obtaining/ [or] retaining] *[name of plaintiff/decedent]’s property;*

2. **That** *[name of plaintiff/decedent]* **was [65 years of age or older/a dependent adult] at the time of the conduct;**
3. **That** *[[name of individual defendant]/[name of employer defendant]’s employee]* **[[took/hid/appropriated/obtained/ [or] retained]/assisted in [taking/hiding/appropriating/obtaining/ [or] retaining]] the property [for a wrongful use/ [or] with the intent to defraud/ [or] by undue influence];**
4. **That** *[name of plaintiff/decedent]* **was harmed; and**
5. **That** *[[name of individual defendant]’s/[name of employer defendant]’s employee’ s]* **conduct was a substantial factor in causing [name of plaintiff]’s harm.**

[One way [name of plaintiff] can prove that [[name of individual defendant]/[name of employer defendant]’s employee] [took/hid/appropriated/obtained/ [or] retained] the property for a wrongful use is by proving that [[name of individual defendant]/[name of employer defendant]’s employee] knew or should have known that [his/her] conduct was likely to be harmful to [name of plaintiff/decedent].

[[name of individual defendant]/[name of employer defendant]’s employee] [took/hid/appropriated/obtained/ [or] retained] the property if [name of plaintiff/decedent] was deprived of the property by an agreement, gift, will, [or] trust[, or] [specify other testamentary instrument] regardless of whether the property was held by [name of plaintiff/decedent] or by [his/her] representative.

[One way [name of plaintiff] can prove that [[name of individual defendant]/[name of employer defendant]’s employee] [[took/hid/appropriated/ [or] retained]/assisted in [taking/hiding/appropriating/ [or] retaining]] the property for a wrongful use is by proving both of

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the following:

1. ~~That [name of plaintiff/decedent] [had the right to have the property [transferred/made readily available] to [him/her]/[[his/her] [conservator/trustee/representative/attorney-in-fact]]; and~~
2. ~~That [[name of individual defendant]/[name of employer defendant]'s employee] knew or should have known that [name of plaintiff/decedent] had this right.~~

~~[[Name of individual defendant]/[Name of employer defendant]'s employee] should have known that [name of plaintiff/decedent] had this right if, on the basis of information received by [[name of individual defendant]/[name of employer defendant]'s employee's authorized third party], it would have been obvious to a reasonable person that [name of plaintiff/decedent] had the right to have the property [transferred/made readily available] to [him/her]/[[his/her] [conservator/trustee/representative/attorney-in-fact]].~~

New September 2003; Revised June 2005, October 2008, April 2009

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder financial abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent's pain and suffering should also use CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering*.

If the individual responsible for the financial abuse is a defendant in the case, use “[name of individual defendant]” throughout. If only the individual's employer is a defendant, use “[name of employer defendant]'s employee” throughout.

If undue influence is alleged in element 3 (See Welf. & Inst. Code, § 15610.30(a)(3)), CACI No. 334, *Affirmative Defense—Undue Influence*, may be adapted for a definition.

~~If the plaintiff is seeking enhanced remedies (attorney fees and costs and damages for the decedent's pain and suffering) against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).~~

If “for a wrongful use” is selected in element 3, give the next-to-last optional paragraph on appropriate facts. Add the bracketed portion at the end of the instruction if the plaintiff is seeking to prove wrongful use by showing that defendant acted in bad faith as defined by the statute. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30(b).)

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Include the last optional paragraph if the elder was deprived of a property right by an agreement, donative transfer, or testamentary bequest. (See Welf. & Inst. Code, § 15610.30(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:
 - “Abuse of an elder or a dependent adult” means either of the following:
 - (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
 - (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.
- Welfare and Institutions Code section 15610.23 provides:
 - (a) “Dependent adult” means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
 - (b) “Dependent adult” includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.
- Welfare and Institutions Code section 15610.27 provides: “ ‘Elder’ means any person residing in this state, 65 years of age or older.”
- Welfare and Institutions Code section 15610.30 provides:
 - (a) “Financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following:
 - (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult ~~to~~ for a wrongful use or with intent to defraud, or both.
 - (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

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~~(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.~~

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains ~~possession of the~~ property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult in bad faith.

~~(1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.~~

~~(2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).~~

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or person property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of the elder or dependent adult. "representative" means a person or entity that is ~~either of the following:~~

~~(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.~~

~~(2) An attorney in fact of an elder or dependent adult who acts within the authority of the power of attorney.~~

~~•Welfare and Institutions Code section 15657.5 provides:~~

~~(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

~~(b) Where it is proven by a preponderance of the evidence that a defendant is liable for~~

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~~financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:~~

~~(1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.~~

~~(2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

~~(e) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.~~

• ~~Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."~~

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a '*physician and surgeon, psychiatrist, psychologist, dentist, ...*' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

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California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30-6.34

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[4] (Matthew Bender)

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3101. Financial Abuse—Decedent’s Pain and Suffering (Welf. & Inst. Code, § 15657.5)

[Name of plaintiff] also seeks to recover damages for [name of decedent]’s pain and suffering. To recover these damages, [name of plaintiff] must also prove by clear and convincing evidence that [name of individual defendant/[name of employer defendant]’s employee] acted with [recklessness/oppression/fraud/ [or] malice] in committing the financial abuse.

New September 2003; Revised June 2005, October 2008; April 2009

Directions for Use

Give this instruction along with CACI No. 3100, *Financial Abuse—Essential Factual Elements*, if the plaintiff seeks survival damages for pain and suffering in addition to conventional tort damages and attorney fees and costs. (See Welf. & Inst. Code, § 15657.5.) Although one would not normally expect that financial abuse alone would lead to a wrongful death action, the Legislature has provided this remedy should the situation arise.

If the individual responsible for the neglect is a defendant in the case, use “[name of individual defendant].” If only the individual’s employer is a defendant, use “[name of employer defendant]’s employee.”

~~If the plaintiff is seeking enhanced remedies (attorney fees and costs and damages for the decedent’s pain and suffering) against the individual’s employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.~~

¶The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15657.5 provides:
 - (a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney’s fees and costs. The term “costs” includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
 - (b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney’s fees and costs set forth in subdivision (a), compensatory damages, and

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all other remedies otherwise provided by law, the ~~following shall apply:~~

~~(1) — The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.~~

~~(2) — The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs.

(d) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.

- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve ‘intentional,’ ‘willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature. ‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur. Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.’ ” (*Delaney, supra*, 20 Cal.4th at pp. 31-32, internal citations omitted.)
- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)
- “The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent’s personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse.

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Even then, those damages would be subject to the \$250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30-6.34, 6.45-6.47

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

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3102A. Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants
(Welf. & Inst. Code, §§ 15657, ~~15657.5~~, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff*] **also claims that** [*name of employer defendant*] **is responsible for** [attorney fees and costs/ **and**] [*name of decedent*]'s **pain and suffering before death**. **To establish this claim,** [*name of plaintiff*] **must prove by clear and convincing evidence** [*insert one or more of the following four options:*]

1. [That [*name of individual defendant*] **was an officer, a director, or a managing agent of** [*name of employer defendant*] **acting on behalf of** [*name of defendant*];] [or]
2. [That **an officer, a director, or a managing agent of** [*name of employer defendant*] **had advance knowledge of the unfitness of** [*name of individual defendant*] **and employed** [*him/her*] **with a knowing disregard of the rights or safety of others;**] [or]
3. [That **an officer, a director, or a managing agent of** [*name of employer defendant*] **authorized** [*name of individual defendant*]'s **conduct;**] [or]
4. [That **an officer, a director, or a managing agent of** [*name of employer defendant*] **knew of** [*name of individual defendant*]'s **wrongful conduct and adopted or approved the conduct after it occurred.**]

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

[If [*name of plaintiff*] proves the above, I will decide the amount of attorney fees and costs.]

Derived from former CACI No. 3102 October 2008; Revised April 2009

Directions for Use

This instruction should be given with CACI No. ~~3101~~, 3104 (neglect), 3107 (physical abuse), or 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is also a defendant. (See Civ. Code, § 3294(b); Welf. & Inst. Code, §§ 15657(c), ~~15657.5(b)(2)~~, 15657.05.) If the employer is the only defendant, give CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

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- Welfare and Institutions Code section 15657 provides:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

- (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
- (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
- (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code, section 15657.5(c) provides:

~~(a) — Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

~~(b) — Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:~~

~~(1) — The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.~~

~~(2) — The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

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- (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found to be liable for financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs.
~~Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.~~

- Welfare and Institutions Code section 15657.05 provides:

Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

- (a)
- (1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
 - (2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.
- (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
- (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."
- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under

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Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve ‘intentional,’ ‘willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature. ‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur. Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.’ ” (*Delaney, supra*, 20 Cal.4th at pp. 31-32, internal citations omitted.)
- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41-6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

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3102B. Employer Liability for Enhanced Remedies—Employer Defendant Only (Welf. & Inst. Code, §§ 15657, ~~15657.5~~, 15657.05; Civ. Code, § 3294(b))

[Name of plaintiff] also claims that *[name of defendant]* is responsible for **attorney fees and costs/ [and] *[name of decedent]*'s pain and suffering before death.** To establish this claim, *[name of plaintiff]* must prove by clear and convincing evidence *[insert one or more of the following four options:]*

1. [That the employee who committed the acts was an officer, a director, or a managing agent of *[name of defendant]* acting on behalf of *[name of defendant]*]; [or]
2. [That an officer, a director, or a managing agent of *[name of defendant]* had advance knowledge of the unfitness of the employee who committed the acts and employed *[him/her/]* with a knowing disregard of the rights or safety of others;] [or]
3. [That an officer, a director, or a managing agent of *[name of defendant]* authorized the conduct of the employee who committed the acts;] [or]
4. [That an officer, a director, or a managing agent of *[name of defendant]* knew of the wrongful conduct of the employee who committed the acts and adopted or approved the conduct after it occurred.]

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

[If *[name of plaintiff]* proves the above, I will decide the amount of attorney fees and costs.]

Derived from former CACI No. 3102 October 2008; Revised April 2008

Directions for Use

This instruction should be given with CACI No. ~~3101~~, 3104 (neglect), 3107 (physical abuse), or 3110 (abduction) if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent’s pain and suffering against an employer and the employee is not also a defendant. (See Civ. Code, § 3294(b); Welf. & Inst. Code, §§ 15657(c), ~~15657.5(b)(2)~~, 15677.05.) If the ~~employer-employee~~ is also a defendant, give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*. The requirements of Civil Code section 3294(b) need not be met in order to obtain enhanced remedies from an employer for financial abuse. (See Welf. & Inst. Code, § 15657.5(c).)

Sources and Authority

- Welfare and Institutions Code section 15657 provides:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse

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as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

- (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
- (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
- (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code, section 15657.5(c) provides:

~~(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.~~

~~(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:~~

~~(1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.~~

~~(2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.~~

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found to be liable for financial abuse as defined in Section

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15610.30. This subdivision shall not apply to the recovery of compensatory damages, or attorney's fees and costs.

~~(e) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.~~

- Welfare and Institutions Code section 15657.05 provides:

Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

- (a)
 - (1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
 - (2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.
- (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
- (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."
- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

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- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41-6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

Preliminary Draft Only -- Not Approved by Judicial Council

VF-3100. Financial Abuse—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.30, 15657.5(b); ~~Civ. Code, § 3294(b)~~)

We answer the questions submitted to us as follows:

1. Was [name of plaintiff/decedent] [65 years of age or older/a dependent adult] at the time of the conduct?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [name of employee defendant] [take/hide/appropriate/**obtain** [or] retain] [name of plaintiff/decedent]'s property [for a wrongful use/ [or] with the intent to defraud **[or] by undue influence**]?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [name of employee defendant]'s conduct a substantial factor in causing harm to [name of plaintiff/decedent]?
 Yes No

If your answer to question 3 is yes, then answer question[s] 4 [and **5**] ~~[select 5, 6, or both]~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [name of plaintiff/decedent]'s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

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[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

TOTAL \$ _____

~~[5. Did [name of plaintiff] prove by clear and convincing evidence that an officer, a director, or a managing agent of [name of employer defendant] had advance knowledge of the unfitness of [name of employee defendant] and employed [him/her] with a knowing disregard of the rights or safety of others?
 _____ Yes _____ No]~~

[65. Did [name of plaintiff] prove by clear and convincing evidence that [name of employee defendant] acted with [recklessness/malice/oppression/ [or] fraud]?
 _____ Yes _____ No

If your answer to question ~~6-5~~ is yes, then answer question 76. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

76. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? \$ _____]

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised June 2005, April 2007, April 2008, October 2008, April 2009

Directions for Use

Preliminary Draft Only -- Not Approved by Judicial Council

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements*, and CACI No. 3101, *Financial Abuse—Decedent’s Pain and Suffering*, ~~and CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*.~~

If the plaintiff alleges that the defendant assisted in the wrongful conduct, modify question 1 as in element 2 of CACI No. 3100.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

~~Include question 5 if employer liability is sought for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657.5(b)(2).) Question 5 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A. A “no” answer to question 5 will foreclose all enhanced remedies from the employer, but not from the individual defendant; a “yes” answer will establish a right to attorney fees and costs from the employer.~~

If the jury answers “yes” to questions 1, 2, and 3, ~~Attorney-attorney~~ fees and costs are recoverable from the individual defendant without any additional showing of any kind. (Welf. & Inst. Code, § 15657.5(a).) Attorney fees are also recoverable from the employer, assuming standard vicarious liability is shown. (See Welf. & Inst. Code, § 15657.5(c).) Incorporate questions 3 and 4 from CACI No. VF-3700, *Negligence—Vicarious Liability*, to address the liability of the employer for the acts of the employee.

Should the financial abuse in some way have caused the victim’s death, the decedent’s pain and suffering before death is recoverable on a showing by clear and convincing evidence that the individual defendant acted with recklessness, oppression, fraud, or malice. (See Welf. & Inst. Code, § 15657.5(b)(~~1~~); Code Civ. Proc., § 377.34.) In such a case, in question 4, include only item 4a for past economic loss. But also include questions 5 and 6 ~~and 7~~.

~~In the transitional language after question 3, direct the jury to answer questions 5, 6 or both, depending on which questions are to be included. If question 6 is to be included but question 5 is not, then 6 will be renumbered as 5.~~

If punitive damages are sought, incorporate a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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**VF-3101. Financial Abuse—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.30,
15657.5**(b)**; ~~Civ. Code, § 3294(b)~~)**

We answer the questions submitted to us as follows:

1. Was *[name of plaintiff/decedent]* [65 years of age or older/a dependent adult] at the time of the conduct?
 Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did *[name of defendant]*'s employee [take/hide/appropriate/**obtain** [or] retain] *[name of plaintiff/decedent]*'s property [for a wrongful use/ [or] with the intent to defraud **[or] by undue influence**]?
 Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was the employee's conduct a substantial factor in causing harm to *[name of plaintiff/decedent]*?
 Yes No

If your answer to question 3 is yes, then answer question[s] 4 [and 5]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are *[name of plaintiff/decedent]*'s damages?

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other future economic loss	\$ _____]

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Total Future Economic Damages: \$ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

TOTAL \$ _____

~~[5. Did [name of plaintiff] prove by clear and convincing evidence that an officer, a director, or a managing agent of [name of defendant] authorized the employee's conduct? Yes No]~~

~~[If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]~~

[6.5. Did [name of plaintiff] prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppression/ [or] fraud]? Yes No]

If your answer to question 6.5 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What were [name of decedent]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death? \$ _____]

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

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Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements*, and CACI No. 3101, *Financial Abuse—Decedent’s Pain and Suffering*, ~~and CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.~~

If the plaintiff alleges that the defendant’s employees assisted in the wrongful conduct, modify question 1 as in element 1 of CACI No. 3100.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If the jury answers “yes” to questions 1, 2, and 3, attorney fees and costs will be recoverable from the employer, assuming standard vicarious liability is shown. (See Welf. & Inst. Code, § 15657.5(c).) Incorporate questions 3 and 4 from CACI No. VF-3700, *Negligence—Vicarious Liability*, to address the liability of the employer for the acts of the employee.

~~Question 5 is required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657.5(b)(2).) Question 5 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102B. A “no” answer to question 5 will foreclose all enhanced remedies; a “yes” answer will establish a right to attorney fees and costs.~~

Should the financial abuse in some way have caused the victim’s death, the decedent’s pain and suffering before death is recoverable on a showing by clear and convincing evidence that the employee acted with recklessness, oppression, fraud, or malice. (See Welf. & Inst. Code, § 15657.5(b)(~~1~~); Code Civ. Proc., § 377.34.) In such a case, in question 4 include only item 4a for past economic loss. But also include ~~the~~ transitional language after questions 5 and ~~questions 6 and 7.~~

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

If there are multiple causes of action, users may wish to combine the individual forms into one form.

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TABLE A

ELDER ABUSE: CAUSES OF ACTION, REMEDIES, AND EMPLOYER LIABILITY

CAUSES OF ACTION	INDIVIDUAL DEFENDANT	EMPLOYER DEFENDANT
FINANCIAL ABUSE	Traditional Damages: preponderance	Traditional Damages: vicarious liability
	Attorney Fees and Costs: preponderance (Welf. & Inst. Code, § 15657.5(a))	Attorney Fees and Costs: <u>vicarious liability</u> Civ. Code, § 3294(b) (Welf. & Inst. Code, § 15657.5(cb)(2))
	Predeath Pain and Suffering: CCE:RMOF (Welf. & Inst. Code, § 15657.5(b)(+))	Predeath Pain and Suffering: Civ. Code, § 3294(b) + <u>vicarious liability</u> + individual CCE:RMOF (Welf. & Inst. Code, 15657.5(b), (c))
ABDUCTION	Traditional Damages: preponderance	Traditional Damages: vicarious liability
	Attorney Fees and Costs: CCE (Welf. & Inst. Code, § 15657.05(a))	Attorney Fees and Costs: Civ. § Code 3294(b) + individual CCE (Welf. & Inst. Code, § 15657.05(c))
	Predeath Pain and Suffering: CCE (Welf. & Inst. Code, § 15657.05(b))	Predeath Pain and Suffering: Civ. Code, § 3294(b) + individual CCE (Welf. & Inst. Code, § 15657.05(c))
NEGLECT AND PHYSICAL ABUSE	Traditional Damages: preponderance	Traditional Damages: vicarious liability
	Attorney Fees and Costs: CCE:RMOF (Welf. & Inst. Code, § 15657(a))	Attorney Fees and Costs: Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, § 15657(a))
	Predeath Pain and Suffering: CCE:RMOF (Welf. & Inst. Code, § 15657(b))	Predeath Pain and Suffering: Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, § 15657(b))

KEY:

CCE = Clear and Convincing Evidence

RMOF = Recklessness, Malice, Oppression, or Fraud

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Civ. Code, § 3294(b) = Standards for imposing liability on employer under Civil Code section 3294(b).

4421. Affirmative Defense—Statute of Limitations—Three Year Limit (Civ. Code, § 3426.6)

[Name of defendant] **claims that** *[name of plaintiff]*'s lawsuit was not filed within the time set by law. **To succeed on this defense,** *[name of defendant]* **must prove that the claimed misappropriation of** *[name of plaintiff]*'s trade secrets occurred before *[insert date three years before date of filing]*.

However, the lawsuit was still filed on time if *[name of plaintiff]* **proves that before** *[insert date three years before date of filing]*, *[he/she/it]* **did not discover, nor with reasonable diligence should have discovered, facts that would have caused a reasonable person to suspect that** *[name of defendant]* **had misappropriated** *[name of plaintiff]*'s *[select short term to describe, e.g., information]*.

New April 2009

Directions for Use

Give this instruction if the California Uniform Trade Secrets Act statute of limitations is at issue. (See Civ. Code, § 3426.6.) In an action in which the defendant is or was a customer of the initial misappropriator, modifications may be required. (See *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal.App.4th 575 [77 Cal.Rptr.3d 685].)

This instruction places the burden on the plaintiff to prove that it did not know nor have any reason to suspect the misappropriation earlier than three years before filing. (See Civ. Code, § 3426.6.) This is the rule for the burden of proof under the nonstatutory delayed-discovery rule. (See *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1030 [98 Cal.Rptr.2d 661]; CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Certain statutes that have their own delayed discovery language (as does Civil Code section 3426.6) have been construed to place the burden on the defendant to prove that the plaintiff knew or should have suspected the facts giving rise to the cause of action earlier than the limitation date. (See, e.g., *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing Code Civ. Proc., § 340.6 on legal malpractice]; CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*.) No court has construed Civil Code section 3426.6 to transfer the burden of proof on delayed discovery to the defendant, so presumably the burden of proof remains with the plaintiff under the nonstatutory rule.

Sources and Authority

- Civil Code Section 3426.6 provides:

An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

- “The unanimous conclusion of courts considering the issue—i.e., from federal courts construing section 3426.6—is that it is the first discovered (or discoverable) misappropriation of a trade secret which commences the limitation period.” (*Glue-Fold, Inc., supra*, 82 Cal.App.4th at p.

1026.)

- “[T]he misappropriation that triggers the running of the statute is that which the plaintiff suspects, not that which may or may not actually exist.” (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 587.)
- “[A] plaintiff may have more than one claim for misappropriation, each with its own statute of limitations, when more than one defendant is involved. This is different from saying that each misappropriation gives rise to a separate claim, which is what section 3426.6 precludes.” (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 583.)
- “A misappropriation within the meaning of the UTSA occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a claim for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in section 3426.6. Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation rather than as giving rise to a separate claim.” (*Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 223 [127 Cal.Rptr.2d 169, 57 P.3d 647].)
- “If someone steals a trade secret and then sells it to a third party, when does the statute of limitations begin to run on any misappropriation claim the trade secret owner might have against the third party? ... We conclude that with respect to the element of knowledge, the statute of limitations on a cause of action for misappropriation begins to run when the plaintiff has any reason to suspect that the third party knows or reasonably should know that the information is a trade secret. The third party's actual state of mind does not affect the running of the statute. (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 579.)
- “We conclude that the trial court erred in ruling, under the stipulated facts, that the statute of limitations did not begin to run until August 2003, when [defendant] actually learned that the DynaSpice program contained [plaintiff] 's trade secrets. Rather, the question is: When did [plaintiff] first have any reason to suspect that a ... customer [of the initial misappropriator] had obtained or used DynaSpice knowing, or with reason to know, that the software contained [plaintiff]'s trade secrets?” (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 588.)
- “[I]t is not necessary that the plaintiff be able to identify the person or persons causing the harm. Since the identity of the defendant is not an element of a cause of action, the failure to discover the identity of the defendant does not postpone accrual of the cause of action. Although never fully articulated, the rationale for distinguishing between ignorance of the defendant and ignorance of the cause of action itself appears to be premised on the commonsense assumption that once the plaintiff is aware of the latter, he normally has sufficient opportunity, within the applicable limitations period, to discover the identity of the former. In this case, therefore, the statute began to run when [plaintiff] had any reason to suspect that the CSI customers knew or should have known that they had acquired [plaintiff]’s trade secrets.” (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 587, internal citations omitted.)

Secondary Sources

5005. Multiple Parties

[There are *[number]* plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of his or her own claim(s). ~~Unless I tell you otherwise, all instructions apply to each plaintiff.~~]

[There are *[number]* defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of his or her own defenses. ~~Unless I tell you otherwise, all instructions apply to each defendant.~~]

[Different aspects of this case involve different parties (plaintiffs and defendants). Each instruction will identify the parties to whom it applies. Pay particular attention to the parties named in each instruction.]

[or]

[Unless I tell you otherwise, all instructions apply to each plaintiff and defendant.]

New April 2004; Revised April 2009

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

The CACI instructions require the use of party names rather than party status words like “plaintiff” and “defendant.” In multiparty cases, it is important to name only the parties in each instruction to whom the instruction applies. For example, an instruction on loss of consortium (See CACI No. 3920) will not apply to all plaintiffs. Instructions on vicarious liability (See CACI Nos. 3700 et seq.) will not apply to all defendants. Unless all or nearly all of the instructions will apply to all of the parties, give the first option for the last paragraph.

Sources and Authority

- “We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)

CACI 09-01**Civil Jury Instruction (CACI) Comment Form**

We prefer receiving comments by E-Mail in an attached Word file sent to
civiljuryinstructions@jud.ca.gov.

However, we provide this form for those who wish to submit comments in writing.

Please indicate the instruction(s) you are commenting on:

Agree

Agree as Modified

Disagree

Comments: _____

Name: _____ Title: _____

On Behalf of (organization): _____

Address: _____

City, State, Zip: _____

Your comments may be written on this *Response Form* or as a letter. Make sure that your letter includes all of the above identifying information. All comments will become part of the public record for this proposal.

Mail or fax this form to:

Judicial Council of California, 455 Golden Gate Avenue,
San Francisco, CA 94102 Attention: Geraldine Dungo
Fax: (415) 865-7664

DEADLINE FOR COMMENT: 5:00 P.M. Friday, March 6, 2009.

Circulation for comment does not imply endorsement by the Judicial Council.