Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

CACI17-01

Title
Civil Jury Instructions (CACI) Revisions

Proposed Rules, Forms, Standards, or Statutes
Add and revise jury instructions and verdict forms

Proposed by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Action Requested
Review and submit comments by March 3, 2017

Proposed Effective Date
July 28, 2017

Contact
Bruce Greenlee, Attorney, 415-865-7698
bruce.greenlee@jud.ca.gov

Executive Summary and Origin

The Judicial Council Advisory Committee on Civil Jury Instructions has posted proposed revisions and additions to the Judicial Council civil jury instructions (CACI). Under Rule 10.58 of the California Rules of Court, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in the midyear supplement to the 2017 edition of the official LexisNexis CACI publication.

Attachments

Proposed revised and new instructions and verdict forms: pp.4–110

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

CIVIL JURY INSTRUCTIONS (CACI 17–01)
TABLE OF CONTENTS

NEGLIGENCE
429. Negligent Sexual Transmission of Disease (*new*) 4

470. Primary Assumption of Risk—Exception to Nonliability—
Coparticipant in Sport or Other Recreational Activity (*renumbered with new title*) 6

471. Primary Assumption of Risk—Exception to Nonliability—
Instructors, Trainers, or Coaches (*renumbered with new title*) 11

472. Primary Assumption of Risk—Exception to Nonliability—
Facilities Owners and Operators and Event Sponsors (*renumbered with new title*) 15

473. Primary Assumption of Risk—Exception to Nonliability—
Occupation Involving Inherent Risk (*new*) 18

DANGEROUS CONDITIONS OF PUBLIC PROPERTY
1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—
Retained Control (*revised*) 21

1010. Affirmative Defense—Recreation Immunity—Exceptions (*revised*) 23

PRODUCT LIABILITY
1249. Affirmative Defense—Reliance on Intermediary (*new*) 26

DEFAMATION
1720. Affirmative Defense—Truth (*revised*) 30

1722. Retraction: News Publication or Broadcast (*revised*) 32

VF-1700. Defamation per se (Public Officer/Figure and Limited Public Figure) (*revised*) 34

VF-1701. Defamation per quod (Public Officer/Figure and Limited Public Figure) (*revised*) 37

VF-1702. Defamation per se (Private Figure—Matter of Public Concern) (*revised*) 40

VF-1703. Defamation per quod (Private Figure—Matter of Public Concern) (*revised*) 44

VF-1704. Defamation per se—Affirmative Defense—Truth
(Private Figure—Matter of Private Concern) (*revised*) 47

VF-1705. Defamation per quod (Private Figure—Matter of Private Concern) (*revised*) 51

FRAUD OR DECEIT
VF-1900. Intentional Misrepresentation (*revised*) 55

VF-1903. Negligent Misrepresentation (*revised*) 58

TRESPASS
2021. Private Nuisance—Essential Factual Elements (*revised*) 61

VF-2006. Private Nuisance (*revised*) 66

CONVERSION
2100. Conversion—Essential Factual Elements (*revised*) 69

VF-2100. Conversion (*revised*) 74

FAIR EMPLOYMENT AND HOUSING ACT (FEHA)
2547. Disability-Based Associational Discrimination—Essential Factual Elements (*revised*) 76

2548. Disability Discrimination─Refusal to Make Reasonable Accommodation in Housing (*new*) 81

2549. Disability Discrimination─Refusal to Permit Reasonable Modification to Housing Unit (*new*) 84

CIVIL RIGHTS
3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm (*revised*) 87

3052. Use of Fabricated Evidence—Essential Factual Elements (*new*) 90

EMINENT DOMAIN
3509A. Precondemnation Damages—Unreasonable Delay (Klopping Damages) (*renumbered with new title*) 93

3509B. Precondemnation Damages—Public Entity's Authorized Entry to Investigate (*new*) 95

3511A. Permanent Severance Damages (*renumbered*) 98

3511B. Temporary Severance Damages (*new*) 102

DAMAGES
3903D. Lost Earning Capacity (Economic Damage) (*revised*) 105

LANTERMAN PETRIS SHORT ACT
4012. Concluding Instruction (*revised*) 108

VF-4000. Conservatorship—Verdict Form (*revised*) 110

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

429. Negligent Sexual Transmission of Disease

[*Name of plaintiff***] claims that [***name of defendant***] sexually transmitted [***specify sexually transmitted disease, e.g., HIV***] to [him/her]. [***Name of defendant***] may be negligent for this transmission if [***name of plaintiff***] proves that [***name of defendant***] knew, or had reason to know, that [he/she] was infected with [e***.g., HIV***].**

New June 2017

Directions for Use

This instruction should be given with CACI No. 400, *Negligence—Essential Factual Elements*. In a claim for negligent transmission of a sexually communicable disease, the elements of negligence, duty, breach, and causation of harm, must be proved. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188 [45 Cal.Rptr.3d 316, 137 P.3d 153].)

One has a duty to avoid transmission if he or she should have known that he or she was infected with the disease (constructive knowledge). (*John B., supra,* 38 Cal.4th at pp. 1190−1191.) While the existence of a duty is a question of law for the court, what a person should have known is a question of fact.

It must be noted that in *John B.*, the court limited its holding on constructive knowledge to the facts of the case before it, which involved a couple who were engaged and subsequently married; a defendant who was alleged to have falsely represented himself as monogamous and disease-free, and who insisted the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those allegedly false representations. The court did not consider the existence or scope of a duty for persons whose relationship did not extend beyond the sexual encounter itself, whose relationship did not contemplate sexual exclusivity, who had not represented themselves as disease-free, or who had not insisted on having sex without condoms. (*John B., supra,* 38 Cal.4th at p. 1193.) Therefore, this instruction may not be appropriate on facts that were expressly reserved in *John B*.

Sources and Authority

- "[A] person who unknowingly contracts a sexually transmitted disease such as herpes may maintain an action for damages against one who either negligently or through deceit infects her with the disease." (*Doe v. Roe* (1990) 218 Cal.App.3d 1538, 1543 [267 Cal.Rptr. 564].)

- "[T]o be *stricken with disease* through another's negligence is in legal contemplation as it often is in the seriousness of consequences, no different from *being struck with an automobile* through another's negligence." (*John B., supra,* 38 Cal.4th at p. 1188, original italics.)

- "Because ' "[a]ll persons are required to use ordinary care to prevent others being injured as a result of their conduct" ', this court has repeatedly recognized a cause of action for negligence not only against those who have actual knowledge of unreasonable danger, but also against those who have constructive knowledge of it." (*John B., supra,* 38 Cal.4th at p. 1190, internal citation omitted.)

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

- " '[C]onstructive knowledge,' which means knowledge 'that one using reasonable care or diligence should have, and therefore is attributed by law to a given person', encompasses a variety of mental states, ranging from one who is deliberately indifferent in the face of an unjustifiably high risk of harm to one who merely should know of a dangerous condition. (*John B., supra,* 38 Cal.4th at pp. 1190−1191, internal citations omitted.)

- "[T]he tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection and would extend at least to those situations where the actor, under the totality of the circumstances, has reason to know of the infection. Under the reason-to-know standard, 'the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.' In other words, 'the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.' " (*John B., supra,* 38 Cal.4th at pp. 1190−1191, internal citations omitted.)

- "[W]e are mindful that our precedents direct us to consider whether a duty of care exists ' "on a case-by-case basis." ' Accordingly, our conclusion that a claim of negligent transmission of HIV lies against those who know or at least have reason to know of the disease must be understood in the context of the allegations in this case, which involves a couple who were engaged and subsequently married; a defendant who falsely represented himself as monogamous and disease-free and insisted the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those false representations. We need not consider the existence or scope of a duty for persons whose relationship does not extend beyond the sexual encounter itself, whose relationship does not contemplate sexual exclusivity, who have not represented themselves as disease-free, or who have not insisted on having sex without condoms." (*John B., supra,* 38 Cal.4th at p. 1193.)

Secondary Sources

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

~~408~~470. Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~– of~~ Coparticipant in Sport or Other Recreational Activity

---

[*Name of plaintiff***] claims [he/she] was harmed while participating in [***specify sport or other recreational 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 [***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 [*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, December 2011, December 2013; Revised and Renumbered From CACI No. 408 June 2017

Directions for Use

This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or other recreational activity. For an instruction applicable to coaches, instructors, or trainers, see CACI No. ~~409~~471, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~– of~~ Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. ~~410~~472, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~– of~~ Facilities Owners and Operators and Event Sponsors*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk.*

Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) Element 1 sets forth the exceptions in which there is a duty.

While duty is generally a question of law, there may be disputed facts that must be resolved by a jury

Copyright Judicial Council of California

before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

Sources and Authority

- "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]n activity falls within the meaning of "sport" if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.' " (*Amezcua v. Los Angeles Harley-Davidson, Inc.* (2011) 200 Cal.App.4th 217, 229 [132 Cal.Rptr.3d 567].)

- "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 [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, supra,* 3 Cal.4th at p. 320.)

- "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, supra,* 42 Cal.4th at p. 497.)

- "[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

Copyright Judicial Council of California

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 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] ['[i]t 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) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)

- "[Plaintiff] has repeatedly argued that primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head. However, a plaintiff's expectation does not define the limits of primary assumption of the risk. 'Primary assumption of risk focuses on the legal question of duty. It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant. … .' " (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 [158 Cal.Rptr.3d 474].)

- "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].)

- "The existence and scope of a defendant's duty depends on the role that defendant played in the activity. Defendants were merely the hosts of a social gathering at their cattle ranch, where [plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibilities of an instructor." (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1550–1551 [98 Cal.Rptr.3d 779], internal citation omitted.)

Copyright Judicial Council of California

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "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 v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], 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 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], original italics, 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.)

- "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 Religious & Cultural Center*], 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves

Copyright Judicial Council of California

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, supra,* 158 Cal.App.4th at pp. 999–1000, internal citation omitted.)

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)

Copyright Judicial Council of California

~~409~~471. Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Instructors, Trainers, or Coaches

---

[*Name of plaintiff***] claims [he/she] was harmed by [***name of defendant***]'s [coaching/training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **[That [***name of defendant***] intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other recreational activity, e.g., horseback riding***] in which [***name of plaintiff***] was participating;]**

   [or]

   [That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., horseback riding***];]**

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 September 2003; Revised April 2004, June 2012, December 2013; Revised and Renumbered From CACI No. 409 June 2017

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

There are exceptions, however, in which there is a duty of care. Use the first option for element 2 if it is alleged that the coach or trainer intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option if it is alleged that the coach's or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, for example, by encouraging or allowing him or her to participate in the sport or activity when he or she was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements.*

Copyright Judicial Council of California

While duty is a question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. ~~408~~470, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to facilities owners and operators and to event sponsors, see CACI No. ~~410~~472, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Facilities Owners and Operators and Event Sponsors.* For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation with Inherent Risk.*

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Here, we do not deal with the relationship between coparticipants in a sport, or with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89, internal citations omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra*, 31 Cal.4th at p. 1006.)

- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to

Copyright Judicial Council of California

improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra,* 191 Cal.App.4th at p. 845, internal citation omitted.)

- "[T]he mere existence of an instructor/pupil relationship does not necessarily preclude application of 'primary assumption of the risk.' Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368−1369 [59 Cal.Rptr.2d 813].)

- "Instructors, like commercial operators of recreational activities, 'have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.' " (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435 [52 Cal.Rptr.2d 812], internal citations omitted.)

- "'Primary assumption of the risk' applies to injuries from risks 'inherent in the sport'; the risks are not any the less 'inherent' simply because an instructor encourages a student to keep trying when attempting a new skill." (*Allan, supra,* 51 Cal.App.4th at p. 1369.)

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether ... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436−1437 [89 Cal.Rptr.2d 920], internal citations 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 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*

Copyright Judicial Council of California

Corp. v. Superior Court (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t 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, supra,* 169 Cal.App.4th at pp. 112–113.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

Secondary Sources

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

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

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

Copyright Judicial Council of California

~~410~~472. Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Facilities Owners and Operators and Event Sponsors

---

[*Name of plaintiff***] claims [he/she] was harmed while [participating in/watching] [***sport or other recreational activity e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**

2. **That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];**

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 December 2013; Revised and Renumbered From CACI No. 410 June 2017

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) There is, however, a duty applicable to facilities owners and operators and to event sponsors not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. ~~408~~470, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. ~~409~~471, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Instructors, Trainers, or Coaches*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation With Inherent Risk.*

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra,* 55 Cal.4th at p. 1162.)

- "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 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] ['[i]t 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, supra,* 169 Cal.App.4th at pp. 112–113.)

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, 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, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra,* 3 Cal.4th at pp. 315−316.)

- "Under *Knight,* defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting

Copyright Judicial Council of California

plaintiff's attention, *while the game was in progress,* constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball." (*Lowe, supra,* 56 Cal.App.4th at p. 114, original italics.)

- "[T]hose responsible for maintaining athletic facilities have a … duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)

- "*Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

Secondary Sources

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

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

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

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

473. Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk

---

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*] while [*name of plaintiff*] was performing [his/her] job duties as [*specify, e.g., a firefighter*]. [*Name of defendant*] is not liable if [*name of plaintiff*]'s injury arose from a risk inherent in the occupation of [*e.g., firefighter*]. However, [*name of plaintiff*] may recover if [he/she] proves all of the following:

[1. That [*name of defendant*] unreasonably increased the risks to [*name of plaintiff*] over and above those inherent in [*e.g., firefighting*];]

[*or*]

[1. That [*name of defendant*] [misrepresented to/failed to warn] [*name of plaintiff*] [of] a dangerous condition that [*name of plaintiff*] could not have known about as part of [his/her] job duties;]

[*or*]

[1. That the cause of [*name of plaintiff*]'s injury was not related to the inherent risk;]

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.

New June 2017

Directions for Use

Give this instruction if the plaintiff asserts an exception to assumption of risk of the injury that he or she suffered because the risk is an inherent part of his or her job duties. This has traditionally been referred to as the "firefighter's rule." (See *Gregory v. Cott* (2014) 59 Cal. 4th 996, 1001 [176 Cal. Rptr. 3d 1, 331 P.3d 179].)

There are, however, exceptions to nonliability under the firefighter's rule. The plaintiff may recover if (1) the defendant's actions have unreasonably increased the risks of injury beyond those inherent in the occupation; (2) the defendant misrepresented or failed to disclose a hazardous condition that the plaintiff had no reason to know about; or (3) the cause of the injury was not related to the inherent risk. This instruction asks the jury to determine whether an exception applies. (*Gregory, supra,* 59 Cal.4th at p. 1010.) These exceptions are presented in the options to element 1.

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to nonliability— Coparticipant in Sport or Other Recreational Activity.* For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption*

of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk—Exception to Nonliability— Facilities Owners and Operators and Event Sponsors*.

Sources and Authority

- "Primary assumption of risk cases often involve recreational activity, but the doctrine also governs claims arising from inherent occupational hazards. The bar against recovery in that context first developed as the 'firefighter's rule,' which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary. After *Knight,* we have viewed the firefighter's rule 'not … as a separate concept,' but as a variant of primary assumption of risk, 'an illustration of when it is appropriate to find that the defendant owes no duty of care.' Whether a duty of care is owed in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity." (*Gregory, supra,* 59 Cal. 4th at pp. 1001−1002, internal citations omitted.)

- "The firefighter's rule, upon which the [defendant] relies, and the analogous veterinarian's rule, are examples of the primary assumption of risk doctrine applied in the employment context." (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 435 [197 Cal.Rptr.3d 51].)

- "Our holding does not preclude liability in situations where caregivers are not warned of a known risk, where defendants otherwise increase the level of risk beyond that inherent in providing care, or where the cause of injury is unrelated to the symptoms of [Alzheimers] disease." (*Gregory, supra,* 59 Cal.4th at p. 1000.)

- "[T]he principle of assumption of risk, which forms the theoretical basis for the fireman's rule, is not applicable where a fireman's injuries are proximately caused by his being misled as to the nature of the danger to be confronted." (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 371 [182 Cal. Rptr. 629, 644 P.2d 822].)

- "The firefighter's rule, however, is hedged about with exceptions. The firefighter does not assume every risk of his or her occupation. The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538 [34 Cal. Rptr. 2d 630, 882 P.2d 347], internal citation omitted.)

- "We have noted that the duty to avoid injuring others 'normally extends to those engaged in hazardous work.' 'We have never held that the doctrine of assumption of risk relieves all persons of a duty of care to workers engaged in a hazardous occupation.' However, the doctrine does apply in favor of those who hire workers to handle a dangerous situation, in both the public and the private sectors. Such a worker, 'as a matter of fairness, should not be heard to complain of the negligence that is the cause of his or her employment. [Citations.] In effect, we have said it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.'

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

This rule encourages the remediation of dangerous conditions, an important public policy. Those who hire workers to manage a hazardous situation are sheltered from liability for injuries that result from the risks that necessitated the employment." (*Gregory, supra,* 59 Cal.4th at p. 1002, internal citations omitted.)

- "Because of the nature of the activity, caring for the mentally infirm, and the relationship between the parties, patient and caregiver, mentally incompetent patients should not owe a legal duty to protect caregivers from injuries suffered in attending to them. Here, the very basis of the relationship between plaintiff and [defendant] was to protect [defendant] from harming either herself or others." (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1770 [53 Cal.Rptr.2d 713].)

Secondary Sources

1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

---

[*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***] retained control over safety conditions at the worksite;**

3. **That [***name of defendant***] negligently exercised [his/her/its] retained control over safety conditions by [***specify alleged negligent acts or omissions***];**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010, December 2011, June 2017

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 retained control over the safety conditions at the worksite. 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 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 providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

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.

The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081].) However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. (*Id.* at p. 212, fn. 3.) ~~The advisory committee believes that the~~ "~~affirmative~~ Affirmative contribution" ~~requirement simply~~ means that there must be causation between the hirer's ~~conduct~~ retained control and the plaintiff's injury. ~~Because~~ But "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act.~~,~~ ~~the committee believes that its~~Element 5, the standard "substantial factor" element,. ~~adequately~~ expresses the "affirmative contribution." requirement. (See

Copyright Judicial Council of California

Regalado v. Callaghan (2016) 3 Cal.App.5th 582, 594−595 [207 Cal.Rptr.3d 712] [agreeing with committee's position that "affirmatively contributed" need not be specifically stated in instruction].)

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, 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.)

- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)

- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)

- "Although drawn directly from case law, [plaintiff]'s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, '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.' The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including 'affirmative contribution' language in CACI No. 1009B. The committee's Directions for Use states: 'The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant*] is not responsible for [*name of plaintiff*]'s harm if [~~he/she~~*name of defendant*] proves that [*name of plaintiff*]'s harm resulted from [his/her*/name of person causing injury's*] entry on ~~or use of~~ [*name of defendant*]'s property for a recreational purpose. However, [*name of defendant*] is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves that

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

[[*name of defendant*] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.]

[or]

[a charge or fee was paid to [*name of defendant*] to use the property.]

[or]

[[*name of defendant*] expressly invited [*name of plaintiff*] to enter ~~use~~ the property ~~for the recreational purpose~~.]

New September 2003; Revised October 2008, December 2014, June 2017

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) In the opening paragraph, if the plaintiff was not the recreational user of the property, insert the name of the person whose conduct on the property is alleged to have caused plaintiff's injury. Immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17 [208 Cal.Rptr.3d 461].)

Choose one or more of the optional exceptions according to the facts. Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a comprehensive list of "recreational purposes," refer to Civil Code section 846.

Whether the term "willful or malicious failure" has a unique meaning under this statute is not entirely clear. One court construing this statute has said that three elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689−690 [217 Cal.Rptr. 522].)

Federal courts interpreting California law have addressed whether the "express invitation" must be

Copyright Judicial Council of California

personal to the user. The Ninth Circuit has held that invitations to the general public do not qualify as "express invitations" within the meaning of section 846. In *Ravell v. United States* (9th Cir. 1994) 22 F.3d 960, 963, the Ninth Circuit held that California law requires a personal invitation for a section 846 invitation, citing *Johnson v. Unocal Corp*. (1993) 21 Cal.App.4th 310, 317 [26 Cal.Rptr.2d 148]. However, the issue has not been definitively resolved by the California Supreme Court.

Sources and Authority

- Recreational Immunity. Civil Code section 846.

- "[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099-1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)

- "Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the 'totality of the facts and circumstances, including ... the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.' " (*Ornelas, supra,* 4 Cal.4th at p. 1102, internal citation omitted.)

- "The phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)

- "[D]efendants' status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be '[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.' Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)

- "Subpart (c) of the third paragraph of section 846 is not limited to injuries to persons on the premises and therefore on its face encompasses persons off-premises such as [plaintiff] and her husband. It is not limited to injuries to recreational participants. Had the Legislature wanted to narrow the third paragraph's immunity to injured recreational users, it could have done so, as it did in the first paragraph." (*Wang, supra,* 4 Cal.App.5th at p. 17.)

- "The concept of willful misconduct has a well-established, well-defined meaning in California law. 'Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.' " (*New, supra,* 171 Cal.App.3d at p. 689, internal citations omitted.)

Copyright Judicial Council of California

- "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)

- "A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play." (*Johnson, supra,* 21 Cal.App.4th at p. 317.)

- "The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra,* 21 Cal.App.4th at p. 315.)

- "Civil Code section 846's liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner's employee while acting within the course of the employment. We base this conclusion on section 846's plain language. The statutory phrase 'keep the premises safe' is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d 722, 235 P.3d 42].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1103–1111

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.22 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.21 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.130 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:34 (Thomson Reuters)

Copyright Judicial Council of California

1249. Affirmative Defense—Reliance on Intermediary

[*Name of defendant***] claims that [he/she/it] is not responsible for any harm to [***name of plaintiff***] based on a failure to warn because [***name of defendant***] sold [***specify product, e.g., asbestos***] to an intermediary purchaser [***name of intermediary***]; and [***name of defendant***] relied on [***name of intermediary***] to provide adequate warnings to end users of [***e.g., asbestos***]. To succeed on this defense, [***name of defendant***] must prove:**

1. **That [***name of defendant***] sold [***specify product, e.g., asbestos***] to [***name of intermediary***];**

[2. **That [***name of defendant***] conveyed adequate warnings of the particular risks in the use of [***e.g., asbestos***] to [***name of intermediary***].]**

[or]

[2. **That [***name of defendant***] knew that [***name of intermediary***] was aware of, or should have been aware of, the particular risks of [***e.g., asbestos***];]**

and

3. **That [***name of defendant***] actually and reasonably relied on [***name of intermediary***] to convey adequate warnings of the particular risks in the use of [***e.g., asbestos***] to those who, like [***name of plaintiff***], might encounter the risk of [***e.g., asbestos***].**

Reasonable reliance depends on many factors, including, but not limited to:

a. **The degree of risk posed by [***e.g., asbestos***];**

b. **The feasibility of [***name of defendant***]'s directly warning those who might encounter [***e.g., asbestos***] in a finished product; and**

c. **The likelihood that the intermediary purchaser will convey warnings.**

In determining the likelihood that [*name of intermediary***] would convey adequate warnings, consider what a supplier of [***e.g., asbestos***] should know about [***name of intermediary***]. Factors to consider include, but are not limited to:**

(1) **Whether [***name of intermediary***] knew or should have been aware of the specific risks posed by [***e.g., asbestos***];**

(2) **Whether [***name of intermediary***] had a reputation**

for carefulness; and

(3) Whether [*name of intermediary*] was willing to, and had the ability to, communicate adequate warnings to end users.

New June 2017

Directions for Use

Give this instruction if the defendant supplier of materials claims that it gave warnings to an intermediary purchaser or relied on an intermediary purchaser to provide warnings to end users of the product. Reasonable reliance on an intermediary is an affirmative defense to a claim of failure to warn under both strict liability and negligence theories. (See *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 187 [202 Cal.Rptr.3d 460, 370 P.3d 1022].)

This instruction sets forth all of the elements of the defense. The reasonableness of the defendant's reliance under factors a−c on the intermediary to warn end users is a question of fact. (*Webb, supra,* 63 Cal.4th at p. 180.)

Sources and Authority

- "When a hazardous raw material is supplied for any purpose, including the manufacture of a finished product, the supplier has a duty to warn about the material's dangers. Under the sophisticated intermediary doctrine, the supplier can discharge this duty if it conveys adequate warnings to the material's purchaser, or sells to a sufficiently sophisticated purchaser, and reasonably relies on the purchaser to convey adequate warnings to others, including those who encounter the material in a finished product. Reasonable reliance depends on many circumstances, including the degree of risk posed by the material, the likelihood the purchaser will convey warnings, and the feasibility of directly warning end users. The doctrine balances the competing policies of compensating those injured by dangerous products and encouraging conduct that can feasibly be performed." (*Webb, supra,* 63 Cal.4th at p. 177.)

- "To establish a defense under the sophisticated intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users. This inquiry will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed." (*Webb, supra,* 63 Cal.4th at pp. 189−190.)

- "Because the sophisticated intermediary doctrine is an affirmative defense, the supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably

relied on the intermediary to transmit warnings." (*Webb, supra,* 63 Cal.4th at p. 187.)

- "Like the sophisticated user defense, the sophisticated intermediary defense applies to failure to warn claims sounding in either strict liability or negligence. As we have previously observed, 'there is little functional difference between the two theories in the failure to warn context.' '[I]n failure to warn cases, whether asserted on negligence or strict liability grounds, there is but one unitary theory of liability which is negligence based—the duty to use reasonable care in promulgating a warning.' " (*Webb, supra,* 63 Cal.4th at p. 187, internal citations omitted.)

- "The goal of products liability law is not merely to spread risk but also 'to "induce conduct that is capable of being performed." ' The sophisticated intermediary doctrine serves this goal by recognizing a product supplier's duty to warn but permitting the supplier to discharge this duty in a responsible and practical way. It appropriately and equitably balances the practical realities of supplying products with the need for consumer safety." (*Webb, supra,* 63 Cal.4th at p. 187, internal citation omitted.)

- "The 'gravity' of risk factor encompasses both the 'serious or trivial character of the harm' that is possible and the likelihood that this harm will result. This factor focuses on the nature of the material supplied. If the substance is extremely dangerous, the supplier may need to take additional steps, such as inquiring about the intermediary's warning practices, to ensure that warnings are communicated. The overarching question is the reasonableness of the supplier's conduct given the potential severity of the harm." (*Webb, supra,* 63 Cal.4th at p. 190, internal citation omitted.)

- "The second Restatement factor, measuring the likelihood that the intermediary will warn, focuses on the reliability of the intermediary. The supplier's knowledge about the intermediary's reliability is judged by an objective standard, based on what a reasonable supplier would have known under the circumstances. Relevant concerns for this factor include, for example, the intermediary's level of knowledge about the hazard, its reputation for carefulness or consideration, and its willingness, and ability, to communicate adequate warnings to end users. Of course, a supplier is always free to inquire about the intermediary's warning policies and practices as a means of assessing the intermediary's reliability. The Second Restatement suggests economic motivations may also be important. For example, an intermediary manufacturer may have an incentive to withhold necessary information about a component material if warnings would make its product less attractive." (*Webb, supra,* 63 Cal.4th at p. 190, internal citations omitted.)

- "It is also significant if, under the circumstances giving rise to the plaintiff's claim, the intermediary itself had a legal duty to warn end users about the particular hazard in question." (*Webb, supra,* 63 Cal.4th at p. 191.)

- "When raw materials are supplied in bulk for the manufacture of a finished product, it may be difficult for the supplier to convey warnings to the product's ultimate consumers. These suppliers likely have no way to identify ultimate product users and no ready means

to communicate with them." (*Webb, supra,* 63 Cal.4th at p. 191.)

- "We recognize that direct proof of actual reliance may be difficult to obtain when, as in the case of latent disease, the material was supplied to an intermediary long ago. However, actual reliance is an inference the factfinder should be able to draw from circumstantial evidence about the parties' dealings." (*Webb, supra,* 63 Cal.4th at p. 193.)

Secondary Sources

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

1720. Affirmative Defense—Truth

[*Name of defendant*] is not responsible for [*name of plaintiff*]'s harm, if any, if [~~he/she~~*name of defendant*] proves that [his/her/its] statement(s) about [*name of plaintiff*] [was/were] true. [*Name of defendant*] does not have to prove that the statement(s) [was/were] true in every detail, so long as the statement(s) [was/were] substantially true.

New September 2003; Revised October 2008, June 2017

Directions for Use

This instruction is to be used only in cases involving private plaintiffs on matters of private concern. In cases involving public figures or matters of public concern, the burden of proving falsity is on the plaintiff. (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

Sources and Authority

- "Truth, of course, is an absolute defense to any libel action." (*Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 581-582 [51 Cal.Rptr.2d 891].)

- "California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' 'Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 154 [162 Cal.Rptr.3d 831], internal citation omitted.)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, 'must be provable as false before there can be liability under state defamation law.' " (*Eisenberg, supra,* 74 Cal.App.4th at p. 1382.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 556–560, 611, 614

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.10 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.55 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.39 (Matthew Bender)

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

1 California Civil Practice: Torts §§ 21:19, 21:52 (Thomson Reuters)

Copyright Judicial Council of California

1722. Retraction: News Publication or Broadcast (Civ. Code, § 48a)

Because [*name of defendant*] is a [[daily/weekly] ~~[~~news publication/broadcaster], [*name of plaintiff*] may recover only the following:

(a) Damages to property, business, trade, profession, or occupation; and

(b) Damages for money spent as a result of the defamation.

However, this limitation does not apply if [*name of plaintiff*] proves both of the following:

1. That [*name of plaintiff*] demanded a correction of the statement within 20 days of discovering the statement; and

2. That [*name of defendant*] did not publish an adequate correction;

[or]

That [*name of defendant*]'s correction was not substantially as conspicuous as the original [publication/broadcast];

[or]

That [*name of defendant*]'s correction was not [published/broadcast] within three weeks of [*name of plaintiff*]'s demand.

New September 2003; Revised June 2016, June 2017

Directions for Use

The judge should decide whether the demand for a retraction was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712].)

The statute is limited to actions "for damages for the publication of a libel in a daily or weekly news publication, or of a slander by radio broadcast." (Civ. Code, § 48a(1).) However a "radio broadcast" includes television. (Civ. Code, § 48.5(4) [the terms "radio," "radio broadcast," and "broadcast," are defined to include both visual and sound radio broadcasting]; *Kalpoe v. Superior Court* (2013) 222 Cal.App.4th 206, 210, 166 Cal.Rptr.3d 80].)

Sources and Authority

- Demand for Correction. Civil Code section 48a.
- "Under California law, a newspaper gains immunity from liability for all but 'special damages' when

Copyright Judicial Council of California

it prints a retraction satisfying the requirements of section 48a." (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410]; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660-661 [256 Cal.Rptr. 310].)

- "An equivocal or incomplete retraction obviously serves no purpose even if it is published in 'substantially as conspicuous a manner ... as were the statements claimed to be libelous.' " (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 629–639

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.24 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.53 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.37 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:55–21:57 (Thomson Reuters)

Copyright Judicial Council of California

VF-1700. Defamation per se (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
   ____ 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 [person/people] to whom the statement was made reasonably understand that the statement was about [***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. **Did [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
   ____ 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 statement false?**
   ____ 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. **Did [***name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] knew the statement was false or had serious doubts about the truth of the statement?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer questions 6, 7, and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

Copyright Judicial Council of California

6. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation? $_____]

[b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements? $_____]

[c. Harm to [*name of plaintiff*]'s reputation? $_____]

[d. Shame, mortification, or hurt feelings? $_____]

[If [*name of plaintiff*] has not proved any actual damages for either c or d, then answer question 8. If [*name of plaintiff*] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation, and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

$_____

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

____ Yes ____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What is your award of punitive damages, if any, against [*name of defendant*]?

$_____

Signed: _____
Presiding Juror

Dated: _____

Copyright Judicial Council of California

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised December 2005, April, 2008, October 2008, December 2010, December 2016, June 2017

Directions for Use

This verdict form is based on CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

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.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

VF-1701. Defamation per quod (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
   ____ 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 [person/people] to whom the statement was made reasonably understand that the statement was about [***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. **Was the statement false?**
   ____ 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***] prove by clear and convincing evidence that [***name of defendant***] knew the statement was false or had serious doubts about the truth of the statement?**
   ____ 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. **Is the statement, because of facts known to the people who heard or read it, the kind that would tend to injure [***name of plaintiff***] in [his/her] occupation?**
   ____ 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 plaintiff***] suffer Harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?**
   ____ Yes ____ No

Copyright Judicial Council of California

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.

ACTUAL DAMAGES

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?
____ Yes ____ No

If your answer to question 7 is yes, then answer questions 8. If you answered no, skip question 8 and answer question 9.

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

[$_____]

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?
____ Yes ____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What is your award of punitive damages, if any, against [*name of defendant*]?

$_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised December 2005, December 2010, December 2016, June 2017

Directions for Use

This verdict form is based on CACI No. 1701, *Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

Copyright Judicial Council of California

DRAFT - 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.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure),* depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

VF-1702. Defamation per se (Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
   ____ 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 [person/people] to whom the statement was made reasonably understand that the statement was about [***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. **Did [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
   ____ 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 statement false?**
   ____ 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. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
   ____ 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.

ACTUAL DAMAGES

Copyright Judicial Council of California

6. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation? $_____]

[b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements? $_____]

[c. Harm to [*name of plaintiff*]'s reputation? $_____]

[d. Shame, mortification, or hurt feelings? $_____]

[If [*name of plaintiff*] has not proved any actual damages for either c or d, answer question 8. If [*name of plaintiff*] has proved actual damages for both c and d, skip questions 8 and 9 and answer question 10.]

ASSUMED DAMAGES

8. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?

____ Yes ____ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

$_____

Regardless of your answer to question 9, skip question 10 and answer question 11.

PUNITIVE DAMAGES

10. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?

____ Yes ____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

Copyright Judicial Council of California

11. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?
____ Yes ____ No

If your answer to question 11 is yes, then answer question 12. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What amount, if any, do you award as punitive damages against [*name of defendant*]?
$_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, June 2017

Directions for Use

This verdict form is based on CACI No. 1702, *Defamation per se—Essential Factual Elements (Private Figure-Matter of Public Concern).*

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.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Copyright Judicial Council of California

Omit question 12 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

VF-1703. Defamation per quod (Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
   ____ 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 [**person/people] to whom the statement was made reasonably understand that the statement was about [*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. **Was the statement false?**
   ____ 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***] fail to use reasonable care to determine the truth or falsity of the statement?**
   ____ 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. **Is the statement, because of facts known to the people who heard or read the statement, the kind of statement that would tend to injure [***name of plaintiff***] in [his/her] occupation?**
   ____ 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 plaintiff***] suffer Harm to [his/her] property, business, profession, or**

Copyright Judicial Council of California

occupation [including money spent as a result of the statement]?
____ 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 the statement a substantial factor in causing [*name of plaintiff***]'s harm?**
____ 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.

ACTUAL DAMAGES

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

[$_____]

If [*name of plaintiff***] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 9.**

PUNITIVE DAMAGES

9. Did [*name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] knew the statement was false or had serious doubts about the truth of the statement?**
____ Yes ____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Has [*name of plaintiff***] proved by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud?**
____ Yes ____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. What amount, if any, do you award as punitive damages against [*name of defendant***]?**

$_____

Signed: _____
Presiding Juror

Copyright Judicial Council of California

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised December 2005, December 2010, December 2016, June 2017

Directions for Use

This verdict form is based on CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure-Matter of Public Concern).*

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.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure-Matter of Public Concern),* depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 11 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

VF-1704. Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
   ____ 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 [person/people] to whom the statement was made reasonably understand that the statement was about [***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. **Did [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
   ____ 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 statement substantially true?**
   ____ 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 use reasonable care to determine the truth or falsity of the statement?**
   ____ 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.

Copyright Judicial Council of California

ACTUAL DAMAGES

6. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation? $_____]

[b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements? $_____]

[c. Harm to [*name of plaintiff*]'s reputation? $_____]

[d. Shame, mortification, or hurt feelings? $_____]

TOTAL $ _____

[If [*name of plaintiff*] has not proved any actual damages for either c or d, then answer question 8. If [*name of plaintiff*] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

$_____

Regardless of your answer to question 8, answer question 9.

PUNITIVE DAMAGES

9. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

____ Yes ____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$_____

Copyright Judicial Council of California

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016

Directions for Use

This verdict form is based on CACI No. 1704, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern),* and CACI No. 1720, Affirmative *Defense—Truth*. Delete question 4 if the affirmative defense of the truth is not at issue.

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.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

~~-~~Multiple statements may need to be set out separately in question 1, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements ~~may~~ will need to be found as to each statement.

~~If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.~~

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

Additional questions on the issue of punitive damages may be needed if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

Copyright Judicial Council of California

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

VF-1705. Defamation per quod (Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
   ____ 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 [person/people] to whom the statement was made reasonably understand that the statement was about [***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. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
   ____ 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 the statement tend to injure [***name of plaintiff***] in [his/her] occupation?**
   ____ 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. **Did [***name of plaintiff***] suffer Harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?**
   ____ 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 statement a substantial factor in causing [***name of plaintiff***]'s harm?**
   ____ Yes ____ No

Copyright Judicial Council of California

If your answer to question 6 is yes, then answer questions 7 and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

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

[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements

$ _____]

[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements

$ _____]

[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation

$ _____]

[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation

$ _____]

TOTAL $ _____

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 8.

PUNITIVE DAMAGES

8. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?
____ Yes ____ No

Copyright Judicial Council of California

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What amount, if any, do you award as punitive damages against [*name of defendant***]?**
$_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised December 2005, December 2010, December 2016, June 2017

Directions for Use

This verdict form is based on CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure-Matter of Public Concern).*

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.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

Multiple statements may need to be set out separately in question 1, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements ~~may~~ will need to be found as to each statement.

~~Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.~~

Question 4 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1705, *Defamation per quod—Essential Factual Elements (Private Figure-Matter of Private Concern),* depending on which ground is applicable in the case.

If the affirmative defense of truth is at issue (see CACI No. 1720, *Affirmative Defense—Truth*), include question 4 from VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)* Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Omit question 9 if the issue of punitive damages has been bifurcated.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

VF-1900. Intentional Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a false representation of [a] fact[s] to [*name of plaintiff*]?
____ 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*] know that the representation was false, or did [he/she] make the representation recklessly and without regard for its truth?
____ 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 defendant*] intend that [*name of plaintiff*] rely on the representation?
____ 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*] reasonably rely on the representation?
____ 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*]'s reliance on [*name of defendant*]'s representation a substantial factor in causing harm to [*name of plaintiff*]?
____ 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. What are [*name of plaintiff*]'s damages?

[a. Past economic loss
[lost earnings $ _____]

Copyright Judicial Council of California

[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 [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2009, December 2010, June 2014, December 2016

Directions for Use

This verdict form is based on CACI No. 1900, *Intentional Misrepresentation.*

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.

If the defendant alleges that the representations referred to in question 1 were opinions only, additional questions may be required on this issue. See CACI No. 1904, *Opinion as Statement of Facts*.

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

Copyright Judicial Council of California

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, if both intentional misrepresentation and negligent misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1903, *Negligent Misrepresentation,* be kept separate and presented in the alternative. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

With respect to the same misrepresentation, question 2 above cannot be answered "yes" and question 3 of VF-1903 cannot also be answered "no." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made recklessly and without regard for the truth (see question 2 above) and one made without reasonable grounds for believing it is true (see CACI No. VF-1903, question 3). Question 2 of VF-1903 should be included to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

VF-1903. Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a false representation of [a] fact[s] to [*name of plaintiff*]?
____ 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*] honestly believe that the representation was true when [he/she] made it?
____ 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 defendant*] have reasonable grounds for believing the representation was true when [he/she] made it?
____ 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.

4. Did [*name of defendant*] intend that [*name of plaintiff*] rely on the representation?
____ 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. Did [*name of plaintiff*] reasonably rely on the representation?
____ 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 [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

Copyright Judicial Council of California

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. 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 [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2009, December 2010, June 2014, December 2016, June 2017

Directions for Use

Copyright Judicial Council of California

This verdict form is based on CACI No. 1903, *Negligent Misrepresentation.*

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.

If the defendant alleges that the representations referred to in question 1 were opinions only, additional questions may be required on this issue. See CACI No. 1904, *Opinion as Statement of Facts*.

If specificity is not required, users do not have to itemize all the damages listed in question 7. 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, if both negligent misrepresentation and intentional misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1900, *Intentional Misrepresentation,* be kept separate and presented in the alternative. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

With respect to the same misrepresentation, question 3 above cannot be answered "no" and question 2 of VF-1900 cannot also be answered "yes." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made without reasonable grounds for believing it is true (see question 3 above) and one made recklessly and without regard for the truth (see CACI No. VF-1900, question 2). Include question 2 to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] interfered with [***name of plaintiff***]'s use and enjoyment of [his/her] land. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***], by acting or failing to act, created a condition or permitted a condition to exist that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   [was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;]**

3. **That this condition substantially interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**

~~5~~4. **That an ordinary person would be reasonably annoyed or disturbed by [***name of defendant***]'s conduct;**

~~4~~5. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

~~5. That an ordinary person would be reasonably annoyed or disturbed by [*name of defendant*]'s conduct;~~

6. **That [***name of plaintiff***] was harmed;**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm; and**

8. **That the seriousness of the harm outweighs the public benefit of [***name of defendant***]'s conduct.**

Copyright Judicial Council of California

New September 2003; Revised February 2007, December 2011, December 2015, June 2016, June 2017

Directions for Use

Element 8 must be supplemented with CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App. 4th 123, 160−165 [184 Cal.Rptr.3d 26].) For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Acts Done Under Express Authority of Statute. Civil Code section 3482.
- "A nuisance is considered a 'public nuisance' when it 'affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' A 'private nuisance' is defined to include any nuisance not covered by the definition of a public nuisance, and also includes some public nuisances. 'In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.' " (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 261-262 [207 Cal.Rptr.3d 532], internal citations omitted.)
- ~~"[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)~~
- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)
- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)

Copyright Judicial Council of California

- ~~"Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but~~ [T]~~t~~o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)

- "~~Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. '~~So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance; … ." ~~'~~" (~~*Koll-Irvine Center Property Owners Assn.*~~*Mendez*, *supra,* 3~~2~~4 Cal.App.5~~4~~th at p. 263~~1041, internal citation omitted~~.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at p. 938, internal citations omitted.)

- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' "(*San Diego Gas & Electric Co., supra,* 13 Cal.4th at pp. 938-939, internal citations omitted.)

- "Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their

Copyright Judicial Council of California

branches extending over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate." (*Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 42 [328 P.2d 269].)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602], internal citations omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422, internal citations omitted.)

- "We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her nuisance claim." (*Wilson, supra,* 234 Cal.App.4th at p. 159, internal citations omitted.)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)

- Restatement Second of Torts, section 822 provides:
  One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
  (a) intentional and unreasonable, or
  (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Copyright Judicial Council of California

- Restatement Second of Torts, section 826 provides:
  An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

  (a) the gravity of the harm outweighs the utility of the actor's conduct, or
  (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 153

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts §§ 17:1, 17:2, 17:4 (Thomson Reuters)

Copyright Judicial Council of California

VF-2006. Private Nuisance

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] [own/lease/occupy/control] the property?
____ 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*], by acting or failing to act, create a condition or permit a condition to exist that was harmful to health?
____ 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 this condition substantially interfere with [*name of plaintiff*]'s use or enjoyment of [his/her] land?
____ 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.

~~5~~4. Would an ordinary person have been reasonably annoyed or disturbed by [*name of defendant*]'s conduct?
Yes No

If your answer to question ~~5~~4 is yes, then answer question 6~~5~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4~~5~~. Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?
____ Yes ____ No

If your answer to question ~~4~~ 5 is no, then answer question ~~5~~6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~**5. Would an ordinary person have been reasonably annoyed or disturbed by [*name of defendant*]'s conduct?**~~
~~**____ Yes ____ No**~~

Copyright Judicial Council of California

~~**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 [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

____ 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. Did the seriousness of the harm outweigh the public benefit of [*name of defendant***]'s conduct?**

____ 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:]

$ _____]

Copyright Judicial Council of California

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2007, December 2010, December 2011, December 2016, June 2017

Directions for Use

This form is based on CACI No. 2021, *Private Nuisance—Essential Factual Elements*.

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.

Depending on the facts of the case, question 2 can be modified, as in element 2 of CACI No. 2021.

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. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

2100. Conversion—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] [a/an] [***insert item of personal property***];**

2. **That [***name of defendant***] ~~intentionally and~~ substantially interfered with [***name of plaintiff***]'s property by [***insert one or more of the following:***]**

   [taking possession of the [*insert item of personal property***];] [or]**

   [preventing [*name of plaintiff***] from having access to the [***insert item of personal property***];] [or]**

   [destroying the [*insert item of personal property***];] [or]**

   [refusing to return the [*insert item of personal property***] after [***name of plaintiff***] demanded its return.]**

3. **That [***name of plaintiff***] did not consent;**

4. **That [***name of plaintiff***] was harmed; and**

5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2009, December 2010, June 2017

Directions for Use

The last option for element 2 may be used if the defendant's original possession of the property was not tortious. (See *Atwood v. S. Cal. Ice Co.* (1923) 63 Cal.App. 343, 345 [218 P. 283], disapproved on other grounds in *Wilson v. Crown Transfer & Storage Co.* (1927) 201 Cal. 701 [258 P. 596].)

Sources and Authority

- "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

Copyright Judicial Council of California

- "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." …' " (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507 [85 Cal.Rptr.3d 268].)

- "[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner's rights thereto constitutes conversion." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50 [108 Cal.Rptr.3d 455].)

- "[Conversion] must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor, supra,* 235 Cal.App.3d at p. 1124, internal citations omitted.)

- "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. The basis of a conversion action ' "rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action." [Citations.]' " (*Los Angeles Federal Credit Union, supra ~~v. Madatyan~~ (2012)* 209 Cal.App.4th at p.~~1383,~~ 1387 ~~[147 Cal.Rptr.3d 768]~~.)

- "The rule of strict liability applies equally to purchasers of converted goods, or more generally to purchasers from sellers who lack the power to transfer ownership of the goods sold. That is, there is no general exception for bona fide purchasers." (*Regent Alliance Ltd., supra,* 231 Cal.App.4th at p. 1181, internal citations omitted.)

- "There are recognized exceptions to the general rule of strict liability. Some exceptions are based on circumstances in which 'the person transferring possession may have the legal power to convey to a bona fide transferee a good title,' as, for example, when 'a principal has clothed an agent in apparent authority exceeding that which was intended.' Another exception concerns goods obtained by means of a fraudulent misrepresentation. If the party who committed the fraud then sells the goods to 'a bona fide purchaser' who 'takes for value and without notice of the fraud, then such purchaser gets good title to the chattel and may not be held for conversion (though the original converter may be).' " (*Regent Alliance Ltd., supra,* 231 Cal.App.4th at p. 1183, internal citation omitted.)

- "[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property." (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461].)

- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn

Copyright Judicial Council of California

over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)

- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. … Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore*, *supra,* ~~*v. Regents of the Univ. of Cal.* (1990)~~ 51 Cal.3d at p.~~120,~~ 136 ~~[271 Cal.Rptr. 146, 793 P.2d 479]~~, internal citations omitted.)

- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)

- "Neither legal title nor absolute ownership of the property is necessary. … A party need only allege it is 'entitled to immediate possession at the time of conversion. … ' … However, a mere contractual right of payment, without more, will not suffice." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "The existence of a lien … can establish the immediate right to possess needed for conversion. 'One who holds property by virtue of a lien upon it may maintain an action for conversion if the property was wrongfully disposed of by the owner and without authority … .' Thus, attorneys may maintain conversion actions against those who wrongfully withhold or disburse funds subject to their attorney's liens." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As [plaintiff] was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, [defendant]'s act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, [plaintiff] is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551–552 [176 P.2d 1], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)

- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)

Copyright Judicial Council of California

- " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.' A 'generalized claim for money [is] not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516], internal citations omitted.)

- "Generally, conversion has been held to apply to the taking of intangible property rights when 'represented by documents, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts.' As one authority has written, 'courts have permitted a recovery for conversion of assets reflected in such documents as accounts showing amounts owed, life insurance policies, and other evidentiary documents. These cases are far removed from the paradigm case of physical conversion; they are essentially financial or economic tort cases, not physical interference cases.' " (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 209 [166 Cal.Rptr.3d 877], internal citation omitted.)

- "Credit card, debit card, or PayPal information may be the subject of a conversion." (*Welco Electronics, Inc., supra,* 223 Cal.App.4th at p. 212, footnote omitted.)

- "One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081–1082 [62 Cal.Rptr.2d 178], internal citations omitted.)

- ~~"[Conversion] must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], internal citations omitted.)~~

- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)

- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)

- "A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case." (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558].)

Copyright Judicial Council of California

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra*, 235 Cal.App.3d at p. 1123, internal citation omitted.)

- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

- "With respect to plaintiffs' causes of action for conversion, '[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.' 'For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, of that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. A similar privilege is afforded an actor for the protection of certain third persons.' " (*Church of Scientology, supra,* 232 Cal.App.3d at p. 1072, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 699–719

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability*, ¶ 2:427.4 et seq. (The Rutter Group)

Rylaarsdam & Turner, California Practice Guide: Civil Procedure Before Trial--Statutes of Limitations, Ch. 4-D, *Actions Involving Personal Property (Including Intangibles)*, ¶ 4:1101 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.40 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 150, *Conversion*, §§ 150.10, 150.40, 150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion*, § 51.21[3][b] (Matthew Bender)

Copyright Judicial Council of California

VF-2100. Conversion

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [own/possess/have a right to possess] a [***insert description of personal property***]?**
   ____ 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***] ~~intentionally and~~ substantially interfere with [***name of plaintiff***]'s property by [[taking possession of/preventing [***name of plaintiff***] from having access to] the [***insert description of personal property***]]/[destroying the [***insert description of personal property***]/refusing to return [***name of plaintiff***]'s [***insert description of personal property***] after [***name of plaintiff***] demanded its return]?**
   ____ 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***] consent?**
   ____ 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.

4. **Was [***name of plaintiff***] harmed?**
   ____ 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 defendant***]'s conduct a substantial factor in causing [***name of plaintiff***]'s harm?**
   ____ 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. **What are [***name of plaintiff***]'s damages?**

Copyright Judicial Council of California

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New December 2005; Revised December 2009, December 2010, June 2011, December 2016, June 2017

Directions for Use

This verdict form is based on CACI No. 2100, *Conversion—Essential Factual Elements.*

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.

If the case involves multiple items of personal property as to which the evidence differs, users may need to modify question 2 to focus the jury on the different items.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

Copyright Judicial Council of California

2547. Disability-Based Associational Discrimination—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] association with a disabled person. 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 plaintiff***] was [***specify basis of association or relationship, e.g., the brother of [name of disabled person]***], who had [a] [***e.g., physical condition***];**

4. [**That [***name of disabled person***]'s [***e.g., physical condition***] was costly to [***name of defendant***] because [***specify reason, e.g., [name of disabled person] was covered under [plaintiff]'s employer-provided health care plan***];]

   [or]

   [**That [***name of defendant***] feared [***name of plaintiff***]'s association with [***name of disabled person***] because [***specify, e.g., [name of disabled person] has a disability with a genetic component and [name of plaintiff] may develop the disability as well***];]

   [or]

   [**That [***name of plaintiff***] was somewhat inattentive at work because [***name of disabled person***]'s [***e.g., physical condition***] requires [***name of plaintiff***]'s attention, but not so inattentive that to perform to [***name of defendant***]'s satisfaction [***name of plaintiff***] would need an accommodation;]

   [or]

   [*Specify other basis for associational discrimination***];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties;**

~~5~~6. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [*or***]**

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [*or***]**

Copyright Judicial Council of California

[That [*name of plaintiff*] was constructively discharged;]

~~6~~7. That [*name of plaintiff*]'s association with [*name of disabled person*] was a substantial motivating reason for [*name of defendant*]'s [decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]/conduct];

~~7~~8. That [*name of plaintiff*] was harmed; and

~~8~~9. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

New December 2014; Revised June 2017

Directions for Use

Give this instruction if plaintiff claims that he or she was subjected to an adverse employment action because of his or her association with a disabled person. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

Select a term to use throughout to describe the source of the disabled person's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655–660 [163 Cal.Rptr.3d 392] [claim for "disability-based associational discrimination" adequately pled].) Element 4 sets forth options for the three versions. But the versions are illustrative rather than exhaustive; therefore, an "other" option is provided. (See *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1042 [207 Cal.Rptr.3d 120].)

An element of a disability discrimination case is that the plaintiff must be otherwise qualified to do the job, with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (see element 5).) However, the FEHA does not expressly require reasonable accommodation for association with a disabled person. (Gov. Code, § 12940(m) [employer must reasonably accommodate applicant or employee].) Nevertheless, one court has suggested that such a requirement may exist, without expressly deciding the issue. (See *Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038−1039.) A reference to reasonable accommodation may be added to element 5 if the court decides to impose this requirement.

Read the first option for element ~~5~~ 6 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element ~~5~~ 6 and also give CACI

Copyright Judicial Council of California

No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 7~~6~~ if either the second or third option is included for element ~~5~~4.

Element ~~6~~ 7 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the existence of the associate's disability is disputed, additional instructions defining "medical condition," "mental disability," and "physical disability," may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With Disabled Person Protected. Government Code section 12926(o).
- " 'Three types of situation are, we believe, within the intended scope of the rarely litigated … association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra,* 220 Cal.App.4th at p. 657.)
- "We agree with *Rope* [*supra*] that *Larimer* [*Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698] provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.' As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with a disabled person was a substantial motivating factor for the employer's adverse employment action.

Copyright Judicial Council of California

Rope held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1042 internal citation omitted.)

- " '[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision … then there is no *disability* discrimination.' " (*Rope, supra,* 220 Cal.App.4th at p. 658, original italics.)

- "A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this [disability discrimination] framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person. … [T]he disability must be a substantial factor motivating the employer's adverse employment action." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical … disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037.)

Secondary Sources

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, Disability Discrimination—California Fair Employment And Housing Act (FEHA), ¶¶ 9:2213-9:2215 (The Rutter Group)

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

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34 (Matthew Bender)

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to reasonably accommodate [his/her] [***select term to describe basis of limitations, e.g., physical disability***] as necessary to afford [him/her] an equal opportunity to use and enjoy a dwelling. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***specify nature of housing at issue, e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify accommodation required***];**

6. **That it was reasonable to [***specify accommodation***];**

7. **That [***name of defendant***] refused to make this accommodation.**

New June 2017

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to reasonably accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. (Gov. Code, § 12927(c)(1).)

In the introductory paragraph, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes." Use the term in element 3.

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what he or she did to obtain the housing.

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because he or she was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, explain the accommodation in rules, policies, practices that is alleged to be needed.

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).

- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.

- "Housing" defined. Government Code section 12927(d).

- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p.1592.)

- "FEHA prohibits, as unlawful discrimination, a 'refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.' 'In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation.' " (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1051 [188

Cal.Rptr.3d 537], internal citation omitted.)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

- "This evidence established the requisite causal link between the [defendant]'s no-pets policy and the interference with the [plaintiffs]' use and enjoyment of their condominium." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

- "When the reasons for a delay in offering a reasonable accommodation are subject to dispute, the matter is left for the trier of fact to resolve. The administrative law judge properly characterized this lengthy delay as a refusal to provide reasonable accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1599, internal citation omitted.)

- "We reiterate that the FEHC did not rule that companion pets are always a reasonable accommodation for individuals with mental disabilities. Each inquiry is fact specific and requires a case-by-case determination." ((*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Accommodations under the Fair Housing Act (May 17, 2004, March 3, 2008)

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 946

California Real Estate Law and Practice, Ch. 214, Government Regulations and Enforcement, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, Civil Rights: Housing Discrimination, § 117.14 (Matthew Bender)

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to permit reasonable modifications of [***name of plaintiff***]'s [***specify type of housing, e.g., apartment***] necessary to afford [***name of plaintiff***] full enjoyment of the premises. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***select term to describe basis of limitations, e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify modification(s) required***];**

6. **That it was reasonable to expect [***name of defendant***] to [***specify modification(s) required***];**

7. **That [***name of plaintiff***] agreed to pay for [this/these] modification[s]; [and]**

8. **[That [***name of plaintiff***] agreed that, at the end of the tenancy, [he/she] would restore the interior of the unit to the condition that existed before the modifications, other than for reasonable wear and tear; and]**

9. **That [***name of defendant***] refused to permit [this/these] modification[s].**

New June 2017

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to permit reasonable modifications to a living unit to accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises. (Gov. Code, § 12927(c)(1).)

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what he or she did to obtain

the housing.

In element 3, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because he or she was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, specify the modifications that are alleged to be needed.

In the case of a rental, the landlord may, if it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear). (Gov. Code, § 12927(c)(1).) Include element 7 if the premises to be physically altered is a rental unit, and the plaintiff agreed to restoration. If the parties dispute whether restoration is reasonable, presumably the defendant would have to prove reasonableness. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that s/he is asserting].)

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.
- "Housing" defined. Government Code section 12927(d).
- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)
- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)
- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical

or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Modifications under the Fair Housing Act (March 3, 2008)

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 946

California Real Estate Law and Practice, Ch. 214, Government Regulations and Enforcement, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, Civil Rights: Housing Discrimination, § 117.14 (Matthew Bender)

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That while imprisoned, [***describe violation that created risk, e.g., [name of plaintiff] was placed in a cell block with rival gang members***];**

2. **That [***name of defendant***]'s [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew that [his/her] [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That [***name of defendant***] disregarded the risk by failing to take reasonable measures to address it;**

~~4~~5. **That there was no reasonable justification for the conduct;**

~~5~~6. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

~~6~~7. **That [***name of plaintiff***] was harmed; and**

~~7~~8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012; Revised December 2014, June 2015, June 2017

Directions for Use

Give this instruction in a case involving conduct that allegedly created a substantial risk of serious harm to an inmate. (See *Farmer v. Brennan* (1994) 511 U.S. 825 [114 S.Ct. 1970, 128 L.Ed.2d 811].) For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*.

Copyright Judicial Council of California

In element 1, describe the act or omission that created the risk. In elements 2 and 3, choose "conduct" if the risk was created by affirmative action. Choose "failure to act" if the risk was created by an omission.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer, supra,* 511 U.S. at p. 834.) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials were aware of a "substantial risk of serious harm" to the inmate's health or safety, but failed to act to address the danger. (See *Castro v. Cnty. of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1073.) Second, the inmate must show that the prison officials had no "reasonable" justification for the conduct, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3, 4, and ~~4~~ 5 express the deliberate-indifference components.

The "official duties" referred to in element ~~5~~ 6 must be duties created by any 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 6~~5~~.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- "[D]irect causation by affirmative action is not necessary: 'a prison official may be held liable under the Eighth Amendment if he knows that inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it*.' " (*Castro, supra,* 833 F.3d at p. 1067, original italics.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra,* 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

Copyright Judicial Council of California

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. … The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in … conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, 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

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 826

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (Matthew Bender)

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

3052. Use of Fabricated Evidence—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] fabricated evidence against [him/her], and that as a result, [he/she] was deprived of [his/her] [***specify constitutional or legal right, privilege, or immunity, e.g, liberty***] without due process of law. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***specify fabricated evidence, e.g., informed the district attorney that plaintiff's DNA was found at the scene of the crime***];**

2. **That this [***e.g., statement***] was not true;**

3. **That [***name of defendant***] knew that the [***e.g., statement***] was not true; and;**

4. **That because of [***name of defendant***]'s conduct, [***name of plaintiff***] was deprived of [his/her] [***e.g., liberty***].**

To decide whether or not there was a deprivation, you must determine what would have happened if the [*e.g., statement***] had not been used against [***name of plaintiff***].**

[Deprivation of liberty does not require that [*name of plaintiff***] have been put in jail. Nor is it necessary that [he/she] prove that [he/she] was wrongly convicted of a crime.]**

New June 2017

Directions for Use

This instruction is for use if the plaintiff claims to have been deprived of a constitutional or legal right based on false evidence. Give also CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*.

What would have happened had the fabricated evidence not been presented (i.e., causation) is a question of fact. (*Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001, 1013 [132 Cal.Rptr.3d 143].)

Give the last optional paragraph in a criminal case. It would appear that the use of fabricated evidence for prosecution may be a constitutional violation even if the arrest was lawful or objectively reasonable. (See *Kerkeles, supra,* 199 Cal.App.4th at pp. 1011–1012, quoting favorably *Ricciuti v. New York City Transit Authority* (2d Cir. 1997) 124 F.3d 123, 130.)

Sources and Authority

- "Substantive due process protects individuals from arbitrary deprivation of their liberty by government." (*Costanich v. Dep't of Soc. & Health Servs.* (9th Cir. 2009) 627 F.3d 1101, 1110.)

- "[T]here is a clearly established constitutional due process right not to be subjected to criminal

charges on the basis of false evidence that was deliberately fabricated by the government." (*Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1074–1075,)

- " 'No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice. Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable "corruption of the truth-seeking function of the trial process." [Citations.]' " (*Ricciuti, supra,* 124 F.3d at p. 130.)

- "Even if there was probable cause to arrest plaintiff, we cannot say as a matter of law on the record before us that he would have been subjected to continued prosecution and an unfavorable preliminary hearing without the use of the false lab report and testimony derived from it. These are questions of fact which defendants appear to concede are material to the issue of causation, and which cannot be determined without weighing the evidence presented and conclusions reached at the preliminary hearing. Defendants' statement of undisputed facts does not establish lack of causation as a matter of law." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1013.)

- "There is no authority for defendants' argument that a due process claim cannot be established unless the false evidence is used to *convict* the plaintiff. … [T]he right to be free from criminal *charges,* not necessarily the right to be free from conviction, is a clearly established constitutional right supporting a section 1983 claim." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1010.)

- "There is no sound reason to impose a narrow restriction on a plaintiff's case by requiring incarceration as a sine qua non of a deprivation of a liberty interest." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1011.)

- "[T]o the extent that [plaintiff] has raised a deliberate-fabrication-of-evidence claim, he has not adduced or pointed to any evidence in the record that supports it. For purposes of our analysis, we assume that, in order to support such a claim, [plaintiff] must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." (*Devereeax, supra,* 263 Fed.3d at p. 1076.)

- "The *Devereaux* test envisions an investigator whose unlawful motivation is illustrated by her state of mind regarding the alleged perpetrator's innocence, or one who surreptitiously fabricates evidence by using coercive investigative methods. These are circumstantial methods of proving deliberate falsification. Here, [plaintiff] argues that the record directly reflects [defendant]'s false statements. If, under *Devereaux,* an interviewer who uses coercive interviewing techniques that are known to yield false evidence commits a constitutional violation, then an interviewer who deliberately mischaracterizes witness statements in her investigative report also commits a constitutional violation. Similarly, an investigator who purposefully reports that she has

interviewed witnesses, when she has actually only attempted to make contact with them, deliberately fabricates evidence." (*Costanich, supra,* 627 F.3d at p. 1111.)

- "In light of long-standing criminal prohibitions on making deliberately false statements under oath, no social worker could reasonably believe that she was acting lawfully in making deliberately false statements to the juvenile court in connection with the removal of a dependent child from a caregiver." (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1113 [190 Cal.Rptr.3d 97], footnotes omitted.)

Secondary Sources

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

3509A. Precondemnation Damages—Unreasonable Delay (*Klopping* Damages)

I have determined that [*insert one or both of the following:***]**

[there was an unreasonable delay between [*date of announcement of intent to condemn***], when the [***name of condemnor***] announced its intent to condemn [***name of property owner***]'s property, and [***date of filing***], when this case was filed] [and]**

[*insert description of unreasonable conduct***].**

In determining just compensation you must award damages that [*name of property owner***] has suffered as a result of the [***name of condemnor***]'s [delay/[***describe unreasonable conduct***]]. ~~Such~~ These damages may include [***insert damages appropriate to the facts, e.g., the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs, and diminution of market value***].**

New September 2003; Revised and Renumbered June 2017

Directions for Use

This instruction will need to be modified ~~in cases where~~if the entity does not ultimately proceed with the condemnation, or ~~where~~ if there has been another type of unreasonable conduct other than "unreasonable delay."

For an instruction on precondemnation damages arising from the public entity's authorized entry to investigate suitability of the property for the project, see CACI No. 3509B, *Precondemnation Damages—Public Entity's Authorized Entry to Investigate*.

Sources and Authority

- "[A] condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52 [104 Cal.Rptr. 1, 500 P.2d 1345].)

- "The measure of damages may be the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs." (*City of Los Angeles v. Tilem* (1983) 142 Cal.App.3d 694, 703 [191 Cal.Rptr. 229], internal citations omitted.)

- "[A]bsent a formal resolution of condemnation, recovery under *Klopping* requires that the public entity's conduct 'directly and specially affect the landowner to his injury.' This requirement mandates that the plaintiff demonstrate conduct on the part of the public entity 'which significantly invaded or appropriated the use or enjoyment' of the property." (*Barthelemy v. Orange County Flood Control*

Copyright Judicial Council of California

Dist. (1998) 65 Cal.App.4th 558, 570 [76 Cal.Rptr.2d 575], internal citations omitted.)

- "[S]ince *Klopping* damages compensate a landowner for a public entity's unreasonable *precondemnation* conduct, their recovery 'is permitted irrespective of whether condemnation proceedings are abandoned or whether they are instituted at all.' " (*Barthelemy, supra,* 65 Cal.App.4th at p. 569, original italics, internal citation omitted.)

- "*Klopping* does not permit an owner to recover precondemnation damages for general market decline as that is not attributable to the condemner." (*People ex rel. Dept. of Transportation v. McNamara* (2013) 218 Cal.App.4th 1200, 1209 [160 Cal.Rptr.3d 812].)

- "Whether there has been unreasonable delay by the condemner and whether the condemner has engaged in unreasonable conduct are both questions of fact. What constitutes a direct and substantial impairment of property rights for purposes of compensation is also a factual question. In deciding factual matters on conflicting testimony and inferences, it is for the trier of fact to determine which evidence and inferences it finds more reasonable." (*Contra Costa County Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 897 [68 Cal.Rptr.2d 272], internal citations omitted.)

- "Whether the public entity has acted unreasonably is a question of fact. 'However, the threshold question of liability for unreasonable precondemnation conduct is to be determined by the court, with the issue of the *amount* of damages to be thereafter submitted to the jury only upon a sufficient showing of liability by the condemnee.' Because inverse condemnation damages for precondemnation conduct must be claimed in a pending eminent domain action, the appropriate procedure is to bifurcate the trial of the action so that the question of the liability of the public entity is first adjudicated by the court without a jury." (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897 [122 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1235

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.8

6 Nichols on Eminent Domain, Ch. 26D, *Abandonment, Dismissal of Action and Assessment of Damages*, § 26D.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.202 (Matthew Bender)

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

3509B. Precondemnation Damages—Public Entity's Authorized Entry to Investigate (Code Civ. Proc., § 1245.060)

A public entity that is considering condemning property for public use may enter the property before condemnation to conduct investigations that are needed to decide whether the property is suitable for a proposed project and should be acquired by the public entity. However, the property owner may recover for any actual damages to, or substantial interference with, the owner's possession and use of the property caused by the public entity's entry for these purposes.

[*Name of property owner***] claims that [he/she/it] suffered damage to, or substantial interference with, the use or possession of [his/her/its] property because of [***name of condemnor***]'s precondemnation activities on the property.**

[If you determine that [*name of property owner***] suffered damages to, or substantial interference with, the use or possession of [his/her/its] property during precondemnation activities], [Y/y]ou must determine the amount of this loss and include it in determining just compensation.**

New June 2017

Directions for Use

Give this instruction if the property owner alleges that the public entity's precondemnation entry onto the property caused actual damage or substantially interfered with the owner's possession or use of the property. (See Code Civ. Proc., 1245.010, 1245.060.) The amount of any such damages must be determined by a jury. (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 207−210 [204 Cal.Rptr.3d 770, 375 P.3d 887].)

The last paragraph is bracketed because it is not clear whether the jury is also to determine whether in fact the owner has suffered any precondemnation harm. (See *City of Perris v. Stamper* (2016) 1 Cal.5th 576, 593−595 [205 Cal.Rptr.3d 797, 376 P.3d 1221.) But for the similar claim for severance damages, the California Supreme Court has held that it is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175].)

For an instruction on a claim for precondemnation damages because of the public entity's unreasonable delay in condemnation, see CACI No. 3509A, *Precondemnation Damages—Unreasonable Delay (Klopping Damages)*.

Sources and Authority

- Precondemnation Activities. Code of Civil Procedure section 1245.010 et seq.
- Public Entity's Precondemnation Entry Authorized for Particular Purposes. Code of Civil Procedure 1245.010.

- Damages to or Interference With Possession and Use of Property by Precondemnation Entry. Code of Civil Procedure section 1245.060.

- "[T]he current precondemnation entry and testing statutes not only establish a statutory compensation procedure but also expressly preserve a property owner's right to pursue and obtain damages in a statutorily authorized civil action or an ordinary inverse condemnation action. Taken as a whole, state law clearly provides 'a " 'reasonable, certain and adequate' " ' procedure to enable a property owner to recover money damages for any injury caused by the activities authorized by the statutes." (*Property Reserve, Inc., supra,* 1 Cal.5th at pp. 186−187, internal citations omitted.)

- "[T]he statutory damages that a property owner is entitled to obtain under section 1245.060, the applicable precondemnation entry and testing statute, are a constitutionally adequate measure of just compensation under the state takings clause for the precondemnation activities authorized by the statutory scheme. [¶] Like the concept of just compensation under the federal takings clause, the just compensation required by the state takings clause is the amount required to compensate the property owner for what the owner has lost." (*Property Reserve, Inc., supra,* 1 Cal.5th at pp. 203−204, internal citation omitted.)

- "[T]he compensation authorized by section 1245.060—damages for any 'actual damage' to the property and for 'substantial interference with the [property owner's] possession or use of the property'—appears on its face to be a reasonable means of measuring what the property owner has lost by reason of the specific precondemnation activities that are authorized by the trial court's environmental order." (*Property Reserve, Inc., supra,* 1 Cal.5th at p. 205.)

- "The statutes at issue in the present case involve a factual setting—precondemnation entry and testing—that falls between the classic condemnation proceeding where the public entity is seeking to obtain title to or a compensable property interest in the property and the typical inverse condemnation action where the public entity does not intend to enter or intrude upon private property but damage to such property nonetheless ensues. Here, the proposed precondemnation entry and testing activities upon the subject property are intentional, but the public entity is not seeking to obtain title to or exclusive possession of the property for a significant period of time. Rather, the public entity is seeking temporary access to the property to conduct investigations that are needed to decide whether the property is suitable for a proposed project and should thereafter be acquired by the public entity." (*Property Reserve, Inc., supra,* 1 Cal.5th at p. 190.)

- "Although the measure of compensation that is 'just' for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc., supra,* 1 Cal.5th at p. 186.)

- "In light of the nature of the environmental order at issue here, however, granting a property owner the rental value of the property in addition to any damages the owner sustains for actual injury or substantial interference with the possession or use of the property would afford the owner an unwarranted windfall. Under the trial court's environmental order, the owner retains full

possession and use of the property over the period covered by the order, notwithstanding the authorized testing activities. Under these circumstances, the rental value of the property would not be a valid measure of what the property owner has lost as a result of the trial court's environmental order." (*Property Reserve, Inc., supra,* 1 Cal.5th at p. 204.)

- "We have long held that this jury right applies only to determining the appropriate amount of compensation, not to any other issues that arise in the course of condemnation proceedings. ' "[A]ll issues except the sole issue relating to compensation[] are to be tried by the court," including, "except those relating to compensation, the issues of fact." ' " ' " 'It is only the 'compensation,' the 'award,' which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury.' " ' " (*City of Perris, supra,* 1 Cal.5th at p. 593, internal citations omitted.)

- "By contrast, *Campus Crusade* held that two pure questions of fact directly pertaining to the proper amount of compensation were reserved to the jury. First, we said that whether it is reasonably probable a city would change the zoning status of the landowners' property in the near future was a jury question. Second, because the landowner had introduced credible evidence that the remaining portion of its property would be worth less after the proposed taking due to hazards associated with a pipeline the government proposed to install on the property, the extent of the resulting severance damages was a jury question." (*City of Perris, supra,* 1 Cal.5th at p. 595, internal citations omitted.)

Secondary Sources

3511A. Permanent Severance Damages

The [*name of condemnor*] has taken only a part of [*name of property owner*]'s property. [*Name of property owner*] claims that [his/her/its] remaining property has lost value as a result of the taking because [*specify reasons alleged for diminution of value of remaining property*]. This loss in value is called "severance damages."

Permanent s~~S~~everance damages are the permanent damages to [*name of property owner*]'s remaining property caused by the taking. If you determine that the remaining property has lost value permanently because of the taking, permanent severance damages must be included in determining just compensation.

Severance damages are determined as follows:

1. **Determine the fair market value of the remaining property on [*date of valuation*] by subtracting the fair market value of the part taken from the fair market value of the entire property;**

2. **Determine the fair market value of the remaining property after the [*name of condemnor*]'s proposed project is completed; and**

3. **Subtract the fair market value of the remaining property after the [*name of condemnor*]'s proposed project is completed from the fair market value of the remaining property on [*date of valuation*].**

New September 2003; Revised December 2016; Revised and Renumbered June 2017

Directions for Use

Give this instruction if the owner claims that property not taken has permanently lost value because of the taking, for example because a view has been lost. It is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175].) Read CACI No. 3512, *Severance Damages—Offset for Benefits*, if benefits to the owner's remaining property are at issue.

A property owner may also be able to recover for temporary economic loss to the remaining property incurred during the construction of the project. (*City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) This recovery has been called "temporary severance damages." ~~This instruction is not for use to compute loss during construction.~~For temporary severance damages, give CACI No. 3511B, *Temporary Severance Damages*.

Sources and Authority

Copyright Judicial Council of California

- Right to Severance Damages. Code of Civil Procedure section 1263.410.

- Damages to Remainder After Severance. Code of Civil Procedure section 1263.420.

- Benefit to Remainder. Code of Civil Procedure section 1263.430.

- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)

- "The claimed loss in market value must directly and proximately flow from the taking. Thus, recovery may not be based on ' " 'speculative, remote, imaginary, contingent, or merely possible' " ' events." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1466 [141 Cal.Rptr.3d 271].)

- The court determines as a matter of law what constitutes the "larger parcel" for which severance damages may be obtained: "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630, 941 P.2d 809], internal citations omitted.)

- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive … a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 972, original italics, internal citations omitted.)

- "[W]here the property owner produces evidence tending to show that some other aspect of the taking … 'naturally tends to and actually does decrease the market value' of the remaining property, it is for

Copyright Judicial Council of California

the jury to weigh its effect on the value of the property, as long as the effect is not speculative, conjectural, or remote." (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 973.)

- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property. The value of the remainder after the condemnation has occurred is referred to as the 'after' value of the property. The diminution in fair market value is determined by comparing the before and after values. This is the amount of the severance damage." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority, supra,* 16 Cal.4th at p. 720.)

- "[S]everance damages are not limited to specific direct damages but can be based on any indirect factors that cause a decline in the market value of the property. California decisions have indicated the following are compensable as direct damages under section 1263.410: (1) impairment of view, (2) restriction of access, (3) increased noise, (4) invasion of privacy, (5) unsightliness of the project, (6) lack of maintenance of the easement and (7) nuisances in general such as trespassers and safety risks. Several courts have recognized that the condemnee should be compensated for any characteristic of the project which causes 'an adverse impact on the fair market value of the remainder.'" (*San Diego Gas & Electric Co., supra,* 205 Cal.App.3d at p. 1345.)

- "When 'the property acquired [by eminent domain] is part of a larger parcel,' in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. Once it is determined that the owner is entitled to severance damages, they, too, normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations and footnote omitted.)

- "[W]hether access to a property has been 'substantially impaired' for purposes of determining severance damages is a question for the court, even though '[s]ubstantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 594 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)

- ~~"Temporary severance damages resulting from the construction of a public project are also compensable. A property owner 'generally should be able "to present evidence to show whether and to what extent the delay disrupted its use of the remaining property." ' However, 'the mere fact of a delay associated with construction' does not, without more, entitle the property owner to temporary severance damages. The temporary easement or taking must interfere with the owner's *actual* intended use of the property." (*City of Fremont, supra,* 160 Cal.App.4th at p. 676, original italics.)~~

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236–1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01–14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

Copyright Judicial Council of California

3511B. Temporary Severance Damages

The [*name of condemnor***] has taken only a part of [***name of property owner***]'s property. [***Name of property owner***] claims that [he/she/it] suffered damage to the remaining property during construction on the property taken. This loss was because of [***specify reasons alleged for damage due to construction, e.g. reduced business because construction made access to owner's business more difficult***]. This loss has been called "temporary severance damages."**

If you determine that [*name of property owner***] suffered damage to [his/her/its] remaining property during construction, you must determine the amount of this damage and include it in determining just compensation.**

New June 2017

Directions for Use

Give this instruction if the owner claims that he or she suffered an economic loss on the property not taken during construction on the property taken, for example because of decreased business due to access being made more difficult. (See *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) It is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175.)

A property owner may also be able to recover permanent severance damages if the remaining property has decreased in value because of the partial taking. If permanent severance damages are sought, give CACI No. 3511A, *Permanent Severance Damages*. Read CACI No. 3512, *Severance Damages—Offset for Benefits*, if benefits to the owner's remaining property are at issue.

Sources and Authority

- Right to Severance Damages. Code of Civil Procedure section 1263.410.
- Damages to Remainder After Severance. Code of Civil Procedure section 1263.420.
- Benefit to Remainder. Code of Civil Procedure section 1263.430.
- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)
- "Temporary severance damages resulting from the construction of a public project are also

Copyright Judicial Council of California

compensable. A property owner 'generally should be able "to present evidence to show whether and to what extent the delay disrupted its use of the remaining property." ' However, 'the mere fact of a delay associated with construction' does not, without more, entitle the property owner to temporary severance damages. The temporary easement or taking must interfere with the owner's *actual* intended use of the property." (*City of Fremont, supra,* 160 Cal.App.4th at p. 676, original italics.)

- "If [owner] had sold the property during the construction period and if the ongoing construction had temporarily lowered the sales price of the property, it would appear that [owner] would be entitled to recover that loss from [city]. But the mere fact of a delay associated with construction of the pipeline did not, without more, entitle [owner] to temporary severance damages relating to the financing or marketing of the property in this eminent domain action. [¶]This is not to say, however, that [owner] is barred from recovering damages for actual injury it may have suffered during the construction of the pipeline. On remand, [owner]\ may have the opportunity before the trial court to create an appropriate record to support its claim of severance damages. In addition, '[w]hen the condemnation action is tried before the improvement is constructed, and substantial although temporary interference with the property owner's rights of possession or access occurs during construction, the property owner may maintain a subsequent action for such damage occurring during construction.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at pp. 975−976, internal citations omitted.)

- "[Owner] sought temporary severance damages for impairment to his property because of construction activities associated with the project. Specifically, [owner] asserted the effect of removal of all landscaping for a period of one year, and the closure of two of four driveways on his property for four months during construction entitles him to temporary severance damages. In addition, [owner] asserts the access to his property was substantially impaired by the traffic detour traveling east through the intersection of East Airway Boulevard and Isabel Avenue created by the construction project." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1471 [141 Cal.Rptr.3d 271] [court erred in excluding evidence of the above].)

- The court determines as a matter of law what constitutes the "larger parcel" for which severance damages may be obtained: "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive … a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 972, original italics, internal citations omitted.)

- "In determining severance damage, the jury must assume 'the most serious damage' which will be

Copyright Judicial Council of California

caused to the remainder by the taking of the easement and construction of the property." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority, supra,* 16 Cal.4th at p. 720.)

- "[W]hether access to a property has been 'substantially impaired' for purposes of determining severance damages is a question for the court, even though '[s]ubstantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 594 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)

- "Although the measure of compensation that is 'just' for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 186 [204 Cal.Rptr.3 770, 375 P.3d 887].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236–1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01–14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

3903D. Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.,* "4."**] The loss of [***name of plaintiff***]'s ability to earn money.**

To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff***] must prove:**

1. **That it is reasonably certain that the injury that [***name of plaintiff***] sustained will cause [him/her] to earn less money in the future than [he/she] otherwise would have earned; and**

2. ~~t~~**The reasonable value of that loss to [him/her].** ~~**It is not necessary that [he/she] have a work history.**~~

In determining the reasonable value of the loss, compare what it is reasonably probable that [*name of plaintiff***] could have earned without the injury to what [he/she] can still earn with the injury. [Consider the career choices that [***name of plaintiff***] would have had a reasonable probability of achieving.] It is not necessary that [he/she] have a work history.**

New September 2003; Revised April 2004, April 2008, June 2017

Directions for Use

This instruction is not intended for use in employment cases.

If lost profits are asserted as an element of damages, see CACI No. 3903N, *Lost Profits (Economic Damage)*.

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C. The verdict form should ensure that the same loss is not computed under both standards.

In the last paragraph, include the bracketed sentence if the plaintiff is of sufficient age that reasonable probabilities can be projected about career opportunities.

Sources and Authority

- ~~"Damages may be awarded for lost earning capacity without any proof of actual loss of earnings." (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348, fn. 6 [100 Cal.Rptr.2d 854], internal citations omitted.)~~Before [lost earning capacity] damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 887 [-- Cal.Rptr.3d --].

Copyright Judicial Council of California

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- "Because these damages turn on the plaintiff's earning capacity, the focus is 'not [on] what the plaintiff would have earned in the future[,] but [on] what she could have earned.' Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages, nor a cap on the amount of those damages. Indeed, proof that the plaintiff had any prior earnings is not required because the 'vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,' even if she had not done so previously." (*Licudine, supra,* 3 Cal.App.5th at pp. 893−894, internal citations omitted.)

- ~~The test [for lost earning capacity] is not what the plaintiff would have earned in the future but what she could have earned. …~~ Such damages are '. . . awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring . . . [her] as nearly as possible to . . . [her] former position, or giving . . . [her] some pecuniary equivalent.' Impairment of the capacity or power to work is an injury separate from the actual loss of earnings." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117], original italics, internal citations omitted.)

- "[T]he jury must fix a plaintiff's future earning capacity based on what it is 'reasonably probable' she could have earned." (*Licudine, supra,* 3 Cal.App.5th at p. 887.)

- "A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s)." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "How [is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff's earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff's prior earnings in that same career. As these options suggest, expert testimony is not always required." (*Licudine, supra,* 3 Cal.App.5th at p. 897.)

- ~~"[I]t is not necessary for a party to produce expert testimony on future earning ability although some plaintiff's attorneys may choose as a matter of trial tactics to present such evidence." (*Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1282 [78 Cal.Rptr.2d 557], internal citations omitted.)~~

- ~~The Supreme Court has stated:~~ " 'Under the prevailing American rule, a tort victim suing for damages

Copyright Judicial Council of California

for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1666, 1667

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss,* §§ 52.10–52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

1 California Civil Practice: Torts, § 5:15 (Thomson Reuters)

Copyright Judicial Council of California

4012. Concluding Instruction

To find that [*name of respondent*] is gravely disabled, all 12 jurors must agree on the verdict. To find that [*name of respondent*] is not gravely disabled, only 9 jurors must agree on the verdict.

As soon as you have agreed on a verdict, the presiding juror must date and sign the form and notify the [clerk/bailiff].

New June 2005; Revised June 2017

Directions for Use

Read this instruction immediately after CACI No. 5009, *Predeliberation Instructions*.

There are many votes that are possible other than a unanimous 12-0 vote for gravely disabled or a 9-3 or better vote for not gravely disabled. A vote other than one of these will result in a mistrial and the option to retry the proceeding.

Sources and Authority

- "The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1].)

- "The LPS Act is silent as to whether the jury must unanimously agree on the issue of grave disability. '[H]owever, the Act incorporates by reference Probate Code procedures for conservatorships. The Probate Code provides for factual determinations by a three-fourths majority . . . . Thus, the Legislature has provided for less than unanimous jury verdicts in grave disability cases.' " (*Conservatorship of Rodney M.* (1996) 50 Cal.App.4th 1266, 1269 [58 Cal.Rptr.2d 513].)

- "The Legislature's determination that a three-fourths majority vote applies in LPS conservatorship proceedings is eminently sound in the context of finding a proposed conservatee is not gravely disabled." (*Conservatorship of Rodney M., supra,* ~~(1996)~~ 50 Cal.App.4th at pp.~~1266,~~ 1271–1272 ~~[58 Cal.Rptr.2d 513]~~.)

- "Permitting a finding of no grave disability to be based on a three-fourths majority coincides with *Roulet's* goal of minimizing the risk of unjustified and needless conservatorships. It also avoids unnecessary confinement of the proposed conservatee while renewal proceedings are completed." (*Conservatorship of Rodney M., supra,* 50 Cal.App.4th at p. 1270.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 104

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

Copyright Judicial Council of California

DRAFT - NOT APPROVED BY JUDICIAL COUNCIL

VF-4000. Conservatorship—Verdict Form

Select one of the following two options:

____ **12 jurors find that [*name of respondent*] is presently gravely disabled due to [a mental disorder/impairment by chronic alcoholism].**

____ **9 or more jurors find that [*name of respondent*] is not presently gravely disabled due to [a mental disorder/impairment by chronic alcoholism].**

[If you have concluded that [*name of respondent*] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] then answer the following:

Do all 12 jurors find that [*name of respondent*] is disqualified from voting because [he/she] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.~~not capable of completing an affidavit of voter registration~~?
____ Yes ____ No]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New June 2005; Revised December 2010, June 2017

Directions for Use

The question regarding voter ~~registration~~ disqualification is bracketed. The judge must decide whether this question is appropriate in a given case. (See CACI No. 4013, *Disqualification From Voting.*

Copyright Judicial Council of California