JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 24, 2018

Title
Jury Instructions: New, Revised, and Revoked Civil Jury Instructions and Verdict Forms (Release 32)

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (CACI)

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

Agenda Item Type
Action Required

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, and revoked civil jury instructions and verdict forms prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official 2018 midyear supplement to the 2018 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 25, 2018, approve for publication the following civil jury instructions and verdict forms prepared by the committee:

1. Revisions to 24 instructions and verdict forms: CACI Nos. 206, 430, 435, 470, 1004, 1005, 1500, 1503, VF-1500, 1730, 1731, 1802, 2021, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2620, 2800, 3244, 4208, and 4605;

2. Addition of 8 new instructions: CACI Nos. 2630, 2740, 2741, 2742, 2743, and 5022, and a new series on the California False Claims Act (CACI Nos. 4800 and 4801); and

3. Revocation of CACI No. 4010.

A table of contents and the proposed new, revised, and renumbered civil jury instructions and verdict forms are attached at pages 143–259.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At this meeting, the council approved the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI* to ensure that the instructions remain clear, accurate, current, and complete.

This is the 32nd release of *CACI*. The council approved *CACI* release 31 at its November 2017 meeting.

Analysis/Rationale

A total of 33 instructions and verdict forms are presented in this release. The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 54 additional instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant additions and changes recommended to the council.

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[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] At its October 20, 2006 meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use.

New series: California False Claims Act

Several committee members, including a trial judge and an attorney, have expressed a need for jury instructions on the California False Claims Act (the Act). The Act provides that a public entity that has paid a claim may recover as damages three times the amount of its payment for the claim if the claim was false or fraudulent (as defined).[3]

The committee now proposes this new series consisting of only two instructions:[4]

- CACI No. 4800, *False Claims Act—Essential Factual Elements*
- CACI No. 4801, *Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements*

Implied certification proved to be a particularly difficult topic. The rule is that when a contractor submits a claim for payment, it impliedly certifies that it has complied with all of the terms of its contract on which the claim for payment is being made.[5] The concern, expressed by several committee members, is that the rule potentially can turn any breach of contract into a false claim resulting in treble damages.

To limit the scope of the rule there is a materiality requirement: a contractual breach is material if it has the "natural tendency to influence agency action or is capable of influencing agency action."[6] In other words, the agency would not have paid the claim had it known about the breach.

A recent United States Supreme Court case, *Universal Health Services v. United States ex rel. Escobar* (*Escobar*),[7] construing the federal False Claims Act cautions that materiality cannot be found if the breach of contract is minor or insubstantial.[8] There are other possible applications of *Escobar* that could make the materiality requirement more restrictive than that presented in the proposed CACI No. 4801. Several commenters argued that the committee should revise No. 4801 to conform to *Escobar*. The committee declined the invitation at this time because *Escobar* does not construe California law. However, the committee did add two excerpts from *Escobar* to the Sources and Authority.

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[3] Gov. Code, § 12651(a).

[4] The issue of whether there should be a minimum number of instructions to justify a new series is one that the committee has pondered from time to time. With this proposal, the committee is confirming that two is enough. The committee notes that the Equitable Indemnity series (CACI No. 3800 et seq.) has only two instructions. Whether one is enough will await another day.

[5] *San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 441.

[6] *Id.* at p. 454 [claim for costs of transporting students to and from school could be false based on contractor's failure to provide safe buses in breach of both the contract and legal requirements].

[7] (2016) __ U.S. __ [136 S.Ct. 1989, 195 L.Ed.2d 348].

[8] *Id.*, 136 S.Ct. at p. 2003.

New subseries: Equal Pay Act

Over a year ago, the committee received an inquiry from the Jury Instructions Subcommittee of the Pay Equity Task Force of the California Commission on the Status of Women and Girls concerning drafting jury instructions for the California Fair Pay Act, effective January 1, 2016, which made major revisions to the California Equal Pay Act.[9] The subcommittee was interested in developing jury instructions themselves and reached out to the committee for expertise. The committee proposed a joint drafting effort, which was agreed to in principle. When after a year the joint effort had still not come to fruition, the committee proceeded on its own.

The committee now proposes an addition to the Labor Code Actions series (CACI No. 2700 et seq.) consisting of four new instructions:

- CACI No. 2740, *Violation of Equal Pay Act—Essential Factual Elements*
- CACI No. 2741, *Affirmative Defense—Different Pay Justified*
- CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*
- CACI No. 2743, *Equal Pay Act—Retaliation—Essential Factual Elements*

The committee received a large number of comments on the proposed new instructions, both from members of equal-pay advocate organizations and from employer representatives. Several issues were raised in the comments that the committee decided were unresolved. Among these are whether a single age-, race-, or ethnicity-based discrepancy between the pay of two employees is sufficient to constitute a violation, or whether a pattern is required.[10] Commenters further pointed out that cases stating that it is appropriate to rely on federal authorities construing the federal Equal Pay Act of 1963 in the absence of California authority are now inapplicable. The 2016 Fair Pay Act introduced significant differences between the California and federal statutes. The committee decided to retain an excerpt on reliance on federal authority while also parenthetically noting the existence of the 2016 Fair Pay Act.

A separate chart summarizing the comments received on the Equal Pay Act and the committee's responses is attached at pages 121–142.

Other new instructions

CACI No. 2630, *Violation of New Parent Leave Act—Essential Factual Elements.* 2017 legislation adopted the New Parent Leave Act[11] (the Act). The Act extends some of the rights

[9] Lab. Code, § 1197.5.

[10] See Lab. Code, § 1197.5(a), (b): "An employer shall not pay any of its employees at wage rates less than the rates paid to *employees* [of the opposite sex/of another race or ethnicity]." (Italics added to emphasize use of plural.) The committee does, however, tend to agree with the advocates that the statute more likely is violated by a one-to-one comparison.

[11] Gov. Code, § 12945.6.

provided to employees by the California Family Rights Act (CFRA)[12] to employees of employers with 20 or more employees.[13] It allows employees to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. Unlike CFRA, it does not provide for a right to personal leave for a serious health condition.[14]

The Act requires the employer to grant the leave on request. The request is deemed to have been denied if the employer does not guarantee to return the employee to the same or a comparable job when the leave has ended.[15] The statute does not expressly make it a violation for the employer to renege on the guarantee and not return the employee to the same or a comparable position. Nevertheless, the committee considered it an absurdity to not actually require the employer to honor the guarantee, and the instruction includes the actual failure to return the employee to the same or a similar position as a violation.

CACI No. 5022, *Introduction to General Verdict Form.* The "paradox of shifting majorities"[16] occurs when the same jury analyzing the same evidence would find liability with a special verdict, but not with a general verdict. The possibility arises because with a special verdict, a juror who votes no on one question but is in a minority of three or fewer must continue to deliberate and vote on all of the remaining questions. If, for example, the vote on element 1 is 9–3 yes with jurors 10, 11, and 12 voting no, and the vote on element 2 is 11-1 yes with juror 1 voting no, there will be liability with a special verdict because each element has received nine yes votes. But if a general verdict is used, there would be no liability because only eight jurors have found true every element of the claim. The California Supreme Court has found this result to be proper with regard to special verdicts.[17]

Few, if any, on the committee are advocates of general verdicts. Still, *CACI* does provide two forms for general verdicts.[18] A committee member who is a trial court judge proposed a new instruction that is designed to eliminate the paradox of shifting majorities.

Under proposed new instruction CACI No. 5022, the jury would be instructed to approach deliberations as if it were to complete a special verdict. They are told to consider and vote, not

[12] Gov. Code, § 12945.2.

[13] See Gov. Code, § 12945.6(a)(1); cf. Gov. Code, § 12945.2(b) [CFRA applies to employers with 50 or more employees].

[14] See Gov. Code, § 12945.2(c)(3).

[15] Gov. Code, § 12945.6(a)(1).

[16] See Raphael, "The Special Verdict Paradox, Part II," *Los Angeles Daily Journal* (May 2, 2017).

[17] See *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768.

[18] See CACI Nos. VF-5000, *General Verdict Form—Single Plaintiff—Single Defendant—Single Cause of Action* and VF-5001, *General Verdict Form—Single Plaintiff—Single Defendant—Multiple Causes of Action*.

just on the ultimate result, but on each element of each claim separately. If an element receives nine votes, then the jury moves on to the next element.

Note that the process assumes that the rule that the same nine jurors do not have to agree as long as some group of nine do for each element would apply to deliberations under a general verdict. To the committee's knowledge, this proposition has never been addressed in the courts. Because of the "up or down" nature of a general verdict, there would be no reason for a court to look behind the verdict and analyze the deliberations.

Revised instructions

CACI Nos. 430 and 435: asbestos causation. In 2007, the committee considered a proposal from the asbestos plaintiff bar that CACI No. 430, *Causation: Substantial Factor*, should not be given in an asbestos case. There are four sentences in CACI No. 430:

> A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

The proponents' objection was to the second and fourth sentences: the "remote or trivial" sentence (the second) and the "would have happened anyway" sentence, sometimes still referred to as "but for." After considerable deliberations, the committee agreed with the proponents, that these two sentences should not be given in an asbestos case. The committee imported the first and third sentences into CACI No. 435, *Causation for Asbestos-Related Cancer Claims*. Then in the Directions for Use, the committee advised only to give 435, and not 430, in an asbestos case.

In a recent case, *Petitpas v. Ford Motor Co. (Petitpas),*[19] the court held that it was not error to give both CACI Nos. 430 and 435 in that case.[20] There were both product liability and premises liability defendants, and CACI No. 435 applies only to defendants who produce or distribute asbestos-containing products. Because the court in *Petitpas* did not address the effect of CACI No. 430's "remote or trivial" language in an asbestos case, and because CACI No. 435 did not apply to the premises liability defendant, the committee has declined to change its view, based on *Petitpas,* that 430 should not be given in an asbestos case. The committee's draft that was posted for public comment addressed with some detail in the Directions for Use why "remote or trivial" is problematic for asbestos causation.

The posted draft generated many comments from both the asbestos plaintiff and the asbestos defense bar. A separate chart summarizing the comments received and the committee's responses is attached at pages 83–120.

[19] (2017) 13 Cal.App.5th 261, 298–299.

[20] The optional "would have happened anyway" sentence of CACI No. 430 was not given.

The committee made only minor revisions in response to the comments. The committee continues to propose the expanded Directions for Use to CACI No. 430, which address "remote or trivial." The committee found that the comment that follows, received from the law firm of Waters Kraus & Paul, by Michael B. Gurien, expressed the views of the committee (edited only for format):

> In reaching its decision as to CACI No. 430, the Court of Appeal [in *Petitpas*] quoted the Supreme Court's statement in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, that, in addition to the asbestos injury causation standard articulated in *Rutherford,* which is now set forth in the second paragraph of CACI No. 435, " '*[t]he standard instructions on substantial factor and concurrent causation (BAJI Nos. 3.76 and 3.77) remain correct in this context and should also be given.*' " (*Petitpas, supra,* 13 Cal.App.5th at p. 299, quoting *Rutherford,* at pp. 982-983, italics added by Court of Appeal.) The Court of Appeal then quoted the current directions for CACI Nos. 430 and 435, which, say not to use CACI No. 430 in an asbestos injury case " '[u]nless there are other defendants who are not asbestos manufacturers or suppliers … .' " (Ibid., quoting CACI No. 435, Directions for Use, second para.) Comparing the italicized statement in *Rutherford* with the statements in the directions for use to CACI No. 430, the Court of Appeal stated that "[i]t appears, therefore, that despite *Rutherford's* statement that the standard instruction on substantial factor remains correct and also should be given, the CACI use notes disagree with this approach." (*Ibid.*) This latter statement is problematic because the standard instruction on substantial factor causation in effect at the time that *Rutherford* was decided – BAJI No. 3.76 – was different than the current standard instruction on substantial factor causation in CACI No. 430.
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> When *Rutherford* was decided in 1997, BAJI No. 3.76 stated as follows: "The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm." (*Espinosa v. Little Co. of Mary Hosp.* (1995) 31 Cal.App.4th 1304, 1313-1314; see *Rutherford, supra,* 16 Cal.4th at p. 969 [identifying BAJI No. 3.76]. [The second sentence of] CACI No. 430 is different. It states: "A substantial factor … must be more than a remote or trivial factor."
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> The first and third sentences of CACI No. 430 do not present a problem in asbestos injury cases. In fact, those sentences are contained verbatim in the first paragraph of CACI No. 435, the standard instruction incorporating the *Rutherford* causation standard. The problem is the second sentence of CACI No. 430, stating that a substantial factor "must be more than a remote or trivial factor." First, that sentence was not contained in BAJI No. 3.76 when the *Rutherford* court stated that BAJI No. 3.76 "remain[s] correct in this context and should also be given." (*Rutherford, supra,* 16 Cal. 4th at p. 983; see *Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314

[quoting BAJI No. 3.76 in its entirety].) Thus, in *Rutherford*, the Supreme Court did not approve the use of that sentence in an asbestos injury case.

Second, the "remote or trivial" sentence is troublesome because, as the Supreme Court explained in *Rutherford*, "plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer … ." (*Rutherford, supra,* 16 Cal.4th at 976-977; accord, id. at p. 982.) The Supreme Court also held that a plaintiff "is free to … establish that his [or her] particular asbestos disease is cumulative in nature, with many separate exposures *each* having constituted a 'substantial factor' (BAJI No. 3.76) that contributed to his [or her] risk of injury." (*Id.* at p. 958; accord, id. at p. 978, italics added.) Thus, under *Rutherford*, separate exposures to even relatively small amounts of asbestos can be sufficient to establish causation, so long as the exposures were "a substantial factor in contributing to the aggregate dose of asbestos." (*Id.* at pp. 976-977.) A jury, however, viewing such small exposures in light of CACI No. 430's statement that a substantial factor "must be more than a remote or trivial factor" – terms the Supreme Court did not use in articulating its causation standard in *Rutherford* – may become confused and fail to understand that small exposures can, indeed, satisfy the standard.

An instructive example is provided by the facts and evidence in *Rutherford*. There, a defense expert testified that "a very light or brief exposure could be considered 'insignificant or at least nearly so' in the 'context' of other, very heavy exposures." (*Rutherford, supra,* 16 Cal.4th at p. 984.) "Plaintiff's expert presented a generally contrary opinion, to the effect that each exposure, even a relatively small one, contributed to the occupational 'dose' and hence to the risk of cancer." (*Ibid.*) Based on its verdict, the jury apparently "accepted much of the defense's factual theory, concluding that exposure to Kaylo contributed a relatively small amount to decedent's cancer risk, but rejected defendant's argument that such a small contribution should be considered insubstantial." (Id. at pp. 984-985.) Nevertheless, consistent with the relatively small exposure from the defendant's product, the jury "allocated only 1.2 percent of the total legal cause to defendant's comparative fault." (*Id.* at p. 985.) Thus, "[i]n the absence of any instruction or evidence that a small amount was necessarily insubstantial, and guided by BAJI No. 3.77's command that every contributing cause was a legal cause regardless of the degree of its contribution, the jury concluded even 1.2 percent of the cause was, on the facts of this case, substantial." (Ibid.) Had the jury, however, been instructed with the second sentence of CACI No. 430, i.e., that a substantial factor "must be more than a remote or trivial factor," it may have been confused or misled into thinking that a small exposure, "even 1.2 percent of the cause," could not be a legal cause of

a person's asbestos-related injury, when, as the Supreme Court in *Rutherford* held, it can be a legal cause.

In *Rutherford,* the Supreme Court noted that it had previously "suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) The Supreme Court also made clear, however, that "[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical," (*id.* at p. 978), and it explained in a later case that "a very minor force that does cause harm is a substantial factor." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79, italics added.) In light of the medical and scientific uncertainties involved with causation in asbestos injury cases, as detailed and discussed by the Supreme Court in *Rutherford,* an instruction telling the jury that a substantial factor "must be more than a … trivial factor" may confuse and invite the jury to disregard or discount smaller exposures that are otherwise medically and legally sufficient to establish causation. It is also worth recognizing that while the Supreme Court in *Rutherford* observed that an "'infinitesimal' or 'theoretical'" force "is not a substantial factor," (*Rutherford,* at p. 969), it did not use that language, those terms, or the term "trivial" in its formulation of the asbestos injury causation standard it said the jury should be instructed with. (*Id.* at pp. 982-983.) Nor, as discussed above, was there any such language in BAJI No. 3.76 when *Rutherford* was decided. (See *Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314 [quoting BAJI No. 3.76 in its entirety].)

Moreover, as to the term "remote" in the second sentence of CACI No. 430, that term will invite jury confusion because it incorrectly suggests that, for there to be causation in an asbestos injury case, there must be a temporal proximity or closeness in time between a particular exposure or series of exposures and the manifestation of the plaintiff's disease. But as the Supreme Court recognized in *Rutherford,* asbestos-related diseases have a "long latency period." (*Rutherford, supra,* 16 Cal.4th at pp. 957, 975; see *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1135 ["the average latency period of asbestosis is 20 years"], 1136 [mesothelioma "has an average latency period of 30 to 40 years"]; *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 540 ["the decades-long latency periods of asbestos-related disease"].) Because of this decades-long latency period, causative exposures in an asbestos injury case will always, by definition, be remote in time compared to the injury. This unique circumstance has the real potential for causing confusion and misunderstanding if the jury is instructed, under CACI No. 430, that a substantial factor "must be more than a remote … factor," because the jury will be invited to apply an erroneous temporal restriction that excludes exposures that are otherwise medically and legally sufficient to establish causation. Again, it is worth noting that the Supreme Court did not include any temporal or remoteness limitation in the causation standard it said the jury should be instructed with in *Rutherford,* (*Rutherford, supra,* 16 Cal.4th at pp. 982-983),

and there was no such language in BAJI No. 3.76 when *Rutherford* was decided. (*Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314.)

The committee agrees with these views of Mr. Gurien, which reflect the reasons for the revisions that the committee has made.

CACI No. 1004, *Obviously Unsafe Conditions.* In a recent case, *Jacobs v. Coldwell Banker Residential Brokerage Co.*,[21] the court addressed an exception to the general lack of a landlord's duty with regard to an obviously unsafe condition. While the landlord has no duty to warn, it must still take remedial steps to address the danger if it is foreseeable that the condition may cause injury to someone who, because of necessity *or other circumstances,* encounters the condition.[22]

As this corollary rule was already noted in the Directions for Use, the committee decided to elevate it to the instruction itself. While the first paragraph expressing the lack of a duty to warn remains unchanged, the committee proposes adding a second paragraph addressing the possible duty to remediate.

There was considerable discussion of what the court in *Jacobs* was referring to as "other circumstances." The court gave no examples, and the committee found none; cases all involved whether there was a necessity of encountering the condition. While the initial inclination was to reproduce the *Jacobs* language completely, the committee reconsidered in light of several public comments received. Ultimately, it was concluded that referencing "other circumstances" without any guidance as to what those circumstances might be would not be helpful and might lead the jury to speculation.

CACI No. 1005, *Business Proprietor's or Property Owner's Liability for the Criminal Conduct of Others* (as retitled). In a recent unpublished case, a fire on the landlord's property did damage to the tenant's business. The court, in an opinion written by a committee member, found that whether the fire was an accident or arson was germane to the landlord's liability. The landlord could be liable for a foreseeable intervening criminal act, that is, arson. If the fire were accidental there would be no liability.[23]

While the committee does not draft *CACI* instructions based on unpublished cases, at times an unpublished case will unearth an issue that calls into question something in *CACI*; that was the situation here. Under CACI No. 1005 as currently drafted, the landlord would be liable for a foreseeable negligent or noncriminal intentional act, not just for a criminal act. Under current

[21] (2017) 14 Cal.App.5th 438, 447.

[22] *Id.* at p. 447.

[23] *Nodulski v. Vargas* (Sep. 6, 2017, No. F072998) __ Cal.App.5th __ [2017 Cal.App. Unpub. Lexis 6105].

CACI 1005, it would make no difference whether the fire was arson or negligently started. The committee decided to revisit CACI No. 1005.

A 1966 case[24] quotes the Restatement of Torts, section 344, that "[a] possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons … ."[25] But the case involved a criminal act, so this language was dicta. In the many intervening years, the committee only found cases involving an intervening criminal act.

While the committee considers the effect of intervening negligent or noncriminal intentional acts to be unresolved, it decided that currently only intervening criminal acts are clearly within CACI No. 1005. The title and text of the instruction have been revised accordingly.

CACI No. 2021, *Private Nuisance—Essential Factual Elements.* A 2016 unpublished case[26] called the committee's attention to whether *CACI*'s private nuisance instruction 2021 lacked a scienter requirement. In that case, the court posited, that "[t]here appears to be an additional element in most private nuisance claims—namely, that the defendant acted intentionally or negligently in creating the interference or allowing it to persist."[27] But the court went on to say that some cases suggest that no such showing is required.

On investigation, the committee did not find a true split of authority. However, the committee concluded that any scienter requirement would be more complex than a simple statement that the defendant acted intentionally or negligently.

In *Lussier v. San Lorenzo Valley Water District,*[28] the court, relying on the Restatement 2d of Torts, section 822, said:

> Although the central idea of nuisance is the unreasonable invasion of this interest and not the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. [Citations] "The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the

[24] *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114.

[25] *Id.* at p. 124.

[26] *Moalem v. Gerard* (Dec. 1, 2016, No. B268963) __ Cal.App.5th __ [2016 Cal.App. Unpub. Lexis 8576].

[27] *Id.* at p. *3.

[28] (1988) 206 Cal.App.3d 92, 100.

> categories mentioned above. In these cases there is no liability." (Rest.2d, *supra*, § 822, com. a, p. 109; *Dufour v. Henry J. Kaiser Co.* (1963) 215 Cal.App.2d 26, 29 [29 Cal.Rptr. 871]; but see Prosser, *supra*, § 87, pp. 619–625 [nuisance liability should be based on only intentional conduct].)

Given the complexity of the issue, for the previous release, the committee did not propose adding a scienter requirement to the instruction. Instead, the issue was noted briefly in the Directions for Use. However, several commenters objected that this approach was inadequate, finding the explanation in the Directions for Use to be insufficiently developed to provide meaningful assistance to a user who wanted to include a scienter element. In view of the comments, the committee withdrew the instruction from the previous release and returned it to the agenda.

After further consideration for this release, the committee now proposes adding a scienter element to the instruction. In reliance on *Lussier,* the committee has opted to base the element on section 822 of the Restatement. The committee has also elected to include a detailed analysis of the role of scienter in a private nuisance claim in the Directions for Use.

CACI Nos. 2521A, B, and C, and 2522A, B, and C: sexual harassment and comparative fault. *CACI* includes six instructions addressing sexual harassment under the Fair Employment and Housing Act (FEHA). CACI Nos. 2521A, B, and C are for claims against the employer. CACI Nos. 2522A, B, and C are for claims against an individual defendant.[29] *CACI* does not have separate instructions for claims against both the employer and an individual.

An attorney had a case in which the court wanted to give a comparative fault instruction to allocate fault between the employer and the individual. The attorney asked that the committee address this issue in *CACI* in some way.

The employer is strictly liable for all acts of sexual harassment by a supervisor.[30] The committee concluded that there could be no comparative fault between an employer and a harassing supervisor as the employer's liability is derivative and not based on any separate conduct of its own.

In contrast, as pointed out by several commenters, the employer is only liable for harassment by a nonsupervisory employee if the employer knew or should have known of the employee's conduct and failed to take immediate and appropriate corrective action.[31] It is possible that comparative fault could apply between a harassing nonsupervisory employee and the employer found liable for failing to take corrective action; however, the committee believes that this is an unresolved question.

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[29] The A instructions are for conduct directed against the plaintiff. The B instructions are for conduct directed against another person. The C instructions are for widespread sexual favoritism.

[30] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042.

[31] Gov. Code, § 12940(j)(1).

The committee elected to address the attorney's request in the Directions for Use to all six instructions. The proposed revisions state that comparative fault and Proposition 51 do not apply to employer and supervisor. Any rule with regard to nonsupervisory employees is not addressed at this time.

CACI No. 2800, *Employer's Affirmative Defense—Injury Covered by Workers' Compensation.* In *Lee v. West Kern Water District*[32] (*Lee*) the court clarified that, in order to fall under the exclusive remedy of workers' compensation, an injury not only had to have occurred within the scope of employment, but also the work must have been a contributing cause of the injury. The court referred to this second requirement as industrial causation. The court was clear that scope of employment and industrial causation are two separate elements, and both must be proved.[33]

The distinction between the two elements is subtle; often if scope of employment is clear (the employee was hurt while working), causation is not really in dispute (what caused the injury was part of the employee's job). In many cases, it is easy to merge the two requirements together as it really is not necessary to analyze them separately.

Nevertheless, in light of *Lee*, the committee decided that CACI No. 2800 needed a separate element on industrial causation. However, choosing the words for industrial causation that clearly distinguished it from scope of employment proved to be a major challenge. The language used by the court in *Lee* was that the work was a "contributing cause" of the injury.[34] Many committee members feared that this language would not be clear to jurors. Many tried to improve on it, but no one succeeded. A commenter suggested a slight revision to "contributed to causing." The committee accepted this small change and now proposes revising the instruction to add this industrial causation element.

Revoked instruction

CACI No. 4010, *Limiting Instruction—Expert Testimony.* In *People v. Sanchez*[35] (*Sanchez*), the California Supreme Court held that a limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness. In *Conservatorship of K.W.*,[36] the court noted that CACI No. 4010 was such a limited-purpose instruction and found it no longer tenable because an expert's testimony regarding the basis for an opinion must be considered for its truth by the jury. The committee agreed and proposes revoking this instruction.

[32] (2016) 5 Cal.App.5th 606, 625.

[33] *Id.* at p. 625.

[34] *Ibid.*

[35] (2016) 63 Cal.4th 665, 684.

[36] (2017) 13 Cal.App.5th 1274, 1281.

The committee also proposes adding a sentence to the Directions for Use to CACI No. 206, *Evidence Admitted for Limited Purpose,* that notes the holding of *Sanchez*.

Policy implications

Jury instructions express the law; there are no policy implications.

Comments

The proposed additions and revisions to *CACI* circulated for comment from January 22 through March 2, 2018. Comments were received from 25 different commenters. Some submitted comments on multiple instructions, and some commented on only a single instruction. 18 comments were received on asbestos causation.

The committee evaluated all comments and, as noted above, revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions other than asbestos causation and the Equal Pay Act and the committee's responses is attached at pages 15–82.

Alternatives considered

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval; therefore, the advisory committee did not consider any alternative actions.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the 2018 mid-year supplement to *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the Judicial Council will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the Judicial Council provides a broad public license for their noncommercial use and reproduction.

Attachments and Links

1. Chart of all comments other than asbestos causation and the Equal Pay Act and the committee's responses, at pages 15-82
2. Chart of comments—asbestos causation and the committee's responses, at pages 83–120
3. Chart of comments—the Equal Pay Act and the committee's responses, at pages 121-142
4. *CACI* instructions and verdict forms, at pages 143–259

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
206, *Evidence Admitted for Limited Purpose*	Association of Southern Defense Counsel, by Lisa Perrochet and John A. Taylor, Jr, Horvitz & Levy	The proposed revisions to the Directions for Use accompanying CACI No. 206 are consistent with [the] principles [of *People v. Sanchez* (2016) 63 Cal.4th 665]. While the instruction provides generally for trial judges to use limiting instructions if evidence is partially inadmissible for certain purposes at trial, the Directions for Use as revised would properly explain that, "A limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness," citing *Sanchez*.	No response is required.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the revisions to the Directions for Use, but we believe a fuller explanation would be helpful. In lieu of the proposed new second paragraph, we suggest: "The jury must consider an expert's testimony concerning the basis for the expert's opinion for its truth in order to evaluate the expert's opinion. As such, hearsay problems with case-specific testimony given by an expert witness cannot be avoided by giving a limited-purpose instruction that such testimony should not be considered for its truth. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)"	The committee finds this language unnecessarily long and confusing for the simple point of calling the users' attention to *Sanchez*.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
	Civil Justice Association of California	It is not clear that *Sanchez* was intended to apply in civil cases, but assuming it does, the summary leaves little or no room for judicial discretion. It would be better, we suggest, to read: "A limited-purpose instruction may, in certain circumstances, be insufficient to cure hearsay problems with case-specific testimony given by an expert witness." The Direction for Use is unclear as to what constitutes "hearsay problems," particularly given that there are multiple hearsay exceptions that may apply.	The committee does not believe that adding "in certain circumstances" is necessary or helpful.
		Perhaps the Direction for Use could be clearer: "If case-specific out-of-court statements are not admitted through a hearsay exception or appropriate witness, a limited-purpose instruction for case-specific testimony given by an expert witness is insufficient. ("If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements *are necessarily considered by the jury for their truth,* thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can	The comment presents a very good statement of *Sanchez* and what it means. But the committee does not believe that a full explanation of *Sanchez* is necessary for this instruction. The point for CACI No. 206 is simply that a limited purpose instruction will not work for *Sanchez* situations. The Directions for Use are not legal analysis unless the analysis is needed to understand issues with the instruction itself. That is not the case here.

ITC CACI18-01
Civil Jury Instructions - CACI
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Sanchez,* 63 Cal.4th at 684.))	
	Walsworth WFBM, by Christine Z. Fan and John A. Kaniewski	In our opinion, this addition to the Directions for Use is not only appropriate, but also underscores a common problem. Too often, we have seen trial courts allowing an expert to testify as to the content of clearly hearsay evidence under the guise that it is part of the basis for the expert's opinion.	No response is necessary.
430, *Causation: Substantial Factor*, and 435, *Causation for Asbestos-Related Disease Claims*	See separate chart		
470, *Primary Assumption of Risk—Exception to Nonliability–Coparticipant in Sport or Other*	Association of Southern California Defense Counsel, by Scott P. Dixle, Horvitz & Levy	ASCDC supports the proposed modifications to the language of the jury instruction itself, and is grateful to the committee for its efforts.	No response is necessary.
		ASCDC recommends revising the comment as follows:	The committee does not agree that "can sometimes be" is right. The long excerpt from *Luna v. Vela* in the Sources and Authority, which summarizes courts on

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
Recreational Activity		While duty is generally a question of law for the court, courts have held that whether the defendant has unreasonably increased the risk ~~is~~ can sometimes be a question of fact for the jury. (Compare *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112-113 with *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 655 (*Foltz*) and *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 538-539.)	both sides of the issue, indicates that there is a conflict, not that sometimes it is a jury question and sometimes not. This instruction is not about the general question of duty under primary assumption of risk, but the particular subquestion of the defendant's conduct that increased the risk. The committee has made a minor revision to note that some courts have held to the contrary.
		ASCDC recommends modifying the descriptive parenthetical following the first citation to *Foltz* as follows so that it more accurately describes the case: "[defendant's guarantee of a hard surface for riding did not alter inherent risks of off-road dirt biking].	The committee finds the proposed expansion to be more words than are necessary.
		ASCDC recommends moving up the excerpt from *Foltz* in the Sources and Authority (regarding the appropriateness of applying the primary assumption of risk doctrine on summary judgment) to the Directions for Use. This language provides important guidance regarding the respective roles of courts and juries in applying the primary assumption of risk doctrine, and its significance warrants inclusion in the Directions for Use.	What can be done on summary judgment is not a direction for the use of a jury instruction.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the revisions to element 1, adding a new alternative element 1 and making current element 1 an optional alternative.	No response is necessary.
		We would modify the third paragraph in the Directions for Use to state that whether the defendant has unreasonably increased the risk "may be" (rather than "is") a question of fact for the jury, and would state that the issue can be resolved as a matter of law if the facts can support only one reasonable conclusion. We recommend this same change in CACI Nos. 471, 472, and 473	Addressed above
		We believe the paragraph starting "Conduct is entirely outside the range . . ." should be made optional as well, by adding brackets, because this paragraph defines language in current element 1 ("entirely outside the range of ordinary activity") that will become optional. And we would add language to the Directions for Use stating to give the optional paragraph starting "Conduct is entirely outside the range . . ." if the first alternative element 1 is given.	The committee agrees with this comment, but as noted below, has adopted a change proposed by the Civil Justice Association that makes this point moot.
	Civil Justice Association of California	The proposed addition makes it appear there is a third way to obviate the affirmative defense when in fact there are only two ways—intentional conduct or conduct that is outside the range of ordinary activity involved in the	*Levinson* does support the Civil Justice Association position. The court says: "The person owes the horseback rider only two duties: (1) to not "intentionally" injure the rider; and (2) to not "increase the risk of harm beyond what is inherent in [horseback riding]" by "engag[ing] in conduct that is so

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		sport/activity. Unreasonably increasing the risk of harm inherent in the sport is an example of conduct that is outside the range of ordinary activity involved in the sport/activity, not a separate basis/ground. (*Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 538 ["In analyzing whether [defendant] owed [plaintiff] a duty at the Ride, we consider whether the risk of being struck by a coparticipant's horse that follows other horses so closely as to come into contact with them is 'inherent in' the activity of endurance riding"].) Increasing the risk of harm beyond what is inherent in the sport/activity occurs when a coparticipant engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport/activity. (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1546-1547.) The proposed addition makes it appear that these are two different ways to impose a duty on the defendant	reckless as to be totally outside the range of the ordinary activity involved in the sport." The committee believes that "increased the risk" needs to be in the instruction, but as an explanation of what makes something "outside the range" in the way done in *Levinson*. The committee believes that any conduct that is outside of the range increases the risk. The committee has also added the *Levinson* language and similar language from *Swigart* to the Sources and Authority.
	Orange County Bar Association, by Nikki P. Miliband President	Nowhere in *Luna v. Vela* or in any of the cited cases is there any mention of "reasonable" with regard to increasing the risks inherent in the sports/activities. In fact, the cases simply state repeatedly that the governing standard of care is the duty "not to increase the risks inherent in the sport". Adding "unreasonable" or "unreasonably" makes it seem that	None of the cases cited in the *Luna* excerpt in the Sources and Authority say "unreasonably." If it increased the risk above those inherent, then it is per se unreasonable.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		increasing the risks is okay, as long as it wasn't unreasonably increasing the risks	
	Walsworth WFBM, by Christine Z. Fan and John A. Kaniewski	We believe that the proposed change to this instruction is not appropriate nor is it supported by *Luna v. Vela* (2008) 169 Cal.App.4th 102. CACI 470 only pertains to defendants who are coparticipants in an activity. Yet, the proposed change borrows the language of CACI 472 for assumption of the risk as it applies to property owners (as was the defendant in *Luna*) and event sponsors. In the latter regard, the standard is indeed whether a sponsor, organizer, or operator unreasonably increased the risk to a plaintiff. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.App.4th 1148, 1162.) However, defendants who are coparticipants owe no such duty. (*Ibid.* ["In delineating legal duty with respect to a sporting or recreational activity, a defendant's relationship to the activity in which the plaintiff was injured is a proper consideration."]) Enforcing the same standard across categories of defendants would defeat the very purpose for having different instructions in the first place. A lower standard of reasonableness for coparticipants in recreational activities also negates the policy behind the assumption of the risk defense, as it would deter active participation in recreational activities.	*Swigart* and *Foltz* are coparticipant cases involving increasing the risk. The changes made in response to the Civil Justice Association and the Orange County Bar Association may partially address this comment's concern.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
1004. *Obviously Unsafe Conditions*	Association of Southern California Defense Counsel, by Joshua C. McDaniel, Howvitz & Levy	Read out of context, the phrase "because of necessity or other circumstances" suggests that a landowner could be liable if it is foreseeable that the condition will cause injury to someone who for any reason encounters the obvious condition. The "other circumstances" language in *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, read in the context of that case and the jurisprudence in this area of the law, thus refers narrowly to premises liability in circumstances compelling someone to choose to encounter a hazard despite its obviousness. (The comment goes on to address the facts of *Jacobs* and why the case should not be read broadly despite the inclusion of "other circumstances.") We therefore propose that the instruction be revised to add the following sentence as a new paragraph: [However, the [owner/lessor/occupier/one who controls the property] must exercise reasonable care to remedy the condition if it is foreseeable that a practical necessity will	The committee agreed with the comment and has removed "or other circumstances." The proposed revision, however, is needlessly wordy.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		require others to choose to encounter the condition despite the obvious hazard.]	
		We propose bracketing the second paragraph because it will not be necessary in every case, but only if it is alleged that there was some practical necessity requiring the plaintiff to encounter the obvious hazard. The Directions for Use should explain when to give the optional second paragraph: "**Give the optional bracketed paragraph if it is alleged that some practical necessity required the plaintiff to encounter the condition despite the obvious hazard. (Jacobs, supra, 14 Cal.App.5th at p. 447; see also *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122 [273 Cal.Rptr. 457].) However, if there are no disputed facts regarding the "practical necessity" of a plaintiff's choice to encounter an obvious hazard, the bracketed paragraph should not be given, and the question of duty should instead be resolved by the court as a matter of law. (*Jacobs,* at pp. 447-449.)"**	Brackets would not be inappropriate, necessarily, but the same point could be made about the first paragraph. The two paragraphs together set forth the duties with regard to obviously unsafe conditions; sometimes to warn and sometimes to remediate. The committee prefers using brackets sparingly, when there is a clear choice that must be made between or among options.
		Add to the Sources and Authority: 'A railroad track . . . is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary	*Christoff* simply says that railroad tracks are a warning. Case excerpts in the Sources and Authority should address legal principles, not factual applications.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		intelligence, that it is not safe to walk . . . near enough to it to be struck by a passing train.' " (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 126 [36 Cal.Rptr.3d 6]; accord, *Allen v. Jim Ruby Construction Co.* (1956) 138 Cal.App.2d 428, 431-432 [reversing jury verdict for the plaintiff where plaintiff tripped and fell into a pit at a construction site while walking to a washroom, since "[i]t was not shown that it *was necessary* in order to reach the washroom for plaintiff to walk close to the pit" (emphasis added)].)	
		Add to Sources and Authority: "[I]t is evident to us that a large tree growing at the edge of a ski run signals an obvious danger, and that its very presence . . . 'itself serves as a warning.' Consequently, . . . we would conclude [as a matter of law] that [the defendant ski run operator] was under no duty to warn that this particular tree, among the hundreds that border the several ski runs . . . , presented a danger . . . . The tree itself provided a warning to plaintiff of the implicit danger of a collision with it. A fortiori, [the defendant] was under no duty to remove it." (*Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 122 [266 Cal.Rptr. 749].)	The legal principles in the proposed excerpt are already present in the Sources and Authority in more recent cases.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Delete "if it is foreseeable" from the proposed new second paragraph. The existence of a duty of care is a question of law for the court to decide, and the jury only decides whether the defendant breached the duty. When the existence of scope of a duty of care depends on foreseeability, the court decides the issue of foreseeability as a question of law. "Foreseeability, when analyzed to determine the existence or scope of duty, is a question of law to be decided by the court." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678.) The instruction as revised would state that the defendant has a duty to protect against the risk of harm "if it is foreseeable that the condition my cause injury." This may suggest to the jury that the jury must decide the question of foreseeability. We believe the court should decide the foreseeability of injury and instruct the jury on the second paragraph, with no mention of foreseeability, only if the court decides such an injury was foreseeable. We suggest adding language to the Directions for Use explaining that the court must decide the issue of foreseeability of injury and instruct on the second paragraph	*Osborn* quotes *Florez v. Groom Development Co.* (1959) 53 Cal.2d 347, 355, in which the court says: "[t]he jury [is] entitled to balance the [plaintiff's] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue. [Citations.]" Therefore, the committee sees some balancing role for the jury.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		of the instruction only if the court finds that such an injury was foreseeable.	
		Delete "or other circumstances" from the proposed new second paragraph. *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 2 Cal.App.5th 438 and *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104 both involved necessity. Although *Jacobs* suggested that the duty of care may also extend to someone who encounters an obviously unsafe condition because of "other circumstances," *Jacobs* did not hold on this point, and the language "other circumstances" is too broad and would provide no guidance to the jury.	Addressed above; "or other circumstances" has been deleted.
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	The proposed revisions to this instruction do not clearly express what must be foreseeable for tort liability to be imposed on a defendant when an unsafe condition is obvious and could improperly expand liability in certain circumstances. Almost by definition, the potential for "harm" will be foreseeable in most cases involving obviously unsafe conditions. As we read the law, what must be foreseeable to justify the imposition of liability for an obviously unsafe condition is not merely the possibility of harm but also the possibility that someone would have to encounter it	The proposed new paragraph says: "… if it is foreseeable that the condition may cause injury to someone who, because of necessity … encounters the condition." It is the encounter that must be foreseeable.

ITC CACI18-01

Civil Jury Instructions - CACI

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		despite recognizing the obviously unsafe condition – for example, where she or he is required to do so by an employer. Thus, we suggest revising with language that emphasizes the knowing encounter rather than the potential for harm. More specifically, we urge revising the instruction to say that reasonable care must be used to protect against the risk where "it is foreseeable that someone, because of necessity or other circumstances, may encounter the risk despite appreciating the obviously unsafe condition."	
	Civil Justice Association of California	The proposed instruction could be read to mean that the landowner is liable if it was foreseeable plaintiff would encounter the known danger for convenience rather than by necessity. We suggest removal of "because of necessity, or other circumstances" in the Instruction because it creates prospect for confusion as it is broad, over-inclusive, and unclear.	The committee agrees with removing "or other circumstances," but does not understand why the Civil Justice Association would also remove "because of necessity" as they recognize that necessity may create a duty.
	Manion Gaynor Manning, by Jennifer A. Cormier and Carrie S. Linn	The proposed modification is confusing and unnecessary because the exception relates to a general duty of care or duty to remedy, not the duty to warn that is the principal subject of CACI 1004. In short, it should be a separate instruction, and should not be presented to the jury in a case – such as an	While each paragraph could be a separate instruction, including two separate duties related to an obviously unsafe condition together in one instruction is better, particularly since both paragraphs are short.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		asbestos premises liability case – if the only allegation of negligence or wrongdoing stems from an alleged failure to warn. See *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal. App. 5th 438, 447. ["While the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn in some situations, such obviousness will not negate a duty of care."] See, also, *Osborn v. Mission Ready Mix* (1990) 224 Cal. App. 3d 104, 119 (1990) ["[T]he obviousness nature of the danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy."]	The committee has, however, revised the language of the Directions for Use slightly to point out the separate functions of each paragraph.
	Walsworth WFBM, by Christine Z. Fan and John A. Kaniewski	We believe that the proposed change should not be made. Examining the plaintiff's necessity and nothing else is consistent with other California decisions. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122, 273 [balancing only the practical necessity of encountering an obvious danger and no other circumstances.]; *Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184; *Beauchamp v. Los Gatos Golf*	As the commentator agrees that there is a necessity exceptionas the committee proposed—the committee does not see any reason why the proposed change should not be made.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		Course (1969) 273 Cal.App.2d 20, 35.) To include a separate inquiry for "other circumstances" is not required. In addition, the phrase "other circumstances" is much too broad to be applied with any legally sufficient specificity.	
1005. *Business Proprietor's or Property Owner's Liability for the Criminal Conduct of Others*	Association of Southern California Defense Counsel, by Lindy F. Bradley, Bradley & Gmelich	The proposed amendment to CACI No. 1005 would replace the term, "Business Proprietor's" in the title with the term "Property Owner's." However, the instruction itself refers to both "an owner of a business" and "a landlord." Moreover, *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, the case cited in support of the instruction, discusses the duties not only of an owner, but also of a landlord and one who has "possession and control." Deleting the term "business proprietor" from the title of the instruction obscures the fact that a business owner, who may have possession and control of leased premises, often is not the owner of the property. Thus, the proposed title revision contradicts the language in the body of the instruction, thereby creating ambiguity and confusion as to the use of this instruction. If the intention of the revision is to instruct juries regarding liability for both business owners and landlords, then conformity between the title and the body of the instruction is necessary.	The committee agrees with the comment and has restored "Business Proprietor" to the title.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		Instead of the proposed language, "that type of conduct," we recommend substituting the term "such criminal conduct." This creates consistency with the original proposed change from "harmful" to "criminal," and eliminates any uncertainty as to the meaning of "that type of conduct."	The committee avoids using "such" in the manner proposed as it is often used in the same way that "said" has been used in legal writing. However, the committee agrees that "type of" is not needed.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	Civil Justice Association of California	if the language is to be changed at all, it should be changed to the following, with the unbolded text in brackets being commentary, not proposed language: **A duty to take affirmative action to control the wrongful acts of a third party will be imposed only when such conduct can be reasonably anticipated.** (*Ann M. v. Pacific Shopping Center* (1993) 6 Cal. 4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5 [113 Cal.Rptr.3d 327, 235 P.3d 988].) [This is somewhat similar to what is stated in the revised CACI 1005 notes, which does not contain any limitation as to scope directly	The first sentence is the current sentence rewritten to lean toward the defense ("only when"). With regard to the other two sentences, which are called "important limitations," foreseeability is part of the court's duty analysis. (*Ann M., supra,* 6 Cal.4th at p. 678.)

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		below.] **The scope of a landowner's duty is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed.** (*Id.,* 6 Cal. 4th at 678-679.) **Where the burden of preventing future harm is great in relation to the size of the entity upon which the burden is imposed, a high degree of foreseeability is required.** (*Id.*) [These last two sentences are important limitations on the scope of the holding in *Ann M.* which are missing from the proposed language.]	
		We oppose the proposed additional paragraph to the Instruction relating to landowner conduct as it improperly implies the landowner should have taken some steps to prevent third-party criminal conduct. Under the current law in California, the landowner only has a duty to take affirmative steps to protect against the criminal acts of third parties if "the conduct can be reasonably anticipated" [*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676] or is "foreseeable" [*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213]. Therefore, the addition is acceptable only if the Directions for Use explain that the instruction may only be used if the court has determined as a matter of law that the	As the Directions for Use point out, reasonable anticipation in the first paragraph is not for the jury. So if the case is before the jury, the court has determined that the defendant could have reasonably anticipated the intervening criminal act. The new second paragraph is for the jury, however.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		landowner owed a duty of care because the third party's criminal conduct was "reasonably anticipated" or "foreseeable." If the court has not determined as a matter of law that the landowner had a duty to prevent third-party criminal conduct because it was reasonably anticipated or foreseeable, the jury should not be instructed using the proposed addition	
	Orange County Bar Association, by Nikki P. Miliband President	The draft seeks to remove the "Negligent/Intentional" from the black letter of the instruction and leave only the word "Criminal." Case law seems to indicate that non-criminal conduct of others can hold the property owner liable. (See *Taylor v. Centennial Bowl, Inc.* (1966), 65 Cal. 2d 114, 124.) As such, we would propose leaving the language "Negligent/Intentional/Criminal" in the title. Further, we disagree that "criminal" should replace "harmful" conduct in the body of the instruction. This seems to be an extremely high standard unsupported by the sources and authority and completely unnecessarily limiting the usefulness of the instruction.	The committee debated this issue extensively and concluded that only *Taylor* suggests that the rule applies to noncriminal conduct. But all the court did in *Taylor* was to quote a rule from the Restatement. This rule is not applied in *Taylor* nor in any other case that the committee found. And *Taylor* is a 1966 case.
1500. *Former Criminal Proceeding–Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by	We agree with the proposed revisions to the instruction and the Sources and Authority.	No response is necessary.
		Modify the proposed new paragraph for the Directions for Use as follows:	The committee believes that the proposed additions are more explanation than is needed.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
	Reuben A. Ginsberg, Chair	"In elements 1 and 3 and in the next-to-last paragraph, include the bracketed references to prosecution if the arrest was without a warrant. In the absence of a warrant, false accusations that lead to an arrest, but do not culminate in formal charges and a prosecution, do not give rise to a cause of action for malicious prosecution because in such a case, there has been no adjudicative criminal proceeding resulting in a favorable termination. (See *Van Audernhove v. Perry* (2017) 11 Cal.App.5th 915, 919-925 [217 Cal.Rptr.3d 843].) In contrast, whether a claim of malicious prosecution can be based on an arrest obtained on a warrant that does not result in a ~~Whether~~ prosecution ~~is required in an arrest on a warrant~~ has not definitively been resolved because a warrant arguably involves court involvement and an adjudicatory criminal proceeding. ~~(See *Van Audernhove v. Perry* (2017) 11 Cal.App.5th 915, 919-925 [217 Cal.Rptr.3d 843].)~~"	
VF-1500. *Malicious Prosecution—Former Criminal Proceeding*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the revisions to the verdict form.	No response is necessary
		We would add to the Directions for Use: "In question 1, include the bracketed reference to prosecution if the arrest was without a warrant."	The committee agreed, and has made the addition.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
	Orange County Bar Association, by Nikki P. Miliband President	For consistency, a use note similar to that found under "Directions for Use" for CACI 1500 should also be included here: "In question 1, include the bracket reference "and prosecuted" if the arrest was without a warrant. Whether prosecution is required in an arrest on a warrant has not definitively been resolved. (See *Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 919–925 [217 Cal.Rptr.3d 843].)"	As noted above, The committee has added "and prosecuted." The committee does not see a benefit to repeating the "Whether" sentence as it is in the instruction's Directions for Use.
1503. *Affirmative Defense—Proceeding Initiated by Public Employee Within Scope of Employment*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	It is unclear whether this instruction as revised is intended to address immunity for the public entity or its employee. The instruction begins by stating that the public entity claims immunity, but the Directions for Use and Sources and Authority both refer to public employee immunity. We believe the instruction should cover immunity for both the public entity and public employee. We would modify the instruction: "[*Name of public entity/public employee defendant*] claims that [he/she/it] cannot be held responsible for [*name of plaintiff*]'s harm, if any, because [*name of employee*] who initiated the [*specify proceeding, e.g., civil action*] ~~was initiated by its employee who~~ was acting within the scope of [his/her] employment. To establish this defense, [*name of defendant*] must prove that [*name*	The comment is correct that the statute makes the employee immune. But revising the language to make the instruction apply to both entity and employee raises drafting problems. By pluralizing the parties making the claim, the entire instruction would need to be pluralized, which the comment does not do. Pluralizing will introduce many brackets. I think that the comment is postulating that the instruction will be presented by either the entity or the employee. But the committee does not think that's a very likely scenario. The entity will be the target of the action. The entity liability will be determined by the employee's scope of employment.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		of employee] was acting within the scope of [his/her] employment."	
		We would cite Government Code section 815.2, subdivision (b) (public entity immunity) in the Directions for Use and Sources and Authority.	The committee agreed and has added the citation to the title.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.

ITC CACI18-01

Civil Jury Instructions - CACI

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1730. Slander of Title—Essential Factual Elements	Orange County Bar Association, by Nikki P. Miliband President	At the second item (?) appearing under Directions for Use, the three sentences proposed for removal should be retained, and set forth as a separate item (?). These three sentences, in a clear and apparent manner, provide relevant information and guidance as to aspects of these claims which might be lost were the proposed revisions adopted. Were these three sentences retained, the proposed revision to the *Albertson v. Raboff (* citation at item 5 (?) would be unnecessary as would the second sentence proposed for inclusion at item 4 (?) addressing other privileges and the need for additional targeted elements or instructions.	Text appears to have been lost from the comment, and the committee cannot really determine what is being proposed. There is no explanation of "item" and the three sentences are not identified. There are three sentences proposed to be deleted in the 2nd paragraph of the Directions for Use. But the second sentence is no longer the law, and the third sentence has been retained. The first sentence cited to *Albertson* would be a "see" cite were it to be retained. *Albertson* does not say that all privileges of Civil Code § 47 apply, but it does apply the litigation privilege. There are also three sentences proposed to be deleted in the 4th paragraph of the Directions for Use. But the content is retained in the proposed new third paragraph. So it does not seem that the comment is referring to these sentences. Nor does the committee understand what is referred to as "the proposed revision to the *Albertson* citation." The committee proposes deleting a sentence cited to *Albertson* and then adding *Albertson* as a "disapproved other grounds" citation. No *Alberson* citations would be deleted.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
1731. *Trade Libel–Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
1802. *False Light*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	Civil Justice Association of California	We disagree with the proposed revisions and believe the instruction should remain unchanged because there is no new case law upon which the proposed amendments are based. The revisions cherry-pick plaintiff-friendly language from old court decisions.	There never was case law to support the parts of the instruction that are being revised and deleted.
2021. *Private Nuisance—Essential Factual Elements*	Association of Southern California Defense Counsel, by Lisa Perrochet Horvitz & Levy	One of ASCDC's concerns is that the Committee has placed this element in brackets, indicating that it is optional. However, it should be no more optional than any other nonbracketed element in other CACI instructions that may be omitted if the parties agree, or if the trial court finds, that there is no disputed issue of fact as to one particular element. *Lussier v. San*	The committee agreed with the comment and has removed the brackets.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		Lorenzo Valley Water Dist. (1988) 206 Cal.App.3d 92 and cases following it make clear that the jury must focus on the nature of the defendant's conduct as a central matter in deciding whether liability exists. Indeed, *Lussier* specifically noted that a nuisance in many, if not in most, instances, especially with respect to buildings or premises, presupposes negligence. (*Luisser, supra,* 206 Cal.App.3d at p. 104; see also id. at p. 105 [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].) *Lussier* found this element to be dispositive, approved the granting of a nonsuit in a case where this element was not met by competent evidence. ASCDC therefore recommends that the brackets be removed and the sentence in the Directions for Use that addresses when to give the element be deleted.	
		New element 3 is somewhat awkwardly phrased. First, the clause regarding conduct that is "unintentional, but negligent or reckless" need not include the words "unintentional, but," because a plaintiff can meet this element with a showing of negligent or reckless conduct, whether the conduct was intentional or unintentional.	The committee considered a number of different approaches to presenting this element. The committee ultimately concluded that it would be best to use the language from the Restatement as set forth in *Lussier*.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		The clause regarding conduct that is "*the result of* an abnormally dangerous activity" is not quite an accurate characterization of the law. (See *Lussier, supra,* 206 Cal.App.3d at p. 100 [noting that an *invasion* of the plaintiff's interests may be " 'caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability' "]; see also *id.* at p. 101 [liability may arise from "such *interferences* as are intentional and unreasonable or result from negligent, reckless *or abnormally dangerous conduct*" (emphasis added)].) Under *Lussier,* the element is met upon a showing that the *conduct itself* is an abnormally dangerous activity, that is, that the *invasion or interference* was caused by such conduct. The case does not support the suggestion, as framed in the committee's proposal, that liability turns on whether the conduct resulted from an abnormally dangerous activity. (The comment then purports to set forth the preferred language, but actually quotes the committee's proposed language. It would appear that they did not present what they propose, probably by oversight.)	While the point of the comment is a subtle one, the committee agreed and has revised this language.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		The new second paragraph in the Directions for Use is framed in a way that is likely to cause confusion, in part because of the punctuation used: "If the act that causes the interference is intentional but reasonable or entirely accidental, there is generally no liability." Grammatically, this paragraph suggests that there may be conduct that is intentional and is also either "reasonable or entirely accidental." Fix it as follows: "If the act that causes the interference is intentional but reasonable**, or if it is** entirely accidental, there is generally no liability."	The committee agreed with the comment and has revised the language as proposed to eliminate the potential confusion.
		Include the full quote from *Lussier* that explains when there is liability, not just when there is not.	The committee agreed and has placed this language in the Directions for Use.
		We are concerned that the new excerpts from *Lussier* in the Sources and Authority quote statements outlining grounds for finding liability, but they omit important context for the selected quotes (including context that shows when liability is negated). The excerpts omit any mention of the fact the quoted statements were made in the course of an opinion affirming an	The committee believes that for most case excerpts in the Sources and Authority, the procedural stance of the case is not important.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		order granting a nonsuit for failure to meet the required elements.	
		The new excerpt in the Sources and Authority beginning, "Clearly, a claim of nuisance based on **[intent]** is easier to prove" quotes dicta in a misleading way, suggesting that any form of "intent" (including an intent not to act) can be equated with the hypothetical scenario that the court in *Lussier* was describing. The court was focusing particularly on a defendant's affirmative intent to change the condition of the defendant's land, which in turn harmed the plaintiff. Because the substitution of the bracketed word "[intent]" is not consistent with the import of the court's analysis, we recommend that the paragraph be deleted.	The committee agreed that inserting "[intent]" into the excerpt was not a clear replacement and has instead restored the original court language "our example."
		In its place, the following excerpt could usefully be added: • However, " 'an actor is no longer liable for accidental interferences with the use and enjoyment of land but only for such interferences as are intentional and unreasonable or result from negligent, reckless or abnormally dangerous conduct.' " (*Lussier, supra,* 206 Cal.App.3d at p. 101 [citing Rest.2d Torts, § 822, com. b, pp. 109-110; and Prosser & Keeton, Torts (5th ed. 1984) § 4, pp. 20-23]; id. at pp. 101-102	The excerpt immediately before the one that the commentator would remove covers the first part of the proposed excerpt. The proposed language in brackets at the end does come from *Lussier*. The committee has added it to the excerpt.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		["We do not intend to suggest, however, that one is strictly liable for damages that arise when a natural condition of one's land interferes with another's free use and enjoyment of his property. Such a rule would, quite anomalously, equate natural conditions with dangerous animals, ultrahazardous activities, or defective products, for which strict liability is reserved."].)	
		The new paragraph containing an incomplete quote from footnote 5 of *Lussier* leaves the impression that the court was approving an interpretation of case law under which nuisance liability could flow "in the absence of wrongful conduct." The truncated reference omits the key subsequent paragraphs in footnote 5 questioning and limiting that concept. (See, e.g., *Redevelopment Agency of City of Stockton v. BNSF* (9th Cir. 2011) 643 F.3d 668, 674 ["We cannot agree that such passive but-for causation is sufficient for nuisance liability to attach. Under California law, conduct cannot be said to 'create' a nuisance unless it more actively or knowingly generates or permits the specific nuisance condition."].) We propose that the partial quote to footnote 5 be omitted, or that footnote 5 be quoted in full and	The whole footnote contains more information about the historical development of the law of nuisance than is needed. However, the committee has added a parenthetical noting that the court is questioning the validity of the trees exception.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		subsequent cases confirming the Lussier court's skepticism be referenced.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe proposed new element 3, based on dicta in *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100, does not accurately state the law. *Lussier,* quoting the Restatement, stated the invasion "may be" (1) intentional and unreasonable, (2) unintentional but negligent or reckless, or (3) the result of an abnormally dangerous activity for which there is strict liability. We regard this as a nonexclusive, rather than exclusive, list of types of conduct supporting nuisance liability. *Lussier* did not hold on this point. Instead, Lussier held that if nuisance liability is based on an omission, the defendant must have been negligent in failing to act. (*Id.* at pp. 102, 105; see *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1237 [quoting *Lussier,* at p. 105]. We believe the stated rule that nuisance must involve (1), (2), or (3) is potentially misleading, particularly if the word "unreasonable" is not defined. According to *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938, an interference with the plaintiff's use and enjoyment of land (not only an intentional interference, but any interference) must be	The committee has concluded that the instruction must have a scienter element, and as noted above, after much deliberation has settled on *Lussier* and the Restatement. As far as "unreasonable" is concerned, the unreasonableness referred to in the San Diego case (and many others) is the unreasonableness of the interference. As noted in the comment, this is expressed in the balancing test of the final element and CACI No. 2022. The comment's proposed revision would suggest that only negligent or reckless acts constitute a nuisance, and that is clearly not the law.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		"unreasonable" to create nuisance liability, and an interference is "unreasonable" if "the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account." This requirement is currently expressed in element 8 (renumbered element 9) and CACI No. 2022, Private Nuisance—Balancing Test Factors—Seriousness and Public Benefit, which must be given with this instruction. So it is unnecessary to add an "unreasonable" requirement in proposed new element 3, and troublesome to use this term without defining its meaning in this context. As to "unintentional, but negligent or reckless," this may suggest that an intentional interference that is negligent or reckless does not give rise to nuisance liability, unless a "negligent or reckless" interference is "unreasonable" (as seems to be the case). It would be simpler to say that any interference, whether intentional or unintentional, must be unreasonable to constitute a nuisance, but current element 8 and CACI No. 2022 already set forth this requirement. We would limit element 3 to the holding in *Lussier* by modifying it as follows:	

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		"[That [*name of defendant*]'s conduct in ~~acting or~~ failing to act was ~~[intentional and unreasonable/unintentional, but~~ negligent or reckless~~/the result of an abnormally dangerous activity];~~]"	
		Accordingly, we would modify the final sentence in the proposed first new paragraph in the Directions for Use: "If ~~there is an issue as to the nature of~~ the defendant's conduct involved the failure ~~in acting or failing~~ to act ~~that caused the interference~~, include Element 3."	The committee has removed the brackets and deleted this sentence.
		The proposed second new paragraph in the Directions for Use derives from the same paragraph in *Lussier* as proposed new element 3. After stating three types of conduct constituting nuisance, *Lussier* stated (quoting the Restatement): "On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability." (*Lussier, supra,* 206 Cal.App.3d at p. 100.)" We do not find the proposed second new paragraph helpful either as an explanation of how the instruction will work in practice or as a direction for use of the instruction.	The ASCDC proposes expanding this paragraph rather than deleting it. The committee prefers expansion.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		The term "reasonable" oversimplifies the required balancing under current element 8 and CACI No. 2022. And an accidental act would support liability if the defendant acted negligently or recklessly. The statement in *Lussier* was qualified by "and not fall within any of the categories mentioned above," but the proposed new second paragraph omits this qualification. We would strike the proposed second new paragraph.	
		The proposed new third paragraph in the Directions for Use explains the intent requirement. The only intent requirement in this instruction is in proposed new element 3, and we would strike that part of element 3, so we would strike the proposed new third paragraph too.	The committee will not revise element 3 as requested. Therefore, explaining that only general intent is required is important.
		The proposed new fourth paragraph in the Directions for Use states, "If the conduct results from an abnormally dangerous activity, it must be one for which there is strict liability," citing *Lussier, supra,* 206 Cal.App.3d at page 100, and the Restatement 2d of Torts. But *Lussier* did not hold on this point. Absent a case holding on point, we would strike this paragraph.	As noted above, the committee has settled on the language from *Lussier* and the Restatement.
		The proposed new fifth paragraph in the Directions for Use refers to an exception, apparently meaning an exception to the	While the committee does not see a reason to delete this paragraph, there is a flaw. The text does not say what the "exception" is to, leading the commentator

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		purported rule that an abnormally dangerous activity supports nuisance liability only if strict liability applies. Since we would strike the fourth paragraph and the reference in proposed new element 3 to abnormally dangerous activity, we would strike this fifth paragraph too absent a case holding on point.	to believe that it is to the immediate preceding paragraph. But it is an exception to the scienter requirements of element 3. The committee has revised the paragraph to clear up this confusion.
		We agree with the proposed new fifth paragraph in the Directions for Use citing *City of Pasadena*.	No response is necessary.
		The quotes from *Lussier* added to the Sources and Authority are dicta and are not particularly helpful, so we would strike them	The fact that language is dicta does not mean that it is of no interest. The committee believes that given the challenges of this instruction, these excerpts are helpful.
	Civil Justice Association of California	We are concerned that the revisions are not supported by, and even contradict, recent case law. Instead, the revisions cherry-pick plaintiff-friendly language from old court decisions. We are opposed to this revision. We rely on *Coppola v. Smith* (E.D. Cal. 2013) 935 F. Supp.2d 993, 1018 (and California law cited therein); Rest. (2nd) of Torts Sections 838, 839	The committee sees nothing particularly "plaintiff friendly" about element 3. It is an additional element that the plaintiff must prove. The current instruction with no scienter element would seem to be more "plaintiff friendly." *Coppola* is a federal case, and is not authority for California nuisance law.
		We suggest revising element 3 to read as follows: "That [*name of defendant*] actively or knowingly generates or permits the specific	The Civil Justice Association proposes that three scenarios presented in *Coppola* are elements and should be in an instruction. Were *Coppola* California law, then each would be a different instruction, not elements to CACI No. 2021.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		nuisance activity, where the nuisance is based on [*name of defendant*]'s creation or assistance in creating the nuisance."	
		We recommend adding a new element 4, as follows: "That [*name of defendant*] did not take reasonable precaution under the circumstances then known to mitigate or abate a known unreasonable risk of loss on land it possessed when presented with a reasonable opportunity to do so, where the nuisance is based on [name of defendant]'s possession of land."	*Coppola* scenario 2. This one is based on Restatement section 839. The committee will not draft either new elements or new instructions based on *Coppola*.
		We suggest amending current element 3 (proposed element 4) by inserting "and unreasonably" after, "That this condition substantially."	"Unreasonably" is subsumed within the balancing test of element 9 and CACI No. 2022. (See *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938–939, in the Sources and Authority.
		We also suggest inserting a new element 6: "That [*name of defendant*] knows or has reason to know that a third party's activity on its land is causing a nuisance (or an unreasonable risk of nuisance), [*name of defendant*] consents to the activity of the third party or fails to take reasonable care to prevent the nuisance, where the nuisance is based on [*name of defendant*]'s right of possession and consent or unreasonably permitting a third party to	*Coppola* scenario 4. As noted above, the committee will not revise or add to CACI based on *Coppola*.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		create a nuisance on the land (such as a leasehold).	
2521A, 2521B, 2521C, 2522A, 2522B, 2522C on Sexual Harassment	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed addition to the "Directions for Use," and notes that this question (joint and several liability) often arises in the trial courts on these claims. Thus, this addition is a useful practical addition that will aid trial courts quite often.	No response is necessary.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	An employer is liable for harassment by a nonsupervisory employee only if the employer knew or should have known about the harassment and failed to take corrective action. (Gov. Code, § 12940(j)(1).) Element 6 reflects this, but the proposed new first sentence in the Directions for Use, "If there are both employer and individual defendants . . . both are liable for any damages," seems to suggest that the employer is automatically liable for harassment by an employee. And the reference to "vicarious liability" in the second sentence seems inappropriate. Under FEHA, employer liability for harassment by a nonsupervisory employee is direct rather than vicarious. Employer liability for harassment by a supervisor under FEHA is described as "strict" rather than "vicarious." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041 [under FEHA an employer is strictly liable for harassment by a	The committee agreed with the comment and has revised the instruction along the lines proposed. References to vicarious liability have been changed to strict liability.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		supervisor, and liability is not based on agency principles]; see Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2017) ¶¶ 10:315.1-10:315.2 [employer liability under Title VII is vicarious, while under FEHA employer liability is strict and therefore is based on agency].) Accordingly, we would modify the final sentence in the Directions for Use: "If there are both employer and individual defendants . . . , and both are found liable, the liability is joint and several ~~both are jointly and severally liable for any damages~~. Comparative fault and Proposition 51 do not apply to the defendants' liability ~~vicarious liability.~~ . . ."	
		We question the appropriateness of the new excerpt from *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 in the Sources and Authority in light of the foregoing.	The committee notes that there does seem to be some tension between *Bihun* and *State Department of Health Services* with regard to strict versus vicarious liability. But the court in *Bihun* said what it said. The committee believes that users should be made aware of its language. However, the committee has added an excerpt from *State Dept Health Services* to the Sources and Authority.
	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy	The proposed addition assumes that individual defendants are jointly and severally liable when an employer defendant is liable, and vice versa. This is not a correct statement of the law.	The committee agreed with the comment and has revised the Directions for Use to limit the inapplicability of comparative fault and Proposition 51 to employer strict liability for supervisor harassment.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
	Directors and Civil Justice Association of California (same comment)	Supervisors are not always liable for resulting damages. For example, a non-harassing supervisor who fails to act to prevent sexual harassment is not personally liable for sexual harassment under FEHA. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322.) Likewise, an employer defendant is not always liable when an individual defendant is found liable for harassment. An employer is vicariously liable for harassment committed by a supervisor of the plaintiff's. But an employer will be liable for harassment committed by a non-supervisory coworker only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1040–1041.) This is a negligence standard, and the employer is liable based on its own negligence, and not as a matter of public policy/respondeat superior. The proposed revision will result in confusion regarding the correct standard of liability in harassment cases in which both the employer and individuals are named as defendants, especially if the employer's	The committee believes that whether comparative fault and Proposition 51 apply between a harassing nonsupervisor employee and the employer who knew of but failed to prevent the harassment, is not settled.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		liability is based on its negligence (coworker harassment) and not on respondeat superior or strict liability.	
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	We submit that, as written, these revised Directions for Use would overstate the circumstances in which liability for employers should be joint and several. The directions provide for joint and several liability "for any damages" in all cases in which there is both an individual defendant and an employer defendant. But the case law on which the directions rely does not support imposing joint and several liability "for any damages" in every case. Instead, at least as to noneconomic damages, the relevant precedents suggest that where the employer's liability is based on its own independent actions (i.e., not on vicarious liability or respondeat superior theories), the employer should be liable only in proportion to the employer's percentage of fault. We propose revising the directions for use accordingly, to state that, "[if] there are both employer and individual defendants, and the employer defendant is liable on a respondeat superior or vicarious liability theory, both are jointly and severally liable for any damages."	As noted above, the committee agreed with the comment and revised the Directions for Use. Note that the ILR does not ask that the text clearly state that Proposition 51 does apply if the employer is liable for nonsupervisor harassment on a "knew and should have stopped it" theory.
2620. *CFRA Rights Retaliation—*	California Employment	CELA supports the proposed additions to the Directions for Use and·to the Sources and Authority.	No response is necessary.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
Essential Factual Elements	Lawyers Association, by David deRobertis		
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We suggest modifying the title and providing specific alternative language in this instruction for use in a retaliation claim under the New Parent Leave Act, rather than simply stating that the instruction may be used for such a claim. This could be done fairly easily by adding "new parent" as a third option to "family care" and "medical" leave in the opening paragraph and in elements 1, 2, and 4.	The committee considered modifying the instruction as proposed, but elected not to proceed. Drafting an instruction to accommodate two different statutes runs the risk of making assembly of the instruction (selecting the options presented) overly complicated. The committee has, however revised the Directions for Use to give more specific directions s to how to modify the instruction for the New Parent Leave Act, per the comment's approach.
2630. *Violation of New Parent Leave Act—Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed instruction number 2630.	No response is necessary.
		Element 4 is incomplete in that it does not account for the statutory point that an employer denies leave by failing to provide a guarantee of reinstatement to the same or a comparable position before the leave' s commencement. For the instruction to be both complete and accurate, element 4 should be revised as follows: 4. That [*name of defendant*] [refused to grant [*name of plaintiff*]'s request for parental leave] [refused to return [*name of plaintiff*] to the same or a comparable job	CELA asserts three ways that the statute could be violated; (1) refusal to grant the leave; (2) failure to guarantee a return to the same or similar job; (3) refusal to actually return the employee to the same or similar job. The statute only provides for 1 and 2. It expressly makes it a violation to fail to guarantee return before the leave, but does not make it a violation to actually deny the employee his/her job back. With regard to the guarantee, what the statute says is that if the employer does not guarantee the return

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		when [his/her] parental leave ended] [failed, by the time the leave began, to provide [*name of plaintiff*] a guarantee of employment in the same or a comparable position when the leave ends]; Or, alternatively, a bracketed option could be added after element 6 as follows: [If [*name of defendant*] failed, by the time the leave began, to provide [*name of plaintiff*] a guarantee of employment in the same or a comparable position when the leave ends, then [*name of defendant*] refused to grant [*name of plaintiff*]'s request for parental leave.]	before the leave is granted, that constitutes denial of the request for the leave at that time. Therefore, the committee agrees with the comment; that the instruction must say something about the guarantee. The committee prefers the alternative of defining "refused to grant" as including a refusal to guarantee. With regard to the employer's actual failure to return the employee to the same or similar job, the committee believes that this would be a violation and should be included in the instruction, despite the lack of specific statutory language. The committee is confident that no court would ever construe the statute to not make it a violation to renege on the guarantee. It would absurdly defeat the purpose.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	This instruction states a cause of action under Government Code section 12945.6, so we would add the code citation to the title.	The committee agreed and has added the citation to the title.
		We believe the statutory threshold of 20 employees must be satisfied as of the calendar year when the employee requested leave or the preceding calendar year, rather than at the time of trial (see Cal. Code Regs., tit. 2 § 11087(d), so we would modify element 1:	The regulation cited currently applies only to the California Family Rights Act. (See 2 CCR 11087 "The following definitions apply only to this article.") The statute says "employs," so the committee does not think it should be changed to "employed."

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		1. That [*name of defendant*] employed at least 20 employees within 75 miles of the site where [*name of plaintiff*] worked;"	
		The "previous 12-month period" under the statute refers to the 12 months prior to the commencement of leave (Cal. Code Regs. tit. 2, § 11087(e)), so we would modify element 2: 2.. That [*name of plaintiff*] worked for [*name of defendant*] for more than a year, and for at least 1,250 hours during the ~~previous~~ twelve months prior to the commencement of the leave;"	Again, the regulation does not currently apply to the New Parent Leave Act.
		The NPLA requires employers, before or on the day the leave starts, to provide the employee a guarantee of reinstatement. (Gov. Code, § 12945.6(a)(1).) We believe the third sentence in the first paragraph in the Directions for Use should make this clear: The act also requires the employer to, on or before commencement of the leave, guarantee employment in the same or a comparable position on the termination of the leave."	The committee agreed with the comment and has made an addition to the Directions for Use' bit without saying "on or before commencement of the leave."
		Unlike the CFRA, which expressly requires an employee to provide prior notice of the foreseeable need for leave, the NPLA does	The statute does include the words "upon request." The proposed instruction has "requested" in element

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		not expressly require prior notice. Rather than construe this omission as unintentional and infer a requirement of prior notice, we believe the Directions for Use should simply identify the issue and acknowledge the uncertainty: "~~Nevertheless, it is likely that a reasonable notice requirement would be implied. Lack of reasonable notice could possibly be viewed as an affirmative defense.~~ Whether an employee's failure to provide reasonable notice of the need for parental leave will provide employers with an affirmative defense is not yet known."	3. The committee has concluded that there really is no open question regarding notice.
		Government Code section 12945.6(g) contains an antiretaliation provision. We believe the Directions for Use should reference the appropriate CACI instruction: " For an instruction on a claim of retaliation under the New Parent Leave Act, see CACI No. 2620, CFRA or NPLA Rights Retaliation—Essential Factual Elements (Gov. Code, §§ 12945.2(l), 12945.6(h)."	The committee agreed with the comment and has added the proposed cross reference.
	California Manufacturers and Technology Association, by Nicole Rice and	Gov. Code, § 12945.6(a)(1) states that "[a]n employer may require an employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date the leave shall commence and the estimated duration of the leave."	As noted above, the committee has concluded that there is no unresolved issue regarding notice. However, this comment quotes the CFRA statute. The New Parent Leave Act says nothing about any duty to give reasonable notice. It does, however, say "upon request."

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
	Jarrell Cook, Policy Directors The Civil Justice Association of California makes the same point.	The proposed instructions should have a reasonable notice element that reflects the law: That [*name of plaintiff*] provided reasonable notice to [*name of defendant*] of [his/her] need for [parental] leave, including its expected timing and length. [If [*name of defendant*] notified [his/her/its] employees that 30 days' advance notice was required before the leave was to begin, then [*name of plaintiff*] must show that [he/she] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she] gave notice as soon as possible.]	
		The first two elements misstate the eligibility requirements for employers and employees under Cal. Gov. Code, § 12945.6(a)(1). Element one and two should be revised to make it clear to jurors that the relevant time period is when the plaintiff requested parental leave. As drafted, jurors will be confused about whether eligibility is determined at the time of the leave request or at the time of trial (i.e., when the jury instruction is given).	While the committee thinks that the comment's position on when eligibility is determined is most likely correct, the statute does not address it, and the CFRA regulations expressly do not apply.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		Both elements should be replaced with a single revision that mirrors the existing instruction for leave under the CFRA: "That, at the time [*name of plaintiff*] requested parental leave, [*name of plaintiff*] was eligible for parental leave.	
	U.S. Chamber Institute for Legal Reform, by John H. Beisner The Civil Justice Association of California makes the same point.	The proposed instruction is new and, for the most part, tracks the statutory language – except in one respect. Specifically, the instructions authorize liability where the plaintiff "[requested/took] leave" – which could be interpreted to mean that liability could be found where a plaintiff took but did not first request leave. The proposed language for this new instruction should be modified to include the employee's obligation to request leave before taking it. The statute expressly conditions parental leave on the employee's request, which we understand to impose at least a limited notice obligation on the employee. The instruction should be revised accordingly.	The committee agreed with the comment, and has revised element 3 to state that a request is required.
	Orange County Bar Association, by Nikki P. Miliband President	Since the new act also requires the employer to maintain the employee's insurance coverage during the leave, as well as other requirements, we suggest adding to the introductory paragraph of 2630:	"Other protected activity" suggests that there might be any number of other protected activities, but that is not the case.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		"[*Name of plaintiff*] claims that [*name of defendant*] refused to [grant [him/her] parental leave/return [him/her] to the same or a comparable job when [his/her] parental leave ended/*other protected activity*]" And to change element 4 to read: "That [*name of defendant*] refused to [grant [*name of plaintiff*]'s request for parental leave/return [name of plaintiff] to the same or a comparable job when [his/her] parental leave ended/*other protected activity*]"	The Directions for Use reference the requirement to maintain health care coverage during the leave. The committee believes that is sufficient.
		Since the new act somewhat mirrors the CFRA as to the length of service requirement, under which the employee need not work for the employer for 12 consecutive months, we suggest changing element 2 to the following in order to avoid confusion and to more accurately track the wording of the new code section: "2. That [*plaintiff*] has more than twelve (12) months of service with [*defendant*] and worked for [*defendant*] for at least 1250 hours during the previous 12 months;"	It would appear that the point of the comment is to object to making some plain-language edits to the statutory language: changing "with more than 12 months of service" to "worked for" and changing "12 months" to "a year." The committee sees no issues with this simplified language.
		We also suggest adding to the "Directions for Use" the following: "The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be	It is true that "refuse to hire" is among the prohibited adverse actions. And possibly, a job applicant could indicate in the job interview that s/he will be requesting parental leave.

ITC CACI18-01

Civil Jury Instructions - CACI

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		modified if the defendant is a prospective employer or other person. (See Gov. Code, § 12945.6(g).)"	But the committee does not think that the possibility as likely or important enough to require a Direction for Use. "Or other person" is wrong as the act applies to "employers."
		We also suggest adding to the "Directions for Use" the following: "Both the California Family Rights Act and the New Parent Leave Act reach a broad range of adverse employment actions short of actual discharge. (See Gov. Code, §§ 12945.2(l), 12945.6(g).) Element 4 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, "Adverse Employment Action" Explained, and CACI No. 2510, "Constructive Discharge" Explained, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction." [similar to the Directions for Use for 2620 for use in retaliation claims.]	There are some significant differences between New Parent Leave essential factual elements and retaliation. The essence of a retaliation claim is an adverse action. But the essential factual elements of a Parental Leave Act claim do not require an adverse action. The wrong is complete on the employer's failure to grant the leave or failure to guarantee return to a comparable position (and presumptively the refusal to honor the guarantee on return). The employer does not have to terminate the employee or take any other adverse action. The question of potential adverse actions will be encompassed in the battle over the question of comparable work.
2740, 2741, 2742, and 2743 on the Equal Pay Act	See separate chart.		

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
2800. *Employer's Affirmative Defense—Injury Covered by Workers' Compensation*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The proposed revisions to the introductory paragraph of the instruction and element 3 are helpful, and we agree with them.	No response is necessary.
		We believe the language "a contributing cause" may not be self-explanatory to jurors. We would modify element 4 for clarification: "4. That this [task/work] ~~was a contributing cause of~~ <u>contributed to causing</u> the injury."	The committee agreed with the comment and has made the proposed change.
		We would add a citation to the Sources and Authority on the contributing cause requirement: " 'Substantial evidence supported the WC's finding that Elavil and Vicodin, prescribed for Clark's industrial injury, contributed to his death.' (*South Coast Framing, Inc. v. Workers' Compensation Appeals Bd.* (2015) 61 Cal.4 th 291, 303.)"	The committee did not add the proposed excerpt. It is basically just an application to the facts.
	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy Directors (Civil Justice Association of California has submitted	The proposed revisions to CACI 2800 adds a new and unnecessary element of proof. CACI 2800 is an affirmative defense that the loss resulted from an injury covered under the Workers Compensation Act. Therefore, there is no reason to add an element not required to establish workers' compensation coverage.	As noted in the Directions for Use, *Lee* 5 Cal.App.5th at pp. 624–625 explains that scope of employment and industrial causation are different requirements, and that both must be proved. Even if the comment is right, that causation is presumed if the injury occurs at work, that does not mean that it is not an element that must be proved to establish coverage.

ITC CACI18-01
Civil Jury Instructions - CACI
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	essentially the same comment)	*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 625 does not stand for the principle that "industrial causation" must be explicitly proven, overruling decades of statutory and common law. Rather, *Lee* concerned only the limited exception to an employer's liability under the workers' compensation bar for intentional acts. The new fourth element is not required to establish workers' compensation coverage. Instead, workers' compensation coverage is established irrespective of whether the work was a contributing factor in the injury; causation is presumed once it is established that the injury occurred while the employee was working. Adding this redundant element would make it more difficult to establish that a claim fell under the workers' compensation bar than the statute intends.	
3244. *Civil Penalty—Willful Violation*	Association of Southern California Defense Counsel, by Lisa Perrochet, Horvitz & Levy	The changes represent a significant improvement over the existing instruction, better capturing the body of law concerning the jury's task in deciding whether and how much to award in civil penalties for a violation of the Song-Beverly Act.	No response is necessary.
		The revisions do not fully capture key language from *Kwan* that a lay jury would probably find to be helpful guidance, namely, that a penalty "ordinarily would not be appropriate if [*name of defendant's*]	"Honest mistake" appears only in a part of the *Kwan* opinion in which the court is surveying the meaning of "willful" in statutes other than Song-Beverly. It is not part of the language that the court concludes should have been in the instruction.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation." That phrasing is probably more easily understood and applied than the language in the instruction as proposed, which ask the jury to find whether the defendant had a reasonable and good faith belief that the facts did not require certain conduct to meet the defendant's statutory obligations. However, the Committee's proposed additions to the Sources and Authority section do include the "honest mistake" language from *Kwan,* so in an appropriate case, the Sources and Authority materials may aid the trial court and counsel in deciding whether a supplemental special instruction is warranted.	
		We suggest one small wording change that is in the nature of correcting a typographical error. In the first line of the first paragraph, replacing the word "violation" with "obligation" in the bracketed clause would more clearly explain what information should be added. (It is the failure to meet an obligation, not the failure to commit a violation, that is intended there.)	The committee agreed with the comment and has made the change (although it was not a typographical error).
		Add the citations in bold to the excerpt from *Kwan* in the Sources and Authority:	CACI standards discourage string citing or citing more than one case for the same principle.

ITC CACI18-01

Civil Jury Instructions - CACI

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		"[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371]; **accord *Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051; *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 815 [relevant inquiry for jury is whether manufacturer had a good faith belief that it could readily repair the vehicle in light of "the nature and details of those prospective repairs"]; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [" 'A violation 'is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.' "]**.)	
		We note that the committee proposes a new excerpt from *Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249-1250. To clarify the import of that decision for jury instruction purposes, we urge that the committee provide a new	Geez, all this over a lousy Sources and Authority excerpt. It is hard to find a good excerpt from *Bishop*. Therefore, the committee selected the "see also" reference to *Bishop* from *Schreidel*, which has very

ITC CACI18-01

Civil Jury Instructions - CACI

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		excerpt from the subsequent decision in *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750. The proposed new quote to *Schreidel* is from the court's general description of the Song-Beverly Act at the beginning of the opinion, and is not part of any legal analysis about jury instructions because, as the court specifically noted, defendant Honda in that case "[did] not challenge the correctness of the instruction" that was given on willfulness for purposes of Song-Beverly penalties. (*Schreidel, supra,* 34 Cal.App. 4th at 1254.) In contrast, the later decision in *Bishop* addressed a claim on appeal that an instruction using language very similar to that which the Committee quotes from *Schreidel* was erroneous. The court expressly agreed with the defendant/appellant that the language would be improper as a jury instruction, holding that defendant Hyundai accurately noted that such language, standing alone, "would permit the jurors to make a finding of willfulness even though Hyundai was unaware of its obligations or had a good faith belief it was fulfilling them." (*Bishop, supra,* 44 Cal.App.4th at p. 759.)	good language, even if its placement in the opinion makes it less persuasive. The problem with the comment's proposed excerpt is that it picks and chooses words from the opinion and then inserts them into a more treatise-like explanation. The court in *Bishop* quotes the instruction given and then says what's wrong with it, and what's right with it. To use this as an excerpt would be very long. (Also, the procedural add-on about the defendant's failure to object is of no significance.) The proposal shortens and clarifies the point being made, but it's no longer an excerpt from the case. The comment is not exactly right in its view of the "see also." The court notes that defendant Hyundi agreed that the jury was properly instructed with this language: "[T]he defendant acted 'willfully' if you determine that it knew of its obligations under the Song-Beverly Act but intentionally declined to fulfill them." The "see also" is a bit imprecise as to what language the defendant agreed was proper. The committee has revised the parenthetical a bit to address this imprecision.

ITC CACI18-01

Civil Jury Instructions - CACI

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		In other words, the *Bishop*'s court ultimately found a waiver (id. at p. 760 rationale about the impropriety of language for a jury instruction is still binding on trial courts fashioning instructions. The *Schreidel* decision, which was not presented with any claim of instructional error on appeal, does not have the same force in that context. As proposed by the Committee, *Bishop* appears only at the end of the *Schreidel* excerpt as a short parenthetical. And that parenthetical is inaccurate or at least imprecise in saying that the "defendant agreed that the jury was properly instructed with this language." The defendant in *Bishop* directly challenged the instruction as improper on appeal, and even at trial the defendant did not affirmatively "agree" the instruction as given was proper. (*Bishop, supra,* at pp. 759-760.) There is a meaningful difference between agreeing that an instruction is proper, and failing to object to an instruction. (See Code Civ. Proc., § 647.) ASCDC therefore suggests that *Bishop* not be relegated to a "see also" cite with a somewhat misleading parenthetical at the end of a quote from *Schreidel,* and that it	

ITC CACI18-01

Civil Jury Instructions - CACI

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		instead be placed in a separate excerpt, consistent with the fact that it is a more recent and more relevant case for consideration in crafting jury instructions than *Schreidel*. We propose this new paragraph, describing the important rationale from *Bishop*: **Jury instruction is erroneous if it states that "willfulness" under Song-Beverly Act " 'does not necessarily imply anything blamable, or any malice toward the plaintiff, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: that the defendant knows what it is doing and intends to do what it is doing.' " Such an instruction "would permit the jurors to make a finding of willfulness even though Hyundai was unware of its obligations and had a good faith belief it was fulfilling them." The court "recognize[d] the error in the formulation of this instruction and the possibility of misdirection," but did not reverse on this ground because Hyundai failed to object to the proposed instruction or request a modification. (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 758-759.)**	

ITC CACI18-01

Civil Jury Instructions - CACI

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	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would modify the second sentence in the third paragraph of the instruction for greater clarity: "However, a violation is not willful if you find that [*name of defendant*] reasonably and in good faith believed that ~~the facts did not require~~ [he/she/it] was not required to [*describe statutory obligation, e.g., repurchasing or replacing the vehicle*]."	The committee does not believe that this sentence, which comes from *Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187, should be changed.
	Civil Justice Association of California	We suggest adding the following after the second paragraph in the Instruction: A violation is not willful if [*name of defendant*] had a good faith and reasonable belief that it was not legally obligated to replace or refund the vehicle. This might be the case, for example, if [*name of defendant*] reasonably believed that the product conformed to the warranty, that a reasonable number of repair attempts had not been made, or that [*name of plaintiff*] desired further repair rather than replacement or a refund, [or any other facts negating the statutory obligation]. We rely on *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal. App. 4th 174, 185 for the above proposed revision ("The considerations discussed above lead us to conclude such a violation is not willful if the	Please see the comment made by the Association of Southern California Defense Counsel and the committee's response, above.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product did conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund.") This case is cited in the last paragraph under Sources and Authority of this jury instruction.	
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	The proposed revisions to the definition of "willful[ness]," which is essential for imposing liability, should be clarified. The proposed language states that a violation is not willful if the jury finds that the defendant "reasonably and in good faith believed that facts did not require" it to act otherwise. While this is a correct statement of the law, we submit that juries would benefit from the plainer language used to illustrate this terminology in the Sources and authority – i.e., that a violation is not willful if it proceeds from "an honest mistake or a sincere and reasonable difference of factual evaluation" – either instead of or in addition to the language presently proposed.	"Honest mistake" is addressed and rejected above. The committee finds "sincere and reasonable difference of factual evaluation" to not be plain language. The point is adequately made with "reasonably and in good faith believed that the facts did not require."

ITC CACI18-01

Civil Jury Instructions - CACI

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	Orange County Bar Association, by Nikki P. Miliband President	It is incorrect to state that "willful" can only be established by proving that the defendant "knew of its/her/his legal obligations"; a more correct statement would be that the defendant "knew the operative facts pertaining to the violation(s) and …"; see *Kwan vs. Mercedes-Benz of North America* (1994) 23 CA4th 174, 180-187 ("The considerations discussed above lead us to conclude such violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief (that) the facts imposing the statutory obligation were not present.");	The instruction does not say that "willful" can only be established by proving that the defendant knew of its legal obligations. The defendant must also have intentionally failed to follow them. Also, the proposed revision retains "reasonably and in good faith believed."
		VF-3203 also requires revisions to conform to this CACI 3244 since it fails to list any good faith defense nor any factors for establishing "willful" violations.	Question 7 asks whether the violation was "willful." CACI No. 3244 is cross referenced in the Directions for Use. That is sufficient; willful" does not need to be defined in the verdict form.
		There needs to be a CACI instruction covering the "nonwillful" violations of Civil Code section 1794(e), or at least some references in CACI 3244 that non-willful violations of Civil Code #1794(e) can also be the basis for civil penalties not exceeding 2 times. (See *Suman vs. Superior Court* (1995) 39 CA4th 1309, 1312-1318.)	The suggestion is beyond the scope of proposed revisions for this release. It will be placed on the agenda for the next release cycle, at least to the extent of looking into the statute and case.
		VF-3203 is also inconsistent with this CACI because the verdict form is entitled "Breach of Express Warranty-New Motor Vehicle-Civil Penalty Sought" even though it is	VF-3203 is not at issue in this release, except to the extent that it might be inconsistent with 3244.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		established that the civil penalties exist for more than just "express warranties" (e.g. service contracts, failures to provide service literature, failure to maintain independent service facilities, assistive devices such as wheelchairs, failure of retailers to comply with the requirements for "used" vehicles).	The Orange County Bar Association's comment about the title will be considered in the next release cycle.
		The Sources and Authority should specifically reference and cite the holdings that a plaintiff can elect to sue for both punitive damages and tort violations at the same time and based on the same facts it/she/he sues for these statutory civil penalties. The punitive damage claims would only be subject to constitutional due process limitations, while these Song-Beverly violations would be subject to the two times actual damages limitations. The punitive damage claims would have a different criteria than presented by the "willful" Song-Beverly criteria. And of course the plaintiff may be determined to have waived one or the other by an election of remedies issue. (See *Johnson vs. Ford Motors* (2005) 35 Cal.4th 1191; *Ortega vs. Toyota Motors* (2008) 572 F.Supp2d 1218.)	In *Johnson,* the relevance to 3244 "willful" is minimal to none. The only mention is to what the lower court held, which is not sufficient for a Sources and Authority excerpt. And *Ortega* is a federal district court case, which CACI does not include in the Sources and Authority of an instruction based on California law.
4010. *Limiting Instruction—Expert Testimony*	Association of Southern California Defense Counsel, by Lisa Perrochet and	ASCDC agrees that, in light of *People v. Sanchez, supra,* it is appropriate to revoke CACI No. 4010, which provided the language for a limiting instruction in the event that an expert relayed to jurors the hearsay	No response is necessary.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
	John A. Taylor, Jr., Horvitz & Levy	contents of certain medical records. Admission of such information for a limited purpose, subject to a limiting instruction, is no longer appropriate. (See *Sanchez, supra,* 634 Cal.4th at p. 684 ["Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth"]; id. at p. 686, fn. 13 [disapproving prior decisions holding that "a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns"].)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
4208. *Affirmative Defense—Statute of Limitations—Actual and*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by	We agree with the revisions to the instruction and the Sources and Authority.	No response is necessary.
		We would modify the proposed new language in the Directions for Use for greater clarity:	The committee has replaced "for use for" with "assert."

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
Constructive Fraud	Reuben A. Ginsberg, Chair	"This instruction may not be modified ~~for use for~~ to state the seven-year period under Civil Code section 3439.09(c).	
	Civil Justice Association of California	We oppose deleting from the instruction the clause relating to the maximum elapsed time to bring a suit. The Directions for Use contains a discussion of the clear and well-known seven-year statute of limitations provision under the Uniform Fraudulent Transfer Act ("UFTA"); thus, we strongly suggest not eliminating this statement of law from the instruction to maintain clarity and consistency.	As noted in the addition to the Directions for Use, per *PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 178–185, Civil Code section 3439.09(c) is a statute of repose, not a statute of limitations.
4605. *Whistleblower Protection—Health or Safety Complaint–Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	Agree	No response is necessary.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	Civil Justice Association of California	We believe the addition of four sub-elements to the instruction is vague, ambiguous and unnecessary because it is not supported by case law (as evidenced by the absence of any cited legal authority).	The revisions reflect recent amendments to the statute.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		We believe existing law and the instruction adequately express the factual elements for establishing whistleblower protection claims.	
4800. *False Claims Act—Essential Factual Elements*, and 4801. *Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	Orange County Bar Association, by Nikki P. Miliband President	Change "or" to "and/or" at the end of the third way that "knowingly" is established. "(3) acted in deliberate ignorance of the truth or falsity of whether [he/she/it] had failed to disclose [his/her/its] noncompliance; "and/or" (While the comment is directed only to 4801, the same content appears in 4800.)	"And/or' is wrong when it is important to make clear whether only one of the group need be proved, or all of them must be proved. The statute says "any of the following." (Gov. Code, § 12650(b)(3).) Therefore, it must be "or."
	Prime Health Care Services, by A. Joel Richlin, Deputy General Counsel	The comment argues that revisions to the materiality requirement in both instructions should be made in light of *Universal Health Services, Inc. v. United States ex rel. Escobar* (2016) --- U.S. ---, 136 S. Ct. 1989. The comment makes the same points as the comments of the Institute for Legal Reform and the Civil Justice Association, below, which are directed only at 4801.	*Escobar* is not authority. Yes, California courts do look to federal interpretations of the False Claims Act for guidance. But that does not make federal court interpretations of the federal statute California law until a California court says that it applies to the state statute. The comment acknowledges that "no California court has yet had occasion to apply *Escobar*."

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
			See additional responses to comments of ILR and CJA below.
4800. *False Claims Act—Essential Factual Elements*,	Civil Justice Association of California	We recommend clarifying the definition of "knowingly," to avoid any confusion or ambiguity.	There is no suggestion as to how it might be clarified. The factors in the instruction come directly from the statute.
	Orange County Bar Association, by Nikki P. Miliband President	Add annotation from CACI 4801 under Sources and Authority, before Secondary Sources: "[A]n alleged falsity satisfies the materiality requirement where it has the ' " 'natural tendency to influence agency action or is capable of influencing agency action.' " [Citation.]' " (*San Francisco Unified School Dist. ex rel. Contreras, supra,* 182 Cal.App.4th at p. 454.)	As the materiality requirements for both 4800 and 4801 are similar, the committee agreed to add the excerpt to the Sources and Authority for 4800 also.
4801. *Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements*	U.S. Chamber Institute for Legal Reform, by John H. Beisner and Civil Justice Association of California (same comment)	The plaintiff should be required to show that the defendant knew the false statement to be material to the government's decision to pay the claim. (*United Health Services, Inc. v. United States ex rel. Escobar* (2016) --- U.S. ---, 136 S. Ct. 1989, 1996 ["What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."].)	While the comment is only directed at 4801, this part of it would seem to be equally applicable to 4800. As stated above, *Escobar* is not authority for a CACI jury instruction.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		The proposed new instruction should be revised to provide that "minor" and "insubstantial" contractual noncompliance is not material. (*Escobar, supra,* 136 S.Ct. at p. 2003.) Indeed, federal law holds that even a term expressly designated as a condition of payment does not necessarily satisfy the materiality requirement. (See *id.* at 2003-04 [rejecting the "extraordinarily expansive view" that "any . . . contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware"].) These important points should be emphasized to jurors to cut against the risk that False Claims Act liability could be used to transform a "garden variety" breach of contract into one giving rise to treble damages and an additional civil fine if the breach was not actually material to the governmental entity at issue. (See id. at 2003 ["The False Claims Act is not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations."].) Thus, we would propose adding a second sentence that states: "Not every breach of a term of a contract, even if the breach would have given the	*Escobar* cannot be the basis for a California jury instruction until a California court adopts its language and reasoning. Further, the committee finds that *Escobar* does not conflict with proposed CACI No. 4801. Both ultimately set forth the requirement that the plaintiff must prove that had the entity been aware of the breach, it would not have paid the claim. *Escobar* does contain language that emphasizes that a garden variety breach of contract is not a false claim unless materiality is proved. While some of this language may ultimately prove appropriate for CACI, for now, the committee has added two excerpts from *Escobar* to the Sources and Authority.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		state the option to decline to pay, will be material to the decision to make a requested payment."	
		We suggest revising the Directions for Use to include a list of the factors the jury can consider in evaluating materiality. A nonexhaustive list of these factors, none of which is dispositive and may have varying relevance or importance based on the facts of particular cases, includes: i) whether the contract expressly identified a provision as a condition of payment; ii) whether the government regularly pays claims in which a particular contractual provision has been violated; iii) whether the defendant knew that the government regularly pays claims in which a particular contractual provision has been violated; and iv) whether the government in fact paid the particular claim at issue despite knowledge of the alleged contractual breach. (*Escobar, supra,* 136 S.Ct. at pp. 2003-04	These factors have been extracted from *Escobar*. As noted above, the committee has decided to limit *Escobar* to the Sources and Authority for now.
5022. *Introduction to General Verdict Form*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The third paragraph in this proposed new instruction refers to what the jury "should consider" with respect to the burden of proof. As set forth below, we believe stronger language is appropriate with respect to this foundational requirement: "must decide."	The committee agreed and has made this revision.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		The plaintiff always has a burden of proof, but the defendant has a burden of proof only if the defendant asserts an affirmative defense. We would avoid referring generally to "the party with the burden of proof," because it may suggest that the defendant has the burden of proof, when in many cases the defendant has no burden of proof. We would modify the third paragraph as set forth below for greater clarity.	The committee does not see how "the party with the burden of proof" suggests that the defendant has the burden of proof if s/he/it does not.
		CACI No. 200, Obligation to Prove—More Likely True Than Not True, defines "burden of proof," but generally instructions on the elements of each claim and instructions on affirmative defenses avoid this term and instead refer to what the plaintiff or defendant "must prove." We believe this language is more comprehensible to lay jurors. As set forth below, we would refer to what the plaintiff and defendant (if applicable) must prove rather than to the parties' "burden of proof."	The proposal is overly complex for a secondary point.
		The instructions on the elements of each claim typically describe what the plaintiff must prove (these are facts) without referring to "elements." As set forth below, we would avoid use of the term "elements," which may be unfamiliar to lay jurors, and instead would refer to what the plaintiff must prove as "facts." We would not refer	The purpose of the instruction is to direct the jury's attention to each element in the underlying instructions. "Facts" is not the appropriate substitute for "elements." A case may involve many facts, but there is no one-to-one correlation between elements and facts.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		to "all of the necessary facts in support of each element" because the instructions only state what the plaintiff must prove, and those are facts, not "elements" or facts in support of elements.	
		We would delete the reference in the third paragraph to "other instructions." The jury hears most of the instructions all at once, and they are collectively "the instructions." (See CACI No. 5000, Duties of the Judge and Jury.) Attorneys see individual instructions, but the jury generally hears them all collectively. This concluding instruction is part of the instructions, and to the jury there are no "other instructions," except maybe pretrial instructions (see CACI No. 5000).	The committee does not really understand the point of the comment. "Other instructions" refers to all instructions except 5022.
		Accordingly, and for greater clarity in other ways, we would revise the third paragraph of the instruction: "~~In reaching~~ To reach your verdict [and answer~~ing~~ the additional questions[s]], you ~~should consider~~ must decide whether ~~the party with the burden of proof~~ [*name of plaintiff*] has proved all of the ~~necessary~~ facts ~~in support of each element of~~ that I have instructed you [*name of plaintiff*] must prove to establish [his/her/its] claim ~~or defense. You should review the elements addressed in the other instructions that I~~	As noted above, the committee agreed only with using "must decide." This proposed rewrite either misses or buries the point of the instruction, which is to try to get the jury to go through each element of each claim separately to determine if there are nine votes for each, as would happen with a special verdict.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		~~have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.~~ [I have also instructed you on [a defense/certain defenses] offered by [*name of defendant*]. You must decide whether [*name of defendant*] has proved all the facts that I have instructed you [*name of defendant*] must prove to establish [his/her/its] defense[s]]. At least nine of you must agree that a fact has been proved for the jury to decide that a fact has been proved, but the same nine do not have to agree on each fact."	
	Civil Justice Association of California	We recommend clarifying the third paragraph of the proposed instruction. As it reads, it would broadly allow a plaintiff to argue that the burden of proof should be shifted to a defendant on all affirmative defenses. The jury will be susceptible to confusion by arguments that a defendant did not meet his/her/its burden, resulting in a verdict in favor of the plaintiff by default.	The committee finds no words that might possibly suggest any shift in the burden of proof. And the defendant does have the burden of proof on all affirmative defenses.
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	The instruction should be revised to eliminate the statement that the same nine jurors need not agree on each answer, and the last two paragraphs of the directions for use should be deleted. The proposed new language would change existing law by allowing a jury to reach a general verdict	If this comment is correct, that the same nine jurors do have to agree to each component issue behind a general verdict, then the theory behind the instruction is flawed, at least in part. When nine jurors agree on element 1, but one of the nine does not agree on element 2, the case is over and the defendant wins, even if one of the jurors who voted no on element 1

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
		despite the fact that nine-jurors did not agree on every element of the claim. We acknowledge that when the jury returns a special verdict – at least if, for example, there are separate questions for liability and damages – the same nine-member majority need not agree on each answer, as the California Supreme Court held in *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768, the case on which this proposed instruction relies. But that is not true with respect to the underlying elements of a single claim. Indeed, even while approving verdicts when different nine-member majorities support liability and damages findings in a special verdict form, *Juarez* expressly acknowledged – and did not purport to disturb – the "well settled [principle] that in a nonbifurcated trial nine identical jurors had to agree on all elements of the ultimate verdict." (31 Cal. 3d at 766.) The Instruction states that it intends to eliminate the possibility that the same jury analyzing the same evidence would reach a decision using a special verdict form, but not reach one using a general verdict form. Though that may be a laudable goal as a matter of policy, the authority cited expressly applies only to special verdicts.	jurors votes yes on element 2. So the paradox of shifting majorities (different results depending on whether a general or special verdict is used) remains. But the committee finds no clear answer as to whether the comment is correct. The "well-settled" principle in *Juarez* re: nine identical jurors having to agree on all elements of the verdict, was only well-settled before 1975 and *Li v. Yellow Cab.* The court in *Juarez* say absolutely nothing about the head count under a general verdict. And that is because it makes no difference. There's only one vote; plaintiff wins or loses. The purpose of this proposed new instruction is to get the jury to deliberate as if it had a special verdict and address and vote on each element of each claim separately. The idea is to avoid the paradox of shifting majorities so that the result will be the same whether a special or general verdict is used. But for this to happen, the rule that the same nine jurors do not have to agree on everything would have to apply to a general verdict. And while *Juarez* is not clear authority that it does not, there is no authority that says that it does. Nevertheless, the committee has elected to propose the instruction essentially as originally drafted. The committee generally does not view general verdicts favorably, but CACI does include two general verdict forms. (See CACI Nos. VF-5000 and VF-5001.) The

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment (comments are not produced verbatim)	Advisory Committee Response
			committee is concerned about the paradox of shifting majorities, and wants to encourage bench officers to attempt to avoid it when a general verdict is used.
All other instructions except as noted above	Orange County Bar Association, by Nikki P. Miliband President	Agree	No response is necessary

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
430, *Causation: Substantial Factor*, and 435, *Causation for Asbestos-Related Disease Claims*	Waters Kraus Paul, Attorneys at Law, by Michael B. Gurien	In reaching its decision as to CACI No. 430, the Court of Appeal [in *Petitpas*] quoted the Supreme Court's statement in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, that, in addition to the asbestos injury causation standard articulated in *Rutherford,* which is now set forth in the second paragraph of CACI No. 435, *"'[t]he standard instructions on substantial factor and concurrent causation (BAJI Nos. 3.76 and 3.77) remain correct in this context and should also be given.'"* (*Petitpas, supra,* 13 Cal.App.5th at p. 299, quoting *Rutherford,* at pp. 982-983, italics added by Court of Appeal.) The Court of Appeal then quoted the current directions for CACI Nos. 430 and 435, which, say not to use CACI No. 430 in an asbestos injury case "'[u]nless there are other defendants who are not asbestos manufacturers or suppliers . . . .'" (Ibid., quoting CACI No. 435, Directions for Use, second para.) Comparing the italicized statement in *Rutherford* with the statements in the directions for use to CACI No. 430, the Court of Appeal stated that "[i]t appears, therefore, that despite *Rutherford's* statement that the standard instruction on substantial factor remains correct and also should be given, the CACI use notes disagree with this approach." (*Ibid.*) This latter statement is problematic because the standard instruction on substantial factor causation in effect at the time that *Rutherford* was decided – BAJI No.	While this commentator is actually last of the asbestos commentators in alphabetical order, the committee has elected to place this comment first because it reflects the committee's conclusions and proposals almost exactly. This comment addresses and responds to many of the comments opposing the committee's proposed revisions to CACI No. 430 that follow. This comment explains why the committee has made only minor revisions in light of the comments that follow. The comment points out why the recent case of *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261 should not be read as endorsing giving CACI No. 430 in all asbestos cases. The comment further makes clear why instructing the jury that "A substantial factor … must be more than a remote or trivial factor" is likely to cause confusion in an asbestos case, a point not developed in *Petitpas*.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		3.76 – was different than the current standard instruction on substantial factor causation in CACI No. 430. When *Rutherford* was decided in 1997, BAJI No. 3.76 stated as follows: "The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm." (*Espinosa v. Little Co. of Mary Hosp.* (1995) 31 Cal.App.4th 1304, 1313-1314; see *Rutherford, supra,* 16 Cal.4th at p. 969 [identifying BAJI No. 3.76]. [The second sentence of] CACI No. 430 is different. It states: "A substantial factor … must be more than a remote or trivial factor." The first and third sentences of CACI No. 430 do not present a problem in asbestos injury cases. In fact, those sentences are contained verbatim in the first paragraph of CACI No. 435, the standard instruction incorporating the *Rutherford* causation standard. The problem is the second sentence of CACI No. 430, stating that a substantial factor "must be more than a remote or trivial factor." First, that sentence was not contained in BAJI No. 3.76 when the *Rutherford* court stated that BAJI No. 3.76 "remain[s] correct in this context and should also be given." (*Rutherford, supra,* 16 Cal. 4th at p. 983; see *Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314 [quoting BAJI	

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		No. 3.76 in its entirety].) Thus, in *Rutherford,* the Supreme Court did not approve the use of that sentence in an asbestos injury case. Second, the "remote or trivial" sentence is troublesome because, as the Supreme Court explained in Rutherford, "plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer . . . ." (*Rutherford, supra,* 16 Cal.4th at 976-977; accord, id. at p. 982.) The Supreme Court also held that a plaintiff "is free to . . . establish that his [or her] particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a 'substantial factor' (BAJI No. 3.76) that contributed to his [or her] risk of injury." (*Id.* at p. 958; accord, id. at p. 978, italics added.) Thus, under *Rutherford,* separate exposures to even relatively small amounts of asbestos can be sufficient to establish causation, so long as the exposures were "a substantial factor in contributing to the aggregate dose of asbestos." (*Id.* at pp. 976-977.) A jury, however, viewing such small exposures in light of CACI No. 430's statement that a substantial	

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		factor "must be more than a remote or trivial factor" – terms the Supreme Court did not use in articulating its causation standard in *Rutherford* – may become confused and fail to understand that small exposures can, indeed, satisfy the standard. An instructive example is provided by the facts and evidence in *Rutherford*. There, a defense expert testified that "a very light or brief exposure could be considered 'insignificant or at least nearly so' in the 'context' of other, very heavy exposures." (*Rutherford, supra,* 16 Cal.4th at p. 984.) "Plaintiff's expert presented a generally contrary opinion, to the effect that each exposure, even a relatively small one, contributed to the occupational 'dose' and hence to the risk of cancer." (*Ibid.*) Based on its verdict, the jury apparently "accepted much of the defense's factual theory, concluding that exposure to Kaylo contributed a relatively small amount to decedent's cancer risk, but rejected defendant's argument that such a small contribution should be considered insubstantial." (*Id.* at pp. 984-985.) Nevertheless, consistent with the relatively small exposure from the defendant's product, the jury "allocated only 1.2 percent of the total legal cause to defendant's comparative fault." (*Id.* at p. 985.) Thus, "[i]n the absence of any instruction or evidence that a small amount was necessarily insubstantial, and	

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		guided by BAJI No. 3.77's command that every contributing cause was a legal cause regardless of the degree of its contribution, the jury concluded even 1.2 percent of the cause was, on the facts of this case, substantial." (Ibid.) Had the jury, however, been instructed with the second sentence of CACI No. 430, i.e., that a substantial factor "must be more than a remote or trivial factor," it may have been confused or misled into thinking that a small exposure, "even 1.2 percent of the cause," could not be a legal cause of a person's asbestos-related injury, when, as the Supreme Court in *Rutherford* held, it can be a legal cause. In *Rutherford,* the Supreme Court noted that it had previously "suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) The Supreme Court also made clear, however, that "[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical," (*id.* at p. 978), and it explained in a later case that "a very minor force that does cause harm is a substantial factor." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79, italics added.) In light of the medical and scientific uncertainties	

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		involved with causation in asbestos injury cases, as detailed and discussed by the Supreme Court in *Rutherford,* an instruction telling the jury that a substantial factor "must be more than a . . . trivial factor" may confuse and invite the jury to disregard or discount smaller exposures that are otherwise medically and legally sufficient to establish causation. It is also worth recognizing that while the Supreme Court in *Rutherford* observed that an "'infinitesimal' or 'theoretical'" force "is not a substantial factor," (*Rutherford,* at p. 969), it did not use that language, those terms, or the term "trivial" in its formulation of the asbestos injury causation standard it said the jury should be instructed with. (*Id.* at pp. 982-983.) Nor, as discussed above, was there any such language in BAJI No. 3.76 when *Rutherford* was decided. (See *Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314 [quoting BAJI No. 3.76 in its entirety].) Moreover, as to the term "remote" in the second sentence of CACI No. 430, that term will invite jury confusion because it incorrectly suggests that, for there to be causation in an asbestos injury case, there must be a temporal proximity or closeness in time between a particular exposure or series of exposures and the manifestation of the plaintiff's disease. But as the Supreme Court recognized in	

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		Rutherford, asbestos-related diseases have a "long latency period." (*Rutherford, supra,* 16 Cal.4th at pp. 957, 975; see *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1135 ["the average latency period of asbestosis is 20 years"], 1136 [mesothelioma "has an average latency period of 30 to 40 years"]; *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 540 ["the decades-long latency periods of asbestos-related disease"].) Because of this decades-long latency period, causative exposures in an asbestos injury case will always, by definition, be remote in time compared to the injury. This unique circumstance has the real potential for causing confusion and misunderstanding if the jury is instructed, under CACI No. 430, that a substantial factor "must be more than a remote . . . factor," because the jury will be invited to apply an erroneous temporal restriction that excludes exposures that are otherwise medically and legally sufficient to establish causation. Again, it is worth noting that the Supreme Court did not include any temporal or remoteness limitation in the causation standard it said the jury should be instructed with in *Rutherford,* (*Rutherford, supra,* 16 Cal.4th at pp. 982-983), and there was no such language in BAJI No. 3.76 when *Rutherford* was decided. (*Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314.)	

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		The one significant problem, however, is the statement in the revisions to CACI No. 430 that, in an asbestos injury case, "[g]ive CACI No. 435, Causation for Asbestos-Related Cancer Claims, and do not give this instruction, as CACI No. 435 is intended as a complete statement of causation for asbestos-related diseases with regard to defendant manufacturers and suppliers." The directions to CACI No. 435, in turn, state: "Unless there are other defendants who are not asbestos manufacturers or suppliers, do not give CACI No. 430." (CACI, No. 435, Directions for Use, second para.) Read together, these statements could incorrectly lead trial courts to conclude that CACI No. 435 should only be given in asbestos injury cases if some or all of the defendants are "manufacturers" or "suppliers," and that in cases with no defendants who are "manufacturers" or "suppliers," such as a case with a contractor or a premises liability defendant, CACI No. 430 should be given, not CACI No. 435. That would be wrong. CACI No. 435 should be given in every asbestos injury case, regardless of the type of defendant involved, as it sets forth the complete causation standard articulated by the Supreme Court in *Rutherford* for all asbestos injury cases.	As noted above, The committee did not consider expansion of CACI No. 435 beyond manufacturers and suppliers. The issue will be placed on the agenda for the next release cycle.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
	Association of Defense Counsel of Northern California and Nevada	The proposed changes to the Directions misstate the law on causation, and would tilt the jury toward a result the law does not intend. The comment then points out that but-for (would have happened anyway) evidence should be relevant to comparative fault.]	CACI Nos. 430 and 435 do not have anything to do with evidence. It is clear that 'but-for" is not a causation limitation for asbestos. (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn.3.)
		The proposed Directions say that in asbestos disease cases, "Give CACI 435 … and do not give this instruction, as CACI No. 435 is intended as a complete statement of causation for asbestos-related diseases with regard to defendant manufacturers and suppliers." This is incorrect and overbroad in at least three ways. First, as the next citation in the proposal itself recites (citing *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261), it is not error to give both 430 and 435 in cases with both product liability and premises defendants.	The committee has removed the "complete statement" language. CACI No. 435 requires exposure to the defendant's product. If the defendant has no product (e.g., a premises liability defendant), then 435 as currently drafted will not apply.
		Second, not every defendant in an asbestos disease case made an asbestos-containing product. *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, cited in the proposed Directions, allowed a relaxed burden of causation, but only with respect to defendants whose products contained asbestos to which a	The commentator's citation doesn't include a page citation that would point to where in *Rutherford* the court says that the relaxed standard applies only to defendants whose products contain asbestos. But as noted above, the commentator is correct that 435 should not be given for these defendants.

ITC CACI18-01

Civil Jury Instructions - CACI

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		plaintiff or decedent was exposed. It does not apply to, for example, premises defendants, or defendants that made products used with asbestos-containing products (e.g., brake grinders used on asbestos-containing brake linings, or saws used to cut asbestos-containing pipe).	
		Third, the *Rutherford* standard only makes sense in connection with what are known to be asbestos-caused diseases, because we cannot scientifically know which fiber from which product actually caused the disease reaction: "there is scientific uncertainty regarding the biological mechanisms by which inhalation of certain microscopic fibers of asbestos leads to lung cancer and mesothelioma." (16 Cal.4th at 974.) If there is any evidence that a particular plaintiff's disease is not unequivocally caused by asbestos, then any rationale for applying 435 instead of 430 falls away.	The committee does not fully understand the intended point of the comment. But If there is any evidence that the plaintiff's disease could have been caused by defendant's asbestos, then CACI No. 435 should be given.
		The proposed Directions complain that "remote," "trivial" and "infinitesimal" "could cause confusion in an asbestos case." But the first and third terms were used by the California Supreme Court in *Rutherford*. And there is no indication that use of the term "trivial" in 430 has led to any incorrect results.	See the committee's response to the comment of Waters and Kraus, above. The word "remote" does not appear in *Rutherford*.
		Asbestos-related *cancer* should not be changed to "disease." *Rutherford* explicitly says "asbestos-related cancer," not "disease,"	The committee has returned to using "cancer," rather than "disease." While it would seem most logical that asbestos causation standards would be the same with

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

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		over a dozen times, including four times on the page cited. (16 Cal.4th at 957 [twice], 960, 961, 974 [twice], 975 [twice], 976, 977 [four times], 978 [three times], 980, 982.) The disease at issue in *Rutherford* was lung cancer, so even when the decision used the word "disease" that is what it was talking about. There is no reason, no intervening decisional authority, requiring a change in terminology.	regard to any asbestos related disease, the commentator is correct that no court has expressly so held. The committee will await the case that expressly addresses a noncancer asbestos-related disease.
		CACI No. 435 should be changed to track *Rutherford's* language. [*Name of plaintiff*] may prove that exposure to asbestos from [*name of defendant*]'s product was a substantial factor causing [his/her/[name of decedent]'s illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor [in] contributing **to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence** to [his/her] risk of developing cancer. "[A] substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested." (*Rutherford v. Owens-Illinois, Inc.* (1977) 16 Cal.4th 953, 976, emphasis in original.) The present Sources and Authority relies heavily on *Rutherford,* yet leaves out this critical phrase.	The committee has not considered this point, and will address it in the next release cycle.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
	Association of Southern California Defense Counsel, by Lisa Perrochet, Horvitz & Levy	We note that the Directions for Use include this new citation: "(But see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants].) *Petitpas,* being an asbestos case that accordingly addressed a particular subset of product liability claims, likely has little bearing outside of toxic tort cases. Other product liability claims don't generally also involve premises liability claims. The reference to *Petitpas* therefore seems out of place in the Directions for Use to CACI No. 430. Moreover the "but see" nomenclature suggests that the Committee believes *Petitpas* is questionably reasoned in some way. Given the limited circumstances in which *Petitpas* applies, as clearly defined in the opinion itself, it is important to characterize the opinion carefully, both to avoid undermining its application in cases to which it does apply, and to avoid suggesting that it extends beyond those cases.	The committee recognizes that the discussion to be added to the Directions for Use to CACI No. 430 would seem to be better located in CACI No. 435. But the issue is whether certain sentences in 430 should be given in an asbestos case. Therefore, the committee believes that the discussion is best placed in No. 430. The committee has changed the "But see"citation to *Petitpas* to a "Cf."
		The paragraph in the Directions for Use addressing "remote" should be removed. The comment that "remote" connotes a time limitation, to set up the argument that *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 975 contains no such limitation, is	The committee has revised the language to state that "remote" often connotes a time limitation. "Remote" does have other meanings unrelated to time. But one of its meanings is related to time, and it is that meaning in the context of asbestos exposure that can mislead a jury.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		misleading. "Remote" generally connotes a spatial limitation, suggesting a location that is removed in distance. But, of course, the word has other connotations, some having nothing to do with either time or space. For example, a person can behave in a "remote" or distant way, and may have a "remote" chance of winning the lottery. "Remote" in the context of legal causation simply captures the ways in which conduct may be attenuated from a plaintiff's injury. The word "remote" is thus aptly used, for example, in CACI No. 2507, to reflect that an improper basis for an adverse employment decision must be a "substantial motivating reason" to support liability, and cannot be a "remote or trivial reason." It is also used in CACI No. 4544 to reflect that a causal link is lacking between a defendant's conduct and a plaintiff's claimed lost profits where those profits "are speculative or remote."	
		The paragraph in the Directions for Use addressing "trivial" should be deleted. The paragraph is flatly and undeniably wrong in advancing the argument that "a very minor force that does cause harm is a substantial factor." Innumerable cases explain that "but for" causation is not, in itself, enough to be deemed a "substantial factor" of harm. It is generally for the jury, and not for the Directions for Use, to determine what "is" a substantial factor if the parties dispute the	As noted in the comment of Waters and Kraus, above, the California Supreme Court has stated that "a very minor force that does cause harm is a substantial factor." (*Bockrath v. Aldrich* Chem. Co. (1999) 21 Cal.4th 71, 79.) The committee believes that instructing on "trivial" can cause the jury to lose sight of this rule.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		nexus between the defendant's conduct and the plaintiff's injury.	
		The new addition of quotes from mostly older cases in the Sources and Authority section is also argumentative, with quotations limited to those that would be used in points and authorities on only one side of the ongoing dispute about causation, especially in toxic tort cases. The CACI Committee should abide by a goal of reflecting rather than creating or shading the law, without putting its thumb on the scale for one side or the other where the law is in flux. ASCDC thus urges that the Committee omit the proposed additional paragraphs from CACI No. 430, not add them to CACI No. 435, and instead await new guidance from the courts regarding the general standard for causation in ordinary tort cases.	The proposed additions are all direct quotes from cases, including California Supreme Court cases that support the proposed revisions to the Directions for Use. CACI standards are to give users language that the committee believes would be of interest. The committee agrees that case language limited to asbestos issues should be in the Sources and Authority to CACI No. 435 rather than in CACI No. 430. Of the four new excerpts proposed for 430, three are from asbestos cases. But only one of them (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990) has language that is limited to asbestos, and that excerpt is already in the Sources and Authority to 435. The others all have language about "substantial factor" that is not restricted to asbestos. The committee has removed the *Jones* excerpt and retained the other three.
		Add to the Sources and Authority to 430: A matter should not be submitted to the jury when the plaintiff "fails to show that [a] breach contributed to plaintiff's injuries in this case"; "'A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.'" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763,	The "mere possibility" language from Prosser is in the Sources and Authority already, in an excerpt from *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030.

ITC CACI18-01

Civil Jury Instructions - CACI

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		775-776 [original emphasis; quoting Prosser & Keeton, Torts (5th ed. 1984) § 41, p. 269, fns. omitted].)	
		Add to the Sources and Authority to 430: "Proof that a negligent act was a substantial factor in causing the injury does not relieve the plaintiff of the burden of proving the negligent act was a cause in fact of the injury." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1115 [citing *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239-1244].) A plaintiff's burden of proof on causation cannot be satisfied by assumptions, speculation, conjecture, guess, or surmise. (*Jennings, supra,* at p. 1117.)	There are currently seven references to "cause in fact" in the Sources and Authority to CACI No. 430.
		Add to the Sources and Authority to 430: "Liability for medical malpractice is predicated upon a proximate causal connection between the negligent conduct and the resulting injury. (*Budd v. Nixen* (1971) 6 Cal.3d195, 200.) '[C]ausation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical 'probability' and a medical "possibility" needs little discussion. There can be many possible "causes," indeed, an infinite number of	This excerpt would go in CACI No. 500, *Medical Negligence—Essential Factual Elements*. No revisions to CACI No. 500 are proposed for this release.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		circumstances which can produce an injury or disease. A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.'" (*Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603; accord *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, and *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1093.)	
		Add to the text of CACI No. 435: "Many factors are relevant in assessing the medical probability that any alleged asbestos exposure was a substantial factor in causing an injury. These factors include the type of asbestos, the nature of the exposure, the frequency of exposure, the regularity of exposure, the duration of exposure, the proximity of the asbestos-containing product, and the type of asbestos-containing product." Authority: *Rutherford, supra,* 16 Cal.4th at p. 975; *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1416-1417; see also *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1094; but see *Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 494-497 (court not required to give instruction on these factors).	The committee previously considered and rejected adding these factors to the instruction. The committee does not wish to revisit this decision.

ITC CACI18-01

Civil Jury Instructions - CACI

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	Luis A. Barba, Attorney at Law, Irvine	The commentator objects to changing "cancer" to "disease" based on the language in *Rutherford*. (See comment of Associated Defense Counsel of Northern California and Nevada, above.) The comment suggests that asbestosis is a noncancerous asbestos-related disease, to which *Rutherford* would not apply.	As noted above, the committee has decided to restore "cancer." However, there is no authority for the proposition in this comment that *Rutherford* does not apply to asbestosis.
		The commentator disagrees that a trivial or remote exposure to asbestos can still constitute a substantial factor. He cites *Rutherford's* favorable citation to BAJI 3.76 and the Restatement Second of Torts, § 431 to conclude that *Rutherford's* "infinitesimal or theoretical" equates to 430, "remote or trivial."	As noted in the comment of Waters and Kraus, above, BAJI 3.76 Is not an asbestos instruction, and it does not include the "remote or trivial" language. No conclusion can be drawn from *Rutherford's* citation of BAJI 3.76.
	Bassi Edlin Huie & Blum, San Francisco, by Jeremy Huie	The commentator argues that "remote or trivial" should be given in an asbestos case for reasons addressed in other comments.	See response to comment of Waters and Kraus, above.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	CertainTeed Corporation, by	The proposed revisions unveil their actual purpose: they are not designed to "mak[e]recommendations to the Judicial	See the comment of Waters and Kraus, above. The committee understands that it does not have the authority to overrule an appellate decision.

ITC CACI18-01

Civil Jury Instructions - CACI

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	Neil Lloyd, Schiff Hardin	Council for updating, revising, and adding topics to the council's civil jury instructions" in light of the Committee's "regular[] review[of] case law and statutes affecting jury instructions;" they are designed to overrule the Court of Appeal's published decision in *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, rev. denied.	
		Nothing however, supports the Committee's proposed CACI 430 usage note that CACI 435 "is intended as *a complete statement* of causation for asbestos-related diseases with regard to defendant manufacturers and suppliers. (But see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298-299[.])." (Emphasis added.) Making *Petitpas* a "But see" in the CACI 430 usage notes guts the decision's precedential force before trial courts have even had an opportunity to apply it and before other reviewing courts have had the opportunity to consider verdicts rendered after juries have been properly instructed with both CACI 430 and 435. The Judicial Council should resist the invitation to step into the middle of developing law.	The committee has removed the "complete statement" language and has changed "But see" to "Cf."
		Geneticists have discovered a new cause for mesothelioma, one requiring no asbestos exposure — a mutation in the BAP1 tumor suppressor gene. Some geneticists have concluded that BAP1 predisposes an individual to developing mesothelioma, requiring no	While the committee finds this interesting information for the future, the committee sees nothing that would affect current jury instructions.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		environmental trigger. Others have opined that BAP1 makes an individual more susceptible to developing mesothelioma, requiring an environmental trigger such as sufficient asbestos exposure, though less exposure than one without the BAP1 mutation. (The commentator has attached a 20 page court order permitting genetic testing for the BAP1 gene. Also attached is a motion for review or depublication filed with the California Supreme Court, a motion which was denied.)	
		In an attempt to skirt a jury's Proposition 51 allocation of fault, plaintiffs in asbestos personal injury cases have in recent years increasingly alleged causes of action for battery, intentional misrepresentation, and intentional concealment. The plaintiffs contend that a jury verdict on any of these theories gives them the option of seeking to void the jury's Proposition 51 allocation. The Committee's proposed usage notes state – without citation or explanation – that permitting a jury in an asbestos case brought against a manufacturer or supplier to be instructed under CACI 430 "could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum." On the contrary, adopting the proposed CACI 430	The language quoted in the comment regarding comparative fault and "remote or trivial" is in a paragraph of explanation cited to *Rutherford* and *Bockrath v. Aldrich Chem. Co. (*1999) 21 Cal.4th 71, 79. The question of joining asbestos claims with other traditional tort claims is one that the committee may consider in the next release cycle.

ITC CACI18-01

Civil Jury Instructions - CACI

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		usage notes could cause a jury to disregard the separate causation standards that apply to intentional torts like battery, intentional concealment, and intentional misrepresentation.	
		The California Supreme Court denied both review and depublication for *Petitpas*.	The committee acknowledges that the comment is correct.
	CJA	We believe the paragraph inserted into the Directions for Use asserting "a very minor force that does cause harm is a substantial factor" is unsupported by legal authority and would create prospect for confusion for jurors in evaluating causation rather than comparative fault, as the Direction purports to honor the latter principle.	The language is a direct quote from *Bockrath, supra,* 21 Cal.4th at p. 79.
		We believe the proposed changes in the Directions for Use to strike the word "cancer" and replace it with the word "disease" is an inappropriate broadening of the *Rutherford* holding; thus, should be eliminated. We believe that the *Rutherford* court very specifically addressed asbestos-related cancer as opposed to all asbestos-related disease, creating a narrow holding and application. There should continue to be separate instructions for asbestos-related cancer cases and asbestos-related disease cases. Currently, CACI No. 430 is utilized for asbestos-related disease cases; whereas CACI No. 435 is limited to asbestos-related cancer cases. We believe	As noted above, the committee is restoring "cancer." The committee does not agree that CACI No. 430 is for asbestos-related disease cases and ACI No. 435 is for asbestos-related cancer cases. There is no authority for such a distinction.

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
		that CACI No. 430 as written, and as applied only to asbestos-related disease cases, continues to be appropriate. As discussed, we believe that CACI No. 435, as the instruction used in asbestos-related cancer cases, should be revised to more closely reflect the Court's holding in *Rutherford*. Once that is done, however, it should continue to be applied – and applied exclusively – in the context of asbestos-related cancer cases.	
		We believe the proposed changes in the Directions for Use misconstrues the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 132	*Viner v. Sweet* establishes that something is not a substantial factor if the same harm would have occurred anyway (what is sometimes referred to as the "but for" rule). This rule does not apply to asbestos causation. (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn.3
		Revise 435 to add the language in bold: "Instead, we can bridge this gap in the humanly knowable by holding that plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor **in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer."** [emphasis added]	As noted above, the committee will consider this suggestion in the next release cycle.
		In stating that '[a] substantial factor in causing harm is a factor that a reasonable person	The language in bold is currently in CACI No. 435.

ITC CACI18-01

Civil Jury Instructions - CACI

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		would consider to have contributed to the harm," CACI No. 435 provides no guidance to one seeking to apply it that would allow one to reasonably distinguish a "substantial" factor from "any" factor. Here again, CACI No. 435 conflicts with what was actually written by the majority in the *Rutherford* holding. The actual direction provided by the Court in *Rutherford* was as follows: "We therefore hold that, in the trial of an asbestos-related cancer case, although no 'shifting the burden of proof as to causation' to defendant is warranted, the jury should be told that the plaintiff's or decedent's exposure to a particular product was a substantial factor in causing or bringing about the disease **if in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer** [emphasis added]. Again, without using the actual verbiage employed by the Court in *Rutherford,* CACI No. 435 will not serve to properly guide anyone seeking to apply it so as to be consistent with the Rutherford holding.	
	Exxon Mobil Corporation and MetalClad Insulation, by Rick Norris,	Defendant objects to any effort to limit the effectiveness of CACI 430's instruction that when addressing a defendant's negligent conduct, the conduct must be more than a "remote or trivial factor" even if it is not the	See response to comment of Waters and Kraus, above.

ITC CACI18-01

Civil Jury Instructions - CACI

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	Dentons. Counsel for Both (same letter submitted on behalf of both)	only cause of the harm. This specific language was approved by the *Petitpas* court.	
		Defendant also objects to any suggestion that CACI 435 is a complete statement of the law with regard to defendant manufacturers or suppliers, because this does not address failure to warn claims that are founded in negligence, or other negligent product liability theories.	As noted above, the committee has removed the "complete statement" language. However, the committee notes that CACI No. 435 currently applies only to manufacturers and suppliers of asbestos-containing products. So claims founded in negligence against other defendants would not be within 435's "complete statement."
		Finally, Defendant objects to the committee's replacement of "cancer" by "disease" in the Directions for Use, without any reference to medical or legal authority to support this change.	Addressed above
		It Is Imperative That A Defendant's Negligent Conduct Be A Cause In Fact Of The Harm, Which Is Provided For In CACI 430, But Not In CACI 435. "Actual causation is an entirely separate and independent element of the tort of negligence." (*Saelzler, supra,* 25 Cal.4th at 778.) This is most apparent in CACI 430's provision of the optional sentence, which is not included in CACI 435: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct . . ." (See, *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [omission of optional last sentence can be error].)	As addressed above, the "would have happened anyway" rule does not apply to asbestos.

ITC CACI18-01

Civil Jury Instructions - CACI

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		[The comment includes several additional paragraphs of supporting argument.]	
		Rutherford and CACI 435 Have Never Expanded Beyond Exposure To A Defendant's Product. Nowhere in the *Rutherford* opinion does the court address claims for alleged negligent conduct, i.e. a premises owner that has asbestos on its property which is removed or disturbed; a contractor that may encounter asbestos in its work; or a claim based on the failure of a company to properly warn of the dangers of asbestos which would have altered the conduct of the plaintiff. CACI 435 has always been consistent with *Rutherford* in that it was limited to "exposure to asbestos from [*name of defendant*]'s product." The Use Notes for CACI 435 never suggest that a defendant's conduct, failure to warn or other act should be substituted for exposure from a product.	The committee is not proposing at this time to expand CACI No. 435 beyond those who produce or disseminate asbestos-containing products.
		The proposed comment states that the CACI 430 sentence that a "trivial" factor is not substantial may "confuse the jury in allocating comparative fault at the lower end of the exposure spectrum." The proposed comment relies on the rule in *Bockrath* that "a very minor force that does cause harm is a	The committee is not clear on what point the comment is making by noting that *Rutherford* and *Bockrath* are both strict liability cases.

ITC CACI18-01

Civil Jury Instructions - CACI

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		substantial factor" and the fact that the *Rutherford* court upheld a 1.2 percent allocation of comparative fault. (See, *Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79; *Rutherford, supra,* 16 Cal.4th at p. 985.) But both *Bockrath* and *Rutherford* are strict products liability cases, which did not focus on a negligent act. Moreover, *Bockrath* was decided at the pleading stage and simply applies the *Rutherford* test . (*Id.* at 80 [plaintiff must plead that "each defendant's product was a substantial factor, as that term is defined in *Rutherford,* in causing his multiple myeloma"].)	
		The Placement Of Comments Regarding Strict Product Liability Toxic Exposure Cases Under CACI 430 Instead Of 435 Is Unnecessary	Addressed above
	Imai Tadlock	The proposed commentary suggests that the term “remote” is improper for asbestos cases, as it might lead the jury to conclude that the instruction could be related to remoteness in time, causing them to ignore evidence of the long latency periods for asbestos-related diseases. Plaintiffs provide no instance of any jury ever having been confused in this way as a result of the use of CACI 430 in asbestos cases. In the context of causation, the term “remote” means “not arising from a primary or proximate action.” (https://www.merriam-	Addressed above

ITC CACI18-01

Civil Jury Instructions - CACI

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		webster.com/dictionary/remote?src=search-dict-box) This is consistent with case law interpreting "substantial factor," which states that an otherwise tortious actor can be relieved from duty by the independent act of another which is not reasonably foreseeable. (See, *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 665-666, citing 4 Witkin, Summary of Cal. Law (8th ed.) Torts, § 628; Rest.2d Torts, §§ 435, 447.)	
		CACI 430 and 435 should instruct the jury regarding how it should approach its determination of whether an exposure was significant enough to be considered a legal cause of the disease, without dictating what that determination should be. The use of the word "trivial" in CACI 430 serves this purpose, as it provides no suggestion of any quantitative measure to be applied by the jury in their evaluation of the exposures at issue. Instead, it invites jurors to consider the factual and scientific evidence submitted at trial and make their own evaluation of the "worth and importance" of the alleged exposures as contributory causes of the increased cancer risk. The proposed comment mischaracterizes the term "trivial factor" stating that it may be synonymous with "infinitesimal" or "theoretical" contributions to injury, which have been cited in case law as examples of	See response to comment of Waters and Kraus, above.

ITC CACI18-01

Civil Jury Instructions - CACI

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		what cannot be considered as substantial contributing factors. Both terms are quantitative in nature. The adjective "infinitesimal" means "(1) taking on values arbitrarily close to but greater than zero, (2) "immeasurably or incalculably small." "Infinitesimal," therefore, is in effect a mathematical concept. If implemented in an instruction as a definition of the upper limit of "substantial contributing factor," it might be interpreted as a judicial direction that the jury should disregard scientific opinion evidence regarding exposure levels of disease, and find as a matter of course that exposures above a level arbitrarily close to zero are per se substantial contributors. By requiring a finding based on an infinitesimal standard, any exposure that is not close to zero is a substantial factor. The term "theoretical," means "confined to theory or speculation often in contrast to practical applications : speculative." (https://www.merriam-webster.com/dictionary/theoretical) Under this definition, "theoretical" connotes a mere mental construct, without reference to the factual or scientific evidence supporting or denying a factual connection between and exposure and the increased disease risk. In the context of a jury instruction, the term	

ITC CACI18-01

Civil Jury Instructions - CACI

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		"theoretical" can be considered a quantitative term insofar as it implies that any exposures greater than zero (i.e., any non-speculative findings of exposure) support a finding of substantial contributing factor. The California Supreme Court noted that "[t]he term "substantial factor" has not been judicially defined with specificity, and indeed it has been observed that it is "neither possible nor desirable to reduce it to any lower terms." (*Rutherford v. Owens-Illinois, Inc., supra,* 16 Cal.4th 953, 969.) Stated another way, the court must not fashion a jury instruction which dictates the jury's liability verdict by setting a numerical threshold above which substantial contributing factor should be found. The term "trivial factor" avoids this trap, by authorizing the jurors to make their own assessment of the "worth and importance" of a contributing factor based on the factual and scientific evidence submitted at trial. CACI 430 as worded is therefore entirely consistent with the *Rutherford* holding, and its inclusion as an instruction in asbestos cases along with CACI 435 will not confuse juries. The proposed commentary, therefore, would provide no clarification of the use of these instructions, but only confusion. For this reason, we urge the commission to reject the proposed commentary.	

ITC CACI18-01

Civil Jury Instructions - CACI

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Instruction	Commentator	Comment	Response
	Kazan, McClain, Satterley & Greenwood, Attorneys at Law, Oakland, by Ted W. Pelletier	The Committee's proposed revisions to CACI 430 and 435 would not change the instructions themselves but instead would only modify the Directions for Use (of both) and add several case citations (to 430 only). We submit that these revisions properly address the recent decision in *Petitpas,* which endorses giving both 430 and 435 in an asbestos-disease case (based solely on the CACI use notes) *Petitpas* could be read to endorse giving both 430 and 435 in every asbestos-disease case. The proposed revisions address this, properly noting that 435 is a "complete statement of causation for asbestos-related diseases" – and thus that when 435 is appropriate, 430 should not also be given. [Proposed Use Note for CACI 430, disagreeing with *Petitpas* ("But see").] On this narrow point, we agree with the proposed revisions.	The committee has removed the "complete statement" language, and changed "But see" to "Cf."
		The revisions should be modified further to remove the existing, unsupported limitation of CACI 435 to only those asbestos-disease cases involving defendants who were asbestos-product "manufacturers" or "suppliers" – i.e., not to premises owners or contractors who caused asbestos exposure via tortious conduct. The *Rutherford* causation standard expressly applies to all "cases of asbestos-related	As noted above, the issue will be placed on the agenda for the next release cycle.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		cancer." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 957; accord id. at 982 ["holding" applies to any "cause of action for asbestos-related injuries"].) In 2007, this Committee inserted into CACI 435 the existing use note purportedly limiting the Rutherford standard to asbestos "manufacturers" and "suppliers." This broad limitation, violating Rutherford, does not appear to have been the express intent of the Committee. (See comment for extensive argument in support of this view.) If the proposed revision becomes effective, defendants will argue even more forcefully that the *Rutherford* causation standard applies only to product manufacturers and suppliers – citing this Committee's unsupported use notes. Defendants like premises-owner Exxon (*Petitpas*) and installation contractor Bechtel (*Whitmire*), although committing misconduct that results in exposure to asbestos products, will argue for "but for" causation – precisely what *Rutherford* holds inapplicable in every asbestos-disease case.	
	Mannion Gaynor	CACI 430, unlike CACI 435, advises that a "substantial factor" in causing harm "must be more than a remote or trivial factor." CACI 435, by contrast, contains no qualifying language with respect to what constitutes a	See the response to the comment of Waters and Kraus, above.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		"substantial factor" to asbestos-related disease. Instead, CACI 435, read by itself, suggests to the jury that an exposure is a "substantial factor" as long as the plaintiff's expert says it is, without reference to whether the jury independently finds such expert testimony "reasonable" or credible. By itself, CACI 435 does not fully, or accurately, reflect the test for causation as articulated by the California Supreme Court. See, *Rutherford v. Owens-Illinois* (1997) 16 Cal. 4th 953, 969. In fact, the California Supreme Court re-affirmed the principle that, even in the context of dose-response asbestos-related disease, the increased risk of disease caused by an exposure must be more than "theoretical" or "infinitesimal." *Id.*	
		The California Supreme Court expressly rejected the basis for these proposed revisions, i.e., the idea that the "substantial factor" test for causation, as expressed in CACI 430, is somehow incompatible with the standard for causation in asbestos product liability claims generally. See *Rutherford, supra.* In fact, the California Supreme Court stated that the instructions in all fairness should be given together. ("Instruction on the limits of the plaintiff's burden of proof of causation, together with the standardized instructions defining cause-in-fact causation under the substantial factor test, and the	As noted in the comment or Waters and Kraus, above, the court in *Rutherford* was referring to the BAJI instructions, which do not contain the "remote or trivial" language.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		doctrine of concurrent proximate legal causation, will adequately apprise the jury of the elements required to establish causation.") *Id.* at 958. ("The standard instructions on substantial factor and concurrent causation…remain correct in this context and should also be given.") *Id.* at 982-983.	
		The Second District Court of Appeals recently affirmed a trial court's decision to give both instructions in an asbestos liability action, rejecting the plaintiff's argument that the two instructions were confusing and incompatible. See, *Petitpas v. Ford Motor Company* (2017) 13 Cal. App. 5th 261, 299. The Court of Appeal rejected the plaintiff's claim of error when the trial court allowed both CACI 430 and CACI 435 to be read to the jury, noting that, outside of the CACI use notes themselves, there was no legal authority supporting plaintiff's claim.	See response to the comment of Waters and Kraus, above.
		CACI 435 essentially assumes two often disputed facts: 1) that the product at issue contained asbestos; and 2) that the disease at issue was caused by exposure to asbestos. Many claims that plaintiff characterize as "asbestos-related cancer" are not caused by exposure to asbestos; CACI 430 is therefore proper instruction. Some of the products plaintiffs claim caused them exposure to asbestos are not products in which asbestos was added as a raw ingredient. Plaintiffs	The commentator is correct that CACI No. 435 assumes that the product contains asbestos. The instruction does not assume that the disease was caused by exposure to asbestos. That is the issue that the instruction presents to the jury.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		contend that the product was contaminated, but those allegations are in fact plaintiff's burden of proof. Again, in such cases, CACI 430 may be the proper instruction. Taking that decision out of the hands of the court means plaintiffs only have to allege an asbestos-related cancer, and the threshold questions regarding exposure to asbestos, and asbestos as a cause, are assumed rather than proven.	
	Orange County Bar Association, by Nikki P. Miliband, President	Please change the word "case" to "cases" in the following sentence: (But see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in *case* with both product liability and premises liability defendants].)	The singular "case" means that in *Petitpas,* it wasn't error to give both instructions. The extension of this view to other scenarios is open to much debate, as demonstrated by the many comments that the committee received.
		In paragraph 3 of the "Directions for Use", newly added parenthetical for *Major v. R.J. Reynolds*, [court did not err in refusing to give last sentence in case involving . . .] Modify for clarity by adding words "of instruction" so it reads: "[court did not err in refusing to give last sentence *of instruction* in case involving . . ."	The committee has made this addition.
	Simmons Hanly Conroy, Attorneys at Law, by Paul C. Cook	CACI 430 is inconsistent with the standard for asbestos injury causation articulated by this Court in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, and remains an improper causation instruction if the	As noted, the committee will consider this issue in the next release cycle.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		defendant happens to be a premises owner or contractor exposing the plaintiff to asbestos, as opposed to an asbestos product manufacturer or supplier. There is no basis in law or reason to alter the causation standard based on a defendant's status as a premises owner, contractor, product manufacturer or supplier. The same causation standard applies to each of these categories of defendants. The error in giving a substantial factor instruction that includes language that excludes "remote" or "trivial" exposures, and which opens the door to the potential use of "but for" causation language disapproved by *Rutherford,* is not remedied by the mere fact that a defendant happens to be a contractor, a premises owner, or other non-manufacturing or non-supplying entity. *Petitpas* itself provides no justification for this distinction without a difference, other than acknowledging one of the defendants there was a premises owner. (*Petitpas, supra,* 13 Cal.App.5th at 298 – 299.) How does that distinction affect causation? *Petitpas* offers no answer. The cited source of this distinction is the Use Note to CACI 435 (*Id.,* at 299), but respectfully, the Use Note itself provides no legal support for the distinction. The medical and biological processes by which asbestos exposure causes disease does not change simply because the defendant negligently	

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		maintained its premises, or negligently disturbed asbestos-containing materials during its work activities, instead of manufacturing or supplying an asbestos-containing product.	
	Simon Greenstone Panatier Bartlett, Attorneys at Law, by Brian T. Barrow	We generally agree with the proposed revisions, particularly with regard to the citation of *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261.	No response is necessary.
		The proposed revisions continue to suggest, perhaps inadvertently, that the asbestos causation standard set forth in *Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953 (which is the basis for CACI No. 435) should only be given in cases involving manufacturers and suppliers of asbestos products. This is incorrect, as the *Rutherford* standard for causation of asbestos injuries applies in all asbestos cases, not just those involving manufacturers and suppliers of asbestos-containing products.	For the next release cycle.
	3M Company, by Jules S. Zeman, Dentons	The proposed changes ignore that CACI 430 applies to claims against manufacturers and suppliers of non-asbestos-containing products, while CACI 435 applies to claims against manufacturers and suppliers of asbestos and asbestos-containing products. Over decades of litigation and following numerous bankruptcies of asbestos product manufacturers and suppliers, plaintiffs have	The committee does not see how it is ignoring the difference between manufacturers and suppliers on the one hand, and others, like 3M, who might create exposure to asbestos through other means. If 3M does not make anything that contains asbestos, then CACI No. 435 as currently drafted, referring to "exposure to the defendant's product," does not apply to 3M. Nothing in the proposed revisions suggests that it would.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		expanded their claims to include manufacturers and suppliers of products that do not contain asbestos. For example, manufacturers of respiratory protection equipment, such as 3M, are often sued in the same action as asbestos product manufacturers for claims arising out of the same asbestos-related injuries. In recognition of the critical distinction between the standard applicable to asbestos product manufacturers and the standard applicable to non-asbestos product manufacturers, in 2007 the Judicial Council specifically incorporated language into CACI 435 noting that CACI 430 may be given in actions involving "defendants who are not asbestos manufacturers or suppliers." The different causation standard applicable to manufacturers and suppliers of asbestos products versus "other defendants" was most recently recognized in *Petitpas v. Ford Motor Company* (2017) 13 Cal.App.5th 261 ("*Petitpas*"). In that decision, the Second Appellate District Court of Appeal affirmed that a defendant premises owner is entitled to the standard instruction embodied in CACI 430, even where other asbestos product defendants are bound by the causation standard articulated by the California Supreme Court in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 ("*Rutherford*") and	

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		contained in CACI No. 435.4 The distinction arises directly from *Rutherford* and has been part of California law for decades. Rutherford dealt only with manufacturers of asbestos-containing products, and its holding is necessarily limited to those defendants. CACI 430 and CACI 435 correctly reflect California's distinction between the two types of defendants involved in claims arising from asbestos-related injuries; the proposed changes ignore it.	
		The proposed comment in the CACI 430 Directions that CACI 435 is intended as a "complete statement of causation for asbestos-related diseases" misconstrues *Rutherford* and disregards *Petitpas*.	As noted, the committee is removing the "complete statement" language
		The proposed CACI 430 language providing an asbestos-specific explanation of substantial, remote and trivial factors is incompatible with *Rutherford*.	See the response to the comment of Waters and Kraus, above
		The proposed changes inappropriately cite cases applicable only to CACI 435 under CACI 430. Those cases are limited to CACI 435, and it is misleading to suggest they support CACI 430.	Addressed above
	Walsworth WFBM, by Christine Z. Fan and John A. Kaniewski	There seems to be the desire to move away from the common lay terms "remote" and "trivial" to the more scientific-sounding terms "infinitesimal," "theoretical," and "*de minimis*." Ultimately, the jury must decide, from a common sense standpoint, what	The committee does not propose to use "infinitesimal," "theoretical," or "*de minimis*."

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Comment	Response
		constitutes a "substantial factor." Indeed, as currently phrased, CACI 435 reflects this concept in asbestos-related products cases: "A substantial factor in causing harm is a factor that a *reasonable person* would consider to have contributed to the harm." (Emphasis added.) Moreover, as the Supreme Court stated in *Rutherford*: "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' " (16 Cal.4th at 969.)	
		The proposed changes to the Directions also significantly broadens the scope of causation in asbestos premises cases. Essentially, it appears that judges are being encouraged to qualify CACI 430 with a warning that as to premises defendants, remote or trivial factors could still constitute as a substantial factor for causation. Until a California appellate court holds that CACI 435 also applies to premises defendants in asbestos cases, CACI 430 still needs to be given in its present form.	See the response to the comment of Waters and Kraus, above. The committee recognizes that *Petitpas* could be construed as the comment suggests. As noted, the committee will consider instructions for defendants other than manufacturers and suppliers in the next release cycle.

ITC CACI18-01

Civil Jury Instructions - CACI

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2740. *Violation of Equal Pay Act—Essential Factual Elements*	California Employment Lawyers Association, by David diRobertis	Much of the authority cited in the Directions for Use and Sources and Authority is stale and/or inapposite to the current version of California's Equal Pay Act statute. Stale California cases pre-dating the statutory overhaul and inapposite federal cases should not be cited. While CELA recognizes that there is no case law interpreting the 2015-forward statutory amendments, we submit that it would be better to have no cases cited than to have cases cited which will engender confusion and mislead trial courts. ~~the~~ The following cases should be removed from the "Directions for Use" and "Sources and Authority" from any of the CEPA instructions: *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99. *Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620. *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318	The committee added a parenthetical to one of the *Green* excerpts noting that there was a change in the law in 2015.
		Delete the excerpt from *Green, supra,* that says that "in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute."	Rather than delete the excerpt, the committee has added a parenthetical pointing out that the case predates the Fair Pay Act.

		The quote predates the Fair Pay Act, when "[t]he California statute [was] nearly identical to the federal Equal Pay Act of 1963" (111 Cal.App.4th at 623). It no longer holds true because the laws now differ in significant respects.	
		Under Sources and Authority, delete the fourth bullet point, which discusses Green v. Par Pools, Inc. (2003) 111 Cal.App.4th 620 and the three-stage burden shifting test articulated in that case. The analytical framework used in employment discrimination claims to assist in determining whether the employer had a discriminatory intent does not apply to claims brought under the California Equal Pay Act. Both CELA and the subcommittee make some interesting arguments appropriate for an appellate brief, but not for jury instructions.	Until a California court agrees with the comment, *Green* is still the law. The commentator does not point out anything in the subsequent amendments that made this point no longer correct.
		The statute makes clear that the correct analysis is whether the plaintiff employee was paid less than others "for substantially similar work, *when viewed as a composite* of skill, effort, and responsibility .... " (Lab. Code § 1197.S(a), (b) (italics added).) The fact-finder is to consider all of the listed factors in the aggregate in doing the "substantially similar work" analysis.	Element 2 says: "That [plaintiff] was performing substantially similar work as the other person[s] with regard to skill, effort, and responsibility." The only change is that "composite" is translated to "with regard to." The committee sees no difference. And it does not believe that a jury will understand "composite" in the way that CELA would like. See the response to the same comment from the subcommittee below.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

		The "when viewed as a composite" language is necessary to ensure that this approach is used (rather . than an approach that improperly compartmentalizes each factor so that the employer can subjectively assert certain factors were so much more important than the others). By eliminating the concept of viewing "skill, effort, and responsibility" as a "composite," the proposed instruction is incomplete and creates a risk of a fragmented, compartmentalized analysis rather than the proper totality of circumstances analysis.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The introductory sentence uses the present tense "is," while the elements use the past tense "was." We believe the past tense is appropriate for a claim that arose before trial, and would change "is" in the introductory sentence to "was." We would also insert the word "unlawfully" before "paid" for greater clarity: "[*Name of plaintiff*] claims that [he/she] ~~is~~ was unlawfully paid at a wage rate that is less than the rate paid to employees	The committee changed "is" to "was." It sees no~~t~~ benefit to adding "unlawfully."
		We would modify element 2 for greater clarity:	The committee sees no difference between "with regard to" and "in terms of."

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

		"That [*name of plaintiff*] was performing substantially similar work as the other person[s] ~~with regard to~~ in terms of skill, effort, and responsibility; and"	
		The California Equal Pay Act prohibits certain pay discrepancies without the need to show that those discrepancies were "due to," "because of," or "based on" gender, race, or ethnicity. We would modify the first sentence in the Directions for Use for greater clarity: "The California Equal Pay Act prohibits ~~discrepancies on pay due to gender, race, or ethnicity~~ paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work."	While the distinction is subtle, the committee agrees with the comment and has made the proposed change. No discriminatory animus is required; just a pay differential without a valid reason.
	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy Directors	CACI 2740 should be revised to read: 1. That *[name of plaintiff*] was paid at lower wage rates than the wage rates paid to [a] person[s] of [the opposite sex/another race/another ethnicity]; (instead of "less than the rate")	The committee believes that its language is a justifiable plain-language translation of the statute.
		CACI 2740 should be revised to read: That [*name of plaintiff*] was performing substantially similar work as those	As addressed above, the committee does not find the "composite" language to be helpful.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

		other person[s] <u>when viewed as a composite of</u> skill, effort, and responsibility; (instead of "with regard to")	
		CACI 2740 should be revised to read: That <u>the work for which</u> [*name of plaintiff*] was <u>paid lower wage rates was performed</u> under similar working conditions as <u>the work performed</u> by those other person[s]. (instead of just "plaintiff was working under similar working conditions)	The committee finds the proposed language to be unnecessary.
	Civil Justice Association of California	The comment also would change "is" to "was" as suggested by the California Lawyers Association above. The comment also makes the same point as the comment of ILR below regarding the need to clarify that the comparison must be with employees of the defendant. The comment also wants the same three edits as suggested by the comment of CMTA above.	The committee changed "is" to "was." The committee agreed that the instruction should make it clear that comparison must be to employees of the defendant. The committee did not agree to the other suggested edits.
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	Instruction 2740 should clearly state the requirement that the relevant comparator employees must work at the same employer. As drafted, the	This change was made.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

		instruction refers in its introductory language to "the rate paid to employees" generally, which is ambiguous and could be understood by a jury to mean, for example, all similar employees of the many employers in a particular segment of the economy. And none of the three elements that follow clarify that the comparator employees must work for the same employer, either. To ensure that this requirement is clear, we suggest revising the first element to read as follows: "That [*name of plaintiff*] was paid less than the rate paid to [a] person[s] of [the opposite sex/another race/another ethnicity] **working for the same employer**." (Emphasis added to proposed additional language.)	
	Orange County Bar Association, by Nikki Miliband, President	The instruction should have, as an essential element, that defendant was, in fact, the employer. Though this may be addressed in demurrer, motion for judgment on the pleadings, or pretrial motions, the issue could survive until trial.	The committee sees little likelihood that the employment relationship would be at issue for the jury. If it is because of an independent contractor claim, that issue will be dealt with in other instructions
	Jury Instructions Subcommittee, California Pay Equity Task Force, by Jennifer Reisch, Legal Director, Equal	This instruction should be revised to consistently use the singular when referring to the employee to whom the plaintiff is compared. To use the current plural form (". . . the rate paid to employees of the opposite sex . . .") may misleadingly indicate that a	The committee finds this to be a significant unresolved issue, and has included singular/plural options. The statute says plural "employee*s,"* which perhaps suggests that some pattern is required. The comment assumes that a single comparison showing inequity is sufficient, but provides no support for that view.

	Rights Advocates, and Doris Ng, Staff Counsel, California Department of Industrial Relations, Division of Labor Standards Enforcement (comments endorsed by California Employment Lawyers Association) (The Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, commenting jointly, sent the same letter)	plaintiff must identify more than one employee comparator to establish her Equal Pay Act claim.	While the committee sees the position of the comment as quite plausible, without authority, it has elected to retain the singular/plural option.
		The comment makes the same point as the comment of CELA, above, regarding element 2 and not including "when viewed as a composite" in the element. Consideration of whether an employee performs "substantially similar work" to another must take into account the overall job content and involve a comparison of all three factors (skill, effort, and responsibility) taken together, not separately or as "individual segments." Thus, the instructions should clarify that if two employees perform work that requires different levels of one factor (e.g., effort) but "substantially similar" levels of the other factors (e.g., skill and responsibility), the employee being paid less could still establish that they were performing "substantially similar work" overall. See e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974) (noting that Court of Appeals had concluded that extra packing, lifting, and cleaning performed by night inspectors was of so little consequence that the job remained substantially equal to those of day	The exclusively federal authority that is cited for the difference between taking the three factors together and taking them separately as individual segments do not seem to the committee to really stand for any difference between "composite" and "with regard to." The point from the federal cases per the EEOC Compensation Guidance (cited in the comment) is that minor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal." The committee does not see how "composite" expresses that point.

		inspectors). See also EEOC Compensation Guidance, available at https://www.eeoc.gov/policy/docs/compensation.html ("[M]inor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal.")	
		Under the Directions for Use, the subcommittee recommends adding to the end of the first paragraph: "The Labor Commissioner may also bring a claim on behalf of an employee or group of employees." This would clarify that not only affected employees may bring Equal Pay Act claims, but also that the Labor Commissioner's Office, which has authority to enforce the Act, may also seek the remedies under Labor Code section 1197.5(g) when it commences a civil action on behalf of one or more employees.	This point is of no significance to a jury.
		The comment makes the same point as the comment from CELA regarding the excerpt from *Green v. Par Pools, Inc., supra,* and the three-stage burden shifting test articulated in that case.	See response to comment of CELA.
		The Subcommittee recommends revising the fifth bullet point under "Sources and Authority," also from *Green, supra,* to state that where the purpose, intent and plain language of the California Equal Pay Act and the	Case excerpts are not revised to say things that the court didn't say. But as noted in response to the comment of CELA above, the committee is adding a parenthetical pointing out that the case predates the Fair Pay Act.

		federal law are the same, it is appropriate to look to federal case law interpreting the federal Equal Pay Act. Where the purpose, intent, or plain language differs, however, unqualified reliance on federal case law would not be appropriate.	
		The final sentence of the last case excerpt from *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324–325 says: "[A plaintiff] cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.'" This sentence appears to apply to class actions or group claims. For individual claims, the sentence may cause confusion, as stakeholders may construe it to provide that a single plaintiff may not compare his or her work to that of another employee who happens to be employed in a job classification that consists of both male and female employees (or of multiple races or ethnicities). The Subcommittee does not read the plain language of the Equal Pay Act to restrict potential plaintiffs in that manner. The	The committee believes that the sentence is helpful and has retained it.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

		Subcommittee therefore recommends deleting this sentence.	
2741. *Affirmative Defense—Different Pay Justified*	California Employment Lawyers Association, by David diRobertis	Instruction 2741 must make clear that "prior salary" only comes into play as an alleged bona fide factor other than sex, race or ethnicity. Thus, the employer must establish the requirements of Instruction 2742 when relying on "prior salary" in combination with other factor(s) to justify the pay disparity. The proposed instruction correctly tracks the language of the statute making clear that prior salary, alone, cannot justify a pay disparity. But the instruction then fails to make clear that, if the employer is nonetheless asserting that prior salary (in combination with other factor(s)) justified the current disparity, it must then prove the requirements of the bona fide factor other than sex, race or ethnicity as to the reliance on prior salary. Thus, CELA proposes that the bold sentence below be added to the existing proposed sentence at the end of the Instruction so that the instruction would now read as follows:	There is no authority for this position; the Legislature didn't say anything about how prior salary might be used in conjunction with other factors.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

		Prior salary does not, by itself, justify any disparity in current compensation. **To rely on prior salary in combination with [another factor] [other factors] to justify any disparity in current compensation, [*name of defendant*] must establish not only that the disparity is justified by [a] factor[s] other than prior salary, but also that the reliance on prior salary was justified as a bona fide factor other than [sex] [race] [or] [ethnicity].**	
		CELA believes the current version of 2741 does not make entirely clear that an alleged bona fide factor other than sex, race or ethnicity as stated in element I(d) is merely an alleged bona fide factor, which the employer must still prove was a legitimate bona fide factor under instruction 2742. CELA submits that this ambiguity can be easily fixed as follows: [d. (*Specify bona fide factor other than sex, race, or ethnicity, such as education, training, or experience*) **which [*name of defendant*] alleges is a bona ficle factor other than [sex], [race], [or] [ethnicity].]**	While the committee does not see this point as very important, it can be addressed with one word: “alleged” rather than with the language proposed in the comment.
	California Lawyers Association,	In the second sentence in the introductory paragraph, consistent with other affirmative defenses, we would	The committee agreed and has made this change.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

	Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	refer to this defense as a "defense" rather than a "claim."	
		A bona fide factor other than sex, race, or ethnicity may, but does not necessarily, justify a pay differential. Accordingly, we would modify the second paragraph in the Directions for Use: "If the catchall factor d is selected . . . which establishes what bona fide factors other than sex, race, or ethnicity may justify a pay differential. . . ."	The committee agreed and has made this change.
	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy Directors	CACI 2741 opening paragraph should be revised to read: [*Name of defendant*] claims paying [*name of plaintiff*] wage rates that were less than the rates paid to an employee of [the opposite sex/another race/another ethnicity] was lawful because there are legitimate reasons for setting different wage rates. To succeed, [*name of defendant*] must prove all of the following: (instead of simply saying "was justified; also deletes "on this claim; changes from "rate" to "rates" and from "employees" to "an employee.")	The committee does not find the proposed lengthening of the opening paragraph to be useful. "Was justified" takes the place of quite a few alternative words. "On this defense" (rather than "claim") is standard language used throughout CACI. The committee sees no need to pluralize "rate."

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

		Change factor d, (*Specify bona fide factor other than sex, race, or ethnicity, such as education, training, or experience*.) from an italicized "specify" direction to static text.	"Such as" signals an open factor, which works best if the user supplies the factor that is alleged to be relevant.
		Revise element 2 to say: That the factor(s) relied upon [was/were] applied reasonably; and	The committee finds this additional language to be unnecessary. The use of "upon" is often legalese and to be avoided if "on" can be used.
		Revise element 3 to say: That one or more of the factor[s] relied upon account[s] for the entire wage differential. (instead of "That the factor[s] that [*name of defendant*] relied on")	"One or more" is not necessary. "Factor(s)" accounts for one and it accounts for more than one. It is sufficient if one factor accounts for the entire wage differential. And this language permits that result. Unlike "each factor" (for element 2), each factor here does not need to account separately.
	Civil Justice Association	Makes many of the same suggested revisions suggested by CMTA above. In addition, would delete: "Prior salary does not, by itself, justify any disparity in current compensation."	The prior-salary limitation is now part of the statute.
	Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, by Jennifer Reisch, Legal Director, Equal Rights Advocates	We suggest clarifying in the Directions for Use that, in order for an employer to rely on prior salary to justify a wage differential, the employer must first demonstrate that prior salary is a "bona fide factor other than sex," which was not "based on or derived from a sex-based difference in compensation" and is consistent with "business necessity," within the meaning of subdivision	Addressed above in response to comment of CELA.

ITC CACI18-01

Civil Jury Instructions - CACI

All comments are paraphrased unless indicated by quotation marks.

		(a)(1)(D). Notably, the employer would have to show that the prior salary was not derived from a sex-based difference, meaning there was not gender wage differential reflected in the prior salary from the prior job.	
	Orange County Bar Association, by Nikki Miliband, President	Seemingly, it would be helpful it might be helpful to add the following: (the comment then would import proposed 2742, addressing factor d, into 2741.) Then the comment goes on to say: "Alternatively, consider including a separate instruction for this section, indicating (sic)."	The committee prefers to keep the explanation of factor d in separate instruction 2742.
		Perhaps 2 should read "That <u>each factor relied upon</u> was applied reasonably." This tracks the statute and may avoid the confusion that could ensue if the jury decided to lump all the factors together to see if the factors were applied reasonably as a whole rather than as individual reasons.	The committee agreed and has revised element 2 to say "each factor."
		Element 3 should read: "That <u>the one or more factors relied upon</u> account for the entire wage differential." (instead of "That the factor[s] that [name of defendant] relied on")	As noted above, the committee does not believe the proposed language is necessary.

ITC CACI18-01

Civil Jury Instructions - CACI

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	Jury Instructions Subcommittee, California Pay Equity Task Force, by Jennifer Reisch, Legal Director, Equal Rights Advocates, and Doris Ng, Staff Counsel, California Department of Industrial Relations, Division of Labor Standards Enforcement (The Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, commenting jointly, sent the essentially same letter)	The Subcommittee repeats its comment above relating to use of the plural form, and recommends using the singular term "an employee."	As noted above, the committee considers the issue unresolved and will retain the singular/plural option.
		The Subcommittee recommends revising the last sentence of the draft instruction to read: "Prior salary cannot, by itself, justify any disparity in compensation." The statute does not contain the word "current."	While it is true that the statute does not contain "current," without it the sentence becomes confusing because prior salary must be compared with something, which can only be the current salary.
		The Subcommittee makes the same comment and recommendation as above relating to reliance on federal cases, for the second bullet point under Sources and Authority." This is especially important here, since there is no parallel language to section 1197.5(a)(1)(D) in federal law, which does not restrict or qualify the "factor[s] other than sex" on which an employer may rely to justify a pay disparity in any way.	Addressed above
		California's statute requires that in order to proffer a "bona fide factor other than sex" defense, an employer must demonstrate that the factor is (1) not based on or derived from a sex- or race-based difference in pay, (2) job related to the position in question, and (3) consistent with a business necessity, as defined therein. (See Lab. Code § 1197.5(a)(1)(D).) As written, this	The committee believes reversing the order would be counterintuitive. In CACI No. 2741, the employer may assert factors a, b, or c, and not need to rely on d's other factors. Only If the employer is relying on other factors, does the jury need to be guided to the limitations imposed on those factors set forth in CACI No. 2742.

ITC CACI18-01

Civil Jury Instructions - CACI

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		instruction suggests that any reason an employer offers as a bona fide factor other than sex may be considered without regard to the additional requirements of § 1197.5(a)(1)(D). The Subcommittee therefore suggests reversing the order of proposed instructions 2741 and 2742 to make it clear that a jury must find that a bona fide factor other than sex meets the requirements of section 1197.5(a)(1)(D) before determining whether the employer has raised such a factor as a valid defense—i.e., before determining whether the factor was applied reasonably and accounts for the entire differential.	
2742. *Bona Fide Factor Other Than Sex, Race, or Ethnicity*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would modify the final sentence in the instruction for greater clarity. The stated facts only defeat the defense of a bona fide factor. They do not establish the elements required for liability, so it seems inappropriate to state the defendant "is in violation." "~~[*Name of defendant*] is in violation~~ This defense does not apply, however, if [*name of plaintiff*] proves an alternative business practice exists that would serve the same business purpose without producing the pay differential."	The committee agreed and has made this change.

ITC CACI18-01

Civil Jury Instructions - CACI

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	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy Directors	Revise the last paragraph to say: [*Specify factor*] shall not justify the pay differential, however, if [*name of plaintiff*] proves that an alternative business practice exists that would serve the same business purpose without producing the pay differential. (instead of "defendant is in violation")	The committee prefers the revision proposed above by the California Lawyers Association committee.
	Civil Justice Association	The comment makes the same point as CMTA above. Delete the words "or derived from" from element 1; "That the factor is not based on or derived from a [sex/race/ethnicity]-based differential in compensation." This phrase is vague, ambiguous, confusing, and subject to misinterpretation.	The committee tends to agree that the meaning of "derived from" is not clear, but it is in the statute.
		Delete "job" (and "with respect to") from element 2 so that it reads, "That the factor is related to [*name of plaintiff*]'s position" to avoid misinterpretation.	The language that would be deleted is in the statute. The comment provides no explanation of how it could be misinterpreted. The committee finds it more likely that the element could be misinterpreted if it doesn't say "*job* related."
		Clarify the vague definition of "business necessity."	The committee tends to agree that the statutory definition is not clear. But the comment does not suggest any way to clarify, and there is no authority to deviate from the statute.
	Jury Instructions Subcommittee, California Pay Equity Task	The Subcommittee repeats its comment above relating to use of the plural form, and recommends using the singular term "an employee."	Addressed above

ITC CACI18-01

Civil Jury Instructions - CACI

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	Force, by Jennifer Reisch, Legal Director, Equal Rights Advocates, and Doris Ng, Staff Counsel, California Department of Industrial Relations, Division of Labor Standards Enforcement (The Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, commenting jointly, sent the essentially same letter)	The Directions for Use should clarify that to raise this defense, an employer must show that the "bona fide factor other than sex" on which it relied to justify a difference in pay meets all of the threshold requirements, e.g., it is not based on or derived from a sex-, race-, or ethnicity-based differential; it is job related to the position in question; and it is consistent with business necessity. (Lab. Code § 1197.5(a)(1)(D).) The Subcommittee recommends clarifying this draft instruction by stating in the Directions for Use that if a factor does not meet these requirements, then the employer cannot rely on such factor as an affirmative defense.	The instruction says that the defendant "must prove all of the following."
2743. *Equal Pay Act—Retaliation—Essential Factual Elements*	California Employment Lawyers Association, by David diRobertis	CELA submits that a language fix should made to ensure that elements I and 3 of proposed instruction 2743 (equal pay retaliation) are entirely symmetrical and use the same language to the extent possible. As the instruction is drafted, element one (protected activity) instructs in brackets to "specify acts taken by plaintiff to	The committee sees no risk in using a shortened label in element 3. The acts that would be specifically stated in element 1 could be a bit wordy. To repeat all these words in element 3 might make that element also (and unnecessarily) very wordy. I don't think there is any risk in using shorthand in element 3.

ITC CACI18-01

Civil Jury Instructions - CACI

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		enforce or assist in the enforcement of the right to equal pay," but then element three (causal nexus) uses different proposed language -i.e., "pursuit of/assisting in the enforcement of another's right to] ... " CELA submits that the protected activity and causal nexus elements should contain the same language to ensure ease of understanding and eliminate any ambiguity. Having the same language in the protected activity element as the causal nexus element makes it easier conceptually for the fact-finder to understand that the causal nexus requirement looks to whether the protected activity motivated the adverse action.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with this instruction.	No response is necessary.
		The employee's pursuit of equal pay is not the only activity protected under the act, which also protects encouraging or assisting others to pursue equal pay or inquiring about others' wages, as stated in the first paragraph of the Directions for Use. We would modify the second paragraph in the Directions for Use accordingly: "Note that there are two causation elements. First there must be a causal	The committee does not see a need to make this addition. The point of the paragraph is to point out the two causation elements and the difference between them, a point that is often missed under FEHA. There is no need to add words that do not address the point.

ITC CACI18-01

Civil Jury Instructions - CACI

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		connection between the employee's pursuit of equal pay (or other activity protected by the act) and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).	
	Civil Justice Association	We oppose adding Element 3 to the instruction. The 3rd element applies a substantial motivating factor element to Equal Pay Act retaliation cases. Paragraph 3 under Directions for Use specifically notes that whether this standard applies to Equal Pay Act retaliation cases has not been addressed by the courts. As such, we would suggest this element should not be included as it would not be an accurate reflection of current law. We suggest a reference to "causal connection" or a "but for" standard.	There must be a causation element in the instruction. After *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232, the committee decided to export "substantial motivating reason" as the causation standard in all employment-related claims Then, as here, the Directions for Use state that "Whether this standard applies to the [claim of the instruction] has not been addressed by the courts. The committee reconsidered this approach, but decided to continue it.
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	The Directions for Use should clarify that the analysis is to follow the federal burden-shifting framework, under which the employer may respond to a prima facie showing of retaliation by proffering evidence that it had a legitimate reason for the adverse employment decision. Such a clarification is included in the Directions for Use for Instruction 2740, establishing the essential elements of a traditional Equal Pay Act	The Directions for Use to 2740 do not say anything about burden shifting. It's in the Sources and Authority in an excerpt from *Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 626. The employee-side advocate groups argue that *McDonnell Douglas* does not apply under the Equal Pay Act.

ITC CACI18-01

Civil Jury Instructions - CACI

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	Jury Instructions Subcommittee, California Pay Equity Task Force, by Jennifer Reisch, Legal Director, Equal Rights Advocates, and Doris Ng, Staff Counsel, California Department of Industrial Relations, Division of Labor Standards Enforcement (The Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, commenting jointly, sent the essentially same letter)	The Subcommittee recommends that the first sentence of this instruction state all the protected acts covered under the anti-retaliation provisions of the Equal Pay Act, which are: disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, aiding or encouraging any other employee to exercise his or her rights under this section, or any action taken by the employee to invoke or assist in any manner the enforcement of this section. (Lab. Code § 1197.5(k)(1).)	The committee believes that including all of the protected acts in the instruction would make it very cumbersome to understand and use. By the time the jury is being instructed, everyone will know what specific act is alleged to have brought about retaliation.
		The Subcommittee recommends deleting elements 4 and 5 from this instruction as they duplicate the previously articulated requirements for an adverse action and causal connection.	As noted in the Directions for Use, there are two causation elements, each with a different function. The committee has encountered a number of cases in which this point has been missed.
		Under "Directions for Use," the Subcommittee recommends adding to the end of the first paragraph: "The Labor Commissioner may also bring a claim on behalf of the affected employee." This would clarify that not only affected employees may bring a retaliation claim under the Equal Pay Act, but also that the Labor Commissioner's Office has authority to enforce the Act and may file civil actions on behalf of employees who	What the Labor Commissioner can do has no relevance to a jury..

		have been discriminated or retaliated against. See Labor Code § 98.7.	

206. Evidence Admitted for Limited Purpose

During the trial, I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described, and not for any other purpose.

New September 2003; Revised May 2018

Directions for Use

~~Where~~ If appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (Evid. Code, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665-666 [313 P.2d 557]; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 412 [264 Cal.Rptr. 779].) It is recommended that the judge call attention to the purpose to which the evidence applies.

A limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

For an instruction on evidence applicable to one party or a limited number of parties, see CACI No. 207, *Evidence Applicable to One Party*.

Sources and Authority

- Evidence Admitted for Limited Purpose. Evidence Code section 355.
- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262 [193 P. 251].)
- Courts have observed that "[w]here the information is admitted for a purpose other than showing the truth of the matter asserted ... , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525 [3 Cal.Rptr.2d 833].)
- An adverse party may be excused from the requirement of requesting a limiting instruction and may be permitted to assert error if the trial court unequivocally rejects the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298-299 [85 Cal.Rptr. 444, 466 P.2d 996].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 32–36

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.66, 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) §§ 4.106, 13.26 (Cal CJER 2010)

430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

New September 2003; Revised October 2004, June 2005, December 2005, December 2007, May 2018

Directions for Use

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation, that is, "but for" the defendant's conduct, the plaintiff's harm would not have occurred. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Rest.2d Torts, § 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give this sentence. (See *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 572–573 [34 Cal.Rptr.2d 607, 882 P.2d 298]; Rest.2d Torts, § 432(1).)

"Conduct," in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff's alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The reference to "conduct" may be changed as appropriate to the facts of the case.

The "but for" test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes. (See also *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563] [court did not err in refusing to give last sentence of instruction in case involving exposure to carcinogens in cigarettes].)

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes,* should also be given.

In a case in which the plaintiff's claim is that he or she contracted cancer from exposure to the defendant's asbestos-containing product~~asbestos-related cancer cases~~, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires a different instruction regarding exposure to a particular product. Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims,* and do not give this instruction. (Cf. *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability

and premises liability defendants].)

Under this instruction, a remote or trivial factor is not a substantial factor. This sentence could cause confusion in an asbestos case. "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases. (See *City of Pasadena v. Superior Court (Jauregui)* (2017) 12 Cal.App.5th 1340, 1343–1344 [220 Cal.Rptr.3d 99] [cause of action for a latent injury or disease generally accrues when the plaintiff discovers or should reasonably have discovered he has suffered a compensable injury].)

Although the court in *Rutherford* did not use the word "trivial," it did state that "a force [that] plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) While it may be argued that "trivial" and "infinitesimal" are synonyms, a very minor force that does cause harm *is* a substantial factor. This rule honors the principle of comparative fault. (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398].) In *Rutherford*, the jury allocated the defendant only 1.2 percent of comparative fault, and the court upheld this allocation. (See *Rutherford*, *supra*, 16 Cal.4th at p. 985.) Instructing the jury that a *de minimis* force (whether trivial or infinitesimal) is not a substantial factor could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum.

Sources and Authority

- "The test for joint tort liability is set forth in section 431 of the Restatement of Torts 2d, which provides: 'The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.' Section 431 correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671–672 [271 Cal.Rptr. 876].)

- "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact." (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative

negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

- "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citations omitted.)

- "The text of Restatement Torts second section 432 demonstrates how the 'substantial factor' test subsumes the traditional 'but for' test of causation. Subsection (1) of section 432 provides: 'Except as stated in Subsection (2), the actor's negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent*.' … Subsection (2) states that if 'two forces are actively operating … and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.' " (*Viner, supra,* 30 Cal.4th at p. 1240, original italics.)

- "Because the 'substantial factor' test of causation subsumes the 'but for' test, the 'but for' test has been phrased in terms of 'substantial factor,' as follows, in the context, as here, of a combination of causes dependent on one another: A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)

- "A tort is a legal cause of injury only when it is a substantial factor in producing the injury. If the external force of a vehicle accident was so severe that it would have caused identical injuries notwithstanding an abstract 'defect' in the vehicle's collision safety, the defect cannot be considered a substantial factor in bringing them about. [¶] The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a 'substantial factor' in producing plaintiff's 'enhanced' injuries. However, this instruction dealt only by 'negative implication' with [defendant]'s theory that any such defect was *not* a 'substantial factor' in this case because this particular accident would have broken plaintiff's ankles in any event. As we have seen, [defendant] presented substantial evidence to that effect. [Defendant] was therefore entitled to its special instruction, and the trial court's refusal to give it was error." (*Soule, supra,* 8 Cal.4th at p. 572–573, original italics, footnote and internal citations omitted.)

- "The first element of legal cause is cause in fact ... . The 'but for' rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' " (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)

- "If the accident would have happened anyway, whether the defendant was negligent or not, then his

or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 [199 Cal.Rptr.3d 522].)

- "We have recognized that proximate cause has two aspects. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." ' This is sometimes referred to as 'but-for' causation. In cases where concurrent independent causes contribute to an injury, we apply the 'substantial factor' test of the Restatement Second of Torts, section 423, which subsumes traditional 'but for' causation. This case does not involve concurrent independent causes, so the 'but for' test governs questions of factual causation." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 354 [188 Cal.Rptr.3d 308, 349 P.3d 1013], original italics, footnote omitted.)

- " 'Whether a defendant's conduct actually caused an injury is a question of fact … that is ordinarily for the jury … .' '[C]ausation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case." ' … ' "A mere possibility of … causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ' " (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 [68 Cal.Rptr.3d 897], internal citations omitted.)

- "[E]vidence of causation 'must rise to the level of a reasonable probability based upon competent testimony. [Citations.] "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." [Citation.] The defendant's conduct is not the cause in fact of harm " 'where the evidence indicates that there is less than a probability, i.e., a 50–50 possibility or a mere chance,' " that the harm would have ensued.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312 [111 Cal.Rptr.3d 787].)

- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)

- "The Supreme Court … set forth explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials: A plaintiff must 'allege that he was exposed to each of the toxic materials claimed to have caused a specific illness'; 'identify each product that allegedly caused the injury'; allege 'the toxins entered his body' 'as a result of the exposure'; allege that 'he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness'; and, finally, allege that 'each toxin he absorbed was manufactured or supplied by a named defendant.' " (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1194 [130 Cal.Rptr.3d 571], quoting *Bockrath, supra,* 21 Cal.4th at p. 80, footnote

omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford*, *supra*, 16 Cal.4th at p. 969, internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath*, *supra*, 21 Cal.4th at p. 79, internal citation omitted.)

- "[M]ultiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two causes, partial combinations of which are sufficient to cause the harm. As such, the trial court did not err in refusing to instruct the jury with the but-for test." (*Major*, *supra*, 14 Cal.App.5th at p. 1200.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1334–1341~~1185–1189, 1191~~

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13–1.15

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.02 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.71 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.260–165.263 (Matthew Bender)

435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[*Name of plaintiff***] may prove that exposure to asbestos from [***name of defendant***]'s product was a substantial factor causing [his/her/[***name of decedent***]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her] risk of developing cancer.**

New September 2003; Revised December 2007, May 2018

Directions for Use

This instruction is to be given in a case in which the plaintiff's claim is that he or she contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product. See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor*, with regard to whether CACI No. 430 may also be given.

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes*, may also be given.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], original italics, internal citation and footnotes omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a

'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at p. 969, internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)

- "Contrary to defendant's assertion, the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal. Rptr. 2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner,* the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,' 'demonstrates how the "substantial factor" test subsumes the traditional "but for" test of causation.' Defendant argues that *Viner* required plaintiffs to show that defendant's product 'independently caused [plaintiff's] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.' *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that 'plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.' " *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- " 'A threshold issue in asbestos litigation is exposure to the defendant's product. … If there has been no exposure, there is no causation.' Plaintiffs bear the burden of 'demonstrating that exposure to [defendant's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff's] risk of developing cancer.' 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].' Therefore, '[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' " (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)

- "Further, '[t]he mere "possibility" of exposure' is insufficient to establish causation. '[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden' of persuasion." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "To support an allocation of liability to another party in an asbestos case, a defendant must 'present evidence that the aggregate dose of asbestos particles arising from' exposure to that party's asbestos

‘constituted a substantial factor in the causation of [the decedent's] cancer.’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)

- “ ‘[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,’ our Supreme Court has held that a plaintiff ‘need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.’ Rather, a ‘plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.’ ” (*Izell, supra,* 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)

- “Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff’s asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff’s injury. [Citations.] ‘Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.’ [Citation.] ” (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363−1364 [169 Cal.Rptr.3d 373].)

- “In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth ‘the requirement in *Rutherford* that causation be decided by taking into account “the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed.” ’ But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion.” (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)

- “Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure.” (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)

- “We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be ‘somebody with an M.D. after his name.’ The *Rutherford* court agreed with the *Lineaweaver* court that ‘the reference to “medical probability” in the standard “is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence.” [Citation.]’ The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor.” (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)

- "Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the 'every exposure' and 'insignificant exposure' camps, and recognizes that the conflict is one for the jury to resolve." (*Izell, supra,* 231 Cal.App.4th at p. 977.)

- "[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]'s statement that it 'takes significant exposures' to increase the risk of disease. This statement uses the plural 'exposures' and also requires that those exposures be 'significant.' The use of 'significant' as a limiting modifier appears to be connected to [expert]'s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)

- "Nor is there a requirement that 'specific words must be recited by [plaintiffs'] expert.' [¶] The connection, however, must be made between the defendant's asbestos products and the risk of developing mesothelioma suffered by the decedent." (*Paulus, supra,* 224 Cal.App.4th at p. 1364.)

- "We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

470. Primary Assumption of Risk—Exception to Nonliability─ Coparticipant in Sport or Other Recreational Activity

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[*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 (1) increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., touch football***], and (2) it 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 May 2017; Revised May 2018

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. 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*. 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, some courts have held that whether the defendant has increased the risk beyond those inherent in the sport or activity 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, including cases *contra*.) 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].)

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.)

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"]; *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 540 [220 Cal.Rptr.3d 556] [horseback riding is an inherently dangerous sport]; *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 656–657 [224 Cal.Rptr.3d 506] [off-road dirt bike riding])

- "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.)

- "The [horseback] rider generally assumes the risk of injury inherent in the sport. Another person does not owe a duty to protect the rider from injury by discouraging the rider's vigorous participation in the sport or by requiring that an integral part of horseback riding be abandoned. And the person has no duty to protect the rider from the careless conduct of others participating in the sport. The person owes the horseback rider only two duties: (1) to not 'intentionally' injure the rider; and (2) to not 'increase the risk of harm beyond what is inherent in [horseback riding]' by 'engag[ing] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport' " (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1545–1546 [98 Cal.Rptr.3d 779].)

- "[T]he general test is '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.' Although a defendant has no duty of care to a plaintiff with regard to inherent risks, a defendant still has a duty not to increase those risks." (*Swigart, supra*, 13 Cal.App.5th at p. 538, internal citations omitted.)

- "The question of which risks are inherent in a recreational activity is fact intensive but, on a sufficient record, may be resolved on summary judgment. Judges deciding inherent risk questions under this doctrine 'may consider not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.' " (*Foltz, supra*, 16 Cal.App.5th at p. 656, internal citations omitted.)

- "[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was 'so reckless as to be totally outside the range of the ordinary activity involved in [golf]' depends on resolution of disputed material facts. Thus, defendant's summary judgment motion was properly denied." (*Shin, supra,* 42 Cal.4th at p. 486, internal citation omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which 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].)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (~~(~~*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 501 [194 Cal.Rptr.3d 830].)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity … and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics.)

- "[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].)

- "Primary assumption of the risk does not depend on whether the plaintiff subjectively appreciated the risks involved in the activity; instead, the focus is an objective one that takes into consideration the risks that are ' "inherent" ' in the activity at issue." (*Swigart, supra*, 13 Cal.App.5th at p. 538.)

- "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, supra, ~~v. Owens~~ (2009)* 176 Cal.App.4th at pp. ~~1534,~~ 1550–1551 ~~[98 Cal.Rptr.3d 779]~~, 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].)

- "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 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~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1339~~1496–1508~~, 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)

1004. Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition.

However, the [owner/lessor/occupier/one who controls the property] does still have to use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition.

New September 2003; Revised May 2018

Directions for Use

Give this instruction with CACI No. 1001, *Basic Duty of Care*, if it is alleged that the condition causing injury was obvious. The first paragraph addresses the lack of a duty to warn of an obviously unsafe condition. (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 [221 Cal.Rptr.3d 701].)

The second paragraph addresses when there may be a duty to take some remedial action. Landowners~~Defendants~~ may have a duty to take precautions to protect against the risk of harm from an obviously unsafe condition, even if they do not have a duty to warn. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122 [273 Cal.Rptr. 457].)

Sources and Authority

- "Foreseeability of harm is typically absent when a dangerous condition is open and obvious. 'Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.' In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition." (*Jacobs, supra*, 14 Cal.App.5th at p. 447, internal citations omitted.)

- "An exception to this general rule exists when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it).' In other words, while the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn of the condition in some situations, such obviousness will not negate a duty of care when it is foreseeable that, because of necessity or other circumstances, a person may choose to encounter the condition." (*Jacobs, supra,* 14 Cal.App.5th at p. 447, internal citation omitted.)

- ~~Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. (6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1126.) However, this is not true in all cases.~~ "[I]t is foreseeable that even an obvious danger may cause injury, if the practical

necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant 'owes a duty of due care "to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." '~~[to the person injured.]~~ " (*Osborn, supra,* 224 Cal.App.3d at p. 121, internal citation~~s~~ omitted.)

- "[W]hen a worker, whose work requires him or her to encounter a danger which is obvious or observable, is injured, '*[t]he jury [is] entitled to balance the [plaintiff's] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue.* [Citations.]' In other words, under certain circumstances, an obvious or apparent risk of danger does not automatically absolve a defendant of liability for injury caused thereby." (*Osborn, supra,* 224 Cal.App.3d at p. 118, original italics, internal citations omitted.)

- "[T]he obvious nature of a danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy."~~It is incorrect to instruct a jury categorically that a business owner cannot be held liable for an injury resulting from an obvious danger.~~ (*Osborn, supra,* 224 Cal.App.3d at p. ~~116~~119.)~~ There may be a duty to remedy a dangerous condition, even though there is no duty to warn thereof, if the condition is foreseeable. (*Id.* at pp. 121-122.)~~

- "The issue is whether there is any evidence from which a trier of fact could find that, as a practical necessity, [plaintiff] was foreseeably required to expose himself to the danger of falling into the empty pool." (*Jacobs, supra,* 14 Cal.App.5th at p. 447.)

- In *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1039-1040 [43 Cal.Rptr.2d 158], the court found that an instruction stating that the defendant "owed no duty to warn plaintiff of a danger which was obvious or which should have been observed in the exercise of ordinary care" was proper: "The jury was free to consider whether Falcon was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of Felmlee's injuries." (*Id.* at p. 1040.)

- ~~One court has observed:~~ "[T]he 'obvious danger' exception to a landowner's ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. ... [T]his type of assumption of the risk has now been merged into comparative negligence." (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [20 Cal.Rptr.2d 148], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1267–1269~~1125–1127~~

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.04[4] (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.20, 381.32 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.25 et seq. (Matthew Bender)

1005. Business Proprietor's or Property Owner's Liability for the ~~Negligent/Intentional/~~Criminal Conduct of Others

[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's criminal~~harmful~~ conduct on [his/her/its] property if the [owner/landlord] can reasonably anticipate ~~such~~ that conduct.

You must decide whether the steps taken by [*name of defendant*] to protect persons such as [*name of plaintiff*] were adequate and reasonable under the circumstances.

New September 2003; Revised May 2018

Directions for Use

A business owner or a landlord has a duty to take affirmative steps to protect against the criminal acts of a third party if the conduct can be reasonably anticipated. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5 [113 Cal.Rptr.3d 327, 235 P.3d 988].) Whether there is a duty as defined in the first paragraph is a question of law for the court. The jury then decides whether the defendant's remedial measures were reasonable and adequate under the circumstances (second paragraph). (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653].)

Sources and Authority

- "A landlord generally owes a tenant the duty, arising out of their special relationship, to take reasonable measures to secure areas under the landlord's control against foreseeable criminal acts of third parties." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213 [63 Cal.Rptr.3d 99, 162 P.3d 610].)

- "[B]road language used in *Isaacs* has tended to confuse duty analysis generally in that the opinion can be read to hold that foreseeability in the context of determining duty is normally a question of fact reserved for the jury. Any such reading of *Isaacs* is in error. Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Ann M., supra,* 6 Cal.4th at p. 678, internal citation omitted.)

- "[T]he decision to impose a duty of care to protect against criminal assaults requires 'balancing the foreseeability of the harm against the burden of the duty to be imposed. [Citation.] " '[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.' [Citation.]" [Citation.] Or, as one appellate court has accurately explained, duty in such circumstances is determined by a balancing of "foreseeability" of the criminal acts against the "burdensomeness, vagueness, and efficacy" of the proposed security measures.' " (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146–1147 [12 Cal.Rptr.3d 615, 88 P.3d 517].)

- " 'A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.' " (*Taylor v. Centennial Bowl, Inc.* (1966), 65 Cal. 2d 114, 124 [52 Cal.Rptr. 561, 416 P.2d 793], quoting Restatement of Torts, § 344.)

- "[T]he property holder only 'has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure.' The court's focus in determining duty ' " 'is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' [Citation.]" ' " (*Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 594 [205 Cal.Rptr.3d 103], internal citation omitted.)

- "[O]nly when 'heightened' foreseeability of third party criminal activity on the premises exists-shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location-does the scope of a business proprietor's special-relationship-based duty *include an obligation to provide guards* to protect the safety of patrons." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240 [30 Cal.Rptr.3d 145, 113 P.3d 1159], internal citations and footnote omitted, original italics.)

- "[F]oreseeability, whether heightened or reduced, is tested by what the defendant knows, not what the defendant could have or should have learned." (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 158 [42 Cal.Rptr.3d 519].)

- "Here [defendant] argues it has no duty unless and until it experiences a similar criminal incident. We disagree. While a property holder generally has a duty to protect against types of crimes of which he is on notice, the absence of previous occurrences does not end the duty inquiry. We look to all of the factual circumstances to assess foreseeability." (*Janice H., supra*, 1 Cal.App.5th at p. 595, internal citation omitted.)

- "Even when proprietors ... have no duty ... to provide a security guard or undertake other similarly burdensome preventative measures, the proprietor is not necessarily insulated from liability under the special relationship doctrine. A proprietor that has no duty ... to hire a security guard or to undertake other similarly burdensome preventative measures still owes a duty of due care to a patron or invitee by virtue of the special relationship, and there are circumstances (apart from the failure to provide a security guard or undertake other similarly burdensome preventative measures) that may give rise to liability based upon the proprietor's special relationship." (*Delgado, supra,* 36 Cal.4th at pp. 240-241.)

- A business proprietor is not an insurer of the safety of his invitees, "but he is required to exercise reasonable care for their safety and is liable for injuries resulting from a breach of this duty. The general duty includes not only the duty to inspect the premises in order to uncover dangerous conditions, but, as well, the duty to take affirmative action to control the wrongful acts of third

persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." (*Taylor*, *supra*, ~~*v. Centennial Bowl, Inc.* (1966)~~ 65 Cal.2d at p. ~~114,~~ 121 ~~[52 Cal.Rptr. 561, 416 P.2d 793]~~, internal citations omitted.)

- ~~"Once a court finds that the defendant was under a duty to protect the plaintiff, it is for the factfinder to decide whether the security measures were reasonable under the circumstances. The jury must decide whether the security was adequate." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653], internal citation omitted.)~~

- ~~"[A]s frequently recognized, a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)~~

- "In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M., supra*, 6 Cal.4th at p. 674, internal citation omitted.)~~;~~ (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499-501 [229 Cal.Rptr. 456, 723 P.2d 573].)

- "[Restatement Second of Torts] Section 314A identifies 'special relations' which give rise to a duty to protect another. Section 344 of the Restatement Second of Torts expands on that duty as it applies to business operators." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 823 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1271–1291~~1129–1149~~

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.06 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.05 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.21 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.12, 334.23, 334.57 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.30 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:5 (Thomson Reuters)

1500. Former Criminal Proceeding—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in causing [***name of plaintiff***] to be arrested [and prosecuted] [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested ~~or~~ [and prosecuted];]**

4. **That [***name of defendant***] acted primarily for a purpose other than to bring [***name of plaintiff***] to justice;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested [and ~~or~~ prosecuted]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008, June 2015, May 2018

Directions for Use

Give this instruction in a malicious prosecution case based on an underlying criminal prosecution. If there is an issue as to what it means to be "actively involved" in element 1, also give CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained*.

In elements 1 and 3 and in the next-to-last paragraph, include the bracketed references to prosecution if the arrest was without a warrant. Whether prosecution is required in an arrest on a warrant has not definitively been resolved. (See *Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 919–925 [217 Cal.Rptr.3d 843].)

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "[A] cause of action for malicious prosecution cannot be premised on an arrest that does not result in formal charges (at least when the arrest is not pursuant to a warrant)." (*Van Audenhove, supra, ~~v. Perry (2017)~~* 11 Cal.App.5th at p.~~915,~~ 917 ~~[217 Cal.Rptr.3d 843]~~ [rejecting Rest.2d Torts, § 654. subd. (2)(c)].)

- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)

- "[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)

- "When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant … to suspect the plaintiff … had committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 465 [156 Cal.Rptr.3d 901].)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Admittedly, the fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut. However, as respondents' own authorities admit, that rebuttal may be by proof that the indictment was based on false or fraudulent testimony." (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 900 [195 Cal.Rptr. 448].)

- "Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]" (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)

- " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citations omitted.)

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice,

establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "Generally, the requirements of the doctrine of collateral estoppel 'will be met when courts are asked to give preclusive effect to preliminary hearing probable cause findings in subsequent civil actions for false arrest and malicious prosecution. [Citation.]' 'A determination of probable cause at a preliminary hearing may preclude a suit for false arrest or for malicious prosecution'].) 'One notable exception to this rule would be in a situation where the plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing. [Citation.] When the officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause at the preliminary hearing would not preclude relitigation of the issue of integrity of the evidence.' Defendants argue, and we agree, that the stated exception itself contains an exception—i.e., if the plaintiff alleges that the arresting officer lied or fabricated evidence at the preliminary hearing, plaintiff challenges that evidence at the preliminary hearing as being false, and the magistrate decides the credibility issue in the arresting officer's favor, then collateral estoppel still may preclude relitigation of the issue in a subsequent civil proceeding involving probable cause." (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 933 [186 Cal.Rptr.3d 887], internal citations omitted.)

- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation omitted.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.' "* (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745], disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882, original italics, internal citations omitted.)

- " 'For purposes of a malicious prosecution claim, malice "is not limited to actual hostility or ill will toward the plaintiff. …" [Citation.]' '[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.' " (*Greene, supra,* 216 Cal.App.4th at pp. 464-465, internal citation omitted.)

- "Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff." (*Verdier, supra,* 152 Cal.App.2d at p. 354.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 552–570, 605

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process,* §§ 147.20–147.53 (Matthew Bender)

1503. Affirmative Defense—Proceeding Initiated by Public ~~Entities and~~ Employee Within Scope of Employments~~ (Gov. Code, § 821.6)

[*Name of public entity defendant***] claims that it~~[he/she]~~ cannot be held responsible for [***name of plaintiff***]'s harm, if any, because the [***specify proceeding, e.g., civil action***] was initiated by its~~[he/she] was a public~~ employee who was acting within the scope of [his/her] employment. To establish this defense, [***name of defendant***] must prove that [***name of employee~~he/she~~***] was acting within the scope of [his/her] employment.**

New September 2003; Renumbered from CACI No. 1506 June 2013; Revised May 2018

Directions for Use

Give this instruction if there is an issue of fact as to whether the proceeding giving rise to the alleged malicious prosecution claim was initiated as a governmental action. Government Code section 821.6 provides immunity from liability for malicious prosecution for a public employee who is acting within the scope of employment, even if the employee acts maliciously and without probable cause. If the employee is immune, then there can be no vicarious liability on the entity. (Gov. Code, § 815.2.) This immunity is not unqualified, however; it applies only if the employee was acting within the scope of employment. (*Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470].)

For an instruction on scope of employment, see CACI No. 3720, *Scope of Employment*, in the Vicarious Responsibility series.

Sources and Authority

- Public Entity Vicarious Liability for Acts of Employee. Government Code section 815.2
- Public Employee Immunity. Government Code section 821.6.
- ~~In *Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470], the court concluded that "the failure to instruct under section 821.6 was prejudicial error." The court observed that~~ "The ~~[~~d~~]~~efendants did not enjoy an unqualified immunity from suit. Their immunity would have depended on their proving by a preponderance of the evidence [that] they were acting within the scope of their employment in doing the acts alleged to constitute malicious prosecution." (*Tur, supra*, 51 Cal.App.4th at p. 904 [failure to instruct jury under section 821.6 was prejudicial error]~~*Ibid.*~~)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § 434 et seq.~~368~~

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §

Draft—Not Approved by Judicial Council

357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process,* § 147.31 (Matthew Bender)

VF-1500. Malicious Prosecution—Former Criminal Proceeding

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] actively involved in causing [***name of plaintiff***] to be arrested [and prosecuted] [or in causing the continuation of the prosecution]?**
   ____ 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***] act primarily for a purpose other than that of bringing [***name of plaintiff***] to justice?**
   ____ Yes ____ No

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

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ 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. **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, April 2008, December 2010, December 2016, May 2018

Directions for Use

This verdict form is based on CACI No. 1500, *Former Criminal Proceeding.* This form can be adapted to include the affirmative defense of reliance on counsel. See VF-1502 for a form that includes this affirmative defense.

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.

In question 1, include the bracketed reference to prosecution if the arrest was without a warrant.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI No. 1500, *Former Criminal Proceeding,* elements 2 and 3.)

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

If 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.

1730. Slander of Title—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by [making a statement/taking an action] that cast doubts about [***name of plaintiff***]'s ownership of [***describe real or personal property, e.g., the residence located at [address]***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [made a statement/[***specify other act, e.g., recorded a deed***] that cast doubts about [***name of plaintiff***]'s ownership of the property;**

2. **That the [statement was made to a person other than [***name of plaintiff***]/[***specify other publication, e.g., deed became a public record***];**

3. **That [the statement was untrue and] [***name of plaintiff***] did in fact own the property;**

4. **That [***name of defendant***] [knew that/acted with reckless disregard of the truth or falsity as to whether] [***name of plaintiff***] owned the property;**

5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the [statement/***e.g., deed***], causing [***name of plaintiff***] financial loss;**

6. **That [***name of plaintiff***] did in fact suffer immediate and direct financial harm because someone else acted in reliance on the [statement/***e.g., deed***];**

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

New December 2012; Revised May 2018

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

An additional element of a slander of title claim is that the alleged slanderous statement was without privilege or justification. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1335 [220 Cal.Rptr.3d 408].) If this element presents an issue for the jury, an instruction on it must be given.~~The privileges of Civil Code section 47 apply to actions for slander of title. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the affirmative defense~~

~~and frame the privilege.~~

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is alleged, give CACI No. 1724, *Fair and True Reporting Privilege.* (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.~~The privilege of Civil Code section 47(c), applicable to communications between "interested" persons (see CACI No. 1723, *Qualified Privilege*), requires an absence of malice. To defeat this privilege, the plaintiff must show malice defined as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406].) While defendant has the burden of proving that an allegedly defamatory statement falls within the scope of the common-interest privilege, plaintiffs have the burden of proving that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) Give CACI No. 1723 if the defendant presents evidence to put the privilege of Civil Code section 47(c) at issue.~~

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (~~see~~ See *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381 [295 P.2d 405]~~*Albertson, supra*, 46 Cal.2d at p. 381.~~) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683]~~.~~) or from accusations made without foundation (element 4) (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- "[S]lander of title is not a form of deceit. It is a form of the separate common law tort of disparagement, also sometimes referred to as injurious falsehood." (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1253 [214 Cal.Rptr.3d 628].)

- "The Supreme Court has recently determined a viable disparagement claim, which necessarily includes a slander of title claim, requires the existence of a 'misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication.' " (*Finch Aerospace Corp., supra,* 8 Cal.App.5th at p. 1253

- " 'Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a

reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.' 'However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property.' " (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- "Slander of title 'occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]' The false statement must be ' "maliciously made with the intent to defame." ' " (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)

- "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity." (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)

- "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused." (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)

- "Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss." (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)

- "In an action for wrongful disparagement of title, a plaintiff may recover (1) the expense of legal proceedings necessary to remove the doubt cast by the disparagement, (2) financial loss resulting from the impairment of vendibility of the property, and (3) general damages for the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property." (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 624 [225 Cal.Rptr.3d 711].)

- "Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code." (*Albertson, supra,* 46 Cal.2d at pp. 378–379, internal citations

omitted.)

- "[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given." (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)

- "The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)

- "The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c)." (*Lundquist, supra,* 7 Cal.4th at pp. 1202–1203, internal citations omitted.)

- ~~" 'The burden is also upon the defendant to prove any affirmative defense upon which he relies, including . . . that the communication is privileged. But when the pleadings admit . . . such facts, manifestly the defendant is thereby relieved of this burden.' 'Normally, privilege is an affirmative defense which must be pleaded in the answer [citation]. However, if the complaint discloses existence of a qualified privilege, it must allege malice to state a cause of action [citation].' Finally, 'Ordinarily privilege must be specially pleaded by the defendant, and the burden of proving it is on him. [Citations.] But where the complaint shows that the communication or publication is one within the classes qualifiedly privileged, it is necessary for the plaintiff to go further and plead and prove that the privilege is not available as a defense in the particular case, e.g., because of malice.'" (*Smith, supra,* 177 Cal.App.3d at pp. 630–631, internal citations omitted.)~~

- "Civil Code section 47(b)(4) clearly describes the conditions for application of the [litigation]

privilege to a recorded lis pendens as follows: 'A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.' Those conditions are (1) the lis pendens must identify a previously filed action and (2) the previously filed action must be one that affects title or right of possession of real property. We decline to add a third requirement that there must also be evidentiary merit." (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 476 [149 Cal.Rptr.3d 716], internal citation omitted.)

- "[T]he property owner may recover for the impairment of the vendibility 'of his property' without showing that the loss was caused by prevention of a particular sale. 'The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.' " (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts § ~~642~~747

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts § ~~1703~~1886

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.80 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.90 (Matthew Bender)

1731. Trade Libel—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making a statement that disparaged [***name of plaintiff***]'s [***specify product***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made a statement that [would be clearly or necessarily understood to have] disparaged the quality of [***name of plaintiff***]'s [***product/service***];**

2. **That the statement was made to a person other than [***name of plaintiff***];**

3. **That the statement was untrue;**

4. **That [***name of defendant***] [knew that the statement was untrue/acted with reckless disregard of the truth or falsity of the statement];**

5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the statement, causing [***name of plaintiff***] financial loss;**

6. **That [***name of plaintiff***] suffered direct financial harm because someone else acted in reliance on the statement; and**

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

New December 2013; Revised June 2015, May 2018

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California's appellate courts (see *Polygram Records, Inc.*, *supra*, 170 Cal.App.3d at p. 548.), perhaps because of the difficulty in proving damages. (See *Erlich*, *supra*, 224 Cal.App.2d at pp. 73−74.)

Include the optional language in element 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant's words. Disparagement by reasonable implication requires more than a statement that may conceivably or plausibly be construed as derogatory. A "reasonable implication" means a clear or necessary inference. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts, which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360−1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is

required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) ~~The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].)~~ If a privilege is claimed, additional instructions will be necessary to ~~state the affirmative defense and~~ frame the privilege.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim. ~~For further discussion, see the Directions for Use to CACI No. 1730, *Slander of Title—Essential Factual Elements*. See also CACI No. 1723, *Common Interest Privilege—Malice*.~~

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700−1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- "Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses 'all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.' [Citation.] [¶] To constitute trade libel, a statement must be false." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [154 Cal.Rptr.3d 698].)

- "To constitute trade libel the statement must be made with actual malice, that is, with knowledge it was false or with reckless disregard for whether it was true or false." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782].)

- "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (*Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

- "[A]n action for 'slander of title' … is a form of action somewhat related to trade libel … ." (*Erlich, supra,* 224 Cal.App.2d at p. 74.)

- "Confusion surrounds the tort of 'commercial disparagement' because not only is its content blurred and uncertain, so also is its very name. The tort has received various labels, such as 'commercial disparagement,' 'injurious falsehood,' 'product disparagement,' 'trade libel,' 'disparagement of property,' and 'slander of goods.' These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim." (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 289.)

- "The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: 'One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [P] (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [P]*(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity*.' [¶] Section 626 of Restatement Second of Torts in turn states: 'The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property.' " (*Melaleuca, Inc., supra,* 66 Cal.App.4th at pp. 1360−1361, original italics.)

- "According to section 629 of the Restatement Second of Torts (1977), '[a] statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and [¶] (a) the publisher intends the statement to cast the doubt, or [¶] (b) the recipient's understanding of it as casting the doubt was reasonable.' " (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 288.)

- "What distinguishes a claim of disparagement is that an injurious falsehood has been directed *specifically* at the plaintiff's business or product, derogating that business or product and thereby causing that plaintiff special damages." (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 294, original italics.)

- "The Restatement [2d Torts] view is that, like slander of title, what is commonly called 'trade libel' is a particular form of the tort of injurious falsehood and need not be in writing." (*Polygram Records, Inc., supra,* 170 Cal.App.3d at p. 548.)

- "While … general damages are presumed in a libel of a businessman, this is not so in action for trade libel. Dean Prosser has discussed the problems in such actions as follows: 'Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The]

plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' " (*Erlich, supra,* 224 Cal.App. 2d at pp. 73−74.)

- "Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant's business, the 'limitations that define the First Amendment's zone of protection' are applicable. '[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property . . . .' " (*Hofmann Co., supra,* 202 Cal.App.3d at p. 397, internal citation omitted.)

- "If respondents' statements about appellant are opinions, the cause of action for trade libel must of course fail. 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' Statements of fact can be true or false, but an opinion─'a view, judgment, or appraisal formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge'─is the result of a mental process and not capable of proof in terms of truth or falsity." (*Hofmann Co., supra,* 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)

- "[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood." (*Nichols, supra,* 169 Cal.App.3d at p. 773.)

- "Disparagement by 'reasonable implication' requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A 'reasonable implication' in this context means a clear or necessary inference." (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 295, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 747–750~~642–645~~

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* § 340.103 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation*, 9.04

1802. False Light

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] publicized information or material that showed [***name of plaintiff***] in a false light;**

2. **That the false light created by the publication would be highly offensive to a reasonable person in [***name of plaintiff***]'s position;**

3. **[That there is clear and convincing evidence that [***name of defendant***] knew the publication would create a false impression about [***name of plaintiff***] or acted with reckless disregard for the truth;]**

   [*or*]

   [That [*name of defendant***] was negligent in determining the truth of the information or whether a false impression would be created by its publication;]**

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

   [*or*]

   [That [*name of plaintiff***] sustained harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]**

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

~~**[In deciding whether [*name of defendant*] publicized the information or material, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information or material was substantially certain to become public knowledge.]**~~

New September 2003; Revised November 2017, May 2018

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

False light claims are subject to the same constitutional protections that apply to defamation claims.

(*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34], overruled on other grounds in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 696, fn. 9 [21 Cal.Rptr.3d 663, 101 P.3d 552] [false light claim should meet the same requirements of a libel claim, including proof of malice when required].) Thus, a knowing violation of or reckless disregard for the plaintiff's rights is required if the plaintiff is a public figure ~~or the subject matter of the communication is a matter of public concern~~. (See *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 721–722 [257 Cal.Rptr. 708, 771 P.2d 406].) Give the first option for element 3 if the publication involves a public figure ~~or a matter of public concern~~. ~~Otherwise, g~~Give the second option for a private citizen, at least with regard to a matter of private concern. (See *id.* at p. 742 [private person need prove only negligence rather than malice to recover for defamation].)

There is perhaps some question as to which option for element 3 to give for a private person if the matter is one of public concern. For defamation, a private figure plaintiff must prove malice to recover presumed and punitive damages for a matter of public concern, but not to recover for damages to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].) No case has been found that provides for presumed damages for a false light violation. Therefore, the court will need to decide whether proof of malice is required from a private plaintiff even though the matter may be one of public concern.

If the jury will also be instructed on defamation, ~~the court should consider whether~~ an instruction on false light would be superfluous and therefore need not be given. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802]; ~~;~~ see also *Briscoe, supra,* 4 Cal.3d at p. 543.) For defamation, utterance of a defamatory statement to a single third person constitutes sufficient publication. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307 [81 Cal.Rptr. 855, 461 P.2d 39]; but see *Warfield v. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 660 [262 Cal.Rptr. 890] [false light case holding that "account" published in defendant's membership newsletter does not meet threshold allegation of a general public disclosure].)

~~Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." The final paragraph addressing this point has been placed in brackets because it may not be an issue in every case.~~

Sources and Authority

- " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 [217 Cal.Rptr.3d 234].)

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a

reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238-239 [228 Cal.Rptr. 215, 721 P.2d 97], internal citation omitted.)

- "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg, supra,* 74 Cal.App.4th at p. 1385, fn. 13, internal citations omitted.)

- "[A] 'false light' cause of action 'is in substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel claim ... including proof of malice and fulfillment of the requirements of [the retraction statute] section 48a [of the Civil Code].' " (*Briscoe, supra,* 4 Cal.3d at p. 543, internal citation omitted.)

- "Because in this defamation action [plaintiff] is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages for actual injury to his reputation. But [plaintiff] was required to prove actual malice to recover punitive or presumed damages … ." (*Khawar, supra,* 19 Cal.4th at p. 274.)

- "The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy." (*Reader's Digest Assn., Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137, 690 P.2d 610], internal citations omitted.)

- "[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (~~In~~ *Time, Inc. v. Hill* (1967) 385 U.S. 374, 387–388 [87 S.Ct. 534, 17 L.Ed.2d 456].~~), the Court held that the *New York Times v. Sullivan* malice standard applied to a privacy action that was based on a "false light" statute where the matter involved a public figure. Given the similarities between defamation and false light actions, it appears likely that the negligence standard for private figure defamation plaintiffs announced in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [94 S.Ct. 2997, 41 L.Ed.2d 789] should apply to private figure false light plaintiffs.~~

- "We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required." (*Fellows, supra,* 42 Cal.3d at p. 251.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.04 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.33 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts §§ 20:12–20:15 (Thomson Reuters)

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 [[***name of defendant***]'s conduct in acting or failing to act was [intentional and unreasonable/unintentional, but negligent or reckless]/[the condition that [***name of defendant***] created or permitted to exist was the result of an abnormally dangerous activity]];**

~~3~~4. **That this condition substantially interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**

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

~~5~~6. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

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

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

~~8~~9. **That the seriousness of the harm outweighs the public benefit of [***name of defendant***]'s conduct.**

New September 2003; Revised February 2007, December 2011, December 2015, June 2016, May 2017, May 2018

Directions for Use

Private nuisance liability depends on some sort of conduct by the defendant that either directly and unreasonably interferes with the plaintiff's property or creates a condition that does so. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100 [253 Cal.Rptr. 470].) Element 2 requires that the defendant have acted to create a condition or allowed a condition to exist by failing to act.

The act that causes the interference may be intentional and unreasonable. Or it may be unintentional but caused by negligent or reckless conduct. Or it may result from an abnormally dangerous activity for which there is strict liability. However, if the act is intentional but reasonable, or if it is entirely accidental, there is generally no liability. (*Lussier*, *supra*, 206 Cal.App.3d at p. 100.)

The intent required is only to do the act that interferes, not an intent to cause harm. (*Lussier*, *supra*, 206 Cal.App.3d at pp. 100, 106; see Rest.2d Torts, § 822.) For example, it is sufficient that one intend to chop down a tree; it is not necessary to intend that it fall on a neighbor's property.

If the condition results from an abnormally dangerous activity, it must be one for which there is strict liability. (*Lussier*, *supra*, 206 Cal.App.3d at p. 100; see Rest.2d Torts, § 822).

There may be an exception to the scienter requirement of element 3 for at least some harm caused by trees. There are cases holding that a property owner is strictly liable for damage caused by tree branches and roots that encroach on neighboring property. (See *Lussier*, *supra*, 206 Cal.App.3d at p.106, fn. 5; see also *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 43 [328 P.2d 269] [absolute liability of an owner to remove portions of his fallen trees that extend over and upon another's land]; cf. *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422] [plaintiff must prove negligent maintenance of trees that fell onto plaintiff's property in a windstorm].) Do not give element 3 if the court decides that there is strict liability for damage caused by encroaching or falling trees.

If the claim is that the defendant failed to abate a nuisance, negligence must be proved. (*City of Pasadena*, *supra*, 228 Cal.App.4th at p. 1236.)

Element ~~8~~ 9 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.)

- "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.)

- "A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1178 [227 Cal.Rptr.3d 390].)

- "[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.)

- "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; … ." (*Mendez, supra*, 3 Cal.App.5th at p. 262.)

- "The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: ' "Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must

put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability … is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." ' " (*Mendez, supra,* 3 Cal.App.5th at p. 263, original italics.)

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

- "Although the central idea of nuisance is the unreasonable invasion of this interest and not

the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. 'The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability.' " (*Lussier, supra*, 206 Cal.App.3d at p. 100, internal citations omitted.)

- "We do not intend to suggest, however, that one is strictly liable for damages that arise when a natural condition of one's land interferes with another's free use and enjoyment of his property. Such a rule would, quite anomalously, equate natural conditions with dangerous animals, ultrahazardous activities, or defective products, for which strict liability is reserved." (*Lussier, supra*, 206 Cal.App.3d at pp. 101–102.)

- "Clearly, a claim of nuisance based on our example is easier to prove than one based on negligent conduct, for in the former, a plaintiff need only show that the defendant committed the acts that caused injury, whereas in the latter, a plaintiff must establish a duty to act and prove that the defendant's failure to act reasonably in the face of a known danger breached that duty and caused damages." (*Lussier, supra*, 206 Cal.App.3d at p. 106.)

- "We note, however, a unique line of cases, starting with *Grandona v. Lovdal* (1886) 70 Cal. 161 [11 P. 623], which holds that to the extent that the branches and roots of trees encroach upon another's land and cause or threaten damage, they may constitute a nuisance. Superficially, these cases appear to impose nuisance liability in the absence of wrongful conduct." (*Lussier, supra*, 206 Cal.App.3d at p. 102, fn. 5[but questioning validity of such a rule], internal citations omitted.)

- "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].)

- "It is the general rule that the unreasonable, unwarrantable or unlawful use by a person of his own property so as to interfere with the rights of others is a nuisance [citation]. In fact, any unwarranted activity which causes substantial injury to the property of another or obstructs its reasonable use and enjoyment is a nuisance which may be abated. And, even a lawful use of one's property may constitute a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent the neighbor from reasonable enjoyment of his own property [citation]." (*McBride, supra*, 18 Cal.App.5th at p. 1180.)

- "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.)

Secondary Sources

13 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Equity, § 174~~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)

2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to harassment based on [his/her] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] was [***protected status, e.g., a woman***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524,

"Severe or Pervasive" Explained.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs.*, *supra*, ~~*v. Superior Court* (2003)~~ 31 Cal.4th at p.~~1026,~~ 1042 ~~[6 Cal.Rptr.3d 441, 79 P.3d 556]~~.)
- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other

than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1041.)

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.2d 464].)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

- "Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant." (*Bihun, supra*, 13 Cal.App.4th at p. 1000.)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an

abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- ~~Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)~~

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers. Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination

on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239 [166 Cal.Rptr.3d 676].)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis, supra*, 224 Cal.App.4th at p. 1527 fn. 8, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

Draft—Not Approved by Judicial Council

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That [***name of plaintiff***], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual*

Defendant. For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) ~~vicarious~~ strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile

or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment**.**' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment**.**' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an

abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs.*, *supra*, ~~*v. Superior Court* (2003)~~ 31 Cal.4th at p.~~1026,~~ 1041 ~~[6 Cal.Rptr.3d 441, 79 P.3d 556]~~, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services*, *supra*, 31 Cal.4th at p. 1041.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections*

(1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that widespread sexual favoritism at [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or

sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) ~~vicarious~~ strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the

manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- " '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' … [¶] California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by

implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs.*, *supra*, ~~*v. Superior Court* (2003)~~ 31 Cal.4th at pp.~~1026,~~ 1040-1041 ~~[6 Cal.Rptr.3d 441, 79 P.3d 556]~~, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services*, *supra*, 31 Cal.4th at p. 1041.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2522A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to harassment based on [***describe protected status, e.g., race, gender, or age***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] was [***protected status, e.g., a woman***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from Former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained,* and CACI No. 2524, *"Severe or Pervasive" Explained.*

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)
- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ' "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," ' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ' " 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " ' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis, supra,* 224 Cal.App.4th at p. 1525, original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the

attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1229 [166 Cal.Rptr.3d 676].) .)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis, supra*, 224 Cal.App.4th at p. 1527, fn. 8, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters)

2522B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of employer***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***];**

2. **That [***name of plaintiff***] although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe*

or Pervasive" Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)
- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that

employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or

abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

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2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that widespread sexual favoritism by [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread and also severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive because of the widespread sexual favoritism;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

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

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

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained,* and CACI No. 2524, *"Severe or Pervasive" Explained.*

If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

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- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)
- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

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3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [[requesting/taking] [family care/medical] leave/[***other protected activity***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [[requested/took] [family care/medical] leave/[***other protected activity***]];**

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [[request for/taking of] [family care/medical] leave/[***other protected activity***]] was a substantial motivating reason for [discharging/[***other adverse employment action***]] [him/her];**

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

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

New September 2003; Revised December 2012, June 2013, May 2018

Directions for Use

Use this instruction in cases of alleged retaliation for an employee's exercise of rights granted by the California Family Rights Act (CFRA). (See Gov. Code, § 12945.2(*l*).) The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

This instruction may also be given for a claim of retaliation under the New Parent Leave Act. The "other protected activity" option of the opening paragraph and elements 2 and 4 may be used to assert what is protected from retaliation under this act. (See Gov. Code, § 12945.6(g), (h).) In element 1, use "new parent" leave instead of "family care" or "medical."

~~The~~ Both statutes reach~~es~~ a broad range of adverse employment actions short of actual discharge. (See Gov. Code, §§ 12945.2(*l*), 12945.6(g).) Element 3 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses the term "substantial motivating reason" to express both intent and causation between the

employee's exercise of a CFRA right and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to CFRA retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited Under California Family Rights Act. Government Code section 12945.2(*l*), (t).
- Retaliation Prohibited Under New Parent Leave Act. Government Code section 12945.6(g), (h).
- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).
- "The elements of a cause of action for retaliation in violation of CFRA are " '(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA [leave]." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 604 [210 Cal.Rptr.3d 59].)
- "Similar to causes of action under FEHA, the *McDonnell Douglas* burden shifting analysis applies to retaliation claims under CFRA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248 [206 Cal.Rptr.3d 841].)
- " 'When an adverse employment action "follows hard on the heels of protected activity, the timing often is strongly suggestive of retaliation." ' " (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 571 [212 Cal.Rptr.3d 682].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1058–1060

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1300, 12:1301 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][c] (Matthew Bender)

2630. Violation of New Parent Leave Act—Essential Factual Elements (Gov. Code, § 12945.6)

[*Name of plaintiff***] claims that [***name of defendant***] refused to [grant [him/her] parental leave/return [him/her] to the same or a comparable job when [his/her] parental leave ended]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] employs at least 20 employees within 75 miles of the site where [***name of plaintiff***] worked;**

2. **That [***name of plaintiff***] worked for [***name of defendant***] for more than a year, and for at least 1,250 hours during the previous 12 months;**

3. **That [***name of plaintiff***] requested leave to bond with a new child within one year of the child's [birth/adoption/foster care placement];**

4. **That [***name of defendant***] refused to [grant [***name of plaintiff***]'s request for parental leave/return [***name of plaintiff***] to the same or a comparable job when [his/her] parental leave ended];**

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

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

[If before the leave began, [*name of defendant***] did not guarantee [***name of plaintiff***] employment in the same or a comparable position on return from the leave, then [***name of defendant***] is considered to have refused to grant [***name of plaintiff***]'s request for parental leave.]**

New May 2018

Directions for Use

The New Parent Leave Act (Gov. Code, § 12945.6) extends some of the rights provided to employees by the California Family Rights Act (CFRA; Gov. Code, § 12945.2) to employees of employers with 20 or more employees. (See Gov. Code, § 12945.6(a)(1); cf. Gov. Code, § 12945.2(b) [CFRA applies to employers with 50 or more employees].). The New Parent Leave Act allows employees to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. The act also requires the employer, before the leave begins, to guarantee employment in the same or a comparable position on the termination of the leave. (Gov. Code, § 12945.6(a)(1).) The employer must maintain the employee's health care coverage during the leave. (Gov. Code, § 12945.6(a)(2).)

Elements 1 and 2 set forth the eligibility requirements for employer and employee under the act. (See Gov. Code, § 12945.6(a)(1).) These elements may be omitted if there are no disputed facts over the act's

applicability to the parties.

For an instruction that can be modified for use for a claim of retaliation under the New Parent Leave Act (see Gov. Code, § 12945.6(h)), see CACI No. 2620, *CFRA Rights Retaliation—Essential Factual Elements*.

Sources and Authority

- New Parent Leave Act. Government Code section 12945.6.

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1060, 1061

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes,* ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA),* ¶¶ 12:146, 12:390, 12:421, 12:852–12:857, 12:1201, 12:1300 (The Rutter Group)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[*Name of plaintiff***] claims that [he/she] was paid at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of plaintiff***] was paid less than the rate paid to [a] person[s] of [the opposite sex/another race/another ethnicity] working for [***name of defendant***];**

2. That [*name of plaintiff***] was performing substantially similar work as the other person[s] with regard to skill, effort, and responsibility; and**

3. That [*name of plaintiff***] was working under similar working conditions as the other person[s].**

New May 2018

Directions for Use

The California Equal Pay Act prohibits paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work.. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which he or she is entitled may bring a civil action to recover the balance of the wages, including interest, and an equal amount as liquidated damages. Costs and attorney fees may also be awarded. (Lab. Code, § 1197.5(h).)

There are a number of defenses that the employer may assert to defend what appears to be an improper pay differential. (Lab. Code, § 1197.5(a), (b).) See CACI Nos. 2741, *Affirmative Defense—Different Pay Justified,* and 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity,* for instructions on the employer's affirmative defenses. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Right to Equal Pay Based on Gender, Race, or Ethnicity. Labor Code section 1197.5(a), (b).
- Private Right of Action to Enforce Equal Pay Claim. Labor Code section 1197.5(h).
- "This section was intended to codify the principle that an employee is entitled to equal pay for equal work without regard to gender." (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104 [165 Cal.Rptr. 100, 611 P.2d 441].)
- "[I]t is appropriate to apply the three-stage burden-shifting test which is used to establish sex discrimination under the federal Equal Pay Act to the trial of an action under section 1197.5 that alleges sexual discrimination by the payment of unequal wages. In the equal pay context, the burden-shifting test requires only that the plaintiff must show that the employer pays workers of one sex more than workers of the opposite sex for equal work [Citation]. If the plaintiff does so,

the employer then has the burden of showing that one of the exceptions listed in section 1197.5 is applicable [Citation]. If the employer does so, the employee may show that the employer's stated reasons are pretextual [Citation]." (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 626 [3 Cal.Rptr.3d 844].)

- "The California statute is nearly identical to the federal Equal Pay Act of 1963. (29 U.S.C. § 206(d)(1).) Accordingly, in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute: 'Although state and federal antidiscrimination laws "differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute." ' " (*Green, supra,* 111 Cal.App.4th at p. 623 [decided before passage of the Fair Pay Act of 2015, which introduced significant differences between federal and state law].)

- "To establish her prima facie case, [plaintiff] had to show not only that she is paid lower wages than a male comparator for equal work, but that she has selected the proper comparator. 'The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects [*sic*] both male and female employees equally, there can be no EPA violation. [Citation.] [A plaintiff] cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.' " (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324–325 [55 Cal.Rptr.3d 732].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, Employment Law: *Wage and Hour Disputes,* § 250.14 (Matthew Bender)

2741. Affirmative Defense—Different Pay Justified

[*Name of defendant***] claims that [he/she/it] was justified in paying [***name of plaintiff***] a wage rate that was less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this defense, [***name of defendant***] must prove all of the following:**

1. That the wage differential was based on one or more of the following factors:

[a. A seniority system;]

[b. A merit system;]

[c. A system that measures earnings by quantity or quality of production;]

[d. (*Specify alleged bona fide factor(s) other than sex, race, or ethnicity, such as education, training, or experience.***).]**

2. That each factor was applied reasonably; and

3. That the factor[s] that [*name of defendant***] relied on account[s] for the entire wage differential.**

Prior salary does not, by itself, justify any disparity in current compensation.

New May 2018

Directions for Use

The California Equal Pay Act presents four factors that an employer may offer to justify a pay differential that results in an apparent pay disparity based on gender, race, or ethnicity. Factors a, b, and c in element 1 are specific; factor d may perhaps be considered a "catchall" factor. (See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196 [94 S.Ct. 2223, 2229, 41 L.Ed.2d 1, 10-11].) Choose the factor or factors that the employer asserts as justification.

If the catchall factor d is selected, the jury must also be instructed with CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, which establishes what bona fide factors other than sex, race, or ethnicity may justify a pay differential. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Factors Justifying Pay Differential. Labor Code section 1197.5(a)(1), (b)(1).
- "The California statute is nearly identical to the federal Equal Pay Act of 1963. (29 U.S.C. § 206(d)(1).) Accordingly, in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute: 'Although state and federal antidiscrimination laws

"differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute." ' " (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 623 [3 Cal.Rptr.3d 844] [decided before passage of the Fair Pay Act of 2015, which introduced significant differences between federal and state law].)

- "The [Federal Equal Pay] Act also establishes four exceptions -- three specific and one a general catchall provision -- where different payment to employees of opposite sexes 'is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.' " (*Corning Glass Works*, *supra*, 417 U.S. at p. 196.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

2742. Bona Fide Factor Other Than Sex, Race, or Ethnicity

[*Name of defendant***] claims that [***specify bona fide factor other than sex, race, or ethnicity***] is a legitimate factor other than [sex/race/ethnicity] that justifies paying [***name of plaintiff***] at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity].**

[*Specify factor***] is a factor that justifies the pay differential only if [***name of defendant***] proves all of the following:**

1. That the factor is not based on or derived from a [sex/race/ethnicity]-based differential in compensation;

2. That the factor is job related with respect to [*name of plaintiff***]'s position; and**

3. That the factor is consistent with a business necessity.

A "business necessity" means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve.

This defense does not apply, however, if [*name of plaintiff***] proves that an alternative business practice exists that would serve the same business purpose without producing the pay differential.**

New May 2018

Directions for Use

This instruction must be given along with CACI No. 2741, *Affirmative Defense—Different Pay Justified,* if factor 1 of element d of CACI No. 2741 is chosen: a bona fide factor other than sex, race, or ethnicity, such as education, training, or experience. This factor applies only if the employer demonstrates that the factor is not based on or derived from a sex, race, or ethnicity-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. "Business necessity" means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve. This defense does not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. (See Lab. Code, § 1197.5(a)(1)(D), (b)(1)(D).)

Sources and Authority

- Bona Fide Factor Other Than Sex, Race, or Ethnicity. Labor Code section 1197.5(a)(1)(D), (b)(1)(D).

- "[D]efendant provided sufficient evidence to establish that [male employee]'s experience justified his employment at a substantially greater wage rate than [plaintiff]. Defendant therefore established that business reasons other than sex led to the wage differential." (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 632 [3 Cal.Rptr.3d 844].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1077.10 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.14 (Matthew Bender)

2743. Equal Pay Act—Retaliation—Essential Factual Elements (Lab. Code, § 1197.5(k))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [pursuing/assisting another in the enforcement of] [his/her] right to equal pay regardless of [sex/race/ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify acts taken by plaintiff to enforce or assist in the enforcement of the right to equal pay***];**

2. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

3. **That [***name of plaintiff***]'s [pursuit of/assisting in the enforcement of another's right to] equal pay was a substantial motivating reason for [***name of defendant***]'s [discharging/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

New May 2018

Directions for Use

Use this instruction in cases of alleged retaliation against an employee under the Equal Pay Act. The act prohibits adverse employment actions against an employee who has taken steps to enforce the equal pay requirements of the act. Also, the employer cannot prohibit an employee from disclosing his or her own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights. (Lab. Code, § 1197.5(k)(1).) An employee who has been retaliated against may bring a civil action for reinstatement, reimbursement for lost wages and work benefits, interest, and equitable relief. (Lab. Code, § 1197.5(k)(2).)

Note that there are two causation elements. First there must be a causal connection between the employee's pursuit of equal pay and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).

Element 3 uses the term "substantial motivating reason" to express both intent and causation between the employee's pursuit of equal pay and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to the Equal Pay Act retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited Under Equal Pay Act. Labor Code section 1197.5(k).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1077.20 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.14 (Matthew Bender)

2800. Employer's Affirmative Defense—Injury Covered by Workers' Compensation

[*Name of defendant***] claims that ~~[he/she/it] is not responsible for any harm that [***~~*name of plaintiff*~~***]~~ ~~may have suffered because~~ [***name of plaintiff*~~he/she~~***]* was [***name of defendant***]'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] was [***name of defendant***]'s employee;**

2. **That [***name of defendant***] [had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]/was self-insured for workers' compensation claims [at the time of [***name of plaintiff***]'s injury]];~~ and~~**

3. **That [***name of plaintiff***]'s injury occurred while [he/she] was working, or performing a task for or related to the work [***name of defendant***] hired [him/her] to do; and**

4. **That this [task/work] contributed to causing the injury.**

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

New September 2003; Revised October 2004, May 2018

Directions for Use

This instruction is intended for use if the plaintiff is suing a defendant claiming to be the plaintiff's employer. This instruction is not intended for use if the plaintiff is suing under an exception to the workers' compensation exclusivity rule.

Element 3 expresses the requirement that the employee be acting in the course of employment at the time of injury. Element 4 expresses what is referred to as "industrial causation;" that the work was a contributing cause of the injury. The two requirements are different, and both must be proved. (See *Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 625 [210 Cal.Rptr.3d 362].) For an instruction asserting that element 3 does not apply, see CACI No. 2805, *Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment*.

For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (CACI Nos. 3700–3726). These instructions may need to be modified to fit this context.

Labor Code section 3351 defines "employee" for purposes of workers' compensation. Labor Code section 3352 sets forth exceptions. ~~Note that t~~This instruction should not be given if the plaintiff/employee has been determined to fall within a statutory exception.~~ For exceptions to Labor Code section 3351, see Labor Code section 3352.~~

If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Responsibility series. These instructions may need to be modified to fit this context.

Sources and Authority

- Exclusive Remedy. Labor Code section 3602(a).
- Conditions of Compensation. Labor Code section 3600(a).
- If Conditions of Compensation Not Met. Labor Code section 3602(c).
- "Employee" Defined. Labor Code section 3351.
- Presumption of Employment Status. Labor Code section 3357.
- Failure to Secure Payment of Compensation. Labor Code section 3706.
- "[T]he basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)
- "Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving 'that the (act) is a bar to the employee's ordinary remedy,' we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had 'secured the payment of compensation' in accordance with the provisions of the act." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347, 587 P.2d 1160], internal citations omitted.)
- "A defendant need not plead and prove that it has purchased workers' compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers' compensation law, and no facts presented in the pleadings or at trial negate the workers' compensation law's application or the employer's insurance coverage." (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554], internal citations omitted.)
- "[T]he fact that an employee has received workers' compensation benefits from some source does not bar the employee's civil action against an uninsured employer. Instead, '[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy [and where the employer chooses] not to pay that price ... it should not be immune from liability.' " (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [101 Cal.Rptr.2d 325], internal citations omitted.)

- "Under the Workers' Compensation Act, employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' 'When the conditions of compensation exist, recovery under the workers' compensation scheme "is the exclusive remedy against an employer for injury or death of an employee." ' " (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 986 [105 Cal.Rptr.2d 88], internal citations omitted.)

- "Unlike many other states, in California workers' compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a 'tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.' " (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723 [112 Cal.Rptr.2d 195], internal citations omitted.)

- "It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney, supra,* 23 Cal.3d at p. 96, internal citations and footnote omitted.)

- "California courts have held worker's compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee's injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee's wrongful death, by an employee's spouse for loss of the employee's services or consortium, and for emotional distress suffered by a spouse in witnessing the employee's injuries." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476, 945 P.2d 781], internal citations omitted.)

- " 'An employer-employee relationship must exist in order to bring the ... Act into effect. (§ 3600)' However, the coverage of the Act extends beyond those who have entered into 'traditional contract[s] of hire.' '[S]ection 3351 provides broadly that for the purpose of the ... Act, " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written ... .' " Given this 'section's explicit use of the disjunctive,' a contract of hire is not 'a prerequisite' to the existence of an employment relationship. Moreover, under section 3357, '[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded ... , is presumed to be an employee.' " (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060−1061 [40 Cal.Rptr.2d 116, 892 P.2d 150], internal citations omitted.)

- "Given these broad statutory contours, we believe that an 'employment' relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act." (*Laeng v. Workmen's Comp. Appeals Bd.*

(1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377, 494 P.2d 1], internal citations omitted.)

- "[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action." (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808 [247 Cal.Rptr. 347], internal citation omitted.)

- "The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law, and the Court of Appeal may independently review those facts to determine the correct answer." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [240 Cal.Rptr. 811], internal citations omitted.)

- "An employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or 'special' employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or 'general' employer. Identifying and analyzing such situations 'is one of the most ancient and complex questions of law in not only compensation but tort law.' " (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578], internal citation omitted.)

- "In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the 'definitional reach of these covered employment relationships is very broad.' A covered employee is 'every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.' 'Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.' ... [T]hese provisions mandate a broad and generous interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon 'informed consent,' but rather on the parties' legal status. ... [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law." (*Santa Cruz Poultry, Inc., supra*, 194 Cal.App.3d at pp. 583-584, internal citations omitted.)

- " 'The requirement of ... section 3600 is twofold. On the one hand, the injury must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." Thus " '[a]n employee is in the "course of his employment" when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.' " And, ipso facto, an employee acts within the course of his employment when " 'performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.' " ' [¶] 'On the other hand, the statute requires that an injury "arise out of" the employment. ... It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment ... ." That is, the employment and the injury must be linked in some causal fashion.' " (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184], internal citations and footnote omitted.)

- "The requirements that an injury arise out of employment or be proximately caused by employment are sometimes referred to together as the requirement of industrial causation. It is a looser concept of

causation than the concept of proximate cause employed in tort law. In general, the industrial causation requirement is satisfied 'if the connection between work and the injury [is] a contributing cause of the injury … .' " (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 624 [210 Cal.Rptr.3d 362], internal citation omitted.)

- "For our purposes here, it is important that 'arising out of' and 'in the course of' are two separate requirements. Even if it is conceded that an employee was injured while performing job tasks in the workplace during working hours, the exclusivity rule applies only if it also is shown that the work was a contributing cause of the injury." (*Lee, supra,* 5 Cal.App.5th at p. 625.)

- "The jury could properly make this finding [that conduct was not within scope of employment] by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly." (*Lee, supra,* 5 Cal.App.5th at pp. 628–629.)

- "The concept of 'scope of employment' in tort is more restrictive than the phrase 'arising out of and in the course of employment,' used in workers' compensation." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057 [103 Cal.Rptr.2d 790], internal citations omitted.)

- "Whether an employee's injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law." (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503], internal citations omitted.)

- "Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer's business." (*Wright, supra,* 95 Cal.App.4th at p. 354.)

Secondary Sources

2 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Workers' Compensation, §§ 23–49~~20, 24–26, 31, 34, 39–42~~

Chin, et al., California Practice Guide: Employment Litigation, Ch. 15-F, Preemption Defenses--California Workers' Compensation Act Preemption ¶¶ 15:520 et seq., 15:555 (The Rutter Group)~~Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 3:515, 12:192, 15:507, 15:509, 15:523.2, 15:523.10, 15:526.1, 15:556, 15:573, 15:580, 15:591~~

1 Hanna, California Law of Employee Injuries and Workers' Compensation (2d ed.) Ch. 4, §§ 4.03−4.06 (Matthew Bender)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, §§ 10.02, 10.03[3], 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.310, 577.530 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe obligation under Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing ~~such~~ violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/it]. The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [***name of plaintiff***]'s actual damages.**

"Willful" means that [*name of defendant***] knew of [his/her/its] legal obligations and intentionally declined to follow them~~what [he/she/it] was doing and intended to do it~~. However, a violation is not willful ~~you may not impose a civil penalty~~ if you find that [***name of defendant***] ~~believed~~ reasonably and in good faith believed that the facts did not require [***describe ~~facts negating~~ statutory obligation, e.g., repurchasing or replacing the vehicle***].**

~~**The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [***name of plaintiff***]'s actual damages.**~~

New September 2003; Revised February 2005, December 2005, December 2011, May 2018

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought.

Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace].)

Sources and Authority

- Civil Penalty for Willful Violation. Civil Code section 1794(c).
- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- "Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.'" (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "In regard to the *willful* requirement of Civil Code section 1794, subdivision (c), a civil penalty may be awarded if the jury determines that the manufacturer 'knew of its obligations but intentionally declined to fulfill them. There is no requirement of blame, malice or moral delinquency. However, '. . . a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249–1250 [40 Cal.Rptr.2d 576], original italics, internal citations omitted; see also *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750, 759 [52 Cal.Rptr.2d 134] [defendant agreed that jury was properly instructed that it "acted 'willfully' if you determine that it knew of its obligations under the Song-Beverly Act but intentionally declined to fulfill them."].)

- "[A] violation … is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant *actually knew* of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

- "[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371], fn. omitted.)

- "There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the jury could conclude that [defendant]'s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]'s decision to reject [plaintiff]'s demand was made pursuant to [defendant]'s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred." (*Oregel, supra*, 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages. Neither punishment nor deterrence is ordinarily called for if the defendant's actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, '. . . courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.' " (*Kwan, supra, ~~v. Mercedes Benz of N. Am.~~ (1994) 23* Cal.App.4th at pp.~~174,~~ 184~~–185 [28 Cal.Rptr.2d 371]~~, internal citation omitted.)

Secondary Sources

4 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

4010. Limiting Instruction—Expert Testimony

Revoked May 2018. See *People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320] and *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1281 [221 Cal.Rptr.3d 622].

~~**You have heard testimony by an expert witness regarding reports and statements from hospital staff and other persons who have come into contact with [***name of respondent***]. This testimony was admitted for the limited purpose of establishing the basis for the opinion expressed by the testifying expert. You may consider those reports and statements to help you examine the basis of the expert's opinion. You may not use the reports and statements as independent proof of respondent's mental condition or [his/her] ability to provide for food, clothing, or shelter.**~~

~~*New June 2005*~~

~~Sources and Authority~~

- ~~Limited Admissibility of Evidence. Evidence Code section 355.~~
- ~~"A psychiatrist is permitted to testify on a person's mental capacities and can rely on hearsay including statements made by the patient or by third persons." (*Conservatorship of Torres* (1986) 180 Cal.App.3d 1159, 1163 [226 Cal.Rptr. 142].)~~
- ~~"When records are admitted ... a limiting instruction need not be given, *sua sponte*, but must be given upon request of counsel." (*Conservatorship of Buchanan* (1978) 78 Cal.App.3d 281, 288 [144 Cal.Rptr. 241], internal citation omitted, disapproved on other grounds in *Conservatorship of Early* (1983) 35 Cal.3d 244, 255 [197 Cal.Rptr. 539, 673 P.2d 209].)~~

~~Secondary Sources~~

~~3 Witkin, California Procedure (5th ed. 2008) Actions, § 102~~

~~32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.43 (Matthew Bender)~~

4208. Affirmative Defense—Statute of Limitations—Actual and Constructive Fraud (Civ. Code, § 3439.09(a), (b))

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law.**

[[With respect to [*name of plaintiff***]'s claim of actual intent to hinder, delay, or defraud,] [To/to] succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] filed [his/her/its] lawsuit later than four years after the [transfer was made/obligation was incurred] [or, if later than four years, no later than one year after the [transfer/obligation] was or could reasonably have been discovered by [***name of plaintiff***]]. ~~But in any event, the lawsuit must have been filed within seven years after the [transfer was made/the obligation was incurred].]~~**

[[With respect to [*name of plaintiff***]'s claim of constructive fraud,] [To/to] succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] filed [his/her/its] lawsuit later than four years after the [transfer was made/obligation was incurred].]**

New June 2006; Revised December 2007, June 2016, May 2018

Directions for Use

This instruction provides an affirmative defense for failure to file within the statute of limitations. (See Civ. Code, § 3439.09(a), (b).) Read the first bracketed paragraph regarding delayed discovery in cases involving actual intent to hinder, delay, or defraud. (See Civ. Code, § 3439.04(a)(1); CACI No. 4200.) Read the second in cases involving constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3439.05; CACI Nos. 4202, 4203.) Read the first bracketed phrases in those paragraphs if the plaintiff has brought both actual and constructive fraud claims.

This instruction may not be modified to assert the seven-year period under Civil Code section 3439.09(c). (See *PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 178–185 [221 Cal.Rptr.3d 353] [Civil Code section 3439.09(c) is a statute of repose, not a statute of limitations].)

Sources and Authority

- Statute of Limitations. Civil Code section 3439.09.
- "[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked. They may also be attacked by, as it were, a common law action. If and as such an action is brought, the applicable statute of limitations is section 338 (d) and, more importantly, the cause of action accrues not when the fraudulent transfer occurs but when the judgment against the debtor is secured (or maybe even later, depending upon the belated discovery issue)." (*Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1].)

- "In the context of the scheme of law of which section 3934.09 is a part, where an alleged fraudulent transfer occurs while an action seeking to establish the underlying liability is pending, and where a judgment establishing the liability later becomes final, we construe the four-year limitation period, i.e., the language, 'four years after the transfer was made or the obligation was incurred,' " to accommodate a tolling until the underlying liability becomes fixed by a final judgment." (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 920 [60 Cal.Rptr.2d 841].)

- " 'Cal. Civ. Code § 3439.09(a) and (b) are statutes of limitation requiring a plaintiff to file a fraudulent transfer action within four years of the transfer or, for an intentional fraud, within one year after the transfer was or could reasonably have been discovered.' [Citation] " *(PGA West Residential Assn., Inc., supra,* 14 Cal.App.5th at p. 179.)

- "However, 'even *if* belated discovery can be pleaded and proven' with respect to the statute of limitations applicable to common law remedies for fraudulent transfers, 'in any event the maximum elapsed time for a suit *under either the UFTA or otherwise* is seven years after the transfer. [Citation.]' This conclusion logically follows from the language of section 3439.09(c). '[B]y its use of the term "[n]otwithstanding any other provision of law," the Legislature clearly meant to provide an overarching, all-embracing maximum time period to attack a fraudulent transfer, no matter whether brought under the UFTA or otherwise.' " (*PGA West Residential Assn., Inc., supra,* 14 Cal.App.5th at pp. 170–171, original italics, internal citation omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:351 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.49, 270.50 (Matthew Bender)

4605. Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements (Lab. Code, § 6310)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [***specify, e.g., complaint to the Division of Occupational Safety and Health regarding unsafe working conditions***]. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

2. **[That [***name of plaintiff***], on [his/her] own behalf or on behalf of others, [***select one or more of the following options:***]**

   [made [an oral/a written] complaint to [*specify to whom complaint was directed, e.g., the Division of Occupational Safety and Health***] regarding [unsafe/unhealthy] working conditions;]**

   [*or***]**

   [[initiated a proceeding/caused a proceeding to be initiated] relating to [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [[testified/was about to testify] in a proceeding related to [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [exercised [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [participated in a workplace health and safety committee;]

   [*or***]**

   [reported a work-related fatality, injury, or illness;]

   [*or*]

   [requested access to occupational injury or illness reports and records;]

   [*or*]

   [exercised [*specify other right(s) protected by the federal Occupational Safety and Health*]

Act];]

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [***specify***] was a substantial motivating reason for [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

New December 2015; Revised December 2016, May 2018

Directions for Use

Use this instruction for a whistleblower claim under Labor Code section 6310 for employer retaliation for an employee's, or an employee's family member's, complaint or other protected activity about health or safety conditions. Select the appropriate statutorily protected activity in element 2 and summarize it in the introductory paragraph. (See Lab. Code, § 6310(a), (c).)

With regard to the first option in element 2, the complaint must have been made to (1) the Division of Occupational Safety and Health, (2) to another governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, (3) to the employer, or (4) to the employee's representative. (Lab. Code, § 6310(a)(1).)

The statute requires that the employee's complaint be "bona fide." (See Lab. Code, § 6310(b).) There appears to be a split of authority as to whether "bona fide" means that there must be an actual health or safety violation or only that the employee have a good-faith belief that there are violations. (See *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682, fn. 5 [145 Cal.Rptr.3d 766].) The instruction should be modified if the court decides to instruct one way or the other on the meaning of "bona fide."

Note that element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's protected conduct and the defendant's adverse action. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under Labor Code section 6310 has not been addressed by the courts. There is authority for a "but for" causation standard instead of "substantial motivating reason." (See *Touchstone Television Productions, supra,* 208 Cal.App.4th at pp. 681−682.)

Sources and Authority

- Whistleblower Protection for Report of Health or Safety Violation. Labor Code section 6310.

- "Division" Defined. Labor Code section 6302(d).

- "[Plaintiff]'s action is brought under section 6310, subdivision (a)(1), which prohibits an employer from discriminating against an employee who makes 'any oral or written complaint.' Subdivision (b) provides that '[a]ny employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to … his or her employer … of unsafe working conditions, or work practices … shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.' " (*Sheridan v. Touchstone Television Productions, LLC* (2015) 241 Cal.App.4th 508, 512 [193 Cal.Rptr.3d 811].)

- "[T]he plaintiff did not lack a remedy: she could sue under section 6310, subdivision (b) which permits 'an action for damages if the employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee's complaints about unsafe work conditions. Here, it is alleged that [the defendant] discriminated against [the plaintiff] by not renewing her employment contract. *To prevail on the claim, she must prove that, but for her complaints about unsafe work conditions, [the defendant] would have renewed the employment contract. Damages, however, are limited to "lost wages and work benefits caused by the acts of the employer." ' "* (*Touchstone Television Productions, supra,* 208 Cal.App.4th at pp. 681−682, original italics.)

- "The voicing of a fear about one's safety in the workplace does not necessarily constitute a complaint about unsafe working conditions under Labor Code section 6310. [Plaintiff]'s declaration shows only that she became frightened for her safety as a result of her unfortunate experience … and expressed her fear to [defendant]; it is not evidence that the … office where she worked was actually unsafe within the meaning of Labor Code sections 6310 and 6402. Hence, [plaintiff]'s declaration fails to raise a triable issue of fact as to whether she was terminated for complaining to [defendant] about unsafe working conditions in violation of Labor Code section 6310." (*Muller v. Auto. Club of So. Cal.* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6 [130 Cal.Rptr.2d 662, 63 P.3d 220].)

- "Citing *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], defendants assert plaintiff's causes of action based on section 6310 must fail because an essential element of a section 6310 violation is that the workplace must actually be unsafe. We first note that the *Muller* court cites no authority for this assertion. It appears to contradict Justice Grodin's pronouncement that '. . . an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated.' We agree that an employee must be protected against discharge for a good faith complaint about working conditions which he believes to be unsafe." (*Cabesuela v. Browning-Ferris Indus.* (1998) 68 Cal.App.4th 101, 109 [80 Cal.Rptr.2d

60], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2010~~2017) Agency, § ~~370~~405

2 Wilcox, California Employment Law, Ch. 21, *Occupational Health and Safety Regulation*, § 21.20 (Matthew Bender)

3 California Torts, Ch. 40A, *Wrongful Termination*, § 40A.30 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 et seq. (Matthew Bender)

4800. False Claims Act—Essential Factual Elements (Gov. Code, § 12651)

The California False Claims Act allows a public entity to recover damages from any person or entity that knowingly presents a false claim for payment or approval. [[*Name of plaintiff***] is an individual who brings this action on behalf of [***name of public entity***].] [***Name of public entity***] is a public entity.**

[*Name of plaintiff***] claims that [***name of defendant***] presented a false claim to [it/**[*name of public entity*]**] for payment or approval. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] knowingly presented or caused to be presented a false or fraudulent claim to [***name of public entity***] for payment or approval;**

2. That the claim was false or fraudulent in that [*specify reason, e.g., [name of defendant] did not actually perform the work for which payment or approval was sought***]; and**

3. That [*name of defendant***]'s false or fraudulent claim was material to [***name of public entity***]'s decision to pay out money to [***name of defendant***].**

"Knowingly" means that with respect to information about the claim, [*name of defendant***]**

1. had actual knowledge that the information was false; or

2. acted in deliberate ignorance of the truth or falsity of the information; or

3. acted in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

"Material" means that the claim had a natural tendency to influence, or was capable of influencing, the payment or receipt of [money/property/services] on the claim.

New May 2018

Directions for Use

An action under the False Claims Act (Gov. Code, § 12650 et seq.) may be brought by the attorney general if state funds are involved, the public entity that claims to have paid out money on a false claim, or by a private person acting as a "qui tam" plaintiff on behalf of the state or public entity. (Gov. Code, § 12650(a)–(c).) Give the optional next-to-last sentence of the opening paragraph if the plaintiff is an individual bringing the action qui tam.

The False Claims Act lists eight prohibited acts that violate the statute. (See Gov. Code, § 12651(a).) Element 1 sets out the first and most common of the prohibited acts—the knowing presentation of a false

claim. (See Gov. Code, § 12650(a)(1).) Modify element 1 if a different prohibited act is at issue.

For an instruction on retaliation against an employee for bringing a false claim action, see CACI No. 4600, *False Claims Act: Whistleblower Protection—Essential Factual Elements.*

Sources and Authority

- California False Claims Act. Government Code section 12650 et seq.

- "In 1987, the California Legislature enacted the False Claims Act, patterned on a similar federal statutory scheme, to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities. As relevant here, the False Claims Act permits the recovery of civil penalties and treble damages from any person who '[k]nowingly presents or causes to be presented [to the state or any political subdivision] . . . a false claim for payment or approval.' To be liable under the False Claims Act, a person must have actual knowledge of the information, act in deliberate ignorance of the truth or falsity of the information, and/or act in reckless disregard of the truth or falsity of the information." (*Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494-495 [99 Cal.Rptr.2d 721], internal citations omitted.)

- "The Legislature designed the CFCA ' "to prevent fraud on the public treasury," ' and it ' "should be given the broadest possible construction consistent with that purpose." ' " (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 446 [106 Cal.Rptr.3d 84], internal citations omitted.)

- "Since there are no pattern instructions for CFCA claims, the trial court gave instructions taken from the language of the statute. Quoting Government Code section 12651, the trial court explained that a person would be liable for damages under the CFCA if the person '(1) Knowingly presents or causes to be presented to an officer or employee of the City, a false claim for payment or approval. [¶] (2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City.' The instructions defined 'person,' 'knowingly,' and 'claim' using the language of Government Code section 12650, but did not define the word 'false.' Indeed, 'false' is not defined in the statute." (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 546 [66 Cal.Rptr.3d 175].)

- "We agree with City that the word 'false' has no special meaning and that [claimant]'s concern is really related to the mental state necessary for liability under the CFCA, an element that was adequately explained in the instructions that were given." (*Thompson Pacific, supra,* 155 Cal.App.4th at p. 547.)

- "[A]n alleged falsity satisfies the materiality requirement where it has the ' " 'natural tendency to influence agency action or is capable of influencing agency action.' " [Citation.]' " (*San Francisco Unified School Dist. ex rel. Contreras, supra,* 182 Cal.App.4th at p. 454.)

- "Our conclusion that the allegations in the Complaint are sufficient to withstand a demurrer does not mean that every breach of a contract term that is in some sense 'material' necessarily satisfies the materiality requirement for a CFCA claim. That is, a false implied certification relating to a

> 'material' contract term may not always be 'material' to the government's decision to pay a contractor. Materiality is a mixed question of law and fact, and a showing in a motion for summary judgment or at trial that the alleged breach would not have affected the payment decision will defeat a CFCA claim." (*San Francisco Unified School Dist. ex rel. Contreras*, *supra,* 182 Cal.App.4th at p. 456, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 306, 307

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 884

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Claims—Retaliation Under Other Whistleblower Statutes,* ¶¶ 5:1770 et seq. (The Rutter Group)

6 Levy et al., California Torts, Ch. 91, *Contractual Arbitration,* § 91.08 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions,* § 468.21 (Matthew Bender)

4801. Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements

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Under the California False Claims Act, when [a/an] [*specify defendant's status, e.g., vendor***] submits a claim to a public entity for payment on a contract, [he/she/it] impliedly certifies that [he/she/it] has complied with all of the requirements of the contract, not just those relevant to the claim presented. [[***Name of plaintiff***] is an individual who brings this action on behalf of [***name of public entity***].] [***Name of public entity***] is a public entity.**

[*Name of plaintiff***] claims that [***name of defendant***] presented a false claim to [it/[***name of public entity***]] for payment or approval by falsely certifying by implication that it had complied with the requirements of the contract. To establish this claim, [***name of plaintiff***] must prove all of the following:**

> **1. That [***name of defendant***] had not complied with [***specify contractual terms alleged to have been breached***] when it presented a claim for payment to [***name of public entity***].**
>
> **2. That when [***name of defendant***] submitted its claims for payment, [he/she/it] knowingly failed to disclose that [he/she/it] had not complied with all of the terms of the contract; and**
>
> **3. That [***name of defendant***]'s failure to comply with all the terms of the contract was material to [***name of public entity***]'s decision to make the requested payment to [***name of defendant***].**

"Knowingly" means that with respect to the claim, [*name of defendant***]**

> **1. had actual knowledge that [he/she/it] had failed to disclose [his/her/its] noncompliance; or**
>
> **2. acted in deliberate ignorance of the truth or falsity of whether [he/she/it] had failed to disclose [his/her/its] noncompliance; or**
>
> **3. acted in reckless disregard of the truth or falsity of whether [he/she/it] had failed to disclose [his/her/its] noncompliance.**
>
> **Proof of specific intent to defraud is not required.**

A failure to comply with all the terms of the contract is "material" if it had a natural tendency to influence, or was capable of influencing, the payment or receipt of [money/property/services] on the claim.

New May 2018

Directions for Use

Under the California False Claims Act, a vendor impliedly certifies compliance with its express

contractual requirements when it bills a public agency for providing goods or services. A False Claims Act action may be based on allegations that the implied certification was false and had a natural tendency to influence the public agency's decision to pay for the goods or services. (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 441 [106 Cal.Rptr.3d 84].)

The vendor must have made the claim knowing that it had failed to disclose noncompliance with all of the terms of the contract. (See *San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at pp. 452–453 [contractor must have the requisite knowledge, rendering the failure to disclose the contractual noncompliance fraudulent]; see also *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494–495 [99 Cal.Rptr.2d 721].) While the breach must be material as defined, it does not have to involve the particular contractual provision on which payment is sought. (See *San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at pp. 442–444 [bus company provided school district with student transportation, but did so with buses that did not meet the contractually and legally required safety requirements].)

Sources and Authority

- "Under the CFCA, a vendor impliedly certifies compliance with its express contractual requirements when it bills a public agency for providing goods or services. Allegations that the implied certification was false and had a natural tendency to influence the public agency's decision to pay for the goods or services are sufficient to survive a demurrer." (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 441.)

- "[Defendant] initially argues its claims for payment were not false, because there was no literally false information on the face of the invoices, which identify the routes driven and the charges arising from each route. However, [defendant] ultimately concedes that a section 12651, subdivision (a)(1) false claim need not contain an expressly false statement to be actionable." (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 448.)

- "[A]n alleged falsity satisfies the materiality requirement where it has the ' " 'natural tendency to influence agency action or is capable of influencing agency action.' " [Citation.]' " (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 454.)

- "Plaintiffs further allege that [defendant]'s invoices impliedly certified compliance with the material terms of the Contract, that the terms violated were material, and that the District was unaware of the falsity of [defendant]'s implied certification, resulting in a loss of District funds. Plaintiffs' allegations are adequate to survive a demurrer. Under the case law discussed above, [defendant]'s implied certification that it had satisfactorily performed its material obligations under the Contract, including provisions designed to protect the health and safety of the student population, had a ' " 'natural tendency' " ' to cause the District to make payments it would not have made had it been aware of [defendant]'s noncompliance." (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 455, internal citation omitted.)

- "Our conclusion that the allegations in the Complaint are sufficient to withstand a demurrer does not mean that every breach of a contract term that is in some sense 'material' necessarily satisfies the materiality requirement for a CFCA claim. That is, a false implied certification relating to a

'material' contract term may not always be 'material' to the government's decision to pay a contractor. Materiality is a mixed question of law and fact, and a showing in a motion for summary judgment or at trial that the alleged breach would not have affected the payment decision will defeat a CFCA claim." (*San Francisco Unified School Dist. ex rel. Contreras, supra,* 182 Cal.App.4th at p. 456, internal citation omitted.)

- "The False Claims Act is not 'an all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." (*Universal Health Servs. v. United States ex rel. Escobar* (2016) ___U.S.___ [136 S.Ct. 1989, 2003, 195 L.Ed.2d 348, 365-366] [construing similar Federal False Claims Act].)

- What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." (*Universal Health Servs. v. United States ex rel. Escobar, supra,* ___U.S. at p. ___ [136 S.Ct. at p. 1996] [construing similar Federal False Claims Act].)

Secondary Sources

5 Witkin Summary of California Law (11th ed. 2017) Torts, § 884

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions,* § 468.21 (Matthew Bender)

5022. Introduction to General Verdict Form

I will give you [a] general verdict form[s]. The form[s] ask[s] you to find either in favor of [*name of plaintiff***] or [***name of defendant***]. [It also asks you to answer [an] additional question[s] regarding [***specify, e.g., the right to punitive damages***]. I have already instructed you on the law that you are to refer to in making your determination[s].**

At least nine of you must agree on your decision [and in answering the additional question[s]]. [If there is more than one question on the verdict form, as long as nine of you agree on your answers to each question, the same nine do not have to agree on each answer.]

In reaching your verdict [and answering the additional question[s]], you must decide whether the party with the burden of proof has proved all of the necessary facts in support of each required element of [his/her/its] claim or defense. You should review the elements addressed in the other instructions that I have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.

New May 2018

Directions for Use

If a general verdict will be used, this instruction may be given to guide the jury on how to go about reaching a verdict. With a general verdict, there is a danger that the jury will shortcut the deliberative process of carefully looking at each element of each claim or defense and simply vote for the plaintiff or for the defendant. This instruction directs the jury to approach its task as if a special verdict were being used and questions on each element of each claim or defense had to be answered. This instruction assumes that the rule applicable to special verdicts, that the same nine jurors do not need to agree on every element of a claim as long as there are nine in favor of each (see *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768–769 [183 Cal.Rptr. 852; 647 P.2d 128]; CACI No. 5012, *Introduction to Special Verdict Form*.), would apply to deliberations using a general verdict.

This purpose of this instruction is to lessen the possibility that the "paradox of shifting majorities" will happen. This paradox occurs when the same jury analyzing the same evidence would find liability with a special verdict, but not with a general verdict. The possibility arises because with a special verdict, a juror who votes no on one question but is in a minority of three or fewer must continue to deliberate and vote on all of the remaining questions.

If, for example, the vote on element 3 is 9-3 yes with jurors 10-12 voting no, and the vote on element 4 is 11-1 yes with juror 1 voting no, there will be liability with a special verdict because each element has received nine yes votes. But if a general verdict is used, there would be no liability because only eight jurors have found true every element of the claim. The California Supreme Court has found this result to be proper with regard to special verdicts. (See *Juarez, supra*, 31 Cal.3d at p. 768.) With a general verdict, if the jury votes on each element of each claim or defense, it is more likely to find nine votes for each element, even though it may be a different nine each time.

Sources and Authority

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of *any* nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez, supra,* 31 Cal.3d at p. 768, original italics.)

- "To determine whether a general verdict is supported by the evidence it is necessary to ascertain the issues embraced within the verdict and measure the sufficiency of the evidence as related to those issues. For this purpose reference may be had to the pleadings, the pretrial order and the charge to the jury. A general verdict implies a finding of every fact essential to its validity which is supported by the evidence. Where several issues responsive to different theories of law are presented to the jury and the evidence is sufficient to support facts sustaining the verdict under one of those theories, it will be upheld even though the evidence is insufficient to support facts sustaining it under any other theory." (*Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 844 [57 Cal.Rptr. 100], internal citations omitted.)

- "Implicit in [general] verdicts is the presumption that 'all material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with the verdict.' " (*Coorough v. De Lay* (1959) 171 Cal.App.2d 41, 45 [339 P.2d 963].)

- "A general verdict imports a finding in favor of the winning party on all the averments of his pleading material to his recovery." (*Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 712 [342 P.2d 987].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 338

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-A, *Verdicts,* ¶ 17:1 et seq. (The Rutter Group)

Haning, et al., California Practice Guide: Personal Injury Ch. 9-M, *Trial of a Personal Injury Case--Verdicts and Judgment* ¶ 9:645 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict,* § 91.21 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts,* § 326A.11 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts,* 18.03 et seq.