JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 18–19, 2017

Title
Jury Instructions: New, Revised, and Renumbered Civil Jury Instructions and Verdict Forms

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

Effective Date
May 19, 2017

Date of Report
April 11, 2017

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

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, and renumbered 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.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 19, 2017, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions and verdict forms prepared by the committee. On Judicial Council approval, the instructions will be published in the official midyear supplement to the 2017 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed new, revised, and renumbered civil jury instructions and verdict forms are attached at pages 11–130.

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 voted to approve 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.*

This is the 30th release of *CACI.* The council approved *CACI* release 29 at its December 2016 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following 22 instructions and verdict forms: CACI Nos. 1009B, 1010, VF-1001, 1720, 1722, VF-1700–VF-1705, VF-1900, VF-1903, 2021, VF-2006, 2100, VF-2100, 2547, 3040, 3903D, 4012, and VF-4000. The committee further recommends revising and renumbering five instructions—CACI Nos. 470, 471, and 472 (to be renumbered from 408, 409, and 410, respectively), 3509A (renumbered from 3509), and 3511A (renumbered from 3511)—as explained below. The committee further recommends the addition of eight new instructions: CACI Nos. 429, 473, 1249, 2548, 2549, 3052, 3509B, and 3511B. Finally, the Life Expectancy Tables for females and males have been updated from the November 28, 2016, *National Vital Statistics Reports*, volume 65, number 8.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 64 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.

New instruction

CACI No. 429, **Negligent Sexual Transmission of Disease.** A former committee member who was sitting as an assigned judge reported that because there was no CACI instruction on the

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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.

negligent sexual transmission of a disease, a colleague was giving the BAJI instruction. The committee reviewed the BAJI instruction and decided that it was flawed in that it presented certain points as elements, when the case on which it was based did not present elements that would apply under all possible factual scenarios.[3] To provide bench and bar with an alternative instruction, the committee proposes this new instruction.

New instruction *CACI No. 473,* Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk. Since 2014 when the California Supreme Court decided *Gregory v. Cott*, the committee has been considering a new instruction on the so-called "Firefighter Rule," which is a variation on the doctrine of primary assumption of risk.[4] Persons in an inherently dangerous occupation are deemed to have assumed the risk of the occupation.[5] But there are exceptions if (1) the plaintiff is not warned of a known risk, (2) the defendant increases the level of risk beyond that inherent in the occupation, or (3) the cause of injury is unrelated to the inherent risk.[6] Proposed new CACI No. 473 states the rule and its exceptions.

Because this instruction is the fourth instruction on exceptions to the defense of primary assumption of risk, the committee wishes to move and renumber the current three instructions to begin a new range in the Negligence series. In addition, the titles have all been slightly revised to clarify that the instructions provide exceptions to defense of primary assumption of risk.

- CACI No. 408, previously titled *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity,* would become CACI No. 470, retitled *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity*.
- CACI No. 409, previously titled *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches,* would become CACI No. 471, retitled *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*.
- CACI No. 410, previously titled *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors,* would become CACI No. 472, retitled *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors.*

New instruction *CACI No. 1249,* Affirmative Defense—Reliance on Knowledgeable Intermediary. On May 23, 2016, the California Supreme Court decided *Webb v. Special Electric Co., Inc.* in which the court established rules for when a supplier of asbestos is relieved from any duty to warn because its product has been supplied to an intermediary who can be

[3] *John B. v. Superior Court* (2006) 38 Cal.4th 1177.

[4] *Gregory v. Cott* (2014) 59 Cal. 4th 996.

[5] *Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 435.

[6] *Gregory, supra,* 59 Cal.4th at p. 1000.

reasonably relied on to give warnings to end users.[7] The rules established are complex, and the committee has taken some time to consider and address the numerous aspects of the opinion.

The court provided two options for the supplier: either give the warnings itself or establish that the intermediary could be reasonably relied on to give the warnings. To establish reasonable reliance, the court presented three factors that a jury should consider, one of which is the likelihood that the intermediary will give the warnings. Then to guide the jury on this "likelihood" factor, the court provided three additional factors.[8]

There is perhaps a fourth factor on reasonable reliance: whether the intermediary itself has an independent duty to warn. After considerable debate, the committee majority decided not to include this possible factor in the instruction at this time. First, the paragraph in *Webb* that presents the issue is not clear on how the factor should be addressed.[9] Second, it was felt that whether the intermediary has an independent duty would be for the court to decide as a matter of law.

New instructions *CACI Nos. 2548,* Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing*, and 2549,* Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit. Government Code section 12927(c)(1) creates claims for disability discrimination in housing. A 2015 case brought this statute to the committee's attention.[10] The committee has been working on one or more instructions under the statute since then, and now proposes two new instructions for adoption.

The statute creates a right to reasonable accommodation in providing housing, including the right to reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. Proposed new CACI 2548, *Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing*, addresses this claim.

A second claim is for the refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises. Proposed new CACI No. 2549, *Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit*, addresses this claim.

***New instruction CACI No. 3052,* Use of Fabricated Evidence—Essential Factual Elements.** A 2011 California appellate case, *Kerkeles v. City of San Jose,* addressed a federal civil rights

[7] *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167.

[8] *Id.* at pp. 189–190.

[9] *Id.* at p. 191.

[10] *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040.

claim for using fabricated evidence to initiate criminal proceedings.[11] The committee considered adding a new instruction on this claim at that time, but decided to defer pending receipt of information from bench and bar as to the prevalence of the claim.

In release 28, approved by the Judicial Council in June 2016, the committee added CACI No. 3051, *Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements*. In a public comment responding to that proposed instruction, an attorney commented that the committee "should also craft a new instruction covering circumstances where government actors present false or misleading evidence to the courts. This is a common occurrence for which no current jury instruction exists." The committee decided to revisit *Kerkeles* and the fabricated-evidence issue.

On posting for public comment, the attorney who requested the instruction objected that the instruction was too narrow in that it did not "address omission of exculpatory evidence, perjury, or the myriad other ways that evidence is typically presented to the courts in a deceptive manner." The committee decided to keep the proposed instruction narrowly focused on the intentional use of fabricated evidence as in *Kerkeles*, though not limited strictly to criminal proceedings. While federal cases might be found to support a broader instruction, the committee does not base the *CACI* civil rights instructions on law from the federal courts of appeal, only on U.S. Supreme Court and California authority. The committee also rejected an objective "should have known" (that the evidence was not true) standard, even though there is some authority for such a standard in a few federal cases.[12]

Finally, a commentator questioned whether the claim would ever apply to fabricated evidence to support probable cause for an arrest if no criminal proceeding is ever filed. While the committee's responses to comments were still under discussion, the U.S. Supreme Court answered this question in the affirmative, holding that when a judge's probable-cause determination is predicated solely on a police officer's false statements, there is a Fourth Amendment violation regardless of what charging decisions are later made.[13]

New instruction *CACI No. 3509B*, Precondemnation Damages—Public Entity's Authorized Entry to Investigate Property's Suitability. Code of Civil Procedure section 1245.010 authorizes a public entity, before condemning property for a public purpose, to enter the property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property. Section 1245.060 provides that if the entry and activities on the property cause actual

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[11] *Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001.

[12] See, e.g., *Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1076. A U.S. Supreme Court case, *Franks v. Delaware* (1978) 438 U.S. 154, 171–172, on the use of fabricated evidence to obtain a search warrant, required a deliberately or *recklessly* false statement. The committee will consider whether recklessness applies outside of the search warrant context in the next release cycle.

[13] *Manuel v. City of Joliet* (2017) __ U.S. __, 2017 U.S. LEXIS 2021 (14-9496).

damage to or substantial interference with the owner's possession or use of the property, the owner may bring a civil action for the loss caused by the damage or interference.

Recently, in *Property Reserve, Inc. v. Superior Court*, the California Supreme Court held that the amount of any precondemnation damages must be determined by a jury.[14] The committee proposes new instruction 3509B for use under the precondemnation statutes as construed in *Property Reserve*.[15]

New instruction *CACI No. 3511B,* Damage to Remainder During Construction. A judge who is a former member of the committee noted that there is no CACI instruction on what courts have called "temporary severance damages."[16] These are damages to the remainder (the property not condemned) caused by the construction and use of the project for which the property has been condemned, whether or not the damage is caused by activities on the part taken.[17] She had a trial for which she needed such an instruction.

The committee now proposes new instruction 3511B. The committee has elected to use "*Damage to Remainder During Construction*" as the title rather than "Temporary Severance Damages." The statute uses neither "temporary" nor "severance" to describe damages caused during construction. A number of committee members found this term to be inaccurate and misleading; the damages themselves are not temporary, nor are they caused by the severance.

CACI No. 3511, currently titled *Permanent Severance Damages,* would be renumbered as CACI No. 3511A and retitled *Severance Damages to Remainder*. Even though the current title was actually adopted in the last release, several commentators who are experienced in eminent domain law objected to the use of the word "permanent." They pointed out that the activity on the portion taken does not need to be a permanent activity. If the activity causes a loss of fair market value to the remainder, the loss is compensable even if the activity will end at some point in the future.[18]

Revised Instruction *CACI No. 1009B,* Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control. A property owner is generally not liable for injuries to an employee of an independent contractor hired to perform work on the property. However,

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[14] *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 207−210.

[15] Former CACI No. 3509, currently titled *Precondemnation Damages (*Klopping *Damages),* would be renumbered as CACI No. 3509A and retitled *.Precondemnation Damages—Unreasonable Delay (*Klopping *Damages).*

[16] See, e.g., *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676.

[17] Code Civ. Proc., § 1263.420(b).

[18] A commentator gave the example of loss of value to the remainder caused by the destruction of trees on the part taken. The fact that the trees are replaced by saplings that will someday grow to replace the trees removed does not make the loss noncompensable.

there is an exception if the owner retains control of the work being performed. But the owner's retained control must have "affirmatively contributed" to the plaintiff's injury.[19]

A number of years ago, the committee debated at length whether the words "affirmatively contributed" had to be in the instruction as an element. The concern was that an affirmative contribution need not be from active conduct, but can be from a failure to act. The committee majority concluded that "affirmative contribution" was simply a rewording of the causation requirement for all tort actions and was subsumed within the element of "substantial factor." The committee explained its reasoning in the Directions for Use as to why it elected not to use "affirmatively contributed" in the elements of the instruction.

In a recent case, the court looked at the committee's explanation and agreed.[20] The court said:

> Although drawn directly from case law, [plaintiff]'s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, 'affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions.' The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including 'affirmative contribution' language in CACI No. 1009B. The committee's Directions for Use states: 'The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.) [¶] We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the 'affirmative contribution' requirement set forth in *Hooker*."[21]

The committee now proposes revisions to the Directions for Use to indicate that a court has endorsed the committee's position on "affirmative contribution."

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[19] *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202.

[20] *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582.

[21] *Regalado, supra,* 3 Cal.App.5th at pp. 594–595.

***Revised Instruction CACI No. 1010,* Affirmative Defense—Recreation Immunity—Exceptions.**[22] Civil Code section 846 provides immunity to a property owner who permits others to enter or use the property for any recreational purpose, subject to certain exceptions as presented in CACI No. 1010. A court recently held that this immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property.[23]

The committee proposes changes to the instruction and verdict form to indicate that it need not be the plaintiff's entry onto or use of the property that is the cause of the injury.

***Revised instruction CACI No.2100,* Conversion—Essential Factual Elements.**[24] In a recent article in *California Litigation* magazine,[25] the author criticized CACI No. 2100 because element 2 required that the defendant have "intentionally" interfered with the plaintiff's property. In the view of the author, "conversion is a strict liability tort, and that defendant's intent, good faith, lack of knowledge or motive are ordinarily irrelevant."[26]

The question of intent in a conversion action is a complex one. However, the committee concluded that the author is correct in stating that the instruction incorrectly requires intentional *interference* with the plaintiff's property.

In *Taylor v. Forte Hotels International,*[27] the court stated:

[Conversion] must be knowingly or intentionally done, but a *wrongful intent* is not necessary. [Citations.] Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' [Citation.] It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (original italics.)

The committee believes that this passage clarifies the intent requirement. The act that constitutes the conversion must be knowingly or intentionally done. The defendant must intend to take possession of the property at issue. However, it is not necessary that the defendant intend to

[22] And verdict form CACI No. VF-1001, *Premises Liability—Affirmative Defense—Recreation Immunity—Exceptions.*

[23] *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17.

[24] And verdict form CACI No. VF-2100, *Conversion.*

[25] Travis Burch, "CACIs Compel Litigators to 'Do It In Reverse'" (2016) 29(2) *California Litigation* 21.

[26] *Ibid*. Citing *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 144.

[27] *Taylor v. Forte Hotels Int'l* (1991) 235 Cal.App.3d 1119, 1124.

interfere with the plaintiff's rights to possession of the property.[28] The committee has removed "intentionally" as a modifier of "interfere" in element 2 and has added "knowingly or intentionally" as modifiers of the various acts in element 2 that constitute conversion.

***Revised instruction CACI No. 3903D,* Lost Earning Capacity (Economic Damage).** In the recent case of *Licudine v. Cedars-Sinai Medical Center,* the court addressed the elusive damages award for lost earning capacity, as distinguished from lost future earnings.[29] While lost future earnings compensate for what the plaintiff *would* have earned but for the injury, lost earning capacity compensates for what the plaintiff reasonably *could* have earned.[30]

The jury has two roles: "(1) find [that] the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury."[31] CACI No. 3903D currently addresses only the second role, valuation. The committee proposes revising the instruction to address the first role also: whether it is reasonably certain that the injury will cause the plaintiff to earn less money in the future than what he or she otherwise could have earned.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 23 through March 3, 2017. Comments were received from 14 different commenters. Of these, 5 addressed the proposed changes to the eminent domain instructions. No other instruction or verdict form garnered any significant legal opposition. Some of the comments are discussed above in presenting issues with particular instructions.

The committee evaluated all comments and, as a result, revised some of the instructions. A summary of the comments received and the committee's responses is attached at pages 131–172.

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. Proposed new and revised instructions are presented semiannually to ensure that the instructions remain clear, accurate, current, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, 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 midyear supplement to the 2017

[28] It is similar to the difference between general intent and specific intent in criminal law. The defendant must have intended to do the act, but need not have intended the result.

[29] *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881.

[30] *Id.* at pp. 893–894.

[31] *Id.* at p. 887.

edition of *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

1. Full text of *CACI* instructions, at pages 11–130
2. Summary of responses to public comments, at pages 131-172

TABLE OF CONTENTS

Release 30: May 2017

429. Negligent Sexual Transmission of Disease

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

New May 2017

Directions for Use

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

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

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

Sources and Authority

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

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

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

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

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

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

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 912

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach,* § 1.13 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.32[2] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.170 (Matthew Bender)

~~408~~470. Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ 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 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

Directions for Use

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

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

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

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

Sources and Authority

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

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

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight, supra*, 3 Cal.4th at p. 320.)

- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that "it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." Thus, even though "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself," they may not increase the likelihood of injury above that which is inherent.' " (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- "In *Freeman v. Hale,* the Court of Appeal advanced a test ... for determining what risks are inherent in a sport: '[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.' " (*Distefano, supra,* 85 Cal.App.4th at p. 1261.)

- "[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.' " (*Shin, supra*, 42 Cal.4th at p. 497.)

- "[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was 'so reckless as to be totally outside the range of the ordinary activity involved in [golf]' depends on resolution of disputed material facts. Thus, defendant's summary judgment motion

was properly denied." (*Shin, supra,* 42 Cal.4th at p. 486, internal citation omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)

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

- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)

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

- "[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 ed. 2005) Torts, §§ 1339, 1340, 1343–1350

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

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

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

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

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

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

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

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

   [or]

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

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

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

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

Directions for Use

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

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

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

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

Sources and Authority

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

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

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

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

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

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

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

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

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

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

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf*

Corp. v. Superior Court (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

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

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

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

Sources and Authority

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

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

[*or*]

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

[*or*]

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

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

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

New May 2017

Directions for Use

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

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

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability─ Coparticipant in Sport or Other Recreational Activity.* For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk─Exception to Nonliability─Instructors, Trainers, or Coaches.* For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk─Exception to Nonliability─Facilities Owners and Operators and Event Sponsors.*

Sources and Authority

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

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

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

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

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

- "We have noted that the duty to avoid injuring others 'normally extends to those engaged in hazardous work.' 'We have never held that the doctrine of assumption of risk relieves all persons of a duty of care to workers engaged in a hazardous occupation.' However, the doctrine does apply in favor of those who hire workers to handle a dangerous situation, in both the public and the private sectors. Such a worker, 'as a matter of fairness, should not be heard to complain of the

negligence that is the cause of his or her employment. [Citations.] In effect, we have said it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.' This rule encourages the remediation of dangerous conditions, an important public policy. Those who hire workers to manage a hazardous situation are sheltered from liability for injuries that result from the risks that necessitated the employment." (*Gregory, supra,* 59 Cal.4th at p. 1002, internal citations omitted.)

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

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1355

1 Levy et al., California Torts, Ch. 15, *General Premises Liability,* § 15.23 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.173 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.412 (Matthew Bender)

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

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

1. **That [***name of defendant***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] retained control over safety conditions at the worksite;**
3. **That [***name of defendant***] negligently exercised [his/her/its] retained control over safety conditions by [***specify alleged negligent acts or omissions***];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

Directions for Use

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

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

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

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

Sources and Authority

- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra*, 27 Cal.4th at p. 202, original italics.)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette, Toland* and *Camargo* because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra*, 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)

- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.)

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

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

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

believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.) [¶] We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the 'affirmative contribution' requirement set forth in *Hooker*." (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594−595 [207 Cal.Rptr.3d 712].)

- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra,* 202 Cal.App.4th at p. 1446, internal citations omitted.)

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)

- ~~Section 414 of the Restatement Second of Torts provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."~~

Secondary Sources

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

Friedman, et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

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

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

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.12 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.20 et seq. (Matthew Bender)

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

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

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

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

[**or**]

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

[**or**]

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

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

Directions for Use

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

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

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

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

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

Sources and Authority

- Recreational Immunity. Civil Code section 846.

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

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

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

VF-1001. Premises Liability—Affirmative Defense—Recreation Immunity—Exceptions

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We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [own/lease/occupy/control] the property?**
____ Yes ____ No

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

2. **Was [***name of defendant***] negligent in the [use/maintenance] of the property?**
____ 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 negligence 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. **Did [***name of plaintiff/name of person causing injury***] enter on or use [***name of defendant***]'s property for a recreational purpose?**
____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. **Did [***name of defendant***] willfully or maliciously fail to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property?**
____ Yes ____ No

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

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

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

[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, October 2008, December 2010, December 2014, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1000, *Premises Liability—Essential Factual Elements,* and CACI No. 1010, *Affirmative Defense—Recreation Immunity─Exceptions*.

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.

~~Question 5 should be modified if~~ If either of the other two exceptions to recreational immunity from Civil Code section 846 is at issue, question 5 should be replaced with appropriate language for the applicable exception. (See CACI No. 1010.)

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

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

1249. Affirmative Defense—Reliance on Knowledgeable Intermediary

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

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

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

[or]

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

and

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

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

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

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

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

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

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

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

for carefulness; and

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

New May 2017

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

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

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

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

- "It is also significant if, under the circumstances giving rise to the plaintiff's claim, the intermediary itself had a legal duty to warn end users about the particular hazard in question. In general, ' "every person has a right to presume that every other person will perform his duty and obey the law." ' As the Restatement notes, '[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so.' This consideration may be especially relevant in the context of a raw material or other component supplied for use in

making a finished product. Under California law, a product manufacturer has a legal duty to warn its customers of all known or knowable dangers arising from use of the product. However, regardless of the purchaser's independent duty, the supplier cannot reasonably ignore known facts that would provide notice of a substantial risk that the intermediary might fail to warn or that warnings might fail to reach the consumer." (*Webb, supra,* 63 Cal.4th at p. 191, internal citations omitted.)

- "When raw materials are supplied in bulk for the manufacture of a finished product, it may be difficult for the supplier to convey warnings to the product's ultimate consumers. These suppliers likely have no way to identify ultimate product users and no ready means to communicate with them." (*Webb, supra,* 63 Cal.4th at p. 191.)

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

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1174A

1 California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.21[3][c] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability,* § 460.11[10][b] (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.263 et seq. (Matthew Bender)

1720. Affirmative Defense—Truth

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

New September 2003; Revised October 2008, May 2017

Directions for Use

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

Sources and Authority

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

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

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

Secondary Sources

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

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

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

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

Bender)

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

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

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

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

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

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

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

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

[or]

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

[or]

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

New September 2003; Revised June 2016, May 2017

Directions for Use

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

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

Sources and Authority

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

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

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

Secondary Sources

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

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

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

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

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

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

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
   ____ Yes ____ No

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

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about** [*name of plaintiff*]**?**
   ____ Yes ____ No

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

3. **Did [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
   ____ Yes ____ No

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

4. **Was the statement false?**
   ____ Yes ____ No

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

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

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

ACTUAL DAMAGES

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

____ Yes ____ No

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

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

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

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

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

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

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

ASSUMED DAMAGES

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

$_____

PUNITIVE DAMAGES

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

____ Yes ____ No

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

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

$_____

Signed: _____

Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
   ____ Yes ____ No

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

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about [***name of plaintiff***]?** \
   ____ Yes ____ No

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

3. **Was the statement false?**
   ____ Yes ____ No

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

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

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

5. **Is the statement, because of facts known to the people who heard or read it, the kind that would tend to injure [***name of plaintiff***] in [his/her] occupation?**
   ____ Yes ____ No

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

6. **Did [***name of plaintiff***] suffer Harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?**
   ____ Yes ____ No

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

ACTUAL DAMAGES

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

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

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

[$_____]

PUNITIVE DAMAGES

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

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

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

$_____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
   ____ Yes ____ No

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

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about [***name of plaintiff***]?**
   ____ Yes ____ No

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

3. **Did [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
   ____ Yes ____ No

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

4. **Was the statement false?**
   ____ Yes ____ No

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

5. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
   ____ Yes ____ No

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

ACTUAL DAMAGES

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

____ Yes ____ No

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

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

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

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

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

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

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

ASSUMED DAMAGES

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

____ Yes ____ No

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

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

$_____

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

PUNITIVE DAMAGES

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

____ Yes ____ No

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

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

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

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

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
____ Yes ____ No

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

2. **Did the [**person/people] to whom the statement was made reasonably understand that the statement was about [*name of plaintiff*]?**
____ Yes ____ No

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

3. **Was the statement false?**
____ Yes ____ No

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

4. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
____ Yes ____ No

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

5. **Is the statement, because of facts known to the people who heard or read the statement, the kind of statement that would tend to injure [***name of plaintiff***] in [his/her] occupation?**
____ Yes ____ No

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

6. **Did [***name of plaintiff***] suffer Harm to [his/her] property, business, profession, or**

occupation [including money spent as a result of the statement]?
____ Yes ____ No

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

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

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

ACTUAL DAMAGES

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

[$_____]

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

PUNITIVE DAMAGES

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

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

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

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

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

$_____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
____ Yes ____ No

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

2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [*name of plaintiff***]?**
____ Yes ____ No

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

3. Did [this person/these people] reasonably understand the statement to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
____ Yes ____ No

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

4. Was the statement substantially true?
____ Yes ____ No

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

5. Did [*name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
____ Yes ____ No

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

ACTUAL DAMAGES

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

____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

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

ASSUMED DAMAGES

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

$_____

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

PUNITIVE DAMAGES

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

____ Yes ____ No

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

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

$_____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

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

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

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.

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

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
   ____ Yes ____ No

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

2. **Did the [person/people] to whom the statement was made reasonably understand that the statement was about [***name of plaintiff***]?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
   ____ Yes ____ No

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

4. **Did the statement tend to injure [***name of plaintiff***] in [his/her] occupation?**
   ____ Yes ____ No

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

5. **Did [***name of plaintiff***] suffer Harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?**
   ____ Yes ____ No

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

6. **Was the statement a substantial factor in causing [***name of plaintiff***]'s harm?**
   ____ Yes ____ No

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

ACTUAL DAMAGES

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

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

$ _____]

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

$ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

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

PUNITIVE DAMAGES

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

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

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

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

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

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

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

VF-1900. Intentional Misrepresentation

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make a false representation of [a] fact[s] to [***name of plaintiff***]?**
   ____ Yes ____ No

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

2. **Did [***name of defendant***] know that the representation was false, or did [he/she] make the representation recklessly and without regard for its truth?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] intend that [***name of plaintiff***] rely on the representation?**
   ____ Yes ____ No

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

4. **Did [***name of plaintiff***] reasonably rely on the representation?**
   ____ Yes ____ No

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

5. **Was [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

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

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

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

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

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

TOTAL $ _____]

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

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

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

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

VF-1903. Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make a false representation of [a] fact[s] to [***name of plaintiff***]?**
____ Yes ____ No

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

[2. Did [*name of defendant***] honestly believe that the representation was true when [he/she] made it?**
____ Yes ____ No

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

3. Did [*name of defendant***] have reasonable grounds for believing the representation was true when [he/she] made it?**
____ Yes ____ No

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

4. Did [*name of defendant***] intend that [***name of plaintiff***] rely on the representation?**
____ Yes ____ No

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

5. Did [*name of plaintiff***] reasonably rely on the representation?**
____ Yes ____ No

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

6. Was [*name of plaintiff***]'s reliance on [***name of defendant***]'s representation a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both negligent misrepresentation and intentional misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1900, *Intentional Misrepresentation*, be kept separate and presented in the alternative. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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

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

2021. Private Nuisance—Essential Factual Elements

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

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

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

   [was harmful to health;] [or]

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

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

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

Sources and Authority

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

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

- "~~Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. '~~So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance; … ." ~~'~~" (~~*Koll-Irvine Center Property Owners Assn.*~~*Mendez*, *supra*, 3~~2~~4 Cal.App.5~~4~~th at p. 262~~1041, internal citation omitted~~.)

- "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 v. Mattos* (1958) 162 Cal.App.2d 41, 42 [328 P.2d 269].)

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

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

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

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

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

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

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of

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

- ~~Restatement Second of Torts, section 822 provides:~~

  ~~One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either~~

  ~~(a) intentional and unreasonable, or~~

  ~~(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.~~

- ~~Restatement Second of Torts, section 826 provides:~~

  ~~An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if~~

  ~~(a) the gravity of the harm outweighs the utility of the actor’s conduct, or~~

  ~~(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.~~

Secondary Sources

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

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

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

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

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

VF-2006. Private Nuisance

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] [own/lease/occupy/control] the property?
____ Yes ____ No

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

2. Did [*name of defendant*], by acting or failing to act, create a condition or permit a condition to exist that was harmful to health?
____ Yes ____ No

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

3. Did this condition substantially interfere with [*name of plaintiff*]'s use or enjoyment of [his/her] land?
____ Yes ____ No

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

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

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

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

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

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

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

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

____ Yes ____ No

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

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

____ Yes ____ No

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

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

[a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

Depending on the facts of the case, question 2 may be replaced with one of the other options from ~~can be modified, as in~~ element 2 of CACI No. 2021.

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

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

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

2100. Conversion—Essential Factual Elements

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

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

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

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

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

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

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

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

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

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

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

Directions for Use

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

Sources and Authority

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

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

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

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

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

- "The rule of strict liability applies equally to purchasers of converted goods, or more generally to purchasers from sellers who lack the power to transfer ownership of the goods sold. That is, there is no general exception for bona fide purchasers." (*Regent Alliance Ltd. v. Rabizadeh~~, supra~~*, (2014) 231 Cal.App.4th 1177,~~at p.~~ 1181 [180 Cal.Rptr.3d 610], internal citations omitted.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to

make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

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

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

- "With respect to plaintiffs' causes of action for conversion, '[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.' 'For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, of that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. A similar privilege is afforded an actor for the protection of certain third persons.' " (*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072 [283 Cal.Rptr. 917], internal citations omitted.)

- "We recognize that the common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel, may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. On the other hand, if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124 [55 Cal.Rptr.3d 621], internal citations omitted.)

Secondary Sources

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

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

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

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

Bender)

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

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

VF-2100. Conversion

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [own/possess/have a right to possess] a [***insert description of personal property***]?**
   ____ Yes ____ No

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

2. **Did [***name of defendant***] ~~intentionally and~~ substantially interfere with [***name of plaintiff***]'s property by knowingly or intentionally [[taking possession of/preventing [***name of plaintiff***] from having access to] the [***insert description of personal property***]]/[destroying the [***insert description of personal property***]/refusing to return [***name of plaintiff***]'s [***insert description of personal property***] after [***name of plaintiff***] demanded its return]?**
   ____ Yes ____ No

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

3. **Did [***name of plaintiff***] consent?**
   ____ Yes ____ No

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

4. **Was [***name of plaintiff***] harmed?**
   ____ Yes ____ No

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

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

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

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

2547. Disability-Based Associational Discrimination—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] association with a disabled person. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] was [***specify basis of association or relationship, e.g., the brother of [name of disabled person]***], who had [a] [***e.g., physical condition***];**

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

   [or]

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

   [or]

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

   [or]

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

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

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

   [*or***]**

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

   [*or***]**

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

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

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

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

New December 2014; Revised May 2017

Directions for Use

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

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

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

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

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

No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 76 if either the second or third option is included for element 54.

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

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

Sources and Authority

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

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

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

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

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

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

- "[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical … disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." (*Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038–1039.)

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

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

New May 2017

Directions for Use

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

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

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

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

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

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

Sources and Authority

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

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

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

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

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

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

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

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

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

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

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

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

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

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Accommodations under the Fair Housing Act (May 17, 2004) https://www.hud.gov/offices/fheo/library/huddojstatement.pdf

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New May 2017

Directions for Use

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

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

the housing.

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

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

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

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

Element 7 may not apply if section 504 of the Rehabilitation Act of 1973 (applicable to federal subsidized housing) or Title II of the Americans With Disabilities Act requires the landlord to incur the cost of reasonable modifications.

In the case of a rental, the landlord may, if it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear). (Gov. Code, § 12927(c)(1).) Include element 8 if the premises to be physically altered is a rental unit, and the plaintiff agreed to restoration. If the parties dispute whether restoration is reasonable, presumably the defendant would have to prove reasonableness. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that s/he is asserting].)

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.
- "Housing" Defined. Government Code section 12927(d).
- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

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

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

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

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Modifications under the Fair Housing Act (March 3, 2008) https://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf

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

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

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

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

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

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

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

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

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

~~4~~5. **That there was no reasonable justification for the [conduct/failure to act];**

~~5~~6. **That [***name of defendant***] was performing ~~acting or purporting to act in the performance of~~ [his/her] official duties when [he/she] [acted/purported to act/failed to act];**

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

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

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

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

Directions for Use

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

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

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

The "official duties" referred to in element ~~5~~ 6 must be duties created by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 6~~5~~.

Sources and Authority

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

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

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

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

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

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries

should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

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

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

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

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

New May 2017

Directions for Use

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

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

Give the last optional paragraph if the alleged fabrication occurred in a criminal case. It would appear that the use of fabricated evidence for prosecution may be a constitutional violation even if the arrest was lawful or objectively reasonable. (See *Kerkeles, supra,* 199 Cal.App.4th at pp. 1010–1012, quoting favorably *Ricciuti v. New York City Transit Authority* (2d Cir. 1997) 124 F.3d 123, 130.)

Sources and Authority

- "Substantive due process protects individuals from arbitrary deprivation of their liberty by government." (*Costanich v. Dep't of Soc. & Health Servs.* (9th Cir. 2010) 627 F.3d 1101, 1110.)

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

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

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

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

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

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

- "[T]here is no such thing as a minor amount of actionable perjury or of false evidence that is somehow permissible. Why? Because government perjury and the knowing use of false evidence are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts. Furthermore, the social workers' alleged transgressions were not made under pressing circumstances requiring prompt action, or those providing ambiguous or conflicting guidance. There are no circumstances in a dependency proceeding that would permit government officials to bear false witness against a parent." (*Hardwick v. Cnty. of Orange* (9th Cir. 2017) 844 F.3d 1112, 1119.)

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

- "The *Devereaux* test envisions an investigator whose unlawful motivation is illustrated by her state of mind regarding the alleged perpetrator's innocence, or one who surreptitiously fabricates evidence by using coercive investigative methods. These are circumstantial methods of proving deliberate falsification. Here, [plaintiff] argues that the record directly reflects [defendant]'s false statements. If, under *Devereaux*, an interviewer who uses coercive interviewing techniques that are known to yield false evidence commits a constitutional violation, then an interviewer who deliberately mischaracterizes witness statements in her investigative report also commits a constitutional violation. Similarly, an investigator who purposefully reports that she has interviewed witnesses, when she has actually only attempted to make contact with them, deliberately fabricates evidence." (*Costanich, supra,* 627 F.3d at p. 1111.)

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

- "[P]retrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification." (*Manuel v. City of Joliet* (2017) __ U.S. __, 2017 U.S. LEXIS 2021 (No. 14-9496), internal citation omitted.)

Secondary Sources

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

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

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

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

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

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

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

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

New September 2003; Revised and Renumbered May 2017

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

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

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

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

Secondary Sources

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

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

14 California Real Estate Law and Practice, Ch. 512, *Compensation*, § 512.12 (Matthew Bender)

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

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

9 California Points and Authorities, Ch. 95, *Eminent Domain*, § 95.123 (Matthew Bender)

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

A public entity that is considering condemning property for public use may enter the property before condemnation to conduct activities that are reasonably related to acquiring the property for a public project. However, the property owner may recover for any actual damage to, or substantial interference with, the owner's possession and use of the property caused by the public entity's entry for these purposes.

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

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

New May 2017

Directions for Use

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

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

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

Sources and Authority

- Public Entity's Precondemnation Entry to Investigate Property's Suitability for Public Project. Code of Civil Procedure section 1245.010 et seq.

- Public Entity's Precondemnation Entry Authorized for Particular Purposes. Code of Civil

Procedure 1245.010.

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

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

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

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

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

- "Although the measure of compensation that is 'just' for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc., supra,* 1 Cal.5th at pp. 203–204.)

- "In light of the nature of the environmental order at issue here, however, granting a property owner the rental value of the property in addition to any damages the owner sustains for actual

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

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

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

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1198

14 California Real Estate Law and Practice, Ch. 503, *Preliminary Case Evaluation and Preparation for the Condemnor*, § 503.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.72 (Matthew Bender)

3511A. ~~Permanent~~ Severance Damages to Remainder (Code Civ. Proc., §§ 1263.410, 1263.420(a))

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

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

Severance damages are determined as follows:

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

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

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

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

Directions for Use

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

A property owner may also be able to recover for ~~temporary~~ economic loss to the remaining property incurred during the construction of the project. (Code Civ. Proc., § 1263.420(b); see *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) For an instruction on this loss, see CACI No. 3511B, *Damage to Remainder During Construction*.~~This recovery has been called "temporary severance damages." This instruction is not for use to compute loss during construction.~~

Sources and Authority

- Right to Severance Damages. Code of Civil Procedure section 1263.410.
- Damages to Remainder After Severance. Code of Civil Procedure section 1263.420(a).
- Benefit to Remainder. Code of Civil Procedure section 1263.430.
- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)
- "The claimed loss in market value must directly and proximately flow from the taking. Thus, recovery may not be based on ' " 'speculative, remote, imaginary, contingent, or merely possible' " ' events." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1466 [141 Cal.Rptr.3d 271].)
- The court determines as a matter of law what constitutes the "larger parcel" for which severance damages may be obtained: "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)
- "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630, 941 P.2d 809], internal citations omitted.)
- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive … a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 972, original italics, internal citations omitted.)
- "[W]here the property owner produces evidence tending to show that some other aspect of the taking … 'naturally tends to and actually does decrease the market value' of the remaining property, it is for

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

3511B. Damage to Remainder During Construction (Code Civ. Proc, § 1263.420(b))

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

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

New May 2017

Directions for Use

Give this instruction if the owner claims that he or she suffered an economic loss on the property not taken during construction of the project, for example because of decreased business due to access being made more difficult. (See *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) Courts have referred to these damages as "temporary severance damages" (see, e.g., *City of Fremont, supra,* 160 Cal.App.4th at p. 676.), though the statute does not call them either "temporary" or "severance." (See Code Civ. Proc., § 1263.420(b) [damage to the remainder caused by the construction and use of the project for which the property is taken].)

It is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175.)

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

Sources and Authority

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

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

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

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

- "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel); the issue is one of law for decision by the court.' " (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

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

- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 720 [66 Cal.Rptr.2d 630, 941 P.2d 809].)

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

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

Secondary Sources

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

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

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

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

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

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

3903D. Lost Earning Capacity (Economic Damage)

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

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

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

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

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

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

Directions for Use

This instruction is not intended for use in employment cases.

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

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. The verdict form should ensure that the same loss is not computed under both standards.

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

Sources and Authority

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

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

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

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

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

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

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

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

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

- ~~The Supreme Court has stated:~~ " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

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

Secondary Sources

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

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

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

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

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

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

Table 3. Life table for females: United States, 2012

Spreadsheet version available from: ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/65_08/Table03.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
0–1	0.005432	100,000	543	99,523	8,116,947	81.2
1–2	0.000374	99,457	37	99,438	8,017,424	80.6
2–3	0.000234	99,420	23	99,408	7,917,985	79.6
3–4	0.000182	99,396	18	99,387	7,818,577	78.7
4–5	0.000140	99,378	14	99,371	7,719,190	77.7
5–6	0.000127	99,364	13	99,358	7,619,819	76.7
6–7	0.000110	99,352	11	99,346	7,520,461	75.7
7–8	0.000097	99,341	10	99,336	7,421,115	74.7
8–9	0.000089	99,331	9	99,327	7,321,779	73.7
9–10	0.000084	99,322	8	99,318	7,222,452	72.7
10–11	0.000083	99,314	8	99,310	7,123,134	71.7
11–12	0.000089	99,306	9	99,301	7,023,824	70.7
12–13	0.000104	99,297	10	99,292	6,924,523	69.7
13–14	0.000129	99,286	13	99,280	6,825,231	68.7
14–15	0.000162	99,274	16	99,266	6,725,951	67.8
15–16	0.000199	99,258	20	99,248	6,626,686	66.8
16–17	0.000236	99,238	23	99,226	6,527,438	65.8
17–18	0.000274	99,214	27	99,201	6,428,212	64.8
18–19	0.000311	99,187	31	99,172	6,329,011	63.8
19–20	0.000346	99,156	34	99,139	6,229,840	62.8
20–21	0.000381	99,122	38	99,103	6,130,701	61.9
21–22	0.000416	99,084	41	99,064	6,031,597	60.9
22–23	0.000446	99,043	44	99,021	5,932,534	59.9
23–24	0.000471	98,999	47	98,975	5,833,513	58.9
24–25	0.000494	98,952	49	98,928	5,734,538	58.0
25–26	0.000517	98,903	51	98,878	5,635,610	57.0
26–27	0.000543	98,852	54	98,825	5,536,732	56.0
27–28	0.000571	98,798	56	98,770	5,437,907	55.0
28–29	0.000601	98,742	59	98,712	5,339,137	54.1
29–30	0.000632	98,683	62	98,652	5,240,424	53.1
30–31	0.000668	98,620	66	98,587	5,141,773	52.1
31–32	0.000707	98,554	70	98,520	5,043,185	51.2
32–33	0.000745	98,485	73	98,448	4,944,666	50.2
33–34	0.000784	98,411	77	98,373	4,846,218	49.2
34–35	0.000826	98,334	81	98,294	4,747,845	48.3
35–36	0.000878	98,253	86	98,210	4,649,551	47.3
36–37	0.000942	98,167	92	98,121	4,551,341	46.4
37–38	0.001015	98,074	100	98,025	4,453,221	45.4
38–39	0.001096	97,975	107	97,921	4,355,196	44.5
39–40	0.001183	97,867	116	97,809	4,257,275	43.5
40–41	0.001276	97,752	125	97,689	4,159,465	42.6
41–42	0.001381	97,627	135	97,559	4,061,776	41.6
42–43	0.001506	97,492	147	97,419	3,964,217	40.7
43–44	0.001657	97,345	161	97,265	3,866,798	39.7
44–45	0.001834	97,184	178	97,095	3,769,534	38.8
45–46	0.002022	97,006	196	96,908	3,672,439	37.9
46–47	0.002222	96,810	215	96,702	3,575,531	36.9
47–48	0.002444	96,594	236	96,476	3,478,829	36.0
48–49	0.002687	96,358	259	96,229	3,382,353	35.1
49–50	0.002942	96,099	283	95,958	3,286,124	34.2
50–51	0.003205	95,817	307	95,663	3,190,166	33.3
51–52	0.003470	95,510	331	95,344	3,094,503	32.4
52–53	0.003738	95,178	356	95,000	2,999,159	31.5
53–54	0.004014	94,822	381	94,632	2,904,159	30.6
54–55	0.004306	94,442	407	94,238	2,809,527	29.7
55–56	0.004622	94,035	435	93,818	2,715,288	28.9
56–57	0.004961	93,600	464	93,368	2,621,471	28.0
57–58	0.005324	93,136	496	92,888	2,528,102	27.1
58–59	0.005712	92,640	529	92,376	2,435,214	26.3
59–60	0.006129	92,111	565	91,829	2,342,838	25.4
60–61	0.006579	91,546	602	91,245	2,251,010	24.6

See footnote at end of table.

Table 3. Life table for females: United States, 2012—Con.

Spreadsheet version available from: ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/65_08/Table03.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
61–62	0.007075	90,944	643	90,622	2,159,764	23.7
62–63	0.007634	90,301	689	89,956	2,069,142	22.9
63–64	0.008274	89,611	741	89,241	1,979,186	22.1
64–65	0.008998	88,870	800	88,470	1,889,945	21.3
65–66	0.009826	88,070	865	87,638	1,801,475	20.5
66–67	0.010745	87,205	937	86,736	1,713,837	19.7
67–68	0.011748	86,268	1,013	85,761	1,627,101	18.9
68–69	0.012811	85,254	1,092	84,708	1,541,340	18.1
69–70	0.013960	84,162	1,175	83,575	1,456,632	17.3
70–71	0.015317	82,987	1,271	82,352	1,373,057	16.5
71–72	0.016935	81,716	1,384	81,024	1,290,705	15.8
72–73	0.018674	80,332	1,500	79,582	1,209,681	15.1
73–74	0.020539	78,832	1,619	78,023	1,130,099	14.3
74–75	0.022642	77,213	1,748	76,339	1,052,076	13.6
75–76	0.025028	75,465	1,889	74,520	975,737	12.9
76–77	0.027826	73,576	2,047	72,552	901,217	12.2
77–78	0.030908	71,529	2,211	70,423	828,664	11.6
78–79	0.034321	69,318	2,379	68,128	758,241	10.9
79–80	0.038452	66,939	2,574	65,652	690,113	10.3
80–81	0.042724	64,365	2,750	62,990	624,461	9.7
81–82	0.047387	61,615	2,920	60,155	561,471	9.1
82–83	0.052600	58,695	3,087	57,152	501,315	8.5
83–84	0.058859	55,608	3,273	53,971	444,164	8.0
84–85	0.066132	52,335	3,461	50,604	390,192	7.5
85–86	0.074693	48,874	3,651	47,049	339,588	6.9
86–87	0.083936	45,223	3,796	43,325	292,539	6.5
87–88	0.094140	41,428	3,900	39,478	249,214	6.0
88–89	0.105361	37,528	3,954	35,551	209,736	5.6
89–90	0.117645	33,574	3,950	31,599	174,186	5.2
90–91	0.131027	29,624	3,882	27,683	142,587	4.8
91–92	0.145527	25,742	3,746	23,869	114,904	4.5
92–93	0.161149	21,996	3,545	20,224	91,035	4.1
93–94	0.177876	18,451	3,282	16,810	70,811	3.8
94–95	0.195666	15,169	2,968	13,685	54,001	3.6
95–96	0.214456	12,201	2,617	10,893	40,315	3.3
96–97	0.234153	9,585	2,244	8,462	29,422	3.1
97–98	0.254640	7,340	1,869	6,406	20,960	2.9
98–99	0.275777	5,471	1,509	4,717	14,554	2.7
99–100	0.297402	3,962	1,178	3,373	9,837	2.5
100 and over	1.000000	2,784	2,784	6,464	6,464	2.3

SOURCE: NCHS, National Vital Statistics System, Mortality.

Table 2. Life table for males: United States, 2012

Spreadsheet version available from: ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/65_08/Table02.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
0–1	0.006499	100,000	650	99,427	7,641,761	76.4
1–2	0.000443	99,350	44	99,328	7,542,334	75.9
2–3	0.000303	99,306	30	99,291	7,443,006	75.0
3–4	0.000224	99,276	22	99,265	7,343,715	74.0
4–5	0.000200	99,254	20	99,244	7,244,451	73.0
5–6	0.000165	99,234	16	99,226	7,145,207	72.0
6–7	0.000144	99,217	14	99,210	7,045,981	71.0
7–8	0.000125	99,203	12	99,197	6,946,771	70.0
8–9	0.000107	99,191	11	99,185	6,847,574	69.0
9–10	0.000090	99,180	9	99,176	6,748,389	68.0
10–11	0.000081	99,171	8	99,167	6,649,213	67.0
11–12	0.000090	99,163	9	99,159	6,550,046	66.1
12–13	0.000128	99,154	13	99,148	6,450,887	65.1
13–14	0.000204	99,141	20	99,131	6,351,739	64.1
14–15	0.000307	99,121	30	99,106	6,252,608	63.1
15–16	0.000415	99,091	41	99,070	6,153,502	62.1
16–17	0.000524	99,050	52	99,024	6,054,432	61.1
17–18	0.000646	98,998	64	98,966	5,955,408	60.2
18–19	0.000779	98,934	77	98,895	5,856,442	59.2
19–20	0.000914	98,857	90	98,812	5,757,547	58.2
20–21	0.001053	98,766	104	98,714	5,658,735	57.3
21–22	0.001178	98,662	116	98,604	5,560,021	56.4
22–23	0.001270	98,546	125	98,484	5,461,417	55.4
23–24	0.001319	98,421	130	98,356	5,362,933	54.5
24–25	0.001337	98,291	131	98,225	5,264,577	53.6
25–26	0.001346	98,160	132	98,094	5,166,351	52.6
26–27	0.001359	98,028	133	97,961	5,068,258	51.7
27–28	0.001373	97,894	134	97,827	4,970,297	50.8
28–29	0.001394	97,760	136	97,692	4,872,469	49.8
29–30	0.001420	97,624	139	97,554	4,774,778	48.9
30–31	0.001448	97,485	141	97,415	4,677,223	48.0
31–32	0.001477	97,344	144	97,272	4,579,809	47.0
32–33	0.001506	97,200	146	97,127	4,482,536	46.1
33–34	0.001537	97,054	149	96,979	4,385,409	45.2
34–35	0.001574	96,905	153	96,828	4,288,430	44.3
35–36	0.001625	96,752	157	96,673	4,191,602	43.3
36–37	0.001694	96,595	164	96,513	4,094,928	42.4
37–38	0.001775	96,431	171	96,346	3,998,415	41.5
38–39	0.001867	96,260	180	96,170	3,902,069	40.5
39–40	0.001970	96,080	189	95,986	3,805,899	39.6
40–41	0.002087	95,891	200	95,791	3,709,914	38.7
41–42	0.002227	95,691	213	95,584	3,614,123	37.8
42–43	0.002398	95,478	229	95,363	3,518,538	36.9
43–44	0.002609	95,249	248	95,125	3,423,175	35.9
44–45	0.002862	95,000	272	94,864	3,328,050	35.0
45–46	0.003136	94,728	297	94,580	3,233,186	34.1
46–47	0.003438	94,431	325	94,269	3,138,606	33.2
47–48	0.003793	94,107	357	93,928	3,044,337	32.3
48–49	0.004205	93,750	394	93,553	2,950,408	31.5
49–50	0.004654	93,356	434	93,138	2,856,856	30.6
50–51	0.005115	92,921	475	92,683	2,763,717	29.7
51–52	0.005581	92,446	516	92,188	2,671,034	28.9
52–53	0.006072	91,930	558	91,651	2,578,846	28.1
53–54	0.006600	91,372	603	91,070	2,487,196	27.2
54–55	0.007173	90,769	651	90,443	2,396,125	26.4
55–56	0.007791	90,117	702	89,766	2,305,682	25.6
56–57	0.008438	89,415	754	89,038	2,215,916	24.8
57–58	0.009100	88,661	807	88,257	2,126,878	24.0
58–59	0.009765	87,854	858	87,425	2,038,620	23.2
59–60	0.010439	86,996	908	86,542	1,951,195	22.4
60–61	0.011156	86,088	960	85,608	1,864,653	21.7

See footnote at end of table.

Table 2. Life table for males: United States, 2012—Con.

Spreadsheet version available from: ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/65_08/Table02.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
61–62	0.011929	85,128	1,016	84,620	1,779,045	20.9
62–63	0.012740	84,112	1,072	83,576	1,694,426	20.1
63–64	0.013593	83,040	1,129	82,476	1,610,849	19.4
64–65	0.014505	81,912	1,188	81,318	1,528,373	18.7
65–66	0.015501	80,724	1,251	80,098	1,447,056	17.9
66–67	0.016614	79,472	1,320	78,812	1,366,958	17.2
67–68	0.017888	78,152	1,398	77,453	1,288,146	16.5
68–69	0.019327	76,754	1,483	76,012	1,210,693	15.8
69–70	0.020930	75,270	1,575	74,483	1,134,681	15.1
70–71	0.022834	73,695	1,683	72,854	1,060,198	14.4
71–72	0.025025	72,012	1,802	71,111	987,344	13.7
72–73	0.027449	70,210	1,927	69,247	916,233	13.0
73–74	0.030017	68,283	2,050	67,258	846,986	12.4
74–75	0.032687	66,233	2,165	65,151	779,728	11.8
75–76	0.035636	64,068	2,283	62,927	714,577	11.2
76–77	0.039103	61,785	2,416	60,577	651,650	10.5
77–78	0.043133	59,369	2,561	58,089	591,073	10.0
78–79	0.047638	56,808	2,706	55,455	532,984	9.4
79–80	0.052915	54,102	2,863	52,671	477,529	8.8
80–81	0.058450	51,239	2,995	49,742	424,858	8.3
81–82	0.064422	48,245	3,108	46,691	375,116	7.8
82–83	0.071408	45,137	3,223	43,525	328,426	7.3
83–84	0.079491	41,913	3,332	40,248	284,901	6.8
84–85	0.088144	38,582	3,401	36,881	244,653	6.3
85–86	0.097713	35,181	3,438	33,462	207,772	5.9
86–87	0.109044	31,743	3,461	30,013	174,310	5.5
87–88	0.121408	28,282	3,434	26,565	144,297	5.1
88–89	0.134836	24,848	3,350	23,173	117,732	4.7
89–90	0.149341	21,498	3,211	19,893	94,559	4.4
90–91	0.164923	18,287	3,016	16,779	74,667	4.1
91–92	0.181561	15,271	2,773	13,885	57,888	3.8
92–93	0.199210	12,499	2,490	11,254	44,003	3.5
93–94	0.217805	10,009	2,180	8,919	32,749	3.3
94–95	0.237254	7,829	1,857	6,900	23,830	3.0
95–96	0.257445	5,971	1,537	5,203	16,930	2.8
96–97	0.278240	4,434	1,234	3,817	11,727	2.6
97–98	0.299485	3,200	958	2,721	7,910	2.5
98–99	0.321012	2,242	720	1,882	5,189	2.3
99–100	0.342642	1,522	522	1,261	3,307	2.2
100 and over	1.000000	1,001	1,001	2,046	2,046	2.0

SOURCE: NCHS, National Vital Statistics System, Mortality.

4012. Concluding Instruction

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

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

New June 2005; Revised May 2017

Directions for Use

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

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

Sources and Authority

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

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

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

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

Secondary Sources

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

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

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

VF-4000. Conservatorship—Verdict Form

Select one of the following two options:

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

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

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

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

Signed: _____
Presiding Juror

Dated: _____

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

New June 2005; Revised December 2010, May 2017

Directions for Use

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

Instruction	Commentator	Comment	Committee Response
429, *Negligent Sexual Transmission of Disease*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The case on which this proposed new instruction is based, *John B. v. Superior Court* (2006) 38 Cal.4th 1177, involved a very specific fact pattern. We question the need for a standard instruction involving such specific facts. We believe the proposed instruction as written does not limit liability to the same factual scenario as in *John B.*, which involved a married couple, promises of monogamy, and unprotected sex. We believe the cautionary language in the Directions for Use is insufficient to avoid the potential misuse of this instruction.	The committee fully considered this point. The problem is that courts are giving a BAJI instruction on this subject because there is no CACI instruction. But in the committee's view, the BAJI instruction is seriously flawed. The committee decided that a CACI instruction, even if of limited applicability, is needed as a better alternative to the BAJI instruction.
		The instruction seems to assume that the defendant had unprotected sex with the plaintiff, when that could be a disputed issue and, in any event, should be expressly stated in the instruction. Also, we would state that the defendant "was negligent" rather than "may be negligent." We find the instruction flawed and would reject this proposed new instruction.	The committee does not find any such assumption in the language of the instruction. Because of the unusual and limited nature of *John B*, it is not possible to express its standards as absolutes. Everything is a "may be."
470, *Primary Assumption of Risk—Exception to Nonliability–Coparticipant in Sport or*	Association of Defense Counsel of Northern California and Nevada, by Don Willenburg, Attorney at Law	Instructions 470 and 471 should include a definition of recklessness.	The only proposed change to these instructions is to renumber them. Therefore, this comment is beyond the scope of the Invitation to

Instruction	Commentator	Comment	Committee Response
Other Recreational Activity 471, *Primary Assumption of Risk—Exception to Nonliability–Instructors, Trainers, or Coaches*			Comment. It will be considered in the next release cycle.
470, 471, 472, *Primary Assumption of Risk—Exception to Nonliability–Facilities Owners and Operators and Event Sponsors* 473, *Primary Assumption of Risk–Exception to Nonliability–Occupation Involving Inherent Risk*	Orange County Bar Association, by Michael L. Baroni, President	We recommend that the title of this instruction be changed to "*Secondary Assumption of Risk – Exception to Nonliability –…*" in order to properly emphasize that this exception is not based on any doctrine of primary assumption of risk, but rather is based on the doctrines of secondary assumption of the risk and comparative fault as set forth in the *Knight vs. Jewett* case.	Only CACI No. 473 is presented for substantive consideration for this release. Any changes to the other three instructions would have to be considered in the next release cycle. However, the committee believes that the comment is contrary to the law and does not intend to address it further. "In cases involving "secondary assumption of risk"--where the defendant does owe a duty of care to the

Instruction	Commentator	Comment	Committee Response
			plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty--the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315.).
		We recommend that the Sources and Authority specifically identify what former language was removed and what new language has been added and the reasons therefor in each instance.	The Sources and Authority are for presenting statutes and case excerpts that would be of interest to the user in researching the subject of the instruction. While identifying changes might also be of interest, trying to document them all would soon become unwieldy. Proposed changes can be seen in the files posted for public comment, which are archived.

Instruction	Commentator	Comment	Committee Response
470, *Primary Assumption of Risk— Exception to Nonliability– Coparticipant in Sport or Other Recreational Activity*	Orange County Bar Association, by Michael L. Baroni, President	We recommend that the following language be added to the end of element number 1: "… or that [*name of defendant*] unreasonably increased the risks to [*name of plaintiff*] over and above those inherent in (e.g. touch football);" This change is necessary to make this CACI consistent with No 471, 472, and 473.	The only proposed change to this instruction is to renumber it. Therefore, this comment is beyond the scope of the Invitation to Comment and would have to be addressed in the next release cycle. However, the committee believes that the comment is contrary to the law and does not intend to address it further. The standard for coparticipants is that the defendant either intentionally injured the plaintiff or acted so recklessly that his/her conduct was entirely outside the range of ordinary activity involved in the sport or activity. (*Knight, supra,* 3 Cal.4th at p. 320.) This is a much higher bar than simply increasing the risk.
473, *Primary Assumption of Risk–Exceptio*	Orange County Bar Association, by Michael L. Baroni, President	We recommend that the language be modified where indicated to state: "However, [*name of plaintiff*] may recover if he/she) proves one or more	The committee does not share this concern. The "or's" are there now between the options for

Instruction	Commentator	Comment	Committee Response
n to Nonliability–Occupation Involving Inherent Risk		of the following: (1. … (or) 1…. (or) 1….) **and also both** 2…. and 3….)." The reason is because as written it will be confusing for a jury trying to decide if all three of the alternative points number 1 are required or just one of them.	element 1. It is not necessary to add any language to tell the jury that both 2 and 3 must also be proved.
		We recommend that some Secondary Sources be added since all other instructions in this grouping cite to Secondary Sources, which are useful to the court and counsel.	Proposed Secondary Sources are submitted by the publishers later.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Unlike the other instructions on exceptions to nonliability, this proposed new instruction states when the defendant is not liable. ("[*Name of defendant*] is not liable if [*name of plaintiff*]'s injury arose from a risk inherent in the occupation of [*e.g., firefighter*])," but without stating which party has the burden of proof on that issue. We believe this language is unnecessary and may confuse the jury. The instruction states that the plaintiff must prove certain facts to establish liability, and this seems sufficient. We would delete the sentence quoted above. This will require a fuller explanation of the "inherent risk" in the third alternative element 1, which we would modify as follows:	The committee believes that the sentence that the commentators would delete is important. It sets up the firefighter rule as a potential bar to liability; and then sets up the exceptions as the plaintiff's burden to prove.

Instruction	Commentator	Comment	Committee Response
		[1. That the cause of [*name of plaintiff*]'s injury was not related to the risks inherent risk in [*e.g., firefighting*];]	
		The Directions for Use of the other instructions on exceptions to nonliability include a paragraph stating, "While duty is question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. . . ." We find this useful and would include the same language in the Directions for Use of this instruction.	The committee agreed and has made this addition.
1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*	Defense Counsel of Northern California and Nevada, by Don Willenburg, Attorney at Law and Allen Glaessner, Attorney at Law San Francisco (both submitting essentially the same letter)	The jury instruction as presently worded omits any reference to the owner/hirer "affirmatively contributing" to the plaintiff's injury. This is a serious shortcoming of the instruction and should be remedied. The Association proposes that a new element 5 be added (present element 5 becoming element 6): 5. That [*name of defendant*]'s negligent exercise of [his/her/its] retained control over safety conditions affirmatively contributed to causing [*name of plaintiff*]'s harm.	The committee extensively considered this point some years ago and concluded, as stated in the current Directions for Use, that "affirmatively contributed" is not a separate element apart from causation. The court in *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594−595 expressly agreed with the committee's conclusion.
		The proposed revised use note cites footnote three in *Hooker* for the proposition that an "affirmative contribution" may "be in the form of an	The complete footnote already appears in the Sources and Authority. Adding this language to

Instruction	Commentator	Comment	Committee Response
		omission to act." That is correct, but incomplete. The next sentence provides as the example an owner-hirer who promises a particular safety measure, but fails to keep that promise, that should result in liability. But a promise is itself more than a failure to act – it is a type of act that misleads others. Rather than using just a potentially misleading snippet, the use note should include the entire short (3-sentence) footnote.	the Directions for Use would extend them beyond the purpose, which is to make it clear to users that an omission can be an "affirmative contribution."
		The proposed revised use note cites *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582 (which in turn cites the existing use note) for the proposition that "Affirmative contribution simply means that there must be causation between the hirer's retained control and the plaintiff's injury." The quotation is accurate (*id.* at 594) but the statement is wrong, because it confuses the nature of the conduct with the results of the conduct. It is flatly inconsistent with *Hooker,* where causation was present but affirmative contribution was not.	The commentator disagrees with the court in *Regalado*, but the committee must follow the law as interpreted in that case.
		Because CACI 1009B (as presently worded) contains no indication that there should be an "affirmative contribution" by the owner/hirer in order to find that defendant liable, the use note should also advise that it may	CACI 401 states the general principles of negligence, one of which is that negligence can be by act or omission. That general principle applies

Instruction	Commentator	Comment	Committee Response
		be appropriate to modify the CACI 401 general negligence instructions to omit reference to an "omission to act" depending on the facts of the case. As in the *Hooker* footnote example, if the owner/hirer promised to be responsible for some aspect of the project safety, inclusion of the "omission" instruction in CACI 401 would be appropriate, because following the promise, there was a failure to act to honor the promise. Conversely, if the owner/hirer made no such promise, then under *Hooker* the owner/hirer's "omission" (not requiring the subcontractor to undertake safety precautions) would not be a basis for liability. (*Hooker, supra,* 27 Cal.4th at 215-216.)	in a 1009B case. The committee sees no problems if the court gives both 401 and 1009B without modifying 401 as proposed in the comment.
	Orange County Bar Association, by Michael L. Baroni, President	1.The last two sentences in the 3rd paragraph in the Directions for Use should be re written as follows for clarity: "Affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act. The "substantial factor" element, as noted in Element 5, adequately expresses the "affirmative contribution" requirement. (See *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594–595 [207	The committee changed "in the form of an omission" to "a failure." The committee did not find the other suggested revisions to be improvements.

Instruction	Commentator	Comment	Committee Response
		Cal.Rptr.3d 712] [agreeing with committee's position that "affirmatively contributed" need not be specifically stated in instruction].)	
1010. *Affirmative Defense—Recreation Immunity—Exceptions*	Orange County Bar Association, by Michael L. Baroni, President	We question the removal of the word "use" and replacing it with the word "enter" in the first and last sentences of the instruction. These changes do not appear to be based on case law or Civil Code § 846. Case law and Civil Code § 846 actually refer to "entry on or use" of property.	The statutory immunity protects the property owner from liability for "entry or use by others for any recreational purpose." The committee agrees that "or use" should be restored to the opening paragraph. However, the statutory language regarding the express invitation exception (last sentence) applies to "any persons who are expressly invited rather than merely permitted to *come upon* the premises by the landowner." "Come upon" requires entry; "or use" should not be included here.
VF-1001. *Premises Liability—Affirmative Defense—Recreation*	Hon. Justice Elizabeth A. Baron (Ret.)	In light of the proposed revisions to CACI 1010, I think VF-1001 needs to be revised in conformity to the changes in the instruction.	The commentator is correct; VF-1001 is added to the release.

Instruction	Commentator	Comment	Committee Response
Immunity—Exceptions			
1249. *Affirmative Defense—Reliance on Intermediary*	Orange County Bar Association, by Michael L. Baroni, President	We recommend changing name of instruction to "Affirmative Defense – Reliance on Knowledgeable Intermediary" for clarity. [See *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 189.]	The committee agreed and has changed the title as suggested.
		We recommend adding the word "knowledgeable" in front of the term "intermediary purchaser" in the instruction in keeping with case law.	The committee believes that this point is adequately made in the second option to element 2 without the need to add "knowledgeable" to the instruction itself.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with this proposed new instruction, except we would add a fourth factor in element 3(c) based on the California Supreme Court authority quoted in the eighth bullet point in the Sources and Authority, stating: "(4) Whether [name of intermediary] had a legal duty to warn end users about the particular risk."	The committee debated this issue extensively. It decided not to include the intermediary's independent duty as a reliance factor in the instruction itself because if the intermediary had a legal duty to give warnings, then reliance would seem to be justified as a matter of law; it would not be a jury issue. Additionally, the committee finds that the

Instruction	Commentator	Comment	Committee Response
			paragraph in *Webb* that addresses this issue (*Webb, supra,* 63 Cal.4th at p. 191) leaves many unresolved questions as to just how and when the intermediary's independent duty to warn affects the supplier's potential liability. The committee has opted to include the entire paragraph in the Directions for Use without any attempt to analyze the language.
	Union Carbide Corporation, by David K. Schultz, Attorney at Law	Proposes replacing proposed 1249 with the following: "Affirmative Defense—Sophisticated Intermediary [*Name of defendant*] claims that [he/she/it] is not responsible for any harm to [*name of plaintiff*] based on a failure to warn because it sold [*specify product, e.g., asbestos*] to an intermediary purchaser [*name of intermediary*]. To succeed on this defense, [*name of defendant*] must prove:	The commentator's proposed instruction differs from the committee's proposed instruction in several ways, but the only difference that is developed in the comment is that the factors to determine reasonable reliance should not be included. The committee, therefore, will not respond to the other differences.

Instruction	Commentator	Comment	Committee Response
		(1) That [*name of defendant*] conveyed adequate warnings of the potential risks of [*specify product, e.g. asbestos*] to [*name of intermediary*] or [*name of intermediary*] was aware of, or should have been aware of, the potential risks of [*e.g. asbestos*]; and (2) That [*name of defendant*] reasonably relied on [*name of intermediary*] to convey adequate warnings of the potential risks of [*e.g. asbestos*] to those, like [*name of plaintiff*], who may encounter it [as a component or ingredient in a finished product].	
		The factors set forth in the proposed instruction unduly emphasize issues and evidence. There is a significant concern that the "reasonable reliance" factors in the currently proposed CACI 1249 will place undue emphasis on evidence and argument that may be presented in connection with the sophisticated intermediary defense.	Factors do emphasize issues and evidence; that is their purpose. But the committee does not believe that the factors "unduly" emphasize issues and evidence. The reasonable-reliance factors are all presented by the court in *Webb.* The committee believes that including them in

Instruction	Commentator	Comment	Committee Response
			the instruction is helpful to jurors.
		Factor b is "[t]he feasibility of [*name of defendant*]'s directly warning those who might encounter [*e.g., asbestos*] in a finished product;". "Circumstances may make it extremely difficult, or impossible, for a raw material supplier to provide warnings directly to the consumers of finished products." (*Webb,* 63 Cal.4th at 185.) "These suppliers likely have no way to identify ultimate product users and no ready means to communicate with them." (*Id.* at 191.) "[A] raw material supplier can often do little more than furnish the manufacturer with appropriate warnings and rely on the manufacturer to pass them along." (*Id.* at 192.) Thus, the *Webb* Court cautioned that a "raw material supplier's ability to warn end users" may "differ significantly from that of a product manufacturer or distributor that sells packaged commodities or deals directly with consumers." (All of page 5 of the comment is on this point.)	The committee believes that it will often be beneficial to the defense to instruct the jury on feasibility. If the defense can show that its giving warnings would be burdensome, it favors relying on the intermediary.
		The factors currently listed in proposed CACI 1249 omit that *Webb* instructed that "[i]t is also significant, if, under the circumstances giving rise to the	See response to this same comment made by the State Bar committee above.

Instruction	Commentator	Comment	Committee Response
		plaintiff's claim, the intermediary itself had a legal duty to warn end users about the particular hazard in question." (*Webb,* 63 Cal.4th at p. 191, citing *Persons*, 217 Cal.App.3d at p. 178).	
		At the very least, if the current list of reasonable reliance factors is retained, it should be amended to include the following additional factors at the beginning, so that juries may also consider such in accordance with the principles discussed by the California Supreme Court in *Webb*: (a) It is "significant, if, under the circumstances giving rise to the plaintiff's claim, the intermediary itself had a legal duty to warn end users about the particular hazard in question." (*Webb, supra,* 63 Cal.4th at p. 191.) (b) "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning." (*Persons,* 217 Cal.App.3d at p. 178, cited favorably in *Webb, supra*, 63 Cal.4th at pp. 191-192.) and	The committee prefers to present the factors with the language from *Webb*. Proposed additional factor (a) is discussed above. Proposed additional factor (b) is current factor (b), but rephrased to favor the defense. Proposed additional factor (c) addresses *actual* reliance. The commentator's proposed replacement language omits actual reliance as an element.

Instruction	Commentator	Comment	Committee Response
		(c) Because "direct proof of actual reliance may be difficult to obtain when, as in the case of latent disease, the material was supplied to an intermediary long ago," reliance on the intermediary is an inference that may be "draw[n] from circumstantial evidence about the parties' dealings." (*Webb, supra,* 63 Cal.4th at p. 193.)	
		Alternatively, in lieu of listing any particular factors in CACI No. 1249, after the elements for the sophisticated intermediary defense are provided, the following concise sentence is preferable: "Reasonable reliance depends on all circumstances in this case." This would not unduly emphasize any particular factor and would allow the parties wide berth to present arguments based on the evidence admitted in the case.	The proposed language does not provide adequate guidance to the jury.
		The term "particular risk" in CACI 1249 should be changed to "potential risk," as in CACI 1205. The alleged risk is a disputed issue in product liability cases, so using the word "potential" is more appropriate. The California Supreme Court has also used the phrase "potential risk" when discussing claims for an alleged failure to warn.	The court in *Webb* uses "particular hazard," (*Webb, supra,* 63 Cal.4th at p. 188.), which is not the same thing as a "potential risk[BG1]."[MS2]

Instruction	Commentator	Comment	Committee Response
		(*Anderson,* 53 Cal.3d at p. 991; *O'Neil,* 53 Cal.4th at p. 363; *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1110–1111.)	
1722. *Retraction: News Publication or Broadcast*	Orange County Bar Association, by Michael L. Baroni, President	In order to more accurately reflect the provisions of the relevant statute, the addition of "[daily/weekly]" to the language of the Instruction is proposed, to describe the news publication involved. As proposed, the bracketed language appears as follows: "… [daily/weekly] [news publication/broadcaster], …." This seems to suggest that to complete the Instruction, one item is to be chosen from each bracketed pair. To avoid confusion, it is suggested that the bracketed language be set forth as follows: "… [daily news publication/ weekly news publication] [broadcaster], …."	The commentator is misreading the brackets. It is actually: [[daily/weekly] news publication/broadcaster] , which is correct. There's a choice (red brackets and /) between a news publication and a broadcaster. Then if the choice is news publication, there is a choice (blue brackets and /) between daily and weekly. The bracket before news publication (green bracket in comment) has actually been deleted; it is just hard to see the strike through. The suggested change is not bracketed quite right. There should be a slash between "weekly news publication" and

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			"broadcaster," not a bracket.
		In the second line of the proposed new paragraph to the Directions for Use, it appears that the citation for the relevant statute is inaccurate. Reference is made to, "Civ. Code, §48a(1)," however, it is suggested that the accurate citation is "Civ. Code, §48a(a)." There is no subdivision (1), though [1] apparently appears in certain published versions of the code, but only to aid in determining the location of the first of many deletions made to the statute in 2016.	The comment is correct; this change has been made.
VF-1900. *Intentional Misrepresentation* VF-1903. *Negligent Misrepresentation*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the revision to the instruction. We believe, however, that in a case in which reasonable reliance is disputed and CACI No. 1908, *Reasonable Reliance,* is given, this verdict form should explicitly require a "material fact." We suggest inserting "[material]" as optional language in question No. 1 immediately before the word "fact" and stating in the Directions for Use to include that optional language if reasonable reliance is disputed and CACI No. 1908 is given.	The committee concluded several years ago that materiality is an element of reasonable reliance, not a separate element of the claim. It is true that the verdict forms only incorporate materiality indirectly, by requiring reasonable reliance. But to accept this comment would be to make it an element of the claim, which would imply that the instructions are not correct.

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2021. *Private Nuisance—Essential Factual Elements*	Civil Justice Association, by John Doherty, President and Chief Executive Officer	The Revisions to the Sources and Authority include the following cite and summary of the *Varjabedian* case: "[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.) It is not clear how the included summary relates to the proposed revisions to these jury instructions, nor how their inclusion would help judge or jury interpret them as a whole. We would suggest it be removed or clarified to better describe the relevant holding in *Varjabedian*.	This excerpt is not new; it is only being moved from the second position because, like the commentator, the committee doesn't see it as very relevant or helpful. The Sources and Authority excerpts are direct quotes from cases that allow the user to go to Lexis or Westlaw to read the case. There is no analysis nor clarification included.

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	Orange County Bar Association, by Michael L. Baroni, President	The quote from the added *Mendez* case is missing ellipses ("…") before the last sentence beginning with "In other words." The ellipses should be added to reflect that some language was omitted from the quote.	The omitted material is an internal citation, which is noted as omitted.
		The modified bullet point striking the citation to the *Koll Irvine* case and adding a cite to the *Mendez* case, should be changed by striking the citation to the *Mendez* case and replacing it with a citation to *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302. The *Mendez* case is quoting from the *Monks* case, and, as such, the citation for the quote should be to the case where the quote was first made.	If a later case is citing an earlier case, the excerpt is taken from the later case. The courts' system of internal quotation marks and the addition of "internal citations omitted" indicate that the court is quoting an earlier case.
		A new bullet point should be added to the Sources and Authority immediately after the second point referenced above, and should read as follows: "The requirements of *substantial damage* and *unreasonableness* are not inconsequential" (*Mendez, supra,* 3 Cal.App.5th at 263, original italics.) This quote would appear to be a more significant new holding than the prior quotations that were added to the instructions from the *Mendez* decision. It also fits in to the case quotes that follow.	The committee has added the entire paragraph that includes the suggested sentence because it explains in policy terms just why the requirements "are not inconsequential."

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	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The word "substantial" or "substantially," although prevalent in published opinions on nuisance, provides little or no meaningful guidance to the jury as to the degree of interference, or harm, required. Moreover, the word "substantial" in the context of harm seems to have a different meaning from "substantial" as used in "substantial factor." If the jury is not instructed on the meaning of "substantial" with respect to harm, the jury may refer to the definition of "substantial factor" in CACI No. 430, *Causation: Substantial Factor,* which may be misleading as to the meaning of "substantial" in this different context.	The committee believes that "substantial" has a commonly understood meaning to average jurors and does not need a special legal definition. What is substantial is a consummate jury question: is there enough of it?. CACI No. 430, *Causation: Substantial Factor*, is different because it is a very specialized legal doctrine.
		The Directions for Use state that this instruction must be given with CACI No. 2022, *Private Nuisance—Balancing Test Factors—Seriousness of Harm and Public Benefit*. *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 163, stated that the balancing test encompasses the requirement that the harm was substantial, and if a jury properly instructed on the balancing test finds the defendant liable the jury necessarily must have found that the harm was substantial. As in *Wilson,* we believe that these two instructions given together adequately cover the	The committee believes that adding the word "substantial" to element 3 of the instruction is a far simpler and cleaner approach than inferring substantiality of the interference (not of the harm) from the rather complex balancing test in CACI No. 2022.

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		substantial harm requirement. The insertion of "substantially" in element 3 of CACI No. 2021 is unnecessary and could confuse the jury, so we would strike the word.	
		In renumbered element 4, we believe that "reasonably have been annoyed or disturbed" conveys the intended meaning more clearly than "have been reasonably annoyed or disturbed." Accordingly, we would modify proposed element 4 as follows: "Would an ordinary person <u>reasonably</u> have been ~~reasonably~~ annoyed or disturbed by [name of defendant]'s conduct?"	The committee agreed with the comment and has made the change.
VF-2006. *Private Nuisance*	Orange County Bar Association, by Michael L. Baroni, President	Question 2 suggests that a nuisance can only exist if the tortious action was "harmful to health." According to the verdict form then, checking "No" to this Question 2 would mean no "nuisance" claim has been established and thus that plaintiff is unable to recover any damages if there has been no evidence of the actions being "harmful to health". However, the statute and the cases all provide that a plaintiff may recover damages based on the tort of "nuisance," if the offending action resulted in a "substantial and unreasonable interference with the comfortable enjoyment of life or	For verdict forms, not all element options from the instruction are presented as questions. One option is presented, and then the Directions for Use say, e.g., "Depending on the facts of the case, question 2 can be modified, as in element 2 of CACI No. 2021." But this sentence could perhaps be phrased better; the question needs to be replaced, not

Instruction	Commentator	Comment	Committee Response
		property," regardless of whether or not it was "harmful to health." Accordingly, it is recommended that Question 2 be revised to read as follows: "Did [*name of defendant*], by acting or failing to act, create a condition or permit a condition to exist that substantially and unreasonably interfered with the comfortable enjoyment of life of property [*name of plaintiff*]?"	modified. The committee has reworded the sentence to better guide the user.
		If Question 2 is modified as suggested above, it would replace Question 3 in its entirety, and thus Question 3 should be deleted.	See the response above
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would strike "substantially" in question No. 3 for the reasons stated above.	See response above rejecting this comment.
		We would modify question No. 4 as follows for the reason stated above: "Would an ordinary person <u>reasonably</u> have been ~~reasonably~~ annoyed or disturbed by [name of defendant]'s conduct?"	Proposed change adopted as explained above.
2100. *Conversion—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree that the words "intentionally and" are misplaced in the current instruction and should be stricken because the defendant need not have intended to wrongfully interfere. However, as stated in the third bullet point in the Sources and Authority, the act constituting conversion must be	The committee agreed with this comment, though not with the proposed solution. *Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 says that conversion

Instruction	Commentator	Comment	Committee Response
		done knowingly and intentionally to create liability. We would add a sentence at the end of element 2 to convey this requirement while distinguishing it from knowingly acting wrongfully: "[*Name of defendant*] need not have known that this act was wrongful, but must have knowingly done the act."	"must be knowingly or intentionally done.'' As noted in the comment, it is not the interference that must be intended, but only the act that creates the interference. Those acts are the options for element 2. The committee has inserted "knowingly or intentionally" into element 2 before presenting the options.
		We suggest that the Advisory Committee consider adding to the Sources and Authority a quotation from *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124-125, discussing the conversion of intangible property if the property right is not reflected in a document: "We recognize that the common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel [citation], may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the	The committee agreed to add a shorter version of the proposed excerpt, omitting the second paragraph on net operating loss.

Instruction	Commentator	Comment	Committee Response
		nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. On the other hand, if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so. [Citation.] The appropriate scope of a conversion action as applied to intangible personal property has been the subject of scholarly and informative discussion. [Citations.] [¶] A net operating loss is a definite amount [citation] that can be recorded in tax and accounting records. The significance of this, in our view, is not that the intangible right is somehow merged or reflected in a document, but that both the property and the owner's rights of possession and exclusive use are sufficiently definite and certain."	
VF-2100. *Conversion*	Civil Justice Association, by John Doherty, President and Chief Executive Officer	We would propose inserting the following language, from the Sources and Authority section of CACI No. 2100, to the Directions of Use section for VF-2100: "With respect to plaintiffs' causes of action for conversion, '[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the	The committee will consider the issue of privilege in the next release cycle. Substantive issues are seldom addressed in the Directions for Use to a verdict form unless the issue somehow affects choices that will need to

Instruction	Commentator	Comment	Committee Response
		possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.' 'For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, of that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. A similar privilege is afforded an actor for the protection of certain third persons.' " (*Church of Scientology, supra,* 232 Cal.App.3d at p. 1072, internal citations omitted.) This case provides clear and useful guidance regarding limitations on what acts are or are not considered conversion related to protection and defense.	be made in completing the form.
2547. *Disability-*	Orange County Bar Association,	The proposed addition is to address a discrete circumstance such as that	Neither proposed addition to this

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Based Associational Discriminatio n—Essential Factual Elements	by Michael L. Baroni, President	found in *Castro-Ramirez* (namely the employee was a relative of the disabled person and the employee sought an accommodation in association with the disability). This concept should be addressed in a separate instruction rather than added to the general instruction on associational disability discrimination in order to avoid confusing the trier of fact.	instruction is related to the points at issue in *Castro-Ramirez,* though it was this case that brought them to the committee's attention. The question of associational disability based on a relative's need is not resolved in *Castro-Ramirez,* as is pointed out in the Directions for Use. Should the issue ever be resolved, it might possibly be a new instruction.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We suggest adding the appropriate code citation to the title "(Gov. Code, § 12926(o)" consistent with other instructions in this series.	It is already there; the last (fifth) statute bulleted excerpt.
		The penultimate bracket in the last line of element 4 appears to be misplaced, so we would delete it: "[*Specify other basis for associational discrimination*~~]~~;]	There is a bracketing error here, but one more bracket, not one less, is needed. The whole sentence is one of the options for element 4, so it needs brackets before and at the end. Then the italicized language also needs brackets around it. This error has been fixed.

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		We can find no authority in the Sources and Authority supporting element 5 in an associational discrimination case. The statement in *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1042, 1038-1039, is dictum. We suggest including element 5 only if authority for the element is provided, and otherwise would delete that element.	*Green v. State of California* (2007) 42 Cal.4th 254, 262 holds that an element of a disability discrimination case is that the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation. The committee believes that this element is required in an associational disability case. The court in *Castro-Ramirez* includes it in setting forth the elements. (*Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038−1039.) Whether or not it is dictum in *Castro-Ramirez,* the committee believes that *Green* supports element 5.
2548. *Disability Discrimination–Refusal to Make Reasonable Accommodation in* Housing	Deborah Thrope, National Housing Law Project Deborah Gettleman, Disability Rights California	The Council should revise the jury instructions to include a definition of "reasonable accommodation." Reasonable accommodation is defined as: A change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a	This definition is not in the statute. If it is a regulation, the commentators did not cite it. Commentators are advised to provide authority for any proposed changes.

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	Joel Marrero, Legal Aid Foundation of Los Angeles Michelle Uzeta, Law Office of Michelle Uzeta Madeline Howard, Western Center on Law and Poverty	disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces.	
		The Council should include examples to illustrate reasonable accommodation such as: a. Exception to "no pets" policy to accommodate an assistance animal. b. Adjustment of rent due date to accommodate date of receipt of public benefit payments. c. Provision of designated parking space for individual with physical disability. d. Providing other similar accommodations for an individual with a disability.	Again, no authority has been provided to support the view that these are examples of reasonable accommodations.
		Element #6 correctly instructs the jury to consider the reasonableness of the request for an accommodation. "Reasonable" should be further explained in the jury instructions. An accommodation is "reasonable" if it is "ordinarily or in the run of cases" or a plaintiff can "show that special circumstances warrant a finding that ... the requested 'accommodation' is 'reasonable' on the particular facts."	The commentators cite only federal cases construing federal law for the meaning of "reasonable." For language to appear in a CACI instruction on a claim created by California law, there must be California authority.

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		Reasonableness can also be established if the plaintiff produces evidence showing that the requested accommodation is merely "possible" (*Giebeler v. M&B Associates* (9th Cir. 2003) 343 F.3d 1143, 1156 (citing *Vinson v. Thomas* (9th Cir.2002) 288 F.3d 1145, 1154 n. 7.(A reasonable accommodation is also one that does not pose an undue financial and administrative burden or require a fundamental alteration of the program. (*Southeastern Cmty. College v. Davis* (1979) 442 U.S. 397, 410, 412; *Giebeler, supra,* 343 F.3d at p. 1157.)	
		Element 5 of the instruction requires that the accommodation be necessary. "Necessary" should be defined in the instructions. To show that a requested accommodation is necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. The plaintiff must show that "but for" the accommodation, the plaintiff will be denied an equal opportunity to use and enjoy a dwelling. (*Giebeler, supra,* 343 F.3d at p. 1155.) Necessity can be shown, at a minimum, if "the desired	Again, only federal authority provided.

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		accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." (*Bronk v. Ineichen* (7th Cir. 1995), 54 F.3d 425, 429.)	
		4. The jury instructions should include the obligation to engage in the interactive process. A housing provider is obligated to engage in a discussion with the tenant before denying an accommodation request. This dialogue is known as the interactive process. The failure or refusal to engage in the interactive process with a person with a disability is discrimination based on disability. (federal cases cited.) The housing provider must discuss alternative accommodations with the tenant rather than denying the accommodation outright. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it. (Joint Statement cited) Even a delay in the process can be considered a failure to accommodate an individual with a disability. The Council should therefore amend the jury instruction to read:	The committee believes that requiring an interactive process is not an element of the claim, but a separate requirement, as it is under the employment branch of the FEHA. (See CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*.) An excerpt on the interactive process has been included in the Sources and Authority.

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		7. That [name of defendant] refused to make this accommodation or engage in the interactive process. We also suggest that the Council include the definition of interactive process above.	
		The Directions for Use should include a discussion regarding the burden of proof in reasonable accommodation cases. Specifically, we propose inclusion of the following: The initial burden is on the plaintiff to show that the accommodation sought is reasonable. This requirement is minimal. Reasonableness can be established if the Plaintiff produces evidence showing that the requested accommodation is "ordinarily or in the run of cases." (*Griebeler* cited.) If the plaintiff cannot make the initial showing that the requested accommodation is reasonable in the run of cases, he "nonetheless remains free to show that special circumstances warrant a finding that ... the requested 'accommodation' is 'reasonable' on the particular facts." (*Griebeler* cited.) Reasonableness can also be established if the Plaintiff produces evidence showing that the requested	Again, only federal authority cited. Also, the proposed discussion is beyond the function of the Directions for Use. Substantive issues are presented in the Directions for Use only when there is an issue that affects some aspect of the instruction.

Instruction	Commentator	Comment	Committee Response
		accommodation is merely "possible." (*Griebeler* cited.) Once the plaintiff shows that the requested accommodation is reasonable, the defendant must make the accommodation unless it can show that the requested accommodation is not reasonable because it poses an undue financial or administrative burden, or fundamental alteration in the basic operation of program or provision of housing services. (*Griebeler* and Joint Statement cited.)	
	Orange County Bar Association, by Michael L. Baroni, President	Element 5 should be amended to read: "That [*specify accommodation required*] was necessary to afford [*name of plaintiff*] an equal opportunity to use and enjoy the [e.g., apartment]." to correct grammatical errors.	Element 5 says: "That in order to afford [*name of plaintiff*] an equal opportunity to use and enjoy the [*e.g., apartment*], it was necessary to [*specify accommodation required*];" The committee does not see any grammatical errors and declines to make this change.
	State Bar of California, Litigation Section, Jury Instructions Committee, by	We note that the first the citation under Secondary Sources in the Sources and Authority appears to include a second date that does not belong (March 3, 2008), which should be stricken.	The comment is correct. The March 2008 publication is a different one on modifications. The March date has been removed.

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	Reuben A. Ginsberg, Chair	We also suggest including a link to the Joint Statement, which may be difficult for users to find: "available at https://www.hud.gov/offices/fheo/library/huddojstatement.pdf .	The committee has added the link.
2549. *Disability Discrimination–Refusal to Permit Reasonable Modification to Housing Unit*	Deborah Thrope, National Housing Law Project Deborah Gettleman, Disability Rights California Joel Marrero, Legal Aid Foundation of Los Angeles Michelle Uzeta, Law Office of Michelle Uzeta Madeline Howard, Western Center on Law and Poverty	Element 7 is inaccurate in some cases because it requires that the plaintiff agree to pay for the modification. If the tenant is protected under Section 504 of the Rehabilitation Act of 1973 or Title II of the Americans With Disabilities Act, then there is no obligation to pay for the modification. The Council should include this information in the Directions for Use to make it clear that element 7 only applies in the case of private housing not covered by Section 504 or the ADA or other sources of law that might shift the payment burden. Section 504 provides another source of protection for people with disabilities in need of a modification. Section 504 applies to federally subsidized housing. Unlike private landlords that must comply solely with the FHA, Section 504 obligates subsidized landlords to pay for a modification when it is necessary and reasonable. Title II of the Americans with Disabilities Act (ADA) also shifts the responsibility of payment to entities covered under the Act.	The Directions for Use have been revised to advise that element 7 does not apply if either of the federal laws apply.

Instruction	Commentator	Comment	Committee Response
	Orange County Bar Association, by Michael L. Baroni, President	Element 5 should be amended to read: "That [*specify accommodation required*] was necessary to afford [*name of plaintiff*] an equal opportunity to use and enjoy the [*e.g., apartment*]." to correct grammatical errors.	Element 5 of this instruction is the same as element 5 of 2548; addressed above. The committee sees no grammatical errors.
		Element 8 should be amended to read: "That [*name of plaintiff*] agreed to restore the [interior/exterior] of the unit to the condition that existed before the modification by the end of the tenancy at [*name of plaintiff's*] own expense, other than for reasonable wear and tear." The proposed instruction says "at" the end of the tenancy which is not the same as "by" the end. The proposed revisions 1) make it clear that the plaintiff must have completed the changes back to the original configuration before, or in any event no later than, the end of the tenancy, not that the changes would be done at the end, 2) the plaintiff agreed to pay for converting the unit back to the original 3) the changes to the exterior that were made to accommodate plaintiff are also included, not simply the interior changes.	The statute says: "In the case of a rental, the landlord may, where it is reasonable to do SO[BG3],[MS4] condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear)." There is no mention of when the restoration should be done, neither *at* the end nor *by* the end. The committee has removed ", at the end of the tenancy," as the timing is not addressed. Although who pays for the restoration is also not

Instruction	Commentator	Comment	Committee Response
		Note that element 7 addresses that plaintiff agreed to pay for the initial changes but not reconverting the unit back to the original condition, which is what is being addressed in element 8.	explicit in the statute, the committee believes that it is implied that the tenant pays ("the renter's agreeing to restore"). Because it is not expressed in the statute, the committee does not believe that it should be addressed in the instruction. There is also no statutory requirement to restore the exterior.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the instruction.	No response is necessary.
		The last sentence in the Directions for Use suggests that the defendant would have the burden of proof on the issue of whether restoration is reasonable, but cites no case authority. It is unclear whether this statement refers to an element in the instruction and whether the instruction should be modified in some manner if the issue is disputed, and if so how it should be modified. We find the statement unhelpful and would strike this sentence.	The committee believes that giving the defendant the burden to prove that no restoration is reasonable is justified under Evidence Code section 500 ("party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting).
		The Joint Statement cited under Secondary Sources in the Sources and Authority appears to be the same Joint Statement cited in CACI No. 2548 and	This is not the same joint statement as the one for CACI No. 2548. This is

Instruction	Commentator	Comment	Committee Response
		should have the same date (May, 17, 2004) shown in the document online and a link, as stated above.	the March 2008 publication.
3040. *Violation of Prisoner's Federal Civil Rights—Eighth Amendment —Substantial Risk of Serious Harm*	Orange County Bar Association, by Michael L. Baroni, President	*Castro v. Cnty of L.A.* (2016) 833 F.3d 1060 held that Eighth Amendment violations under § 1983 may be based upon an affirmative action or an omission by a prison official. The elements of the instruction have been slightly rewritten and renumbered to accurately accommodate whether the action is based upon "conduct" or a "failure to act" thus adding clarity for the jury. Additionally, use notes and Sources and Authority sections have been updated to reflect and recent accurate statements of decisional law. For clarification, the following modifications are recommended: 5. That there was no reasonable justification for the conduct/**failure to act**: 6. That [*name of defendant*] was acting or purporting to act or **failed to act** in the performance of [his/her] official duties;	The committee agreed with the comment and has revised the elements to include failure to act.

Instruction	Commentator	Comment	Committee Response
		8. That [*name of defendant*]'s conduct/**failure to act** was a substantial factor in causing [*name of plaintiff*]'s harm.	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Proposed new element 4 seems unnecessary if the defendant knowingly exposed the plaintiff to a substantial risk of serious harm. If the defendant knowingly created the risk through the defendant's conduct or failure to act (as required in elements 2 & 3), it should not be necessary to prove that the defendant failed to take reasonable measures to protect against the risk the defendant knowingly created. The source of the proposed new language, *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060, 1067, quoted in the Sources and Authority, refers to "failing to take reasonable measures to abate [a substantial risk of serious harm]" in the context of a failure to act, as distinguished from affirmative conduct. A defendant who, in the language of proposed new element 4, fails to take reasonable measures to protect against a risk of serious harm creates a risk of serious harm by failure to act, as stated in one of the alternatives of element 2. Thus, proposed new element 4 appears	A failure to act could be merely negligence, which is not a 1983 violation. There must be a failure to act that creates a risk (element 2); then an awareness of the risk (element 3); and then standing by and doing nothing (new element 4).

Instruction	Commentator	Comment	Committee Response
		to be duplicative of element 2 if the defendant failed to act, and should be unnecessary. So we would strike proposed new element 4.	
3052. *Use of Fabricated Evidence—Essential Factual Elements*	Shawn McMillan, Attorney at Law, San Diego	The jury instruction as presently framed does not address omission of exculpatory evidence, perjury, or the myriad other ways that evidence is typically presented to the courts in a deceptive manner. The Due Process Clause of the Fourteenth Amendment includes the right to be free from deception in the presentation of evidence by government agents during judicial proceedings, i.e., use of perjured testimony and/or the suppression of known exculpatory evidence. (*Beltran v. Santa Clara County* (9th Cir. 2008) 514 F.3d 906, 908; *Greene, supra,* 588 F.3d at 1034-1035; see also, *Hardwick v. Cnty. of Orange* (9th Cir. 2017) 844 F.3d 1112, 1118.)) The following changes to the proposed jury instruction should be made: [*Name of plaintiff*] claims that [name of defendant] [fabricated evidence, suppressed exculpatory evidence, committed perjury, made false statements] against [him/her], and that	The committee finds authority only for a narrowly focused instruction at this time limited to the knowing use of fabricated evidence. Authority for expansion into any of the "myriad other ways" that evidence might be used against someone is not clear. The committee may consider further work in this area in the next release cycle.

Instruction	Commentator	Comment	Committee Response
		as a result, [he/she] was deprived of [his/her] [*specify constitutional or legal right, privilege, or immunity, e.g, liberty*] without due process of law. In order to establish this claim, [*name of plaintiff*] must prove all of the following: 1. That [*name of defendant*] [<u>fabricated evidence, suppressed exculpatory evidence, committed perjury, made false statements – specify,</u> e.g., informed the district attorney that plaintiff's DNA was found at the scene of the crime];	
		A constitutional violation occurs if the affiant "intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." (*Liston v. County. of Riverside* (9th Cir. 1997) 120 F.3d 965, 973.).) To support a § 1983 claim of judicial deception, a plaintiff must show that the defendant deliberately or recklessly made false statements or omissions that were material to underlying courts orders and findings. (*KRL v. Moore* (9th Cir. 2004) 384 F.3d 1105, 1117; see, also, *Franks v. Delaware* (1978) 438 U.S. 154, 171-172.)	This instruction is based on the California case of *Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001. The court in *Kerkeles* says that "the Due Process Clause is violated by the *knowing* use of perjured testimony or the *deliberate* suppression of evidence favorable to the accused." (199 Cal.App.4th at p. 1008, emphasis added.) The word "reckless" does not appear in the opinion.

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		The following change should be made: 3. That [*name of defendant*] knew [or in the exercise or reasonable care should have known] that the [*e.g., statement*] was not true;	The commentator cites two 9th Circuit cases involving search warrants in support of "reckless." The committee does not write instructions if the only authority is from the 9th Circuit. The commentator does cite *Franks v. Delaware*, which is a United States Supreme Court case also involving a search warrant. *Franks* does include "reckless disregard for the truth." (438 U.S. at p. 165.) The committee will consider in the next release cycle whether to expand the instruction to include reckless disregard outside of the search warrant situation. It appears that the commentator wants to morph "recklessly" into "should have known." But "recklessly," is not the same thing as "in the exercise of reasonable

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			care should have known." There is no support for this objective standard, which sounds like negligence, in *Kerkeles* or *Lewis*. (See response to comment of Orange County Bar Association below.)
		Add loss of custody to the final paragraph: [Deprivation of liberty does not require that [*name of plaintiff*] have been put in jail [or] [lost custody of their child]. Nor is it necessary that [he/she] prove that [he/she] was wrongly convicted of a crime.]	This paragraph is limited to fabricated evidence used in an underlying criminal cases.
	Orange County Bar Association, by Michael L. Baroni, President	This is a new instruction for use in § 1983 actions where the use of fabricated evidence has resulted in the deprivation of a constitutional right etc. The instruction format and elements overall appear legally correct and follow the template of other § 1983 claim instructions. The cases cited in both the Directions for Use and the Sources and Authority sections are appropriate and relevant. However, for legal accuracy's sake, based upon the cited decisional law and in particular, *Devereaux v. Abbey*	As noted above, this instruction is based on *Kerkeles*, not *Devereaux.* Even if the committee were inclined to treat *Devereaux* as controlling authority, it is not clear in *Deveraux* that what the officer should have known is that the questionable information was not true.

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		(9th Cir. 2001) 263 F.3d 1070, 1074–1075, the phrase "or should have known" should be inserted after the word "knew" in element 3 so that the instruction would now read as follows: "3. That [*name of defendant*] knew or should have known that the [e.g., statement] was not true; and;".	
	Office of the City Attorney of San Francisco, Sean F. Connolly, Deputy City Attorney	A. The opening paragraph contains redundant language and is confusing. Section 1983 creates a cause of action for violations of the Constitution or federal statute. The proposed instruction arises from the Ninth Circuit's decision in *Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, a case that recognized a Due Process right under the Fourteenth Amendment not to be subjected to criminal charges on the basis of fabricated evidence. Every case interpreting *Devereaux* has interpreted it in the context of whether certain deliberate conduct by a government official deprived a person of due process. The claim is based on substantive Due Process rights, and the plaintiff must show that the claim involves a constitutionally recognized right to "life, liberty, or property" that has been deprived by the defendant's actions. (*Costanich v. Dept. of Social*	There are three proposed changes to the opening paragraph: 1. Add "deliberately." The committee agrees given the current formulation of the instruction and has made this addition. 2. Add "as a result of that evidence being used against [him/her]".The committee agrees with this change also as the proposed language is more legally precise. 3. Revise the italicized direction as to the right involved and drop "without due process of law." The committee