

**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 20, 2007

SUBJECT: Civil Jury Instructions: Approve Publication of Revisions (Cal. Rules of Court, rule 2.1050) (Action Required)

Issue Statement

The Advisory Committee on Civil Jury Instructions has drafted and approved new and revised *California Civil Jury Instructions (CACI)*. *CACI* was first published in September 2003.

Recommendation

The advisory committee recommends that the Judicial Council, effective April 27, 2007, 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 revisions will be officially published in a new 2007 edition of *CACI*.

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

Rationale for Recommendation

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

The advisory committee drafted and edited the revisions in this proposal, and then 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 29 instructions and verdict forms are included in this revised set: 107, 112, 222, 454, 455, 503A, 503B, 510, 512, 513, 530A, 530B, 610, 611, 1003, 1009A, 1009B, VF-1101, VF-1201, VF-1202, 2322, 2527, 2541, 3013, 3200, 3201, 4106, 5003, and 5016. Of these, 9 are newly drafted and 20 are revised. The instructions with A and B numbers are divisions of a current instruction into two separate instructions. Of the new instructions, 5 are for statutes of limitations.¹

The instructions were revised based on comments or suggestions from judges, attorneys, staff, and committee members as well as on recent changes in the law. The following instructions and verdict forms were revised based primarily on comments received from judges and attorneys: 107, 512, 513, 530A, 530B 5003, and 5016. For example, CACI No. 512, *Wrongful Birth—Essential Factual Elements*, and CACI No. 513, *Wrongful Life—Essential Factual Elements*, were revised in response to a judge’s comment noting that the phrase “probably be born” did not sufficiently set forth the causation element in wrongful birth and wrongful life cases. CACI No. 530, *Medical Battery*, was divided into two instructions, CACI Nos. 530A, *Medical Battery*, and 530B, *Medical Battery—Conditional Consent*, because intent is not presumed in the case of conditional consent.

The following instructions were revised based primarily on suggestions from staff or committee members: 222, 454, 455, 610, 611, 1003, VF-1201, VF-1202, 2322, 3200, 3201, and 4106. For example, CACI No. 454, *Affirmative Defense—Statute of Limitations* (negligence); CACI No. 455, *Statute of Limitations—Delayed Discovery*; CACI No. 610, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)*; CACI No. 611, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)*; and CACI No. 4106, *Affirmative Defense—Statute of Limitations* (breach of fiduciary duty), were added as the first phase of the committee’s initiative to add instructions on the applicable statutes of limitation in all of the cause-of-action series.

The following instructions were added or revised based primarily on recent changes in the law: 112, 503A, 503B, 510, 1009A, 1009B, VF-1101, 2527, 2541, and 3013. For example, CACI No. 503, *Psychotherapist’s Duty to Warn—Essential Factual Elements*,

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 in Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 16 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee staff has made many nonsubstantive grammatical and typographical corrections and other similar changes.

was divided into 503A, *Psychotherapist's Duty to Protect Intended Victim From Patient's Threat*, and 503B, *Affirmative Defense—Psychotherapist's Warning to Victim and Law Enforcement*, because of a 2006 legislative amendment to Civil Code section 43.92(b). The amendment clarified that a psychotherapist's duty to advise the intended victim and a law enforcement agency of a patient's threat of violence is an affirmative defense, and that there is potential (but not automatic) liability for failure to protect if the warnings are not given. Similarly, CACI No. 1009, *Liability to Employees of Independent Contractors for Dangerous Conditions*, was divided into 1009A, *Liability to Employees of Independent Contractors for Dangerous Unsafe Concealed Conditions*, and 1009B, *Liability to Employees of Independent Contractors for Dangerous Unsafe Concealed Conditions—Retained Control or Defective Equipment*, because of a recent case that made it no longer appropriate to include all possible grounds for liability in a single instruction.

Many (133) verdict forms were revised based on an attorney's experience in a recent case. In *Greer v. Buzgheia*, counsel lost the opportunity to make a claim for a reduction in medical expenses awarded by the jury to those actually paid because the CACI verdict form used did not segregate the various categories of economic damages. (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150.) While the court did not fault the verdict form, noting that the Directions for Use clearly advised that the CACI verdict forms may need to be modified depending on the facts of the case, the committee believes that the CACI verdict forms should allow the jury to find the amount of each category of economic damages (medical expenses, lost earnings, lost profits, other) separately. This change has been made to the 133 verdict forms that call for the jury to find an amount of economic damages. Rather than include 133 verdict forms all with the same change in the accompanying instructions, the change has been made in VF-1101, VF-1201, and VF-1202, which are presented for approval for other reasons. A list of all 133 verdict forms for which the change has been made is attached as Attachment A.

Finally, the committee received a request from a law librarian at the Court of Appeal Fourth Appellate District to move the instruction revision dates from the end of the commentary section to the beginning, and to include all revision dates, not just the latest one. The committee agreed to make these changes, and all instructions in the 2007 edition will reflect them.

Alternative Actions Considered

Rule 10.58 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. The committee received a number of comments, evaluated them, and made changes to the instructions based on the recommendations. A chart summarizing the comments is included at pages 4–6.

Thirteen instructions involving bad-faith insurance actions (2330–2334 and 2336) and the Fair Employment and Housing Act (2505, 2507 [new], 2521–2524, and VF-2504) were circulated for comment. The committee received extensive comments from attorneys and organizations who represent or advocate for the interests of insureds in bad-faith actions and employees in FEHA actions. The committee is not proposing revisions to these instructions at this time, but instead will thoroughly review the proposed changes in light of the comments received.

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

ATTACHMENT A

VF-400	VF-1601	VF-2601
VF-401	VF-1602	VF-2602
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VF-403	VF-1604	VF-2705
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VF-405	VF-1800	VF-2801
VF-406	VF-1801	VF-2802
VF-407	VF-1802	VF-2803
VF-408	VF-1803	VF-2804
VF-409	VF-1804	VF-2805
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VF-501	VF-1806	VF-2901
VF-502	VF-1807	VF-3000
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VF-703	VF-1901	VF-3002
VF-704	VF-1902	VF-3003
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VF-1202	VF-2006	VF-3011
VF-1203	VF-2200	VF-3012
VF-1204	VF-2201	VF-3013
VF-1205	VF-2202	VF-3014
VF-1206	VF-2203	VF-3015
VF-1207	VF-2301	VF-3100
VF-1208	VF-2302	VF-3101
VF-1300	VF-2303	VF-3102
VF-1301	VF-2406	VF-3103
VF-1302	VF-2407	VF-3104
VF-1303	VF-2408	VF-3105
VF-1400	VF-2500	VF-3106
VF-1401	VF-2501	VF-3107
VF-1402	VF-2502	VF-3700
VF-1403	VF-2503	
VF-1404	VF-2504	
VF-1405	VF-2505	
VF-1406	VF-2506	
VF-1407	VF-2507	
VF-1500	VF-2508	
VF-1501	VF-2509	
VF-1502	VF-2510	
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VF-1504	VF-2512	
VF-1600	VF-2600	

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
Generally	Mike Roddy Executive Officer Superior Court of California San Diego County	Y	Agree	No response required
Generally	Hon. Vincent J. O'Neill Superior Court of California, County of Ventura	Y	Agree	No response required

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

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Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
107 and 5003	Jeffrey Erdman Lesbian and Gay Lawyers Association of Los Angeles+	Y	<p>“We support the revisions to Instructions 107 and 5003 which seeks to include all forms of prejudice prohibited under the Standards for Judicial Administration and/or the Code of Judicial Ethics. We do note, however, that bias based on "gender identity" should also be prohibited in the instructions despite the lack of direct mention in the above referenced authority. While some might argue that "gender identity" falls within the broader term "gender," many do not readily recognize this to be so. Accordingly, failure to include an express prohibition against bias based on one's "gender identity" leaves open the possibility that such bias will be tolerated in our court system. We ask that you help to avoid this by adding the specific term "gender identity" to the instructions.”</p>	<p>The committee considered this request and decided to specify only those categories expressly referenced in the Standards and Code. Many other characteristics may be a trigger for prejudice, and gender identity is certainly one of them. But the committee was concerned that it would be impossible to anticipate every possible witness characteristic that might engender prejudice in someone. The instructions include the option to add other protected categories.</p>
107 and 5003	Joseph L. Chairez, President Orange County Bar Association	Y	<p>“Occupation” should be included (it was removed for this release).</p>	<p>See above. “Occupation” is not a characteristic specifically included in the Standards and Code.</p>
107 and 5003	State Bar Litigation Section	Y	<p>The Committee believes that the deletion in the revision of “occupation” is a mistake, but suggests using the plain-language term “job.”</p>	<p>See above</p>

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
107 and 5003	State Bar Litigation Section	Y	The Committee recommends using the phrase “whether rich or poor” in place of “socioeconomic status.” We think the use of a word such as “socioeconomic” is inconsistent with the purpose of making CACI instructions understandable to laypersons. Propose changing it to “whether someone is rich or poor.”	The committee agrees in spirit with the comment, but linguistically, the series needs to be all nouns so that additional categories can be added as nouns. The committee does not have a plain-English noun synonym for “socioeconomic status” and thinks it best to use the language from the Standards and Code.
107 and 5003	Hon. Talmadge Jones Judge Superior Court of California, County of Sacramento.	N	“Witness’s” is hard to say. Commentator edited instruction to change it and all the “he or she’s” to “they’s.”	These proposed edits would not conform to the committee’s grammatical standards.
112	Joseph L. Chairez President, Orange County Bar Association	Y	Agree	No response required.
222	Walter Walker Walker, Hamilton & White San Francisco	N	“Directions for Use should reflect discretion afforded judge by CCP § 877.5(a)(2).”	The committee agrees with the comment and made this addition to the Directions for Use..
222	Joseph L. Chairez, President Orange County Bar Association	Y	Strike second paragraph of instruction. This language is extraneous to the instruction and may prove prejudicial in that it may cause juries to consider the parameters of the settlement rather than the prospective bias.	The committee believes that the second paragraph is important to help the jury understand why a witness might be biased. Without it, the jury is told that there was a settlement, and that the settlement may be considered in determining bias, but not provided with information as to why the settlement might cause bias.

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
222	Joseph L. Chairez, President Orange County Bar Association	Y	Modify the third paragraph to delete: “[who testified on behalf of <i>[name of settling defendant]</i>]”.	This language is needed if the settling defendant is an entity. It does need to be set off with commas, however, and this change was made.
454 and 455	Joseph L. Chairez, President Orange County Bar Association	Y	Modify instruction to define “claimed harm.” Since the purported “claimed harm” and the discovery thereof are likely to be questions of fact for the jury, this instruction appears to beg the question and will not materially assist a juror in this determination without a definition of “claimed harm.” Provide an option to modify if something other than “claimed harm” may trigger the affirmative defense.	The committee has considered this issue, but believes that there is no real definition of “claimed harm.” It means all of the elements of the cause of action, expressed in a way that is more understandable to the average person. As the commentator notes, it is very fact specific and may need modification to further explain in a particular case. The committee has, however, modified the Directions for Use to explain this consideration.

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
455	Howard A. Kapp Law Offices of Howard A. Kapp Los Angeles	N	This instruction incorrectly allocated the burden of proof to the plaintiff on the delayed discovery statute of limitations issue. (see <i>Samuels v. Mix</i> (1999) 22 Cal.4th 1)	The committee disagrees that the defendant has the burden of proof on delayed discovery. (See <i>McKelvey v. North Am. Inc.</i> (1999) 74 Cal.App.4th 151, 160). <i>Samuels</i> is not contra; it is a legal malpractice case, and holds that on the elements of the cause of action, defendant has the burden. Delayed discovery is not an element of the cause of action. The committee has, however, changed the title of this instruction to delete “Affirmative Defense,” to clarify that the instruction is not an affirmative defense, but rather sets forth plaintiff’s response to a limitation affirmative defense.
455	State Bar Litigation Section	Y	The committee believes that the words “and the defense does not succeed” should be added to this instruction to parallel the wording in Instruction 454. This wording will help to ensure that jurors understand the operative effect of the exception to the time-bar established by Instruction 455.	The committee feels that the language “plaintiff’s lawsuit was still filed on time” makes it clear that the affirmative defense does not succeed and that the additional words are not needed.

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
455	Joseph L. Chairez, President Orange County Bar Association	Y	Omit second paragraph of Directions for Use. It appears to conflict with the reasonable-person standard set forth in the instruction.	The committee agrees that the second paragraph as drafted is confusing, and has revised it to eliminate the problem. The committee currently is considering an additional instruction based on <i>Fox v. Ethicon Endo-Surgery</i> (2005) 35 Cal.4th 797.
503A and 503B	Mary J. Riemersma Executive Director California Association of Marriage and Family Therapists	Y	CAMFT supports and agrees with these proposed jury instructions, which deal with a psychotherapist’s duty to protect an intended victim from a patient’s threatened physical violence and the affirmative defense of warning (communicating the threat to) the intended victim and to law enforcement. We believe the committee’s proposal accurately reflects the changes made to Section 43.92(b) of the Civil Code by AB 733 (Stats. 2006).	No response required.
503A and 503B	Robert Weinstock, M.D. Chair, Judicial Action Committee California Psychiatric Association	Y	We support jury instructions 503A and 503B as modified. These revised instructions take our concerns into account and accomplish what the new legislation modifying Civil Code section 43.92 was intended to accomplish. We appreciate your responsiveness to our concerns and to our previous comments. Thank you.	No response required.

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
503A and 503B	Joseph L. Chairez, President Orange County Bar Association	Y	The existing CACI 503 is preferable to the proposed 503A and 503B. The proposed 503A and 503B split existing 503 into two parts. Existing 503(5) states that one of the elements is that the psychotherapist “did not make reasonable efforts to warn plaintiff and a law enforcement agency about the treat.” Proposed 503A(6) changes that to the element that the defendant “failed to make reasonable efforts to protect” the plaintiff, which is different than an obligation to “warn” plaintiff and law enforcement. 503B then attempts to deal with the “reasonable efforts to communicate the threat” as an affirmative defense rather than as an element of the claim. This is confusing and appears to create liability for a failure to protect rather than a failure to warn.	The committee spent much time considering the point made by the commentator. The legislative history to the amendments to Civil Code section 43.92 makes it clear that the duty to advise the victim and law enforcement is an affirmative defense, and that there is potential (but not automatic) liability for failure to protect if the required warnings are not given.
510	Gerald E. Agnew, Jr.	N	Proposed 510 is clear, straightforward, and a correct statement of law. I welcome this modification. It recognizes the special relationship between a vulnerable, if not helpless, patient and his or her surgeon.	No response required.
530A and 530B	Gerald E. Agnew, Jr.	N	The language of 530A is reasonable and appropriate if 530B is also available when the facts warrant.	No response required.

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
611	Joseph L. Chairez, President Orange County Bar Association	Y	The instruction misquotes the statute, which should be reprinted accurately.	The commentator did not specify how the instruction misquotes the statute. The committee paraphrases statutory language to express the law in plain English, while maintaining an accurate statement of the law..
611	Joseph L. Chairez, President Orange County Bar Association	Y	The first paragraph should read as follows: ... [<i>Name of plaintiff</i>]'s lawsuit was filed too late if [<i>name of defendant</i>] proves that the wrongful act or omission complained of occurred before [<i>insert date four years before date of filing</i>]. (instead of [defendant's] wrongful act or omission) The current wording assumes that the defendant must prove that the wrongful act or omission occurred four years before the date of filing. The defendant will deny that any wrongful act or omission occurred, and should not be put to the task of proving it.	The committee agrees that the current language seems to assume liability if the limitation defense does not succeed. To address this concern, the committee added the word "alleged" here and also in CACI No. 610. ([defendant's] alleged wrongful act or omission)
1003	Hon. Brad Boeckman Superior Court of California, County of Shasta	Y	Should the defendant's status with regard to the property (owner, etc.) be an element of the cause of action as it is in 1009B?	The committee agrees and added this element.
1003	State Bar Litigation Section	Y	The committee recommends making the element of defendant's ownership as element #1 with a Use Note that it be eliminated if ownership is not in issue.	See above; element was added.

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
1003	State Bar Litigation Section	Y	“The committee recommends inserting the phrase “through the exercise of reasonable care” into current element 2. [Name of defendant] knew or should have known, about (the condition) through the exercise of reasonable care.”	The committee agrees. The suggested additional language is supported by <i>Swanberg v. O’Mectin</i> (1984) 157 Cal.App.3d 325, 330, cited under Sources and Authority.
1003	State Bar Litigation Section	Y	“The Committee recommends moving the two sentences at the end of the instruction to precede the elements, and both should be stated as legal principles to guide the jury’s deliberation on the elements.”	The move would deviate from CACI drafting standards, which are to first state the claim, then the elements, then any additional explanatory material.
VF-1101	Joseph L. Chairez President, Orange County Bar Association	Y	Agree	No response required.
VF-1201	Joseph L. Chairez President, Orange County Bar Association	Y	Agree	No response required.
VF-1202	Joseph L. Chairez President, Orange County Bar Association	Y	Agree	No response required.
3013	Joseph L. Chairez President, Orange County Bar Association	Y	Agree	No response required.
3200 and 3201	Joseph L. Chairez, President, Orange County Bar Association	Y	Good changes. Language much more precise and accurate. Easier to read as well.	No response required.

Special Cycle
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y / N)	Summary of Comments	Committee Response
3200 and 3201	Martin W. Anderson Anderson Law Firm Santa Ana, California	N	The committee should not change the titles to the instructions because the changed titles do not describe the elements of a claim for breach of express warranty.	While Civil Code section 1793.2(d) does apply only in the case of an express warranty, the committee agrees that "Breach of Express Warranty" is probably not the best title. <i>The committee changed the titles to Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d)) (for 3200) and Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d)) (for 3201).</i>
3200 and 3201	State Bar Litigation Section	Y	The committee believes that it is a mistake to rename these two instructions. The instructions mirror the statutory provisions, and by using the more generic term “breach of warranty,” there is a likelihood of confusion and misapplication.	See above; titles changed.
4106	Joseph L. Chairez President, Orange County Bar Association	Y	Agree	No response required.
5016	Joseph L. Chairez President, Orange County Bar Association	Y	Agree	No response required.

CIVIL JURY INSTRUCTIONS (CACI)

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107. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?
- (b) How well did the witness remember and describe what happened?
- (c) How did the witness look, act, and speak while testifying?
- (d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?
- (e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased in favor of or against any witness because of his or her disability, gender, race, sex, religion, ~~occupation~~, ethnicity, sexual orientation, age, [or] national origin, [or] socioeconomic status [or [*insert any other impermissible form of bias*]].

[New September 2003; Revised April 004; June 2005; April 2007](#)

Directions for Use

This instruction ~~should~~ may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5003, *Witnesses*).

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Evidence Code section 312 provides:
 - Except as otherwise provided by law, where the trial is by jury:
 - (a) All questions of fact are to be decided by the jury.
 - (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.
- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:
 - Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
 - (a) His demeanor while testifying and the manner in which he testifies.
 - (b) The character of his testimony.
 - (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
 - (d) The extent of his opportunity to perceive any matter about which he testifies.
 - (e) His character for honesty or veracity or their opposites.
 - (f) The existence or nonexistence of a bias, interest, or other motive.
 - (g) A statement previously made by him that is consistent with his testimony at the hearing.
 - (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
 - (i) The existence or nonexistence of any fact testified to by him.
 - (j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

- Evidence Code section 411 provides that “[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.” According to former Code of Civil Procedure section 2061, the jury should be instructed that “they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.”
- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: “It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar.” (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)
- ~~The Standards for Judicial Administration~~, Standard 10.20(a)2) of the California Standards for Judicial Administration provides: “In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants.”
- ~~The Code of Judicial Ethics~~, Canon 3(b)(5) of the California Code of Judicial Ethics provides: “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.” Canon 3(b)(6) requires the judge to impose these standards on attorneys.

Secondary Sources

1A California Trial Guide, Unit 22, *Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

(Revised June 2005)

112. Questions From Jurors

If, during the trial, you have a question you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. Do not discuss your question with other jurors until after deliberations begin. I will share your question with the attorneys. There may be legal reasons why a suggested question is not asked of a witness. You should not try to guess the reason why a question is not asked.

New February 2005; Revised April 2007

Directions for Use

~~The decision on whether to allow jurors to ask questions is left to the discretion of the judge.~~ The instruction may need to be modified to account for an individual judge's practice.

Sources and Authority

- ~~California Rules of Court, Rule 2.1033 of the California Rules of Court provides: “A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions outside of the presence of the jury.”~~
- “In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness.” (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)
- “[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)
- “The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other.” (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578-579 [204 P. 259].)

Secondary Sources

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

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

~~(New February 2005)~~

222. Evidence of Sliding-Scale Settlement

You have heard evidence that there was a settlement agreement between [name of settling defendant] and [name of plaintiff].

Under this agreement, the amount of money that [name of settling defendant] will have to pay to [name of plaintiff] will depend on the amount of money that [name of plaintiff] receives from [name of nonsettling defendant] at trial. The more money that [name of plaintiff] might receive from [name of nonsettling defendant], the less that [name of settling defendant] will have to pay under the agreement.

You may consider evidence of the settlement only to decide whether [name of settling defendant/name of witness] [, who testified on behalf of [name of settling defendant],] is biased or prejudiced and whether [his/her] testimony is believable.

New April 2007

Directions for Use

Use this instruction for cases involving sliding scale or “Mary Carter” settlement agreements if a party who settled appears at trial as a witness. If the settling defendant is an entity, insert the name of the witness who testified on behalf of the entity and include the bracketed language in the third paragraph.

The court must give this instruction on the motion of any party unless it finds that disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Code. Civ. Proc., § 877.5(a)(2).)

See CACI No. 217, *Evidence of Settlement*.

See also CACI No. 3926, *Settlement Deduction*.

Sources and Authority

- Code of Civil Procedure section 877.5(a)(2) provides:

If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

- Evidence of a settlement agreement is admissible to show bias or prejudice of an adverse party.

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Relevant evidence includes evidence relevant to the credibility of a witness. (*Moreno v. Sayre* (1984) 162 Cal.App.3d 116, 126 [208 Cal.Rptr. 444].)

- Evidence of a prior settlement is not automatically admissible. “Even if it appears that a witness could have been influenced in his testimony by the payment of money or the obtaining of a dismissal, the party resisting the admission of such evidence may still appeal to the court’s discretion to exclude it under section 352 of the code.” (*Granville v. Parsons* (1968) 259 Cal.App.2d 298, 305 [66 Cal.Rptr. 149].)

Secondary Sources

454. Affirmative Defense--Statute of Limitations

[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 from applicable statute of limitation].

New April 2007

Directions for Use

This instruction states the common-law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].)

For an instruction on the delayed-discovery rule, see CACI No. 455, *Affirmative Defense—Statute of Limitations-Delayed Discovery*.

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit*)

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

Sources and Authority

- Code of Civil Procedure section 335.1 provides a two-year limitation period for an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.
- Code of Civil Procedure section 338(c) provides a three-year limitation period for an action for taking, detaining, or injuring any goods or chattels, including an action for the specific recovery of personal property.
- Code of Civil Procedure section 340.2(c) provides a one-year limitation period for an action for the wrongful death of any plaintiff's decedent, based on exposure to asbestos, measured by the later of the date of death or the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by exposure to asbestos.

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- “A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable.” (*Glue-Fold, Inc.*, *supra*, 82 Cal.App.4th at p. 1029, internal citations omitted.)
- “In tort actions, the statute of limitations commences when the last element essential to a cause of action occurs. The statute of limitations does not begin to run and no cause of action accrues in a tort action until damage has occurred. If the last element of the cause of action to occur is damage, the statute of limitations begins to run on the occurrence of ‘appreciable and actual harm, however uncertain in amount,’ that consists of more than nominal damages. ‘. . . [O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.’ Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action.” (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [44 Cal.Rptr.2d 305], internal citations omitted.)
- “ ‘[R]esolution of the statute of limitations issue is normally a question of fact’ ” (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

Secondary Sources

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

455. Statute of Limitations--Delayed Discovery

If [name of defendant] proves that [name of plaintiff]’s claimed harm occurred before [insert date from applicable statute of limitations], [name of plaintiff]’s lawsuit was still filed on time if [he/she/it] proves that before that date, [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, that [he/she/it] had suffered harm that was caused by someone’s wrongful conduct.

New April 2007

Directions for Use

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

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

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit*)

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

Sources and Authority

- “An exception to the general rule for defining the accrual of a cause of action--indeed, the ‘most important’ one--is the discovery rule. ... It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [¶] [T]he plaintiff

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discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof--when, simply put, he at least 'suspects . . . that someone has done something wrong' to him, 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person on inquiry'; he need not know the 'specific "facts" necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place--he 'cannot wait for them to find him and sit on his rights; he must go find them himself if he can and file suit if he does.' “ (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398 [87 Cal.Rptr.2d 453, 981 P.2d 79], internal citations and footnote omitted.)

- “[I]t is the discovery of facts, not their legal significance, that starts the statute.” (*Jolly, supra*, 44 Cal.3d at p. 1113.)
- “While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute.” (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal.Rptr.2d 440, 873 P.2d 613].)
- “[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis.” (*Fox, supra*, 35 Cal.4th at p. 803.)
- “A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action.” (*Glue-Fold, Inc, supra*, 82 Cal.App.4th at p. 1029, internal citations omitted.)
- “[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. ‘Although never fully articulated, the rationale for distinguishing between ignorance’ of the defendant and ‘ignorance’ of the cause of action itself ‘appears to be premised on the commonsense assumption that once the plaintiff is aware of’ the latter, he ‘normally’ has ‘sufficient opportunity,’ within the ‘applicable limitations period,’ ‘to discover the identity’ of the former. He may ‘often effectively extend[]’ the limitations period in question ‘by the

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filing' and amendment 'of a Doe complaint' and invocation of the relation-back doctrine. 'Where' he knows the 'identity of at least one defendant . . . , [he] must' proceed thus." (*Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 399, internal citations and footnote omitted.)

- "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have " "information of circumstances to put [them] on inquiry" " " or if they have " " "the opportunity to obtain knowledge from sources open to [their] investigation." " " In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox, supra*, 35 Cal.4th at pp. 807-808, internal citations omitted.)
- "When it is apparent from the face of the complaint that, but for the delayed discovery rule, the action would be time barred, it is the plaintiff's burden to show diligence." (*McKelvey v. North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.3d 645].)
- " '[R]esolution of the statute of limitations issue is normally a question of fact' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr. 2d 20, 926 P.2d 1114].)

Secondary Sources

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

503A. Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

[Name of plaintiff] claims that [name of defendant]'s failure to protect [name of plaintiff/decedent] was a substantial factor in causing [injury to [name of plaintiff]/the death of [name of decedent]]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] was a psychotherapist;**
 - 2. That [name of patient] was [name of defendant]'s patient;**
 - 3. That [name of patient] communicated to [name of defendant] a serious threat of physical violence;**
 - 4. That [name of plaintiff/decedent] was a reasonably identifiable victim of [name of patient]'s threat;**
 - 5. That [name of patient] [injured [name of plaintiff]/killed [name of decedent]];**
 - 6. That [name of defendant] failed to make reasonable efforts to protect [name of plaintiff/decedent]; and**
 - 7. That [name of defendant]'s failure was a substantial factor in causing [[name of plaintiff]'s injury/the death of [name of decedent]].**
-

Derived from former CACI No. 503 April 2007

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist for failure to protect a victim from a patient's act of violence after the patient made a threat to the therapist against the victim. (See *Tarasoff v. Regents of University of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14; 551 P.2d 334.]) The liability imposed by *Tarasoff* is modified by the provisions of Civil Code section 43.92(a). First read CACI No. 503B, *Affirmative Defense—Psychotherapist's Warning to Victim and Law Enforcement*, if the therapist asserts that he or she is immune from liability under Civil Code section 43.92(b) by having made reasonable efforts to warn the victim and a law enforcement

agency of the threat.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Civil Code section 43.92(a) provides:

“There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient’s threatened violent behavior or failing to predict and warn of and protect from a patient’s violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.”

- “[T]herapists cannot escape liability merely because [the victim] was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.” (*Tarasoff, supra*, 17 Cal.3d at p. 431.)
- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff* regarding a therapist’s duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245 [267 Cal.Rptr. 553].) Under this provision, “[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.” (*Tarasoff, supra*, 17 Cal.3d at p. 1245.)
- “When the communication of the serious threat of physical violence is received by the therapist from a member of the patient’s immediate family and is shared for the purpose of facilitating and furthering the patient’s treatment, the fact that the family member is not technically a ‘patient’ is not crucial to the statute’s purpose.” (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)
- “Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist’s disclosure of a patient confidence will potentially disrupt or destroy the patient’s trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person.” (*Calderon v. Glick* (2005) 131 Cal. App. 4th 224, 231 [31 Cal.Rptr.3d 707].)

Secondary Sources

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6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1050, 1051

26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

503B. Affirmative Defense—Psychotherapist’s Warning to Victim and Law Enforcement

[Name of defendant] is not responsible for [[name of plaintiff]’s injury/the death of [name of decedent]] if [name of defendant] proves that [he/she] made reasonable efforts to communicate the threat to the [name of plaintiff/decedent] and to a law enforcement agency.

Derived from former CACI No. 503 April 2007

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist (*Tarasoff v. Regents of University of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334]) if there is a dispute of fact regarding whether the defendant made reasonable efforts to warn the victim and a law enforcement agency of a threat made by the defendant’s patient. The therapist is immune from liability under *Tarasoff* if he or she makes reasonable efforts to communicate the threat to the victim and to a law enforcement agency. (Civ. Code, § 43.92(b).) CACI No. 503A, *Psychotherapist’s Duty to Warn and Protect Intended Victim From Patient’s Threat*, sets forth the elements of a *Tarasoff* cause of action if the defendant is not immune.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Civil Code section 43.92(b) provides:

“There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified above, discharges his or her duty to warn and protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.”
- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the “firefighter’s rule” and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86 [82 Cal.Rptr.2d 497].)
- “When the communication of the serious threat of physical violence is received by the therapist from a member of the patient’s immediate family and is shared for the purpose of facilitating and furthering the patient’s treatment, the fact that the family member is not technically a ‘patient’ is not crucial to the statute’s purpose.” (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1050, 1051

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26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons* (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

510. Derivative Liability of Surgeon

A surgeon is **held** responsible for the negligence of other medical practitioners or nurses who are **assisting [him/her] under his or her supervision and control and actively participating** during an operation **if the surgeon has direct control over how they perform their duties.—**

New September 2003; Revised April 2007

Directions for Use

Give this instruction in a case in which the plaintiff seeks to hold a surgeon vicariously responsible under the “captain-of-the-ship” doctrine for the negligence of nurses or other hospital employees that occurs during the course of an operation. There is some disagreement in the courts ~~as to~~ regarding whether the captain-of-the-ship doctrine remains a viable rule of law. (Compare *Truhitte v. French Hospital* (1982) 128 Cal.App.3d 332, 348 [180 Cal.Rptr. 152] (doctrine has been eroded) with *Fields v. Yusuf* (2006) 144xxx Cal.App.4th 1381xxx, 1397-1398xxx [51xxx Cal.Rptr.2d 277xxx] (doctrine remains viable).)

Sources and of Authority

- “The ‘captain of the ship’ doctrine imposes liability on a surgeon under the doctrine of respondeat superior for the acts of those under the surgeon’s special supervision and control during the operation.” (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 967 [55 Cal.-Rptr. 2d 197].)
- “The doctrine has been explained as follows: ‘A physician generally is not liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, particularly where he has no knowledge thereof or no connection therewith. On the other hand, a physician is liable for the negligence of hospital or other nurses, attendants, or internes, who are not his employees, where such negligence is discoverable by him in the exercise of ordinary care, he is negligent in permitting them to attend the patient, or the negligent acts were performed under conditions where, in the exercise of ordinary care, he could have or should have been able to prevent their injurious effects and did not. The mere fact that a physician or surgeon gives instructions to a hospital employee does not render the physician or surgeon liable for negligence of the hospital employee in carrying out the instructions. Similarly, the mere right of a physician to supervise a hospital employee is not sufficient to render the physician liable for the negligence of such employee. On the other hand, if the physician has the right to exercise control over the work to be done by the hospital employee and the manner of its performance, or an employee of a hospital is temporarily detached in whole or in part from the hospital’s general control so as to become the temporary servant of the physician he assists, the physician will be subject to liability for the employee’s negligence. [¶] Thus, where a hospital employee, although not in the regular employ of an operating surgeon, is under his special supervision and control during the operation, the relationship of master and servant exists, and the surgeon is liable, under the doctrine of respondeat superior, for the employee’s negligence.’” (*Thomas, supra*, 47 Cal.App.4th at pp. 966-967.)
- This doctrine applies only to medical personnel who are actively participating in the surgical

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procedure. (Thomas, supra, 47 Cal.App.4th at pp. 966-967.)

- While the “captain of the ship” doctrine has never been expressly rejected, it has been eroded by modern courts. “A theory that the surgeon directly controls all activities of whatever nature in the operating room certainly is not realistic in present day medical care.” (*Truhitte, supra, v. French Hospital (1982)* 128 Cal.App.3d 332, at p. 348, original italics [180 Cal.Rptr. 152].)
- “[T]he *Truhitte* court ignores what we have already recognized as the special relationship between a vulnerable hospital patient and the surgeon operating on the patient. A helpless patient on the operating table who cannot understand or control what is happening reasonably expects a surgeon to oversee her care and to look out for her interests. We find this special relationship sufficient justification for the continued application of captain of the ship doctrine. Moreover, in light of the Supreme Court's expressions of approval of the doctrine . . . , we feel compelled to adhere to the doctrine.” (*Fields v. Yusuf, supra*, 144 Cal.App.4th at pp. 1397-1398, internal citations omitted.)
- Absent evidence of right to control, an operating surgeon is generally not responsible for the conduct of anesthesiologists or others who independently carry out their duties. (*Seneris v. Haas* (1955) 45 Cal.2d 811, 828 [291 P.2d 915]; *Marvulli v. Elshire* (1972) 27 Cal.App.3d 180, 187 [103 Cal.Rptr. 461].)
- ~~This doctrine applies only to medical personnel who are actively participating in the surgical procedure. (*Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 969 [55 Cal.Rptr.2d 197].)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 976

~~6 Witkin, Summary of California Law (2002 supp.) Torts, § 795, p. 73~~

~~3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.45 (Matthew Bender)~~

California Tort Guide (Cont.Ed.Bar-1996) § 9.4

3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.45 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

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

~~(New September 2003)~~

512. Wrongful Birth—~~Genetic Testing~~—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] was negligent because ~~he/she~~name of defendant failed to inform [him/her] of the risk that [he/she] would have a [genetically impaired/disabled] child. To establish this claim, [name of plaintiff] must prove all of the following:

[1. That [name of defendant] negligently failed to [diagnose/ or] warn [name of plaintiff] of] the risk that [name of child] would ~~probably~~ be born with a [genetic impairment/disability];]

~~_____~~ ~~or:]~~ ~~and~~

[1, That [name of defendant] negligently failed to [perform appropriate tests/advise [name of plaintiff] of tests] that would more likely than not have disclosed the risk that [name of child] would be born with a [genetic impairment/disability];]

2. That [name of child] was born with a [genetic impairment/disability]; ~~and~~

3. That if [name of plaintiff] had known of the [genetic impairment/disability], [insert name of mother] would not have conceived [name of child] [or would not have carried the fetus to term]; and

4. That [name of defendant]'s negligence was a substantial factor in causing [name of plaintiff] ~~to will~~ have to pay extraordinary expenses to care for [name of child].

New September 2003; Revised April 2007

Directions for Use

The general medical negligence instructions ~~instructions~~ on the standard of care and causation (see CACI Nos. 500-502) ~~could~~ may be used in conjunction with this instruction one. Read also CACI No. 513, Wrongful Life—Essential Factual Elements, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772].)

Sources ~~of~~ and Authority

- ``Claims for `wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing.'' (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22

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Cal.Rptr.2d 819].) Since the wrongful life action corresponds to the wrongful birth action, it is reasonable to conclude that this principle applies to wrongful birth actions.

- Regarding wrongful-life actions, courts have observed: “[A]s in any medical malpractice action, the plaintiff must establish: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence.” ~~“[Citation.]”~~ (*Gami, supra*, 18 Cal.App.4th at p. 877.)
- [The negligent failure to administer a test that had only a twenty-percent chance of detecting Down Syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality. \(*Simmons, supra*.\)](#)
- Both parent and child may recover damages to compensate for “the extraordinary expenses necessary to treat the hereditary ailment.” (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239 [182 Cal.Rptr. 337, 643 P.2d 954].)
- In wrongful-birth actions, parents are permitted to recover the medical expenses incurred on behalf of a disabled child. (~~*Turpin, supra*, 31 Cal.3d at p. 238.~~) ~~Such children can~~ [The child may](#) also recover medical expenses in a wrongful-life action, though both parent and child may not recover the same expenses. ([Turpin, supra](#), 31 Cal.3d at p. 238-239.)(~~*Ibid.*~~)

Secondary Sources

[6 Witkin, Summary of California Law \(10th ed. 2005\) Torts, §§ 979–985](#)

~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 797–800, pp. 143–152~~

~~3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, §§ 31.15, 31.50 (Matthew Bender)~~

California Tort Guide (Cont.Ed.Bar-1996) §§ 9.21-9.22

[3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, §§ 31.15, 31.50 \(Matthew Bender\)](#)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

~~(New September 2003)~~

513. Wrongful Life—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] failed to inform [name of plaintiff]’s parents of the risk that [he/she] would be born [genetically impaired/disabled]. To establish this claim, [name of plaintiff] must prove all of the following:

[1. That [name of defendant] negligently failed to [diagnose/ ~~or~~ and warn [name of plaintiff]’s parents of the risk that their child would ~~probably~~ be born with a [genetic impairment/disability];]

[or]

[1. That [name of defendant] negligently failed to [perform appropriate tests/advise [name of plaintiff]’s parents of tests] that would more likely than not have disclosed the risk that [name of plaintiff] would be born with a [genetic impairment/disability];]

2. That [name of plaintiff] was born with a [genetic impairment/disability];

3. That if [name of plaintiff]’s parents had known of the [genetic impairment/hereditary ailment ~~or~~ disability], [his/her] mother would not have conceived [him/her] [or would not have carried the fetus to term]; and

4. That defendant’s negligence was a substantial factor in causing [name of plaintiff]’s parents to will have to pay extraordinary ~~medical or training~~ expenses for [name of plaintiff] ~~because of~~ [his/her] [genetic impairment/disability].

New September 2003; Revised April 2007

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500-502) may be used in conjunction with this instruction. Read also CACI No. 512, *Wrongful Birth—Genetic Testing—Essential Factual Elements*, if the parents’ cause of action for wrongful birth is joined with the child’s cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772].)

In order for this instruction to apply, the genetic impairment must result in a physical or mental disability. This is implied by the fourth element in the instruction.

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~~The general medical negligence instructions on the standard of care and causation could be used in conjunction with this one.~~

Sources ~~of~~ and Authority

- “[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name-`wrongful life’-plaintiff’s basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff’s claim is that she has suffered harm or damage as a result of defendants’ negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles.” (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954].)
- “Claims for `wrongful life’ are essentially actions for malpractice based on negligent genetic counseling and testing.” (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)
- General damages are not available: “[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child-like his or her parents-may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment.” (*Turpin, supra*, 31 Cal.3d at p. 239.)
- A child may not recover for loss of earning capacity in a wrongful-life action. (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899].)
- The negligent failure to administer a test that had only a ~~twenty~~20-percent chance of detecting a ~~genetic abnormality~~Down sSyndrome did not establish a reasonably probable causal connection to the birth of a child with ~~Down’s Syndrome~~this genetic abnormality. (*Simmons, supra v. West Covina Medical Clinic* (1989) ~~212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772]~~.)
- Wrongful life does not apply to normal children. (*Alexandria S. v. Pacific Fertility Medical Center* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23].)
- Civil Code section 43.6(a) provides: “No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.”

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 979–985

~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 797-800, pp. 143-152~~

~~3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, §§ 31.15, 31.50 (Matthew Bender)~~

California Tort Guide (Cont.Ed.Bar-~~1996~~) §§ 9.21-9.22

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[3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, §§ 31.15, 31.50 \(Matthew Bender\)](#)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.70 (Matthew Bender)

~~(New September 2003)~~

530A. Medical Battery

[Name of plaintiff] claims that [name of defendant] committed a **medical** battery. To establish this claim, [name of plaintiff] must prove all of the following:

1. [That [name of defendant] performed a medical procedure without [name of plaintiff]’s **informed** consent; ~~or~~]

[That [name of plaintiff] **gave informed** consent~~ed~~ to one medical procedure, but [name of defendant] performed a substantially different medical procedure; ~~or~~]

~~[That [name of plaintiff] consented to a medical procedure, but only on the condition that [describe what had to occur before consent would be given], and [name of defendant] proceeded without such occurring;]~~

2. That [name of plaintiff] was harmed; and
3. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.

A patient can consent to a medical procedure by words or conduct.

Derived from former CACI No. 530 April 2007

Directions for Use

Select either or both ~~One or more~~ of the ~~two~~~~three~~ bracketed options in the first element ~~should be selected~~, depending on the nature of the case. In a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred, give CACI No. 530B, *Medical Battery—Conditional Consent*.

Give also CACI No. 532, *Informed Consent—Definition*.

Sources and Authority

- Battery may also be found if a substantially different procedure is performed: “Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery.” (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239 [104 Cal.Rptr. 505, 502 P.2d 1].)
- The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor

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performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence. (*Cobbs v. Grant, supra*, 8 Cal.3d at p. 240.)

- ~~Battery may also be found if a conditional consent is violated: “[I]t is well recognized a person may place conditions on [his or her] consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act.” (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610 [278 Cal.Rptr. 900].)~~
- “Confusion may arise in the area of ‘exceeding a patient’s consent.’ In cases where a doctor exceeds the consent and such excess surgery is found necessary due to conditions arising during an operation which endanger the patient’s health or life, the consent is presumed. The surgery necessitated is proper (though exceeding specific consent) on the theory of assumed consent, were the patient made aware of the additional need.” (*Pedsky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123 [59 Cal.Rptr. 294].)
- “Consent to medical care, including surgery, may be express or may be implied from the circumstances.” (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454 [30 Cal.Rptr. 243].)
- “It is elemental that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words. ~~[Citations.]~~” (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38-39 [224 P.2d 808].)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 352-562, ~~pp. 439-658~~

~~3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.41, Ch. 41, Assault and Battery (Matthew Bender)~~

California Tort Guide (Cont.Ed.Bar ~~1996~~) §§ 9.11-9.16

3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.41, Ch. 41, Assault and Battery (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

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

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

| ~~(Revised October 2004)~~

530B. Medical Battery—Conditional Consent

[Name of plaintiff] claims that [name of defendant] committed a medical battery. To establish this claim, [name of plaintiff] must prove all of the following:

1. **That [name of plaintiff] gave informed consent to a medical procedure, but only on the condition that [describe what had to occur before consent would be given], and [name of defendant] proceeded without this condition having occurred;**
2. **That [name of defendant] intended to perform the procedure with knowledge that the condition had not occurred;**
3. **That [name of plaintiff] was harmed; and**
4. **That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**

A patient can consent to a medical procedure by words or conduct.

Derived from former CACI No. 530 April 2007

Directions for Use

Give this instruction in a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred. If the claim is that the defendant proceeded without any consent or deviated from the consent given, give CACI No. 530A, *Medical Battery*.

Give also CACI No. 532, *Informed Consent—Definition*.

Sources of ~~of~~ and Authority

- Battery may also be found if a conditional consent is violated: “[I]t is well recognized a person may place conditions on [his or her] consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act.” (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610 [278 Cal.Rptr. 900].)
- Battery is an intentional tort. Therefore, a claim for battery against a doctor as a violation of conditional consent requires proof [that](#) the doctor intentionally violated the condition placed on the patient’s consent. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1498 [21 Cal.Rptr.3d 36], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 352-562, ~~pp. 439-65~~

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~~3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.41, Ch. 41, Assault and Battery (Matthew Bender)~~

California Tort Guide (Cont.Ed.Bar-1996) §§ 9.11-9.16

3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.41, Ch. 41, Assault and Battery (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

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

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

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

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

unless [name of plaintiff] proves

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

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

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

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

New April 2007

Directions for Use

Use CACI No. 611, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)*, if the four-year limitation provision is at issue.

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

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

Sources and Authority

- Code of Civil Procedure section 340.6 provides:
 - (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have

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discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

- (1) The plaintiff has not sustained actual injury;
 - (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
 - (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
 - (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
- (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.
- Code of Civil Procedure section 352 provides:
 - (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.
 - (b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.
 - “Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal. 4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
 - “[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor.” (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 n.2 [46 Cal.Rptr.2d 594, 902 P.2d 1205], internal citations omitted.)
 - “[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations.” (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

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- “[D]efendant, if he is to avail himself of the statute’s one-year-from-discovery limitation defense, has the burden of proving, under the ‘traditional allocation of the burden of proof’ that plaintiff discovered or should have discovered the facts alleged to constitute defendant’s wrongdoing more than one year prior to filing this action.” (*Samuels, supra*, 22 Cal.4th at pp. 8–9, internal citations omitted.)
- “In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff’s ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client.” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- “We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action.” (*Neel, supra*, 6 Cal.3d at p. 194.)
- “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm--not yet realized--does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice.” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

Secondary Sources

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

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

[Name of defendant] contends that *[name of plaintiff]*'s lawsuit was not filed within the time set by law. *[Name of plaintiff]*'s lawsuit was filed too late if *[name of defendant]* proves that **[his/her/its] alleged wrongful act or omission occurred before [insert date four years before date of filing].**

unless *[name of plaintiff]* proves:

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

[that [he/she/it] did not sustain actual injury until after [insert date four years and one day before date of filing].]

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

[that after [insert date four years and one day before date of filing] [name of defendant] knowingly concealed the facts constituting the wrongful act or omission.]

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

New April 2007

Directions for Use

Use CACI No. 610, *Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)*, if the one-year limitation provision is at issue.

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

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

Sources and Authority

- Code of Civil Procedure section 340.6 provides:

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- (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within four years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:
- (1) The plaintiff has not sustained actual injury;
 - (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
 - (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and
 - (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.
- (b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.
- Code of Civil Procedure section 352. provides:
 - (a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335) is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.
 - (b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.
 - “Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
 - “[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor.” (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 n.2 [46 Cal.Rptr.2d 594, 902 P.2d 1205], internal citations omitted.)

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- “[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations.” (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- “In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff’s ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client.” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- “We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action.” (*Neel, supra*, 6 Cal.3d at p. 194.)
- “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm--not yet realized--does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney’s negligence, the client cannot establish a cause of action for malpractice.” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

Secondary Sources

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

1003. Unsafe Concealed Conditions

[Name of plaintiff] claims that [he/she] was harmed by an unsafe hidden concealed condition on [name of defendant]’s property.

~~[An owner/A lessee/An occupier/One who controls the property]~~ [Name of defendant] is responsible for an injury caused by an unsafe hidden concealed condition if:

1. [Name of defendant] [owned/leased/occupied/controlled] the property;
2. The condition created an unreasonable risk of harm;
3. ~~The [owner/lessee/occupier/one who controls the property]~~ [Name of defendant] knew or, through the exercise of reasonable care, should have known about it; and
4. ~~The [owner/lessee/occupier/one who controls the property]~~ [Name of defendant] failed to repair or give adequate warning of the condition ~~take reasonable precautions to protect against the risk of harm.~~

~~[An owner/A lessee/An occupier/One who controls the property]~~ [Name of defendant] must make reasonable inspections of the property to discover ~~such~~ unsafe concealed conditions.

An unsafe condition is concealed if it is either not visible or its dangerous nature is not apparent to a reasonable person.

New September 2003; Revised April 2007

Directions for Use

Read this instruction with CACI No. 1001, *Basic Duty of Care*, if the evidence indicates the plaintiff’s injury was due to a concealed condition on the defendant’s property. Read also CACI No. 1000, *Essential Factual Elements*.

Sources and Authority

- If a dangerous condition is created by the owner’s negligence or by his or her employees acting within the scope of their employment, then the owner may be presumed to know that the condition exists. (*Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 806 [117 P.2d 841].)
- “Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely

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upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it.” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)

- “An owner of property is not an insurer of safety, but must use reasonable care to keep the premises in a reasonably safe condition and must give warning of latent or concealed perils.” (*Lucas v. George T. R. Murai Farms, Inc.* (1993) 15 Cal.App.4th 1578, 1590 [19 Cal.Rptr.2d 436], internal citation omitted.)
- “Although liability might easily be found where the landowner has actual knowledge of the dangerous condition, “[the] 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.” (*Swanberg v. O’Mectin* (1984) 157 Cal.App.3d 325, 330 [203 Cal.Rptr. 701], internal citation omitted.)
- [Whether a hazard is concealed is a factual matter. \(*Kinsman v. Unocal Corp.* \(2005\) 37 Cal.4th 659, 682 \[36 Cal.Rptr.3d 495\], 123 P.3d 931.\)](#)

Secondary Sources

[6 Witkin, Summary of California Law \(10th ed. 2005\) Torts, §§ 1119–1123](#) ~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 924–928~~

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

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.02 (Matthew Bender)

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

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.51 (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)

[California Civil Practice \(Thomson West\) Torts, § 16:4](#)

~~1 Baneroft-Whitney’s California Civil Practice (1992) Torts, § 16:4~~

~~(New September 2003)~~

1009A. Liability to Employees of Independent Contractors for ~~Dangerous~~ Unsafe Concealed Conditions

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

1. That [name of defendant] [owned/leased/occupied/controlled] the property;
2. That [name of defendant] knew, or reasonably should have known, of a preexisting unsafe concealed condition on the property;
3. That [name of plaintiff's employer] neither knew nor could be reasonably expected to know of the unsafe concealed condition;
4. That the condition was not part of the work that [name of plaintiff's employer] was hired to perform;
5. That [name of defendant] failed to warn [name of plaintiff's employer] of the condition;

~~2. — [Insert one or more of the following:]~~

~~[That the unsafe condition was created by or known to [name of defendant] and was not a known condition that [name of plaintiff's employer] was hired to correct or repair;] [or]~~

~~[That [name of defendant] retained control over safety conditions at the worksite and through [his/her/its] actions [or failure to take actions [he/she/it] was required to take] contributed to [name of plaintiff]'s injuries;] [or]~~

~~[That [name of defendant] negligently provided unsafe equipment that contributed to [name of plaintiff]'s injuries;]~~

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

An unsafe condition is concealed if either it is ~~either~~ not visible or its dangerous nature is not apparent to a reasonable person.

Derived ~~f~~From ~~f~~Former CACI No. 1009 April 2007

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Directions for Use

This instruction is for use if a concealed dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Concealed Conditions*. For an instruction for injuries based on the owner’s retained control or faulty 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 Nos. 3700 et seq. for instructions on the liability of a hirer for the acts of an independent contractor.

~~The internal bracket within the second bracketed option of element 2 is intended to be read in cases involving alleged omissions that constitute “affirmative contributions” under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 212 fn. 3 [115 Cal.Rptr.2d 853, 38 P.3d 1081].~~

Sources and Authority

- “[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor.” (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675 [36 Cal.Rptr.3d 495, 123 P.3d 931].)
- “[T]here is no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and premises liability based on a hazardous substance that is visible but is known to be hazardous only to the landowner. If the hazard is not reasonably apparent, and is known only to the landowner, it is a concealed hazard, whether or not the substance creating the hazard is visible.” (*Kinsman, supra*, 37 Cal.4th at p. 678.)
- ~~“[W]e conclude that in the absence of the hirer’s retention of control of the methods or operative details of the independent contractor’s work, the hirer cannot be held liable to the independent contractor’s employee as a result of the dangerous condition on the hirer’s property if: 1) a preexisting dangerous condition was known or reasonably discoverable by the contractor, and the condition is the subject of at least a part of the work contemplated by the independent contractor; or 2) the contractor creates the dangerous condition on the hirer’s property and the hirer does not increase the risk of harm by its own affirmative conduct.” (*Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373, 1401 [68 Cal.Rptr.2d 806], disapproved of on other grounds in *Hooker, supra*, 27 Cal.4th at p. 214 and *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245 [108 Cal.Rptr.2d 617, 25 P.3d 1096].)~~
- “A landowner's duty generally includes a duty to inspect for concealed hazards. But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, ... the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof

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would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability.” (Kinsman, supra, 37 Cal.4th at pp. 677-678, internal citations omitted.)

- ~~“We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer’s exercise of retained control affirmatively contributed to the employee’s injuries.” (Hooker, supra, 27 Cal.4th at p. 202.)~~
- ~~“Imposing tort liability on a hirer of an independent contractor when the hirer’s conduct has affirmatively contributed to the injuries of the contractor’s employee is consistent with the rationale of our decisions in Privette, Toland and Camargo because the liability of the hirer in such a case is not “‘in essence ‘vicarious’ or ‘derivative’ in the sense that it derives from the ‘act or omission’ of the hired contractor.’” To the contrary, the liability of the hirer in such a case is direct in a much stronger sense of that term.” (Hooker, supra, 27 Cal.4th at pp. 211-212, internal citations and footnote omitted.)~~
- ~~“Such affirmative contribution need not always be in the form of actively directing a contractor or contractor’s employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer’s negligent failure to do so should result in liability if such negligence leads to an employee injury.” (Hooker, supra, 27 Cal.4th at p. 212, fn. 3.)~~
- ~~Restatement Second of Torts, section 414, provides: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.”~~
- ~~“[W]e hold that a hirer is liable to an employee of an independent contractor insofar as the hirer’s provision of unsafe equipment affirmatively contributes to the employee’s injury.” (McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal.4th 219, 222 [115 Cal.Rptr.2d 868, 38 P.3d 1094.]~~
- ~~“[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party’s own negligence that renders it liable, not that of the contractor.” (McKown, supra, 27 Cal.4th at p. 225, internal citation omitted.)~~

Secondary Sources

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

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~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 922~~

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

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

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

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

~~(New September 2003)~~

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

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

1. That [name of defendant] [owned/leased/occupied/controlled] the property;
 2. [Insert either or both of the following:]

[That [name of defendant] retained control over safety conditions at the worksite, and [his/her/its]'s acts [or failure to take actions that [he/she/it] was required to take] contributed to [name of plaintiff]'s injuries; [or]

[That [name of defendant] negligently provided unsafe equipment that contributed to [name of plaintiff]'s injuries;]
 3. That [name of plaintiff] was harmed; and
 4. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.
-

Derived from former CACI No. 1009 April 2007

Directions for Use

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

See also the Vicarious Responsibility Series, CACI Nos. 3700 et seq. for instructions on the liability of a hirer for the acts of an independent contractor.

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

Sources and Authority

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- “We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer’s exercise of retained control *affirmatively contributed* to the employee’s injuries.” (*Hooker, supra*, 27 Cal.4th at p. 202, original italics.)
- “Imposing tort liability on a hirer of an independent contractor when the hirer’s conduct has affirmatively contributed to the injuries of the contractor’s employee is consistent with the rationale of our decisions in *Privette, Toland* and *Camargo* because the liability of the hirer in such a case is not “ ‘in essence ‘vicarious’ or ‘derivative’ in the sense that it derives from the ‘act or omission’ of the hired contractor.’ ” To the contrary, the liability of the hirer in such a case is direct in a much stronger sense of that term.” (*Hooker, supra*, 27 Cal.4th at pp. 211-212, internal citations and footnote omitted.)
- “Such affirmative contribution need not always be in the form of actively directing a contractor or contractor’s employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer’s negligent failure to do so should result in liability if such negligence leads to an employee injury.” (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.)
- Section 414 of the Restatement Second of Torts provides: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.”
- “[W]e hold that a hirer is liable to an employee of an independent contractor insofar as the hirer’s provision of unsafe equipment affirmatively contributes to the employee’s injury.” (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222 [115 Cal.Rptr.2d 868, 38 P.3d 1094].)
- “[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party’s own negligence that renders it liable, not that of the contractor.” (*McKown, supra*, 27 Cal.4th at p. 225, internal citation omitted.)

Secondary Sources

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

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

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

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

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

VF-1101. Dangerous Condition of Public Property—Affirmative Defense of Reasonable Act or Omission (Gov. Code, § 835.4)

We answer the questions submitted to us as follows:

1. **Did [name of defendant] own [or control] the property?**
___ Yes ___ No

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

2. **Was the property in a dangerous condition at the time of the incident?**
___ 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 dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?**
___ 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 negligent or wrongful conduct of [name of defendant]’s employee acting within the scope of his or her employment create the dangerous condition?]**

[or]

[Did [name of defendant] have notice of the dangerous condition for a long enough time to have protected against it?]
___ 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 the act or omission that created the dangerous condition reasonable?]**

[or]

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\$ _____]

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

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

[New September 2003; Revised April 2007](#)

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. 1100, *Essential Factual Elements (Gov. Code, § 835)*; CACI No. 1111, *Affirmative Defenses—Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a))*; and CACI No. 1112, *Affirmative Defenses—Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b))*.

[NOTE: The California Supreme Court has granted review in *Metcalf v. County of San Joaquin* \(2006\) 139 Cal.App.4th 969 \[43 Cal.Rptr.3d 522\], review granted September 20, 2006, S144831. The decision in that case may affect the use of this verdict form.](#)

[For questions 4 and 5, choose the first bracketed options if liability is alleged due to an employee's negligent conduct under Government Code section 835\(a\). Use the second bracketed options if liability is alleged for failure to act after actual or constructive notice under Government Code section 835\(b\).](#)

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional; depending on the circumstances, ~~users may wish to break down the damages even further.~~

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

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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.

~~(New September 2003)~~

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<u>[lost profits</u>	<u>\$</u>	<u>]</u>
<u>[medical expenses</u>	<u>\$</u>	<u>]</u>
<u>[other past economic loss</u>	<u>\$</u>	<u>]</u>
Total Past Economic Damages:		\$ _____]

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

~~[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:]~~

~~\$ _____]~~

~~[b. Future economic loss, including [lost
earnings/lost profits/lost earning capacity/
medical expenses:]~~

~~\$ _____]~~

[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 October 2004; April 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. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*.

~~If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.~~

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

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

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.

~~(Revised October 2004)~~

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<u>[lost profits</u>	<u>\$</u>	<u>]</u>
<u>[medical expenses</u>	<u>\$</u>	<u>]</u>
<u>[other past economic loss</u>	<u>\$</u>	<u>]</u>
Total Past Economic Damages:		\$ _____]

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

~~[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:]~~

~~\$ _____]~~

~~[b. Future economic loss, including [lost
earnings/lost profits/lost earning capacity/
medical expenses:]~~

~~\$ _____]~~

[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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Directions for Use

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

This verdict form is based on CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*.

~~If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.~~

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

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

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.

~~(New September 2003)~~

2322. Affirmative Defense—Insured’s Voluntary Payment

[Name of defendant] **claims that it does not have to pay** *[specify, e.g., the amount of the settlement]* **because** *[name of plaintiff]* **made a voluntary payment. To succeed on this defense,** *[name of defendant]* **must prove the following:**

1. *[Select either or both of the following:]*

[That *[name of plaintiff]* **[made a payment to** *[name of third party claimant]* **in [partial/full] settlement of** *[name of third party claimant]* **’s claim against** *[name of plaintiff]* **]; [or]**

[That *[name of plaintiff]* **[made a payment/ [or] assumed an obligation/ [or] incurred an expense] to** *[name]* **with regard to** *[name of third party claimant]* **’s claim against** *[name of plaintiff]* **];**

AND

2. **That** *[name of defendant]* **did not give its consent or approval for the [payment/obligation/expense].**
-

New April 2007

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.

This instruction is intended for use by an insurer as a defense to a breach of contract action based on a third party liability policy. This instruction also may be modified for use as a defense to a judgment creditor’s action to recover on a liability policy. This defense is not available if the insurer refused to defend before the voluntary payment was made.

A voluntary-payments clause in an insurance policy typically provides that the insured may not voluntarily make a payment, assume an obligation, or incur an expense without the insurer’s consent. (See, e.g., *Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976 [94 Cal.Rptr.2d 516].) In element 1, select the appropriate options depending on the acts alleged. Modify, as necessary, depending on the actual language of the policy. Use the first option if the insured has made a payment in settlement of the claim. Use the second option if the insured has made a payment, assumed an obligation, or incurred an expense for other reasons, such as to an attorney for legal services, or to a creditor of the claimant, such as a provider of medical or repair services.

Sources and Authority

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- “The general validity of no-voluntary-payment provisions in liability insurance policies is well established. ... [S]uch clauses are common 'to prevent collusion as well as to invest the insurer with the complete control and direction of the defense or compromise of suits or claims.’” (*Insua v. Scottsdale Ins. Co.* (2002) 104 Cal.App.4th 737, 742 [129 Cal.Rptr.2d 138], internal citations omitted.)
- “California law enforces ... no-voluntary-payments provisions in the absence of economic necessity, insurer breach, or other extraordinary circumstances. They are designed to ensure that responsible insurers that promptly accept a defense tendered by their insureds thereby gain control over the defense and settlement of the claim. That means insureds cannot unilaterally settle a claim before the establishment of the claim against them and the insurer's refusal to defend in a lawsuit to establish liability [T]he decision to pay any remediation costs outside the civil action context raises a 'judgment call' left solely to the insurer. In short, the provision protects against coverage by fait accompli.” *Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1544 [2 Cal.Rptr.3d 761], internal citations omitted.)
- “Typically, a breach of that provision occurs, if at all, before the insured has tendered the defense to the insurer. ... [A voluntary-payments] provision is [also] enforceable posttender until the insurer wrongfully denies tender. ‘It is only when the insured has requested and been denied a defense by the insurer that the insured may ignore the policy's provisions forbidding the incurring of defense costs without the insurer's prior consent and under the compulsion of that refusal undertake his own defense at the insurer's expense’” (*Low v. Golden Eagle, supra*, 110 Cal.App.4th at pp. 1546-1547, internal citations omitted.)
- “[T]he existence or absence of prejudice to [the insurer] is simply irrelevant to [its] duty to indemnify costs incurred *before* notice. The policy plainly provides that notice is a *condition precedent* to the insured's right to be indemnified; a fortiori the right to be indemnified cannot relate back to payments made or obligations incurred before notice. ... The prejudice requirement ... applies only to the insurer's attempt to assert lack of notice as a *policy defense* against payment even of losses and costs incurred *after* belated notice.” ([*Jamestown Builders, Inc. v. General Star Indemnity Co.* \(1999\) 77 Cal.App.4th 341, 350 \[91 Cal.Rptr.2d 514\]](#), italics in original, internal citations omitted.)
- “[There is] an exception where an insured makes an involuntary payment due to circumstances beyond its control, as where it does not know the insured's identity or the policy contents, or must act immediately to protect its legal interests.” (*Low v. Golden Eagle, supra*, 110 Cal.App.4th at p. 1545.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 7:439.5-7.439.10

2527. Failure to Prevent Harassment, ~~or~~ Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k))

[Name of plaintiff] claims that [name of defendant] failed to prevent [harassment/discrimination/retaliation] [based on [describe protected status—e.g., race, gender, or age]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/was a person providing services pursuant to a contract with [name of defendant]];
 2. That [name of plaintiff] was subjected to [either:]

~~[That [name of plaintiff] was subjected to~~ [harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [protected status];

[or]

retaliation because [he/she] [opposed [name of defendant]’s unlawful and discriminatory employment practices/ [or] [filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing].
 3. That [name of defendant] failed to take reasonable steps to prevent the [harassment/discrimination/retaliation];
 4. That [name of plaintiff] was harmed; and
 5. That [name of defendant]’s failure to take reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [name of plaintiff]’s harm.
-

New June 2006; Revised April 2007

Directions for Use

If harassment is at issue, this instruction should be read in conjunction with CACI No. 2523, “*Harassing Conduct*” Explained. If retaliation is alleged, read this instruction in conjunction with CACI No. 2505, *Retaliation* (Gov. Code, § 12940(h)).

Read the bracketed language in the opening paragraph beginning with “based on” and the first option for element 2 if the claim is for failure to prevent harassment or discrimination.

Choose the second option ~~for~~ in element 2 if the claim is based on failure to prevent retaliation because the plaintiff (1) opposed practices forbidden by the FEHA; (2) filed a complaint with the Department of

Fair Employment and Housing (DFEH); (3) testified in a DFEH proceeding; or (4) assisted in a DFEH proceeding. (See Gov. Code, § 12940(h).)

Sources and Authority

- Government Code section 12940(k) provides that it is an unlawful employment practice for “an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”
- Government Code section 12940(h) provides that it is an unlawful employment practice “For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”
- “The employer’s duty to prevent harassment and discrimination is affirmative and mandatory.” (*Northrop Grumman Corp. v. Workers’ Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 [127 Cal. Rptr. 2d 285].)
- “This section creates a tort that is made actionable by statute. ‘ “[T]he word “tort” means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.’ It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.’ Examples of statutory torts are plentiful in California law.” Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH.” (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596], internal citations omitted.)
- “With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants’ legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff.” (*Trujillo, supra*, 63 Cal.App.4th at pp. 286–287, internal citation omitted.)
- “Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented. Plaintiffs have not shown this duty was owed to them, under these circumstances. Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur.” (*Trujillo, supra*, 63 Cal.App.4th at p. 289.)
- “In accordance with ... the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov.

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Code] section 12940, subdivision (k).” (Taylor v. City of Los Angeles Dept. of Water & Power (2006) 144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206].)

Secondary Sources

Chin, et al., Cal-~~ifornia~~ Practice Guide: Employment Litigation (The Rutter Group ~~2006~~) ¶¶ 7:670-7:672

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

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

~~(New June 2006)~~

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

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

1. That [name of defendant] was [an employer/[other covered entity]];
2. That [name of plaintiff] [was an employee of [name of defendant]/applied to [name of defendant] for a job/[describe other covered relationship to defendant]];
3. That [name of defendant] thought that [name of plaintiff] had a [physical/mental] [condition/disease/disorder/[describe health condition]] that limited [insert major life activity];
4. That [name of defendant] knew of [name of plaintiff]’s [physical/mental] [condition/disease/disorder/[describe health condition]] that limited [insert major life activity];
- 4/5. That [name of defendant] failed to provide reasonable accommodation for [name of plaintiff]’s [physical/mental] [condition/disease/disorder/[describe health condition]];
- 5/6. That [name of plaintiff] was harmed; and
- 6/7. That [name of defendant]’s failure to provide reasonable accommodation was a substantial factor in causing [name of plaintiff]’s harm.

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

New September 2003; Revised April 2007

Directions for Use

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

In a case of perceived disability, include “[name of defendant] thought that” in element 3, and delete optional element 4.

~~Where-If~~ the existence of a qualifying disability is disputed, the court must tailor an instruction to the

evidence in the case.

There appears a divergence in authority regarding whether the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job. Cases involving discrimination based on disability have stated that the issue is an element of the plaintiff's burden of proof: "The plaintiff can establish a prima facie case by proving that: (1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability." (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236 [66 Cal.Rptr.2d 830], internal citations omitted.) However, in *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360 [118 Cal.Rptr.2d 443], a case involving an alleged failure to provide a reasonable accommodation, the court observed that FEHA, unlike ADA, does not require a plaintiff to prove he or she is "a qualified individual with a disability." [Note that the Supreme Court is reviewing this issue. \(See *Green v. State of California* \(2005\) 132 Cal.App.4th 97 \[33 Cal.Rptr.3d 254\], review granted Nov. 16, 2005, S137770.\)](#)

Sources and Authority

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."
- "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.9.)
- Government Code section 12926(n) provides:
 - "Reasonable accommodation" may include either of the following:
 - (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
 - (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.
- Government Code section 12940(n) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."
- For a definition of "mental disability," see Government Code section 12926(i).

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- For a definition of “physical disability,” see Government Code section 12926(k).
- Government Code section 12926.1(c) provides, in part: “[T]he Legislature has determined that the definitions of ‘physical disability’ and ‘mental disability’ under the law of this state require a ‘limitation’ upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a ‘substantial limitation.’ This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, ‘working’ is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”
- “Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an ‘undue hardship.’” (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947 [62 Cal.Rptr.2d 142].)
- “[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees.” (*Prilliman, supra*, 53 Cal.App.4th at pp. 950-951.)
- “‘Ordinarily the reasonableness of an accommodation is an issue for the jury.’” (*Prilliman, supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)
- “[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA.” (*Bagatti, supra, v. Department of Rehabilitation* (2002) 97 Cal.App.4th at p. 344, 362 [~~118 Cal.Rptr.2d 443~~].)
- “Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an ‘undue hardship’ on its operations or if there is no vacant position for which the employee is qualified.” (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)
- “On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA’s statutorily defined ‘disabilities,’ including those ‘regarded as’ disabled, and must engage in an informal, interactive process to determine any effective accommodations.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

Secondary Sources

~~2-Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 306, p. 301; id. (2002~~

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~~supp.) at § 306, pp. 293-295~~

8 Witkin, Summary of California Law (9th-10th ed. 1988-2006) Ch. X Constitutional Law, § 762, pp. 262-263; *id.* (2002-supp.) at §§ 762, 762A, pp. 159-164

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 2000) Discrimination Claims, § 2.79, pp. 64-65

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

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

[California Civil Practice \(Thomson West\) Employment Litigation, § 2:50](#)

~~Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Discrimination in Employment, § 2:49, pp. 64-66~~

~~(New September 2003)~~

3013. Supervisor Liability (42 U.S.C. § 1983)

[Name of plaintiff] claims that *[name of supervisor defendant]* is personally liable for *[his/her]* harm. In order to establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of supervisor defendant]* knew, or in the exercise of reasonable diligence should have known, of *[name of employee defendant]*'s wrongful conduct;
 2. That *[name of supervisor defendant]*'s response was so inadequate that it showed deliberate indifference to, or tacit authorization of, *[name of employee defendant]*'s conduct; and
 3. That *[name of supervisor defendant]*'s inaction was a substantial factor in causing *[name of plaintiff]*'s harm.
-

New April 2007

Directions for Use

Read this instruction in cases in which a supervisor is alleged to be personally liable for the violation of the plaintiff's civil rights under Title 42 United States Code section 1983.

Sources and Authority

- "A supervisory official may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. [T]hat liability is not premised upon *respondeat superior* but upon 'a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict.'" (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209 [73 Cal.Rptr.2d 571], internal citations omitted.)
- "To establish supervisory liability under section 1983, [plaintiff] was required to prove: (1) the supervisor had actual or constructive knowledge of [defendant's] wrongful conduct; (2) the supervisor's response was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices'; and (3) the existence of an 'affirmative causal link' between the supervisor's inaction and [plaintiff's] injuries." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279 [48 Cal.Rptr.3d 715], internal citations omitted.)

Secondary Sources

- 5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 347
- 8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 8

3200. ~~Violation of Civil Code Section 1793.2(d)~~ Failure to Purchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Consumer Goods—Essential Factual Elements (Civ. Code, § 1793.2(d))

[Name of plaintiff] claims that *[he/she]* was harmed by *[name of defendant]*'s breach of a warranty that *[describe alleged express warranty]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* bought a[n] *[consumer good]* [from/distributed by/manufactured by] *[name of defendant]*;
2. That *[name of defendant]* gave *[name of plaintiff]* a warranty by *[insert at least one of the following:]*

[making a written statement that *[describe alleged express warranty]*]; [or]

[showing *[him/her]* a sample or model of the *[consumer good]* and representing, by words or conduct, that *[his/her]* *[consumer good]* would match the quality of the sample or model;]

3. That the *[consumer good]* *[insert at least one of the following:]*

[did not perform as stated for the time specified;] [or]

[did not match the quality [of the [sample/model]]] [or] [as set forth in the written statement];]

4. [That *[name of plaintiff]* delivered the *[consumer good]* to *[name of defendant]* or its authorized repair facilities for repair;]

[That *[name of plaintiff]* notified *[name of defendant]* in writing of the need for repair because *[he/she]* reasonably could not deliver the *[consumer good]* to *[name of defendant]* or its authorized repair facilities due to the [size and weight/method of attachment/method of installation] [or] [the nature of the defect] of the *[consumer good]*]; [and]

5. That *[name of defendant]* or its representative failed to repair the *[consumer good]* to match the [written statement/represented quality] after a reasonable number of opportunities; [and]

6. [That *[name of defendant]* did not replace the *[consumer good]* or reimburse *[name of plaintiff]* an amount of money equal to the purchase price of the *[consumer good]*, less the value of its use by *[name of plaintiff]* before discovering the defect[s].]

[A written statement need not include the words “warranty” or “guarantee,” but if those words are used, a warranty is created. It is also not necessary for *[name of defendant]* to have specifically intended to create a warranty. A warranty is not created if *[name of defendant]*

**simply stated the value of the [consumer good] or gave an opinion about the [consumer good].
General statements concerning customer satisfaction do not create a warranty.]**

[New September 2003; Revised April 2007](#)

Directions for Use

An instruction on the definition of “consumer good” may be necessary if that issue is disputed. Civil Code section 1791(a) provides: “‘Consumer goods’ means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. ‘Consumer goods’ shall include new and used assistive devices sold at retail.”

Select the alternative in element 4 that is appropriate to the facts of the case.

Regarding element 4, ~~where if~~ the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, ~~-see~~ Civil Code section 1793.2(c), ~~-~~ is unclear on this point.

Depending on the circumstances of the case, further instruction may be warranted regarding element 6 to clarify how the jury should calculate “the value of its use” during the time before discovery of the defect.

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines ~~that such~~ proof is necessary, add the following element to this instruction:

That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time ~~That that~~ the [consumer good] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: “It is not necessary for [name of plaintiff] to prove the cause of a defect in the [consumer good].” The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good “did not conform to the express warranty.” (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)-(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

[See also CACI Nos. 3202, “Repair Opportunities” Explained.](#)

~~Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)~~

Sources and Authority

- “Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer’s remedies to include costs, attorney fees and civil penalties. ... [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties.” (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- Civil Code section 1794(a) provides, in part: “Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief.”
- Civil Code section 1791.2 provides:
 - (a) “Express warranty” means:
 - (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
 - (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.
 - (b) It is not necessary to the creation of an express warranty that formal words such as “warrant” or “guarantee” be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.
 - (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.
- Civil Code section 1795 provides, in part: “If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer.”
- Civil Code section 1793.2(d) provides, in part:
 - (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price

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paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the nonconformity.

- (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.
- “[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer’s use of the motor vehicle. These ‘Lemon Law’ provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty.” (*National R. V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)
 - [Under Civil Code section 1793.1\(a\)\(2\), if the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect.](#)
 - Civil Code section 1793.2(c) provides, in part: “The buyer shall deliver nonconforming goods to the manufacturer’s service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section.”
 - The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, “[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that ... a differentiation between manufacturer and local representative is unwarranted.” (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)
 - Civil Code section 1795.5 provides, in part: “Notwithstanding the provisions ... defining consumer goods to mean ‘new’ goods, the obligation of a distributor or retail seller of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers,” with limited exceptions provided by statute.
 - Civil Code section 1790.3 provides: “The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail.”

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- Civil Code section 1793.1(a)(2) provides, in part: “The warranty period will be extended for the number of whole days that the product has been out of the buyer’s hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed.”
- Civil Code section 1795.6 provides, in part:
 - (a) Every warranty period relating to an ... express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars (\$50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer’s possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer’s residence.
 - (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

Secondary Sources

[4 Witkin, Summary of California Law \(10th ed. 2005\) Sales, §§ 52, 56, 314–324](#)

~~[3 Witkin, Summary of California Law \(9th ed. 1987\) Sales, §§ 51, 55, 306–308](#)~~

1 California UCC Sales [and](#) Leases (Cont.Ed.Bar-~~2002~~) Warranties, §§ 3.4, 3.8, 3.15, 3.87

2 California UCC Sales ~~&~~[and](#) Leases (Cont.Ed.Bar-~~2002~~) Prelitigation Remedies, § 17.70; *id.*, Litigation Remedies, § 18.25; *id.*, Leasing of Goods, § 19.38

~~[California Products Liability Actions, Ch. 2, Liability for Defective Products, §§ 2.30\[3\], 2.31, Ch. 8, Defenses, § 8.07\[3\]\[b\] \(Matthew Bender\)](#)~~

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44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.42, 502.53 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 California Civil Practice (Thomson West) Business Litigation, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27

~~5 Baneroft Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27, pp. 6, 8–10, 14–15, 18–23, 27–29, 31–34; *id.* (2001 supp.) at §§ 53:3–53:4, 53:10, 53:14, 53:16, 53:26–53:27, pp. 29–33, 36–37~~

~~(New September 2003)~~

3201. ~~Violation of Civil Code Section 1793.2(d)~~ Failure to Promptly Purchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—~~New Motor Vehicle~~—Essential Factual Elements (Civ. Code, § 1793.2(d))

[Name of plaintiff] claims that *[name of defendant]* breached a warranty. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* [bought/leased] a[n] *[new motor vehicle]* [from/ distributed by/manufactured by] *[name of defendant]*;
2. That *[name of defendant]* gave *[name of plaintiff]* a written warranty that *[describe alleged express warranty]*;
3. That the vehicle had [a] defect[s] that [was/were] covered by the warranty and that substantially impaired its use, value, or safety to a reasonable person in *[name of plaintiff]*'s situation;
4. [That *[name of plaintiff]* delivered the vehicle to *[name of defendant]* or its authorized repair facility for repair of the defect[s];]

[That *[name of plaintiff]* notified *[name of defendant]* in writing of the need for repair of the defect[s] because [he/she] reasonably could not deliver the vehicle to *[name of defendant]* or its authorized repair facility because of the nature of the defect[s];]
5. That *[name of defendant]* or its authorized repair facility failed to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so; and
6. That *[name of defendant]* did not promptly replace or buy back the vehicle.

[It is not necessary for *[name of plaintiff]* to prove the cause of a defect in the *[new motor vehicle]*.]

[A written warranty need not include the words “warranty” or “guarantee,” but if those words are used, a warranty is created. It is also not necessary for *[name of defendant]* to have specifically intended to create a warranty. A warranty is not created if *[name of defendant]* simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]

New September 2003; Revised February 2005; December 2005; April 2007

Directions for Use

If remedies are sought under the Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that **such** proof is necessary, add the following element to this instruction:

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That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [new motor vehicle] had a defect covered by the warranty;

See also CACI No. 1243, *Notification/Reasonable Time*.

Regarding element 4, ~~where-if~~ the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, ~~-see~~ Civil Code section 1793.2(c)-, is unclear on this point.

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good “did not conform to the express warranty.” (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)-(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

~~Where the warranty period has been extended, it cannot expire any sooner than 60 days after the last repair of a claimed defect. (Civ. Code, § 1793.1(a)(2).)~~

See also CACI Nos. 3202, “Repair Opportunities” Explained, CACI No. 3203, Reasonable Number of Repair Opportunities—Rebuttable Presumption—(Civ. Code, § 1793.22(b)), and CACI No. 3204, “Substantially Impaired” Explained.

Sources and Authority

- “Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer’s remedies to include costs, attorney fees and civil penalties. ... [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties.” (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- “A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element).” (*Oregel, supra*, 90 Cal.App.4th at p. 1101.)
- The Song-Beverly Act does not apply unless the vehicle was purchased in California. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478 [30 Cal.Rptr.3d 823, 115 P.3d 98].)
- Under Civil Code section 1793.1(a)(2), if the warranty period has been extended, it cannot expire any

sooner than 60 days after the last repair of a claimed defect.

- Civil Code section 1794(a) provides, in part: “Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [Act] or under an ... express warranty ... may bring an action for the recovery of damages and other legal and equitable relief.”
- Civil Code section 1790.3 provides: “The provisions of [the Song-Beverly Consumer Warranty Act] shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the act], the provisions of [the act] shall prevail.”
- Civil Code section 1791.2 provides:
 - (a) “Express warranty” means:
 - (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
 - (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.
 - (b) It is not necessary to the creation of an express warranty that formal words such as “warrant” or “guarantee” be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.
 - (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.
- Civil Code section 1795 provides, in part: “If express warranties are made by persons other than the manufacturer of the goods, the obligation of the person making such warranties shall be the same as that imposed on the manufacturer.”
- Civil Code section 1793.22(e)(2) provides, in part: “‘New motor vehicle’ means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. ‘New motor vehicle’ also means a new motor vehicle ... that is bought or used primarily for business purposes by a person ... or any ... legal entity, to which not more than five motor vehicles are registered in this state. ‘New motor vehicle’ includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion ..., a dealer-owned vehicle and a ‘demonstrator’ or other motor vehicle sold with a manufacturer’s new car warranty.”
- “Under well-recognized rules of statutory construction, the more specific definition [of “new”] new motor

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vehicle”~~”~~ found in the current section 1793.22 governs the more general definition [of “consumer goods”~~”~~ found in section 1791.” (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 126 [41 Cal.Rptr.2d 295].)

- “‘Nonconformity’ is defined as ‘a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.’ The term is similar to what the average person would understand to be a ‘defect.’” (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted; see also *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801 n.11 [50 Cal.Rptr.3d 731] ([nonconformity can include entire complex of related conditions]).)
- “The issue of whether the problems constituted substantial impairment is one for the trier of fact.” (*Schreidel, supra*, 34 Cal.App.4th at p. 1250.)
- Civil Code section 1793.2(d)(2) provides, in part: “If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle ... to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle ... or promptly make restitution to the buyer. ... However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required to accept a replacement vehicle.”
- “[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer’s use of the motor vehicle. These ‘Lemon Law’ provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty.” (*National R. V., Inc., supra*, 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)
- Civil Code section 1793.2(c) provides, in part: “The buyer shall deliver nonconforming goods to the manufacturer’s service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. If the buyer cannot return the nonconforming goods for any of these reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section.”
- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, “[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that ... a differentiation between manufacturer and local representative is unwarranted.” (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)
- “[T]he only affirmative step the Act imposes on consumers is to ‘permit[] the manufacturer a reasonable *opportunity* to repair the vehicle.’” (*Oregel, supra*, 90 Cal.App.4th at p. 1103, internal

citation omitted.)

- “[T]he Act does not *require* consumers to take any affirmative steps to secure relief for the failure of a manufacturer to service or repair a vehicle to conform to applicable warranties-other than, of course, permitting the manufacturer a reasonable opportunity to repair the vehicle. ... [A]s a practical matter, the consumer will likely request replacement or restitution. But the consumer’s request is not mandated by any provision in the Act. Rather, the consumer’s request for replacement or restitution is often prompted by the manufacturer’s unforthright approach and stonewalling of fundamental warranty problems.” (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302-303 [45 Cal.Rptr.2d 10], ~~emphasis in original~~ italics.)
- Civil Code section 1793.1(a)(2) provides, in part: “The warranty period will be extended for the number of whole days that the product has been out of the buyer’s hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed.”
- Civil Code section 1795.6 provides, in part:
 - (a) Every warranty period relating to an ... express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars (\$50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer’s possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer’s residence.
 - (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if ... : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

Secondary Sources

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4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 52, 56, 314–324

~~3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47–48, 50–51, 240–243; *id.* (2002 supp.) at §§ 51, 55, 306–308, pp. 14–15, 94–103~~

~~1 Sales & and Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.*, Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*, Litigation Remedies, at § 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807~~

~~California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31 (Matthew Bender)~~

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43[5][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 California Civil Practice (Thomson West) Business Litigation, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27

~~5 Baneroff Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27, pp. 6, 8–10, 14–15, 18–23, 27–29, 31–34; *id.* (2001 supp.) at §§ 53:3–53:4, 53:10, 53:14, 53:16, 53:26–53:27, pp. 29–33, 36–37~~

~~(Revised December 2005)~~

4106. Affirmative Defense--Statute of Limitations

[Name 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 four years before complaint was filed] unless [name plaintiff] proves that before [insert date four years before complaint was filed], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [name of defendant]'s wrongful act or omission.

New April 2007

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI No. 454 (*Affirmative Defense--Statute of Limitations*) and CACI No. 455, (*Affirmative Defense--Statute of Limitations--Delayed Discovery*).

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, see CACI No. 610 (*Affirmative Defense--Statute of Limitations—Attorney Malpractice—One-Year Limit*) and CACI No. 611 (*Affirmative Defense--Statute of Limitations—Attorney Malpractice—Four-Year Limit*). One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty. (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368 [12 Cal.Rptr.2d 354].)

Sources and Authority

- Code of Civil Procedure section 343 provides: “An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.”
- “The statute of limitations for breach of fiduciary duty is four years. (§ 343.)” (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43], internal citation omitted.)
- “A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed.” (*Stalberg, supra*, 230 Cal.App.3d at p. 1230, internal citation omitted.)

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- “Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion and do not give rise to a duty of inquiry. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist.” (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], internal citations omitted.)
- “[A] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available.” (*Hobbs, supra*, 164 Cal.App.3d at p. 202, internal citations omitted.)
- “The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation.” (*Hobbs, supra*, 164 Cal.App.3d at p. 202, internal citations omitted.)
- “ ‘[R]esolution of the statute of limitations issue is normally a question of fact’ ” (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 617-619

5003. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?
- (b) How well did the witness remember and describe what happened?
- (c) How did the witness look, act, and speak while testifying?
- (d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?
- (e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her disability, gender, race, sex, religion, ~~occupation, ethnicity~~, sexual orientation, age, national origin, [or] socioeconomic status [or [insert any other impermissible form of bias]].

[New September 2003; Revised April 2004; April 2007](#)

[Directions for Use](#)

This instruction may be given as either an introductory instruction before trial (See CACI No. 107) or as a concluding instruction.

The ~~Advisory~~ ~~advisory~~ ~~Committee~~ ~~committee~~ recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Evidence Code section 312 provides:

Except as otherwise provided by law, where the trial is by jury:

- (a) All questions of fact are to be decided by the jury.
- (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

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- (i) The existence or nonexistence of any fact testified to by him.
 - (j) His attitude toward the action in which he testifies or toward the giving of testimony.
 - (k) His admission of untruthfulness.
- Evidence Code section 411 provides that “[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact.” According to former Code of Civil Procedure section 2061, the jury should be instructed that “they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.”
 - The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: “It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar.” (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)
 - Standard 10.20(a)(2) of ~~t~~The Standards for Judicial Administration; ~~Standard 10.20(a)(2)~~ provides: “In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants.”
 - Canon 3(b)(5) of ~~t~~The Code of Judicial Ethics; ~~Canon 3(b)(5)~~ provides: “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.” Canon 3(b)(6) requires the judge to impose these standards on attorneys also.

Secondary Sources

14 California Forms of Pleading and Practice, Ch. 160, *Corporations* (Matthew Bender)

5 California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

(Revised April 2004)

5016. Judge's Commenting on Evidence

In this case, I have exercised my right to comment on the evidence. However, you the jury are the exclusive judges of all questions of fact and of the credibility of the witnesses. You are free to completely ignore my comments on the evidence and to reach whatever verdict you believe to be correct, even if it is contrary to any or all of those comments.

New April 2007

Directions for Use

Read this instruction before deliberations if the judge has exercised the right under article VI, section 10 of the California Constitution to comment on the evidence. This instruction should also be given if after deliberations have begun, the jury asks for additional guidance and the judge then comments on the evidence. (See *People v. Rodriguez* (1986) 42 Cal.3d 730 [230 Cal.Rptr. 667, 726 P.2d 113].)

Sources and Authority

- Article VI, section 10 of the California Constitution permits the court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."
- "[T]he decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 766, internal citations omitted.)
- "[A] trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but *may focus critically on particular evidence*, expressing views about its persuasiveness. ... [A] judge may restrict his comments to portions of the evidence or to the *credibility of a single witness* and need not sum up all the testimony, both favorable and unfavorable." (*People v. Proctor* (1992) 4 Cal.4th 499, 542 [15 Cal.Rptr.2d 340, 842 P.2d 1100], original italics.)
- "[A] judge's power to comment on the evidence is not unlimited. He cannot withdraw material evidence from the jury or distort the testimony, and he must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of the witnesses. In civil cases, the court's powers of comment are less limited than in criminal cases, but they still must be kept within certain bounds. The court may express an opinion on negligence, but the court's remarks must be appropriate and fair." (*Lewis v. Bill Robertson & Sons Inc.* (1984) 162 Cal.App.3d 650, 654 [208 Cal.Rptr. 699], internal citation omitted.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 265