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: September 17, 2008

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

Issue Statement

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

Recommendation

The advisory committee recommends that the Judicial Council, effective October 24, 2008, approve for publication under rule 2.1050 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be officially published in the 2009 edition of the *Judicial Council of California Civil Jury Instructions (CACI)*.

A table of contents and the proposed additions and revisions to the civil jury instructions are attached beginning at page 23.

Rationale for Recommendation

The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating *CACI*. The council approved the committee's last update at its April 25, 2008, meeting.

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

The following 62 instructions and verdict forms are included in this proposal: 408, 456, 530A, 530B, 532, 610, 712, 1003, 1011, 1100, VF-1101, 1244, 1306, 1321, 1500, 1501, 1502, 1503, 1504, 1702, VF-1700, VF-1702, VF-1704, 2600, 3100, 3101, 3102A, 3102B, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3113, 3114, 3115, VF-3100, VF-3101, VF-3102, VF-3103, VF-3104, VF-3105, VF-3106, VF-3107, 3940, 3942, 3943, 3945, 3947, 3949, VF-3900, VF-3901, VF-3902, VF-3903, VF-3904, 4327, 5012, and 5017. Of these, 6 are newly drafted, 48 are revised, 2 involve a division of CACI No. 3102 into 3102A and 3102B, 1 has an addition to the Sources and Authority that raises a substantive issue, and 5 are revoked. Additionally, the Judicial Council's Rules and Projects Committee (RUPRO) has given final approval to additional instructions under a delegation of authority from the council to RUPRO.[1]

The instructions were revised or added based on comments or suggestions from judges, attorneys, staff, and committee members, as well as on recent developments in the law. The following instructions and verdict forms were revised or added based primarily on comments received from judges and attorneys: 712, 1003, 1011, VF-3900, VF-3901, VF-3902, VF-3903, VF-3904, 4327, 5012, and 5017.

In response to a request from a judge, the verdict forms on punitive damages (VF-3900–VF-3904) have been modified to allow them to be used in both bifurcated and nonbifurcated trials.

In the relatively new Unlawful Detainer series (approved by the council in August 2007), new CACI No. 4327, *Affirmative Defense—Landlord's Refusal of Rent*, was added in response to tenant attorney requests for more instructions on affirmative defenses.

The following instructions were revised or added based primarily on suggestions from staff or committee members: 408, 456, 610, 1100, 1306, 1321, 1500, 1501, 1502, 1503, 1504, 1702, VF-1700, VF-1702, VF-1704, 3100–3111, 3113, 3114, 3115, VF-3100–VF-3107, 3940, 3942, 3943, 3945, 3947, and 3949.

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

Under the implementing guidelines that RUPRO approved on December 14, 2006, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 20 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee staff has made other nonsubstantive grammatical, typographical, and technical corrections.

CACI No. 456, *Defendant Estopped From Asserting Statute of Limitations Defense,* was added as the third phase of the committee's initiative to add instructions on the applicable statutes of limitation in most of the cause-of-action series.

In the Malicious Prosecution series (1500 et seq.), the committee decided that the special rules governing the mixed roles of judge and jury in determining probable cause and favorable termination needed to be integrated into the instructions for the causes of action rather than as standalone instructions. Therefore, CACI No. 1503, *Reasonable Grounds,* and CACI No. 1504, *Favorable Termination,* are proposed to be revoked, and their text has been moved to CACI Nos. 1500–1502.

An excerpt has been added to the Sources and Authority for CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* to point out the different rules for medical malpractice and legal malpractice regarding tolling of the one-year limitation period for reasons other than those set forth in the malpractice limitations statutes.[2]

The following instructions were added or revised based primarily on recent developments in the law: 530A, 530B, 532, VF-1100, 1244, and 2600.

Verdict form VF-1101, *Dangerous Condition of Public Property—Affirmative Defense of Reasonable Act or Omission (Gov. Code, § 835.4),* was modified in response to the California Supreme Court's decision in *Metcalf v. County of San Joaquin,*[3] in which the court clarified that the reasonableness standards of Government Code section 835.4 are in fact affirmative defenses to public entity liability under Government Code section 835.

New CACI No. 1244, *Affirmative Defense—Sophisticated User,* was drafted in response to the California Supreme Court's decision in *Johnson v. American Standard, Inc.*[4] (see Comments From Interested Parties, below). CACI No. 2600, *Violation of CFRA Rights—Essential Factual Elements,* was revised in response to the court's decision in *Lonicki v. Sutter Health Central,*[5] that a potential ability to work with an employer other than the defendant was not a complete defense under the California Family Rights Act.

Elder Abuse reorganization

The largest component of this release is a major reorganization of the Elder Abuse series (CACI No. 3100 et seq.). The committee concluded that because of the complexity of the

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[2] Compare *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] (refusing to toll one-year limitation period under Code Civ. Proc., § 340.6, applicable to legal malpractice) with *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] (tolling one-year limitation period under substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice).

[3] *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121 [72 Cal.Rptr.3d 382, 176 P.2d 654].

[4] *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56 [74 Cal.Rptr.3d 108, 179 P.3d 905] (recognizing a sophisticated user defense to a failure-to-warn products liability claim).

[5] *Lonicki v.Sutter Health Central* (2008) 43 Cal.4th 201 [74 Cal.Rptr.3d 570, 180 P.2d 321].

Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.), the current instructions were overly difficult to follow.

Under the act, the three components of civil liability are (1) the basic cause of action, (2) enhanced remedies, and (3) employer liability. In some scenarios, the burden of proof on the elements of the cause of action changes from a preponderance of the evidence, required to obtain traditional remedies, to clear and convincing evidence, required to obtain the enhanced remedies provided by the act.[6] Most of the current instructions are "composite" instructions that attempt to address all three components together in the same instruction.

The committee decided that composite instructions were not appropriate for the Elder Abuse series, and that the three components need to be separated into different instructions. Under the proposed reorganization, instructions for the essential factual elements of the four basic causes of action (financial abuse, neglect, physical abuse, and abduction) are retained (CACI Nos. 3100, 3103, 3106, and 3109, respectively). Because the rules for obtaining enhanced remedies under each of these causes of action are different, the committee proposes separate instructions limited to enhanced remedies for each cause of action (CACI Nos. 3101, 3104, 3107, and 3110, respectively). But because the rules for employer liability are the same for all causes of action, the committee proposes only two instructions that present employer liability: one if the employer and employee are both defendants and one if the employer is the only defendant (CACI Nos. 3102A and 3102B, respectively). Because fewer instructions are needed under this reorganization, CACI Nos. 3105, 3108, and 3111 are proposed to be revoked. The committee also proposes adding a chart at the end of the series that sets forth the rules for all four causes of action regarding enhanced remedies and employer liability.

Alternative Actions Considered

Rule 2.1050 of the California Rules of Court requires that the advisory committee update, amend, and add topics to *CACI* on a regular basis and 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 actions.

Comments From Interested Parties

All revisions to the civil jury instructions were circulated for public comment. Only one instruction included in this proposal generated extensive comments or controversy. The committee evaluated all comments and made some changes to the instructions based on them. A chart summarizing the comments and committee responses is attached at pages 6–22.

[6] See *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].

Affirmative Defense—Sophisticated User (CACI No. 1244)
The one instruction that generated numerous comments is proposed new CACI No. 1244, *Affirmative Defense—Sophisticated User*. As noted above, the California Supreme Court in *Johnson v. American Standard, Inc.* (see fn. 4, *supra*) recognized a sophisticated user defense to a failure-to-warn products liability claim.

A number of commentators asked the committee to extend the instruction to apply to a situation in which the plaintiff's employer is a sophisticated user regardless of whether the injured employee-plaintiff is one. Commentators also asked for extension of the instruction to apply if the purchaser of the product is a sophisticated user regardless of whether the injured consumer-plaintiff is one. While there is language in *Johnson* that would perhaps support these extensions, there was no holding on these issues. Therefore, the committee did not consider the matter to be clearly resolved and declined to extend the instruction as requested at this time.

Two additional instructions on statutes of limitation for medical malpractice were drafted and circulated for public comment. Extensive comments raising significant issues were received from the California Medical Association, the California Dental Association, the California Hospital Association, and the State Bar Committee on the Administration of Justice. Based on these comments, the committee has withdrawn the proposed instructions at this time and will consider them further in the next meeting cycle.

The committee made additional revisions to other instructions based on comments received, as shown in the attached chart.

Implementation Requirements and Costs
There are no significant implementation costs. Under the publication agreement, the official publisher, LexisNexis Matthew Bender, will make copies of the 2009 edition available to all judicial officers free of charge in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright in this work and will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC will provide a broad public license for their noncommercial use and reproduction.

Attachments

All comments are paraphrased unless indicated by quotation marks.

	Commentator	Comment	Committee Response
1.	Brydon Hugo and Parker Foster Wheeler by James C. Parker San Francisco	See comments on specific instructions below.	
2.	California Apartment Association by Heidi Palutke, Research and Legislative Counsel Sacramento	See comments on specific instructions below.	
3.	California Medical Association California Dental Association California Hospital Association by David S. Ettinger and H. Thomas Watson Horvitz and Levy Encino	See comments on specific instructions below.	
4.	Californians Allied for Patient Protection by Lisa Maas, Executive Director Sacramento	See comments on specific instructions below.	
5.	Connor & Bishop by Charles S. Bishop San Francisco	See comments on specific instructions below.	
6.	Curt Cutting Horvitz & Levy Encino	See comments on specific instructions below.	
7.	Louis S. Franecke Franecke Law Group San Rafael	See comments on specific instructions below.	
8.	Jackson & Wallace by John J. Murray and Daniel D. O'Shea San Francisco	See comments on specific instructions below.	

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	Commentator	Comment	Committee Response
9.	George H. Koenig M.D. La Quinta	See comments on specific instructions below.	
10.	Mendes & Mount PRC-DeSoto International, Inc. by Warren M. Williams Los Angeles	See comments on specific instructions below.	
11.	Robert A. Olson Greines, Martin, Stein & Richland Los Angeles	See comments on specific instructions below.	
12.	Daniel Murphy and Darrell Thompson (No additional information provided)	See comments on specific instructions below.	
13.	Hon. Alan S. Rosenfield Superior Court of Los Angeles County	See comments on specific instructions below.	
14.	William J. Sayers McKenna, Long & Aldridge Los Angeles	See comments on specific instructions below.	
15.	State Bar of California Committee on Administration of Justice (CAJ)	See comments on specific instructions below.	
16.	Superior Court of Los Angeles County by Janet Garcia, Court Manager, Planning and Research Unit	Agree with proposed changes. No additional comments	No response required
17.	Superior Court of Sacramento County by Robert Turner, ASO II	"[The Superior Court of California, County of] Sacramento has reviewed the New and Revised CACI Instructions (CACI08-02) and does not have a position at this time."	No response required
18.	Superior Court of San Diego County by Michael M. Roddy, Executive Officer	Agree with proposed changes. No additional comments	No response required
19.	Don Willenberg Gordon & Rees San Francisco	See comments on specific instructions below.	
20.	P. Gerhardt Zacher	See comments on specific instructions below.	

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	Commentator	Comment	Committee Response
	Gordon & Rees San Diego		

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Instruction	Commentator	Summary of Comment	Committee Response
456: Defendant Estopped From Asserting Statute of Limitations Defense	State Bar of California Committee on Administration of Justice (CAJ)	The first sentence in the proposed instruction suggests that the plaintiff concedes that the complaint was untimely if estoppel is inapplicable. There may be disputed factual questions affecting the statute of limitations defense apart from the estoppel issue, and the jury may be instructed on those other factual issues. The first sentence should be changed to "[*Name of plaintiff*] claims that even ~~though~~ if [his/her/its] lawsuit was not filed on time,"	The committee agreed and has made this change.
		The possible issue raised in the Directions for Use regarding intent has been settled in favor of the approach taken in the instruction by *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384, and *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153. An intent to induce reliance need not be proven to establish an estoppel from relying on the statute of limitations. (*Lantzy, supra*, 31 Cal.4th at p. 384)	The committee added citations to *Lantzy* and *Vu* to the Directions for Use and Sources and Authority. *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767, cited in the Directions for Use, does suggest that there is an intent element. The committee believes that *Ashou* should be noted.
		The discussion in the Directions for Use does not provide guidance as to how or when to use the instruction, and therefore does not seem to fit a Direction for Use.	The committee sometimes uses the Directions for Use to point out possible issues that may arise if the instruction is proposed. Here, the Directions for Use explain why no element for specific intent has been included.
		Lantzy identifies an additional element to establish an estoppel from relying on the statute of limitations that is not encompassed in the proposed CACI instruction; the plaintiff must "proceed[] diligently once the truth is discovered." (*Lantzy, supra*, 31	The committee agreed and added this element. There is also another element mentioned in *Lantzy*, that the representation proves false after the limitations period has expired. The committee also added this element.

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Instruction	Commentator	Summary of Comment	Committee Response
		Cal.4th at p. 384.) The proposed instruction should add this as a fourth enumerated element.	
	P. Gerhardt Zacher Gordon & Rees San Diego	The instruction should incorporate a "reasonable person" standard more clearly. Either change element 1 to: "That [*name of defendant*] did or said something that would have caused a reasonable person in [*name of plaintiff*]'s position to believe that it would not be necessary to file a lawsuit;" Or change element 3 to: "That ~~it was~~ a reasonable person in ~~for~~ [*name of plaintiff*]'s position would ~~to~~ have relied on [*name of defendant*]'s conduct."	The committee agrees that the commentator's revision to element 3 is an improvement and has made this change.
530A: Medical Battery	California Medical Association California Dental Association California Hospital Association by David S. Ettinger and H. Thomas Watson Horvitz and Levy Encino	The preliminary draft of CACI No. 530A does not adequately take into account the requisite element of intent. As worded, the instruction allows juries to find a healthcare provider liable for medical battery regardless of whether the nonconsensual touching was intentional or accidental (negligent). Also, cases making it clear that medical battery is an intentional tort should be added to the Sources and Authority.	Case law indicates that the intent is presumed from the lack of consent. The second excerpt in the Sources and Authority from *Cobbs v. Grant* (1972) 8 Cal.3d 229 expresses the standard adequately.
	Californians Allied for Patient Protection by Lisa Maas, Executive Director Sacramento	The commentator directs the committee's attention to *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 and asks the committee to modify 530A to eliminate reference to "informed" consent.	The proposed revised instruction does what the commentator suggests.
	George H. Koenig M.D.	The commentator is very concerned by the	The committee believes that the holding in

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Instruction	Commentator	Summary of Comment	Committee Response
	La Quinta	excerpt from *Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 647, which holds that it is a question of fact whether operating on the wrong disk within inches of the correct disk is a "substantially different procedure." "If spine surgeons are going to face possible litigation alleging tort and therefore lack of protection under MICRA, this will send an enormous chill through the spine surgery community."	*Kaplan* should be included in the Sources and Authority.
		In element 1 of 530A there appears to be a proposed difference between informed consent and consent. This may be a valid legal distinction, but from the physician standpoint, consent is either defensibly informed or it is not. The proposed change seems to blur that distinction (if it does exist) and the reason for it is unclear.	The proposed change is required by the court of appeal's decision in *Saxena v. Goffney* (2008) 159 Cal.App.4th 316.
532: Informed Consent—Definition	California Medical Association California Dental Association California Hospital Association by David S. Ettinger and H. Thomas Watson Horvitz and Levy Encino George H. Koenig M.D. La Quinta	The health-care association commentators claim that the use of the phrase "fully explained" in the second sentence of the preliminary draft of CACI No. 532, paragraph 1, is misleading because the courts have put limitations on how detailed and extensive the disclosure must be. It should be modified to read: "A patient gives 'informed consent' only after the *[insert type of medical practitioner]* has ~~fully explained~~ <u>disclosed</u> to the patient all material information that is reasonably necessary for the patient to make a meaningful decision about whether to undergo the proposed treatment or procedure."	These comments will be considered at the next full committee meeting because they address new material beyond the changes circulated for comment.

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Instruction	Commentator	Summary of Comment	Committee Response
		Similarly, Doctor Koenig questions the use of "fully" explained. He states: "[T]he text states 'has FULLY explained'. What is fully? Again, informed is informed, 'FULLY' raises the opportunity to quibble, which I assume is not the intent."	
	California Medical Association California Dental Association California Hospital Association by David S. Ettinger and H. Thomas Watson Horvitz and Levy Encino	This statement in paragraph 2 is too broad: "The patient must be told about *any* risk of death or serious injury or significant potential complications that may occur if the procedure is performed." Physicians need not discuss remote risks of death or serious injury. We recommend inserting the phrase "nonremote" between the words "any" and "risk."	The last sentence of the instruction says "**A** [*insert type of medical practitioner*] is not required to explain minor risks that are not likely to occur." The committee believes that this is sufficient.
1011: Constructive Notice Regarding Dangerous Conditions on Property	P. Gerhardt Zacher Gordon & Rees San Diego	The commentator does not think that the cross-references to the instructions on injury to employees of an independent contractor should be deleted.	The committee does not think that there is any particular connection between constructive notice and injury to employees of an independent contractor that requires this cross-reference.
VF-1101: Dangerous Condition of Public Property—Affirmative Defense–Reasonable Act or Omission	State Bar of California Committee on Administration of Justice (CAJ)	The proposal inserts "____ *Yes* ____ *No"* after the first alternative in Question 4. CAJ supports that change.	No response required
		Question 4 is currently presented in the alternative, depending on the theory under which the plaintiff is proceeding–creating the dangerous condition, or failing to protect against a dangerous condition. Mention should be made in the Directions for Use that both alternatives may be given if a plaintiff is proceeding under both theories.	The committee agreed and has made this change.

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Instruction	Commentator	Summary of Comment	Committee Response
		The proposal also inserts "[either option for]" in the last paragraph in Question 4. CAJ supports that change. CAJ also recommends that "[to both options]" be added after "If you answered no" to clarify that, if both options are presented, the jury should "stop here" only if it answers no to both questions.	The committee agreed and has made this change.
		Question 6 as revised draws too much attention to the factors that need to be considered when deciding the Government Code, section 835.4 defense. If a section 835.4 defense is at issue in the case, the jury will have been given CACI No. 1111 and/or No. 1112. The substance of those affirmative defenses should not be repeated as part of the verdict form. *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1139 did not change the law regarding § 835.4.	The committee gave this issue full consideration, and several members expressed this view. But a strong majority believes that in this case, the verdict form must present the complete Government Code section 835.4 defenses. As noted by the CAJ in its comment, although *Metcalf* did not change the law, the Supreme Court reiterated the accepted proposition that the reasonableness standard referred to in section 835.4 differs from the reasonableness standard that applies under ordinary tort principles because, under the latter, the reasonableness of the defendant's conduct does not depend upon the existence of other, conflicting claims. The defense should not have to rely on the jury's returning to the instructions to recall the particular qualifications on reasonableness set forth in section 835.4.
		As proposed, Question 6 is incomplete in that it fails to repeat that it is the defendant's burden to prove reasonableness, as spelled out in CACI Nos. 1111 and 1112.	The CACI verdict forms do not include the burden of proof unless there is something unusual about the burden, such as a shift from a preponderance of the evidence to clear and convincing evidence.
1244: Affirmative	Brydon Hugo and Parker	These commentators all propose that the	Although *Johnson v. American Standard*,

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Instruction	Commentator	Summary of Comment	Committee Response
Defense—Sophisticated User	Foster Wheeler by James C. Parker San Francisco Connor & Bishop by Charles S. Bishop San Francisco Jackson & Wallace by John J. Murray and Daniel D. O'Shea San Francisco Mendes & Mount PRC-DeSoto International, Inc. by Warren M. Williams Los Angeles Don Willenberg Gordon & Rees San Francisco P. Gerhardt Zacher Gordon & Rees San Diego	instruction should be extended to apply if the purchaser of the product is a sophisticated user, even if the injured party is an employee of the purchaser or a downstream user who may not be a sophisticated user. Or in the alternative, there should be a separate instruction for a sophisticated employer/purchaser.	*Inc.* (2008) 43 Cal.4th 56 does contain language (quoted under Sources and Authority) that would support the extension of the instruction to employers and purchasers as sought by the commentators, the committee does not believe that the issue is resolved. Therefore, extending the instruction would not be appropriate at this time.
		Commentator Don Willenberg drafted and proposed a separate instruction on the employer as a sophisticated user.	See response above.
		Commentator Gerhardt Zacher would add the following to the end of the instruction: "[If the person or entity to whom the product was sold has sophisticated knowledge about the product and its appropriate uses, and that person or entity can be reasonably expected to communicate warning instructions to the user of the product, then the manufacturer has no duty to warn or instruct the user about the product.]"	The proposed language would provide some guidelines on when an employer's or purchaser's sophistication can be imputed to an unsophisticated employee or consumer, but the commentator cites no authority, and none has been found, that this standard is currently the law.
	Curt Cutting Horvitz & Levy Encino Connor & Bishop by Charles S. Bishop San Francisco	These commentators would delete or modify the language "because of [his/her] particular position and training." The California Supreme Court's opinion in *Johnson v. American Standard* (2008) 43 Cal.4th 56, did not limit the application of the sophisticated user defense to situations in which the plaintiff obtained knowledge of the hazards of	The committee believes that it is helpful to the jury to suggest the source of the knowledge or imputed knowledge that makes one a sophisticated user.

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Instruction	Commentator	Summary of Comment	Committee Response
	Jackson & Wallace by John J. Murray and Daniel D. O'Shea San Francisco William J. Sayers McKenna, Long & Aldridge Los Angeles State Bar of California Committee on Administration of Justice (CAJ) Don Willenberg Gordon & Rees San Francisco	a product from his or her "position and training."	
		Commentator CAJ suggests that consideration be given to broadening this language to encompass knowledge gained through education and/or experience.	The committee agreed and broadened the language to also refer to "experience, knowledge, or skill."
		Commentator Don Willenberg suggested adding "or membership in a group or class.**"**	The committee believes that this language is not readily understandable, and that "position" expresses this idea adequately.
	Connor & Bishop by Charles S. Bishop San Francisco Jackson & Wallace by John J. Murray and Daniel D. O'Shea San Francisco William J. Sayers McKenna, Long & Aldridge Los Angeles	These commentators state that the use of the phrase "[*Name of defendant*] claims" in the first sentence of the instruction as initially proposed is misleading because it suggests that the jury is free to decide whether the defense is available to the defendant, regardless of whether the elements of the defense are met. The first sentence of the instruction must affirmatively state that the defense is available to the defendant, a result that will not be reached if the phrase "[*Name of Defendant*] claims" begins the instruction.	All affirmative defense instructions begin with "[*Name of defendant*] claims…." The committee does not believe that this language misleads the jury in any way.

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Instruction	Commentator	Summary of Comment	Committee Response
	Louis S. Franecke Franecke Law Group San Rafael	The definition of "sophisticated user" does not distinguish between ordinary knowledge and sophisticated knowledge regarding the product or the user. Suggested language: "A sophisticated user is an individual who, by education, experience, or training, is familiar in detail with the product's use and potential risks associated with the use of the product when used in a reasonably foreseeable manner." The "latter definition" of how the product is used is a negligence definition rather than a sophisticated user definition. Suggested wording would be: "The sophisticated user knew or should have known of the inherent hazards and risks of the product, in absence of defects or warnings of those hazards and risks which would not be known or anticipated and which caused the injury suffered."	The committee does not believe that the proposed language would improve the instruction.
	William J. Sayers McKenna, Long & Aldridge Los Angeles State Bar of California Committee on Administration of Justice (CAJ) Don Willenberg Gordon & Rees San Francisco	These commentators believe that the proposed instruction suggests that a defendant be required to establish that the plaintiff knew or should have known that the danger that the product would cause was the particular "injury that [he/she] suffered." But *Johnson* does not require such specific knowledge. Nothing in the *Johnson* decision requires a defendant asserting the sophisticated user defense to establish that the plaintiff was aware of the potential for the product to cause the particular injury or disease that the plaintiff ultimately suffered.	The committee agreed and revised this language in the instruction.

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Instruction	Commentator	Summary of Comment	Committee Response
	State Bar of California Committee on Administration of Justice (CAJ) Don Willenberg Gordon & Rees San Francisco	These commentators propose deleting "inherent" modifying "risk." *Johnson* allows the defense based on the "knew or should have known" standard with respect to all hazards, not just those considered "inherent." Some risks may not be "inherent" but may involve the use of a product in conjunction with other products. Some courts consider the risks of other products made by other parties to be something about which there is a duty to warn. All such risks are subject to the sophisticated user defense. While *Johnson* does use the word "inherent" twice (in the very first paragraph and in describing the holding in *Anderson*), it elsewhere in the opinion and far more often speaks of risks, dangers, or hazards generally, without this qualifier.	The committee agreed that "inherent" was not essential to the instruction and deleted it.
		These commentators would add the following at the end to clarify the purpose of the instruction: "<u>If you find that [*plaintiff*] knew, or should have known, about potential risks of injury associated with [*product or product type*] and the applicable precautions available to address those risks when the product was purchased, you must find that [*defendant*] is not liable to [*plaintiffs*] for failure to warn."</u>	The committee does not believe that the proposed language would improve the instruction.
3100 et seq.: Elder Abuse	Daniel Murphy and Darrell Thompson (No additional information provided)	The commentators believe the changes are appropriate and the wording is consistent with their understanding of the current state of the law. One change that could be made is to switch the order of the first two questions in the verdict forms. The statutes apply to	The committee agreed and has made this change to the order of questions in the verdict forms.

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Instruction	Commentator	Summary of Comment	Committee Response
		persons age 65 or older or dependent adults. That issue is usually straightforward, but it is the second question in the verdict forms. Placing it first would avoid the jury's reaching the more controversial issues if they determine neither requirement is met.	
VF-3901, VF-3902: Punitive Damages—Employer Liability	P. Gerhardt Zacher Gordon & Rees San Diego	The commentator recommends the following revision: "Was [*name of employee/agent*] an officer, director, or managing agent of [*name of defendant*] acting ~~in a [corporate/employment] capacity~~ <u>on behalf of [*name of defendant*]</u>?" The language of the verdict forms should track the language of the instructions. Jury confusion could result from the use of different terminology in the jury instructions and in the corresponding verdict forms.	The committee agreed and has made this change.
3940 et seq.: Punitive Damages—Amount	Robert A. Olson Greines, Martin, Stein & Richland Los Angeles	The phrase "in light of types of misconduct that would deserve punishment" should be added after "How reprehensible was the [defendant's] conduct" in the 3940 series. Leaving the reprehensibility factor in the abstract ("how reprehensible was the defendant's conduct?") with a list of factors that the jury may consider sets the jury at the wrong task. California and United States Supreme Court precedent make clear that the issue is a relative one, a matter of degree—how reprehensible is the conduct compared to other conduct deserving of punishment? *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419: " '[T]he most important indicium of the reasonableness of a	The committee does not believe that the quoted authorities establish that the jury should be instructed to compare the reprehensibility of the defendant's conduct with that of other defendants in other cases or other situations.

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
		punitive damages award is the *degree* of reprehensibility of the defendant's conduct.' [Citation]." (Emphasis added.); *Adams v. Murakami* (1991) 54 Cal.3d 105, 110-112, fn. 2: (The reprehensibility of a defendant's conduct must be measured "in light of the types of misconduct that will support punitive damages").	
	State Bar of California Committee on Administration of Justice (CAJ)	The distinction that is presented in *Philip Morris USA v. Williams* (2007) 549 U.S. __ [127 S.Ct. 1057, 1064] between considering evidence of harm caused to others to determine the degree of reprehensibility (which is permissible) and considering that same evidence for the purpose of punishing a defendant directly for harm caused to others (which is impermissible) is somewhat elusive. Unless the jury is expressly instructed that evidence of harm caused to others can be considered in determining the degree of reprehensibility, some jurors instructed in the language of the CACI instruction are likely to conclude that this evidence cannot be considered for any purpose in determining the amount of punitive damages. The jury might believe that it can consider evidence that the defendant disregarded the health and safety of others only if that evidence does not include evidence of actual harm caused to others. Suggested revision: Add as reprehensibility factor (a)(6): "Whether [*name of defendant*]'s conduct that harmed [*name of plaintiff*] also harmed other	The committee agrees that the distinction is elusive. Because the United States Supreme Court has again granted *certiorari* in *Philip Morris v. Williams*, the committee will await further clarification on this issue. It will revisit these instructions after the Court issues its opinion.

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
		persons. However, you may not award punitive damages to punish [*name of defendant*] directly for harm caused to others."	
	P. Gerhardt Zacher Gordon & Rees San Diego	We agree with the Judicial Council's correct statement of the law in the proposed instructions on punitive damages, which, in our view, correctly state the relevant legal principles in a straightforward manner.	No response required
4327: Affirmative Defense—Landlord's Refusal of Rent	California Apartment Association by Heidi Palutke, Research and Legislative Counsel Sacramento	The proposed instruction should be deleted in its entirety. Although refusal of rent is listed as an affirmative defense in Judicial Council form UD-105, Answer-—Unlawful Detainer, section 3c, a landlord's refusal of rent after service of a three-day notice to pay or quit is not, in fact, an affirmative defense. Whether or not the tenant has paid the rent is part of the landlord/plaintiff's case in chief in an unlawful detainer action based on the tenant's nonpayment of rent. If the tenant tendered the rent and landlord refused to accept payment, the landlord cannot prove the tenant's noncompliance with the notice. This is a defense to an allegation on which the landlord has the burden of proof.	The authority that the commentator cites for her position does not support it. (see *Strom v. Union Oil Co.* (1948) 88 Cal.App.2d 78; Eviction Defense Manual (Cont.Ed.Bar) § 14.13 [landlord's bad faith is an affirmative defense, citing *Strom*].)
		The words "before the three-day notice has expired" in element 1 could mislead the jury into believing that a landlord's refusal to accept rent before the notice is served is a defense. There are many times when a landlord refuses payment and sometime later serves a three-day notice to pay or quit. A jury could mistake these facts as a defense to a nonpayment of rent notice. If the instruction	The committee agreed and has made this change.

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
		is not deleted in its entirety, Subpart 1 should be rewritten to read: "That after service of the three-day notice and before the three-day notice period has expired, … "	
		Use of the word "full" in element 1 may have unintended consequences. A tenant may tender too much rent, which is rejected by a landlord who does not want to create a holdover tenancy. It is not an uncommon practice for tenants to pay more than the exact amount of rent due to purposely pay for extra days. If this extra payment (and the resulting holdover tenancy) are refused, the tenant would have a defense under this proposed jury instruction. Use of the word "correct" and not "full" when referring to rent in element 1 would be clearer.	The committee does not believe that possibility of a holdover tenancy created by an excessive tender is sufficiently likely to occur to require changing the reference to "the full amount."
		If this instruction is not deleted in its entirety, an additional instruction on the effect of a landlord "holding" a rent payment would be appropriate. What is the legal effect of holding a tenant's check in a file and not cashing it? It is unclear how conduct should be viewed by a jury that is provided this instruction.	The committee cannot adopt the proposed instruction because neither the Legislature nor any court has yet addressed these facts.
		It is unclear what Civil Code section 1500 has to do with this proposed jury instruction. The jury instruction addresses the refusal of the landlord to accept rent that is tendered by the tenant. Section 1500 deals only with a specific type of tender—deposit of the sum owed into a bank in the name of the creditor	Civil Code section 1500 sets forth a process that constitutes sufficient tender. The landlord may take the position that a tender that does not comply with section 1500 is insufficient to create a duty to accept.

Instruction	Commentator	Summary of Comment	Committee Response
		that must be accepted. That is only one of many possible ways for the tenant to tender rent and is not directly related to the subject of the instruction—the refusal to accept rent. Section 1500 merits a separate and distinct instruction because the actions required of a debtor by that section are quite specific. By contrast, there are a wide variety of facts a tenant could muster to prove that rent was refused by the landlord. Providing Section 1500 as a source or authority under this proposed instruction is misleading.	
5012: Introduction to Special Verdict Form, and 5017: Polling the Jury	Hon. Alan S. Rosenfield Superior Court of Los Angeles County	"As a proponent of the proposed revision to CACI 5012 and the language for the proposed new CACI 5017, I wholeheartedly concur in this language and the decision to break this into two instructions. What I had forwarded has been very well edited and pared down so as to be a very useful tool for trial judges who try to explain the special verdict form. My compliments to you and Judge Grimes and the AOC/JC staff who have taken the thoughts and rendered them succinct and understandable.	The committee appreciates the kind words.
	P. Gerhardt Zacher Gordon & Rees San Diego	The commentator believes that the language in 5012, "Although you may discuss the evidence and the issues to be decided in any order," could lead to jury confusion and error. If the jury may discuss the evidence in any order, jurors may skip over necessary conditional questions, possibly leading to confusion and inconsistent verdicts. This language is also unnecessary.	Because the evidence and facts presented to a jury often involve overlapping evidence—testimony or exhibits that apply to more than one issue, the committee believes that it is appropriate to let the jury know that their deliberations do not have to mirror the order of the verdict form. The deliberation process should involve a free discussion of all of the evidence presented at trial.

CIVIL JURY INSTRUCTIONS (CACI)
FOR FINAL JUDICIAL COUNCIL APPROVAL
TABLE OF CONTENTS

408. Primary Assumption of Risk~~Coparticipant in a Sports Activity~~

[*Name of plaintiff***] claims [he/she] was harmed while participating in [a sporting activity/***specify other activity***] and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] either intentionally injured [***name of plaintiff***] or acted so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in the [sport/activity];**

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

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

Conduct is entirely outside the range of ordinary activity involved in [a sport/the activity] if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].

[*Name of defendant***] is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent.**

New September 2003; Revised April 2004, [month] 2008

Sources and Authority

- "Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell [v. Japanese-American Religions & Cultural Center]*, 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient])." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citation omitted.)

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

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

[11 Cal.Rptr.2d 30, 834 P.2d 724].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

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

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

- "[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.' " (*Shin v. Ahn* (2007) 42 Cal.4th 482, 497 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

- " '[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty." (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted.)

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

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

- "Primary assumption of the risk is an objective test. It does not depend on a particular plaintiff's subjective knowledge or appreciation of the potential for risk." (*Saville v. Sierra College* (2005) 133

Cal.App.4th 857, 866 [36 Cal.Rptr.3d 515].)

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

- "[T]he doctrine [of primary assumption of risk] is not limited to sports, as the Supreme Court recognized in *Knight:* Whether a duty exists 'does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.' It is the 'nature of the activity' and the parties' relationship to it that determines whether the doctrine applies—not its characterization as a sporting event." (*McGarry, supra,* 158 Cal.App.4th at p. 999, internal citations omitted.)

Secondary Sources

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

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

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

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

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

456. Defendant Estopped From Asserting Statute of Limitations Defense

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[*Name of plaintiff***] claims that even if [his/her/its] lawsuit was not filed on time, [he/she/it] may still proceed because [***name of defendant***] did or said something that caused [***name of plaintiff***] to delay filing the lawsuit. In order to establish the right to proceed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] said or did something that caused [***name of plaintiff***] to believe that it would not be necessary to file a lawsuit;**

2. **That [***name of plaintiff***] relied on [***name of defendant***]'s conduct and therefore did not file the lawsuit within the time otherwise required;**

3. **That a reasonable person in [***name of plaintiff***]'s position would have relied on [***name of defendant***]'s conduct;**

4. **That after the limitation period had expired, [***name of defendant***]'s representations by words or conduct proved to not be true; and**

5. **That [***name of plaintiff***] proceeded diligently to file suit once [he/she/it] discovered the actual facts.**

It is not necessary that [*name of defendant***] have acted in bad faith or intended to mislead [***name of plaintiff***].**

New [Month] 2008

Directions for Use

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767 [41 Cal.Rptr.3d 819].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 21 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included.

Sources and Authority

- “Equitable tolling and equitable estoppel are distinct doctrines. ‘ “Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice.” ‘Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling.” (*Lantzy, supra,* 31 Cal.4th at pp. 383–384, internal citations omitted.)

- “Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action.” (*Lantzy, supra,* 31 Cal. 4th at p. 384, internal citations omitted.)

- “ ’An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. … To create an equitable estoppel, “it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. … Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense.” ‘ “ (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)

- “ ‘A defendant will be estopped to invoke the statute of limitations where there has been “some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action.” It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] “[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law.” [Citations.]’ ” (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)

- “It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim.” (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)

- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. Apropos to this rule are the following established principles: A person, by his conduct, may be estopped to rely on the statute; where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought; actual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period; a party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of limitation imposed by the statute for commencing the action; and that whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice— is a question of fact and not of law. It is also an established principle that in cases of estoppel to plead the statute of limitations, the same rules are applicable, as in cases falling within subdivision 4 of section 338, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action." (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)

- "Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations." (*Holdgrafer, supra,* 160 Cal.App.4th at p. 927.)

- "The estoppel issue in this case arises in a unique context. Defendants' wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Shaffer, supra,* 17 Cal.App.4th at p. 43, internal citation omitted.)

- "At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended." (*Ashou, supra,* 138 Cal.App.4th at p. 767.)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 523-536

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) § 5:111.6

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Action,* § 71.06

(Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.81 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitations of Actions,* § 143.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.42

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~~consented to one medical procedure, but [***name of defendant***] performed a substantially different medical procedure;]**

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; Revised [month] 2008

Directions for Use

Select either or both of the two bracketed options in the first element 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 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, supra,* 8 Cal.3d at p. 240.)

- "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].

- "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." (*Pedesky 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." (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38–39 [224 P.2d 808].)

- "In the absence of any definitive case law establishing whether operating on the wrong disk within inches of the correct disk is a 'substantially different procedure,' we conclude the matter is a factual question for a finder of fact to decide and at least in this instance, not one capable of being decided on demurrer." (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 647 [75 Cal.Rptr.3d 861.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 388–635

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 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*, § 41.01 (Matthew Bender)

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

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, §§ 415.13, 415.20 ~~414, *Physicians and Other Medical Personnel*~~ (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.20 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.28 et seq. (Matthew Bender)

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

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~~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 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; Revised [month] 2008

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 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.)

- "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast,

a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 388–635

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.11–9.16

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41, Ch. 41, § 41.01 *Assault and Battery* (Matthew Bender)

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

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, §§ 415.13, 415.20~~414, *Physicians and Other Medical Personnel*~~ (Matthew Bender)

2 California Points and Authorities, Ch. 21, § 21.25 *Assault and Battery* (Matthew Bender)

17 California Points and Authorities, Ch. 175, § 175.28 *Physicians and Surgeons* (Matthew Bender)

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

532. Informed Consent—Definition

A patient's consent to a medical procedure must be "informed." A patient gives an ``informed consent'' only after the [*insert type of medical practitioner***] has fully explained the proposed treatment or procedure.**

A [*insert type of medical practitioner***] must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand. A [***insert type of medical practitioner***] must give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed. A [***insert type of medical practitioner***] is not required to explain minor risks that are not likely to occur.**

New September 2003; Revised December 2005, [month] 2008

Directions for Use

This instruction should be read in conjunction with CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual Elements.* Do not give this instruction with CACI No. 530A, *Medical Battery*, or 530B, *Medical Battery—Conditional Consent*. (See *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].)

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another.*

Sources and Authority

- A physician is required to disclose "all information relevant to a meaningful decisional process." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 242 [104 Cal.Rptr. 505, 502 P.2d 1].)

- "When a doctor recommends a particular procedure then he or she must disclose to the patient all material information necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances." (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343 [13 Cal.Rptr.2d 819].)

- "A physician has a duty to inform a patient in lay terms of the dangers inherently and potentially involved in a proposed treatment." (*McKinney v. Nash* (1981) 120 Cal.App.3d 428, 440 [174 Cal.Rptr. 642].)

- Courts have observed that *Cobbs* created a two-part test for disclosure. "First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated with a proposed procedure." (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1301 [61 Cal.Rptr.2d 260].) "Second, '[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.' " (*Id.* at p. 1302, citation omitted.) The doctor has no duty to discuss minor risks inherent in common procedures when it is common knowledge that such risks are of very low incidence. (*Cobbs, supra,* 8 Cal.3d at p. 244.)

- The courts have defined "material information" as follows: "Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. To be material, a fact must also be one which is not commonly appreciated. If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [165 Cal.Rptr. 308, 611 P.2d 902], internal citations omitted.)

- "Obviously involved in the equation of materiality are countervailing factors of the seriousness and remoteness of the dangers involved in the medical procedure as well as the risks of a decision not to undergo the procedure." (*McKinney, supra,* 120 Cal.App.3d at p. 441.)

- Expert testimony is not required to establish the duty to disclose the potential of death, serious harm, and other complications. (*Cobbs, supra,* 8 Cal.3d at p. 244.) Expert testimony is admissible to show what other information a skilled practitioner would have given under the circumstances. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1191–1192 [23 Cal.Rptr.2d 131, 858 P.2d 598].)

- A physician must also disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his or her medical judgment. (*Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 129-132 [271 Cal.Rptr. 146, 793 P.2d 479], cert. denied, 499 U.S. 936 (1991).)

- Appellate courts have rejected a general duty of disclosure concerning a treatment or procedure a physician does not recommend. However, in some cases, "there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463].)

- "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena, supra,* 159 Cal.App.4th at p. 324.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 400–507~~, 409, 410~~

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

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

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

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, §§ 415.13, 415.20 ~~414, *Physicians and Other Medical Personnel*~~ (Matthew Bender)

2 California Points and Authorities, Ch. 21, § 21.20 *Assault and Battery* (Matthew Bender)

17 California Points and Authorities, Ch. 175, § 175.28 *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***].][./; or]]**

[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.][./; or]]**

[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*, 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 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, fn. 2 [46 Cal.Rptr.2d 594, 904 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.)

- "[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, 187–188 [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.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities

in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

Secondary Sources

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

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

712. Failure to Wear a Seat ~~belt~~Belt

[*Name of defendant***] claims that [***name of plaintiff***] was negligent because [he/she] failed to wear a seat belt. To succeed, [***name of defendant***] must prove all of the following:**

1. **That a working seat belt was available;**

2. **That a reasonably careful person in [***name of plaintiff***]'s situation would have used the seat belt;**

3. **That [***name of plaintiff***] failed to wear a seat belt; and**

4. **That~~, based on expert testimony,~~ [***name of plaintiff***]'s injuries would have been avoided or less severe if [he/she] had used the seat belt.**

[In deciding whether a reasonably careful person would have used a seat belt, you may consider Vehicle Code section 27315, which states: [*insert pertinent provision***].]**

New September 2003; Revised [month] 2008

Directions for Use

Note that Vehicle Code section 27315 applies only to persons 16 years or older. No case law regarding whether persons under 16 can be found comparatively negligent for failing to wear a seat belt has been found.

Sources and Authority

- Vehicle Code section 27315, the "Motor Vehicle Safety Act," was adopted in 1985.

- Defendants must prove two elements to establish the seat belt defense: "Defendants~~,~~ ... are required to prove two issues of fact: (1) the defendant must show whether in the exercise of ordinary care the plaintiff should have used the seat belt which was available to him. ... (2) The defendant must show what the consequence to the plaintiff would have been had seat belts been used." (*Franklin v. Gibson* (1982) 138 Cal.App.3d 340, 343 [188 Cal.Rptr. 23].)

- The second requirement must almost always be established by expert testimony, and it appears to overlap somewhat with the issue of causation: "Upon a retrial the court or jury will determine whether in the exercise of ordinary care [plaintiff] should have used the seat belt; expert testimony will be required to prove whether [plaintiff] would have been injured, and, if so, the extent of the injuries he would have sustained if he had been using the seat belt ... ." (*Truman v. Vargas* (1969) 275 Cal.App.2d 976, 983 [80 Cal.Rptr. 373].)

- In *Housley v. Godinez* (1992) 4 Cal.App.4th 737, 747 [6 Cal.Rptr.2d 111], the court approved of the

following jury instruction, which was read in addition to section 27315: "The Defendants have raised the seat belt defense in this case. First, you must decide whether in the exercise of ordinary care, the Plaintiff should have used seat belts, if available to him. Second you must determine with expert testimony the nature of injuries and damages Plaintiff would have sustained if he had used seat belts."

- In *Housley, supra,* 4 Cal.App.4th at page 747, the court held that the jury may be instructed "on the existence of the seat belt statute [section 27315] in appropriate cases, while allowing the jury to decide what weight, if any, to give the statute in determining the standard of reasonable care."

- Subdivision (j) provides that violations of section 27315 "shall not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation." The *Housley* court observed that "nothing in the statute prohibits a jury from knowing and considering its very existence when determining the reasonableness of driving without a seat belt." (*Housley, supra,* 4 Cal.App.4th at p. 744.)

- Failure to wear a seat belt is not considered a supervening cause. (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 28 [22 Cal.Rptr.2d 106].)

- "Expert testimony is not always required to prove that failure to use a seat belt may cause at least some, if not all, of plaintiff's claimed injuries. [¶] Depending on the facts of the case, expert testimony may be necessary for the jury to distinguish the injuries that [plaintiff] unavoidably sustained in the collision from the injuries he could have avoided if he had worn a seat belt." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 458–459 [19 Cal.Rptr.3d 865], internal citation omitted.)

- "The seat belt defense does not depend on a Vehicle Code violation nor is it eviscerated by a Vehicle Code exemption from the requirement to wear seat belts." (*Lara, supra,* 123 Cal.App.4th at p. 461 fn. 3.)

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.71

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles,* § 20.05[2] (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action,* § 82.10 (Matthew Bender)

2 California Civil Practice: Torts (Thomson West) § 25:26

1003. Unsafe ~~Concealed~~ Conditions

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

[*Name of defendant***]** **was negligent in the use or maintenance of the property** ~~**is responsible for an injury caused by an unsafe concealed condition**~~ **if:**

~~**1. [***Name of defendant***] [owned/leased/occupied/controlled] the property;**~~

~~**2**~~**1**. ~~**The**~~ **A condition on the property created an unreasonable risk of harm;**

~~**3**~~**2. [***Name of defendant***] knew or, through the exercise of reasonable care, should have known about it; and**

~~**4**~~**3. [***Name of defendant***] failed to repair the condition, protect against harm from the condition, or give adequate warning of the condition.**

~~**[***Name of defendant***] must make reasonable inspections of the property to discover unsafe concealed conditions.**~~

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

New September 2003; Revised April 2007, [month] 2008

Directions for Use

Read this instruction with CACI No. 1000, *Essential Factual Elements*, in a premises liability case involving an unsafe condition on property. ~~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*~~. If there is an issue as to the owner's constructive knowledge of the condition (element 2), also give CACI No. 1011, *Constructive Notice Regarding Dangerous Conditions on Property*.

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 Bros.* (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 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].)

- " '[T]he proprietor of a store who knows of, or by the exercise of reasonable care could discover, an artificial condition upon his premises which he should foresee exposes his business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm. …' [Plaintiff] was entitled to have the jury so instructed." (*Williams v. Carl Karcher Enters., Inc.* (1986) 182 Cal.App.3d 479, 488 [227 Cal.Rptr. 465], internal citations omitted, disapproved on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 574, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability. Although the owner's lack of knowledge is not a defense, '[t]o impose liability for injuries suffered by an invitee due to [a] defective condition of the premises, the owner or occupier "must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises.…" ' "(*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206 [114 Cal.Rptr.2d 470, 36 P.3d 11], internal citation omitted.)

- "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him. Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it." (*Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806 [117 P.2d 841], internal citation omitted.)

- "[U]nder current California law, a store owner's choice of a particular 'mode of operation' does not eliminate a slip-and-fall plaintiff's burden of proving the owner had knowledge of the dangerous condition that caused the accident. Moreover, it would not be prudent to hold otherwise. Without this knowledge requirement, certain store owners would essentially incur strict liability for slip-and-fall injuries, i.e., they would be insurers of the safety of their patrons. For example, whether the french fry was dropped 10 seconds or 10 hours before the accident would be of no consequence to the liability finding. However, this is not to say that a store owner's business choices do not impact the negligence analysis. If the store owner's practices create a higher risk that dangerous conditions will exist,

ordinary care will require a corresponding increase in precautions." (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 479 [3 Cal.Rptr. 3d 813].)

- ~~"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

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*, § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 et seq. (Matthew Bender)

California Civil Practice: Torts (Thomson West) § 16:4

1011. Constructive Notice Regarding Dangerous Conditions on Property

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In determining whether [*name of defendant***] should have known of the condition that created the risk of harm, you must decide whether, under all the circumstances, the condition was of such a nature and existed long enough ~~so~~ that [***name of defendant***] had sufficient time to discover it and, using reasonable care:**

1. Repair the condition; or

2. Protect against harm from the condition; or

3. Adequately warn of the condition.

~~it would have been discovered and corrected by an owner using reasonable care~~.

[[*Name of defendant***] must make reasonable inspections of the property to discover unsafe conditions. If an inspection was not made within a reasonable time before the accident, this may show that the condition existed long enough so that [a store/[a/an] [***insert other commercial enterprise***]] owner using reasonable care would have discovered it.]**

New September 2003; Revised February 2007, [month] 2008

Directions for Use

This instruction is intended for use if there is an issue concerning the ~~presence or absence of an~~ owner's constructive knowledge of a dangerous condition. It should be given with CACI No. 1003, *Unsafe Conditions.*

The bracketed second paragraph of this instruction is based on *Ortega v. Kmart* (2001) 26 Cal.4th 1200 [114 Cal.Rptr.2d 470, 36 P.3d 11]. *Ortega* involved a store. The court should determine whether the bracketed portion of this instruction applies to other types of property.

~~For instructions for use in the case of injury to an employee of an independent contractor working on the premises, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*, and CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control or Defective Equipment*.~~

Sources and Authority

- "It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega, supra*, 26 Cal.4th at p. 1205, internal citation omitted.)

- "We conclude that a plaintiff may prove a dangerous condition existed for an unreasonable

time with circumstantial evidence, and that ... 'evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it.' " (*Ortega, supra*, 26 Cal.4th at p. 1210, internal citation omitted.)

- "A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is commensurate with the risks involved." (*Ortega, supra*, 26 Cal.4th at p. 1205, internal citation omitted.)

- "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega, supra*, 26 Cal.4th at p. 1206, internal citations omitted.)

- "Courts have also held that where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Ortega, supra*, 26 Cal.4th at p. 1206, internal citations omitted.)

- "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence." (*Ortega, supra*, 26 Cal.4th at p. 1206, internal citations omitted.)

- "We emphasize that allowing the inference does not change the rule that if a store owner has taken care in the discharge of its duty, by inspecting its premises in a reasonable manner, then no breach will be found even if a plaintiff does suffer injury." (*Ortega, supra*, 26 Cal.4th at p. 1211, internal citations omitted.)

- "We conclude that plaintiffs still have the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the defendant had constructive notice of the hazardous condition. We also conclude, however, that plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard. In other words, if the plaintiffs can show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it. It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care." (*Ortega, supra*, at pp. 1212–1213, internal citations omitted.)

Secondary Sources

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

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

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

17 California Points and Authorities, Ch. 178, § 178.23 et seq. *Premises Liability* (Matthew Bender)

1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

[*Name of plaintiff***] claims that [he/she] was harmed by a dangerous condition of [***name of defendant***]'s property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owned [or controlled] the property;**

2. **That the property was in a dangerous condition at the time of the incident;**

3. **That the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred;**

4. **[That negligent or wrongful conduct of [***name of defendant***]'s employee acting within the scope of his or her employment created the dangerous condition;]**

   [or]

   [That [*name of defendant***] had notice of the dangerous condition for a long enough time to have protected against it;]**

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

6. **That the dangerous condition was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised [month] 2008

Directions for Use

The concepts of notice, ~~is addressed in subsequent instructions. The concepts of~~ "dangerous condition," "protect against," and "property of a public entity" are addressed in subsequent instructions.

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

Sources and Authority

- Government Code section 835 provides:

  > Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

- Government Code section 835.2(a) provides: "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."

- Government Code section 835.2(b) provides, in part: "A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

- Government Code section 830 provides:

  As used in this chapter:

  (a) "Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

  (b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.

  (c) "Property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.

- "[A] public entity is not liable for injuries except as provided by statute [Gov. Code, § 815] and [Government Code] section 835 sets out the exclusive conditions under which a public entity is liable for injuries caused by a dangerous condition of public property." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829 [15 Cal.Rptr.2d 679, 843 P.2d 624].)

- The Supreme Court has observed: "Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought

under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees." (*Brown, supra,* 4 Cal.4th at p. 836.)

- In section 835(a), "the term 'created' must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity's part." (*Brown, supra,* 4 Cal.4th at p. 836.) The res ipsa loquitur presumption does not satisfy section 835(a). (*Ibid.*)

- "Focusing on the language in *Pritchard, supra,* 178 Cal. App. 2d at page 256, stating that where the public entity 'has itself created the dangerous condition it is per se culpable,' plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists whenever the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a '*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.' (Italics added.) Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.2d 654], original italics, internal citation omitted.)

- The plaintiff need not prove both that the public entity was negligent in creating the condition and that it had notice of the condition; either negligence or notice is sufficient. (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843].)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)

- "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition-absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855], internal citations omitted.)

- "The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.' " (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 [75 Cal.Rptr.3d 168].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 249–285

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ~~th~~ ed.) §§ 12.9-12.55

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (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?]
____ Yes ____ No

[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 [either option for] question 4 is yes, then answer question 5. If you answered no [to both options], 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]**~~

~~**[Was [*name of defendant*] acting reasonably in failing to take sufficient steps to protect against the risk of injury?]**~~
~~**____ Yes ____ No**~~

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

~~6~~5. **Was the dangerous condition a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

6. [When you consider the likelihood and seriousness of potential injury, compared with the practicality and cost of either (a) taking alternative action that would not have created the risk of injury, or (b) protecting against the risk of injury, was [*name of defendant***]'s [act/***specify failure to act***] that created the dangerous condition reasonable under the circumstances?]**
____ Yes ____ No

[or]

[When you consider the likelihood and seriousness of potential injury, compared with (a) how much time and opportunity [*name of defendant***] had to take action, and (b) the practicality and cost of protecting against the risk of injury, was [***name of defendant***]'s failure to take sufficient steps to protect against the risk of injury created by the dangerous condition reasonable under the circumstances?]**
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

[After 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, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. 1100, *Essential Factual Elements*, CACI No. 1111, *Affirmative Defense—Condition Created by Reasonable Act or Omission*, and CACI No. 1112, *Affirmative Defense—Reasonable Act or Omission to Correct.*

For questions 4 and ~~5~~6, choose the first bracketed options if liability is alleged ~~due to~~because of 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). Both options may be given if the plaintiff is proceeding under both theories of liability.

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

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

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.

1244. Affirmative Defense—Sophisticated User

[*Name of defendant***] claims that [he/she/it] is not responsible for any harm to [***name of plaintiff***] based on a failure to warn because [***name of plaintiff***] is a sophisticated user of the [***product***]. To succeed on this defense, [***name of defendant***] must prove that, at the time of the injury, [***name of plaintiff***], because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known of the [***product***]'s risk, harm, or danger.**

New [Month] 2008

Directions for Use

Give this instruction as a defense to CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*, or 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*.

Sources and Authority

- "A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71 [74 Cal.Rptr.3d 108, 179 P.3d 905.)

- "The sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about the products' potential hazards. The defense is considered an exception to the manufacturer's general duty to warn consumers, and therefore, in most jurisdictions, if successfully argued, acts as an affirmative defense to negate the manufacturer's duty to warn." (*Johnson, supra,* 43 Cal.4th at p. 65, internal citation omitted.)

- "Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' This is because the user's knowledge of the dangers is the equivalent of prior notice." (*Johnson, supra,* 43 Cal.4th at p. 65, internal citations omitted.)

- "[T]he defense applies equally to strict liability and negligent failure to warn cases. The duty to warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge." (*Johnson, supra,* 43 Cal.4th at pp. 65–66, internal citations omitted.)

- "The relevant time for determining user sophistication for purposes of this exception to a manufacturer's duty to warn is when the sophisticated user is injured and knew or should have

known of the risk." (*Johnson, supra*, 43 Cal.4th at p. 73.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467, 1537, 1541-1542

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability* (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.246 (Matthew Bender)

1306. Sexual Battery—Essential Factual Elements

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

1. **[(a) That [***name of defendant***] intended to cause a harmful [or offensive] contact with [***name of plaintiff***]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

   [OR]

   [(b) That [*name of defendant***] intended to cause a harmful [or offensive] contact with [***name of plaintiff***] by use of [***name of defendant***]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

   [OR]

   [(c) That [*name of defendant***] caused an imminent fear of a harmful [or offensive] contact with [[***name of plaintiff***]'s [sexual organ/anus/groin/buttocks/ [or] breast]/ [or] [***name of plaintiff***] by use of [***name of defendant***]'s [sexual organ/anus/groin/buttocks/ [or] breast]], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

AND

2. **That [***name of plaintiff***] did not consent to the touching; and**

3. **That [***name of plaintiff***] was harmed [or offended] by [***name of defendant***]'s conduct.**

["Offensive contact" means contact that offends a reasonable sense of personal dignity.]

New [Month] 2008

Directions for Use

Omit any of the options for element 1 that are not supported by the evidence. If more than one are at issue, include the word "OR" between them.

Give the bracketed words "or offensive" in element 1 and "or offended" in element 3 and include the optional last sentence if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of "intent," see CACI No. 1320, *Intent.*

Sources and Authority

- Civil Code section 1708.5 provides:

  (a) A person commits a sexual battery who does any of the following:

  (1) Acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results.

  (2) Acts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results.

  (3) Acts to cause an imminent apprehension of the conduct described in paragraph (1) or (2), and a sexually offensive contact with that person directly or indirectly results.

  (b) A person who commits a sexual battery upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages.

  (c) The court in an action pursuant to this section may award equitable relief, including, but not limited to, an injunction, costs, and any other relief the court deems proper.

  (d) For the purposes of this section "intimate part" means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female.

  (e) The rights and remedies provided in this section are in addition to any other rights and remedies provided by law.

  (f) For purposes of this section "offensive contact" means contact that offends a reasonable sense of personal dignity.

- Civil Code section 3515 provides: “He who consents to an act is not wronged by it.”

- “A cause of action for sexual battery under Civil Code section 1708.5 requires the batterer intend to cause a ‘harmful or offensive’ contact and the batteree suffer a ‘sexually offensive contact.’ Moreover, the section is interpreted to require that the batteree did not consent to the contact.” (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225 [44 Cal.Rptr.2d 197], internal citation omitted.)

- “The element of lack of consent to the particular contact is an essential element of battery.” (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)

- “As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the 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, 609–610 [278 Cal.Rptr. 900].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 381–416

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.27, 58.55 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.27 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 12:7–12:9, 12:36-39

1321. Transferred Intent

If the [*name of defendant*] intended to commit a battery or assault on one person, but by mistake or accident committed the act on [*name of plaintiff*], then the battery or assault is the same as if the intended person had been the victim.

New [Month] 2008

Directions for Use

Use this instruction with CACI No. 1300, *Battery—Essential Factual Elements*, or 1301, *Assault—Essential Factual Elements*, if it is alleged that the defendant intended to batter or assault one person, and mistakenly or accidentally battered or assaulted the plaintiff.

Sources and Authority

- "While throwing rocks at trees or into the street ordinarily is an innocent and lawful pastime, that same act when directed at another person is wrongful. The evidence at bar … warrants an inference that [defendant] threw at [third party] and inadvertently struck [plaintiff]. In such circumstances the doctrine of "transferred intent" renders him liable to [plaintiff]. … 'If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act.' The rule is not confined to criminal cases, as argued by respondents." (*Singer v. Marx* (1956) 144 Cal.App.2d 637, 642 [301 P.2d 440], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 384

5 Levy et al., California Torts, Ch. 41, *Assault and Battery* (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.13, 58.15 (Matthew Bender)

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

1 California Civil Practice: Torts (Thomson West) §§ 12:8

1500. Former Criminal Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

New September 2003; Revised April 2008, [month] 2008

Directions for Use

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

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

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

Element 4 expresses the malice requirement.

Sources and Authority

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

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

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

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

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

- Restatement Second of Torts, section 673 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- In *Bertero* [*Bertero v. National General Corp.* (1974) 13 Cal.3d 43 [118 Cal.Rptr. 184, 529 P.2d 608]], the court approved a jury instruction stating that liability can be found if the prior action asserts a legal theory that is brought without probable cause, even if alternate theories are brought with probable cause. (*Bertero*, *supra*, 13 Cal.3d at pp. 55–57.) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)

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

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

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact."

(*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

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

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

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

Secondary Sources

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

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

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

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

1501. Wrongful Use of Civil Proceedings

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

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

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

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [***name of plaintiff***];]**

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

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

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

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

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

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

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether [***name of defendant***] had reasonable grounds for bringing the earlier lawsuit against [him/her/it]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

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

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

New September 2003; Revised April 2008, [month] 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the

proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, ~~it~~ the jury may be required ~~the jury~~ to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3~~give CACI No. 1503, *Reasonable Grounds*~~.

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

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

Element 4 expresses the malice requirement.

Sources and Authority

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

- Restatement Second of Torts~~,~~ section 674 provides:

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

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

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

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

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

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

against him;

(b) the proceedings were terminated in his favor;

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

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

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

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

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

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

(a) a civil proceeding has been initiated;

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

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

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

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

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

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

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

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

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

- Government Code section 821.6 provides: “A public employee is not liable for injury caused by his

instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

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

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

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

- The litigation privilege of Civil Code section 47 does not preclude malicious prosecution actions. (See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524] [litigation privilege "has been interpreted to apply to virtually all torts except malicious prosecution"]; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 [266 Cal.Rptr. 638, 786 P.2d 365] ["only exception ... has been for malicious prosecution actions"]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 [6 Cal.Rptr.2d 781] ["privilege applies only to tort causes of action, and not to the tort of malicious prosecution"].)

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

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

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

- ~~In *Bertero*, the court approved a jury instruction stating that liability can be found if the prior action~~

~~asserts a legal theory that is brought without probable cause, even if alternate theories are brought with probable cause. (*Bertero, supra*, 13 Cal.3d at pp. 55–57.) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)~~

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

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

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

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

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

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

- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184-185 [156 Cal.Rptr. 745], internal citations omitted, disapproved on other grounds in *Sheldon Appel Co. supra*, 47 Cal.3d at p. 882.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.*' " (*Weaver, supra,* 95 Cal.App.3d at p. 185, original italics, internal citations omitted.)

- In *Bertero,* the court approved a jury instruction stating that liability can be found if the prior action asserts a legal theory that is brought without probable cause, even if alternate theories are brought

with probable cause. (*Bertero, supra*, 13 Cal.3d at pp. 55–57.) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)

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

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

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

- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' ... If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury." (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

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

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

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

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

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The

plaintiff must plead and prove actual ill will or some improper ulterior motive. It may range anywhere from open hostility to indifference." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

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

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

- ~~The litigation privilege of Civil Code section 47 does not preclude malicious prosecution actions. See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524] (litigation privilege "has been interpreted to apply to virtually all torts except malicious prosecution"); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 [266 Cal.Rptr. 638, 786 P.2d 365] ("only exception ... has been for malicious prosecution actions"); *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 [6 Cal.Rptr.2d 781] ("privilege applies only to tort causes of action, and not to the tort of malicious prosecution").~~

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 471, 474, 477–484, 486–512

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

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

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

1502. Wrongful Use of Administrative Proceedings

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

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

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

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

[4. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the proceeding against [***name of plaintiff***];]**

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

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether the proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

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

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

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 4 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were reasonable grounds for bringing the proceeding against [***name of plaintiff***]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

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

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

New September 2003; Revised April 2008, [month] 2008

Directions for Use

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

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

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

Element 5 expresses the malice requirement.

Sources and Authority

- Restatement Second of Torts, section 680 provides:

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

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

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

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

- " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and

cannot be held liable in an action for malicious prosecution.' " (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 673 [151 P.2d 308], internal citation omitted.)

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

1503. Reasonable Grounds

I will decide whether [*name of defendant***] had reasonable grounds for [causing [***name of plaintiff***] to be arrested or prosecuted] [bringing the [lawsuit/administrative proceeding] against [***name of plaintiff***]]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes regarding the state of defendant's factual knowledge when the prior action was instituted***.]**

New September 2003

Sources and Authority

- "A plaintiff has probable cause to bring a civil suit if his claim is legally tenable. This question is addressed objectively, without regard to the mental state of plaintiff or his attorney. The court determines as a question of law whether there was probable cause to bring the maliciously prosecuted suit. Probable cause is present unless any reasonable attorney would agree that the action is totally and completely without merit." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 [90 Cal.Rptr.2d 408], internal citations omitted.)

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

- "The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question. It is then for the court to decide whether the state of defendant's knowledge constitutes an absence of probable cause." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1154 [85 Cal.Rptr.2d 726], internal citations omitted.)

- "'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' ... If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury." (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

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

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable

cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief." (*Sheldon Appel Co.*, *supra*, 47 Cal.3d at p. 881, internal citation omitted.)

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

- "Probable cause may be present even where a suit lacks merit. ... Suits which all reasonable lawyers agree totally lack merit-that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts*, *supra*, 76 Cal.App.4th at p. 382.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 480–484

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.05 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.16 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.45, 147.51 (Matthew Bender)

1504. Favorable Termination

I will decide if the earlier [prosecution/lawsuit/proceeding] ended in [*name of plaintiff*]'s favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

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

New September 2003

Sources and Authority

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

- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184-185 [156 Cal.Rptr. 745], internal citations omitted, disapproved of on other grounds by *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 882 [254 Cal.Rptr. 336, 765 P.2d 498].)

- " 'Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.' " (*Weaver*, *supra*, 95 Cal.App.3d at p. 185, internal citations omitted.)

- "Favorable termination can occur short of a trial on the merits, but it must bear on the merits. Thus, a plaintiff does not establish favorable termination merely by showing that he or she prevailed in an underlying action." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1149 [85 Cal.Rptr.2d 726], internal citation omitted.)

- "[T]he termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky*, *supra*, 64 Cal.App.4th at p. 128, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 477–479, 498

4 California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.04 (Matthew Bender)

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

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

~~Bender)~~

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

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

Liability

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

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

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

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

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

Actual Damages

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

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

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

c. **Harm to [***name of plaintiff***]'s reputation; or**

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

Assumed Damages

If [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings [~~*name of plaintiff*~~] ~~has failed to prove actual damages for harm to reputation or shame, mortification, or hurt feelings~~ but proves by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or that [he/she] had serious doubts about the truth of the statement(s), then the law assumes that [***name of plaintiff***]'s reputation has been harmed and that [he/she] has suffered shame, mortification, or hurt feelings. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this**

assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

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

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

New September 2003; Revised April 2008, [month] 2008

Directions for Use

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

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

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

Sources and Authority

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Secondary Sources

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

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

30 California Forms of Pleading and Practice, Ch. 340, § 340.18 *Libel and Slander* (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.87 et seq. (Matthew Bender)

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

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

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

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

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

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

ACTUAL DAMAGES

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

____ Yes ____ No

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

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

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

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

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

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

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

ASSUMED DAMAGES

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

$_____

PUNITIVE DAMAGES

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

____ Yes ____ No

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

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

$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, April, 2008, [month] 2008

Directions for Use

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

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

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

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

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

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

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

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

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

4. Was the statement false?
____ Yes ____ No

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

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

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

ACTUAL DAMAGES

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

____ Yes ____ No

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

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

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

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

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

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

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

ASSUMED DAMAGES

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

____ Yes ____ No

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

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

$_____

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

PUNITIVE DAMAGES

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

____ Yes ____ No

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

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

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

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

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, April 2008, [month] 2008

Directions for Use

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

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

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

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

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

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

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

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

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

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

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

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

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

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

ACTUAL DAMAGES

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

____ Yes ____ No

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

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

[a.	**Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation?**	**$_____]**
[b.	**Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements?**	**$_____]**
[c.	**Harm to [*name of plaintiff*]'s reputation?**	**$_____]**
[d.	**Shame, mortification, or hurt feelings?**	**$_____]**

TOTAL $ _____

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

ASSUMED DAMAGES

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

$_____

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

PUNITIVE DAMAGES

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

____ Yes ____ No

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

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

$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, April 2008, [month] 2008

Directions for Use

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

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

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

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

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

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

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

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

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.

2600. Violation of CFRA Rights—Essential Factual Elements

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

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

2. **That [***name of plaintiff***] [requested/took] leave [***insert one of the following:***]**

   [for the birth of [*name of plaintiff***]'s child or bonding with the child;]**

   [for the placement of a child with [*name of plaintiff***] for adoption or foster care;]**

   [to care for [*name of plaintiff***]'s [child/parent/spouse] who ~~has~~ had a serious health condition;]**

   [for [*name of plaintiff***]'s own serious health condition that ~~makes~~ made [him/her] unable to perform the functions of [his/her] job with [***name of defendant***];]**

3. **That [***name of plaintiff***] provided reasonable notice to [***name of defendant***] of [his/her] need for [family care/medical] leave, including its expected timing and length. [If [***name of defendant***] notified [his/her/its] employees that 30 days' advance notice was required before the leave was to begin, then [***name of plaintiff***] must show that [he/she] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she] gave notice as soon as possible];**

4. **That [***name of defendant***] [refused to grant [***name of plaintiff***]'s request for [family care/medical] leave] [refused to return [***name of plaintiff***] to the same or a comparable job when [his/her] [family care/medical] leave ended] [***other violation of CFRA rights***];**

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

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

New September 2003; Revised [month] 2008

Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs., tit. 2, § 7297.4(a).)

The last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term pursuant to Government Code section 12945.2(c)(8).

Sources and Authority

- Government Code section 12945.2(a) provides, in part, that "it shall be an unlawful employment practice for any employer ... to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave ... shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."

- Government Code section 12945.2(*l*) provides:

  > It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:
  >
  > (1) An individual's exercise of the right to family care and medical leave. ...
  >
  > (2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

- Government Code section 12945.2(c)(3) provides:

  > "Family care and medical leave" means any of the following:
  >
  > (A) Leave for reason of the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee.
  >
  > (B) Leave to care for a parent or a spouse who has a serious health condition.
  >
  > (C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions.

- Government Code section 12945.2(c)(8) provides:

  "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either of the following:

  (A) Inpatient care in a hospital, hospice, or residential health care facility.

  (B) Continuing treatment or continuing supervision by a health care provider.

- Government Code section 12945.2(h) provides, in part: "If the employee's need for a leave ... is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave."

- Government Code section 12945.2(i) provides, in part: "If the employee's need for leave ... is foreseeable due to a planned medical treatment or supervision, the employee shall make a reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of the employer, subject to the approval of the health care provider of the individual requiring the treatment or supervision."

- "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision ... .' " (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)

- "[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally' … ." (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.2d 321].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 942–944

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4:26, 12:32, 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300

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

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.25[2], 8.30[1]–[2], 8.31[2], 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][a]–[b] (Matthew Bender)

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

TABLE A

ELDER ABUSE: CAUSES OF ACTION, REMEDIES, AND EMPLOYER LIABILITY

Causes of Action	Individual Defendant	Employer Defendant
Financial Abuse	**Traditional Damages:** preponderance	**Traditional Damages:** vicarious liability
	Attorney Fees and Costs: preponderance (Welf. & Inst. Code, § 15657.5(a))	**Attorney Fees and Costs:** Civ. Code, § 3294(b) (Welf. & Inst. Code, § 15657.5(b)(2))
	Predeath Pain and Suffering: CCE:RMOF (Welf. & Inst. Code, § 15657.5(b)(1))	**Predeath Pain and Suffering:** Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, 15657.5(b))
Abduction	**Traditional Damages:** preponderance	**Traditional Damages:** vicarious liability
	Attorney Fees and Costs: CCE (Welf. & Inst. Code, § 15657.05(a))	**Attorney Fees and Costs:** Civ. § Code 3294(b) + individual CCE (Welf. & Inst. Code, § 15657.05(c))
	Predeath Pain and Suffering: CCE (Welf. & Inst. Code, § 15657.05(b))	**Predeath Pain and Suffering:** Civ. Code, § 3294(b) + individual CCE (Welf. & Inst. Code, § 15657.05(c))
Neglect and Physical Abuse	**Traditional Damages:** preponderance	**Traditional Damages:** vicarious liability
	Attorney Fees and Costs: CCE:RMOF (Welf. & Inst. Code, § 15657(a))	**Attorney Fees and Costs:** Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, § 15657(a))
	Predeath Pain and Suffering: CCE:RMOF (Welf. & Inst. Code, § 15657(b))	**Predeath Pain and Suffering:** Civ. Code, § 3294(b) + individual CCE:RMOF (Welf. & Inst. Code, § 15657(b))

KEY:

CCE = Clear and Convincing Evidence

RMOF = Recklessness, Malice, Oppression, or Fraud

Civ. Code, § 3294(b) = Standards for imposing liability on employer under Civil Code section 3294(b).

3100. Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

[*Name of plaintiff***] claims that [[***name of individual defendant***]/ [and] [***name of employer defendant***]] violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [him/her/[***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely to be true than not true:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee][~~*name of defendant*~~] [***insert one of the following:***]**

   [[took/hid/appropriated/ [or] retained] [*name of plaintiff/decedent***]'s property;]**

   [[assisted in [taking/hiding/appropriating/ [or] retaining] [*name of plaintiff/decedent***]'s property;]**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee][~~*name of defendant*~~] [[took/hid/appropriated/ [or] retained]/assisted in [taking/hiding/appropriating/ [or] retaining]] the property [for a wrongful use/[or] with the intent to defraud];**

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

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

[One way [*name of plaintiff***] can prove that [[***name of individual defendant***]/[***name of employer defendant***]'s employee][~~*name of defendant*~~] [[took/hid/appropriated/ [or] retained]/assisted in [taking/hiding/appropriating/ [or] retaining]] the property for a wrongful use is by proving both of the following:**

1. **That [***name of plaintiff/decedent***] had the right to have the property [transferred/made readily available] to [him/her]/[[his/her] [conservator/trustee/representative/attorney-in-fact]]; and**

2. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee][~~*name of defendant*~~] knew or should have known that [***name of plaintiff/decedent***] had this right.**

[[*Name of individual defendant***]/[***Name of employer defendant***]'s employee][~~*Name of defendant*~~] should have known that [***name of plaintiff/decedent***] had this right if, on the basis of information received by [[***name of individual defendant***]/[***name of employer defendant***]'s employee[s]] [[~~*name of defendant*~~]/[~~*name of defendant*~~]][['s/s'] authorized third party], it would have been obvious to a**

reasonable person that [*name of plaintiff/decedent***] had the right to have the property [transferred/made readily available] to [him/her]/[[his/her] [conservator/trustee/representative/attorney-in-fact]].**

New September 2003; Revised June 2005, [month] 2008

Directions for Use

This instruction ~~is intended for~~may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of ~~the~~ elder financial abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent's pain and suffering should also use~~see~~ CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering.*

If the individual responsible for the financial abuse is a defendant in the case, use [*name of individual defendant*] throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies (attorney fees and costs and damages for the decedent's pain and suffering) against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* ~~*Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants*, or CACI No. 3102, *Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought-Employer Defendant*. The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.~~

To recover ~~If the plaintiff is also seeking tort~~ damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

Add the bracketed portion at the end of the instruction if the plaintiff is seeking to prove wrongful use by showing that defendant acted in bad faith as defined by the statute. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30(b).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:

  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or

other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

  (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.30 provides:

  (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:

    (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

    (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

  (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.

    (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.

    (2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).

(c) For purposes of this section, "representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

- Welfare and Institutions Code section 15657.5 provides:

(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:

(1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.

(2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

(c) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.

~~•Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."~~

~~•Welfare and Institutions Code section 15610.23 provides:~~

~~(a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or~~

~~whose physical or mental abilities have diminished because of age.~~

~~(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a '*physician* and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30-6.34

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[4] (Matthew Bender)

3101. Financial Abuse—Decedent's Pain and Suffering~~Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants~~ (Welf. & Inst. Code, §§ 15657.5, ~~15610.30~~)

[*Name of plaintiff***] also seeks t~~T~~o recover ~~enhanced remedies, including~~ damages for [***name of decedent***]'s pain and suffering ~~from the financial abuse~~. To recover these damages, [***name of plaintiff***] must also prove by clear and convincing evidence that [***name of individual defendant***/[*name of employer defendant*]'s employee~~*employee*~~] acted with [recklessness/oppression/fraud/ [or] malice] in committing the financial abuse.**

New September 2003; Revised June 2005, [month] 2008

Directions for Use

Give this instruction along with CACI No. 3100, *Financial Abuse—Essential Factual Elements*, if the plaintiff seeks~~This instruction is intended for plaintiffs who are seeking~~ survival damages for pain and suffering in addition to~~. Plaintiffs who are seeking~~ conventional tort damages and attorney fees and costs. (See Welf. & Inst. Code, § 15657.5.) Although one would not normally expect that financial abuse alone would lead to a wrongful death action, the Legislature has provided this remedy should the situation arise.~~ only, should use CACI No. 3100, *Financial Abuse—Essential Factual Elements.*~~

~~The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.~~

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies (attorney fees and costs and damages for the decedent's pain and suffering) against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

I~~f the plaintiff is seeking damages against the employer, use CACI No. 3102, *Financial Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*~~The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

~~•Welfare and Institutions Code section 15610.07 provides:~~

~~"Abuse of an elder or a dependent adult" means either of the followi~~

~~(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.~~

~~(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.~~

- Welfare and Institutions Code section 15657.5 provides:

(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:

(1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.

(2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

(c) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.

~~•Welfare and Institutions Code section 15610.30 provides:~~

~~(a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:~~

~~(1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.~~

~~(2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.~~

~~(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.~~

~~(1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.~~

~~(2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).~~

~~(c) For purposes of this section, "representative" means a person or entity that is either of the following:~~

~~(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.~~

~~(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.~~

~~•Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."~~

~~•Welfare and Institutions Code section 15610.23 provides:~~

~~(a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.~~

~~(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur.

Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31-32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30-6.34, 6.45-6.47

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, §~~§ 5.33[4], 5.38~~ 5.35 (Matthew Bender)

3102A. ~~Financial Abuse—Essential Factual Elements—~~Employer Liability for Enhanced Remedies ~~Sought—~~Both Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15657.5, 15657.05; Civil Code, § 3294(b)~~15610.30~~)

[*Name of plaintiff***] also claims that [***name of ~~defendant~~ employer defendant***] is responsible for [attorney fees and costs/ [and] [***name of decedent***]'s pain and suffering before death][~~***insert enhanced remedies***~~]. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence [***insert one or more of the following four options:***]**

1. **[That [***name of ~~employee~~individual defendant***] was an officer, a director, or a managing agent of [***name of ~~defendant~~ employer defendant***] acting on behalf of [***name of defendant~~in [a corporate/an employment] capacity~~***];] [or]**

2. **[That an officer, a director, or a managing agent of [***name of ~~defendant~~ employer defendant***] had advance knowledge of the unfitness of [***name of individual defendant~~employee~~***] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of ~~defendant~~ employer defendant***] authorized [***name of individual defendant~~employee~~***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of ~~defendant~~ employer defendant***] knew of [***name of individual defendant~~employee~~***]'s wrongful conduct and adopted or approved the conduct after it occurred.~~;~~] ~~and~~**

   ~~That [*name of employee***] acted with [recklessness/malice/oppression/fraud] in committing the abuse.~~**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

Derived from former CACI No. 3102 [month] 2008
~~New September 2003; Revised June 2005, December 2005~~

Directions for Use

This instruction should be given with CACI No. 3101, 3104, 3107, or 3110 if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is also a defendant. (See Welf. & Inst. Code, §§ 15657(c), 15657.5(b)(2), 15657.05.) If the employer is the only defendant, give CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

~~This instruction is intended for plaintiffs who are seeking survival damages for pain and suffering and/or other enhanced remedies, including attorney fees and costs, against an employer. Plaintiffs who are seeking conventional tort damages should use CACI No. 3100, *Financial Abuse—Essential Factual Elements.*~~ The instructions in this series are not intended to cover every circumstance in which a plaintiff ~~can~~ may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15657 provides:

  Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

  (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

  (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

  (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

~~• Welfare and Institutions Code section 15610.07 provides:~~

~~"Abuse of an elder or a dependent adult" means either of the following:~~

~~(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.~~

~~(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.~~

- Welfare and Institutions Code, section 15657.5 provides:

  (a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to,

reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:

(1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.

(2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

(c) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.

- Welfare and Institutions Code section 15657.05 provides:

Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

(a)

(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted

under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.30 provides:

(a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.

(1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.

(2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).

(c) For purposes of this section, "representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

(a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including,

~~but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.~~

~~(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney, supra,* 20 Cal.4th at pp. 31-32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ ~~6.23, 6.30-6.34,~~ 6.41-6.44~~, 6.48-6.52~~

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.3~~3[4]~~5 (Matthew Bender)

3102B. Employer Liability for Enhanced Remedies—Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15657.5, 15657.05; Civ. Code, § 3294(b))

[*Name of plaintiff***] also claims that [***name of defendant***] is responsible for [attorney fees and costs/ [and] [***name of decedent***]'s pain and suffering before death]. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence [***insert one or more of the following four options:***]**

1. **[That the employee who committed the acts was an officer, a director, or a managing agent of [***name of defendant***] acting on behalf of [***name of defendant***]]; [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of the employee who committed the acts and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized the conduct of the employee who committed the acts;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of the wrongful conduct of the employee who committed the acts and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

Derived from former CACI No. 3102 [month] 2008

Directions for Use

This instruction should be given with CACI No. 3101, 3104, 3107, or 3110 if the plaintiff is seeking the enhanced remedies of attorney fees and costs and/or damages for a decedent's pain and suffering against an employer and the employee is not also a defendant. (See Welf. & Inst. Code, §§ 15657(c), 15657.5(b)(2), 15677.05.) If the employer is also a defendant, give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*.

Sources and Authority

- Welfare and Institutions Code section 15657 provides:

  > Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the

following shall apply, in addition to all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code, section 15657.5 provides:

(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), and all other remedies otherwise provided by law, the following shall apply:

(1) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.

(2) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

(c) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.

- Welfare and Institutions Code section 15657.05 provides:

Where it is proven by clear and convincing evidence that an individual is liable for abduction, as

defined in Section 15610.06, in addition to all other remedies otherwise provided by law:

(a)

(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

(2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

- "[A] finding of ratification of [agent's] actions by [employer], and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and

reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.41-6.44

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3103. Neglect—Essential Factual Elements— (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [[***name of individual defendant***]/ [and] [***name of employer defendant***]][~~*name of defendant*~~] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee][~~*name of defendant*~~] had care or custody of [***name of plaintiff/decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee][~~*name of defendant*~~] failed to use the degree of care that a reasonable person in the same situation would have used ~~by~~ in [***insert one or more of the following:***]**

   [~~failing to~~ assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [~~failing to provide~~ providing medical care for physical and mental health needs;]

   [~~failing to~~ protecting [*name of plaintiff/decedent***] from health and safety hazards;]**

   [~~failing to~~ preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

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

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's][~~*name of defendant*~~]'s conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, June 2006, [month] 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought*, in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the financial abuse is a defendant in the case, use [*name of individual defendant*] throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

~~This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use CACI No. 3104, *Neglect – Essential Factual Elements – Enhanced Remedies Sought – Individual or Individual and Employer Defendants*, or CACI No. 3105, *Neglect – Essential Factual Elements – Enhanced Remedies Sought – Employer Defendant*. The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.~~

This instruction is not intended for cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) (see Welf. & Inst. Code, § 15657.2 and Civ. Code, § 3333.2(c)(2)).

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:
  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
  (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.57 provides:

    (a) "Neglect" means either of the following:

        (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
        (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

    (b) Neglect includes, but is not limited to, all of the following:

        (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
        (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
        (3) Failure to protect from health and safety hazards.
        (4) Failure to prevent malnutrition or dehydration.
        (5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

- Welfare and Institutions Code section 15657.2 provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

~~•Civil Code section 3333.2(c)(2) provides: " 'Professional negligence' means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."~~

~~•Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."~~

~~•Welfare and Institutions Code section 15610.23 provides:~~

~~(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out~~

~~normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.~~

~~(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.~~72~~71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

3104. Neglect—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[*Name of plaintiff***] also seeks to recover [attorney fees and costs/ [and] damages for [***name of decedent***]'s pain and suffering]. To recover these remedies, [***name of plaintiff***] must prove all of the requirements for neglect by clear and convincing evidence, and must also prove by clear and convincing evidence that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in neglecting [***name of plaintiff/decedent***].**

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

New September 2003; Revised June 2005, [month] 2008

Directions for Use

Give this instruction along with CACI No. 3103, *Neglect—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15657 provides:

> Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:
>
> (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not

exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [¶] 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney, supra*, 20 Cal.4th at p. 35, internal citation omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)

- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin*, *supra*, 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3104. Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [***name of individual defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual defendant***] had care or custody of [***name of plaintiff/decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody;**

3. **That [***name of individual defendant***] failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

4. **That [***name of individual defendant***] acted with [recklessness/malice/oppression/ [or] fraud];**

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

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

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence[:***insert one or more of the following:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant employer***] authorized [***name of individual defendant***]'s conduct;] [or]**

4. [That an officer, a director, or a managing agent of [*name of defendant employer*] knew of [*name of individual defendant*]'s wrongful conduct and adopted or approved the conduct after it occurred.]

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.]

New September 2003; Revised December 2005, April 2008

Directions for Use

This instruction is intended for plaintiffs who are seeking a decedent's predeath damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking these damages should use CACI No. 3103, *Neglect—Essential Factual Elements*. The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is seeking damages only against the employer, use CACI No. 3105, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*

Sources and Authority

- Welfare and Institutions Code section 15657 provides:

> Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:
>
> (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
>
> (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted

under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.57 provides:

(a) "Neglect" means either of the following:

(1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

(2) The negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

(2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.

(3) Failure to protect from health and safety hazards.

(4) Failure to prevent malnutrition or dehydration.

(5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

Welfare and Institutions Code section 15657.2 provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- Welfare and Institutions Code section 15610.07 provides:

"Abuse of an elder or a dependent adult" means either of the following:

(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to

avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

> (a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
>
> (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney*, *supra*, 20 Cal.4th at p. 33.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney*, *supra*, 20 Cal.4th at p. 35, internal citation omitted.)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack*, *supra*, 80 Cal.App.4th at p. 974, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1686

California Elder Law Litigation (Cont.Ed.Bar) §§ 2.70–2.72

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

~~1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, §§ 5.33, 5.36 (Matthew Bender)~~

3105. Neglect—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57)

[*Name of plaintiff***] claims [he/she/[***name of decedent***]] was neglected by [***name of defendant***]'s employee(s) in violation of the Elder Abuse and Dependent Adult Civil Protection Act and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of defendant***] had care or custody of [***name of plaintiff/decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody;**

3. **That one or more of [***name of defendant***]'s employees failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

4. **That the employee[s] acted with [recklessness/malice/oppression/fraud/];**

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

6. **That the employee['s][s'] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm; and**

7. **[***Insert one or more of the following:***]**

   [That the employee[s] [was/were] [an] officer[s], [a] director[s], or [a] managing agent[s] of [*name of defendant***] acting in [a corporate/an employment] capacity;] [or]**

   [That an officer, a director, or a managing agent of [*name of defendant***] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others;] [or]**

   [That an officer, a director, or a managing agent of [*name of defendant***] authorized the employee['s][s'] conduct;] [or]**

[That an officer, a director, or a managing agent of [*name of defendant***] knew of the employee['s][s'] wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised December 2005

Directions for Use

This instruction is intended for plaintiffs who are seeking survival damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use CACI No. 3103, *Neglect—Essential Factual Elements*. If the plaintiff is seeking damages against the employer and the employee, use CACI No. 3104, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants*. The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15657 provides:

> Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:
>
> (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
>
> (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.57 provides

(a) "Neglect" means either of the following:

(1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

(2) The negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

(2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.

(3) Failure to protect from health and safety hazards.

(4) Failure to prevent malnutrition or dehydration.

(5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

- Welfare and Institutions Code section 15657.2 provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- Welfare and Institutions Code section 15610.07 provides:

"Abuse of an elder or a dependent adult" means either of the following:

(a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

(b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.27 provides: "'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:

(a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker*

(1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney*, *supra*, 20 Cal.4th at p. 35, internal citation omitted.)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals-health practitioners as well as care custodians-should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack*, *supra*, 80 Cal.App.4th at p. 974, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1686

~~California Elder Law Litigation (Cont.Ed.Bar) §§ 2.70-2.72~~

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

~~1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)~~

3106. Physical Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.63)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was physically abused by [[***name of individual defendant***]/ [and] [***name of employer defendant***]][~~***name of defendant***~~] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee][~~***name of defendant***~~] physically abused [***name of plaintiff/decedent***] by [***insert applicable grounds for abuse***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

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

4. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's][~~***name of defendant***~~]'s conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005. [month] 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder physical abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought*, in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use [*name of individual defendant*] throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

~~This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or~~

~~attorney fees and costs. Plaintiffs who are seeking such damages should use CACI No. 3107, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendant* or CACI No. 3108, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought-Employer Defendant.*~~ The instructions in this series are not intended to cover every circumstance in which a plaintiff ~~can~~ may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:

  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
  (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.63 provides:

  "Physical abuse" means any of the following:

  (a) Assault, as defined in Section 240 of the Penal Code.

  (b) Battery, as defined in Section 242 of the Penal Code.

  (c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.

  (d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.

(e) Sexual assault, that means any of the following:

(1) Sexual battery, as defined in Section 243.4 of the Penal Code.

(2) Rape, as defined in Section 261 of the Penal Code.

(3) Rape in concert, as described in Section 264.1 of the Penal Code.

(4) Spousal rape, as defined in Section 262 of the Penal Code.

(5) Incest, as defined in Section 285 of the Penal Code.

(6) Sodomy, as defined in Section 286 of the Penal Code.

(7) Oral copulation, as defined in Section 288a of the Penal Code.

(8) Sexual penetration, as defined in Section 289 of the Penal Code.

(f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:

(1) For punishment.

(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.

(3) For any purpose not authorized by the physician and surgeon.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a '*physician* and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.69, 2.71

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[2] (Matthew Bender)

3107. Physical Abuse—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657)

[*Name of plaintiff***] also seeks to recover [attorney fees and costs/ [and] damages for [***name of decedent***]'s pain and suffering]. To recover these remedies, [***name of plaintiff***] must prove all of the requirements for the physical abuse by clear and convincing evidence, and must also prove by clear and convincing evidence that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in physically abusing [***name of plaintiff***].**

[If [*name of plaintiff***] proves the above, I will decide the amount of attorney fees and costs.]**

New September 2003; Revised June 2005, [month] 2008

Directions for Use

Give this instruction along with CACI No. 3106, *Physical Abuse—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the physical abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15657 provides:

> Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:
>
> (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the

damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. [¶] 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2, subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

- "[I]f the neglect is 'reckless[],' or done with 'oppression, fraud or malice,' then the action falls within the scope of section 15657 and as such cannot be considered simply 'based on ... professional negligence' within the meaning of section 15657.2. The use of such language in section 15657, and the explicit exclusion of 'professional negligence' in section 15657.2, make clear the Elder Abuse Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious abuse' against elder and dependent adults, while allowing acts of negligence in the rendition of medical services to elder and dependent adults to be governed by laws specifically applicable to such negligence. That only these egregious acts were intended to be sanctioned under section 15657 is further underscored by the fact that the statute requires liability to be proved by a heightened 'clear and convincing evidence' standard." (*Delaney*, *supra*, 20 Cal.4th at p. 35, internal

citation omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)

- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.72

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.35 (Matthew Bender)

3107. Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.63)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was physically abused by [***name of individual defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual defendant***] physically abused [***name of plaintiff/decedent***] by [***insert applicable grounds for abuse***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **That [***name of individual defendant***] acted with [recklessness/malice/oppression/ [or] fraud];**

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

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

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence[:** *insert one or more of the following:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in a [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant employer***] authorized [***name of individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of individual defendant***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.]

New September 2003; Revised December 2005, April 2008

Directions for Use

This instruction is intended for plaintiffs who are seeking a decedent's predeath damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking these damages should use CACI No. 3106, *Physical Abuse—Essential Factual Elements*. The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is only seeking damages against the employer, use CACI No. 3108, *Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant*.

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

> "Abuse of an elder or a dependent adult" means either of the following:
>
> (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
>
> (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15657 provides:

> Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:
>
> (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
>
> (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted

under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.63 provides:

"Physical abuse" means any of the following:

(a) Assault, as defined in Section 240 of the Penal Code.

(b) Battery, as defined in Section 242 of the Penal Code.

(c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.

(d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.

(e) Sexual assault, that means any of the following:

(1) Sexual battery, as defined in Section 243.4 of the Penal Code.

(2) Rape, as defined in Section 261 of the Penal Code.

(3) Rape in concert, as described in Section 264.1 of the Penal Code.

(4) Spousal rape, as defined in Section 262 of the Penal Code.

(5) Incest, as defined in Section 285 of the Penal Code.

(6) Sodomy, as defined in Section 286 of the Penal Code.

(7) Oral copulation, as defined in Section 288a of the Penal Code.

(8) Sexual penetration, as defined in Section 289 of the Penal Code.

(f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:

(1) For punishment.

(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.

(3) For any purpose not authorized by the physician and surgeon.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney*, *supra*, 20 Cal.4th at pp. 31–32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts § 1688

California Elder Law Litigation (Cont.Ed.Bar) §§ 2.69, 2.71

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

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33 (Matthew Bender)

3108. Physical Abuse—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.63)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was physically abused by [***name of defendant***]'s employee(s) in violation of the Elder Abuse and Dependent Adult Civil Protection Act and that [***name of defendant***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That one or more employees of [***name of defendant***] physically abused [***name of plaintiff/decedent***] by [***insert applicable grounds for abuse***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **That the employee[s] acted with [recklessness/malice/oppression/fraud];**

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

5. **That the employee['s][s'] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm; and**

6. **[***Insert one or more of the following:***]**

   [That the employee[s] [was/were] [an] officer[s], [a] director[s], or [a] managing agent[s] of [*name of defendant***] acting in [a corporate/an employment] capacity;] [or]**

   [That an officer, a director, or a managing agent of [*name of defendant***] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others;] [or]**

   [That an officer, a director, or a managing agent of [*name of defendant***] authorized the employee['s][s'] conduct;] [or]**

   [That an officer, a director, or a managing agent of [*name of defendant***] knew of the employee['s][s'] wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised December 2005

Directions for Use

This instruction is intended for plaintiffs who are seeking survival damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use CACI No. 3106, *Physical Abuse—Essential Factual Elements*. The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

If the plaintiff is seeking damages against the employer and the employee, use CACI No. 3107, *Physical Abuse–Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants*.

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:

> "Abuse of an elder or a dependent adult" means either of the following:
>
> (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
>
> (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15657 provides:

> Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:
>
> (a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
>
> (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.63 provides:

> "Physical abuse" means any of the following:

(a) Assault, as defined in Section 240 of the Penal Code.

(b) Battery, as defined in Section 242 of the Penal Code.

(c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.

(d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.

(e) Sexual assault, that means any of the following:

(1) Sexual battery, as defined in Section 243.4 of the Penal Code.

(2) Rape, as defined in Section 261 of the Penal Code.

(3) Rape in concert, as described in Section 264.1 of the Penal Code.

(4) Spousal rape, as defined in Section 262 of the Penal Code.

(5) Incest, as defined in Section 285 of the Penal Code.

(6) Sodomy, as defined in Section 286 of the Penal Code.

(7) Oral copulation, as defined in Section 288a of the Penal Code.

(8) Sexual penetration, as defined in Section 289 of the Penal Code.

(f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:

(1) For punishment.

(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.

(3) For any purpose not authorized by the physician and surgeon.

- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate

employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "In order to obtain the remedies available in section 15657, a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct. The latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.'" (*Delaney*, *supra*, 20 Cal.4th at pp. 31-32, internal citations omitted.)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) §§ 2.69, 2.71

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[2] (Matthew Bender)

3109. Abduction—Essential Factual Elements (Welf. & Inst. Code, § 15610.06)

[*Name of plaintiff***] claims that [[***name of individual defendant***]/ [and] [***name of employer defendant***]][~~***name of defendant***~~] abducted [him/her/[***name of decedent***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee][~~***name of defendant***~~] removed [***name of plaintiff/decedent***] from California and] restrained [him/her/[***name of decedent***]] from returning to California;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **[That [***name of plaintiff/decedent***] did not have the capacity to consent to the [removal and] ~~/~~restraint~~]~~;]**

   [*or***]**

   [That [[*name of plaintiff/decedent*~~*conservator*~~**]'s conservator/the court] did not consent to the [removal and] ~~/~~restraint~~]~~;]**

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

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's][~~***name of defendant***~~]'s ~~ ~~ conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, [month] 2008

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder abduction, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series.

If the individual responsible for the abduction is a defendant in the case, use [*name of individual defendant*] throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3110, *Abduction—Enhanced Remedies Sought*. (See Welf. & Inst. Code, § 15657.05.)

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

~~This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use CACI No. 3110, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants*, or CACI No. 3111, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant.*~~ The instructions in this series are not intended to cover every circumstance under which a plaintiff ~~can~~ may bring a cause of action under the Elder Abuse a~~A~~nd Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15610.06 provides: " 'Abduction' means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court."

- Welfare and Institutions Code section 15610.07 provides:

  "Abuse of an elder or a dependent adult" means either of the following:

  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.23 provides:

  (a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

  (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15657.05 provides:

> Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:
>
> (a)
>
> (1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
>
> (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- "The effect of the 1991 amendment to the elder abuse law was to ... permit a decedent's personal representative or successor to recover pain and suffering damages when plaintiff can prove by clear and convincing evidence recklessness, oppression, fraud, or malice in the commission of elder abuse. Even then, those damages would be subject to the $250,000 cap placed by Civil Code section 3333.2,

subdivision (b) for noneconomic damages against a health care provider. In this limited circumstance, the decedent's right to pain and suffering damages would not die with him or her; the damages would be recoverable by a survivor." (*ARA Living Centers—Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1563 [23 Cal.Rptr.2d 224].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1686–1688
~~California Elder Law Litigation (Cont.Ed.Bar 2003) § 2.68~~

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[5] (Matthew Bender)

3110. Abduction—Enhanced Remedies Sought (Welf. & Inst. Code, § 15657.05)

[*Name of plaintiff*] also seeks to recover [attorney fees and costs/ [and] damages for [*name of decedent*]'s pain and suffering]. To recover these remedies, [*name of plaintiff*] must prove all of the requirements for the abduction by clear and convincing evidence.

[If [*name of plaintiff*] proves the above, I will decide the amount of attorney fees and costs.]

New September 2003; Revised December 2005, April 2008, [month] 2008

Directions for Use

Give this instruction along with CACI No. 3109, *Abduction—Essential Factual Elements*, if the plaintiff seeks the enhanced remedies of attorney fees and costs and/or damages for the decedent's predeath pain and suffering. (See Welf. & Inst. Code, § 15657.05.)

If the plaintiff is seeking enhanced remedies against the individual's employer, also give CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Welfare and Institutions Code section 15657.05 provides:

> Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:
>
> (a)
>
> (1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the

damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

- " 'Liability' under section 15657 includes as an element 'causation,' which, as all elements of liability, must be proved by clear and convincing evidence for purposes of an award of attorney fees." (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 664 [77 Cal.Rptr.3d 743].)

- "We reject plaintiffs' argument that a violation of the Act does not constitute an independent cause of action. Accordingly, plaintiffs' failure to obtain a verdict establishing causation—one element of liability—by clear and convincing evidence, precludes an award of attorney fees." (*Perlin, supra*, 163 Cal.App.4th at p. 666.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts §§ 1686–1688

3110. Abduction—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657.05, 15610.06)

[*Name of plaintiff***] claims that [***name of individual defendant***] abducted [him/her/[***name of decedent***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That [***name of individual defendant***] [removed [***name of plaintiff/decedent***] from California and] restrained [him/her/[***name of decedent***]] from returning to California;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **[That [***name of plaintiff/decedent***] did not have the capacity to consent to the [removal/restraint];]**

   [That [[*name of conservator***]/the court] did not consent to the [removal/restraint];]**

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

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

[[*Name of plaintiff***] also claims that [***name of defendant employer***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove by clear and convincing evidence[:** *insert one or more of the following:***]**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of defendant employer***] acting in [a corporate/an employment] capacity;] [or]**

2. **[That an officer, a director, or a managing agent of [***name of defendant employer***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others;] [or]**

3. **[That an officer, a director, or a managing agent of [***name of defendant employer***] authorized [***name of individual defendant***]'s conduct;] [or]**

4. **[That an officer, a director, or a managing agent of [***name of defendant employer***] knew of [***name of individual defendant***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.]

New September 2003; Revised December 2005, April 2008

Directions for Use

This instruction is intended for plaintiffs who are seeking a decedent's predeath damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking these damages should use CACI No. 3109, *Abduction—Essential Factual Elements*. The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Add the second bracketed portion if the individual defendant is an employee and the plaintiff is also seeking damages against this defendant's employer. If the plaintiff is seeking damages only against the employer, use CACI No. 3111, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant*.

Sources and Authority

- Welfare and Institutions Code section 15657.05 provides:

> Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:
>
> (a)(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
>
> (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.06 provides: " 'Abduction' means the removal from this

state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court."

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971–972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts §§ 1686, 1688

California Elder Law Litigation (Cont.Ed.Bar) §§ 2.68, 2.71–2.72

1 Levy et al., California Torts; Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.50 (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33 (Matthew Bender)

3111. Abduction—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657.05, 15610.06)

[*Name of plaintiff***] claims that [***name of defendant***]'s employee(s) abducted [him/her/[***name of decedent***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act and that [***name of defendant***] is responsible for the harm. To establish this claim, [***name of plaintiff***] must prove all of the following by clear and convincing evidence:**

1. **That one or more of [***name of defendant***]'s employees [removed [***name of plaintiff/decedent***] from California and] restrained [him/her/[***name of decedent***]] from returning to California;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **[That [***name of plaintiff/decedent***] did not have the capacity to consent to the [removal/restraint];]**

[That [[*name of conservator***]/the court] did not consent to the [removal/restraint];]**

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

5. **That the employee['s][s'] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm; and**

6. **[***Insert one or more of the following:***]**

[That the employee[s] [was/were] [an] officer[s], [a] director[s], or [a] managing agent[s] of [*name of defendant***] acting in [a corporate/an employment] capacity;] [or]**

[That an officer, a director, or a managing agent of [*name of defendant***] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others;] [or]**

[That an officer, a director, or a managing agent of [*name of defendant***] authorized the employee['s][s'] conduct;] [or]**

[That an officer, a director, or a managing agent of [*name of defendant***] knew of the employee[s']['s] wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised December 2005

Directions for Use

This instruction is intended for plaintiffs who are seeking survival damages for pain and suffering and/or attorney fees and costs. Plaintiffs who are not seeking such damages should use CACI No. 3109, *Abduction—Essential Factual Elements.* The instructions in this series are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

If the plaintiff is seeking damages against the employer and the employee, use CACI No. 3110, *Abduction—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants*.

Sources and Authority

- Welfare and Institutions Code section 15657.05 provides:

> Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law:
>
> (a)(1) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" shall include, but is not limited to, costs of representing the abductee and his or her family in this state and any other state in any action related to the abduction and returning of the abductee to this state, as well as travel expenses for returning the abductee to this state and reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.
>
> (2) The award of attorney's fees shall be governed by the principles set forth in Section 15657.1.
>
> (b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
>
> (c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

- Welfare and Institutions Code section 15610.06 provides: " 'Abduction' means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and

the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court."

- Civil Code section 3294(b) provides: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "As amended in 1991, the Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. In addition to adopting measures designed to encourage reporting of abuse and neglect, the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) §§ 2.68, 2.71-2.72

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[5] (Matthew Bender)

3113. "Recklessness" Explained

[[*Name of individual defendant***]/[***Name of employer defendant***]'s employee][~~*Name of defendant*~~] acted with "recklessness" if [he/she] knew it was highly probable that [his/her] conduct would cause harm and [he/she] knowingly disregarded this risk.**

"Recklessness" is more than just the failure to use reasonable care.

New September 2003; Revised [month] 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use "[*name of individual defendant*]." If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

Sources and Authority

- " 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur. Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it.' " (*Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 [82 Cal.Rptr.2d 610, 971 P.2d 986], internal citations omitted.)

- In *Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336], the court found that the following instruction adequately defined "recklessness": "[T]he term 'recklessness' requires that the defendant have knowledge of a high degree of probability that dangerous consequences will result from his or her conduct and acts with deliberate disregard of that probability or with a conscious disregard of the probable consequences. Recklessness requires conduct more culpable than mere negligence."

- Restatement Second of Torts, section 500, provides: "The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

Secondary Sources

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[1] (Matthew Bender)

3114. "Malice" Explained

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

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

New September 2003; Revised [month] 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use [*name of individual defendant*]. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee."

Sources and Authority

- Civil Code section 3294(c)(1) provides: " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

3115. "Oppression" Explained

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

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

New September 2003; Revised [month] 2008

Directions for Use

If the individual responsible for the elder abuse is a defendant in the case, use [*name of individual defendant*]. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee's."

Sources and Authority

- Civil Code section 3294(c)(2) provides: " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

VF-3100. Financial Abuse—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.30, 15657.5~~,~~ ; Civ. Code, § 3294(b)~~15610.30~~)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?~~Did [*name of defendant*] [take/hide/appropriate/retain] [*name of plaintiff/decedent*]'s property for a wrongful use [or with the intent to defraud]?~~**

____ Yes ____ No

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

2. **Did [***name of employee defendant***] [take/hide/appropriate/ [or] retain] [***name of plaintiff/decedent***]'s property [for a wrongful use/ [or] with the intent to defraud]?~~Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?~~**

____ Yes ____ No

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

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

____ Yes ____ No

If your answer to question 3 is yes, then answer question[s] 4[and] [*select 5, 6, or both***]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

~~**Answer question 4.**~~

4. **What are [***name of plaintiff/decedent***]'s damages?**

[a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

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

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

TOTAL $ _____

~~**[Answer question 5.**~~

[5. Did [*name of plaintiff***] prove by clear and convincing evidence that an officer, a director, or a managing agent of [***name of employer defendant ~~employer~~***] had advance knowledge of the unfitness of [***name of employee defendant ~~employee~~***] and employed [him/her] with a knowing disregard of the rights or safety of others?**
____ Yes ____ No]

~~**[Answer question 6.**~~

[6. Did [*name of plaintiff***] prove by clear and convincing evidence that [***name of employee defendant***] acted with [recklessness/malice/oppression/ [or] fraud]?**
____ Yes ____ No~~]~~

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

7. What were [*name of decedent***]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?**
$ _____]

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form

to the [clerk/bailiff/judge].

New September 2003; Revised June 2005, April 2007, April 2008, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements*, CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering~~Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants~~*, and CACI No. 3102A, *~~Financial Abuse—Essential Factual Elements—~~Employer Liability for Enhanced Remedies~~Sought—~~Both Individual and Employer Defendants*.

If the plaintiff alleges that the defendant assisted in the wrongful conduct, modify question 1 as in element 2 of CACI No. ~~3101~~3100.

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

Include question 5 if employer liability is ~~at issue~~sought for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657.5(b)(2).) Question 5 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A. A "no" answer to question 5 will foreclose all enhanced remedies from the employer, but not from the individual defendant; a "yes" answer will establish a right to attorney fees and costs from the employer. Attorney fees and costs are recoverable from the individual without any additional showing of any kind. (Welf. & Inst. Code, § 15657.5(a).)

Should the financial abuse in some way have caused the victim's death~~In a financial abuse wrongful death case~~, the decedent's pain and suffering before death is recoverable on a showing by clear and convincing evidence that the individual defendant acted with~~of~~ recklessness, oppression, fraud, or malice ~~by clear and convincing evidence~~. (See Welf. & Inst. Code, § 15657.5(b)(1); Code Civ. Proc., § 377.34.) ~~Therefore~~In such a case, in question 4, include only item 4a for past economic loss. But also include questions 6 and 7. ~~(See Welf. & Inst. Code, § 15657.5(b); Code Civ. Proc., § 377.34.)~~

In the transitional language after question 3, direct the jury to answer questions 5, 6 or both, depending on which questions are to be included. If question 6 is to be included but question 5 is not, then 6 will be renumbered as 5.

If punitive damages are sought, incorporate a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)~~CACI No. VF-3900, *Punitive Damages—Trial Not Bifurcated*.~~

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

VF-3101. Financial Abuse—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.30, 15657.5~~, ~~; Civ. Code, § 3294(b)~~15610.30~~)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?~~Did [*name of defendant*]'s employee [take/hide/appropriate/retain] [*name of plaintiff/decedent*]'s property for a wrongful use [or with the intent to defraud]?~~**

____ Yes ____ No

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

2. **Did [***name of defendant*]**'s employee [take/hide/appropriate/ [or] retain] [***name of plaintiff/decedent*]**'s property [for a wrongful use/ [or] with the intent to defraud]?~~Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?~~**

____ Yes ____ No

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

3. **Was the employee's conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**

____ Yes ____ No

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

~~**4.** **Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] authorized the employee's conduct?~~

~~**____ Yes ____ No**~~

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

~~5~~4. **What are [***name of plaintiff/decedent***]'s damages?**

[a. Past economic loss

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

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

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

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

TOTAL $ _____

~~**[Answer question 6.**~~

[5. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] authorized the employee's conduct?
_____ Yes _____ No]

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

6. Did [*name of plaintiff*] prove by clear and convincing evidence that ~~[*name of defendant*]~~'s the employee acted with [recklessness/malice/oppression/ [or] fraud]?
_____ Yes _____ No~~]~~

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

7. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised June 2005, April 2007, April 2008, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. 3100, *Financial Abuse—Essential Factual Elements*, CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering,* and CACI No. 3102B, ~~*Financial Abuse—Essential Factual Elements—*~~*Employer Liability for Enhanced Remedies* ~~*Sought*~~*—Employer Defendant Only*.

If the plaintiff alleges that the defendant's employees assisted in the wrongful conduct, modify question 1 as in element 1 of CACI No. 3100. ~~Question 4 can be altered to correspond to one of the alternative bracketed options in CACI No. 3102.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~ 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Question 5 is required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657.5(b)(2).) Question 5 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102B. A "no" answer to question 5 will foreclose all enhanced remedies; a "yes" answer will establish a right to attorney fees and costs.

Should the financial abuse in some way have caused the victim's death~~In a financial abuse wrongful death case~~, the decedent's pain and suffering before death is recoverable on a showing by clear and convincing evidence that the employee acted with ~~of~~ recklessness, oppression, fraud, or malice ~~by clear and convincing evidence~~. (See Welf. & Inst. Code, § 15657.5(b)(1); Code Civ. Proc., § 377.34.) ~~Therefore~~In such a case, in question ~~5~~4~~,~~ include only item ~~5a~~ 4a for past economic loss. But also include the transitional language after question 5 and questions 6 and 7. ~~(See Welf. & Inst. Code, § 15657.5(b); Code Civ. Proc., § 377.34.)~~

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

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

VF-3102. Neglect—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610. 57, 15657~~, ~~; Civ. Code, § 3294(b)~~15610.57~~)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she] was in [***name of employee defendant***]'s care or custody?~~Did [*name of defendant*] have care or custody of [*name of plaintiff/decedent*]?~~**

   ____ Yes ____ No

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

2. **Did [***name of employee defendant***] have care or custody of [***name of plaintiff/decedent***]?~~Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] while [he/she] was in [*name of defendant*]'s care or custody?~~**

   ____ Yes ____ No

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

3. **Did [***name of employee defendant***] fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?**

   ____ Yes ____ No

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

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

   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question[s] 5 [and] [*select 6, 7 or both***]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

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

   [a. Past economic loss

   [lost earnings $ _____]

   [lost profits $ _____]

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

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

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

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

TOTAL $ _____

~~**[Answer question 6.**~~

[6. Did [*name of plaintiff***] prove by clear and convincing evidence that an officer, a director, or a managing agent of [***name of employer defendant~~ employer~~***] had advance knowledge of the unfitness of [***name of employee defendant~~ employee~~***] and employed [him/her] with a knowing disregard of the rights or safety of others?**
____ Yes ____ No]

~~**[Answer question 7.**~~

[7. Did [*name of plaintiff***] prove 1 through ~~5~~ 4 above by clear and convincing evidence and also prove by clear and convincing evidence that [***name of employee defendant***] acted with [recklessness/malice/oppression/ [or] fraud]?**
____ Yes ____ No]

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

8. What were [*name of decedent***]'s damages for noneconomic loss for pain, suffering, or**

disfigurement incurred before death?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. 3103, *Neglect—Essential Factual Elements*, ~~and~~ CACI No. 3104, *Neglect—~~Essential Factual Elements—~~Enhanced Remedies Sought~~—Individual or Individual and Employer Defendants.~~*, and CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants.*

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. ~~3104~~3103.

~~Include question 6 if employer liability is at issue. Question 6 can be altered to correspond to one of the alternative bracketed options for employer liability in the lower bracketed portion of CACI No. 3104.~~

~~If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.~~

Include question 6 if employer liability is at issue. Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

Optional questions 6, 7, and 8 address enhanced remedies. If the neglect is proved by clear and convincing evidence, and it is also proved by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See Welf. & Inst. Code, § 15657.) If any of these remedies are sought against the employer, include question 6. (See Welf. & Inst. Code, § 15657(c).) Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

If any enhanced remedies are sought against either the individual or the employer, include question 7. If

the neglect led to the elder's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

In the transitional language after question 4, direct the jury to answer questions 6 or 7 or both, depending on which questions are to be included. If question 7 is to be included but question 6 is not, then 7 will be renumbered as 6.

~~If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657(a)), include question 7. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657(b); Code Civ. Proc., § 377.34.) Therefore, in question 5, include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8. To recover these enhanced remedies, not only must recklessness, malice, oppression, or fraud be proved by clear and convincing evidence, but the underlying neglect under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.)~~

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

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

VF-3103. Neglect—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.57, 15657~~,~~; Civ. Code, § 3294(b)~~15610.57~~)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she] was in [***name of defendant***]'s care or custody?~~Was [*name of plaintiff/decedent*] in [*name of defendant*]'s care or custody?~~**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff/decedent***] in [***name of defendant***]'s care or custody?~~Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] while [he/she] was in [*name of defendant*]'s care or custody?~~**
   ____ Yes ____ No

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

3. **Did one or more of [***name of defendant***]'s employees fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?**
   ____ Yes ____ No

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

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

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

~~5. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others?~~
~~____ Yes ____ No~~

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

~~6~~5. What are [*name of plaintiff/decedent***]'s damages?**

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

~~[Answer question 7.~~

[6. Did [*name of plaintiff***] prove by clear and convincing evidence that an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of the employee and employed [him/her] with a knowing disregard of the rights or safety of others?**
_____ Yes _____ No

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

form.

7. Did [*name of plaintiff*] prove 1 through ~~6~~ 4 above by clear and convincing evidence and also prove by clear and convincing evidence that the employee~~[s]~~ acted with [recklessness/malice/oppression/ [or] fraud]?
____ Yes ____ No]

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

8. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. ~~3105~~3103, *Neglect—Essential Factual Elements ~~—Enhanced Remedies Sought—Employer Defendant~~*, CACI No. 3104, *Neglect—Enhanced Remedies Sought*, and CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

Question 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. ~~3105~~3103. ~~Question 5 can be altered to correspond to one of the alternative bracketed options for employer liability in element 7 of CACI No. 3105~~.

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 6 and 7 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657; Code Civ. Proc., § 377.34.) Question 6 may be altered to correspond to one of the alternative bracketed options in CACI No. 3102B.

If the neglect led to the elder's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.~~If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657(a)), include question 7. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657(b); Code Civ. Proc., § 377.34.) Therefore, in question 6, include only item 6a for past economic loss. But also include the transitional language after question 7 and include question 8. To recover these enhanced remedies, not only must recklessness, malice, oppression, or fraud be proved by clear and convincing evidence, but the underlying neglect under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.)~~

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

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

VF-3104. Physical Abuse—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.63, 15657~~,~~; Civ. Code, § 3294(b)~~15610.63~~)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?~~Did [*name of defendant*] physically abuse [*name of plaintiff/decedent*]?~~**

   ____ Yes ____ No

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

2. **Did [***name of employee defendant***] physically abuse [***name of plaintiff/decedent***]?~~Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?~~**

   ____ Yes ____ No

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

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

   ____ Yes ____ No

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

4. **What are [***name of plaintiff/decedent***]'s damages?**

   [a. Past economic loss

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

   Total Past Economic Damages: $ _____]

   [b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**

[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

~~**[Answer question 5.**~~

[5. Did [*name of plaintiff***] prove by clear and convincing evidence that an officer, a director, or a managing agent of [***name of employer defendant~~ employer~~***] had advance knowledge of the unfitness of [***name of employee defendant~~ employee~~***] and employed [him/her] with a knowing disregard of the rights or safety of others?**
____ Yes ____ No]

~~**[Answer question 6.**~~

[6. Did [*name of plaintiff***] prove 1 through ~~4~~ 3 above by clear and convincing evidence and also prove by clear and convincing evidence that [***name of employee defendant***] acted with [recklessness/malice/oppression/ [or] fraud]?**
____ Yes ____ No]

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

7. What were [*name of decedent***]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?**

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. 3106, *Physical Abuse—Essential Factual Elements*, CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought*, and CACI No. ~~3107~~3102A, ~~*Physical Abuse—Essential Factual Elements—*~~ *Employer Liability for Enhanced Remedies* ~~*Sought—Individual or*~~ *Both Individual and Employer Defendants.*

~~Include question 5 if employer liability is at issue. Question 5 can be altered to correspond to one of the alternative bracketed options for employer liability in the lower bracketed portion of CACI No. 3107.~~

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

Include question 5 if employer liability is at issue. Question 5 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

Optional questions 5, 6, and 7 address enhanced remedies. If the physical abuse is proved by clear and convincing evidence, and it is also proved by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See Welf. & Inst. Code, § 15657.) If any of these remedies are sought against the employer, include question 5. (See Welf. & Inst. Code, § 15657(c).)

If any enhanced remedies are sought against either the individual or the employer, include question 6. If the physical abuse led to the neglected elder's death, in question 4 include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7.

In the transitional language after question 3, direct the jury to answer questions 5 or 6 or both, depending on which questions are to be included. If question 6 is to be included but question 5 is not, then 6 will be renumbered as 5.

~~If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657(a)), include question 6. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657(b); Code Civ. Proc., § 377.34.) Therefore, in question 4, include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7. To recover these enhanced remedies, not only must recklessness, malice, oppression, or fraud be proved by clear and convincing evidence, but the underlying physical abuse under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.)~~

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

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

VF-3105. Physical Abuse—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.63, 15657~~,~~; Civ. Code, § 3294(b)~~15610.63~~)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?~~Did one or more of [*name of defendant*]'s employees physically abuse [*name of plaintiff/decedent*]?~~**

____ Yes ____ No

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

2. **Did [***name of defendant***]'s employee physically abuse [***name of plaintiff/decedent***]?~~Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?~~**

____ Yes ____ No

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

3. **Was the employee~~[~~'s~~][s']~~ conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**

____ Yes ____ No

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

~~**4. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee[s] and employed [him/her/them] with a knowing disregard of the rights or safety of others?**~~

~~**____ Yes ____ No**~~

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

~~5~~4. **What are [***name of plaintiff/decedent***]'s damages?**

[a. Past economic loss

[lost earnings $ _____]

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

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

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

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

TOTAL $ _____

~~**[Answer question 6.**~~

[5. Did [*name of plaintiff*] prove by clear and convincing evidence that an officer, a director, or a managing agent of [*name of defendant*] had advance knowledge of the unfitness of the employee and employed [him/her/them] with a knowing disregard of the rights or safety of others?
____ Yes ____ No

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

6. Did [*name of plaintiff*] prove 1 through ~~5~~ 3 by clear and convincing evidence and also prove by clear and convincing evidence that ~~[*name of defendant*]~~the employee acted with [recklessness/malice/oppression/ [or] fraud]?
____ Yes ____ No]

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

form.

7. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. ~~3108~~3106, *Physical Abuse—Essential Factual Elements—~~Employer Defendant~~* CACI No. 3107, *Physical Abuse—Enhanced Remedies Sought*, and CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

~~Question 4 can be altered to correspond to one of the alternative bracketed options for employer liability in element 6 of CACI No. 3108.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~ 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 5 and 6 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657; Code Civ. Proc., § 377.34.) Question 5 may be altered to correspond to one of the alternative bracketed options in CACI No. 3102B.

If the physical abuse led to the elder's death, in question 4 include only item 4a for past economic loss. But also include the transitional language after question 6 and include question 7.~~If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657(a)), include question 6. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657(b); Code Civ. Proc., § 377.34.) Therefore, in question 5, include only item 5a for past economic loss. But also include the transitional language after question 6 and include question 7. To recover these enhanced remedies, not only must recklessness, malice, oppression, or fraud be proved by clear and convincing evidence, but the underlying physical abuse under the Elder Abuse Act must also be proved by clear and~~

~~convincing evidence. (See Welf. & Inst. Code, § 15657.)~~

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

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

VF-3106. Abduction—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.06, 15657.05~~,~~ ; Civ. Code, § 3294(b)~~15610.06~~)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?~~Did [*name of defendant*] [remove [*name of plaintiff/decedent*] from California and] restrain [him/her/[*name of plaintiff/decedent*]] from returning to California?~~**

____ Yes ____ No

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

2. **Did [***name of employee defendant***] [remove [***name of plaintiff/decedent***] from California and] restrain [him/her/[***name of plaintiff/decedent***]] from returning to California?~~Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?~~**

____ Yes ____ No

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

3. **Did [***name of plaintiff/decedent***] lack the capacity to consent to the [removal and]~~/~~restraint~~]~~?**

____ Yes ____ No

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

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

____ Yes ____ No

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

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

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

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

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

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

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

TOTAL $ _____

~~**[Answer question 6.**~~

[6. Did **[***name of plaintiff***] prove by clear and convincing evidence that [***name of employee defendant~~ employee~~***] was an officer, director, or managing agent of [***name of employer defendant~~ employer~~***] acting ~~in a [corporate/employment] capacity?~~on behalf of [***name of defendant***].**
____ Yes ____ No]

~~**[Answer question 7.**~~

[7. Did [*name of plaintiff***] prove 1 through ~~5~~ 4 above by clear and convincing evidence?**
____ Yes ____ No]

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

8. What were [*name of decedent***]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?**

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. 3109, *Abduction—Essential Factual Elements*, ~~and~~ CACI No. 3110, *Abduction—~~Essential Factual Elements—~~Enhanced Remedies Sought*, and CACI No. 3102A, *Employer Liability for Enhanced Remedies—~~Individual or~~Both Individual and Employer Defendants.*

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of CACI No. ~~3110~~3109.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

~~Include question 6 if employer liability is at issue. Question 6 can be altered to correspond to one of the alternative bracketed options for employer liability in the lower bracketed portion of CACI No. 3110.~~

Optional questions 6, 7, and 8 address enhanced remedies. If the abduction is proved by clear and convincing evidence, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See Welf. & Inst. Code, § 15657.05.) If any of these remedies are sought against the employer, include question 6. (See Welf. & Inst. Code, § 15657.05(c).) Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

If any enhanced remedies are sought against either the individual or the employer, include question 7. If the abduction led to the abductee's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

In the transitional language after question 4, direct the jury to answer questions 6, 7, or both, depending on which questions are to be included. If question 7 is to be included but question 6 is not, then 7 will be renumbered as 6.

~~If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657.05(a)), include question 7. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657.05(b); Code Civ. Proc., § 377.34.) Therefore, in question 5, include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8. To recover these enhanced remedies, the underlying abduction under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.05.)~~

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

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

VF-3107. Abduction—Employer Defendant Only (Welf. & Inst. Code, §§ 15610.06, 15657.05~~,~~; Civ. Code, § 3294(b)~~15610.06~~)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] at the time of the conduct?~~Did one or more of [*name of defendant*]'s employees [remove [*name of plaintiff/decedent*] from California and] restrain [him/her/[*name of plaintiff/decedent*]] from returning to California?~~**

   ____ Yes ____ No

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

2. **Did [***name of defendant***]'s employee [remove [***name of plaintiff/decedent***] from California and] restrain [him/her/[***name of plaintiff/decedent***]] from returning to California?~~Was [*name of plaintiff/decedent*] [65 years of age or older/a dependent adult] at the time of the conduct?~~**

   ____ Yes ____ No

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

3. **Did [***name of plaintiff/decedent***] lack the capacity to consent to the [removal and]~~/~~restraint~~]~~?**

   ____ Yes ____ No

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

4. **Was the employee~~[~~'s~~]~~[s'] conduct a substantial factor in causing harm to [***name of plaintiff/decedent***]?**

   ____ Yes ____ No

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

~~5. Did [*name of plaintiff*] prove by clear and convincing evidence that the employee[s] [was/were] [an] officer[s], director[s], or managing agent[s] of [*name of defendant employer*] acting in a [corporate/employment] capacity?~~

~~____ Yes ____ No~~

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

~~6~~5. **What are [***name of plaintiff/decedent***]'s damages?**

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

~~**[Answer question 7.**~~

[6. Did **[***name of plaintiff***] prove by clear and convincing evidence that the employee was an officer, a director, or a managing agent of [***name of defendant***] acting in on behalf of [***name of defendant***]?**
_____ Yes _____ No

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

7. Did [*name of plaintiff*] prove 1 through ~~6~~ 4 by clear and convincing evidence?
____ Yes ____ No]

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

8. What were [*name of decedent*]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, [month] 2008

Directions for Use

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

This verdict form is based on CACI No. ~~3111~~3109, *Abduction—Essential Factual Elements*, CACI No. 3110, *Abduction—Enhanced Remedies Sought ~~—Employer Defendant~~*, and CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*.

Question 3 can be altered to correspond to the alternative bracketed option in element 3 of CACI No. ~~3111~~3109.

~~Question 5 can be altered to correspond to one of the alternative bracketed options in element 6 of CACI No. 3111.~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Questions 6 and 7 are required to obtain employer liability for enhanced remedies, including attorney fees and costs. (See Welf. & Inst. Code, § 15657.05(b); Code Civ. Proc., § 377.34.) Question 6 may be altered to correspond to one of the alternative bracketed options in CACI No. 3102B.

If the abduction led to the abductee's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.~~If attorney fees and costs are sought (see Welf. & Inst. Code, § 15657.05(a)), include question 7. In a wrongful death case, the decedent's pain and suffering before death is recoverable. (See Welf. & Inst. Code, § 15657.05(b); Code Civ. Proc., § 377.34.) Therefore, in question 6, include only item 6a for past economic loss. But also include the transitional language after question 7 and include question 8. To recover these enhanced remedies, the underlying abduction under the Elder Abuse Act must also be proved by clear and convincing evidence. (See Welf. & Inst. Code, § 15657.05.)~~

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

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

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages only if [*name of plaintiff***] proves by clear and convincing evidence that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud.**

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

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

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

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and

[*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]? ~~[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]~~**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, [month] 2008

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given where an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the

plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

~~Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant's conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)~~

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 1332, *13].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co.*, *supra*, ~~*v. Campbell* (2003)~~ 538 U.S. at p. ~~408,~~ 422 ~~[123 S.Ct. 1513, 155 L.Ed.2d 585]~~.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by

clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA ~~v. Williams~~, supra,* 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *13~~).)~~].)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA ~~v. Williams~~, supra,* 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *16~~).)~~].)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an

instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's

conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp.*, *supra* ~~*v. Alliance Resources Corp.* (1993) 509 U.S.~~

~~443 [113 S.Ct. 2711, 125 L.Ed.2d 366]~~] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages,* §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**

2. **Whether [***name of defendant***] disregarded the health or safety of others;**

3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**

4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**

5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]? ~~[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]~~**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, [month] 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

~~Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm the defendant's conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)~~

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 13332, *13].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ~~. . .~~… that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co.*, *supra,* ~~*v. Campbell* (2003)~~ 538 U.S. at p. ~~408,~~ 422 ~~[123 S.Ct. 1513, 155 L.Ed.2d 585]~~.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall'

form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA ~~v. Williams~~, supra,* 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *13~~).)~~].)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others

nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA ~~v. Williams~~*, *supra,* 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *16~~).)~~].)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

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precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

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- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule ~~. . .~~… that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp.*, *supra* ~~*v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]~~] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

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4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.20–54.25 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated

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If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/agent***]'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of defendant***] for [***name of employee/agent***]'s conduct only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud.**

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

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

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

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

[*Name of plaintiff***] must also prove [one of] the following by clear and convincing evidence:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***], who was acting on behalf of [***name of defendant***]; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately

determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]? ~~[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]~~**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, [month] 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947,

Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, ~~and~~ or managing agents, use CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

~~Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant's conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)~~

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 13332, *13].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co.*, *supra,* ~~*v. Campbell* (2003)~~ 538 U.S. at p. ~~408,~~ 422 ~~[123 S.Ct. 1513, 155 L.Ed.2d 585]~~.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

  (c) As used in this section, the following definitions shall apply:

  (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*

(1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA ~~v. Williams~~*, *supra*, 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *13~~).)~~].)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible -- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA ~~v. Williams~~*, *supra*, 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *16~~).)~~].)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra*, 83 Cal.App.4th at p. 168, internal citations omitted.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp.*, *supra* ~~*v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]~~] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages,* § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of defendant***] only if [***name of plaintiff***] proves that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [***name of defendant***], who acted on behalf of [***name of defendant***]; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of defendant***]; [or]]**

3. **[That one or more officers, directors, or managing agents of [***name of defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

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

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

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

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant*] disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];

4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and

5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]? ~~[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]~~

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007, [month] 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—*

Clear and Convincing Proof.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

~~Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant's conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)~~

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 13332, *13].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co.*, *supra,* ~~*v. Campbell* (2003)~~ 538 U.S. at p.~~408,~~ 422 ~~[123 S.Ct. 1513, 155 L.Ed.2d 585]~~.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to

be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

  (c) As used in this section, the following definitions shall apply:

  (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

  (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

  (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a

material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a

particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA ~~v. Williams~~*, *supra*, 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *13~~).)~~].)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA ~~v. Williams~~*, *supra*, 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *16~~).)~~].)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "The high court in *TXO* [*TXO Production Corp.*, *supra* ~~*v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]~~] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3947. Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated

If you decide that [*name of individual defendant***]'s or [***name of entity defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

You may award punitive damages against [*name of entity defendant***] only if [***name of plaintiff***] proves that [***name of entity defendant***] acted with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [***name of entity defendant***], who acted on behalf of [***name of entity defendant***]; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of entity defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of entity defendant***]; [or]]**

4. **[That one or more officers, directors, or managing agents of [***name of entity defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

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

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

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff***].**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision-making such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff***] was financially weak or vulnerable and the defendant knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her~~/it~~];**

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that the defendant knew was likely to occur because of his, her, or its conduct]? ~~[Punitive damages may not be used to punish a defendant for the impact of his, her, or its alleged misconduct on persons other than [***name of plaintiff***].]~~**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, [month] 2008

Directions for Use

This instruction is intended to apply if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI

No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated.*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *More Likely True—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

~~Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant's conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)~~

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 13332, *13].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co.*, *supra*, ~~*v. Campbell* (2003)~~ 538 U.S. at p.~~408,~~ 422 ~~[123 S.Ct. 1513, 155 L.Ed.2d 585]~~.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

  (c) As used in this section, the following definitions shall apply:

  (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful

and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- " 'The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to

economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA ~~v. Williams~~, supra,* 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *13~~).)~~].)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA ~~v. Williams~~, supra,* 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *16~~).)~~].)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that

evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27

Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra*, 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp.*, *supra* ~~*v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]~~] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and the defendant knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that the defendant knew was likely to occur because of ~~his, her, or its~~ [his/her/its] conduct]? ~~[Punitive damages may not be used to punish a defendant for the impact of his, her, or its alleged misconduct on persons other than [*name of plaintiff*].]~~

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, [month] 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

~~Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant's conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)~~

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940, 2007 U.S. LEXIS 13332, *13].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co.*, *supra*, ~~*v. Campbell* (2003)~~ 538 U.S. at p.~~408,~~ 422 ~~[123 S.Ct. 1513, 155 L.Ed.2d 585~~].) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall'

form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citations omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA ~~v. Williams~~, supra,* 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *13~~).)~~].)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others

nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA ~~v. Williams~~*, *supra*, 549 U.S. at p. ___ ~~([~~2007 U.S. LEXIS 1332, *16~~).)~~].)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The

precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra*, 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ~~["]['~~reasonable relation~~"]~~ ~~']~~ rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp.*, *supra* ~~*v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]~~] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

VF-3900. Punitive Damages~~— Trial Not Bifurcated~~

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] engage in the conduct with malice, oppression, or fraud?**
____ 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. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**
$_____]

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 [month] 2008

Directions for Use

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

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 2 if the trial is not bifurcated.

This form is based on CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated* and CACI No. 3941, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase)*.

VF-3901. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee~~— Trial Not Bifurcated~~

We answer the questions submitted to us as follows:

1. Did [*name of agent/employee***] engage in the conduct with malice, oppression, or fraud?**
____ Yes ____ No

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

2. Was [*name of employee/agent***] an officer, director, or managing agent of [***name of defendant***] acting ~~in a [corporate/employment] capacity~~on behalf of [*name of defendant*]?**
____ 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. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**
$_____]

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 [month] 2008

Directions for Use

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

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 3 if the trial is not bifurcated.

This form is based on CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of*

a Specific Agent or Employee—Trial Not Bifurcated, and CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)*.

Depending on the facts of the case, alternative grounds for liability may be substituted in question 2, as in CACI No. 3943.

VF-3902. Punitive Damages—Entity Defendant~~—Trial Not Bifurcated~~

We answer the questions submitted to us as follows:

1. Was the conduct constituting malice, oppression, or fraud committed by one or more officers, directors, or managing agents of [*name of defendant***] acting ~~in a corporate capacity~~on behalf of [*name of defendant*]?**
____ Yes ____ No

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

2. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**
$_____]

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 [month] 2008

Directions for Use

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

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 2 if the trial is not bifurcated.

This form is based on CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*, and CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. This form is intended to address the first bracketed option in CACI Nos. 3945 and 3946.

VF-3903. Punitive Damages—Entity Defendant—Ratification ~~—Trial Not Bifurcated~~

We answer the questions submitted to us as follows:

1. Did an agent or employee of [*name of defendant***] engage in the conduct with malice, oppression, or fraud?**
____ Yes ____ No

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

2. Did one or more officers, directors, or managing agents of [*name of defendant***] know of this conduct and adopt or approve it after it occurred?**
____ 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. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**
$_____]

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 [month] 2008

Directions for Use

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

Normally, this verdict form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 2 if the trial is not bifurcated.

This form is based on CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*, and CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. This form is intended to address the third bracketed option in CACI Nos. 3945 and 3946.

VF-3904. Punitive Damages—Entity Defendant—Authorization~~—Trial Not Bifurcated~~

We answer the questions submitted to us as follows:

1. Did an agent or employee of [*name of defendant***] engage in the conduct with malice, oppression, or fraud?**
____ Yes ____ No

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

2. Did one or more officers, directors, or managing agents of [*name of defendant***] authorize this conduct?**
____ Yes ____ No

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

3. What amount of punitive damages, if any, do you award [*name of plaintiff***]?**
$_____]

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 [month] 2008

Directions for Use

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

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Include question 3 if the trial is not bifurcated.

This form is based on CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*, and CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)*. This form is intended to address the second bracketed option in CACI Nos. 3945 and 3946.

Users may wish to combine this verdict form with the verdict form(s) on the underlying cause(s) of action.

4327. Affirmative Defense—Landlord's Refusal of Rent

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/it] because [***name of plaintiff***] refused to accept [***name of defendant***]'s payment of the rent. To succeed on this defense, [***name of defendant***] must prove:**

1. **That after service of the three-day notice but before the three-day period had expired, [***name of defendant***] presented the full amount of rent that was due to [***name of plaintiff***]; and**

2. **That [***name of plaintiff***] refused to accept the payment.**

[Giving a check constitutes payment if [*name of plaintiff***]'s practice was to accept payment by check unless [***name of plaintiff***] had previously notified [***name of defendant***] that payment by check was no longer acceptable.]**

New [Month] 2008

Directions for Use

Give the last bracketed paragraph if the tender was by check and there is an issue as to the landlord's motive in refusing the check.

Sources and Authority

- Civil Code section 1500 provides: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or savings and loan association within this state, of good repute, and notice thereof is given to the creditor."

- "The mere giving of a check or checks does not constitute payment." (*Mau v. Hollywood Commercial Bldgs., Inc.* (1961) 194 Cal.App.2d 459, 470 [15 Cal.Rptr. 181], internal citation omitted.)

- "On this appeal appellants do not discuss or mention the above finding of their bad faith, but argue that respondent was in default because its rental debt was not extinguished within the three-day period as respondent tendered checks instead of money, sent the checks by mail without checking delivery instead of making personal tender and did not keep the tender alive by deposit in a bank as provided by section 1500 of the Civil Code within the three-day period. However, we think that the finding of bad faith, which is supported by the evidence showing the facts, as stated hereinbefore, is of primary importance where appellants try to enforce a forfeiture." (*Strom v. Union Oil Co.* (1948) 88 Cal.App.2d 78, 81 [198 P.2d 347].)

- "With respect to appellants there is no doubt that they could have had timely payment if they had so desired, but that they were intentionally evasive and uncooperative, hoping thereby to induce some technical shortcoming on which to terminate a lease which they thought disadvantageous."

(*Strom, supra,* 88 Cal.App.2d at pp. 83-84.)

- "Appellants complain that respondent mailed checks for the rent instead of tendering money in person. The lease does not contain any place or mode of payment of rent. Payment of rent to the original lessor had been made by mailing of checks to his assignee. Appellant was entitled to continue payment by mailing of checks so long as he had not been notified that this form of payment was no longer acceptable. … If the payment by mailing of check, a normal mode of payment though not a legal tender, was not acceptable to appellants, as it had been to their predecessors, they should have notified respondent to that effect. Neither was respondent after the mailing under duty to take special measures to check timely receipt of the checks. 'The ordinary principles of reason, common sense, and justice should govern in questions of this kind. The lessee, in law, had a right to assume that the Postoffice Department would do its duty and deliver the envelop containing the rent in due time, and that the lessor would, in justice, accept such rent; and if for any reason it was not received or delivered the lessee should, as a matter of ordinary fairness and justice, be advised of such fact and have a chance to remedy the same.' This principle was held applicable even where the letter containing the rent was lost in the mail. It must govern a fortiori here, where the mail functioned correctly and the fact that the checks did not reach appellants was solely attributable to circumstances for which they were responsible. No further action of any kind could be expected from respondent until it was informed, by the return of the unclaimed letter, of the fact that the payment had not been effectuated. If respondent's action is open to any criticism it would be that the deposit of the rent in a bank … did not follow soon enough after the checks were returned …. However the delay did not cause any prejudice or make any difference to appellants as they had then already launched the action in unlawful detainer at which they had been aiming ever since respondent refused increase of rent. The shortcoming of respondent is trivial compared to appellants' bad faith." (*Strom, supra,* 88 Cal.App.2d at p. 84.)

- "Nor does the rejection of the 'tender' that appellants made by letter, unaccompanied by payment, and conditioned upon dismissal of the action, after the action was brought, compel a finding of bad faith. It did not extinguish the debt, since the procedure prescribed by Civil Code, section 1500, was not followed. Nor was there a showing of continuous readiness to pay after the tender." (*Budaeff v. Huber* (1961) 194 Cal.App.2d 12, 21 [14 Cal.Rptr. 729].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 7.53-7.56

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 17.21

5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, ~~Please~~ you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next. All 12 of you must deliberate on and answer each question. At least ~~nine~~ 9 of you must agree on an answer before all of you can move on to the next question. However, the same ~~nine~~ 9 or more people do not have to agree on each answer.

When you ~~are~~ have finished filling out the form[s], your presiding juror must write the date and sign it at the bottom [of the last page]. Return the form[s] to [me/the bailiff/the clerk/the court attendant] when you have finished.

New September 2003; Revised April 2004, [month] 2008

Directions for Use

If this instruction is read, do not read the sixth paragraph of CACI No. 5009, *Predeliberation Instructions*.

Sources and Authority

- Code of Civil Procedure section 624 provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law."

- Code of Civil Procedure section 625 provides: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."

- "A special verdict presents to the jury each ultimate fact in the case, so that 'nothing shall remain to the Court but to draw from them conclusions of law.' This procedure presents certain problems: "[']"The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. '[T]he possibility of a defective or incomplete special verdict, or possibly no

verdict at all, is much greater than with a general verdict that is tested by special findings ....' " ' With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. The verdict's correctness must be analyzed as a matter of law." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596], internal citations omitted.)

- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved. " (*Stoner*, *supra*, 46 Cal.App.4th at p. 1002.)

- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 352–355

5017. Polling the Jury

After your verdict is read in open court, you may be asked individually to indicate whether the verdict expresses your personal vote. This is referred to as "polling" the jury and is done to ensure that at least nine jurors have agreed to each decision.

The verdict form[s] that you will receive ask[s] you to answer several questions. You must vote separately on each question. Although nine or more jurors must agree on each answer, it does not have to be the same nine for each answer. Therefore, it is important for each of you to remember how you have voted on each question so that if the jury is polled, each of you will be able to answer accurately about how you voted.

[Each of you will be provided a draft copy of the verdict form for your use in keeping track of your votes.]

New [Month] 2008

Directions for Use

Use this instruction to explain the process of polling the jury, particularly if a long special verdict form will be used to assess the liability of multiple parties and the damages awarded to each plaintiff from each defendant.

Sources and Authority

- Article I, section 16 of the California Constitutions provides in part: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict."

- Code of Civil Procedure section 618 provides: "When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court and the verdict rendered by their foreperson. The verdict must be in writing, signed by the foreperson, and must be read to the jury by the clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror's verdict. If upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no disagreement is expressed, the verdict is complete and the jury discharged from the case."

- "[I]t is quite apparent that when a poll discloses that more than one-quarter of the members of the jury disagree with the verdict, the trial judge retains control of the proceedings, and may properly order the jury to retire and again consider the case." (*Van Cise v. Lencioni* (1951) 106 Cal.App.2d 341, 348 [235 P.2d 236].)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of

action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of any nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768 [183 Cal.Rptr. 852, 647 P.2d 128].)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 349, 359

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.30[3][b] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, Jury Verdicts, § 326A.14 (Matthew Bender)