JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
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Report

TO: Members of the Judicial Council

FROM: Advisory Committee on Civil Jury Instructions
Hon. H. Walter Croskey, Chair
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DATE: March 17, 2008

SUBJECT: Civil Jury Instructions: Approve Publication of Revisions (Action Required)

Issue Statement

The Advisory Committee on Civil Jury Instructions has drafted for approval new and revised civil jury instructions to include in the *Judicial Council of California Civil Jury Instructions (CACI)*. *CACI* was first published in September 2003.

Recommendation

The advisory committee recommends that the Judicial Council, effective April 25, 2008, approve for publication under rule 2.1050 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be officially published in the 2008 supplement to the 2008 edition of the *Judicial Council of California Civil Jury Instructions (CACI)*.

A table of contents and the proposed additions and revisions to the civil jury instructions are attached.

Rationale for Recommendation

The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating *CACI*. The council approved the committee's last update at its December 2007 meeting.

The advisory committee drafted and edited the new and revised instructions in this proposal and circulated them for public comment. The official publisher (LexisNexis Matthew Bender) is preparing to publish print, HotDocs document assembly, and online versions of the new and revised instructions approved by the council.

The following 58 instructions and verdict forms are included in this revised set: 223, 224, 425, 1006, 1009C, 1500, 1501, 1502, VF-1500, VF-1501, VF-1502, VF-1503, 1700, 1701, 1702, 1703, 1704, 1705, VF-1700, VF-1702, VF-1704, 1804A, 1804B, VF-1804, 1925, 2030, 2331, 2332, 2337, VF-2301, VF-2302, 3024, VF-3014, 3104, 3107, 3110, VF-3100, VF-3101, VF-3102, VF-3103, VF-3104, VF-3105, VF-3106, VF-3107, 3610, 3723, 3903D, 3903F, 3093G, 3904, 3905A, 3921, 3922, 4107, 4324, 4326, 4402, and 4412. Of these, 11 are newly drafted, 44 are revised, two involve a division of CACI No. 1804 into 1804A and 1804B, and one is revoked. Additionally, RUPRO has given final approval to additional instructions under a delegation of authority from the council to RUPRO.[1]

The instructions were revised or added based on comments or suggestions from judges, attorneys, staff, and committee members as well as on recent developments in the law. The following instructions and verdict forms were revised or added based primarily on comments received from judges and attorneys: 223, 224, 425, 1700, 1701, 1702, 1703, 1704, 1705, VF-1700, VF-1702, VF-1704, 2331, 2332, 2337, VF-2301, 3104, 3107, 3110, VF-3100, VF-3101, VF-3102, VF-3103, VF-3104, VF-3105, VF-3106, VF-3107, 3723, 3903D, 3904, 3905A, 3921, 3922, 4324, 4326, 4402, and 4412.

The following new instructions were drafted in response to requests from judges who discovered a need for them during trial: 223, *Opinion Testimony of Lay Witness*; 224, *Testimony of Child*; 425, *"Gross Negligence" Explained*; and 2337, *Factors to Consider in Evaluating Insurer's Conduct*.

Numerous Defamation series (1700 et seq.) instructions and verdict forms were revised in response to a request from an attorney to better distinguish between the concepts of presumed damages and nominal damages in defamation per se cases. Numerous Elder Abuse series (3100 et seq.) instructions and verdict forms were revised in response to concerns expressed by an attorney that the questions were not presented in the best order for the jury to understand the different burdens of proof provided in the elder abuse statutes. CACI No. 2332, *Bad Faith (First Party)—Failure to Properly Investigate*

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[1] At its October 20, 2006 meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes to jury instructions and corrections and minor substantive changes 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, 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. RUPRO has already given final approval to 33 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee staff has made other nonsubstantive grammatical and typographical corrections and other similar changes.

Claim, was renamed and revised and CACI No. VF-2302, *Bad Faith (First Party)—Failure to Properly Investigate Claim,* was revoked in response to an attorney who found them misleading because the failure to conduct a full, fair, and thorough investigation is not a separate cause of action, but simply evidence that the insurer acted in bad faith. The committee agreed, and concluded that the verdict form was unnecessary.

CACI Nos. 3904, *Present Cash Value*, 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, 3921, *Wrongful Death (Death of an Adult)*, and 3922, *Wrongful Death (Parents' Recovery for Death of a Minor Child)*, were revised in response to requests received from two trial judges and one law firm to better explain to the jury the process for determining the present value of future noneconomic damages.

In the relatively new Unlawful Detainer series (approved by the council August 2007), CACI No. 4324, *Affirmative Defense—Waiver by Acceptance of Rent,* was expanded at the suggestion of several organizations representing tenants to cover waiver with regard to a breach of a condition in the lease other than a failure to pay rent. New CACI No. 4326, *Affirmative Defense—Repair and Deduct,* was added in response to tenant attorney requests for more instructions on affirmative defenses. The committee will consider additional affirmative defense instructions in future cycles.

The following instructions were revised or added based primarily on suggestions from staff or committee members: 1500, 1501, 1502, VF-1500, VF-1501, VF-1502, VF-1503, 1804A, 1804B, VF-1804, 1925, and 2030. CACI Nos. 1925, *Affirmative Defense — Statute of Limitations—Fraud or Mistake,* and 2030, *Affirmative Defense —Statute of Limitations—Trespass or Private Nuisance,* were added as the third phase of the committee's initiative to add instructions on the applicable statutes of limitation in most of the cause-of-action series. Numerous Malicious Prosecution series (1500 et seq.) instructions and verdict forms were revised because the committee believed that the elements of favorable termination and probable cause, which are to be determined by the court as a matter of law after the jury finds any disputed facts, should be presented differently.

The following instructions were added or revised based primarily on recent developments in the law: 1006, 1009C, 3024, VF-3014, 3610, 3903F, 3093G, and 4107. A new instruction, CACI No. 1009C, *Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty,* was drafted to address the holding of *Evard v. Southern California Edison* (2007) 153 Cal. App. 4th 137, which held that a property owner may be liable to an employee of an independent contractor for an injury caused by a dangerous condition on the property because the duty to eliminate the condition may not be delegated. CACI Nos. 3903F, *Damage to Real Property (Economic Damage),* and 3903G, *Loss of Use of Real Property (Economic Damage),* were revised to incorporate a recent case that addressed damages for injury to real property of low value to deter

environmental damage to the land. (See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583.)

Alternative Actions Considered

Rule 2.1050 of the California Rules of Court requires the advisory committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. The proposed new and revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative action.

Comments From Interested Parties

All revisions to the civil jury instructions were circulated for public comment. None of the subjects included in this proposal generated extensive comments or controversy. The committee did receive some comments, evaluated them, and made some changes to the instructions based on the recommendations. Several suggested additions and revisions to the unlawful detainer instructions made by an attorney representing landlords and a landlord advocacy organization were incorporated. A chart summarizing the comments is attached at pages 5–27.

Implementation Requirements and Costs

Implementation costs will be minimal. Under the publication agreement, LexisNexis Matthew Bender, as the official publisher, will make copies of the 2007 edition available to all judicial officers free of charge in both print and HotDocs document assembly software. The AOC will register the copyright in this work. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC will provide a broad public license for their use and reproduction. With respect to commercial publishers, the AOC will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters.

Attachments

Judicial Council Civil Jury Instructions (CACI)
Spring 2008 – CACI08-01

Instruction	Commentator	Summary of Comment[1]	Committee Response
General	State Bar Litigation Section, Jury Instructions Committee	The committee suggests that future releases of modified instructions contain a brief explanation of the reason for the proposed changes or that the advisory committee make available for review the comments or submissions that led to the changes. This would make it much easier for persons reviewing the changes to understand their purpose and whether that purpose is appropriate and has been met.	The committee will consider this suggestion for the public comment period for the next release cycle.
All	Orange County Bar Association, by Catherine M. Castaldi, President	Agree with all proposed CACI revisions except as otherwise noted below.	No response required
	Superior Court, Los Angeles County, by Janet Garcia, Court Manager	Agree	No response required
	Superior Court, Sacramento County, by Lorraine Dias Herbon, Administrative Services Officer	Thank you for the opportunity for our court to review the proposed changes to the civil jury instructions. We have no comments at this time.	No response required
	Superior Court, San Diego County, by Mike Roddy, Court Executive Officer	The Superior Court of California, County of San Diego agrees with the Winter 2008 Revisions to the California Civil Jury Instructions as proposed. The court has no additional comments.	No response required

[1] Some shorter comments are presented verbatim. Longer comments have been summarized.

Judicial Council Civil Jury Instructions (CACI)
Spring 2008 – CACI08-01

Instruction	Commentator	Summary of Comment[1]	Committee Response
223 Opinion Testimony of Lay Witness	State Bar Litigation Section, Jury Instructions Committee	Modify second paragraph as follows: Consider the extent of the witness's opportunity to perceive the matters on which the opinion is based and the reasons the witness gave for the opinion. ~~and the facts or information on which the witness relied in forming that opinion.~~ It is for ~~Y~~you to ~~must~~ decide whether the facts and information on which the witness relied were~~as~~ ~~true and~~ accurate. Telling the jury "You must decide" in the context of this instruction would be inappropriate because the jury should not be diverted from its job of deciding the case into a side issue about whether certain facts were accurate. Rather the point is that the jury should give credence to an opinion if it concludes that the facts on which it is based are accurate.	The committee does not believe that the jury will be diverted from its job by the language "You must decide."
224 Testimony of Child	Orange County Bar Association, by Catherine M. Castaldi, President	Why not just use the language directly out of Penal Code Section 1127f?	Penal Code § 1127f does not apply in civil proceedings. The committee believes that more flexibility is appropriate.
425 Gross Negligence	State Bar Litigation Section, Jury Instructions Committee	Modify as follows: Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the	The committee agreed and made the change, but without the brackets.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		same situation to prevent harm [to oneself or] to others. The additional phrase comes from the ordinary negligence instruction (CACI No. 401) in recognition that this instruction should be a complete statement of the applicable principle as it may be given without the ordinary negligence instruction.	
1006 Landlord's Duty	State Bar Litigation Section, Jury Instructions Committee	Modify second and third paragraphs as follows: After a tenant has taken possession, a landlord must use reasonable care to correct an unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it. [After a tenant has taken possession, a landlord must use reasonable care to correct an unsafe condition in an area of the premises ~~not~~ under the ~~landlord's~~ tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.] The Committee found the instruction confusing when read in conjunction with the Directions for Use as to the proposed	The committee agreed with the comment and made the requested revisions.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		new third paragraph. The Directions for Use state that it is applicable if "a tenant is in possession," but that condition is also present in the case of the second paragraph. The difference between the two paragraphs is actually whether the condition is in an area under the landlord's control or the tenant's control and the committee suggests that the Directions for Use be changed to reflect that and that the instruction be modified as shown above to make this clear.	
1500, 1501, 1502 (Malicious Prosecution – Probable Cause)	State Bar Litigation Section, Jury Instructions Committee	We do not understand why the instruction should be modified to insert the probable cause standard into item no. 3. As the cases cited in the Directions for Use state, probable cause is for the court not the jury. The jury would only resolve disputed facts pertinent to the probable cause element and the court would then apply them. Indeed, the proposed revisions to VF-1500 seem to reflect this approach. We suggest that there is no basis for changing the gist of the probable cause element.	In arriving at the proposed revisions to these instructions, the committee considered the commentator's point in detail. The probable cause element is optional in all three instructions. The Directions for Use make it clear that it should be included only if there are disputed underlying basic facts that the jury will have to decide, in which case, CACI No. 1503 will also be given. As the commentator notes, there is no probable cause question in the verdict forms, so the jury will never be asked to find probable cause. A majority of the committee believes

Instruction	Commentator	Summary of Comment[1]	Committee Response
			that if there is a dispute of fact, instructing the jury that probable cause is an element of malicious prosecution is helpful to the jury's overall understanding of the process. CACI No. 1503 makes it clear what the jury's role is.
2030 Affirmative Defense—Statute of Limitations—Trespass or Private Nuisance	State Bar Litigation Section, Jury Instructions Committee	Modify as follows: ~~Among the factors to consider in determining whether~~Factors that show that the [trespass/nuisance] can be discontinued are the following: (a) ~~Whether~~ That the [trespass/nuisance] is currently continuing; (b) ~~Whether~~ That the impact of the condition will vary over time; (c) ~~Whether~~ That the [trespass/nuisance] can be discontinued at any time, in a reasonable manner, and for reasonable cost, considering the benefits and detriments if it is discontinued. [~~You must consider~~These factors refer to the continuous nature of the damage to the property ~~that~~ caused by a nuisance ~~causes~~, not ~~the continuous nature of the~~	The committee agreed with the comment and made most of the proposed modifications.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		~~nuisance itself~~to the acts causing the nuisance to occur.]] The instruction contains factors for a jury to apply in the event that a determination needs to be made as to whether a trespass/nuisance is permanent or continuing. However, the instruction does not explain how to apply the listed factors and, given the nature of these factors, how they are applied is not immediately obvious.	
2331 and 2332 Bad-Faith Insurance	Arnold R. Levinson Pillsbury & Levinson San Francisco, CA	I have looked at the new CACI bad faith instructions. My belief is that they are now fair, complete and simply explain the law to the jury. Thank you for the excellent work. The *Wilson* (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713) quote from 2331 is excellent.	No response required
	Douglas deVries Attorney at Law Sacramento, CA	The first sentence of the Directions for Use re 2331 and the second sentence of the Directions for Use re 2332: "The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case." are improper and confusing because they seem to suggest that an insurer could be deemed a plaintiff on an insurance bad faith-based tort claim or	This sentence appears in all instructions in the Insurance Litigation series. The committee believes that there are possible situations that might change the party designations; for example, the insurer sues the insured for rescission and the insured cross complains for bad faith. The *Kransco* case holds that an insurer cannot sue an insured in tort for breach

Instruction	Commentator	Summary of Comment[1]	Committee Response
		counter-claim for failure to pay benefits or delay in payment of benefits (as opposed to some other type of claim). The sentences should be deleted as they are contrary to law - *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 406-408.	of the implied covenant of good-faith and fair dealing. The committee does not believe that the Directions for Use could reasonably be construed to suggest that it can.
2332 Bad Faith (First Party)—Failure to Properly Investigate Claim	Arnold R. Levinson Pillsbury & Levinson San Francisco, CA State Bar Litigation Section, Jury Instructions Committee	I have a concern about the *Wilson* quote added to the Sources and Authority: It suggests that an insurer is free from bad faith if it obtains a medical exam or otherwise obtains a doctor's opinion to support its denial. However, an insurer can obtain this information, which itself may be biased, or the insurer can adopt a biased interpretation of such a report. My suggestion is simply to add at least the first sentence of the conclusion in *Wilson*, which reads, "The . . . record demonstrates the existence of triable issues of fact as to whether, before rejecting Wilson's UIM claim in July 2001, 21st Century thoroughly investigated and ***fairly evaluated*** the claim." (Emphasis added.) The "and fairly evaluated" quote solves the problem.	The committee thinks that the text of the instruction and the Sources and Authority set forth the standard adequately without the additional quote from *Wilson*. The excerpt says that the insurer "would have been within its rights" to do the things enumerated. It does not say that if it does these things, that automatically negates bad faith.
	State Bar Litigation Section, Jury Instructions Committee	The word "full" is repetitive. We also suggest that the applicable concept is that the insurer must look for evidence	The committee agreed that adding "coverage of" improves clarity and made this change. In *Jordan v. Allstate Ins.*

Instruction	Commentator	Summary of Comment[1]	Committee Response
		supporting *coverage of* the loss.	*Co.* (2007) 148 Cal.App.4th 1062, 1066, the standard was described as "full, fair, and thorough," and the committee believes that all words should be used in the instruction.
2337 Factors to Consider in Evaluating Insurer's Conduct	Douglas deVries Attorney at Law Sacramento, CA	Agree	No response required
	State Bar Litigation Section, Jury Instructions Committee	Modify as follows to better capture the concept of a consideration of the whole without unnecessary word repetition: You must consider [*name of defendant*]'s conduct as a whole in making this determination and not rely solely on ~~T~~he presence or absence of any of these factors ~~alone is not enough to determine~~ in determining whether [name of defendant]'s conduct was or was not unreasonable or without proper cause. ~~You must consider [name of defendant]'s conduct as a whole in making this determination.~~	The committee believes that its language is clearer.
VF-2301 Breach of the Implied Obligation of Good Faith and Fair Dealing Failure or Delay in Payment	Douglas deVries Attorney at Law Sacramento, CA	This proposed special verdict form fails to include a number of the categories of damages that are recoverable on the claim addressed by the form.	This comment will be considered at the next committee meeting because it addresses new material beyond the changes circulated for comment.
	Arnold R. Levinson Pillsbury & Levinson San Francisco, CA	The verdict forms are prepared for personal injury cases and not bad faith cases. They should be changed to permit	This comment will be considered at the next committee meeting because it addresses new material beyond the

Instruction	Commentator	Summary of Comment[1]	Committee Response
		recovery for (a) contract damages; (b) general damages (which can be broken down into various elements, such as future benefits, emotional distress damages, consequential financial damages and (c) punitive damages. That punitive damage portion of the verdict form should incorporate the punitive damage verdict forms and would depend on whether the case was bifurcated on that issue.	changes circulated for comment.
3100 et seq. Elder Abuse	Russell S. Balisok Balisok & Associates Glendale, CA	Elder Abuse is remedial. There is no such thing as a cause of action for elder abuse, unless the court, in using those words, means to say that a plaintiff has expressed a cause of action that includes claims under the Act. Why does it matter? Clearly, if the Act is remedial, then a theory for relief in tort must be identified by counsel, who must then plead and prove the cause of action. Tagged onto the tort pleading and proof are additional elements which if proved, would entitle the plaintiff to the enhanced remedies under the Act. Like punitive damages.	In arriving at the proposed revisions to these instructions, the committee considered the commentator's point in detail. The committee also solicited the views of other practitioners of elder abuse law, who did not agree with the commentator's analysis of the Elder Abuse Act. The Act sets forth specific acts that if committed, yield a right to sue for damages. The committee and the other practitioners consider this to be a statutory cause of action.
		Why does it matter? Because among other things, harm and causation would be subject to proof by the same standards	The committee recognizes that there is a gray area with regard to causation and damages if enhanced remedies are

Instruction	Commentator	Summary of Comment[1]	Committee Response
		applicable to the underlying cause of action, and not by the varying standards of proof in sections 15657; 15657.5. Why would causation and harm (injury or damage) be subject to proof by a heightened burden of proof?	sought, and the statute requires that the underlying elder abuse violations must then be proved by clear and convincing evidence. But in the absence of direct authority that the heightened standard does not apply to causation and damages, the committee does not believe that any revisions are currently appropriate. The committee will continue to monitor and consider this issue.
3103, 3104 and 3105 Neglect Instructions	Russell S. Balisok Balisok & Associates Glendale, CA	I believe that one instruction for these claims whether the plaintiff seeks predeath pain and suffering, or not, is more appropriate. Since here, the standard of proof is the same in either case (as opposed to financial abuse under 15657.5), the separation of these issues into two forms serves more to confuse.	This comment will be considered at the next committee meeting because it addresses new material beyond the changes circulated for comment.
3104, 3107, 3108	Russell S. Balisok Balisok & Associates Glendale, CA	Remove element on harm and substantial factor. Neither is part of a showing under the Act (although both are part of the elements of any underlying intentional tort). CACI's reliance on Welf. & Inst. Code § 15610.07 is misplaced. "Abuse of an elder . . . " is not part of the Elder Abuse Act at 15657. Instead, section 15610.07 is directly relevant only to the requirement of Welf. & Inst. Code § 15630 to report	In the absence of direct authority that a heightened burden of proof- does not apply to causation and damages, the committee does not believe that any revisions are currently appropriate. The instruction does not rely on Welf. & Inst. Code § 15610.07. This statute is cited under the Sources and Authority for the proposition that elder abuse can be financial abuse, neglect, physical abuse, or abduction, the four categories

Instruction	Commentator	Summary of Comment[1]	Committee Response
		elder abuse.	of instructions.
VF 3100 Financial Abuse—Individual or Individual and Employer Defendants	Russell S. Balisok Balisok & Associates Glendale, CA	If it weren't for the fact that financial abuse is, like neglect and physical abuse, remedial, questions 3 and (the new) 4 might stay in a special verdict form if the only claim under the Act is for attorneys fees. This is because the standard of proof for liability for financial abuse of Welf. & Inst. Code, § 15657.5 is merely preponderance, where the plaintiff only seeks attorney fees. But because the act is remedial, 3 and 4 must go. Now for questions 5 and 6: It is not essential that a plaintiff prove the elements of Civ. Code, § 3294 by clear and convincing evidence if liability under the Act depends solely on Welf. & Inst. Code, § 15657.5. That is because liability, even for "bad faith" may be maintained without regard for any culpability standard. Welf. & Inst. Code, § 15610.30(b)(1) "deems" the act to have been in bad faith if the elder had readily at his disposal or readily transferable to him the assets which are the subject of the financial abuse claim. Conduct under the elder abuse act in this sole instance may be developed based on a breach of contract theory, and in such cases,	The committee does not believe that any of the challenged questions in the verdict form are improper. Questions 3 and 4 are on causation and damages. In the absence of direct authority that a heightened burden of proof- does not apply to causation and damages, the committee does not believe that any revisions are currently appropriate. Question 5 is on employer liability. The argument that Civ. Code, § 3294 does not require proof of the factors imposing liability on an employer for the acts of an employee by clear and convincing evidence was rejected in *Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644. The CACI punitive damages instructions all require clear and convincing evidence for employer liability. Question 6 is on recklessness, malice, oppression, and fraud under Welf. & Inst. Code § 15657.5(b). This statute requires proof by clear and convincing

Instruction	Commentator	Summary of Comment[1]	Committee Response
		respondeat superior theory should suffice to impose liability on a principal, since attorneys fees are not punitive in nature.	evidence.
3610 Aiding and Abetting Tort—Essential Factual Elements	Laurence F. Janssen & Ruth D. Kahn Steptoe & Johnson Los Angeles, CA	Element 1 addresses the knowledge requirement for aiding and abetting, but, as presently drafted, does not explain that requirement with sufficient accuracy. See *Casey v. U.S. Bank Nat'l Ass'n* (2005) 127 Cal. App. 4th 1138 Proposed modification: **1. That [***name of defendant***] ~~knew~~ had actual knowledge that [a/an] [***e.g.*****, assault and battery] was [being/going to be] committed by [***name of actor***] against [***name of plaintiff***];**	The committee does not think that there is any difference to a jury between knowing and "actually" knowing. Juries will not be thinking of the legal concept of constructive knowledge. The committee did agree that adding "by [*name of actor*] against [*name of plaintiff*]" improves the instruction and made this revision. It also added *Casey* to the Sources and Authority.
		Element 2 addresses the "substantial assistance or encouragement" requirement for aiding and abetting, but, as presently drafted, does not encompass the specific-intent element of that requirement. See *Schulz v. Neovi Data Corp.* (2007) 152 Cal. App. 4th 86, 95. Proposed modification: **That [***name of defendant***] made a conscious decision to provide~~gave~~ substantial assistance or encouragement to [***name of actor***] for the purpose of assisting [***name of actor***]**	The committee believes that the citation to *Schulz* in the Directions for Use is sufficient to note a possible specific-intent requirement. *Schulz* does not reach the issue, and indicates the matter is not resolved.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		in the commission of [a/an] [*e.g.*, assault and battery] against [*name of plaintiff*];	
		The proposed draft does not instruct the jury as to key factors set forth in the Comments to Restatement (Second) of Torts § 876 that must be considered in determining whether a defendant may be held secondarily liable under an aiding and abetting theory. Proposed addition: **The assistance of or participation by the defendant may be so slight that he or she is not liable for the act of the other. You should therefore consider the following factors in determining whether [*name of defendant*] is liable for aiding and abetting [*name of actor*] in committing [a/an] [*e.g.*, assault and battery] against [*name of plaintiff*]: the nature of the act encouraged; the amount of assistance given by [*name of defendant*]; [*his/her*] presence or absence at the time of the tort; [*his/her*] relation to [*name of actor*]; and [*his/her*] state of mind.**	The committee does not believe that including a de minimis limitation with factors to consider in the instruction would be appropriate without supporting California authority.
		The paragraph in the "Sources and Authority" section, which quotes *Sindell v. Abbott Labs.* (1980) 26 Cal. 3d 588, as presently drafted, incorrectly suggests that	The committee does not believe that the *Sindell* excerpt suggest anything that is inaccurate. The *Chavers* case does not say that aiding and abetting is to be

Instruction	Commentator	Summary of Comment[1]	Committee Response
		Sindell stands for the proposition that the concept of aiding and abetting enjoys broad application in California. The quoted language does not reflect the gravamen of *Sindell*, which is that the theory of aiding and abetting is limited to a narrow range of circumstances, and that a broad application of the doctrine would expand it far beyond its intended scope. Suggested substitution: an excerpt from *Chavers v. Gatke Corp.* (2003) 107 Cal. App. 4th 606, 617 stating that aiding and abetting is to be construed narrowly.	construed narrowly. The court refused to extend the concept to cover an alleged theory of liability labeled "concerted action."
3723 Substantial Deviation	State Bar Litigation Section, Jury Instructions Committee	The words "depart" and "departures" express in plain English the concept of a "deviation" from the employer's business.	The committee does not think that "departure" is preferable in plain English to "deviation."
3905A, 3921, 3922 (reduction of noneconomic damages to current cash value)	Curt Cutting Lisa Perrochet Horvitz & Levy Encino, CA	The proposed revisions state that jurors should not further reduce future noneconomic damages to present value because the jury's award should already be a present-value sum. We agree that juries should not "further" reduce an award that is already a present-value sum. Unfortunately, nothing in the CACI instructions informs juries that they should award a present-value sum in the first instance. If juries are never instructed to award a present-value sum, there is no reason to believe they will do so. *Salgado v. County of Los Angeles*	The committee agreed with the comment and added language from *Salgado* similar to that proposed by the commentator in the instruction itself.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		(1998) 19 Cal.4th 629, 646-647 requires that the jury be specifically instructed to award a present-value sum.	
3921 Wrongful Death (Adult)	Orange County Bar Association, by Catherine M. Castaldi, President	Omit the suggested modification to the "Directions for Use." The modification adds unnecessary confusion.	The committee believes that any possible confusion is resolved by adding the *Salgado* language to the instruction itself (see response, above), and that the Directions for Use do not need to be revised.
3922 Wrongful Death (Parent's Recovery for Death of Minor Child)		The suggested modification of the second paragraph to the Directions for Use (explaining the possible conflict between *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 and *Salgado*) adds unnecessary confusion and should be omitted.	The committee believes that it is necessary to explain how *Fox* may be affected by *Salgado*.
3921 and 3922	Orange County Bar Association, by Catherine M. Castaldi, President	Use of the life expectancy tables should be indicated as permissible rather than recommended.	This comment will be considered at the next committee meeting because it addresses new material beyond the changes circulated for comment.
4107 Duty of Disclosure by Real Estate Broker	Orange County Bar Association, by Catherine M. Castaldi, President	Language should make clear that the instruction applies only to the broker who is a fiduciary, that is, these heightened duties are owed by the agent only to his or her principal. Accordingly, the instruction should be titled: Duty of Disclosure by Real Estate Broker Where a Fiduciary. Additionally, the proposed language at the beginning of the first paragraph should be modified by replacing the	The committee believes that the existence of the fiduciary relationship would most likely be resolved by the court as a matter of law and would not be determined by the jury.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		following: "As a fiduciary, a real estate broker must" with "Where a real estate broker is a fiduciary, he or she must."	
		The instruction uses the term "client" rather than "principal," which could obscure the need for a direct agent/principal relation in order for these duties to arise. "His or her" then should precede the term in order to indicate a relationship between the client and the broker.	The committee believes that "client" is a reasonable plain English word for "principal" in the broker context. The committee agreed that using "his or her client" instead of "the client" the first time is an improvement and made this change.
4324 Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice	California Apartment Association, by Heidi Palutke, Research Counsel	The instruction deals with waiver, yet this term is not used anywhere in the instruction, other than the title, and it is not defined. A definition or description may be helpful.	The committee does not believe that the definition is needed. The instruction sets forth what constitutes a waiver; the label and a general definition add nothing that the jury has to know.
		The burden of proof for the defendant claiming waiver by the plaintiff is "clear and convincing" evidence. This should be stated in the instruction. See, e.g. *DRG/Beverly Hills v. Chopstix Dim Sum Cafe & Takeout III* (1994) 30 Cal.App.4th 54, 60-61 (burden is on the party who claims a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation; doubtful cases should be decided against waiver) and *Wells Fargo Bank v. Superior Court* (1996) 49 Cal.App.4th 1320, 1336	No unlawful detainer case holds that waiver by acceptance of rent requires clear and convincing evidence. The cases cited by the commentator are very different. *DRG/Beverly Hills* is a lease case, but the issue is one of contract, involving waiver of a condition to performance in the contract. *Wells Fargo Bank* is a trust case involving waiver of attorney-client privilege.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		(clear and convincing evidence that does not leave the matter doubtful or uncertain).	
		The proposed instruction does not accurately track the case law defining how the presumption of tender and acceptance may be overcome. "While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent provides." *EDC Assocs. v. Gutierrez* (1994) 153 Cal. App 3d 167, 170. By contrast the proposed instruction only allows the landlord to overcome the presumption by proving the landlord "rejected the rent payment," which is a more definite and narrower requirement than "some positive evidence of rejection." See *Thriftmart, Inc. v. Me & Tex* (1981) 123 Cal.App. 3d 751, 754	The committee agreed and added an option for nonwaiver by continuously objecting to the acts constituting breach, as held in *Thriftmart*.
		The jury instruction describes the second way a landlord may overcome the presumption of waiver as "that the lease contained a provision stating that the acceptance of late rent would not affect [landlord's] right to evict." If the eviction is for a breach other than nonpayment of rent, acceptance of "late payment" is not	The committee agreed and modified the second option under the landlord's burden of proof to include the option for acceptance after nonmonetary breach.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		relevant. Additionally, the term "late payment" is confusing. As commonly used, late payment does not apply to payment after a 3-day notice is issued, only to payments before the notice and after the due date. This provision should refer to rental/lease agreement provisions that reserve the landlord's right to evict, despite acceptance "of rent" in a way that is consistent with the *EDC Associates* reference to a "specific reservation of rights in the lease."	
		The proposed instruction does not provide any guidance to jury members regarding how to determine if the landlord "knew" of a lease violation. The instruction does not refer to "full knowledge of all relevant facts." The landlord must not only have actual knowledge that the lease has been violated, but must also know what the consequences of acceptance of rent are, including waiver.	The committee believes that "knows that tenant had violated the lease" is an appropriate plain-English expression of "full knowledge of all relevant facts." The committee does not think that the landlord has to appreciate the legal significance of accepting rent; i.e., waiver. It is sufficient if the landlord knows that there has been a breach, and accepts the rent anyway.
	Joseph S. Dzida; Sullivan, Workman & Dee Los Angeles, CA	CAC1 4324 does not say what the burden of proof is and who has it.	The instruction says that the tenant must prove acceptance, and then the burden shifts to the landlord to prove one of the reasons why acceptance is not a waiver. The CACI standard is that if there is no reference to proof by clear and convincing evidence, the burden is by a preponderance of the evidence.

Instruction	Commentator	Summary of Comment[1]	Committee Response
		Waiver must be intentional. See *Waller* v. *Truck Ins. Exch.* (1995) 11 Cal. 4th 1, 31 and *Stanolind Oil & Gas Co.* v. *Guertzgen* (9th Cir. 1938) 100 F. 2d 299. Even the cases that deal with acceptance of rent say this and hold against the landlord only when the acceptance of rent clearly confirms an intent to waive. However, CACI No. 4324 does not include intent as an element of what must be proved. The mere acceptance of rent alone, without evidence of intent to waive, is insufficient to establish a waiver.	The committee does not believe that general rules of waiver are necessarily applicable in this narrow unlawful detainer context. *Waller* is an insurance coverage case. *Stanolind Oil & Gas Co.* is an old federal case construing Montana law. See also response below.
		The instruction does not define how rent is "accepted." In *EDC Associates, LTD., v. Gutierrez* (1984) 153 Cal.App.3d 167, 171, the court found a waiver only because: "No evidence suggested that landlord refused tender, returned the money orders or failed to negotiate them."	*EDC Associates* says that "While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates." The tenant does not have to prove that the landlord intended to waive the breach by accepting rent, only that there was "acceptance." Then the landlord has to present some positive evidence of rejection, or a right to accept without waiving in the lease.
		The new instruction is logically inconsistent in that it requires both that the tenant prove that the rent was	The committee agreed with this comment and revised the refusal option to refer to the situation in which the

Instruction	Commentator	Summary of Comment[1]	Committee Response
		accepted and the landlord prove that it was refused. Obviously, if the tenant proves that it was accepted, the landlord could not prove that it was refused. Yet the instruction calls for both.	landlord accepts a noncash form of payment (e.g., a check) but does not negotiate the instrument.
		The instruction does not address exceptions to the general rule of waiver by acceptance of rent that have been recognized in case law.	See response concerning the *Thriftmart* case, above.
		There is a legal issue concerning whether acceptance of rent constitutes waiver in nonmonetary default cases. All of the rent waiver cases predate the passage of Code of Civil Procedure § 1161.1. That section applies to acceptance of rent by commercial landlords "after default in the payment of rent." It allows a commercial landlord to accept rent without waiver after a lawsuit is filed, if the landlord has given the tenant actual notice that no waiver is intended. Obviously, if the legislature believed that acceptance of rent constituted a waiver in nonmonetary default cases, it would have extended section 1161.1 to also cover nonmonetary defaults, because there can be no logical reason to permit acceptance of rent in rent default cases, but not in nonmonetary default cases.	The committee does not base jury instructions on what the legislature may have intended by what it did not do. Numerous cases, including *Thriftmart*, involve waiver in nonmonetary cases.
4326 Affirmative	California Apartment	Civil Code Sec. 1942 requires more than	*Green* actually compels the opposite

Instruction	Commentator	Summary of Comment[1]	Committee Response
Defense—Repair and Deduct	Association, by Heidi Palutke, Research Counsel	a mere condition in need of repair. The conditions must be "dilapidations rendering the premises untenantable." The terms "dilapidations" and "untenantable" should be used and defined within the instruction. See *Green v. Superior Court of San Francisco* (1974) 10 Cal.3d 616, 630–631	conclusion. The court says that the "repair and deduct" remedy encompasses only "relatively minor dilapidations" and is therefore not an adequate tenant remedy for major dilapidations. The language in *Green* that the commentator cites addresses the warranty of habitability, not repair and deduct.
		The instruction does not indicate that the presumption that the tenant has waited a reasonable time is not conclusive, that it can, in fact, be rebutted. The instruction should include a description of how it can be rebutted by the landlord.	The committee agreed and added language addressing the right to rebut the presumption, but not only by the landlord if 30 days is not reasonable, but by the tenant also if a shorter period is essential.
4402 "Trade Secret" Defined	Jill F. Kopeikin Dechert LLP Mountain View, CA	The proposed revisions to CACI No. 4402 should be adopted because they more accurately reflect the law as articulated in Civ. Code, § 3426.1 and the case law. The prior version, in what appears to have been an effort to style these instructions in "plain English" fashion, actually modified the language of the Code. Specifically, the term "substantial business advantage over [his/her/its] competitors" does not appear in Section 3426.1 et seq. While that "plain English" language may have been intended to reflect Section 3426.1, it might be construed to modify and/or restrict the availability of relief in a manner inconsistent with the plain	No response required

Instruction	Commentator	Summary of Comment[1]	Committee Response
		language of Section 3426.1.	
	Michael C. Spillner Orrick Herrington Menlo Park, CA	In element 2, change "not generally known to the public or to others who can obtain economic value from its disclosure or use" back to "secret." This would better promote the "plain English" goal of the instructions, and it would be consistent with the same phrase in the second paragraph of 4412. In addition, the concept of "others who can obtain economic value from its disclosure or use" is already accounted for in the current draft of 4412.	The committee agreed and made this change.
4412 "Independent Economic Value" Explained	Eric E. Bensen Paul Hastings Janofsky & Walker LLP New York, NY Roger M. Milgrim Easton, PA (author of Milgram on Trade Secrets)	The use of "substantial" in the first paragraph to qualify "business advantage," which is unsupported by the California Uniform Trade Secret Act ("CUTSA"), suggests that information must meet some unspecified minimum value threshold to even be considered for trade secret protection. The adjective "substantial," while no doubt found in dictum in California authority, adds an overlay not found in either the statute or the font of common law, embodied in the Restatement, which the statute codifies.	The committee agreed and replaced "substantial" with "actual or potential."
	Jill F. Kopeikin Dechert LLP Mountain View, CA	The entire prefatory language preceding Proposed Instruction No. 4412 should be stricken as inconsistent with and representing an overstatement of the	The committee believes that changing "substantial" to "actual or potential" is sufficient to address the commentator's concerns, and does not believe it is

Instruction	Commentator	Summary of Comment[1]	Committee Response
		statutorily-imposed burden upon a trade secret owner in establishing that the alleged trade secret has "independent economic value." In particular, the prefatory language "gives the owner a substantial business advantage over others who do not know the … " is not consistent with Civ. Code, § 3426.1 and overstates the requirements of the law as articulated in the Code and by the reported decisional authorities.	necessary to remove the entire introductory paragraph.
	State Bar Litigation Section, Jury Instructions Committee	Modify as follows to correctly reflect the case law and give the jury the best understanding of this concept: [*Select short term to describe, e.g.,* Information] has actual or potential independent economic value if it is not generally known and gives or has the potential to give the owner a substantial business advantage over others who do not know the [*e.g.*, information] and who could ~~can~~obtain economic value from its disclosure or use. A substantial business advantage is an advantage that is more than trivial.	The committee believes that changing "substantial" to "actual or potential" is the better way to present the standard. Saying that "a substantial business advantage is an advantage that is more than trivial" in imprecise because there is much ground between "substantial" and "more than trivial."

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223. Opinion Testimony of Lay Witness

A witness [who was not testifying as an expert] gave an opinion during the trial. You may, but are not required to, accept that opinion. You may give the opinion whatever weight you think is appropriate.

Consider the extent of the witness's opportunity to perceive the matters on which the opinion is based, the reasons the witness gave for the opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

New April 2008

Directions for Use

Give the bracketed phrase in the first sentence regarding the witness not testifying as an expert if an expert witness also testified in the case.

Sources and Authority

- Evidence Code section 800 provides:

  If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

  (a) Rationally based on the perception of the witness; and

  (b) Helpful to a clear understanding of his testimony.

- Evidence Code section 802 provides: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

- Evidence Code section 1100 provides: "Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character."

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, §§ 3–25

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224. Testimony of Child

You have heard testimony from a witness who is [__] years old. As with any other witness, you must decide whether the child gave truthful and accurate testimony.

In evaluating a child's testimony, you should consider all of the factors surrounding that testimony, including the child's age and ability to perceive, understand, remember, and communicate.

You should not discount or distrust testimony just because a witness is a child.

New April 2008

Sources and Authority

- Evidence Code section 700 provides: "Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter."

- Penal Code section 1127f provides:

  In any criminal trial or proceeding in which a child 10 years of age or younger testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows:

  In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation, § 88(3)

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425. "Gross Negligence" Explained

Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others.

A person can be grossly negligent by acting or by failing to act.

New April 2008

Directions for Use

Give this instruction if a particular statute that is at issue in the case creates a distinction based on a standard of gross negligence. (See, e.g., Gov. Code, § 831.7(c)(5) [immunity for public entity or employee to liability to participant in or spectator to hazardous recreational activity does not apply if act of gross negligence is proximate cause of injury].) Courts generally resort to this definition if gross negligence is at issue under a statute. (See, e.g., *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 971 [4 Cal.Rptr.3d 340].)

Give this instruction with *CACI No 400, Essential Factual Elements,* but modify that instruction to refer to gross negligence.

This instruction may also be given if case law has created a distinction between gross and ordinary negligence. For example, under the doctrine of express assumption of risk, a signed waiver of liability may release liability for ordinary negligence only, not for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095]; see also CACI No. 451, *Express Assumption of Risk.*)

Sources and Authority

- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, internal citations omitted.)

- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- "The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Constr. Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644], internal citation omitted.)

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- "Numerous California cases have discussed the doctrine of gross negligence. Invariably these cases have turned upon an interpretation of a statute which has used the words 'gross negligence' in the text." (*Cont'l Ins. Co. v. Am. Prot. Indus.* (1987) 197 Cal.App.3d 322, 329 [242 Cal.Rptr. 784].)

- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 777, original italics.)

- " 'Prosser on Torts (1941) page 260, also cited by the *Van Meter* court for its definition of gross negligence, reads as follows: "Gross Negligence. This is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either -- sometimes on the ground that this must have been the purpose of the legislature. But most courts have considered that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *So far as it has any accepted meaning, it is merely an extreme departure from the ordinary standard of care.*" ' " (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 [257 Cal.Rptr. 356], original italics, internal citations omitted.)

- "California courts require a showing of 'the want of even scant care or an extreme departure from the ordinary standard of conduct' in order to establish gross negligence. Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence but not always." (*Decker, supra,* 209 Cal.App.3d at p. 358, internal citations omitted.)

- "The Legislature has enacted numerous statutes … which provide immunity to persons providing emergency assistance except when there is gross negligence. (See Bus. & Prof. Code, § 2727.5 [immunity for licensed nurse who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of nurse's employment unless the nurse is grossly negligent]; Bus. & Prof. Code, § 2395.5 [immunity for a licensed physician who serves on-call in a hospital emergency room who in good faith renders emergency obstetrical services unless the physician was grossly negligent, reckless, or committed willful misconduct]; Bus. & Prof. Code, § 2398 [immunity for licensed physician who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event for an injury suffered in the course of that event unless the physician was grossly negligent]; Bus. & Prof. Code, § 3706 [immunity for certified respiratory therapist who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of employment unless the respiratory therapist was grossly negligent]; Bus. & Prof. Code, § 4840.6 [immunity for a registered animal health technician who in good faith renders emergency animal health care at the scene of an emergency unless the animal health technician was grossly negligent]; Civ. Code, § 1714.2 [immunity to a person who has completed a basic cardiopulmonary resuscitation course for cardiopulmonary resuscitation and emergency cardiac

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care who in good faith renders emergency cardiopulmonary resuscitation at the scene of an emergency unless the individual was grossly negligent]; Health & Saf. Code, § 1799.105 [immunity for poison control center personnel who in good faith provide emergency information and advice unless they are grossly negligent]; Health & Saf. Code, § 1799.106 [immunity for a firefighter, police officer or other law enforcement officer who in good faith renders emergency medical services at the scene of an emergency unless the officer was grossly negligent]; Health & Saf. Code, § 1799.107 [immunity for public entity and emergency rescue personnel acting in good faith within the scope of their employment unless they were grossly negligent].)" (*Decker, supra,* 209 Cal.App.3d at pp. 356–357.)

- "The jury here was instructed: 'It is the duty of one who undertakes to perform the services of a police officer or paramedic to have the knowledge and skills ordinarily possessed and to exercise the care and skill ordinarily used in like cases by police officers or paramedics in the same or similar locality and under similar circumstances. A failure to perform such duty is negligence. [para.] The standard to be applied in this case is gross negligence. The term gross negligence means the failure to provide even scant care or an extreme departure from the ordinary standard of conduct.' " (*Wright v. City of L.A.* (1990) 219 Cal.App.3d 318, 343 [268 Cal.Rptr. 309] [construing "gross negligence" under Health & Saf. Code, § 1799.106, which provides that a police officer or paramedic who renders emergency medical services at the scene of an emergency shall only be liable in civil damages for acts or omissions performed in a grossly negligent manner or not performed in good faith].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 278

1 Levy et al., California Torts, Ch. 1, *General Principles of Liability,* § 1.01 (Matthew Bender)

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1006. Landlord's Duty

Before giving possession of leased property to a tenant [or upon renewal of a lease], a landlord must conduct a reasonable inspection of the property for unsafe conditions and correct any such conditions discovered in that process. The inspection must include common areas under the landlord's control.

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

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

New September 2003; Revised April 2008

Directions for Use

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

Sources and Authority

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

- "Historically, the public policy of this state generally has precluded a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession. This is true even though by the exercise of reasonable

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diligence the landlord might have discovered the condition. [¶] The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' " (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510-511 [118 Cal.Rptr. 741], internal citations omitted.)

- "To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act." (*Ucello, supra,* 44 Cal.App.3d at p. 511, internal citations omitted.)

- "Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." (*Mata v. Mata* (2003) 105 Cal.App.4th 1121, 1131-1132 [130 Cal.Rptr.2d 141.)

- "[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger." (*Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669], internal citations omitted.)

- "[T]he landlord's responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor 'only with those matters which would have been disclosed by a reasonable inspection.' The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord's obligation is only to do

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what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation." (*Mora, supra*, 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)

- "[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)

Secondary Sources

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

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

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

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

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

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

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

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1009C. Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty

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[*Name of plaintiff***] claims that [he/she] was harmed while employed by [***name of plaintiff's employer***] and working on [***name of defendant***]'s property because [***name of defendant***] breached a duty to [him/her]. There is a duty that cannot be delegated to another person arising from [***insert statute or regulation establishing nondelegable duty***] that is as follows: [***quote from statute/regulation or paraphrase duty***].**

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***] breached this duty;**

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

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

New April 2008

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 breached a duty established by a statute or regulation and that this duty was nondelegable as a matter of law. The statute or regulation that creates the duty may be paraphrased rather than quoted verbatim if its language would be confusing to the jury.

For an instruction for injuries to others involving a concealed condition, see CACI No. 1003, *Unsafe Concealed Conditions*. For an instruction for injuries to an employee of an independent contractor based on unsafe concealed conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the owner's retained control or defective equipment, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control or 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.

Sources and Authority

- "One who by statute or by administrative regulation is under a duty to provide specified

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safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions." (*Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146 [62 Cal.Rptr.3d 479].)

- "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 v. Dep't of Transp.* (2002) 27 Cal.4th 198, 211–212 [115 Cal.Rptr.2d 853, 38 P.3d 1081], original italics, internal citations omitted.)

- "[A]n owner may be liable if its breach of regulatory duties affirmatively contributes to injury of a contractor's employee." (*Evard, supra,* 153 Cal.App.4th at p. 147.)

- "Liability may be predicated on a property owner's 'breach of its own regulatory duties, regardless of whether or not it voluntarily retained control or actively participated in the project. … For purposes of imposing liability for affirmatively contributing to a plaintiff's injuries, the affirmative contribution need not be active conduct but may be in the form of an omission to act.' " (*Evard, supra,* 153 Cal. App. 4th at p. 147.)

Secondary Sources

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

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

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

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability* § 421.33 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability* § 178.90 et seq. (Matthew Bender)

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1500. Former Criminal Proceeding

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

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

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

[3. **That no reasonable person in [***name of defendant***]'s circumstances would have ~~did not reasonably~~ believed that there were grounds for causing [***name of plaintiff***] to be arrested or prosecuted~~[*insert disputed fact necessary to determine probable cause*]~~;]**

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

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

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

New September 2003; Revised April 2008

Directions for Use

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also give CACI No. 1503, *Reasonable Grounds.*

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also give CACI No. 1504, *Favorable Termination*. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are

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no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.
~~Do not read element #3 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see CACI No. 1503, *Reasonable Grounds*).~~

~~Do not read element #2 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use CACI No. 1504, *Favorable Termination*.~~

~~Note that acquittal does not necessarily reflect lack of reasonable grounds to have brought the prosecution.~~

~~Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."~~

Sources and Authority

- Restatement Second of Torts, section 653 provides:

  A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if

  (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and

  (b) the proceedings have terminated in favor of the accused.

- Restatement Second of Torts, section 657 provides: "The fact that the person against whom criminal proceedings are instituted is guilty of the crime charged against him, is a complete defense against liability for malicious prosecution."

- Restatement Second of Torts, section 673 provides:

  (1) In an action for malicious prosecution the court determines whether

  (a) the proceedings of which the plaintiff complains were criminal in character;

  (b) the proceedings were terminated in favor of the plaintiff;

  (c) the defendant had probable cause for initiating or continuing the proceedings;

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(d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

(2) In an action for malicious prosecution, subject to the control of the court, the jury determines

(a) the circumstances under which the proceedings were initiated in so far as this determination may be necessary to enable the court to determine whether the defendant had probable cause for initiating or continuing the proceedings;

(b) whether the defendant acted primarily for a purpose other than that of bringing an offender to justice;

(c) the circumstances under which the proceedings were terminated;

(d) the amount that the plaintiff is entitled to recover as damages;

(e) whether punitive damages are to be awarded, and if so, their amount.

- Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

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

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

- "The test is whether the defendant was actively instrumental in causing the prosecution." (*Cedars-Sinai Medical Center, supra,* 206 Cal.App.3d at p. 417.)

- In *Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654], the court observed that the Supreme Court in an 1861 case had approved a jury instruction whose effect "was to impose liability upon one who had not taken part until after the commencement of the prosecution." ~~(*Id.* at p. 263.)~~

- "Originally the common law tort of malicious prosecution was limited to criminal cases, but the tort was extended to afford a remedy for the malicious prosecution of a civil action." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 58 [75 Cal.Rptr.2d 83], internal citation omitted.)

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- ~~Restatement Second of Torts, section 653 provides:~~

  ~~A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if~~

  ~~(a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and~~

  ~~(b) the proceedings have terminated in favor of the accused.~~

- ~~Restatement Second of Torts, section 673 provides:~~

  ~~(1) In an action for malicious prosecution the court determines whether~~

  ~~(a) the proceedings of which the plaintiff complains were criminal in character;~~

  ~~(b) the proceedings were terminated in favor of the plaintiff;~~

  ~~(c) the defendant had probable cause for initiating or continuing the proceedings;~~

  ~~(d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.~~

  ~~(2) In an action for malicious prosecution, subject to the control of the court, the jury determines~~

  ~~(a) the circumstances under which the proceedings were initiated in so far as this determination may be necessary to enable the court to determine whether the defendant had probable cause for initiating or continuing the proceedings;~~

  ~~(b) whether the defendant acted primarily for a purpose other than that of bringing an offender to justice;~~

  ~~(c) the circumstances under which the proceedings were terminated;~~

  ~~(d) the amount that the plaintiff is entitled to recover as damages;~~

  ~~(e) whether punitive damages are to be awarded, and if so, their amount.~~

- "Probable cause" [is defined] as ~~"~~'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' " (*Clary v. Hale* (1959) 175 Cal.App.2d 880, 886 [1 Cal.Rptr. 91], internal citation omitted.)

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

- ~~"The burden of proving that there was no probable cause for defendant's prosecution of plaintiff upon which an action for malicious prosecution is based rests upon the plaintiff." (*Singleton v. Singleton* (1945) 68 Cal.App.2d 681, 691 [157 P.2d 886], internal citations omitted.)~~

- ~~Proof that the defendant was innocent does not necessarily establish lack of probable cause: "'While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime.'" (*Singleton*, *supra*, 68 Cal.App.2d at p. 693, quoting *Ball v. Rawles* (1892) 93 Cal. 222, 234 [28 P. 937].)~~

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

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

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

- ~~"In a malicious prosecution case the plaintiff is not required ... to show that the prosecution was inspired by personal hostility, a grudge or ill will. What is required is evidence which establishes bad faith, or the absence of an honest and sincere belief that the prosecution was justified by the existent facts and circumstances." (*Singleton*, *supra*, 68 Cal.App.2d at p. 696, internal citation omitted.)~~

- ~~Restatement Second of Torts, section 657 provides: "The fact that the person against whom criminal proceedings are instituted is guilty of the crime charged against him, is a complete defense against liability for malicious prosecution."~~

- In *Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123], the court observed that

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> "[a]cquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]"

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 469–485, 511

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

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

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

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1501. Wrongful Use of Civil Proceedings

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

1. **That [*name of defendant*] was actively involved in bringing [or continuing] the lawsuit;**

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

[3. **That no reasonable person in [*name of defendant*]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [*name of plaintiff*]**[~~*insert disputed fact necessary to establish probable cause*~~]**;**]

4. **That [*name of defendant*] acted primarily for a purpose other than succeeding on the merits of the claim;**

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

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

New September 2003; Revised April 2008

Directions for Use

~~Do not read element #3 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see CACI No. 1503, *Reasonable Grounds*).~~

~~Do not read element #2 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use CACI No. 1504, *Favorable Termination*.~~ Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also give CACI No. 1503, *Reasonable Grounds.*

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also give CACI No. 1504, *Favorable Termination*. Once these facts are

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determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

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

Element 4 expresses the malice requirement.
~~Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."~~

Sources and Authority

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. The Restatement uses the term 'wrongful use of civil proceedings' to refer to the tort." (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 486, internal citations omitted.)

- ~~"To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations omitted.)~~

- Restatement Second of Torts, section 674 provides:

  One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

  (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

  (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

- Restatement Second of Torts, section 681A provides:

  In an action for wrongful civil proceedings the plaintiff has the burden of proving, when the issue is properly raised, that

  (a) the defendant has initiated, continued or procured the civil proceedings against him;

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(b) the proceedings were terminated in his favor;

(c) the defendant did not have probable cause for his action;

(d) the primary purpose for which the proceedings were brought was not that of securing the proper adjudication of the claim on which the proceedings were based;

(e) he suffered special harm, and the extent of the harm;

(f) the circumstances make the recovery of punitive damages appropriate.

- Restatement Second of Torts, section 681B provides:

(1) In an action for wrongful civil proceedings, the court determines whether

(a) a civil proceeding has been initiated;

(b) the proceeding was terminated in favor of the plaintiff;

(c) the defendant had probable cause for his action;

(d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

(2) In an action for wrongful civil proceedings, subject to the control of the court, the jury determines

(a) the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them;

(b) whether the defendant acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based;

(c) the circumstances under which the proceedings were terminated;

(d) the amount that the plaintiff is entitled to recover as general and special damages;

(e) whether punitive damages are to be awarded, and if so, in what amount.

- Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

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- "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations omitted.)

- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)

- A person who had no part in the commencement of the action but who participated in it at a later time may be held liable for malicious prosecution: "There does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Lujan v. Gordon* (1977) 70 Cal.App.3d. 260, 264 [138 Cal.Rptr. 654].)

- "One who did not file the complaint may nevertheless be liable if he instigated or was actively instrumental in 'putting the law in motion.' " (5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 486, 497, citing *Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1371 [234 Cal.Rptr. 44].)

- "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra,* 13 Cal.3d at p. 53.)

- In *Bertero,* the court approved a jury instruction stating that liability can be found if the prior action asserts a legal theory that is brought without probable cause, even if alternate theories are brought with probable cause. (*Bertero, supra,* 13 Cal.3d at pp. 55-57.) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)

- "[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Sierra Club Found.* ~~*v. Graham* (1999) 72 Cal.App.4th 1135,~~*supra,* at p. 1153 ~~[85 Cal.Rptr.2d 726]~~, internal citation omitted.)

- "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in nature, or (3) a continuation of an existing proceeding." (*Merlet, supra,* 64 Cal.App.4th at p. 60.)

~~•Restatement Second of Torts, section 681A provides:~~

~~In an action for wrongful civil proceedings the plaintiff has the burden of proving, when the issue is~~

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~~properly raised, that~~

~~(a) the defendant has initiated, continued or procured the civil proceedings against him;~~

~~(b) the proceedings were terminated in his favor;~~

~~(c) the defendant did not have probable cause for his action;~~

~~(d) the primary purpose for which the proceedings were brought was not that of securing the proper adjudication of the claim on which the proceedings were based;~~

~~(e) he suffered special harm, and the extent of the harm;~~

~~(f) the circumstances make the recovery of punitive damages appropriate.~~

~~•Restatement Second of Torts, section 681B provides:~~

~~(1) In an action for wrongful civil proceedings, the court determines whether~~

~~(a) a civil proceeding has been initiated;~~

~~(b) the proceeding was terminated in favor of the plaintiff;~~

~~(c) the defendant had probable cause for his action;~~

~~(d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.~~

~~(2) In an action for wrongful civil proceedings, subject to the control of the court, the jury determines~~

~~(a) the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them;~~

~~(b) whether the defendant acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based;~~

~~(c) the circumstances under which the proceedings were terminated;~~

~~(d) the amount that the plaintiff is entitled to recover as general and special damages;~~

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~~(e) whether punitive damages are to be awarded, and if so, in what amount.~~

- "~~'~~[P]laintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.~~'~~" (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 128 [75 Cal.Rptr.2d 118], internal citation omitted.)

- ~~"The element of favorable termination is for the court to decide ...." (*Sierra Club Found., supra*, 72 Cal.App.4th at p. 1149.)~~

- "Favorable termination can occur short of a trial on the merits, but it must bear on the merits. Thus, a plaintiff does not establish favorable termination merely by showing that he or she prevailed in an underlying action." (*Sierra Club Found.*~~*ation*~~, *supra*, 72 Cal.App.4th at p. 1149, internal citation omitted.)

- ~~"[T]he termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra*, 64 Cal.App.4th at p. 128, internal citation omitted.)~~
- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra*, 38 Cal.App.4th at p. 1808, internal citations omitted.)

- Establishing the lack of probable cause on a set of facts is traditionally "a question of law to be determined by the court, rather than a question of fact for the jury" ~~...~~ …. [¶] [~~it~~It] "requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors ... ." (*Sheldon Appel Co.*, *supra*, ~~*v. Albert & Oliker* (1989)~~ 47 Cal.3d at p. ~~863,~~ 875 ~~[254 Cal.Rptr. 336, 765 P.2d 498]~~.)

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

- "The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question. It is then for the court to decide whether the state of defendant's knowledge constitutes an absence of probable cause." (*Sierra Club Found., supra*, 72 Cal.App.4th at p. 1154.)

- "'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' ... If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury." (*Walsh v. Bronson*

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(1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [46 Cal.Rptr.3d 638, 139 P.3d 30]~~*Sierra Club Found., supra*, 72 Cal.App.4th at p. 1154, internal citation omitted~~.)

- "Probable cause may be present even where a suit lacks merit. ... Suits which all reasonable lawyers agree totally lack merit-that is, those which lack probable cause-are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 [90 Cal.Rptr.2d 408].)

- "California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 383.)

- "Without actual malice, there can be no action for malicious prosecution. Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. It may range anywhere from open hostility to indifference." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

- "The malice element of the malicious prosecution tort goes to the defendant's subjective intent in initiating the prior action. It is not limited to actual hostility or ill will toward the plaintiff. Rather, malice is present when proceedings are instituted primarily for an improper purpose. Suits with the hallmark of an improper purpose are those in which: ~~"'...~~' "... (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.~~'"~~" ' " (*Sierra Club Found., supra,* 72 Cal.App.4th at pp. 1156-1157, citing *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383 [295 P.2d 405].)

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

- The litigation privilege of Civil Code section 47 does not preclude malicious prosecution actions. See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524] (litigation privilege "has been interpreted to apply to virtually all torts except malicious prosecution"); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 [266 Cal.Rptr. 638, 786 P.2d 365] ("~~The~~ only exception ... has

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been for malicious prosecution actions~~.~~"); *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 [6 Cal.Rptr.2d 781] ("~~The~~ privilege applies only to tort causes of action, and not to the tort of malicious prosecution~~.~~").

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 471, 474, 486–512

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

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

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

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1502. Wrongful Use of Administrative Proceedings

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully brought an administrative proceeding against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in bringing [or continuing] the administrative proceeding;**

2. **~~{~~That [***name of administrative body***] did not conduct an independent investigation;~~}~~**

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

4. **[That no reasonable person in [***name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the proceeding against [***name of plaintiff***]~~[***insert disputed fact necessary to establish probable cause***]~~;]**

5. **That [***name of defendant***] acted primarily for a purpose other than succeeding on the merits of the claim;**

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

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

New September 2003; Revised April 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 3) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 4). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].). If so, include element 4 and also give CACI No. 1503, *Reasonable Grounds.*

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 3 and also give CACI No. 1504, *Favorable Termination*. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

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

Element 5 expresses the malice requirement.
~~Do not read element #4 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see CACI No. 1503, *Reasonable Grounds*).~~

~~Do not read element #3 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use CACI No. 1504, *Favorable Termination*.~~

~~Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."~~

Sources and Authority

- ~~"'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.'" (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 673 [151 P.2d 308], internal citation omitted.)~~

- Restatement Second of Torts, section 680 provides:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if

(a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and

(b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

- Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

- " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.'" (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 673 [151 P.2d 308], internal citation omitted.)

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- "We adopt the rule set forth in section 680 of the Restatement of Torts and hold that an action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency." (*Hardy v. Vial* (1957) 48 Cal.2d 577, 581 [311 P.2d 494].)

- "[W]e hold that the State Bar, not respondents, initiated, procured or continued the disciplinary proceedings of [plaintiff]. Therefore, [plaintiff] failed to allege the elements required for a malicious prosecution of an administrative proceeding against respondents." (*Stanwyck v. Horne* (1983) 146 Cal.App.3d 450, 459 [194 Cal.Rptr. 228].)

- "The [Board of Medical Quality Assurance] is similar to the State Bar Association. Each is empowered and directed to conduct an independent investigation of all complaints from the public prior to the filing of an accusation." (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 [195 Cal.Rptr. 5], internal citation omitted.)

- "*Hogen* and *Stanwyck* placed an additional pleading burden upon the plaintiff in a malicious prosecution case based upon the favorable termination of an administrative proceeding. Those cases held that since it is the administrative body, and not the individual initiating the complaint, which actually files the disciplinary proceeding, a cause of action for malicious prosecution will not lie if the administrative body conducts an independent preliminary investigation prior to initiating disciplinary proceedings." (*Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1568 [31 Cal.Rptr.2d 199].)

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

- The same rules for determining probable cause in the wrongful institution of civil proceedings apply to cases alleging the wrongful institution of administrative proceedings. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1666, fn. 4 [26 Cal.Rptr.2d 778].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 513–516

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

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

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

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VF-1500. Malicious Prosecution—Former Criminal Proceeding

We answer the questions submitted to us as follows:

1. Was [*name of defendant*] actively involved in causing [*name of plaintiff*] to be prosecuted [or in causing the continuation of the prosecution]?
____ Yes ____ No

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

~~**2. Did the criminal proceeding end in [*name of plaintiff*]'s favor?**~~
~~**____ 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*] reasonably believe [*insert disputed fact necessary to determine probable cause*]?**~~
~~**____ 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~~2. Did [*name of defendant*] act primarily for a purpose other than that of bringing [*name of plaintiff*] to justice?
____ Yes ____ No

If your answer to question ~~4~~ 2 is yes, then answer question ~~5~~3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~3. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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~~6~~4. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified

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

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI Nos. 1503, *Reasonable Grounds*, and 1504, *Favorable Termination*.)

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case.

The breakdown of damages is optional depending on the circumstances.

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

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VF-1501. Malicious Prosecution—Wrongful Use of Civil Proceedings

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We answer the questions submitted to us as follows:

1. Was [*name of defendant***] actively involved in bringing [or continuing] a lawsuit against [***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 the lawsuit end in [***name of plaintiff***]'s favor?**~~
~~**____ 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. Would any reasonable person in [***name of defendant***]'s circumstances have believed [***insert disputed fact necessary to establish probable cause***]?**~~
~~**____ 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~~2. Did [*name of defendant***] act primarily for a purpose other than succeeding on the merits of the claim?**
____ Yes ____ No

If your answer to question ~~4~~ 2 is yes, then answer question ~~5~~3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~3. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

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~~6~~4. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

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This verdict form is based on CACI No. 1501, *Wrongful Use of Civil Proceedings*. See VF-1502 for a form that includes the affirmative defense of reliance on counsel.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI Nos. 1503, *Reasonable Grounds*, and 1504, *Favorable Termination*.)
~~Do not read question 3 if the court has determined from undisputed facts that there was no probable cause.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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VF-1502. Malicious Prosecution—Wrongful Use of Civil Proceedings—Affirmative Defense of Reliance on Counsel

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We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] actively involved in bringing [or continuing] the lawsuit against [***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***] make a full and honest disclosure of all the important facts known to [him/her] to [his/her] attorney?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] reasonably rely on [his/her] attorney's advice?**
   ____ 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 the lawsuit end in [*name of plaintiff*]**'s favor?**~~
~~**____ 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.** Would any reasonable person in [*name of defendant*]**'s circumstances have believed [***insert disputed fact necessary to establish probable cause***]?**~~
~~**____ Yes ____ No**~~

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

~~**6**~~**4. Did [***name of defendant***] act primarily for a purpose other than succeeding on the merits of the claim?**
   ____ Yes ____ No

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If your answer to question ~~6~~ 4 is yes, then answer question ~~7~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~7~~5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

____ Yes ____ No

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

~~8~~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

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Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 1501, *Wrongful Use of Civil Proceedings,* and CACI No. 1505, *Affirmative Defense—Reliance on Counsel.*

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI Nos. 1503, *Reasonable Grounds*, and 1504, *Favorable Termination*.)
~~Do not read question 5 if the court has determined from undisputed facts that there was no probable cause.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~ 6 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.

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VF-1503. Malicious Prosecution—Wrongful Use of Administrative Proceedings

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We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] actively involved in bringing [or continuing] an administrative proceeding against [***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 administrative body***] conduct an independent investigation?**
   ____ Yes ____ No

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

~~3. **Did the proceeding end in [***name of plaintiff***]'s favor?**~~
   ~~**____ 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 any reasonable person in [***name of defendant***]'s circumstances have believed [***insert disputed fact necessary to establish probable cause***]?**~~
   ~~**____ 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~~3. **Did [***name of defendant***] act primarily for a purpose other than succeeding on the merits of the claim?**
   ____ Yes ____ No

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

~~6~~4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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If your answer to question ~~6~~ 4 is yes, then answer question ~~7~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~7~~5. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 1502, *Wrongful Use of Administrative Proceedings.* See VF-1502 for a form that includes the affirmative defense of reliance on counsel.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI Nos. 1503, *Reasonable Grounds*, and 1504, *Favorable Termination.*)
~~Do not read question 4 if the court has determined from undisputed facts that there was no probable cause.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~7~~ 5 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.

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1700. Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely true than not true:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]]; and**

4. **That the statement(s) [was/were] false.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

~~*Nominal Damages*~~

~~**If [***name of plaintiff***] has proved all of the above, the law assumes that [his/her] reputation has been harmed. Without further evidence of damage, [***name of plaintiff***] is entitled to a nominal sum such as one dollar or such greater sum as you believe is proper for the assumed harm to [his/her] reputation under the circumstances of this case.**~~

Actual Damages

[~~*Name of plaintiff*~~] ~~is also entitled to recover if [he/she] proves it is more likely true than not true~~ If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following ~~actual damages~~:**

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 ~~in addition to that assumed by the law~~; or**

d. **Shame, mortification, or hurt feelings.**

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Assumed Damages

Even if [*name of plaintiff*] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law nonetheless assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [*name of plaintiff*] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

[*Name of plaintiff*] may also recover damages to punish [*name of defendant*] if [he/she] proves by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud.

[*For specific provisions, see CACI Nos. 3940–3949*]

~~**"Malice" means that [*name of defendant*] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**~~

~~**"Oppression" means that [*name of defendant*]'s conduct was despicable and subjected [*name of plaintiff*] to cruel and unjust hardship in knowing disregard of [his/her] rights.**~~

~~**"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.**~~

~~**"Fraud" means that [*name of defendant*] intentionally misrepresented or concealed a material fact and did so intending to deprive [*name of plaintiff*] of property or of a legal right or otherwise to cause [him/her] injury.**~~

New September 2003; Revised April 2008

Directions for Use

~~A s~~Special verdict form CACI No. VF-1700, *Defamation per se (Public Officer/Figure and Limited Public Figure),* should be used in this type of case.

Use the bracketed element 3 only ~~when~~ if the statement is not defamatory on its face (i.e., ~~where~~ if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 [Libel] and 46 [Slander]. Note that certain specific grounds of libel per se have been defined by case law.

Sources and Authority

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- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- Civil Code section 44 provides:

  Defamation is effected by either of the following:

  (a) Libel.

  (b) Slander.

- Civil Code section 45 provides: "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

- Civil Code section 46 provides:

  Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

  1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

  2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

  3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

  4. Imputes to him impotence or a want of chastity; or

  5. Which, by natural consequence, causes actual damage.

- Section 558 of the Restatement Second of Torts provides:

  To create liability for defamation there must be:

  (a) a false and defamatory statement concerning another;

  (b) an unprivileged publication to a third party;

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(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

- Section 559 of the Restatement Second of Torts states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

- Section 563 of the Restatement Second of Torts states: "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."

- Section 577(1) of the Restatement Second of Torts provides: "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed."

- California does not follow the majority rule, which is that all libel is actionable per se. If the court determines that the statement is reasonably susceptible to a defamatory interpretation, it is for the jury to determine if a defamatory meaning was in fact conveyed to a listener or reader. (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)

- A plaintiff is not required to allege special damages if the ~~if~~ statement is libelous per se (either on its face or by jury finding). (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- The distinction between fact and opinion is not absolute~~:~~ . "A statement of opinion ... may still be actionable 'if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.'

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~~[Citations.]~~" (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 [52 Cal.Rptr.2d 831], internal citations 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.' Whether a statement contains provably false factual assertions is a question of law for the trial court to decide." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], internal citations omitted.)

- In matters involving public concern, the First Amendment protection applies to non-media defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith, supra,* 72 Cal.App.4th at p. 645, internal citations omitted.)

- "[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor." (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr.2d 1], internal citation omitted.)

- "At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations." (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178, 965 P.2d 696], internal citations omitted.)

- The general rule is that "a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." There is an exception to this rule. [When it is foreseeable that the plaintiff] " 'will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents.' " (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198], internal citations omitted.)

- Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137, 690 P.2d 610].) "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203 [35 Cal.Rptr.2d 740], internal citation omitted.)

- "To qualify as a limited purpose public figure, a plaintiff 'must have undertaken some voluntary

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[affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.' " (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193]; see also *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430].)

- "The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of ... probable falsity.'" (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447], internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262]; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279-280 [84 S.Ct. 710, 11 L.Ed.2d 686].)

- The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "California ... permits defamation liability so long as it is consistent with the requirements of the United States Constitution." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359 [78 Cal.Rptr.2d 627], citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740-742 [257 Cal.Rptr. 708, 771 P.2d 406].)

- "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.... In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." (*Masson, supra,* 501 U.S. at pp. 510-511, internal citations omitted.)

- Actual malice "does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth." (*Jackson, supra,* 68 Cal.App.4th at p. 35.)

- "The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective recklessness or doubt." (*Melaleuca, supra,* 66 Cal.App.4th at p. 1365.)

- To show reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (*St. Amant, supra,* 390 U.S. at p. 731.)

- "Although the issue turns on the subjective good faith of the defendant, the plaintiff may attempt to prove reckless disregard for truth by circumstantial evidence. 'A failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable, or known to be biased against the plaintiff--such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' " (*Copp, supra,* 45 Cal.App.4th at p. 847,

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internal citations omitted, quoting *Reader's Digest Assn., supra,* 37 Cal.3d at p. 258, footnote omitted.)

- "An entity other than a natural person may be libeled." (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1283.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 601–612

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

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

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

1 California Civil Practice: Torts (Thomson West) §§ 21:1–21:2, 21:22–21:25, 21:44–21:52

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1701. Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per quod defamatory statements***].**

Liability

To establish this claim, [*name of plaintiff***] must prove that all of the following are more likely true than not true:**

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff***];**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That the statement(s) [was/were] false;**

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

6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves it is more likely true than not true that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

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; or**

d. **Shame, mortification, or hurt feelings;**

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Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

~~**"Malice" means that [***name of defendant***] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**~~

~~**"Oppression" means that [***name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**~~

~~**"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.**~~

~~**"Fraud" means that [***name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [him/her] injury.**~~

New September 2003; Revised April 2008

Directions for Use

~~A s~~Special verdict form VF-1701, *Defamation per quod (Public Officer/Figure and Limited Public Figure),* should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

Sources and Authority

- Civil Code section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

- Civil Code section 48a(4)(b) provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

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- Section 559 of the Restatement Second of Torts states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7.)

- "A libel 'per quod,' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement"~~,~~).' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354], internal citations omitted.)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 601–612

4 Levy et al., California Torts, Ch. 45, *Defamation,* §§ 45.04, 45.13 (Matthew Bender)

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

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

1 California Civil Practice: Torts (Thomson West) §§ 21:1–21:2, 21:22–21:25, 21:44–21:52

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1702. Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statement(s)***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) defamation per se, e.g., "[name of plaintiff] had committed a crime"***];**

4. **That the statement(s) [was/were] false; and**

5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual ~~damages~~Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following ~~actual damages~~:**

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; or**

d. **Shame, mortification, or hurt feelings.**

~~Nominal~~ Assumed ~~damages~~Damages

If [*name of plaintiff***] has failed to prove ~~any of the above~~ actual damages for harm to reputation or shame, mortification, or hurt feelings but proves by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or that [he/she] had serious doubts about the truth of the statement(s), then the law assumes that [***name of plaintiff***]'s reputation has been harmed and that [he/she] has suffered shame, mortification, or hurt feelings. Without presenting ~~further~~ evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.~~a nominal sum such as one dollar or such greater sum as you believe is proper for the~~**

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~~**assumed Harm to [his/her] reputation under the circumstances of this case.**~~

Punitive ~~damages~~Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

~~**"Malice" means that [***name of defendant***] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**~~

~~**"Oppression" means that [***name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**~~

~~**"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.**~~

~~**"Fraud" means that [***name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [him/her] injury.**~~

New September 2003; Revised April 2008

Directions for Use

~~A s~~Special verdict form CACI No. VF-1702, *Defamation per se (Private Figure—Matter of Public Concern),* should be used in this type of case.

Use the bracketed element 3 only ~~when~~ if the statement is not defamatory on its face (i.e., ~~where~~ if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 [Libel] and 46 [Slander]. Note that certain specific grounds of libel per se have been defined by case law.

Regarding the issue of what is a public concern, courts have observed: "'[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.'" (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

Sources and Authority

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- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

- A private plaintiff is not required to prove malice to recover actual damages. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347-348 [94 S.Ct. 2997, 41 L.Ed.2d 789]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 742 [257 Cal.Rptr. 708, 771 P.2d 406].)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

- "When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation." (*Brown, supra,* 48 Cal.3d at p. 747.)

- "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." (*Gertz, supra,* 418 U.S. at p. 350.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for

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defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)

- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages. This malice must be established by 'clear and convincing proof.' " (*Brown, supra,* 48 Cal.3d at p. 747, internal citations omitted.)

- When the court is instructing on punitive damages, it is error to fail to instruct that *New York Times* malice is required when the statements at issue involve matters of public concern. (*Carney, supra,* 221 Cal.App.3d at p. 1022.)

- "To prove actual malice ... a plaintiff must 'demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.' " (*Khawar, supra,* 19 Cal.4th at p. 275, internal citation omitted.)

- "Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence ...." (*Khawar, supra,* 19 Cal.4th at p. 279.)

- "'The inquiry into the protected status of speech is one of law, not fact.'" (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781], quoting *Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [103 S.Ct. 1684, 75 L.Ed.2d 708].)

- "For the *New York Times* standard to be met, 'the publisher must come close to willfully blinding itself to the falsity of its utterance.'" (*Brown, supra,* 48 Cal.3d at p. 747, internal citation omitted.)

- " 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 613–615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

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

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

1 California Civil Practice: Torts (Thomson West) §§ 21:1–21:2, 21:22–21:25, 21:51

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1703. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That the statement(s) [was/were] false;**

5. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**

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

7. **That the statements [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

Actual ~~damages~~Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

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; or**

d. **Shame, mortification, or hurt feelings.**

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Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

~~**"Malice" means that [***name of defendant***] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**~~

~~**"Oppression" means that [***name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**~~

~~**"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.**~~

~~**"Fraud" means that [***name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [him/her] injury.**~~

New September 2003; Revised April 2008

Directions for Use

~~A s~~Special verdict form VF-1703, *Defamation per quod (Private Figure—Matter of Public Concern),* should be used in this type of case.

Regarding the issue of what is a public concern, courts have observed: " '[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.' " (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

Presumed damages either are not available or will likely not be sought in a per quod case.

Sources and Authority

- Civil Code section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

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- Civil Code section 48a(4)(b) provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

- Section 559 of the Restatement Second of Torts states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7, footnote omitted.)

- "A libel 'per quod' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement"~~.~~).' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to

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recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)

- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 613–615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

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

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

1 California Civil Practice: Torts (Thomson West) §§ 21:1–21:2, 21:22–21:25, 21:51

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1704. Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statement(s)***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]];**

4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s).**

Actual ~~damages~~Damages

If [~~Name~~ *name of plaintiff*] has proved all of the above, then [he/she] is ~~also~~ entitled to recover [his/her] actual damages if [he/she] proves that [*name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following ~~actual damages~~:**

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 ~~in addition to that assumed by the law~~; or**

d. **Shame, mortification, or hurt feelings.**

~~Nominal~~ Assumed ~~damages~~Damages

Even if [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**
~~If [*name of plaintiff*] has proved all of the above, the law assumes that [his/her] reputation has been harmed. Without further evidence of damage, [*name of plaintiff*] is entitled to a nominal sum such as one dollar or such greater sum as you believe is proper for the assumed Harm to [his/her]~~

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~~**reputation under the circumstances of this case.**~~

Punitive ~~damages~~Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

~~**"Malice" means that [***name of defendant***] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**~~

~~**"Oppression" means that [***name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**~~

~~**"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.**~~

~~**"Fraud" means that [***name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [him/her] injury.**~~

New September 2003; Revised April 2008

Directions for Use

~~A s~~Special verdict form VF-1704, *Defamation per se—Affirmative Defense of the Truth (Private Figure—Matter of Private Concern),* ~~should~~ may be used in this type of case.

Use the bracketed element 3 only ~~when~~ if the statement is not defamatory on its face (i.e., ~~where~~ if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 [Libel] and 46 [Slander]. Note that certain specific grounds of libel per se have been defined by case law.

Sources and Authority

- "Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- "The question whether a plaintiff is a public figure [or not] is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

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- The jury should be instructed that the defendant's negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)

- "A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406].)

- "The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest." (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- "Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the 'public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.' " (*Stolz, supra,* 30 Cal.App.4th at p. 202, internal citations omitted.)

- "Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. 'While such speech is not totally unprotected by the First Amendment, its protections are less stringent' [than that applying to speech on matters of public concern]." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760 [105 S.Ct. 2939, 86 L.Ed.2d 593], internal citation omitted.)

- "We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." (*Dun & Bradstreet, Inc., supra,* 472 U.S. at p. 763.)

- "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet,* the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [106 S.Ct. 1558, 89 L.Ed.2d 783].)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in

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> the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations 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." (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

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

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

1 California Civil Practice: Torts (Thomson West) §§ 21:1–21:2, 21:22–21:25, 21:51

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1705. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***insert all claimed per quod defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about** [*name of plaintiff*]**;**

3. **That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [***name of plaintiff***] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**

4. **That [***name of defendant***] failed to use reasonable care to determine the truth or falsity of the statement(s);**

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

6. **That the statement(s) [was/were] a substantial factor in causing [***name of plaintiff***]'s harm.**

Actual ~~damages~~Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following actual damages:**

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; or**

d. **Shame, mortification, or hurt feelings.**

Punitive ~~damages~~Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by**

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clear and convincing evidence that [*name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

~~**"Malice" means that [***name of defendant***] acted with intent to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**~~

~~**"Oppression" means that [***name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**~~

~~**"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.**~~

~~**"Fraud" means that [***name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause [him/her] injury.**~~

New September 2003; Revised April 2008

Directions for Use

~~A s~~Special verdict form VF-1705, *Defamation per quod (Private Figure—Matter of Private Concern),* should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

Sources and Authority

- Civil Code section 45a provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

- Civil Code section 48a(4)(b) provides: " 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

- Section 559 of the Restatement Second of Torts states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

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- "Libel is recognized as either being per se (on its face), or per quod (literally meaning, 'whereby'), and each requires a different standard of pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- "If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 5, internal citation omitted.)

- "In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader's special knowledge of extrinsic facts but must specially plead and prove those facts." (*Palm Springs Tennis Club, supra,* 73 Cal.App.4th at p. 7, footnote omitted.)

- "A libel 'per quod' ... requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154 [185 Cal.Rptr. 244, 649 P.2d 886].)

- "In the libel context, 'inducement' and 'innuendo' are terms of art: '[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) allege his interpretation of the defamatory meaning of the language (the "innuendo," ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the "inducement").' " (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)

- "A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof." (*Selleck v. Globe Int'l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)

- "The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)

- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are required to prove only negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)

- If the language is not defamatory on its face, there is no distinction between libel and slander: "In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)

- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-347 [94 S.Ct. 2997, 41

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L.Ed.2d 789].)

- "The question whether a plaintiff is a public figure is to be determined by the court, not the jury." (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 529–555, 615

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

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

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

1 California Civil Practice: Torts (Thomson West) §§ 21:1–21:2, 21:22–21:25, 21:51

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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.

~~ASSUMED DAMAGES TO REPUTATION~~

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~~**6. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation? $_____**~~

ACTUAL DAMAGES

~~7~~**6. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*] actual harm?**
____ Yes ____ No

If your answer to question ~~7~~ 6 is yes, then answer question~~s 8~~7. If you answered no, skip question ~~8~~ 7 and answer question ~~9~~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.

~~**8. In addition to the amount awarded in question 6, what are [*name of plaintiff*]'s actual damages? $_____**~~

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*]?

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_____$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, April, 2008

Directions for Use

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

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

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.~~

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. Unless proof for both categories is offered, include question 8.

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.

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

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VF-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.

<u>ACTUAL DAMAGES</u>

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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 ~~any~~ actual damages for both c and d, skip questions 8 and 9 and answer question 10.

ASSUMED DAMAGES ~~TO REPUTATION~~

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.

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

New September 2003; Revised December 2005, April 2008

Directions for Use

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

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

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 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.~~

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. Unless proof for both categories is offered, include question 8.

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

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Omit question 12 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.

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

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VF-1704. Defamation per se—Affirmative Defense of the 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.

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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.

~~6~~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? $_____

~~**[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 $ _____

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If [*name of plaintiff*] has not proved any actual damages for either c or d, then answer question ~~7~~8.

If [*name of plaintiff*] has proved ~~any~~ actual damages for both c and d, skip question ~~7~~ 8 and answer question ~~8~~9.

ASSUMED DAMAGES ~~TO REPUTATION~~

~~7~~8. What are the damages you award [*name of plaintiff*] for the assumed ~~H~~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 ~~7~~8, answer question ~~8~~9.

PUNITIVE DAMAGES

~~8~~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 ~~8~~ 9 is yes, then answer question ~~9~~10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~9~~10. What amount, if any, do you award as punitive damages against [*name of defendant*]?
_____ $_____

Signed: _____
Presiding Juror

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

New September 2003; Revised December 2005, April 2008

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on CACI No. 1704, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)*, and CACI No. 1720, *Defense of the Truth*. Delete question 4 if the affirmative defense of the truth is not at issue.

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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.

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~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. Unless proof for both categories is offered, include question 8.

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

Omit question ~~9~~ 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.

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

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1804A. Use of Name or Likeness (Civ. Code, §§ 3344, 3344.1)

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

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]products or services];**

2. **That the use did not occur in connection with a [[news/public affairs/sports] broadcast or account/political campaign];**

3. **That [***name of defendant***] did not have [***name of plaintiff***]'s consent;**

4. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**

4. **[That the use did not occur in connection with a [[news/public affairs/sports] broadcast or account] [political campaign];]**

5. **[That [***name of defendant***] knew the account was false or that [***name of defendant***] acted with knowledge or in reckless disregard of its falsity;]**

   [That [*name of defendant***] was negligent in determining the truth of the account;]**

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

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

New September 2003Derived from former CACI No. 1804 April 2008

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.

Different standards apply if the use is in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. (See Civ. Code, § 3344(d); *Eastwood v. Superior Court* (1983) 149

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Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) The plaintiff bears the burdent of proving the nonapplicability of these exceptions. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307].) Element 2 may be omitted if there is no question of fact with regard to this issue. See CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account or Political Campaign*, for an instruction to use if one of the exceptions of Civil Code section 3344(d) applies.

~~Depending on the facts, the jury may need to be instructed on elements 4 or 5, which are based on Civil Code section 3344(d). (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 425 [198 Cal.Rptr. 342].) In *Eastwood*, the court held that subdivision (d), as it pertains to news, "does not provide an exemption for a knowing or reckless falsehood." If subdivision (d) is implicated by the facts, the burden of proof is on the plaintiff to demonstrate that the news account was false and that the defendant acted with knowledge or in reckless disregard of its falsity. (*Id.* at p. 426.) The lower standard of negligence, stated in the second bracketed option in element 5, may be appropriate if the plaintiff is not a public figure.~~

If plaintiff alleges that the ~~publication~~ use was not covered by Civil Code section 3344~~subdivision~~ (d) (e.g., not a "news" account) but that even if it ~~was~~ were covered it is not protected under the standards of *Eastwood*~~because it was false~~, then both this instruction and CACI No. 1804B~~elements 4 and 5~~ should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth in element 2~~element 4~~, the claim is still viable if the plaintiff proves all the elements of CACI No. 1804B~~element 5~~.

~~-~~Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven.

Sources and Authority

~~•Civil Code section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366-367 [92 Cal.Rptr.2d 713].)~~

- Civil Code section 3344(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

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- Civil Code section 3344(d) provides: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

- Civil Code section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enters v. Matthews* (2000) 78 Cal.App.4th 362, 366-367 [92 Cal.Rptr.2d 713].)

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enterprises, supra,* 78 Cal.App.4th at p. 367.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra,* ~~*v. Superior Court* (1983)~~ 149 Cal.App.3d at p. ~~409,~~ 417, fn. 6 ~~[198 Cal.Rptr. 342]~~, internal citation omitted.)

- In addition to the common law elements, a party seeking the statutory remedy provided in section 3344 must also allege "a knowing use of the plaintiff's name, photograph or likeness" and "a 'direct' connection must be alleged between the use and the commercial purpose." (*Eastwood, supra,* 149 Cal.App.3d at pp. 417-418, internal citation omitted; see *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 [118 Cal.Rptr. 370].)

- ~~In *Eastwood, supra,* the court held that "subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." (*Eastwood, supra,* 149 Cal.App.3d at p. 425.) If subdivision (d) is implicated by the facts, the burden of proof is on the plaintiff to demonstrate that the news account was false and that the defendant acted with knowledge or in reckless disregard of its falsity. (*Id.* at p. 426.)~~

- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo, supra,* ~~*v. Major League Baseball* (2001)~~ 94 Cal.App.4th ~~400,~~ at pp. 416-417 [114 Cal.Rptr.2d 307], internal citation omitted.)

- ~~"We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute. We also presume that the term 'public affairs' was intended to mean something less important than news. Public affairs must be related to real-life occurrences." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790], internal citations omitted.)~~

- ~~"[N]o cause of action will lie for the 'publication of matters in the public interest, which rests on the~~

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~~right of the public to know and the freedom of the press to tell it.'" (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citations omitted.)~~

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 681–683

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

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

18 California Points and Authorities, Ch. 185, *Privacy* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 20:17

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1804B. Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign (Civ. Code, §§ 3344(d), 3344.1)

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

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]products or services];**

2. **That the use occurred in connection with a [[news/public affairs/sports] broadcast or account/political campaign];**

3. **That the use contained false information;**
[*name of defendant***] did not have [***name of plaintiff***]'s consent;**

4. **[***Use for public figure***: That [***name of defendant***] knew the [broadcast or account/campaign material] was false or that [he/she/it] acted with reckless disregard of its falsity;]**

   [*or***]**

   [*Use for private individual***: That [***name of defendant***] was negligent in determining the truth of the [broadcast or account/campaign material];]**

3. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**

4. **[That the use did not occur in connection with a [[news/public affairs/sports] broadcast or account] [political campaign];]**

5. **[That [***name of defendant***] knew the account was false or that [***name of defendant***] acted with knowledge or in reckless disregard of its falsity;]**

   [That [*name of defendant***] was negligent in determining the truth of the account;]**

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

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

New September 2003Derived from former CACI No. 1804 April 2008

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Directions for Use

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

Give this instruction if the plaintiff's name or likeness has been used in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. In this situation, consent is not required. (Civ. Code, § 3344(d).) However, in *Eastwood v. Superior Court*, the court held that the constitutional standards under defamation law apply under section 3344(d) and that the statute as it applies to news does not provide protection for a knowing or reckless falsehood. (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) Under defamation law, this standard applies only to public figures, and private individuals may sue for negligent publication of defamatory falsehoods. (*Id.* at p. 424.) Presumably, the same distinction between public figures and private individuals would apply under Civil Code section 3344(d). Element 4 provides for the standards established and suggested by *Eastwood*.

~~Depending on the facts, the jury may need to be instructed on elements 4 or 5, which are based on Civil Code section 3344(d). (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 425 [198 Cal.Rptr. 342].) In *Eastwood*, the court held that subdivision (d), as it pertains to news, "does not provide an exemption for a knowing or reckless falsehood." If subdivision (d) is implicated by the facts, the burden of proof is on the plaintiff to demonstrate that the news account was false and that the defendant acted with knowledge or in reckless disregard of its falsity. (*Id.* at p. 426.) The lower standard of negligence, stated in the second bracketed option in element 5, may be appropriate if the plaintiff is not a public figure.~~

Give CACI No. 1804A, *Use of Name or Likeness*, if there is no issue whether one of the exceptions of Civil Code section 3344(d) applies. If plaintiff alleges that the ~~publication~~ use was not covered by subdivision (d) (e.g., not a "news" account) but that even if it ~~was~~ were covered it is not protected under the standards of *Eastwood*~~because it was false~~, then both this instruction and CACI No. 1804A~~elements 4 and 5~~ should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth element 2 of CACI No. 1804A ~~element 4~~, the claim is still viable if the plaintiff proves all the elements of this instruction~~element 5~~.

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.

~~-~~Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven.

Even though consent is not required, it may be an affirmative defense. CACI No. 1721, *Defense of*

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Consent (to defamation), may be used in this situation.

Sources and Authority

- ~~Civil Code section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366-367 [92 Cal.Rptr.2d 713].)~~

- Civil Code section 3344(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

- Civil Code section 3344(d) provides: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

- Civil Code section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enters v. Matthews* (2000) 78 Cal.App.4th 362, 366-367 [92 Cal.Rptr.2d 713].)

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enterprises*, *supra*, 78 Cal.App.4th at p. 367.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood*, *supra*, ~~*v. Superior Court* (1983)~~ 149 Cal.App.3d at p. ~~409,~~ 417, fn. 6 ~~[198 Cal.Rptr. 342]~~, internal citation omitted.)

- In addition to the common law elements, a party seeking the statutory remedy provided in section 3344 must also allege "a knowing use of the plaintiff's name, photograph or likeness" and "a 'direct' connection must be alleged between the use and the commercial purpose." (*Eastwood*, *supra*, 149 Cal.App.3d at pp. 417~~-~~–418, internal citation omitted; see *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 [118 Cal.Rptr. 370].)

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- "The spacious interest in an unfettered press is not without limitation. This privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. Hence, in defamation cases, the concern is with defamatory lies masquerading as truth. Similarly, in privacy cases, the concern is with nondefamatory lies masquerading as truth. Accordingly, we do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." (*Eastwood*, *supra*, 149 Cal.App.3d at p. 426, internal citations omitted.)

- The burden of proof as to knowing or reckless falsehood under Civil Code section 3344(d) is on the plaintiff. (See *Eastwood*, *supra*, 149 Cal.App.3d at p. 426.)

~~In *Eastwood*, *supra*, the court held that "subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." (*Eastwood*, *supra*, 149 Cal.App.3d at p. 425.) If subdivision (d) is implicated by the facts, the burden of proof is on the plaintiff to demonstrate that the news account was false and that the defendant acted with knowledge or in reckless disregard of its falsity. (*Id.* at p. 426.)~~

- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416-417 [114 Cal.Rptr.2d 307], internal citation omitted.)

- "We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute. We also presume that the term 'public affairs' was intended to mean something less important than news. Public affairs must be related to real-life occurrences." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790], internal citations omitted.)

- "[N]o cause of action will lie for the 'publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 681–683

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

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

18 California Points and Authorities, Ch. 185, *Privacy* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 20:17

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VF-1804. Privacy—Use of Name or Likeness (Civ. Code, §~~§~~ 3344~~, 3344.1~~)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] knowingly use [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] on merchandise or to advertise or sell products or services?**
   ____ 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***] have [***name of plaintiff***]'s consent?**
   ____ Yes ____ No

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

3. **Was [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] directly connected to [***name of defendant***]'s commercial purpose?**
   ____ 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 [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

   [a. Past economic loss

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

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[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 1804A, *Use of Name or Likeness.*

Additional questions may be necessary if the facts implicate Civil Code section 3344(d) (see Directions for Use under CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*).

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not

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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.

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1925. Affirmative Defense—Statute of Limitations—Fraud or Mistake

---

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

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

New April 2008

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable three-year period for fraud or mistake. (See Code Civ. Proc., § 338(d).) Include the second paragraph if the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense. The plaintiff bears the burden of pleading and proving delayed discovery. (See *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319 [64 Cal.Rptr.3d 9] [regardless of which limitation statute applied to case, burden was on plaintiff].)

Sources and Authority

- Code of Civil Procedure section 338 provides in part:

  Within three years:

  > (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

- The three-year statute of limitations of Code of Civil Procedure section 338, subdivision (d) does not begin to run until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. (*Sun'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 701 [148 Cal.Rptr. 329, 582 P.2d 920].)

- "The discovery rule 'may be expressed by the Legislature or implied by the courts.' By statute, the discovery rule applies to fraud actions. (Code Civ. Proc., § 338, subd. (d).) In addition, 'judicial decisions have declared the discovery rule applicable in situations where the plaintiff is unable to see or appreciate a breach has occurred.' " (*E-Fab, Inc., supra,* 153 Cal.App.4th at p. 1318, internal citations omitted.)

- "Code of Civil Procedure section 338, subdivision (d), effectively codifies the delayed discovery rule in connection with actions for fraud, providing that a cause of action for fraud 'is not to be

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deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' In a case such as this, that date is the date the complaining party learns, or at least is put on notice, that a representation was false." (*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35 [3 Cal.Rptr.3d 330].)

- "Case law has interpreted this accrual provision to mean that 'a cause of action [under Code Civ. Proc., § 338(d)] accrues, and the limitations period commences to run, when the aggrieved party could have discovered the . . . mistake through the exercise of reasonable diligence.' " (*Creditors Collection Serv. v. Castaldi* (1995) 38 Cal.App.4th 1039, 1044 [45 Cal.Rptr. 2d 511].)

- "With respect to actions based on fraud, the statute of limitations is tolled whenever plaintiff is able to show the defendant fraudulently concealed facts which would have led him to discover his potential cause of action. … 'Technical rules as to when a cause of action accrues apply therefore only in those cases which are free from fraud committed by the defendant. Said section 338, subdivision 4, . . . recognizes the nonapplicability of those technical rules where the fraud of the defendant may be so concealed that in the absence of circumstances imposing greater diligence on the plaintiff, the cause of action is deemed not to accrue until the fraud is discovered. Otherwise, in such cases, the defendant by concealing his fraud, would effectively block recovery by the plaintiff because of the intervention of the statute of limitations.' " (*Snow v. A. H. Robins Co.* (1985) 165 Cal.App.3d 120, 127-128 [211 Cal.Rptr. 271], internal citation omitted.)

- "[C]ourts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed accrual rule. The rule is generally applicable to confidential or fiduciary relationships. The fiduciary relationship carries a duty of full disclosure, and application of the discovery rule 'prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure.' " (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1526 [37 Cal.Rptr. 2d 810], internal citations omitted.)

- " 'The provision tolling operation of [section 338(d)] until discovery of the fraud has long been treated as an exception and, accordingly, this court has held that if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint.' " (*Samuels v. Mix* (1999) 22 Cal.4th 1, 14 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citation omitted.)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 596–606

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2030. Affirmative Defense—Statute of Limitations—Trespass or Private Nuisance

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

[If [*name of defendant***] proves that [***name of plaintiff***]'s claimed harm occurred before [***insert date three years before date of filing***], the lawsuit was still filed on time if [***name of plaintiff***] proves that the [trespass/nuisance] is continuous. A [trespass/nuisance] is continuous if it can be discontinued. Among the factors that indicate that the [trespass/nuisance] can be discontinued are the following:**

(a) That the [trespass/nuisance] is currently continuing;

(b) That the impact of the condition will vary over time;

(c) That the [trespass/nuisance] can be discontinued at any time, in a reasonable manner, and for reasonable cost, considering the benefits and detriments if it is discontinued.

[You must consider the continuous nature of the damage to the property that a nuisance causes, not the continuous nature of the acts causing the nuisance to occur.]]

New April 2008

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable three-year period for injury to real property. (See Code Civ. Proc., § 338(b).) This instruction may be used for a permanent trespass other than an action for damages for wrongful damage to timber, to which a five-year statute applies. (See Civ. Code, § 3346(c).) It may also be used for a permanent private nuisance. There is no limitation period for a public nuisance. (See Civ. Code § 3490.). There is also essentially no statute of limitation for a continuing trespass or continuing private nuisance, but damages for future harm are not recoverable. (See *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 291 [62 Cal.Rptr.3d 696] [nuisance]; *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 592 [63 Cal.Rptr.3d 165] [trespass].)

Include the optional second paragraph if there is an issue of fact as to whether the trespass or nuisance is permanent or continuous. If applicable, include the last sentence in the case of a nuisance.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery*, may be adapted for use.

See also CACI No. 3903F, *Damages to Real Property (Economic Damage)*, and CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

Sources and Authority

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- Code of Civil Procedure section 338 provides in part:

  Within three years:

  (b) An action for trespass upon or injury to real property.

- Civil Code section 3490 provides: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."

- "[A] trespass may be continuing or permanent. A permanent trespass is an intrusion on property under circumstances that indicate an intention that the trespass shall be permanent. In these cases, the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value. The cause of action accrues and the statute of limitations begins to run at the time of entry. … [¶] In contrast, a continuing trespass is an intrusion under circumstances that indicate the trespass may be discontinued or abated. In these circumstances, damages are assessed for present and past damages only; prospective damages are not awarded because the trespass may be discontinued or abated at some time, ending the harm. … Continuing trespasses are essentially a series of successive injuries, and the statute of limitations begins anew with each injury. In order to recover for all harm inflicted by a continuing trespass, the plaintiff is required to bring periodic successive actions. (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 592.)

- "Two distinct classifications have emerged in nuisance law which determine the remedies available to injured parties and the applicable statute of limitations. On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' … In such cases, plaintiffs ordinarily are required to bring one action for all past, present and future damage within three years after the permanent nuisance is erected. The statutory period is shorter for claims against public entities. (Gov. Code, § 911.2.) Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence. [¶] On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable." (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868–869 [218 Cal.Rptr. 293, 705 P.2d 866], internal citations and footnotes omitted.)

- "Historically, the application of the statute of limitations for trespass has been the same as for nuisance and has depended on whether the trespass has been continuing or permanent." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1148 [281 Cal.Rptr. 827].)

- "[G]enerally the principles governing the permanent or continuing nature of a trespass or nuisance are the same and the cases discuss the two causes of action without distinction." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 594.)

- "Generally, whether a trespass is continuing or permanent is a question of fact properly submitted

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to the jury. A trial court may remove the issue of fact from the jury by directed verdict only if there is no evidence tending to prove the case of the party opposing the motion." (*Starrh & Starrh Cotton Growers, supra,* 153 Cal.App.4th at p. 597, internal citations omitted.)

- "[T]he key question [in determining whether a trespass is continuous or permanent] is whether the trespass or nuisance can be discontinued or abated and there are a number of tests used to answer this question. A respected legal treatise summarizes the various tests as follows: '[W]hether (1) the offense activity is currently continuing, which indicates that the nuisance is continuing, (2) the impact of the condition will vary over time, indicating a continuing nuisance, or (3) the nuisance can be abated at any time, in a reasonable manner and for reasonable cost, and is feasible by comparison of the benefits and detriments to be gained by abatement.' " (*Starrh & Starrh Cotton Growers. supra,* 153 Cal.App.4th at pp. 593–594, citing 8 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 22.39, pp. 148–149.)

- "[T]he 'continuing' nature of a nuisance 'refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur.' " (*Lyles, supra,* 153 Cal.App.4th at p. 291, internal citation omitted.)

- "[A] cause of action for damage to real property accrues when the defendant's act causes '*immediate and permanent* injury' to the property or, to put it another way, when there is '[a]ctual and appreciable harm' to the property " (*Siegel v. Anderson Homes, Inc.* (2004) 118 Cal.App.4th 994, 1005 [13 Cal.Rptr.3d 462], original italics, internal citations omitted.)

- "Property damage cases … are different from medical malpractice cases in the sense that, when property is damaged, there is ordinarily some wrongful cause. Thus, when one's property is damaged, one should reasonably suspect that someone has done something wrong to him and, accordingly, be charged with knowledge of the information that would have been revealed by an investigation. That particular property damage could result from natural causes does not mean that the same property damage could result only from natural causes." (*Lyles, supra,* 153 Cal.App.4th at pp. 287–288.)

- "The traditional rule in tort cases is that the statute of limitations begins to run upon the *occurrence* of the last fact essential to the cause of action. Although sometimes harsh, the fact that plaintiff is neither aware of his cause of action nor of the identity of a wrongdoer will not toll the statute. [¶] The harshness of this rule has been ameliorated in some cases where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured. This modified rule has been applied to latent defects in real property and improvements. In the case of such latent defects the statute of limitations begins to run only when 'noticeable damage occurs.' " (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 406–407 [163 Cal.Rptr. 711], internal citations omitted, disapproved on another ground in *Trope v. Katz* (1995) 11 Cal.4th 274, 292 [45 Cal.Rptr.2d 241, 902 P.2d 259], original italics.)

Secondary Sources

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass,* § 17.09[5] (Matthew Bender)

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2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements

---

[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by [failing to pay/delaying payment of] benefits due under the insurance policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**
2. **That [***name of defendant***] was notified of the loss;**
3. **That [***name of defendant***], unreasonably or without proper cause, [failed to pay/delayed payment of] policy benefits;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [***name of plaintiff***]'s harm.**

In determining whether [*name of defendant***] acted unreasonably or without proper cause, you should consider only the information that [***name of defendant***] knew or reasonably should have known at the time when it [failed to pay/delayed payment of] policy benefits.**

New September 2003; Revised December 2007, April 2008

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- If an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. ... [¶] ... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574-575 [108 Cal.Rptr. 480, 510 P.2d 1032], original italics.)
- "An insurer's obligations under the implied covenant of good faith and fair dealing with respect to

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first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)

- "[A]n insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.' ... In other words, 'before an [insurer] can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so "without proper cause." ' " (*Opsal v. United Servs Auto. Ass'n* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal.Rptr.2d 352], citations omitted.)

- "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776].)

- "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. … 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. … On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' "(*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics, internal citations omitted.)

- "We evaluate the reasonableness of the insurer's actions and decision to deny benefits as of the time they were made rather than with the benefit of hindsight." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468].)

- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)

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- "While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved *legal* rather than *factual* disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. That does not mean, however, that the genuine dispute doctrine may properly be applied in every case involving purely a factual dispute between an insurer and its insured. This is an issue which should be decided on a case-by-case basis." (*Chateau Chamberay Homeowners Assn., supra,* 90 Cal.App.4th at p. 348, original italics, footnote and internal citations omitted.)

- "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant. (*Morris v. Paul Revere Life Insurance Co.* (2003) 109 Cal.App.4th 966, 973 [135 Cal.Rptr.2d 718]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect—subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)

- "[A]n insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. If the insurer's investigation—adequate or not—results in a correct conclusion of no coverage, no tort liability arises for breach of the implied convenant." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 [39 Cal.Rptr.3d 650], internal citations omitted.)

- "An insurance company may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing." (*Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1624 [50 Cal.Rptr.2d 224].)

- "We conclude ... that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. ... [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra,* 9 Cal.3d at p. 578.)

- "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)

- "[P]ublic policy mandates that the reasonableness of the insurer's decision must be evaluated as of the time it was made … ." (*Filippo Industries v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429, 1441 [88 Cal.Rptr.2d 881].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 240–242

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 12:822-12:1016

2 California Liability Insurance Practice: Claims ~~and~~ & Litigation (Cont.Ed.Bar) General Principles of

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Contract and Bad Faith Actions, §§ 24.25-24.45A

2 California Insurance Law ~~and~~ & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a]-[c], 13.06 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20-24.21, 24.40 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17 (Matthew Bender)

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2332. Bad Faith (First Party)—Failure to Properly Investigate Claim~~—Essential Factual Elements~~

~~**[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing by failing to properly investigate [*name of plaintiff*]'s loss. To establish this claim, [*name of plaintiff*] must prove all of the following:**~~

~~**1. That [*name of plaintiff*] suffered a loss covered under an insurance policy with [*name of defendant*];**~~

~~**2. That [*name of plaintiff*] notified [*name of defendant*] of the loss;**~~

~~**3. That [*name of defendant*] failed to conduct a fair and thorough investigation of the loss;**~~

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

~~**5. That [*name of defendant*]'s failure to conduct a fair and thorough investigation of the loss was a substantial factor in causing [*name of plaintiff*]'s harm.**~~

[*Name of defendant*] acted unreasonably or without proper cause if it failed to conduct a full, fair, and thorough investigation of all of the bases of the claim. When investigating [*name of plaintiff*]'s ~~the~~ claim, [*name of defendant*] had a duty to diligently search for and consider evidence that supported ~~[*name of plaintiff*]'s~~coverage of the claimed loss.

New September 2003; Revised December 2005, December 2007, April 2008

Directions for Use

This instruction must be used with CACI No. 2331, *Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements*, if it is alleged that the insurer acted unreasonably or without proper cause by failing to properly investigate the claim.

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

Sources and Authority

- "[A]n insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 817 [169 Cal.Rptr. 691, 620 P.2d 141].)

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- "To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial." (*Frommoethelydo v. Fire Insurance Exchange* (1986) 42 Cal.3d 208, 214-215 [228 Cal.Rptr. 160, 721 P.2d 41], internal citation omitted.)

- "To protect [an insured's] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim. Although we recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, ... an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (*Egan, supra*, 24 Cal.3d at p. 819.)

- "When investigating a claim, an insurance company has a duty to diligently search for evidence which supports its insured's claim. If it seeks to discover only the evidence that defeats the claim it holds its own interest above that of the insured." (*Mariscal v. Old Republic Ins. Co.* (1996) 42 Cal.App.4th 1617, 1620 [50 Cal.Rptr.2d 224].)

- "While we agree with the trial court ~~. . .~~… that the insurer's interpretation of the language of its policy which led to its original denial of [the insured]'s claim was reasonable, it does not follow that [the insurer]'s resulting claim denial can be justified in the absence of a full, fair and thorough investigation of *all* of the bases of the claim that was presented." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1066 [56 Cal.Rptr.3d 312]~~-~~, original italics.)

- "An unreasonable failure to investigate amounting to ... unfair dealing may be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages. ... [¶] The insurer's willingness to reconsider its denial of coverage and to continue an investigation into a claim has been held to weigh in favor of its good faith." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880 [93 Cal.Rptr.2d 364], internal citation omitted.)

- "[The insurer], of course, was not obliged to accept [the doctor]'s opinion without scrutiny or investigation. To the extent it had good faith doubts, the insurer would have been within its rights to investigate the basis for [plaintiff]'s claim by asking [the doctor] to reexamine or further explain his findings, having a physician review all the submitted medical records and offer an opinion, or, if necessary, having its insured examined by other physicians (as it later did). What it could not do, consistent with the implied covenant of good faith and fair dealing, was *ignore* [the doctor]'s conclusions without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 722 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics.)

- "[W]hether an insurer breached its duty to investigate [is] a question of fact to be determined by the particular circumstances of each case." (*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 196 [197 Cal.Rptr. 501].)

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- "[W]ithout actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty imposed on the insurer to investigate the claim." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 57 [221 Cal.Rptr. 171].)

- "It would seem reasonable that any responsibility to investigate on an insurer's part would not arise unless and until the threshold issue as to whether a claim was filed, or a good faith effort to comply with claims procedure was made, has been determined. In no event could an insured fail to keep his/her part of the bargain in the first instance, and thereafter seek recovery for breach of a duty to pay seeking punitive damages based on an insurer's failure to investigate a nonclaim." (*Paulfrey, supra,* 150 Cal.App.3d at pp. 199-200.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 245

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 12:848-12:904

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Investigating the Claim, §§ 9.2-9.3, 9.14-9.22A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith,* § 13.04[1]–[3] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.11 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance,* § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.153, 120.184 (Matthew Bender)

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2337. Factors to Consider in Evaluating Insurer's Conduct

In determining whether [*name of defendant***] acted unreasonably or without proper cause, you may consider whether the defendant did any of the following:**

[(a) Misrepresented to [*name of plaintiff***] relevant facts or insurance policy provisions relating to any coverage at issue.]**

[(b) Failed to acknowledge and act reasonably promptly after receiving communications about [*name of plaintiff***]'s claim arising under the insurance policy.]**

[(c) Failed to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under its insurance policies.]

[(d) Failed to accept or deny coverage of claims within a reasonable time after [*name of plaintiff***] completed and submitted proof-of-loss requirements.]**

[(e) Did not attempt in good faith to reach a prompt, fair, and equitable settlement of [*name of plaintiff***]'s claim after liability had become reasonably clear.]**

[(f) Required [*name of plaintiff***] to file a lawsuit to recover amounts due under the policy by offering substantially less than the amount that [he/she/it] ultimately recovered in the lawsuit, even though [***name of plaintiff***] had made a claim for an amount reasonably close to the amount ultimately recovered.]**

[(g) Attempted to settle [*name of plaintiff***]'s claim for less than the amount to which a reasonable person would have believed he or she was entitled by referring to written or printed advertising material accompanying or made part of the application.]**

[(h) Attempted to settle the claim on the basis of an application that was altered without notice to, or knowledge or consent of, [*name of plaintiff***], [his/her/its] representative, agent, or broker.]**

[(i) Failed, after payment of a claim, to inform [*name of plaintiff***] at [his/her/its] request, of the coverage under which payment was made.]**

[(j) Informed [*name of plaintiff***] of its practice of appealing from arbitration awards in favor of insureds or claimants for the purpose of forcing them to accept settlements or compromises less than the amount awarded in arbitration.]**

[(k) Delayed the investigation or payment of the claim by requiring [*name of plaintiff***], [or [his/her] physician], to submit a preliminary claim report, and then also required the submission of formal proof-of-loss forms, both of which contained substantially the same information.]**

[(l) Failed to settle a claim against [*name of plaintiff***] promptly once [his/her/its] liability had become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.]**

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[(m) Failed to promptly provide a reasonable explanation of its reasons for denying the claim or offering a compromise settlement, based on the provisions of the insurance policy in relation to the facts or applicable law.]

[(n) Directly advised [*name of plaintiff***] not to hire an attorney.]**

[(o) Misled [*name of plaintiff***] as to the applicable statute of limitations, that is, the date by which an action against [***name of defendant***] on the claim had to be filed.]**

[(p) Delayed the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome (AIDS) or AIDS-related complex for more than 60 days after it had received [*name of plaintiff***]'s claim for those benefits, doing so in order to investigate whether [***name of plaintiff***] had the condition before obtaining the insurance coverage. However, the 60-day period does not include any time during which [***name of defendant***] was waiting for a response for relevant medical information from a healthcare provider.]**

The presence or absence of any of these factors alone is not enough to determine whether [*name of defendant***]'s conduct was or was not unreasonable or without proper cause. You must consider [***name of defendant***]'s conduct as a whole in making this determination.**

New April 2008

Directions for Use

Although there is no private cause of action under Insurance Code section 790.03(h) (see *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304–305 [250 Cal.Rptr. 116, 758 P.2d 58]), this instruction may be given in an insurance bad-faith action to assist the jury in determining whether the insurer's conduct was unreasonable or without proper cause. (See *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078 [56 Cal.Rptr.3d 312], internal citations omitted.)

Include only the factors that are relevant to the case.

Sources and Authority

- Insurance Code section 790.03 provides in part:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.

> (h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:
>
> (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.

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(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.

(4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.

(7) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.

(8) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his or her representative, agent, or broker.

(9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.

(10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.

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(14) Directly advising a claimant not to obtain the services of an attorney.

(15) Misleading a claimant as to the applicable statute of limitations.

(16) Delaying the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome or AIDS-related complex for more than 60 days after the insurer has received a claim for those benefits, where the delay in claim payment is for the purpose of investigating whether the condition preexisted the coverage. However, this 60-day period shall not include any time during which the insurer is awaiting a response for relevant medical information from a health care provider.

- "[Plaintiff] was not seeking to recover on a claim based on a violation of Insurance Code section 790.03, subdivision (h). Rather, her claim was based on a claim of common law bad faith arising from [defendant]'s breach of the implied covenant of good faith and fair dealing which she is entitled to pursue. [Plaintiff] 's reliance upon the [expert's] declaration was for the purpose of providing evidence supporting her contention that [defendant] had breached the implied covenant by its actions. This is a *proper* use of evidence of an insurer's violations of the statute and the corresponding regulations." (*Jordan, supra,* 148 Cal.App.4th at p. 1078, original italics, internal citations omitted.)

Secondary Sources

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VF-2301. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**
   ____ 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***] notified of the loss?**
   ____ 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 pay/delay payment of] policy benefits?**
   ____ 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.

~~3~~4. **Was ~~Did~~ [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits unreasonable~~y~~ or without proper cause~~[fail to pay/delay payment of] policy benefits~~?**
   ____ Yes ____ No

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

~~4~~5. **Was [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

~~5~~6. **What are [***name of plaintiff***]'s damages?**

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[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2004, April 2007, December 2007; April 2008

Directions for Use

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

This verdict form is based on CACI No. 2331, *Breach of the Implied Obligation of Good Faith and Fair*

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Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements.

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~ 6 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 punitive damages are claimed, combine this form with the appropriate verdict form numbering from VF-3900 to VF-3904.

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

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REVOKED April 2008

~~VF-2302. Bad Faith (First Party) – Failure to Properly Investigate Claim~~

~~We answer the questions submitted to us as follows:~~

~~1. Did [*name of plaintiff*] suffer a loss covered under an insurance policy with [*name of defendant*]?~~

~~_____ 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 plaintiff*] notify [*name of defendant*] of the loss?~~

~~_____ 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 fairly and thoroughly investigate the loss and [deny coverage/fail to pay insurance benefits/delay payment of insurance benefits]?~~

~~_____ 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 [*name of defendant*]'s failure to properly investigate the loss a substantial factor in causing harm to [*name of plaintiff*]?~~

~~_____ Yes _____ No~~

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

~~5. What are [*name of plaintiff*]'s damages?~~

~~[a. Past economic loss~~

~~[lost earnings $ _____]~~

~~[lost profits $ _____]~~

~~[medical expenses $ _____]~~

~~[other past economic loss $ _____]~~

~~Total Past Economic Damages: $ _____]~~

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

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

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

~~**TOTAL $ _____**~~

~~**Signed: _____**~~
~~**Presiding Juror**~~

~~**Dated: _____**~~

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

~~*New September 2003; Revised April 2007, December 2007*~~

~~**Directions for Use**~~

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

~~This verdict form is based on CACI No. 2332, *Bad Faith (First Party)—Failure to Properly Investigate Claim—Essential Factual Elements*.~~

~~If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to include the categorizations of "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.~~

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

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3024. Sexual Harassment in Defined Relationship ~~(Civ. Code, § 51.9)~~—Essential Factual Elements (Civ. Code, § 51.9)

[*Name of plaintiff***] claims that [***name of defendant***] sexually harassed [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a business, service, or professional relationship with [***name of defendant***];**

2. **[That [***name of defendant***] made [sexual advances/solicitations/sexual requests/demands for sexual compliance/[***insert other actionable conduct***] to [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] engaged in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender]~~ that was unwelcome and pervasive or severe~~;]**

3. **That [***name of defendant***]'s conduct was unwelcome and also pervasive or severe;**

4~~3~~. **That [***name of plaintiff***] was unable to easily end the relationship with [***name of defendant***]; and**

5~~4~~. **That [***name of plaintiff***] has suffered or will suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [***name of defendant***]'s conduct.**

New September 2003; Revised April 2008

Directions for Use

~~The first bracketed portion of element 2 should be analogous to quid pro quo harassment under FEHA in terms of the severity of conduct that must be proved.~~

~~In element 1, either insert the appropriate profession from the statutory list (Civ. Code, § 51.9(a)(1)(A)–(E)), or if there is a factual dispute over whether the relationship qualifies, provide examples from this list as guidance. (Civ. Code, § 51.9(a)(1)(F).)~~

Select either or both options for element 2 depending on the defendant's conduct.

See also CACI No. 2524, *"Severe or Pervasive" Explained.*

Sources and Authority

- Civil Code section 51.9 provides:

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(a) A person is liable in a cause of action for sexual harassment under this section when the plaintiff proves all of the following elements:

(1) There is a business, service, or professional relationship between the plaintiff and defendant. Such a relationship may exist between a plaintiff and a person, including, but not limited to, any of the following persons:

(A) Physician, psychotherapist, or dentist. For purposes of this section, "psychotherapist" has the same meaning as set forth in paragraph (1) of subdivision (c) of Section 728 of the Business and Professions Code.

(B) Attorney, holder of a master's degree in social work, real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer.

(C) Executor, trustee, or administrator.

(D) Landlord or property manager.

(E) Teacher.

(F) A relationship that is substantially similar to any of the above.

(2) The defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe.

(3) There is an inability by the plaintiff to easily terminate the relationship.

(4) The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including, but not limited to, emotional distress or the violation of a statutory or constitutional right, as a result of the conduct described in paragraph (2).

(b) In an action pursuant to this section, damages shall be awarded as provided by subdivision (b) of Section 52.

(c) Nothing in this section shall be construed to limit application of any other remedies or rights provided under the law.

(d) The definition of sexual harassment and the standards for determining liability set forth in this section shall be limited to determining liability only with regard to a

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cause of action brought under this section.

Secondary Sources

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.35, 116.90, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.32 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights* (Matthew Bender)

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VF-3014. Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] have a business, service, or professional relationship with [*name of defendant*]?**
   ____ 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*] make [sexual advances/sexual solicitations/sexual requests/demands for sexual compliance/[*insert other actionable conduct*]] to [*name of plaintiff*]?]**

   [or]

   [Did [*name of defendant*] engage in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender]?]
   ____ Yes ____ No

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

3. **Was [*name of defendant*]'s conduct unwelcome and also pervasive or severe?**
   ____ 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.

~~3~~4. **Was [*name of plaintiff*] unable to easily end the relationship with [*name of defendant*]?**
   ____ Yes ____ No

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

~~4~~5. **Has [*name of plaintiff*] suffered or will [he/she] suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [*name of defendant*]'s conduct?**
   ____ Yes ____ No

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

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stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~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 $ _____

[Answer question ~~6~~7.

~~6~~7. What amount do you award as punitive damages?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

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New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 3024, *Sexual Harassment in Defined Relationship—Essential Factual Elements.*

Select either or both options for question 2 depending on the facts at issue.~~If alternate conduct is alleged, modify question 2 as in element 2 of CACI No. 3024.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~ 6 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. For instructions on punitive damages, see instructions in the Damages series (CACI No. 3900 et seq.).

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

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3104. Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [***name of individual defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual defendant***] had care or custody of [***name of plaintiff/decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody;**

3. **That [***name of individual defendant***] failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

4. **That [***name of individual defendant***] acted with [recklessness/malice/oppression/ [or] fraud];**

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

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

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence[:~~[~~***insert one or more of the following:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant employer***] authorized [***name of individual defendant***]'s conduct;] [or]**

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4. [That an officer, a director, or a managing agent of [*name of defendant employer*] knew of [*name of individual defendant*]'s wrongful conduct and adopted or approved the conduct after it occurred.]

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

New September 2003; Revised December 2005, April 2008

Directions for Use

This instruction is intended for plaintiffs who are seeking ~~survival~~ a decedent's predeath damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking ~~such~~ these damages should use CACI No. 3103, *Neglect—Essential Factual Elements*. The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is seeking damages only against the employer, use CACI No. 3105, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*

Sources and Authority

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, ~~or fiduciary abuse as defined in Section 15610.30,~~ and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

  (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

  (b) The limitations imposed by Section ~~337~~377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts

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of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.57 provides:

(a) "Neglect" means either of the following:

(1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

(2) The negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

(2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.

(3) Failure to protect from health and safety hazards.

(4) Failure to prevent malnutrition or dehydration.

(5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

- ~~"[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)~~

- Welfare and Institutions Code section 15657.2 provides:

"Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- Welfare and Institutions Code section 15610.07 provides:

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"Abuse of an elder or a dependent adult" means either of the following:

(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ...

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with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney*, *supra*, ~~*v. Baker* (1999)~~ 20 Cal.4th ~~23,~~at p. 33 ~~[82 Cal.Rptr.2d 610, 971 P.2d 986]~~.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers-Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra,* 20 Cal.4th at p. 35, internal citation omitted.)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals--health practitioners as well as care custodians--should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack, supra,* 80 Cal.App.4th at p. 974, internal citations omitted.)

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Secondary Sources

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

California Elder Law Litigation (Cont.Ed.Bar) §§ 2.70-2.72

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.50 (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly,* §§ 5.33[3], 5.36 (Matthew Bender)

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3107. Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.63)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was physically abused by [***name of individual defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual defendant***] physically abused [***name of plaintiff/decedent***] by [***insert applicable grounds for abuse***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **That [***name of individual defendant***] acted with [recklessness/malice/oppression/ [or] fraud];**

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

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

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence[: ~~[~~***insert one or more of the following:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in a [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant employer***] authorized [***name of individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of individual defendant***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

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

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Directions for Use

This instruction is intended for plaintiffs who are seeking ~~survival~~ a decedent's predeath damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking ~~such~~ these damages should use CACI No. 3106, *Physical Abuse—Essential Factual Elements.* The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is only seeking damages against the employer, use CACI No. 3108, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:

  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, ~~or fiduciary abuse as defined in Section 15610.30,~~ and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

  (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

  (b) The limitations imposed by Section ~~337~~377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts

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of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.63 provides:

"Physical abuse" means any of the following:

(a) Assault, as defined in Section 240 of the Penal Code.

(b) Battery, as defined in Section 242 of the Penal Code.

(c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.

(d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.

(e) Sexual assault, that means any of the following:

(1) Sexual battery, as defined in Section 243.4 of the Penal Code.

(2) Rape, as defined in Section 261 of the Penal Code.

(3) Rape in concert, as described in Section 264.1 of the Penal Code.

(4) Spousal rape, as defined in Section 262 of the Penal Code.

(5) Incest, as defined in Section 285 of the Penal Code.

(6) Sodomy, as defined in Section 286 of the Penal Code.

(7) Oral copulation, as defined in Section 288a of the Penal Code.

(8) Sexual penetration, as defined in Section 289 of the Penal Code.

(f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:

(1) For punishment.

(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.

(3) For any purpose not authorized by the physician and surgeon.

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- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31-32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) §§ 2.69, 2.71

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[2] (Matthew Bender)

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3110. Abduction—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657.05, 15610.06)

[*Name of plaintiff***] claims that [***name of individual defendant***] abducted [him/her/[***name of decedent***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual defendant***] [removed [***name of plaintiff/decedent***] from California and] restrained [him/her/[***name of decedent***]] from returning to California;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **[That [***name of plaintiff/decedent***] did not have the capacity to consent to the [removal/restraint];]**

   [That [[*name of conservator***]/the court] did not consent to the [removal/restraint];]**

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

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

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence[: ~~H~~***insert one or more of the following:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant employer***] authorized [***name of individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of individual defendant***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

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

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New September 2003; Revised December 2005, April 2008

Directions for Use

This instruction is intended for plaintiffs who are seeking ~~survival~~ a decedent's predeath damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking ~~such~~ these damages should use CACI No. 3109, *Abduction—Essential Factual Elements.* The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is seeking damages only against the employer, use CACI No. 3111, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*

Sources and Authority

- Welfare and Institutions Code section 15657.05 provides:

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

  (a)(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

  (2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.

  (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

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

- Welfare and Institutions Code section 15610.06 provides: " 'Abduction' means the removal from this

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state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court."

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) §§ 2.68, 2.71-2.72

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

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

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [take/hide/appropriate/retain] [***name of plaintiff/decedent***]'s property for a wrongful use [or with the intent to defraud]?**
   ____ Yes ____ No

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

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

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

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**
   ____ 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***] acted with [recklessness/malice/oppression/fraud]?**~~
   ~~**____ 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.**~~

   Answer question ~~5~~4.

~~5~~4. **What are [***name of plaintiff/decedent***]'s damages?**

   [a. Past economic loss
   [lost earnings $ _____]
   [lost profits $ _____]
   [medical expenses $ _____]

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[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 $ _____

[Answer question 5.

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

[Answer question 6.

6. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with [recklessness/malice/oppression/ [or] fraud]?
_____ 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 were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?
$ _____]

Signed: _____

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Presiding Juror

Dated: _____

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

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

Directions for Use

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

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements* ~~*(Welf. & Inst. Code, § 15610.30)*~~, ~~and~~ CACI No. 3101, *Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought* ~~*Against*~~ *—Individual*~~/~~ *or Individual and Employee Defendants*, and CACI No. 3102, *Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.* ~~*(Welf. & Inst. Code, § 15657.5)*~~. ~~Delete question 4 if enhanced remedies are not sought.~~

If the plaintiff alleges that the defendant assisted in the wrongful conduct, modify question 1 as in element 2 of CACI No. 3101.

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~ 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Include question 5 if employer liability is at issue. Question 5 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102.

In a financial abuse wrongful death case, the decedent's pain and suffering before death is recoverable on a showing of recklessness, oppression, fraud, or malice by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.5(b)(1); Code Civ. Proc., § 377.34.) Therefore, in question 4, include only item 4a for past economic loss. But also include questions 6 and 7. (See Welf. & Inst. Code, § 15657.5(b), Civ. Code, § 377.34.)

If punitive damages are sought, incorporate CACI No. VF-3900, *Punitive Damages—Trial Not Bifurcated.*

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

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VF-3101. Financial Abuse—Employer Defendant Only (Welf. & Inst. Code, §§ 15657.5, 15610.30)

We answer the questions submitted to us as follows:

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

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

2. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**
   ____ 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*] prove by clear and convincing evidence that the employee acted with [recklessness/malice/oppression/fraud]?~~
~~____ 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~~3. **Was the employee's conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**
   ____ Yes ____ No

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

~~5~~4. **Did [***name of plaintiff***] prove by clear and convincing evidence that an officer, a director, or a managing agent of [***name of defendant***] authorized the employee's conduct?**
   ____ Yes ____ No

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

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~~6~~5. What are [*name of plaintiff/decedent*]'s damages?

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

[Answer question 6.

6. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*]'s employee acted with [recklessness/malice/oppression/[or] fraud]?
_____ 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 were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

$ _____]

Signed: _____

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Presiding Juror

Dated: _____

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

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

Directions for Use

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

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements*, and CACI No. 3102, *Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*

If the plaintiff alleges that the defendant's employees assisted in the wrongful conduct, modify question 1 as in element ~~2~~ 1 of CACI No. ~~3102~~3100. Question ~~5~~ 4 can be altered to correspond to one of the alternative bracketed options in ~~element 7 of~~ CACI No. 3102. ~~If the employee was joined as a party and the jury fills out findings regarding enhanced remedies against the employee, then questions 1 through 4 and 6 probably do not need to be answered again on this form.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 5 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.

In a financial abuse wrongful death case, the decedent's pain and suffering before death is recoverable on a showing of recklessness, oppression, fraud, or malice by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.5(b)(1); Code Civ. Proc., § 377.34.) Therefore, in question 5, include only item 5a for past economic loss. But also include questions 6 and 7. (See Welf. & Inst. Code, § 15657.5(b); Civ. Code, § 377.34.)

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

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

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VF-3102. Neglect—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] have care or custody of [***name of plaintiff/decedent***]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody?**
   ____ 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 that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene~~,~~ or in the provision of food, clothing, or shelter?**
   ____ 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***] act with [recklessness/malice/oppression/fraud]?**~~
~~**____ 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**~~**4. Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**
   ____ Yes ____ No

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

~~**6.Did an officer, a director, or a managing agent of [***name of defendant employer***] have**~~

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~~**advance knowledge of the unfitness of [***name of defendant employee***] and employ [him/her] with a knowing disregard of the rights or safety of others?**~~
~~**_____ Yes _____ No**~~

~~**Answer question 7.**~~

~~**7**~~**5. What are [***name of plaintiff/decedent***]'s damages?**

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

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

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

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

TOTAL $ _____

[Answer question 6.

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

[Answer question 7.

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7. Did [*name of plaintiff*] prove 1 through 5 above by clear and convincing evidence and also prove by clear and convincing evidence that [*name of defendant*] acted with [recklessness/malice/oppression/ [or] fraud]?
_____ 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 were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?
$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 3103, *Neglect—Essential Factual Elements*, and CACI No. 3104, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants*. ~~Delete questions 4 and 6 if this form is being used in conjunction with CACI No. 3103, *Neglect—Essential Factual Elements*.~~

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. 3104.

Include question 6 if employer liability is at issue. Question 6 can be altered to correspond to one of the alternative bracketed options for employer liability in the lower bracketed portion of CACI No. 3104~~, or it can be omitted if the plaintiff is not suing an employer~~.

If specificity is not required, users do not have to itemize all the damages listed in question ~~7~~ 5 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.

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If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657(a)), include question 7. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657(b); Civ. Code, § 377.34.) Therefore, in question 5, include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8. To recover these enhanced remedies, not only must recklessness, malice, oppression, or fraud be proved by clear and convincing evidence, but the underlying neglect under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.)

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

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

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VF-3103. Neglect—Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15610.57)

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff/decedent***] in [***name of defendant***]'s care or custody?**
____ Yes ____ No

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

2. Was [*name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody?**
____ 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 one or more of [*name of defendant*]**'s employees fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene~~,~~ or in the provision of food, clothing, or shelter?**
____ 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 employee[s] act with [recklessness/malice/oppression/fraud]?~~
~~____ 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~~4. Was the employee['s][s'] conduct a substantial factor in causing harm to [*name of plaintiff/decedent***]?**
____ Yes ____ No

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

~~6~~5. Did [*name of plaintiff***] prove by clear and convincing evidence that an officer, a director, or a managing agent of [***name of defendant***] ~~have~~ had advance knowledge of**

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the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others?
____ Yes ____ No

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

~~7~~6. What are [*name of plaintiff/decedent*]'s damages?

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

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

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

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

TOTAL $ _____

[Answer question 7.

7. Did [*name of plaintiff*] prove 1 through 6 above by clear and convincing evidence and also prove by clear and convincing evidence that the employee[s] acted with [recklessness/malice/oppression/ [or] fraud]?
_____ Yes _____ No]

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[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 were [*name of decedent*]'s damages for noneconomic loss for pain, suffering or disfigurement incurred before death?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 3105, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. 3105. Question ~~6~~ 5 can be altered to correspond to one of the alternative bracketed options for employer liability in element ~~8~~ 7 of CACI No. 3105.

If specificity is not required, users do not have to itemize all the damages listed in question ~~7~~ 6 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 attorney fees and costs are sought (see Welf. & Inst. Code, § 15657(a)), include question 7. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657(b); Civ. Code, § 377.34.) Therefore, in question 6, include only item 6a for past economic loss. But also include the transitional language after question 7 and include question 8. To recover these enhanced remedies, not only must recklessness, malice, oppression, or fraud be proved by clear and convincing evidence, but the underlying neglect under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.)

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

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

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VF-3104. Physical Abuse—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.63)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] physically abuse [***name of plaintiff/decedent***]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**
   ____ 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***] act with [recklessness/malice/oppression/fraud]?**~~
~~**____ 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**~~**3. Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**
____ Yes ____ No

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

~~**5. Did an officer, a director, or a managing agent of [***name of defendant employer***] have advance knowledge of the unfitness of [***name of defendant employee***] and employ [him/her] with a knowing disregard of the rights or safety of others?**~~
~~**____ Yes ____ No**~~

~~**Answer question 6.**~~

~~**6**~~**4. What are [***name of plaintiff/decedent***]'s damages?**

[a. Past economic loss

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[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 $ _____

[Answer question 5.

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

[Answer question 6.

6. Did [*name of plaintiff*] prove 1 through 4 above by clear and convincing evidence and also prove by clear and convincing evidence that [*name of defendant*] acted with [recklessness/malice/oppression/ [or] fraud]?
_____ 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.

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

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 3106, *Physical Abuse—Essential Factual Elements*, and CACI No. 3107, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants.* ~~Delete questions 3 and 5 if this form is being used in conjunction with CACI No. 3106, *Physical Abuse—Essential Factual Elements.*~~

Include question 5 if employer liability is at issue. Question 5 can be altered to correspond to one of the alternative bracketed options for employer liability in the lower bracketed portion of CACI No. 3107~~, or it can be omitted if the plaintiff is not suing an employer~~.

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657(a)), include question 6. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657(b); Civ. Code, § 377.34.) Therefore, in question 4, include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7. To recover these enhanced remedies, not only must recklessness, malice, oppression, or fraud be proved by clear and convincing evidence, but the underlying physical abuse under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.)

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

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

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VF-3105. Physical Abuse—Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15610.63)

We answer the questions submitted to us as follows:

1. **Did one or more of [***name of defendant***]'s employees physically abuse [***name of plaintiff/decedent***]?**
   ____ Yes ____ No

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

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

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

~~**3. Did the employee[s] act with [recklessness/malice/oppression/fraud]?**~~
~~**____ 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**~~**3. Was the employee['s][s'] conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**
   ____ Yes ____ No

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

~~**5**~~**4. Did [***name of plaintiff***] prove by clear and convincing evidence that an officer, a director, or a managing agent of [***name of defendant***] ~~have~~ had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others?**
   ____ Yes ____ No

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

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~~6~~5. What are [*name of plaintiff/decedent*]'s damages?

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

[Answer question 6.

6. Did [*name of plaintiff*] prove 1 through 5 by clear and convincing evidence and also prove by clear and convincing evidence that [*name of defendant*] acted with [recklessness/malice/oppression/ [or] fraud]?
_____ 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 were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

$ _____]

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Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 3108, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*

Question ~~5~~ 4 can be altered to correspond to one of the alternative bracketed options for employer liability in element 6 of CACI No. 3108.

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 5 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 attorney fees and costs are sought (see Welf. & Inst. Code, § 15657(a)), include question 6. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657(b); Civ. Code, § 377.34.) Therefore, in question 5, include only item 5a for past economic loss. But also include the transitional language after question 6 and include question 7. To recover these enhanced remedies, not only must recklessness, malice, oppression, or fraud be proved by clear and convincing evidence, but the underlying physical abuse under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.)

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

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

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VF-3106. Abduction—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657.05, 15610.06)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [remove [***name of plaintiff/decedent***] from California and] restrain [him/her/[***name of plaintiff/decedent***]] from returning to California?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**
   ____ 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/decedent***] lack the capacity to consent to the [removal/restraint]?**
   ____ 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 [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**
   ____ 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 employee***] an officer, director, or managing agent of [***name of defendant employer***] acting in a [corporate/employment] capacity?**~~
   ~~**____ Yes ____ No**~~

   ~~**Answer question 6.**~~

~~6~~5. **What are [***name of plaintiff/decedent***]'s damages?**

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[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 $ _____

[Answer question 6.

6. Did [*name of plaintiff*] **prove by clear and convincing evidence that [***name of defendant employee***] was an officer, director, or managing agent of [***name of defendant employer***] acting in a [corporate/employment] capacity?**
_____ Yes _____ No]

[Answer question 7.

7. Did [*name of plaintiff***] prove 1 through 5 above by clear and convincing evidence?**
_____ 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 were [*name of decedent***]'s damages for noneconomic loss for pain, suffering, or**

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disfigurement incurred before death?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 3109, *Abduction—Essential Factual Elements,* and CACI No. 3110, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants.* ~~Delete question 5 if this form is being used in conjunction with CACI No. 3109, *Abduction—Essential Factual Elements.*~~

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of CACI No. 3110.

~~Question 5 can be altered to correspond to one of the alternative bracketed options in the lower bracketed portion of CACI No. 3110, or it can be omitted if the plaintiff is not suing an employer.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Include question 6 if employer liability is at issue. Question 6 can be altered to correspond to one of the alternative bracketed options for employer liability in the lower bracketed portion of CACI No. 3110.

If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657.05(a)), include question 7. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657.05(b); Civ. Code, § 377.34.) Therefore, in question 5, include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8. To recover these enhanced remedies, the underlying abduction under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.05.)

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See

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CACI Nos. VF-3900–VF-3904.)

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

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VF-3107. Abduction—Employer Defendant Only (Welf. & Inst. Code, §§ 15657.05, 15610.06)

We answer the questions submitted to us as follows:

1. **Did one or more of [***name of defendant***]'s employees [remove [***name of plaintiff/decedent***] from California and] restrain [him/her/[***name of plaintiff/decedent***]] from returning to California?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?**
   ____ 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/decedent***] lack the capacity to consent to the [removal/restraint]?**
   ____ 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 employee['s][s'] conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**
   ____ 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~~[Was/Were]~~ the employee[s] [was/were] [an] officer[s], director[s], or managing agent[s] of [***name of defendant employer***] acting in a [corporate/employment] capacity?**
   ____ Yes ____ No

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

[Answer question 7.

7. Did [*name of plaintiff*] prove 1 through 6 by clear and convincing evidence?
_____ 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 were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

$ _____]

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Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008

Directions for Use

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

This verdict form is based on CACI No. 3111, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of CACI No. 3111.

Question 5 can be altered to correspond to one of the alternative bracketed options in element 6 of CACI No. 3111.

If specificity is not required, users do not have to itemize all the damages listed in question 6 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 attorney fees and costs are sought (see Welf. & Inst. Code, § 15657.05(a)), include question 7. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657.05(b); Civ. Code, § 377.34.) Therefore, in question 6, include only item 6a for past economic loss. But also include the transitional language after question 7 and include question 8. To recover these enhanced remedies, the underlying abduction under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.05.)

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

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

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3610. Aiding and Abetting Tort—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of actor***]'s [***insert tort theory, e.g., assault and battery***] and that [***name of defendant***] is responsible for the harm because [he/she] aided and abetted [***name of actor***] in committing the [***e.g., assault and battery***].**

If you find that [*name of actor***] committed [a/an] [***e.g., assault and battery***] that harmed [***name of plaintiff***], then you must determine whether [***name of defendant***] is also responsible for the harm. [***Name of defendant***] is responsible as an aider and abetter if [***name of plaintiff***] proves all of the following:**

> **1. That [***name of defendant***] knew that [a/an] [***e.g., assault and battery***] was [being/going to be] committed by [***name of actor***] against [***name of plaintiff***];**
>
> **2. That [***name of defendant***] gave substantial assistance or encouragement to [***name of actor***]; and**
>
> **3. That [***name of defendant***]'s conduct was a substantial factor in causing harm to [***name of plaintiff***].**

Mere knowledge that [a/an] [*e.g., assault and battery***] was [being/going to be] committed and the failure to prevent it do not constitute aiding and abetting.**

New April 2008

Directions for Use

Give this instruction if the plaintiff seeks to hold a defendant responsible for the tort of another on a theory of aiding and abetting, whether or not the active tortfeasor is also a defendant.

Some cases seem to hold that in addition to the elements of knowledge and substantial assistance, a complaint must allege the aider and abettor had the specific intent to facilitate the wrongful conduct. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95 [60 Cal.Rptr.3d 810].)

Sources and Authority

- "The jury was also instructed on aiding and abetting, as follows: 'A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1140–1141

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[69 Cal.Rptr.3d 445].)

- "[W]e consider whether the complaint states a claim based upon 'concert of action' among defendants. The elements of this doctrine are prescribed in section 876 of the Restatement Second of Torts. The section provides, 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' With respect to this doctrine, Prosser states that 'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [para.] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . .' " (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 604 [163 Cal.Rptr. 132, 607 P.2d 924], internal citations omitted.)

- " ' "Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person … knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act … ." [Citations.]' This is consistent with Restatement Second of Torts, which recognizes a cause of action for aiding and abetting in a civil action when it provides: 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [¶] … [¶] (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself … .' 'Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. … It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.' " (*Schulz, supra,* 152 Cal.App.4th at pp. 93–94, internal citations omitted.)

- "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … 'The words "aid and abet" as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained.*' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145–1146 [26 Cal.Rptr.3d 401], original italics, internal citations omitted.)

- " 'Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. "As a general rule, one owes no duty to control the conduct of another . . . ." More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates.' " (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 [57 Cal.Rptr.3d 454], internal citations omitted.)

- " 'In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent. … A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to

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be, committed, and acted *with the intent of facilitating the commission of that tort*.' Of course, a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is. … [T]he defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1146 [26 Cal.Rptr.3d 401], original italics, internal citations omitted.)

- It appears that one may be liable as an aider and abetter of a negligent act. (See *Orser v. George* (1967) 252 Cal.App.2d 660, 668 [60 Cal.Rptr. 708] ["James too must be held as a defendant because, although he did not fire the fatal bullet, there is evidence (*which may or may not be sufficient to prove him liable at the trial*) creating a question for the trier of fact. This evidence indicates he was firing alternately with Vierra at the same mudhen, in the same line of fire and possibly tortiously. In other words (to paraphrase the Restatement …), the record permits a possibility James knew Vierra's conduct constituted a breach of duty owed Orser and that James was giving Vierra substantial 'assistance or encouragement'; also that this was substantial assistance to Vierra in a tortious result with James' own conduct, 'separately considered, constituting a breach of duty to' Orser."], original italics; see also Rest. 2d Torts, § 876, Com. on Clause (b), Illustration 6.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 44

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability,* §§ 9.01, 9.02 (Matthew Bender)

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3723. Substantial Deviation

If [an employee/a representative] combines his or her personal business with the employer's business, then the employee's conduct is within the scope of [employment/authorization] unless the [employee/representative] substantially deviates from the employer's business.

Deviations that do not amount to abandoning the employer's business, such as incidental personal acts, minor delays, or deviations from the most direct route, are reasonably expected and within the scope of employment.

~~**However, if at the time of the conduct the [employee/representative] was not performing work for his or her employer, either directly or indirectly, but was acting only for his or her own personal reasons, then the conduct was not within the scope of [employment/authorization].**~~

[~~An employee's conduct that slightly deviates from an employee's work is to be expected. For example, acts~~ Acts that are necessary for [an employee/a representative]'s comfort, health, and convenience while at work are within the scope of employment.]

New September 2003; Revised June 2006, April 2008

Directions for Use

This instruction is closely related to CACI No. 3720, *Scope of Employment*. It focuses on when an act is not within the scope of employment. Give the optional third paragraph if the employee was at the work site when the act giving rise to liability occurred, but was not directly involved in performing job duties at the time (for example, at lunch or on break).

Sources and Authority

- "[C]ases that have considered recovery against an employer for injuries occurring within the scope and during the period of employment have established a general rule of liability 'with a few exceptions' in instances where the employee has 'substantially deviated from his duties for personal purposes.' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 218 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)

- "In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Mary M., supra*, 54 Cal.3d at p. 213, internal citations omitted.)

- "[A]n employer cannot deny responsibility for a tort that occurs when an employee engages in an act necessary to his or her comfort and convenience while at work." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1563 [56 Cal.Rptr.2d 333].)

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- "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 [176 Cal.Rptr. 287], internal citation omitted.)

- "[D]eviations which do not amount to a turning aside completely from the employer's business, so as to be inconsistent with its pursuit, are often reasonably expected . . . . In order to release an employer from liability, the deviation must be so material or substantial as to amount to an entire departure." (*DeMirjian v. Ideal Heating Corp.* (1954) 129 Cal.App.2d 758, 766 [278 P.2d 114], internal citation omitted.)

- Where the employee combines personal business with that of the employer or attends "to both at substantially the same time, no nice inquiry will be made" into which business the employee was engaged in at the time of injury unless it is readily apparent that the employee could not have been serving the employer, either directly or indirectly. (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].)

- The fact that the employee is on the same route of return that would be used for both his employer's errand and his own tends to show a combination of missions. (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 496 [48 Cal.Rptr. 765].)

- But if the employee deviates substantially from employment duties for personal purposes, or "if the misconduct is not an 'outgrowth' of the employment," the scope-of-employment test is not met. (*Farmers Insurance Group, supra,* 11 Cal.4th at p. 1005.) Thus, " 'if the tort is personal in nature, the employee's mere presence at the worksite and attendance to job duties prior to or subsequent to the tort, will not call into play the principles of respondeat superior.' " (*Ibid.*, internal citations omitted.)

- " '[A]cts necessary to the comfort, convenience, health and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take him outside the scope of his employment.' " (*Bailey, supra,* 48 Cal.App.4th at p. 1560, internal citations omitted.)

- "While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 933 [237 Cal.Rptr. 718], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 178–180

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §

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248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 3:8

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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 the reasonable value of that loss to [him/her]~~the amount of money [he/she] would have been reasonably certain to earn if the injury had not occurred~~. It is not necessary that [he/she] have a work history.**

New September 2003; Revised April 2004, April 2008

Directions for Use

This instruction is not intended for use in employment cases.

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

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

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.)

- "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].)

- "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.)

- ~~" 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)~~

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- "[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* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

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

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3903F. Damage to Real Property (Economic Damage)

[*Insert number, e.g.,* "6."**] The harm to [***name of plaintiff***]'s property.**

To recover damages for harm to property, [*name of plaintiff***] must prove [the reduction in the property's value/ [or] the reasonable cost of repairing the harm]. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.] [However, if [***name of plaintiff***] has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value.]]**

[To determine the reduction in value, you must determine the fair market value of the property before the harm occurred and then subtract the fair market value of the property immediately after the harm occurred. The difference is the reduction of value.

"Fair market value" is the highest price for the property that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**

2. **That the buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.]**

[To determine whether the cost of repairing the harm is reasonable, you must decide if there is a reasonable relationship between the cost of repair and the harm caused by [*name of defendant***]'s conduct. You must consider the expense and time involved to restore the property to its original condition compared to the value of the property [and [***insert other applicable factors.***]].**
~~[If [*name of plaintiff*] has a genuine desire to repair the property for personal reasons, and if the costs of repair are reasonable given the damage to the property and the value after repair, then the costs of repair may be awarded even if they exceed the property's loss of value.]~~

If you find that the cost of repairing the harm is not reasonable, then you may award any reduction in the property's value.]

New September 2003; Revised April 2008

Directions for Use

Give this instruction for damages to real property caused by trespass, nuisance, or other tortious conduct. See also CACI No. 3903G, *Loss of Use of Real Property (Economic Damage).*

If there is evidence of both diminution in value and cost of repair, include all optional paragraphs. However, include ~~Before~~ the last bracketed sentence in the first paragraph only if ~~is given,~~ the judge ~~should decide whether~~has determined that the claimed personal reasons are legally sufficient to justify the

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costs of repair.

If only the cost of repair is at issue, give just the first paragraph. However, if the reasonableness of the cost of repair is at issue, then the value of the property must be considered, and all paragraphs must be included. If only diminution of value is at issue, omit the last two optional paragraphs.

Sources and Authority

- Civil Code section 3334(a) provides: "The detriment caused by the wrongful occupation of real property, in cases not embraced in Section 3335 of this code, the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), or Section 1174 of the Code of Civil Procedure, is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession."

- "The measure applicable to ordinary cases involving tortious injury to real property is 'diminution in value' or 'cost of repair,' whichever is less." (*Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 810 [24 Cal.Rptr.2d 554], internal citations omitted.)

- "Diminution in market value ... is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. 'There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted.' " (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104].)

- "Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Heninger, supra*, 101 Cal.App.3d at p. 862.)

- "Defendant ... contends that the trial court awarded excessive damages, on the ground that when the cost of restoration is less than the depreciation in value, the former is the measure of damages. This contention cannot be sustained. Plaintiffs established their damages by showing the depreciation in value. It was then incumbent upon defendants to come forward with proof that the cost of restoration would be less." (*Herzog v. Grosso* (1953) 41 Cal.2d 219, 226 [259 P.2d 429], internal citations omitted.)

- "Where a plaintiff establishes damages by showing depreciation in the value of real property, courts have held defendants to the burden of coming forward with proof that cost of restoration would be less. It follows that when a plaintiff proves damages by showing the cost of repairs it should be incumbent on the defendant to introduce evidence that the repair costs exceed the value of the property." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "The 'fair market value' of real property is 'the best price obtainable from a purchaser on a cash sale.' It 'is measured by the highest price the property would command if offered for sale in the open

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market with a reasonable time allowed to the seller to find a purchaser who will buy with a knowledge of all the uses to which it may be put.' " (*CMSH Co. v. Antelope Development, Inc.* (1990) 223 Cal.App.3d 174, 182 [272 Cal.Rptr. 605], internal citations omitted.)

- "Civil Code section 3334 requires that restoration costs be *reasonable*. In addition, general principles of damages in trespass cases require that the damages bear a *reasonable* relationship to the harm caused by the trespass. *Mangini* explains that whether abatement costs are *reasonable* requires an evaluation of a number of fundamental considerations, including the expense and time required to perform the abatement, along with other legitimate competing interests. (*Mangini*, *supra*, 12 Cal.4th at p. 1100; see also *Beck*, *supra*, 44 Cal.App.4th at pp. 1221–1222 [reasonableness includes consideration of monetary expense, burden on public, and costs of remediation versus value of land].)" (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 601 [63 Cal.Rptr.3d 165], original italics.)

- "The trial court must instruct the jury on how to determine whether the statutory requirement that any restoration costs be reasonable was met. It must also advise the jury what to do if the jury concludes the evidence shows the proposed restoration project to be unreasonable." (*Starrh & Starrh Cotton Growers*, *supra*, 153 Cal.App.4th at pp. 600–601.)

- "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 604.)

- "Where, as here, the plaintiffs have a personal reason to repair and the costs of repair are not unreasonable in light of the damage to the property and the value after repair, costs of repair which exceed the diminution in value may be awarded." (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193], internal citations omitted.)

- "Contrary to the defendants' argument, the 'personal reason' exception does not require that the [plaintiffs] own a 'unique' home. Rather, all that is required is some personal use by them and a bona fide desire to repair or restore." (*Orndorff*, *supra*, 217 Cal.App.3d at p. 688.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1727, 1728

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.35 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:19

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3903G. Loss of Use of Real Property (Economic Damage)

[*Insert number, e.g.,* "7."**] The loss of use of [***name of plaintiff***]'s [***insert identification of real property***].**

To recover damages for the loss of use, [*name of plaintiff***] must prove [the reasonable cost to rent similar property for the time when [he/she/it] could not use [his/her/its] own property/ [or] the benefits obtained by [***name of defendant***] because of [his/her/its] wrongful occupation]. [If there is evidence of both, [***name of plaintiff***] is entitled to the greater of the two amounts.]**

[Benefits obtained may include [*name of defendant***]'s profits if they are directly linked to the wrongful occupation.]**

New September 2003; Revised April 2008

Directions for Use

Use this instruction along with CACI No. 3903F, *Damage to Real Property (Economic Damage).* Include the optional last paragraph if plaintiff claims that the measure of damages is the benefits obtained by the defendant and that these include the defendant's profits obtained because of the tortious conduct.

This instruction may be used if the general measure of damages under CACI No. 3903F will be the cost of repair rather than diminution in value. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 555 [87 Cal.Rptr.2d 886, 981 P.2d 978].)

If the jury determines that the cost of repair is not reasonable, it is not clear whether loss-of-use damages are recoverable. The rule has been that when real property has been damaged so that it cannot be restored, damages for loss of use may not be recovered. (*Ferraro v. Southern California Gas Co.* (1980) 102 Cal.App.3d 33, 50–51 [162 Cal.Rptr. 238].) But in 1992, the Legislature amended Civil Code section 3334 to allow for "benefits obtained" as an alternative to rental value as a measure of damages for loss of use. The legislative intent was to deter polluters from dumping toxic material on land of little value. (See *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 603 [63 Cal.Rptr.3d 165].) In *Starrh & Starrh Cotton Growers*, the court indicated that it was extremely unlikely in that case that the cost of repair could be considered to be reasonable, but also allowed the jury to consider awarding the defendant's profits as "benefits obtained." (*Id.* at pp. 598–606.) The court did not limit the jury's right to award profits as damages only if it found the cost of repair to be reasonable. And it seems that if the court believed there was such a limitation, it would have expressly said so. The legislative objective would not be achieved if one could pollute land to the point that it could not reasonably be restored and also not be required to pay for the benefits obtained. Therefore, it seems most likely that this limitation on loss-of-use damages no longer applies in light of the 1992 amendment and its legislative history.

This instruction is not intended for cases in which the plaintiff is a landlord seeking to recover compensation for lost rents. A more appropriate instruction for that situation is CACI No. 3903N, *Lost Profits (Economic Damage).*

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Sources and Authority

- Civil Code section 3334 provides:

  (a) The detriment caused by the wrongful occupation of real property, in cases not embraced in Section 3335 of this code, the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), or Section 1174 of the Code of Civil Procedure, is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession.

  (b)(1) Except as provided in paragraph (2), for purposes of subdivision (a), the value of the use of the property shall be the greater of the reasonable rental value of that property or the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation.

  (2) If a wrongful occupation of real property subject to this section is the result of a mistake of fact of the wrongful occupier, the value of the use of the property, for purposes of subdivision (a), shall be the reasonable rental value of the property.

- "[T]he general measure of damages where injury to property is capable of being repaired is the reasonable cost of repair together with the value of lost use during the period of injury." (*Erlich*, *supra*, ~~*v. Menezes* (1999)~~ 21 Cal.4th at p.~~543,~~ 555 ~~[87 Cal.Rptr.2d 886, 981 P.2d 978]~~, internal citation omitted.)

- "There is no question that when cost of restoration is the correct measure of damages for injury to real property, compensation for loss of use ... would be appropriate." (*Ferraro*, *supra*, ~~*v. Southern California Gas Co.* (1980)~~ 102 Cal.App.3d at p~~33,~~ 51 ~~[162 Cal.Rptr. 238]~~.)

- "There is nothing in Civil Code section 3334 or its legislative history to suggest that the phrase 'benefits obtained' should be read narrowly. To the contrary, the intent of the Legislature was to eliminate *any* economic incentive to trespass as a means of waste disposal. (Sen. Com. on Judiciary, com. on Assem. Bill No. 2663 (1991–1992 Reg. Sess.) for June 23, 1992, hearing, p. 2.) If the Legislature had wanted to limit the phrase 'benefits obtained' to costs avoided, it could easily have done so. [¶] Further, this interpretation is consistent with the fundamental rule that the prime consideration in interpreting a statute is to achieve the objective of the statute. As we have indicated, the evil to be prevented by the 1992 amendments is identified in the legislative history—to prevent any economic advantage for polluters resulting from the wrongful dumping on another's land." (*Starrh & Starrh Cotton Growers*, *supra*, 153 Cal.App.4th at p. 604, original italics, internal citation omitted,)

- "Trial courts in trespass actions have historically been given great flexibility to award damages that fit the particular facts of the case. [Defendant] has admitted that it chose the challenged method for disposing of produced water because it was the least expensive alternative and maximized its profits. In light of these factors, we conclude that the term 'benefits obtained' may include profits enjoyed by

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[defendant] that are directly linked to the wrongful trespass." (*Starrh & Starrh Cotton Growers, supra*, 153 Cal.App.4th at p. 604, internal citations omitted.)

- ~~When real property has been damaged so that it cannot be restored, damages for loss of use may not be recovered. (*Ferraro, supra*, 102 Cal.App.3d at pp. 50–51.)~~

- Restatement Second of Torts section 931 provides:

  If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for

  (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and

  (b) harm to the subject matter or other harm of which the detention is the legal cause.

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1728

California Real Property Remedies Practice (Cont.Ed.Bar) Damages for Injury to Real Property, § 11.5

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.36 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:19

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3904. Present Cash Value

If you decide that [*name of plaintiff*]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[*insert other economic damages*]], then the amount of those future damages must be reduced to their present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/its] future damages.

[You may consider expert testimony in determining the present cash value of future [economic] damages.]

[You will be provided with a table to help you calculate the present cash value.]

New September 2003; Revised April 2008

Directions for Use

Give this instruction if future economic damages are sought. Include "economic" if future noneconomic damages are also sought. Future noneconomic damages are not reduced to present cash value because the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*.)

Give the ~~second bracketed option~~optional last sentence if the parties have stipulated to a discount rate or if evidence from which the jury can determine an appropriate discount rate has been presented. A table appropriate to this calculation should be provided. (See *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716].)

Expert testimony will usually be required to accurately establish present values for future economic losses. However, tables may be helpful to the jury in many cases.

Sources and Authority

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)

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- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)

- The Supreme Court has held that "it is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado*, *supra*, ~~*v. County of Los Angeles* (1998)~~ 19 Cal.4th at p. ~~629,~~ 649 ~~[80 Cal.Rptr.2d 46, 967 P.2d 585]~~, internal citation omitted.)

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining ... "the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss .... " ' " (*Schiernbeck*, *supra*, ~~*v. Haight* (1992)~~ 7 Cal.App.4th ~~869,~~at p. 877 ~~[9 Cal.Rptr.2d 716]~~, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1552

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21–52.22 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 5:22

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3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress [***insert other damages***]].**

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.]**

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[For future [*insert item of pain and suffering***], determine the amount in current dollars paid at the time of judgment that will compensate [***name of plaintiff***] for future [***insert item of pain and suffering***]~~Your award for noneconomic damages~~. This amount should not be further reduced to present cash value.]**

New September 2003; Revised [month] 2008

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, give the second and fourth optional paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904, *Present Cash Value*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].)

~~The final bracketed sentence should be used if the plaintiff is claiming both economic and noneconomic damages.~~

Sources and Authority

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

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- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* ~~*v. County of Los Angeles* (1998)~~ 19 Cal.4th at pp. ~~629,~~ 646–647 ~~[80 Cal.Rptr.2d 46, 967 P.2d 585]~~.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1671–1675

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

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4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

1 California Civil Practice (Thomson West) Torts, § 5:10

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3921. Wrongful Death (Death of an Adult)

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*] for the death of [*name of decedent*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the death of [*name of decedent*]. This compensation is called "damages."

[*Name of plaintiff*] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by [*name of plaintiff*] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[*Name of plaintiff*] claims the following economic damages:

1. **The financial support, if any, that [*name of decedent*] would have contributed to the family during either the life expectancy that [*name of decedent*] had before [his/her] death or the life expectancy of [*name of plaintiff*], whichever is shorter;**

2. **The loss of gifts or benefits that [*name of plaintiff*] would have expected to receive from [*name of decedent*];**

3. **Funeral and burial expenses; and**

4. **The reasonable value of household services that [*name of decedent*] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff*] also claims the following noneconomic damages:

1. **The loss of [*name of decedent*]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support; [and]**

[2. The loss of the enjoyment of sexual relations.]

[2. The loss of [*name of decedent*]'s training and guidance.]

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. [For noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for those damages, and do not reduce them further to present cash value.]~~[Your award for noneconomic damages should~~

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~~**not be reduced to present cash value.]**~~

In determining [*name of plaintiff***]'s loss, do not consider:**

1. **[***Name of plaintiff***]'s grief, sorrow, or mental anguish;**

2. **[***Name of decedent***]'s pain and suffering; or**

3. **The poverty or wealth of [***name of plaintiff***].**

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information***], the average life expectancy of a [***insert number***]-year-old [male/female] is [***insert number***] years, and the average life expectancy of a [***insert number***]-year-old [male/female] is [***insert number***] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.**

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, February 2007, [month] 2007

Directions for Use

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Table A, Life Expectancy Table—Male and Table B, Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50-51 means the one-year interval between the fiftieth and fifty-first birthdays.

The sentence concerning not reducing noneconomic damages to present cash value is bracketed because the law is not clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox. v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of: society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is

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to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904, *Present Cash Value*.) While it seems reasonable that *Salgado* should apply to wrongful death actions, no court has expressly so held. Note that if only economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages. (See CACI No. VF-3905, *Damages for Wrongful Death (Death of an Adult)*.)

Sources and Authority

- Code of Civil Procedure section 377.60 provides:
  A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

  (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

  (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

  (c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

  (d) This section applies to any cause of action arising on or after January 1, 1993.

  (e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

  (f) For the purpose of this section, "domestic partner" has the meaning provided in Section 297 of the Family Code.

- Code of Civil Procedure section 377.61 provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

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- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)

- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- "The death of a father may also cause a special loss to the children." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 547 [55 Cal.Rptr. 741], internal citation omitted.)

- "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial "injury" to the family for which just compensation should be paid.' " (*Allen, supra,* 109 Cal.App.3d at p. 423, internal citations omitted.)

- The wrongful death statute "has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 52–521

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[196 Cal.Rptr. 82], internal citations omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra*, 19 Cal.4th at pp. 646–647.)

- "The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- "Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of

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one of the plaintiffs or that of the deceased. ...' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1690–1697

California Tort Damages (Cont.Ed.Bar 2d ed.) Wrongful Death, §§ 3.1–3.58

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions,* §§ 55.10–55.13 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

California Civil Practice (Thomson West) Torts, §§ 23:8–23:8.2

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3922. Wrongful Death (Parents' Recovery for Death of a Minor Child)

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*] for the death of [*name of minor*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the death of [*name of minor*]. This compensation is called "damages."

[*Name of plaintiff*] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by [*name of plaintiff*] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[*Name of plaintiff*] claims the following economic damages:

1. **The value of the financial support, if any, that [*name of minor*] would have contributed to the family during either the life expectancy that [*name of minor*] had before [his/her] death or the life expectancy of [*name of plaintiff*], whichever is shorter;**

2. **The loss of gifts or benefits that [*name of plaintiff*] could have expected to receive from [*name of minor*];**

3. **Funeral and burial expenses; and**

4. **The reasonable value of household services that [*name of minor*] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff*] also claims the following noneconomic damages: The loss of [*name of minor*]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support.

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. [For noneconomic damages, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for those damages, and do not reduce them further to present cash value~~Your award for noneconomic damages should not be reduced to present cash value~~.]

Do not include in your award any compensation for the following:

1. **[*Name of plaintiff*]'s grief, sorrow, or mental anguish; or**

2. **[*Name of minor*]'s pain and suffering.**

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In computing these damages, you should deduct the present cash value of the probable costs of [*name of minor*]'s support and education.

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

New September 2003; Revised December 2005, [month] 2008

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Table A, Life Expectancy Table—Male and Table B, Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50-51 means the one-year interval between the fiftieth and fifty-first birthdays.

The sentence concerning not reducing noneconomic damages to present cash value is bracketed because the law is not clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox. v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of: society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss (See *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]), so there is no further reduction to present value. (See CACI No. 3904, *Present Cash Value*.) While it seems reasonable that *Salgado* should apply to wrongful death actions, no court has expressly so held. Note that if only economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages. (See CACI No. VF-3906, *Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child)*.)

Sources and Authority

- Code of Civil Procedure section 377.60 provides:

  A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

  (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including

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the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

(f) For the purpose of this section, "domestic partner" has the meaning provided in Section 297 of the Family Code.

- Code of Civil Procedure section 377.61 provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.'" (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- "Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1695.)

- "There is authority in such cases for deducting from the loss factors-including the pecuniary loss a parent suffers by being deprived of the comfort, protection and society of a child-the prospective cost to the parent of the child's support and education. [¶] Although neither the loss factors nor such offsets are readily measurable in a particular case-nor need they be measured in precise terms of dollars and cents-in the case at bench the jury had before it for consideration a court order subject to mathematical computation which required plaintiff to pay support for his child in the sum of $125 monthly. The jury was entitled and required to take into consideration the prospective cost to plaintiff of the boy's maintenance and rearing, and they may well have offset their reasonable appraisal of

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such costs, under the general verdict, against any pecuniary loss which they found that plaintiff suffered." (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 315 [81 Cal.Rptr. 671], internal citations omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.'" (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)

- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- The wrongful death statute "has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- "The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- "Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In

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the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish [that] apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 535-536 [196 Cal.Rptr. 82].)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased....' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120-121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770-771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [167 Cal.Rptr. 270], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1695

California Tort Damages (Cont.Ed.Bar) Wrongful Death, §§ 3.1-3.52

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10-55.13 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

2 California Civil Practice (Thomson West) Torts, §§ 23:8–23:8.2

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4107. Duty of Disclosure by Real Estate Broker

As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision.

New April 2008

Directions for Use

This instruction may be read after CACI No. 4101, *Failure to Use Reasonable Care—Essential Factual Elements,* if a real estate broker's duty of disclosure is at issue.

Sources and Authority

- "Under the common law, … a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. [P] . . . [P] The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.' " (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25–26 [73 Cal.Rptr.2d 784, internal citations omitted.)

- "A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 766, 762 [67 Cal.Rptr.3d 797], internal citations omitted.)

- " 'A broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud [citations], but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them.' " (*Salahutdin v. Valley of Cal.* (1994) 24 Cal.App.4th 555, 562 [29 Cal.Rptr.2d 463].)

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- "[T]he fiduciary duty owed by brokers to their own clients is substantially more extensive than the *nonfiduciary* duty codified in [Civil Code] section 2079 [duty to visually inspect and disclose material facts]." (*Michel, supra,* 156 Cal.App.4th at p. 763, original italics.)

- "[Fiduciary] duties require full and complete disclosure of all material facts respecting the property or relating to the transaction in question." (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1286 [63 Cal.Rptr.2d 373].)

- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 794

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4324. Affirmative Defense—Waiver by Acceptance of Rent ~~After Three-Day Notice~~

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/it] because [***name of plaintiff***] accepted payment of rent after [the three-day notice period had expired/[***name of defendant***] had violated the [lease/rental agreement]]. To succeed on this defense, [***name of defendant***] must prove:**

[1]. That [*name of plaintiff***] accepted a [partial] payment of rent after [the three-day notice period had expired/[***name of plaintiff***] knew that [***name of defendant***] had violated the [lease/rental agreement]] [./; and]**

[2. That [*name of plaintiff***] failed to provide actual notice to [***name of defendant***] that partial payment would be insufficient to avoid eviction.]**

If [*name of defendant***] has proven that [he/she/it] paid rent, then [he/she/it] has the right to continue occupying the property unless [***name of plaintiff***] proves [~~either~~ one of the following:]**

[1. That even though [*name of plaintiff***] received [***name of defendant***]'s [***specify noncash form of payment, e.g., check***], [he/she/it] rejected the rent payment because [***e.g., it never cashed the check***]][./; or]**

[2. That the lease contained a provision stating that acceptance of [late rent/rent after knowing of a violation of the [lease/rental agreement]] would not affect [his/her/its] right to evict [*name of defendant***][./; or~~.~~]**

[3. That [*name of plaintiff***] clearly and continuously objected to the violation of the [lease/rental agreement].]**

New August 2007; Revised April 2008

Directions for Use

The affirmative defense in this instruction applies to an unlawful detainer for nonpayment of rent or breach of another condition of the lease if either the landlord accepts a rent payment after the three-day period to cure or quit has expired or ~~. The instruction may be adapted for use if~~ the ~~tenant claims that the~~ landlord waived a breach of a condition by accepting rent after the breach and then subsequently served a notice of forfeiture and filed an unlawful detainer.

With regard to the tenant-defendant's burden, include the word "partial" in element 1 and read element 2 only in cases involving commercial tenancies and partial payment. (Code Civ. Proc., § 1161.1(c).)

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With regard to the landlord plaintiff's burden, give option 3 if there is evidence that the landlord at all times made it clear that acceptance of rent was not a waiver of the breach. (See *Thriftmart, Inc. v. Me & Tex* (1981) 123 Cal.App. 3d 751, 754 [177 Cal.Rptr. 24] [accepting rent for five years was not a waiver].)

Sources and Authority

- Code Civil Procedure section 1161.1(c), applicable only to commercial real property, provides: "If the landlord accepts a partial payment of rent after filing the complaint pursuant to Section 1166, the landlord's acceptance of the partial payment is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord shall be entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment shall not delay the matter from proceeding. However, this subdivision shall apply only if the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property."

- "It is a general rule that the right of a lessor to declare a forfeiture of the lease arising from some breach by the lessee is waived when the lessor, with knowledge of the breach, accepts the rent specified in the lease. While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates." (*EDC Assocs. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170 [200 Cal.Rptr. 333], internal citations omitted.)

- "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. … 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.' " (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440-441 [6 P.2d 71], internal citations omitted.)

- "Here the lessor not only relied upon the express agreement in the contract of the lease against waiver of its right to assert a forfeiture for the acceptance of rent after knowledge of the breach of covenant prohibiting assignment of the lease without its written consent first obtained, but it also gave notice that its acceptance of the rent after the breach of covenant

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became known was not to be construed as a consent to the assignment of the lease or a waiver of its right to assert a forfeiture." (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342 [53 Cal.Rptr. 335].)

- "The landlord had the obligation of going forward with the evidence in order to prove that the money orders were not negotiated or that it took other action to insure that there was no waiver. 'Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation. Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.' " (*EDC Assocs., supra*, 153 Cal.App.3d at p. 171, internal citations omitted.)

- "Waiver is a matter of intent. Here plaintiff, from the start, evidenced, not a willingness to waive -- which would have kept the original lease in force at the contractual rent -- but a willingness to lease the land encroached upon and, if that extended lease were arrived at, to continue the lease on the original parcel. We cannot impose on plaintiff a penalty for a reasonable effort to achieve an amicable adjustment of the breach." (*Thiftmart, Inc., supra*, 123 Cal.App.3d at p. 754.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 669

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) § 10.60

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.31-6.37, 6.41, 6.42

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.65 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:205

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4326. Affirmative Defense—Repair and Deduct

[*Name of defendant***] claims that [he/she] does not owe [any/the full amount of] rent because [he/she] was not given credit against the rent for repairs performed during the period for which rent was not paid. To succeed on this defense, [***name of defendant***] must prove the following:**

1. [*Name of defendant***] gave notice to [***name of plaintiff***][’s agent] of one or more conditions on the premises in need of repair;**

2. [*Name of plaintiff***] did not make the requested repairs within a reasonable time after receiving notice;**

3. [*Name of defendant***] spent $_____ to make the repairs and gave [***name of plaintiff***] notice of this expenditure;**

4. [*Name of plaintiff***] did not give [***name of defendant***] credit for this amount against the rent that was due; and**

5. [*Name of defendant***] had not exercised the right to repair and deduct more than once within the 12 months before the month for which the cost of repairs was deducted from the rent.**

If [*name of defendant***] acts to repair and deduct more than 30 days after the notice, [he/she] is presumed to have waited a reasonable time. This presumption may be overcome by evidence showing that a [shorter/ [or] longer] period is more reasonable. [[***Name of defendant***] may repair and deduct after a shorter notice if all the circumstances require shorter notice.]**

[Even if [*name of defendant***] proves all of the above requirements, [***name of defendant***] was not entitled to repair and deduct if [***name of plaintiff***] proves that [***name of defendant***] has done any of the following that contributed substantially to the need for repair or interfered substantially with [***name of plaintiff***]’s ability to make the necessary repairs:**

[Failed to keep [his/her] living area as clean and sanitary as the condition of the property permits][./; or]

[Failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[Failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits][./; or]

[Intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[Failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property][./;or]

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[Otherwise failed to exercise reasonable care.]

New April 2008

Directions for Use

Give this instruction if the tenant alleges the affirmative defense of having exercised the right to make repairs and deduct their cost from the rent. (See Civ. Code, § 1942.) If the landlord alleges that repair and deduct is not available because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

Sources and Authority

- Civil Code section 1942 provides:

  (a) If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period.

  (b) For the purposes of this section, if a tenant acts to repair and deduct after the 30th day following notice, he is presumed to have acted after a reasonable time. The presumption established by this subdivision is a rebuttable presumption affecting the burden of producing evidence and shall not be construed to prevent a tenant from repairing and deducting after a shorter notice if all the circumstances require shorter notice.

  (c) The tenant's remedy under subdivision (a) shall not be available if the condition was caused by the violation of Section 1929 or 1941.2.

  (d) The remedy provided by this section is in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.

- Civil Code section 1929 provides: "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care."

- Civil Code section 1941.2 provides:

  (a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or

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1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:

(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.
(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.
(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.
(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.
(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.

- "[T]he limited nature of the 'repair and deduct' remedy, in itself, suggests that it was not designed to serve as an exclusive remedy for tenants in this area. As noted above, section 1942 only permits a tenant to expend up to one month's rent in making repairs, and now also provides that this self-help remedy can be invoked only once in any 12-month period. These limitations demonstrate that the Legislature framed the section only to encompass relatively minor dilapidations in leased premises. As the facts of the instant case reveal, in the most serious instances of deterioration, when the costs of repair are at all significant, section 1942 does not provide, and could not have been designed as, a viable solution." (*Green v. Superior Court of San Francisco* (1974) 10 Cal.3d 616, 630–631 [111 Cal.Rptr. 704, 517 P.2d 1168, internal citations omitted.)

- "Clearly, sections 1941 and 1942 express the policy of this state that landlords in the interest of public health and safety have the duty to maintain leased premises in habitable condition and that tenants have the right, after notice to the landlord, to repair dilapidations and deduct the cost of the repairs from the rent. The policy expressed in these sections cannot be effectuated if landlords may evict tenants who invoke the provisions of the statute. Courts would be withholding with one hand what the Legislature has granted with the other if they order evictions instituted in retaliation against the exercise of statutory rights." (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 516 [90 Cal.Rptr. 729, 476 P.2d 97].)

- "[T]he statutory remedies provided a tenant under Civil Code section 1941 et seq. were not intended by the Legislature as the tenant's exclusive remedy for the landlord's failure to repair. 'Although past cases have held that the Legislature intended the remedies afforded by section 1942 to be the sole procedure for enforcing the statutory duty on landlords imposed by section 1941 [citations], no decision has suggested that the Legislature designed these statutory provisions to displace the common law in fixing the respective rights of landlord and tenant. On the contrary,

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> the statutory remedies of section 1942 have traditionally been viewed as additional to, and complementary of, the tenant's common law rights.' Thus, '. . . *the statutory framework of section 1941 et seq. has never been viewed as a curtailment of the growth of the common law in this field*.' " (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 914–915 [162 Cal.Rptr. 194], original italics, internal citations and footnote omitted.)

Secondary Sources

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.42[3] (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64[10] (Matthew Bender)

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4402. "Trade Secret" Defined

To prove that the [*select short term to describe, e.g., information***] [was/were] [a] trade secret[s], [***name of plaintiff***] must prove all of the following:**

1. **That the [***e.g., information***] [was/were] secret;**

2. **That the [***e.g., information***] had actual or potential independent economic value~~[was/were] actually or potentially valuable, giving [*name of plaintiff*] a substantial business advantage over [his/her/its] competitors,~~ because [it was/they were] secret; and**

3. **That [***name of plaintiff***] made reasonable efforts to keep the [***e.g., information***] secret.**

New December 2007; Revised April 2008

Directions for Use

Give also CACI No. 4403, *Secrecy Requirement*, ~~and CACI No. 4404, *Reasonable Efforts to Protect, Secrecy,*~~ if more explanation of element~~s~~ 1 ~~and 3 are~~is needed. Give CACI No. 4412, *"Independent Economic Value" Explained*, if more explanation of element 2 is needed. Give CACI No. 4404, *Reasonable Efforts to Protect Secrecy*, if more explanation of element 3 is needed.

Sources and Authority

- Civil Code section 3426.1(d) provides:

  ~~(d)~~ "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

  (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

  (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

- " 'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private.' Thus, 'the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 881 [4 Cal.Rptr.3d 69, 75 P.3d 1], internal citations omitted.)

- "[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. … [I]n order to qualify as a trade secret, the information 'must be secret, and must not be of public

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knowledge or of a general knowledge in the trade or business.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 1085], internal citations omitted.)

- "[A]ny information (such as price concessions, trade discounts and rebate incentives) disclosed to [cross-complainant's] customers cannot be considered trade secret or confidential." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455 [125 Cal.Rptr. 2d 277].)

- " '[A] trade secret … has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure.' Public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. 'If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.' A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' " (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr. 2d 8330, internal citations omitted.)

- "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 [66 Cal.Rptr. 2d 731], internal citations omitted.)

Secondary Sources

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.8-4.10

1 Milgrim on Trade Secrets (Matthew Bender) Ch. 1

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Ch. 1

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4412. "Independent Economic Value" Explained

[*Select short term to describe, e.g., Information***] has independent economic value if it gives the owner an actual or potential business advantage over others who do not know the [*e.g.,* *information*] and who could obtain economic value from its disclosure or use.**

In determining whether [*select short term to describe, e.g., information***] had actual or potential independent economic value because it was secret, you may consider the following:**

> **(a) The extent to which [***name of plaintiff***] obtained or could obtain economic value from the [***e.g., information***] in keeping [it/them] secret;**
>
> **(b) The extent to which others could obtain economic value from the [*e.g.,* *information*] if [it were/they were] not secret;**
>
> **(c) The amount of time, money, or labor that [***name of plaintiff***] expended in developing the [***e.g., information***];**
>
> **(d) The amount of time, money, or labor that [would be/was] saved by a competitor who used the [***e.g., information***];**
>
> **[(e) [***Insert other applicable factors.***]**

The presence or absence of any one or more of these factors is not necessarily determinative.

New April 2008

Directions for Use

Give this instruction to further explain element 2 of CACI No. 4402, *"Trade Secret" Defined.* Inapplicable factors may be omitted.

Sources and Authority

- Civil Code section 3426.1(d) provides:

  Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

  (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

  (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

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- "[I]t is not true that evidence of 'some' helpfulness or usefulness, if credited, would compel a finding of independent economic value. The Restatement defines trade secret as business or technical information 'that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.' (Rest.3d, Unfair Competition, § 39.) The advantage 'need not be great,' but must be 'more than trivial.' (Rest.3d, Unfair Competition, § 39, com. e, p. 430.) Merely stating that information was helpful or useful to another person in carrying out a specific activity, or that information of that type may save someone time, does not compel a factfinder to conclude that the particular information at issue was 'sufficiently valuable … to afford an … economic advantage over others.' (Rest.3d, Unfair Competition, § 39.) The factfinder is entitled to expect evidence from which it can form some solid sense of *how* useful the information is, e.g., *how much* time, money, or labor it would save, or at least that these savings would be 'more than trivial.' (Rest.3d., Unfair Competition, § 39, com. e.)" (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 564–565 [66 Cal.Rptr.3d 1], original italics.)

- "Moreover, it seems inherent in the requirement of value, as codified, that it is relevant to ask to *whom* the information may be valuable. The statute does not speak of value in the abstract, but of the value that is '[d]eriv[ed] … *from not being generally known to the public or to other persons who can obtain economic value* from its disclosure or use … .' In other words, the core inquiry is the value to the owner in *keeping the information secret* from persons who could *exploit it to the relative disadvantage of the original owner."* (*Yield Dynamics, Inc., supra,* 154 Cal.App.4th at p. 568, original italics, internal citation omitted.)

- " '[C]ourts are reluctant to protect customer lists to the extent they embody information which is "readily ascertainable" through public sources, such as business directories. …. On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. …. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1539–1540 [67 Cal.Rptr.3d 54], internal citation omitted.)

- "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 [66 Cal.Rptr. 2d 731], internal citations omitted.)

Secondary Sources

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Ch. 1

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