

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Advisory Committee on Civil Jury Instructions
Hon. H. Walter Croskey, Chair
Bruce Greenlee, Attorney, 415-865-7698
bruce.greenlee@jud.ca.gov

DATE: January 2, 2007

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

Issue Statement

The Advisory Committee on Civil Jury Instructions has completed its new revisions to the *California Civil Jury Instructions (CACI)*, which was first published in September 2003.

Recommendation

The advisory committee recommends that the Judicial Council, effective February 23, 2007, approve for publication under rule 2.1050 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the revisions will be officially published in a 2006--2007 supplement to the 2006 edition of *CACI*.

A table of contents and the proposed revisions to the civil jury instructions follow this report.

Rationale for Recommendation

The Task Force on Jury Instructions was appointed in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that the average juror could readily understand. In July 2003, the council approved publication of approximately 800 civil jury instructions and special verdict forms. The instructions were first published in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating the instructions. The council approved the committee's last update at its June 2006 meeting.

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

The following instructions and verdict forms are included in this revised set: 101, 503, 802 (revoked), 1011, 1204, 1231, 1243, 2021, 2407, VF-3203, 3513, 3921, 3932, 5002, and 5009. All are revisions; there are no new instructions in this release. A proposed new series on Unlawful Detainer (CACI Nos. 4300--4315) was sent out for public comment, but based on comments, the committee has decided that further work is needed before it can recommend approval of these new instructions. The committee will reconsider these instructions in the next revision cycle.

The instructions were revised based on comments or suggestions from judges, attorneys, staff, and committee members as well as on recent changes in the law. The following instructions and verdict forms were revised based primarily on comments received from judges and attorneys: 101, 1204, 2407, and VF-3203. For example, the title to CACI No. 2407 was changed from *Breach of Employment Contract—Unspecified Term—Employee’s Duty to Mitigate Damages* to *Employee’s Duty to Mitigate Damages* in response to an attorney’s comment noting that the duty to mitigate applies to all types of employment cases, including discrimination. Previously, the instruction was limited to breach-of-contract cases.

The following instructions were revised based primarily on suggestions from staff or committee members: 1011, 2021, 5002, and 5009. For example, CACI No. 1011, *Constructive Notice Regarding Dangerous Conditions on Property*, was revised to broaden its application after a committee member noted that courts were applying its rule more broadly than just to store owners and dangerous conditions on commercial property.

The following instructions were revised or revoked based primarily on recent changes in the law: 503, 802 (revoked), 1231, 1243, and 3513. For example, CACI No. 802, *Reasonable Warning of Approach*, was revoked because 2006 legislative changes to Public Utilities Code section 7604 (effective September 30, 2006) removed the legal basis for the instruction. There is no longer a “reasonable engineer” standard for when to sound a warning within city limits.

Instruction 101 now includes a reference under Sources and Authority to rule of the California rules of Court 2.1035, one of the recently adopted jury rules. The committee will consider adding other new jury rules as authority for other instructions at its next meeting.

Additionally, the Center for Disease Control’s national Center for Health Statistics has issued new life expectancy tables based on 2003 data. These life expectancy tables for

males and females are included in CACI as appendices to the Damages series. The Directions for Use for CACI Nos. 3921, *Wrongful Death (Death of an Adult)*, and 3932, *Life Expectancy*, were revised to improve references to the tables.

Alternative Actions Considered

The instructions that generated the most attention from commentators were those involving unlawful detainer actions. A proposed new series of 16 unlawful detainer instructions was circulated for comment. The committee received extensive comments from attorneys and organizations who represent or advocate for the interests of both landlords and tenants. The committee decided that it needed additional time to thoroughly review the proposed changes in light of the comments received.

Comments From Interested Parties

All revisions to the civil jury instructions were circulated for public comment. The committee received a number of comments, evaluated them, and made changes to the instructions based on the recommendations. A chart summarizing the comments is included at pages 4–6.

Implementation Requirements and Costs

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

Attachments

Special Cycle—Winter 2006
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y/N)	Summary of Comments	Committee Response
Generally	Pam Moraida Court Program Manager Superior Court of Solano County	Y	Agree with proposed changes.	No response required
Generally	Michael M. Roddy Executive Officer Superior Court of San Diego County	Y	Agree	No response required
Generally	Janet Garcia Court Manager Superior Court of Los Angeles County	Y	Agree	No response required
101	Hon. Judy Hersher Superior Court of Sacramento County	N	Change “jury will start hearing” to “jury will hear.”	The committee agreed to make this edit.
101	Hon. Judy Hersher Superior Court of Sacramento County	N	Suggested a significant rewording and combination of the two paragraphs on documents and evidence.	The committee disagreed with this comment. It did not feel that the proposed revision was necessary or helpful.
101	Hon. Jamie Jacobs-May Superior Court of Santa Clara County	N	Leave in bracketed language for cross-complaints; it provides a good template and prompts the judge to instruct on cross-actions.	The committee disagreed with this comment. Cross-complaint information may still be included in the new paragraph, which allows for the entire structure of the case to be explained to the jury, not just cross-complaints.
1011	Curt Cutting Horovitz & Levy Encino, California,	N	Add Direction for Use that instruction is not for use in <i>Kinsman</i> situation (<i>Kinsman v. Unocal</i> (2005) 37 Cal.4th 659: injury to employee of independent contractor).	The committee agreed with this comment and added a cross-reference to CACI No. 1009, which addresses the <i>Kinsman</i> situation.

Special Cycle—Winter 2006
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y/N)	Summary of Comments	Committee Response
1204	Curt Cutting Horovitz & Levy Encino, California,	N	There is authority <i>contra</i> to the statement under Sources and Authority that plaintiff does not have to prove the existence of a feasible alternative design (<i>Bernal</i> 221 Cal.App.3d, at 1335). Suggest dropping <i>Bernal</i> .	The committee disagreed with this comment. The committee believes that the rule of <i>Bernal</i> is the correct one. The cases cited by the commentator for the <i>contra</i> position are either in tangential dicta or predate the development of the current approach to risk-benefit analysis.
2021	Lawrence Jensen Attorney at Law San Jose, California,	N	Add “by acting or failing to act” to element 2.	The committee agreed with this comment and added the proposed additional language.
2021	Lawrence Jensen Attorney at Law San Jose, California,	N	Element 2, third option: The term “obstruction to free use of property” is pretty vague and unhelpful, while “interfered with comfortable enjoyment of life or property” is quite clear. Delete “obstruction” portion of the subclause of the element.	The committee disagreed with this comment. The language is from the statute (Civ. Code, § 3479), and all the words need to be included.
VF-3203	Ronald F. Frank Bannan, Green, Frank & Terzian Los Angeles, California, For Mercedes-Benz USA	Y	Question 5: Add “offer to” after “fail to” so that question reads: “Did defendant fail to <i>offer to</i> promptly replace or repair etc.”	The committee disagreed with this comment. While the committee believed that the proposed additional language was reasonable (i.e., the merchant meets its obligation if it offers restitution or a replacement vehicle), it was concerned that it would create an issue as to whether the merchant’s offer was bona fide and for full value. In the absence of any direct authority, the committee was unwilling to make the change.

Special Cycle—Winter 2006
Judicial Council Civil Jury Instructions
(update and revise)

Instruction	Commentator	Comment on behalf of group (Y/N)	Summary of Comments	Committee Response
VF-3203	Ronald F. Frank Bannan, Green, Frank & Terzian Los Angeles, California, For Mercedes-Benz USA	Y	Add Directions for Use to VF-3203 and CACI 3241: “On request of either party, the jury should be instructed that the vehicle will be returned to the manufacturer if they find for the plaintiff.”	The committee disagreed with this comment. The suggested language would not be appropriate for a verdict form. The committee will consider this request as a Direction for Use to CACI No. 3241.
VF-3203	Jon D. Universal Universal, Shannon & Wheeler Roseville, California	N	Restore question 5 as was. Concern is that merchant needs to know that repairs were unsuccessful.	The committee disagreed with this comment. “The consumer’s request [for replacement or restitution] is not mandated by any provision in the [Song-Beverly] Act.” (<i>Krotin v. Porsche Cars NA, Inc.</i> (1995) 38 Cal.App.4th 294.)
Life Expectancy Tables	Hon. Dennis S. Choate Superior Court of Orange County	N	Is it really necessary to list all the numbers? Old table was easy to understand.	The new tables will look like the old tables in print.
5002	Hon. Judy Hersher Superior Court of Sacramento County	N	Change “receive into evidence” to “admit into evidence.” “Receiving evidence” is awkward.	The committee agreed to make this change.
5009	Hon. Judy Hersher Superior Court of Sacramento County	N	Add “court attendant” to “clerk/bailiff.”	The committee agreed to make this addition.

CIVIL JURY INSTRUCTIONS (CACI) WINTER 2006 REVISIONS—TABLE OF CONTENTS

INTRODUCTORY SERIES

101.	Overview of Trial (Revised)	1
------	-----------------------------------	---

MEDICAL NEGLIGENCE SERIES

503.	Psychotherapist's Duty to Warn—Essential Factual Elements (Revised)	4
------	---	---

RAILROAD CROSSINGS SERIES

802	Reasonable Warning of Approach (Revoked)	6
-----	--	---

PREMISES LIABILITY SERIES

1011.	Constructive Notice Regarding Dangerous Conditions on Property (Revised)	8
-------	---	---

PRODUCT LIABILITY SERIES

1204.	Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof (Revised)	10
1231.	Implied Warranty of Merchantability—Essential Factual Elements (Revised) ..	13
1243.	Notification/Reasonable Time (Revised)	18

TRESPASS SERIES

2021.	Private Nuisance—Essential Factual Elements (Revised)	20
-------	---	----

WRONGFUL TERMINATION SERIES

2407.	Employee's Duty to Mitigate Damages (Revised)	24
-------	---	----

SONG-BEVERLY CONSUMER WARRANTY SERIES

VF-3203.	Breach of Express Warranty—New Motor Vehicle—Civil Penalty Sought (Revised)	27
----------	--	----

EMINENT DOMAIN SERIES

3513.	Goodwill (Revised)	31
-------	--------------------------	----

DAMAGES SERIES

3921.	Wrongful Death (Death of an Adult) (Revised)	34
3932.	Life Expectancy (Revised)	40
	Table A: Life Expectancy for Males (Revised)	42
	Table B: Life Expectancy for Females (Revised)	44

CONCLUDING SERIES

5002.	Evidence (Revised)	46
5009.	Predeliberation Instructions (Revised)	48

101. Overview of Trial

To assist you in your tasks as jurors, I will now explain how the trial will proceed. [Name of plaintiff] filed this lawsuit. [He/She/It] is called a plaintiff. [He/She/It] seeks damages [or other relief] from [name of defendant], who is called a defendant. Each plaintiff and each defendant is called a party to the case.

~~[[Name of cross-complainant] has also filed a lawsuit against [name of cross-defendant] for [insert cause of action].]~~

First, each side may make an opening statement, but neither side is required to do so. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence. ~~You cannot use it to make any decisions in this case.~~

Next, the jury will ~~start hearing~~**hear** the evidence. [Name of plaintiff] will present [his/her/its] evidence first. When [name of plaintiff] is finished, [name of defendant] will have an opportunity to present [his/her/its] evidence.

Each witness will first be questioned by the side that asked the witness to testify. This is called direct examination. Then the other side is permitted to question the witness. This is called cross-examination.

Documents or objects referred to during the trial are called exhibits. Exhibits ~~will be~~**are** given a [number/letter] and marked so they may be clearly identified. Exhibits are not evidence until I admit them into evidence. ~~You will be able to look at these exhibits~~
~~d~~**During your deliberations, you will be able to look at all exhibits admitted into evidence.**

There are many rules that govern whether something will be considered evidence in the trial. As one side presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of your presence.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

~~[In this case, [name of plaintiff] claims [insert description of the elements of plaintiff's claim(s)]. [Name of defendant] claims [insert description of the elements of defendant's affirmative defense(s) and/or cross-complaint].]~~

Directions for Use

This instruction is intended to provide a “road map” for the jurors. This instruction should be read in conjunction with CACI No. 100, *Preliminary Admonitions*.

Throughout these instructions, the names of the parties should be inserted as indicated. This instruction should be modified to reflect the number of plaintiffs and defendants involved in the suit.

If the case involves cross-complainants and cross-defendants, make sure that the names of the parties inserted in the applicable instructions are adjusted accordingly.

The bracketed last paragraph is optional. At its discretion, the court may wish to use this paragraph to provide jurors with a brief description of the claims and defenses that are at issue in the case.

Sources and Authority

- California Rules of Court, Rule 2.1035 provides: “Immediately after the jury is sworn, the trial judge may, in his or her discretion, preinstruct the jury concerning the elements of the charges or claims, its duties, its conduct, the order of proceedings, the procedure for submitting written questions for witnesses as set forth in Rule 2.1033 if questions are allowed, and the legal principles that will govern the proceeding.”
- Code of Civil Procedure section 607 provides:

When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:

 1. The plaintiff may state the issue and his case;
 2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;
 3. The plaintiff must then produce the evidence on his part;
 4. The defendant may then open his defense, if he has not done so previously;
 5. The defendant may then produce the evidence on his part;
 6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
 7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;

8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;
9. The court may then charge the jury.

Secondary Sources

7 Witkin, *California Procedure* (4th ed. 1997) Trial, § 161, pp. 189-190

California Practice Guide: Civil Trials and Evidence, §§ 1:427-1:432; 4:460-4:463

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.50 (Matthew Bender)

(*New September 2003*)

(*Revised February 2007*)

503. Psychotherapist's Duty to Warn—Essential Factual Elements

[Name of plaintiff] **claims that** [name of defendant] **was negligent because** [he/she] **did not warn** [name of plaintiff] **and a law enforcement agency about** [name of third party]'s **threat of violent behavior. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That** [name of defendant] **was a psychotherapist;**
 - 2. That** [name of third party] **was** [name of defendant]'s **patient;**
 - 3. That** [name of third party] **communicated a serious threat of physical violence to** [name of defendant];
 - 4. That** [name of defendant] **knew or should have known that** [name of plaintiff] **was** [name of third party]'s **intended victim; and**
 - 5. That** [name of defendant] **did not make reasonable efforts to warn** [name of plaintiff] **and a law enforcement agency about the threat.**
-

Sources and Authority

- Civil Code section 43.92 provides:
 - (a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.
 - (b) ~~If there is a duty to warn and protect~~ There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified above, discharges his or her duty to warn and protect by ~~the duty shall be discharged by the psychotherapist~~ making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.
- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334], regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245 [267 Cal.Rptr. 553].) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Id.* at p. 1245.)

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the “firefighter’s rule” and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86 [82 Cal.Rptr.2d 497].)
- “When the communication of the serious threat of physical violence is received by the therapist from a member of the patient’s immediate family and is shared for the purpose of facilitating and furthering the patient’s treatment, the fact that the family member is not technically a ‘patient’ is not crucial to the statute’s purpose.” (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864]; see also *Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 1293 [16 Cal.Rptr.3d 591].)

Secondary Sources

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

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

(Revised June 2006)

(Revised February 2007)

NOTE: Amendments to Pub. Util. Code section 7604 effective September 30, 2006 make this instruction no longer an accurate statement of the law. The Advisory Committee on Civil Jury Instructions will consider whether to revise the instruction at its next meeting.

~~802. Reasonable Warning of Approach~~

~~A train operator must warn others that the train is approaching a crossing by activating the train's [bell] [or] [whistle] [or] [siren] if a reasonable train operator would do so. The warning must be adequate for the existing conditions, including conditions that affect a driver's ability to observe the train's approach.~~

~~Directions for Use~~

~~Use this instruction only if the accident occurred in within a city's limits. Public Utilities Code section 7604 provides that a train crew must ring a bell or, except in cities, sound a whistle for a distance of at least 1,320 feet (a quarter mile) before crossing any street, road, or highway and until the train has passed the crossing. Under section 7604(a)(1), operators have discretion to sound warning devices in cities only. Accordingly, if the accident did not occur in a city, use CACI No. 801, *Duty to Comply With Safety Regulations*.~~

~~This instruction should be used when the plaintiff contends that the train operator failed to give adequate warning that the train was approaching the crossing. The scope of a railroad's duty regarding the installation of traffic control and warning devices at the intersection is covered by CACI No. 805, *Installing Warning Systems*.~~

~~Sources and Authority~~

- ~~•Public Utilities Code section 7604(a)(1) provides: "In a city, the ringing of the bell or the sounding of the steam whistle, air siren, or air whistle shall be at the discretion of the operator of the locomotive engine." This section does not prohibit the sounding of a warning device in a city, and if a defendant should have sounded the warning device in the exercise of due care, it is not excused by this code section. (See *Southern Pacific Co. v. Haight* (9th Cir. 1942) 126 F.2d 900, 909.)~~
- ~~•Public Utilities Code section 7604 provides, in part, that a train crew must ring a bell or, except in cities, sound a whistle for a distance of at least 1,320 feet (a quarter mile) before crossing any street, road, or highway and until the train has passed the crossing. Statutes set forth only a minimum standard of care. (See *Marquis v. St. Louis San Francisco Ry.* (1965) 234 Cal.App.2d 335, 345 [44 Cal.Rptr. 367].)~~
- ~~•The failure to sound a train whistle or bell or to give some other warning can be sufficient, by itself, to support a finding of negligence. (*Peri v. Los Angeles Junction Ry. Co.* (1943) 22 Cal.2d 111, 125 [137 P.2d 441].)~~

- ~~“It was the duty of those in charge of the train to give notice of the approach of the engine when approaching the highway and its traveling over the highway by all warnings reasonably necessary under the conditions existing at the time and place of the accident.” (*Downey v. Santa Fe Transportation Co.* (1955) 134 Cal.App.2d 720, 727 [286 P.2d 40].)~~
- ~~“[T]he conditions with respect to the ability of a traveler on the highway to observe the train approaching the crossing and the character of the crossing may be a basis for the conclusion of the trier of fact that the defendant failed to conform to the required standard of care in respect to the warnings it must give of the approach of the train to the crossing.” (*Downey, supra*, 134 Cal.App.2d at p. 726, internal citation omitted.)~~

Secondary Sources

~~2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.26[4] (Matthew Bender)~~

~~California Tort Guide (Cont.Ed.Bar 1996) Railroad Crossings, § 12.4~~

~~42 California Forms of Pleading and Practice, Ch. 485, *Railroads* (Matthew Bender)~~

~~(New September 2003)~~

1011. Constructive Notice ~~of Store Owner~~ Regarding Dangerous Conditions on Property

In determining whether [name of defendant] ~~knew or~~ 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 it would have been discovered and corrected by an owner using reasonable care.

[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 store/[a/an] [insert other commercial enterprise]] owner using reasonable care would have discovered it.-]

Directions for Use

This instruction is intended for use ~~where if~~ there is an issue concerning the presence or absence of an ~~store~~ owner's ~~actual~~ constructive knowledge of a dangerous condition. 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* arose in the context of involved a store. The court should determine whether the bracketed portion of this instruction applies to other types of property.

For an instruction for use in the case of injury to an employee of an independent contractor working on the premises, see CACI No. 1009, *Liability to Employees of Independent Contractors for Dangerous Conditions*.

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, v. Kmart* (2001) 26 Cal.4th ~~1200~~, at p. 1205 [114 Cal.Rptr.2d 470, 36 P.3d 11], 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.)

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

- “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, *Premises Liability* (Matthew Bender)

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

(New September 2003)

| (Revised February 2007)

1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

[Name of plaintiff] claims that the *[product]*'s design caused harm to *[name of plaintiff]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* [manufactured/distributed/sold] the *[product]*;
2. [That, at the time of the use, the *[product]* was substantially the same as when it left *[name of defendant]*'s possession;]

[or]

[That any changes made to the *[product]* after it left *[name of defendant]*'s possession were reasonably foreseeable to *[name of defendant]*;]
3. That the *[product]* was used [or misused] in a way that was reasonably foreseeable to *[name of defendant]*; and
4. That the *[product]*'s design was a substantial factor in causing harm to *[name of plaintiff]*.

If *[name of plaintiff]* has proved these four facts, then your decision on this claim must be for *[name of plaintiff]* unless *[name of defendant]* proves that the benefits of the design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:

- (a) The gravity of the potential harm resulting from the use of the *[product]*;
- (b) The likelihood that ~~such~~ this harm would occur;
- (c) The feasibility of an alternative **safer** design at the time of manufacture;
- (d) The cost of an alternative design; [and]
- (e) The disadvantages of an alternative design; [and]
- (f) *[Other relevant factor(s)]*.

Directions for Use

If the plaintiff asserts both tests for design defect (the consumer expectation test and the risk-benefit test) ~~are asserted by the plaintiff~~, the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431].)

Some cases state that product misuse must be pleaded as an affirmative defense. (See, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the advisory committee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:

- “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the *sole* reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121], internal citations omitted.)
- “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

Sources and Authority

- Under the risk-benefit test, the plaintiff does not have to prove the presence of a defect. Rather, once the plaintiff makes a prima facie showing that the product’s design caused the injury, the burden shifts to the defendant to prove the design was not defective. A jury instruction stating that the plaintiff had the burden of proving that a design was defective in a case based on the risk-benefit test was held to be error in *Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487], and in *Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 498 [200 Cal.Rptr. 387].
- The jury should be directed to consider several factors in deciding whether the risks of a design outweigh its benefits. Among the relevant factors are: “the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design’.” (*Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1331-1332 [272 Cal.Rptr. 41], internal citation omitted, disapproved and overruled on another point in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 822 P.2d 298].)
- The plaintiff does not have to prove the existence of a feasible alternative design. (*Bernal, supra*, 221 Cal.App.3d at p. 1335.)
- This instruction should not be used in connection with the consumer expectation test for design defect: “Risk-benefit weighing is not a formal part of, nor may it serve as a ‘defense’ to, the consumer expectations test.” (*Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1569 [38 Cal.Rptr.2d 446], internal citation omitted.)

Secondary Sources

| 6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449–1467

California Products Liability Actions, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

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

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

(*New September 2003*)

| (*Revised February 2007*)

1231. Implied Warranty of Merchantability—Essential Factual Elements

[Name of plaintiff] **[also] claims that [he/she/it] was harmed by the [product] that [he/she/it] bought from [name of defendant] because the [product] did not have the quality that a buyer would expect. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That *[name of plaintiff]* bought the [product] from *[name of defendant]*;**
 - 2. That, at the time of purchase, *[name of defendant]* was in the business of selling these goods [or by [his/her/its] occupation held [himself/herself/itself] out as having special knowledge or skill regarding these goods];**
 - 3. That the [product] *[insert one or more of the following:]***

[was not of the same quality as those generally acceptable in the trade;]

[was not fit for the ordinary purposes for which such goods are used;]

[did not conform to the quality established by the parties' prior dealings or by usage of trade;]

[other ground as set forth in Commercial Code section 2314(2);]
 - 4. [That *[name of plaintiff]* took reasonable steps to notify *[name of defendant]* within a reasonable time that the [product] did not have the expected quality;]**
 - 5. That *[name of plaintiff]* was harmed; and**
 - 6. That the failure of the [product] to have the expected quality was a substantial factor in causing *[name of plaintiff]*'s harm.**
-

Directions for Use

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Ghera v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- “A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity.” (3 Witkin, Summary of Cal. Law (9th ed. 1987) Sales, § 50, p. 46.)
- “Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. It does not ‘impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.’” (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295-1296 [44 Cal.Rptr.2d 526], internal citations omitted.)
- It has been observed that “in cases involving personal injuries resulting from defective products, the theory of strict liability in tort has virtually superseded the concept of implied warranties.” (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 432 [79 Cal.Rptr. 369].)
- Commercial Code section 2314 provides:
 - (1) Unless excluded or modified (Section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
 - (2) Goods to be merchantable must be at least such as
 - (a) Pass without objection in the trade under the contract description; and
 - (b) In the case of fungible goods, are of fair average quality within the description; and
 - (c) Are fit for the ordinary purposes for which such goods are used; and
 - (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) Are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) Conform to the promises or affirmations of fact made on the container or label if any.
 - (3) Unless excluded or modified (Section 2316) other implied warranties may arise from course of dealing or usage of trade.

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

- “Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability.” (*U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.)
- Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser’s family. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].) Vertical privity is also waived for employees. (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339 [5 Cal.Rptr. 863, 353 P.2d 575].) A plaintiff satisfies the privity requirement when he or she leases or negotiates the sale or lease of the product. (*United States Roofing, supra.*)
- Commercial Code section 2104(1) defines “merchant,” in relevant part, as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.”
- Commercial Code section 2105(1) defines “goods,” in relevant part, as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid.”
- Commercial Code section ~~1205~~1303 provides:

~~(1) — A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.~~

~~(2) — A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.~~

~~(3) — A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.~~

~~(4) — The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.~~

~~(5) — An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.~~

~~(6) — Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.~~

- (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
 - (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
 - (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.
- (b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
- (c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.
- (d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.
- (e) Except as otherwise provided in subdivision (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:
 - (1) express terms prevail over course of performance, course of dealing, and usage of trade;
 - (2) course of performance prevails over course of dealing and usage of trade;
 - (3) course of dealing prevails over usage of trade.
- (f) Subject to Section 2209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one party is not
admissible unless that party has given the other party notice that the

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31-2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.200-502.214 (Matthew Bender)

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

(New September 2003)

(Revised February 2007)

1243. Notification/Reasonable Time

If a buyer is required to notify the seller that a product [is not as represented] [does not have the expected quality] [is not suitable] [is in a harmful condition], [he/she/it] must do so within a reasonable time after [he/she/it] discovers or should have discovered this. A reasonable time depends on the circumstances of the case. In determining whether notice was given within a reasonable time, you must apply a more relaxed standard to a retail consumer than you would to a merchant buyer. A buyer notifies a seller by taking such steps as may be reasonably required to inform the seller [regardless of whether the seller actually receives the notice].

Sources and Authority

- Commercial Code section 2607(3) provides: “Where a tender has been accepted [t]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.”
- Commercial Code section ~~1201(26)~~1202(d) defines “notification” as follows: “A person ‘notifies’ or ‘gives’ a notice or notification to another person by taking ~~those~~such steps ~~that~~ as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.”
- Commercial Code section ~~1204(2)~~1205(a) provides: “~~Whether a~~ at is a reasonable time for taking any ~~action~~ required by this code is reasonable depends on the nature, purpose, and circumstances of ~~such~~ the action.”
- The Uniform Commercial Code comment to section 2-607(~~43~~) states: “The time of notification is to be determined by applying commercial standards to a merchant buyer. ‘A reasonable time’ for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer’s rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer’s rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.”

- A plaintiff is not required to prove that he or she gave notice of a breach of warranty in personal injury and property damage lawsuits against a manufacturer or another supplier with

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Ghera v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94].)

- Notice is more likely to be required in disputes between merchants. (See *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, 369-370 [62 Cal.Rptr.2d 701].)
- When required, notice must be pleaded and proved. (*Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188 [272 P.2d 1].)
- The purpose of the demand for notice is to protect the seller from stale claims (*Whitfield v. Jessup* (1948) 31 Cal.2d 826, 828 [193 P.2d 1]; *Metowski v. Triad Corp.* (1972) 28 Cal.App.3d 332, 339 [104 Cal.Rptr. 599]) and to give the defendant an opportunity to repair the defective item, reduce damages, improve products in the future, and negotiate settlements. (*Pollard v. Saxe & Yolles Development Co.* (1974) 12 Cal.3d 374, 380 [115 Cal.Rptr. 648, 525 P.2d 88].)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.28, 502.100 (Matthew Bender)

(New September 2003)

(Revised February 2007)

2021. Private Nuisance—Essential Factual Elements

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

1. That [*name of plaintiff*] **[owned/leased/occupied/controlled]** the property;
 2. That [*name of defendant*], **by acting or failing to act,** created a condition that [*insert one or more of the following:*]

[was harmful to health;] [or]

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

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

[unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;]
 3. That this condition interfered with [*name of plaintiff*]'s use or enjoyment of [his/her] land;
 4. That [*name of plaintiff*] **did not consent to** [*name of defendant*]'s conduct;
 5. That an ordinary person would be reasonably annoyed or disturbed by [*name of defendant*]'s conduct;
 6. That [*name of plaintiff*] **was harmed;**
 7. That [*name of defendant*]'s conduct **was a substantial factor in causing** [*name of plaintiff*]'s harm; and
 8. That the seriousness of the harm **outweighs the public benefit of** [*name of defendant*]'s conduct.
-

Directions for Use

For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- Civil Code section 3479 provides: “Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.”
- Civil Code section 3482 provides: “Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”
- “[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ...” “A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.” “ (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- “In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff’s property; proof of interference with the plaintiff’s use and enjoyment of that property is sufficient.” (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)
- “[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must ‘disturb or prevent the comfortable enjoyment of property,’ such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery.” (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)
- “Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public.” (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)
- “Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. ‘So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.’” (*Koll-Irvine Center Property Owners Assn.*, *supra*, 24 Cal.App.4th at p. 1041, internal citation omitted.)

- “The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff’s interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer ‘substantial actual damage.’ The Restatement recognizes the same requirement as the need for proof of ‘significant harm,’ which it variously defines as ‘harm of importance’ and a ‘real and appreciable invasion of the plaintiff’s interests’ and an invasion that is ‘definitely offensive, seriously annoying or intolerable.’ The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? ‘If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.’ This is, of course, a question of fact that turns on the circumstances of each case.” (*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at p. 938, internal citations omitted.)
- “The second additional requirement for nuisance is superficially similar but analytically distinct: ‘The interference with the protected interest must not only be substantial, but it must also be unreasonable’, i.e., it must be ‘of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.’ The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant’s conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but ‘whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.’ And again this is a question of fact: ‘Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.’ (*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at pp. 938-939, internal citations omitted.)
- “The fact that the defendants’ alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability. (¶) A nuisance may be either a negligent or an intentional tort.” (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)
- Restatement Second of Torts, section 822 provides:
One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either
 - (a) intentional and unreasonable, or
 - (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

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

- Restatement Second of Torts, section 827 provides:
In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
 - (a) the extent of the harm involved;
 - (b) the character of the harm involved;
 - (c) the social value that the law attaches to the type of use or enjoyment invaded;
 - (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
 - (e) the burden on the person harmed of avoiding the harm.
- Restatement Second of Torts, section 828 provides:
In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
 - (a) the social value that the law attaches to the primary purpose of the conduct;
 - (b) the suitability of the conduct to the character of the locality; and
 - (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

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

1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 17:1-17:2, 17:4

(New September 2003)

(Revised February 2007)

2407. ~~Breach of Employment Contract—Unspecified Term~~—Employee’s Duty to Mitigate Damages

[Name of defendant] claims that if [name of plaintiff] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment. To succeed, [name of defendant] must prove all of the following:

1. That employment substantially similar to [name of plaintiff]’s former job was available to [him/her];
2. That [name of plaintiff] failed to make reasonable efforts to seek [and retain] ~~such~~ this employment; and
3. The amount that [name of plaintiff] could have earned from ~~such~~ _____ employment.

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

- (a) The nature of the work was different from [name of plaintiff]’s employment with [name of defendant];
- (b) The new position was substantially inferior to [name of plaintiff]’s former position;
- (c) The salary, benefits, and hours of the job were similar to [name of plaintiff]’s former job;
- (d) The new position required similar skills, background, and experience;
- (e) The job responsibilities were similar; [and]
- (f) The job was in the same locality; [and]
- (g) [insert other relevant factor(s)].

[In deciding whether [name of plaintiff] failed to make reasonable efforts to retain comparable employment, you should consider whether [name of plaintiff] quit or was discharged from that employment for a reason within [his/her] control.]

Directions for Use

This instruction ~~should~~ may be given when there is evidence that the employee’s damages could have been mitigated. The bracketed language at the end of the instruction regarding

plaintiff's failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

Only read those factors that have been shown by the evidence.

This instruction should be given in all employment cases, not just in breach of contract cases. (See Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶ 17:492.)

This instruction should not be used for wrongful demotion cases.

Sources and Authority

- “The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee’s rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages.” (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted.)
- “The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort.” (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459].)
- “[W]e conclude that the trial court should not have deducted from plaintiff’s recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant.” (*Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 99 [127 Cal.Rptr. 222].)
- “[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement.” (*Stanchfield, supra*, 37 Cal.App.4th at pp. 1502-1503.)
- In deciding whether a school bus driver could have obtained a substantially similar job in other nearby school districts, the court looked at several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (*California School Employees Ass’n v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].)

Secondary Sources

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed. 1997) Contract Actions, § 8.41

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

~~[10 California Points and Authorities, Ch. 100, *Wrongful Termination and Discipline*, Forms 40, 142 \(Matthew Bender\)](#)~~

(New September 2003)

(Revised February 2007)

VF-3203. Breach of Express Warranty—New Motor Vehicle—Civil Penalty Sought

We answer the questions submitted to us as follows:

1. Did *[name of plaintiff]* **[buy/lease]** **[a/an]** *[new motor vehicle]* **[from/distributed by/**
manufactured by] *[name of defendant]*?

_____ Yes _____ No

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

2. Did *[name of defendant]* **give** *[name of plaintiff]* **a written warranty?**

_____ 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 vehicle have a defect covered by the warranty that substantially impaired the vehicle's use, value, or safety to a reasonable *[buyer/lessee]* in *[name of plaintiff]*'s situation?

_____ Yes _____ No

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

4. Did *[name of defendant]* or its authorized repair facility fail to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so?

_____ 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 promptly replace or repurchase the vehicle **as**
requested by ~~*[name of plaintiff]*~~?

_____ Yes _____ No

**PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL**

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

6. What are [name of plaintiff]'s damages? Calculate as follows:

Add the following amounts:

- | | | |
|----|---|---------|
| a. | The purchase price of the vehicle itself: | \$_____ |
| b. | Charges for transportation and manufacturer-
installed options: | \$_____ |
| c. | Finance charges actually paid by [name of plaintiff]: | \$_____ |
| d. | Sales tax, license fees, registration fees, and other
official fees: | \$_____ |
| e. | Incidental and consequential damages: | \$_____ |

[SUBTOTAL/TOTAL DAMAGES:] \$_____

[Calculate the value of the use of the vehicle before it was [brought in/submitted] for repair as follows:

- | | | |
|----|---|---------|
| 1. | Add dollar amounts listed in lines a and b above: | \$_____ |
| 2. | Multiply the result in step 1 by the number of miles
the vehicle was driven before it was [brought in/
submitted] for repair: | \$_____ |
| 3. | Divide the dollar amount in step 2 by 120,000 and insert result in
VALUE OF USE below: | |

VALUE OF USE: \$_____

Subtract the VALUE OF USE from the SUBTOTAL above and insert result in
TOTAL DAMAGES below:

TOTAL DAMAGES: \$_____]

[What is the number of miles that the vehicle was driven between the time when
[name of plaintiff] took possession of the vehicle and the time when [he/she/it] first
delivered the vehicle to [name of defendant] or its authorized repair facility to fix the
problem?

Answer: _____ miles]

Answer question 7.

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

7. Did [name of defendant] willfully fail to repurchase or replace the [new motor vehicle]?

_____ 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 amount, if any, do you impose as a penalty? [You may not exceed two times the “TOTAL DAMAGES” that you entered in question 6.]

[PENALTY: \$ _____]

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].

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. Items of damages that do not apply to the facts of the case may be omitted.

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

This verdict form is based on CACI No. 3201, *Violation of Civil Code Section 1793.2(d) —New Motor Vehicle—Essential Factual Elements*, CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle*, and CACI No. 3244, *Civil Penalty—Willful Violation (Civ. Code, § 1794(c))*. See CACI No. VF-3201 for additional questions if the plaintiff is claiming consequential damages.

If the plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of CACI No. 3201. In question number 6, users have the option of either allowing the jury to calculate the deduction for value of use, or asking the jury for the relevant mileage number only. The bracketed sentence in question 8 is intended to be given only if the jury has been asked to calculate the deduction for value of use.

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

(Revised December 2005)

| *(Revised February 2007)*

3513. Goodwill

In this case, [name of business owner] is entitled to compensation for any loss of goodwill as a part of just compensation. “Goodwill” is the benefit that a business gains as a result of its location, reputation for dependability, skill or quality, and any other circumstances that cause a business to keep old customers or gain new customers. You must include the amount of any loss of goodwill as an item in your award for just compensation.

Sources and Authority

- Code of Civil Procedure section 1263.510 provides:
 - (a) The owner of a business conducted on the property taken, or on the remainder if ~~such the~~ property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following:
 - (1) The loss is caused by the taking of the property or the injury to the remainder.
 - (2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.
 - (3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code.
 - (4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.
 - (b) Within the meaning of this article, “goodwill” consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.
 - (c) If the public entity and the owner enter into a leaseback agreement pursuant to Section 1263.615, the following shall apply:
 - (1) No additional goodwill shall accrue during the lease.
 - (2) The entering of a leaseback agreement shall not be a factor in determining goodwill. Any liability for goodwill shall be established and paid at the time of acquisition of the property by eminent domain or subsequent to notice that the property may be taken by eminent domain.

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

- “Historically, business goodwill was not an element of damages under eminent domain law. As recently as 1975, the California Supreme Court reaffirmed the principle that damage to a business conducted on property condemned for public use was not compensable as a property right under the just compensation clause of the California Constitution. But in 1975, the Legislature enacted a comprehensive revision of California’s eminent domain law, which, among other things, authorizes compensation for the loss of business goodwill.” (*Community Development Com. v. Asaro* (1989) 212 Cal.App.3d 1297, 1301-1302 [261 Cal.Rptr. 231], internal citation and footnote omitted.)
- “As to entitlement of goodwill, the landowner bears the burden of proof.” (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473], internal citations omitted.)
- “We ... hold that where the presence of [the conditions in section 1263.510(a)] is disputed, the determination of that dispute, including the resolution of any disputed factual issues, is for the trial court. Only upon proving to the court’s satisfaction that the statutory conditions are satisfied may the landowner present evidence of lost goodwill to the jury.” (*Emeryville Redevelopment v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1119 [125 Cal.Rptr.2d 12].)
- “After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation.” (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687], internal citations omitted.)
- “Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill.” (*San Diego Metropolitan Transit Development Bd., supra*, 73 Cal.App.4th at p. 537, internal citation omitted.)
- “The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a loss of patronage.” (*San Diego Metropolitan Transit Development Bd., supra*, 73 Cal.App.4th at p. 537, internal citations omitted.)
- “Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted.” (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772, 681 P.2d 1340], internal citations omitted.)
- “Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, ‘goodwill is compensable in an inverse condemnation action to the same extent and with the same

limitations on recovery found in ... section 1263.510.’” (*San Diego Metropolitan Transit Development Bd.*, *supra*, 73 Cal.App.4th at p. 537, internal citations omitted.)

- “Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits. Valuation methods differ with the nature of the business and the purpose for which the evaluation is conducted. There is no single method to evaluate goodwill.” (*People ex rel. Dept. of Transportation v. Leslie* (1997) 55 Cal.App.4th 918, 922-923 [64 Cal.Rptr.2d 252], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1245, 1246

8 Witkin, Summary of California Law (9th ed. 1988) Constitutional Law, § 1031

1 Condemnation Practice in California (Cont.Ed.Bar 2005) §§ 4.64-4.78

4 Nichols on Eminent Domain, Ch. 13, *Loss of Business Goodwill*, § 13.18[5] (Matthew Bender)

6A Nichols on Eminent Domain, Ch. 29, *Loss of Business Goodwill*, §§ 29.01-29.08 (Matthew Bender)

20 California Forms of Pleading and Practice, Chapter 247, *Eminent Domain* (Matthew Bender)

(*New September 2003*)

(*Revised February 2007*)

3921. Wrongful Death (Death of an Adult)

If you decide that *[name of plaintiff]* has proved *[his/her]* claim against *[name of defendant]* for the death of *[name of decedent]*, you also must decide how much money will reasonably compensate *[name of plaintiff]* for the death of *[name of decedent]*. This compensation is called “damages.”

[Name of plaintiff] does not have to prove the exact amount of these damages. However, you must not speculate or guess in awarding damages.

The damages claimed by *[name of plaintiff]* fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.

[Name of plaintiff] claims the following economic damages:

1. The financial support, if any, that *[name of decedent]* would have contributed to the family during either the life expectancy that *[name of decedent]* had before *[his/her]* death or the life expectancy of *[name of plaintiff]*, whichever is shorter;
2. The loss of gifts or benefits that *[name of plaintiff]* would have expected to receive from *[name of decedent]*;
3. Funeral and burial expenses; and
4. The reasonable value of household services that *[name of decedent]* would have provided.

Your award of any future economic damages must be reduced to present cash value.

[Name of plaintiff] also claims the following noneconomic damages:

1. The loss of *[name of decedent]*’s love, companionship, comfort, care, assistance, protection, affection, society, moral support; [and]
- [2. The loss of the enjoyment of sexual relations.]
- [2. The loss of *[name of decedent]*’s training and guidance.]

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. [Your award for noneconomic damages should not be reduced to present cash value.]

In determining [name of plaintiff]’s loss, do not consider:

1. [Name of plaintiff]’s grief, sorrow, or mental anguish;
2. [Name of decedent]’s pain and suffering; or
3. The poverty or wealth of [name of plaintiff].

In deciding a person’s life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person’s health, habits, activities, lifestyle, and occupation. According to [insert source of information], the average life expectancy of a [insert number]-year-old [male/female] is [insert number] years, and the average life expectancy of a [insert number]-year-old [male/female] is [insert number] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

Directions for Use

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See *Damages*, Table A, Life Expectancy Table-Male and Table B, Life Expectancy Table-Female.) The first column shows the age interval between the two exact ages indicated. For example, 50-51 means the one-year interval between the fiftieth and fifty-first birthdays.

Sources and Authority

- Code of Civil Procedure section 377.60 provides:
A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent’s personal representative on their behalf:
 - (a) The decedent’s surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

- (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, ‘putative spouse’ means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.
 - (c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent’s death, the minor resided for the previous 180 days in the decedent’s household and was dependent on the decedent for one-half or more of the minor’s support.
 - (d) This section applies to any cause of action arising on or after January 1, 1993.
 - (e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.
 - (f) For the purpose of this section, “domestic partner” has the meaning provided in Section 297 of the Family Code.
- Code of Civil Procedure section 377.61 provides: “In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.”
 - “A cause of action for wrongful death is purely statutory in nature, and therefore ‘exists only so far and in favor of such person as the legislative power may declare.’” (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)
 - “There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: ‘(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.’” (*Barrett, supra*, 222 Cal.App.3d at p. 1185, internal citation omitted.)
 - “We therefore conclude, on this basis as well, that ‘wrongful act’ as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce.” (*Barrett, supra*, 222 Cal.App.3d at p. 1191.)
 - “In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence.” (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)
 - “Damages for wrongful death are not limited to compensation for losses with ‘ascertainable

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

economic value.’ Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived.” (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- “The death of a father may also cause a special loss to the children.” (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 547 [55 Cal.Rptr. 741], internal citation omitted.)
- “These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. ‘The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial “injury” to the family for which just compensation should be paid.’” (*Allen, supra*, 109 Cal.App.3d at p. 423, internal citations omitted.)
- The wrongful death statute “has long allowed the recovery of funeral expenses in California wrongful death actions.” (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)
- “Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received.” (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520-521 [196 Cal.Rptr. 82], internal citations omitted.)
- “The California statutes and decisions ... have been interpreted to bar the recovery of punitive damages in a wrongful death action.” (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)
- “Punitive damages are awardable to the decedent’s estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived.” (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)
- “California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action.” (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)
- “[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice.” (*Krouse, supra*, 19 Cal.3d at p. 69.)

PRELIMINARY DRAFT ONLY
NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL

- “[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs’ respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice.” (*Canavin, supra*, 148 Cal.App.3d at pp. 535-536.)
- “[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal.” (*Canavin, supra*, 148 Cal.App.3d at p. 536.)
- “We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with ‘the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased....’ This was a correct statement of the law.” (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120-121 [34 Cal.Rptr. 754], internal citation omitted.)
- “It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents.” (*Parsons v. Easton* (1921) 184 Cal. 764, 770-771 [195 P. 419], internal citation omitted.)
- “The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased’s health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive.” (*Allen, supra*, 109 Cal.App.3d at p. 424, internal citations omitted.)

Secondary Sources

[6 Witkin, Summary of California Law \(10th ed. 2005\) Torts, §§ 1690–1697](#)

~~[6 Witkin, Summary of California Law \(9th ed. 1988\) Torts, §§ 1423–1430, pp. 903–909](#)~~

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10-55.13 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Wrongful Death, §§ 3.1-3.52

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 23:8

| *(Revised December 2005)*

| *(Revised February 2007)*

3932. Life Expectancy

If you decide [name of plaintiff] has suffered damages that will continue for the rest of [his/her] life, you must determine how long [he/she] will probably live. According to [insert source of information], a [insert number]-year-old [male/female] is expected to live another [insert number] years. This is the average life expectancy. Some people live longer and others die sooner.

This published information is evidence of how long a person is likely to live but is not conclusive. In deciding a person's life expectancy, you should also consider, among other factors, that person's health, habits, activities, lifestyle, and occupation.

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See *Damages*, Table A, Life Expectancy Table-Male and Table B, Life Expectancy Table-Female.) The first column shows the age interval between the two exact ages indicated. For example, 50-51 means the one-year interval between the fiftieth and fifty-first birthdays.

Sources and Authority

- “The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive. Here the jury was correctly told the figure given was not conclusive evidence of Charlene's life expectancy. It was merely ‘a factor which you may consider,’ along with the evidence of Charlene's health, habits, occupation and activities.” (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [167 Cal.Rptr. 270], internal citations omitted.)
- “Mortality tables are admissible to assist the jury but they are not indispensable. It has been held, for example, that, absent mortality tables, the trier of fact may still approximate the life expectancy of a statutory beneficiary who appeared in court.” (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 121 [34 Cal.Rptr. 754], internal citations omitted.)
- “It is a matter of common knowledge that many persons live beyond the period of life allotted them by the mortality roles.” (*Temple v. De Mirjian* (1942) 51 Cal.App.2d 559, 566 [125 P.2d 544], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1667

~~6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 1405, pp. 876-877~~

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, § 51.42[2][c], Ch. 52, *Medical Expenses and Economic Loss*, § 52.20 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

(*Revised February 2005*)

(*Revised February 2007*)

TABLE A

10 National Vital Statistics Reports, Vol. 54, No. 14, April 19, 2006

Table 2. Life table for males: United States, 2003

[Click here for spreadsheet version.](#)

Age	Probability of dying between ages x to $x+1$	Number surviving to age x	Number dying between ages x to $x+1$	Person-years lived between ages x to $x+1$	Total number of person-years lived above age x	Expectation of life at age x
	$q(x)$	$K(x)$	$d(x)$	$L(x)$	$T(x)$	$e(x)$
0-1	0.007611	100,000	761	99,329	7,477,315	74.8
1-2	0.000518	99,239	51	99,213	7,377,986	74.3
2-3	0.000365	99,187	36	99,169	7,278,772	73.4
3-4	0.000293	99,151	29	99,137	7,179,603	72.4
4-5	0.000220	99,122	22	99,111	7,080,466	71.4
5-6	0.000192	99,100	19	99,091	6,981,355	70.4
6-7	0.000173	99,081	17	99,073	6,882,264	69.5
7-8	0.000152	99,064	15	99,057	6,783,191	68.5
8-9	0.000157	99,049	15	99,041	6,684,134	67.5
9-10	0.000138	99,034	14	99,027	6,585,093	66.5
10-11	0.000186	99,020	18	99,011	6,486,066	65.5
11-12	0.000162	99,002	16	98,994	6,387,055	64.5
12-13	0.000217	98,986	22	98,975	6,288,062	63.5
13-14	0.000255	98,964	25	98,951	6,189,087	62.5
14-15	0.000334	98,939	33	98,922	6,090,136	61.6
15-16	0.000430	98,906	43	98,884	5,991,213	60.6
16-17	0.000706	98,863	70	98,828	5,892,329	59.6
17-18	0.000908	98,793	90	98,748	5,793,501	58.6
18-19	0.001212	98,704	120	98,644	5,694,752	57.7
19-20	0.001356	98,584	134	98,517	5,596,108	56.8
20-21	0.001395	98,450	137	98,382	5,497,591	55.8
21-22	0.001412	98,313	139	98,244	5,399,210	54.9
22-23	0.001444	98,174	142	98,103	5,300,966	54.0
23-24	0.001388	98,032	136	97,964	5,202,863	53.1
24-25	0.001373	97,896	134	97,829	5,104,898	52.1
25-26	0.001326	97,762	130	97,697	5,007,069	51.2
26-27	0.001360	97,632	133	97,566	4,909,372	50.3
27-28	0.001317	97,500	128	97,435	4,811,806	49.4
28-29	0.001301	97,371	127	97,308	4,714,371	48.4
29-30	0.001367	97,244	133	97,178	4,617,063	47.5
30-31	0.001393	97,112	135	97,044	4,519,885	46.5
31-32	0.001416	96,976	137	96,908	4,422,841	45.6
32-33	0.001521	96,839	147	96,765	4,325,933	44.7
33-34	0.001505	96,692	146	96,619	4,229,168	43.7
34-35	0.001596	96,546	154	96,469	4,132,549	42.8
35-36	0.001732	96,392	167	96,309	4,036,080	41.9
36-37	0.001876	96,225	181	96,135	3,939,772	40.9
37-38	0.002008	96,045	193	95,948	3,843,637	40.0
38-39	0.002126	95,852	204	95,750	3,747,689	39.1
39-40	0.002341	95,648	224	95,536	3,651,939	38.2
40-41	0.002535	95,424	242	95,303	3,556,403	37.3
41-42	0.002800	95,182	266	95,049	3,461,100	36.4
42-43	0.003040	94,916	289	94,771	3,366,051	35.5
43-44	0.003231	94,627	306	94,474	3,271,279	34.6
44-45	0.003582	94,321	338	94,153	3,176,805	33.7
45-46	0.003777	93,984	355	93,806	3,082,652	32.8
46-47	0.004278	93,629	401	93,428	2,988,846	31.9
47-48	0.004598	93,228	429	93,014	2,895,418	31.1
48-49	0.004926	92,799	457	92,571	2,802,404	30.2
49-50	0.005356	92,342	495	92,095	2,709,833	29.3
50-51	0.005773	91,848	530	91,583	2,617,738	28.5
51-52	0.006153	91,318	552	91,037	2,526,155	27.7
52-53	0.006633	90,756	602	90,455	2,435,119	26.8
53-54	0.006813	90,154	614	89,847	2,344,664	26.0
54-55	0.007688	89,540	688	89,195	2,254,817	25.2
55-56	0.007986	88,851	710	88,496	2,165,622	24.4
56-57	0.009095	88,142	802	87,741	2,077,126	23.6
57-58	0.008825	87,340	771	86,955	1,989,385	22.8
58-59	0.010289	86,569	891	86,124	1,902,430	22.0
59-60	0.011298	85,678	968	85,194	1,816,307	21.2
60-61	0.012631	84,710	1,070	84,175	1,731,112	20.4
61-62	0.013049	83,640	1,091	83,095	1,646,937	19.7
62-63	0.014841	82,549	1,225	81,936	1,563,842	18.9
63-64	0.015666	81,324	1,274	80,687	1,481,906	18.2
64-65	0.017184	80,050	1,376	79,362	1,401,219	17.5
65-66	0.018456	78,674	1,452	77,948	1,321,857	16.8
66-67	0.020034	77,222	1,547	76,449	1,243,909	16.1

Table 2. Life table for males: United States, 2003—Con.

[Click here for spreadsheet version](#)

Age	Probability of dying between ages x to $x+1$	Number surviving to age x	Number dying between ages x to $x+1$	Person-years lived between ages x to $x+1$	Total number of person-years lived above age x	Expectation of life at age x
	$q(x)$	$l(x)$	$d(x)$	$L(x)$	$T(x)$	$e(x)$
67-68	0.021998	75,675	1,665	74,843	1,167,460	15.4
68-69	0.023697	74,010	1,754	73,134	1,092,617	14.8
69-70	0.026257	72,257	1,897	71,308	1,019,484	14.1
70-71	0.028427	70,359	2,000	69,359	948,176	13.5
71-72	0.030325	68,359	2,073	67,323	878,816	12.9
72-73	0.033933	66,286	2,249	65,162	811,493	12.2
73-74	0.036781	64,037	2,355	62,859	746,332	11.7
74-75	0.039863	61,682	2,459	60,452	683,472	11.1
75-76	0.044460	59,223	2,633	57,906	623,020	10.5
76-77	0.048518	56,590	2,746	55,217	565,114	10.0
77-78	0.052622	53,844	2,833	52,428	509,896	9.5
78-79	0.057085	51,011	2,912	49,555	457,469	9.0
79-80	0.062847	48,099	3,023	46,587	407,914	8.5
80-81	0.069652	45,076	3,140	43,506	361,327	8.0
81-82	0.075675	41,936	3,174	40,350	317,820	7.6
82-83	0.081382	38,763	3,155	37,186	277,471	7.2
83-84	0.094027	35,608	3,348	33,934	240,285	6.7
84-85	0.095172	32,260	3,070	30,725	206,351	6.4
85-86	0.103762	29,190	3,029	27,675	175,626	6.0
86-87	0.113017	26,161	2,957	24,683	147,951	5.7
87-88	0.122971	23,204	2,853	21,778	123,268	5.3
88-89	0.133651	20,351	2,720	18,991	101,490	5.0
89-90	0.145087	17,631	2,558	16,352	82,499	4.7
90-91	0.157299	15,073	2,371	13,888	66,147	4.4
91-92	0.170307	12,702	2,163	11,620	52,260	4.1
92-93	0.184124	10,539	1,940	9,569	40,639	3.9
93-94	0.198755	8,598	1,709	7,744	31,071	3.6
94-95	0.214201	6,889	1,476	6,152	23,327	3.4
95-96	0.230452	5,414	1,248	4,790	17,175	3.2
96-97	0.247491	4,166	1,031	3,651	12,386	3.0
97-98	0.265289	3,135	832	2,719	8,735	2.8
98-99	0.283809	2,303	654	1,976	6,016	2.6
99-100	0.303003	1,650	500	1,400	4,039	2.4
100+	1.00000	1,150	1,150	2,640	2,640	2.3

TABLE B

12 National Vital Statistics Reports, Vol. 54, No. 14, April 19, 2006

Table 3. Life table for females: United States, 2003

[Click here for spreadsheet version](#)

Age	Probability of dying between ages x to $x+1$	Number surviving to age x	Number dying between ages x to $x+1$	Person-years lived between ages x to $x+1$	Total number of person-years lived above age x	Expectation of life at age x
	$q(x)$	$l(x)$	$d(x)$	$L(x)$	$T(x)$	$e(x)$
0-1	0.006083	100,000	608	99,460	8,009,389	80.1
1-2	0.000410	99,392	41	99,371	7,909,929	79.6
2-3	0.000296	99,351	29	99,336	7,810,557	78.6
3-4	0.000223	99,322	22	99,310	7,711,221	77.6
4-5	0.000175	99,299	17	99,291	7,611,911	76.7
5-6	0.000143	99,282	14	99,275	7,512,620	75.7
6-7	0.000127	99,268	13	99,262	7,413,345	74.7
7-8	0.000132	99,255	13	99,249	7,314,083	73.7
8-9	0.000121	99,242	12	99,236	7,214,835	72.7
9-10	0.000129	99,230	13	99,224	7,115,599	71.7
10-11	0.000143	99,217	14	99,210	7,016,375	70.7
11-12	0.000132	99,203	13	99,197	6,917,164	69.7
12-13	0.000133	99,190	13	99,183	6,817,968	68.7
13-14	0.000164	99,177	16	99,169	6,718,784	67.7
14-15	0.000176	99,161	17	99,152	6,619,616	66.8
15-16	0.000243	99,143	24	99,131	6,520,464	65.8
16-17	0.000353	99,119	35	99,102	6,421,333	64.8
17-18	0.000399	99,084	39	99,064	6,322,231	63.8
18-19	0.000494	99,045	49	99,020	6,223,167	62.8
19-20	0.000465	98,996	46	98,973	6,124,147	61.9
20-21	0.000486	98,950	48	98,926	6,025,174	60.9
21-22	0.000489	98,902	48	98,877	5,926,248	59.9
22-23	0.000505	98,853	50	98,828	5,827,371	58.9
23-24	0.000495	98,803	49	98,779	5,728,543	58.0
24-25	0.000514	98,754	51	98,729	5,629,764	57.0
25-26	0.000494	98,704	49	98,679	5,531,035	56.0
26-27	0.000547	98,655	54	98,628	5,432,356	55.1
27-28	0.000566	98,601	56	98,573	5,333,728	54.1
28-29	0.000549	98,545	54	98,518	5,235,155	53.1
29-30	0.000618	98,491	61	98,461	5,136,637	52.2
30-31	0.000626	98,430	62	98,399	5,038,176	51.2
31-32	0.000669	98,369	66	98,336	4,939,777	50.2
32-33	0.000693	98,303	68	98,269	4,841,441	49.3
33-34	0.000799	98,235	78	98,195	4,743,172	48.3
34-35	0.000852	98,156	84	98,114	4,644,977	47.3
35-36	0.000977	98,073	96	98,025	4,546,862	46.4
36-37	0.001040	97,977	102	97,926	4,448,838	45.4
37-38	0.001141	97,875	112	97,819	4,350,912	44.5
38-39	0.001216	97,763	119	97,704	4,253,093	43.5
39-40	0.001356	97,644	132	97,578	4,155,389	42.6
40-41	0.001521	97,512	148	97,438	4,057,811	41.6
41-42	0.001635	97,364	159	97,284	3,960,373	40.7
42-43	0.001785	97,204	174	97,117	3,863,089	39.7
43-44	0.001876	97,030	182	96,939	3,765,972	38.8
44-45	0.002125	96,848	206	96,745	3,669,033	37.9
45-46	0.002261	96,642	219	96,533	3,572,288	37.0
46-47	0.002486	96,424	240	96,304	3,475,755	36.0
47-48	0.002613	96,184	251	96,058	3,379,451	35.1
48-49	0.002780	95,933	267	95,799	3,283,393	34.2
49-50	0.003040	95,666	291	95,520	3,187,594	33.3
50-51	0.003264	95,375	311	95,219	3,092,073	32.4
51-52	0.003508	95,064	333	94,897	2,996,854	31.5
52-53	0.003829	94,730	363	94,549	2,901,957	30.6
53-54	0.003978	94,367	375	94,180	2,807,408	29.7
54-55	0.004502	93,992	423	93,781	2,713,228	28.9
55-56	0.004759	93,569	445	93,346	2,619,448	28.0
56-57	0.005466	93,124	509	92,869	2,526,102	27.1
57-58	0.005474	92,615	507	92,361	2,433,232	26.3
58-59	0.006512	92,108	600	91,808	2,340,871	25.4
59-60	0.007104	91,508	650	91,183	2,249,063	24.6
60-61	0.007979	90,858	725	90,495	2,157,881	23.8
61-62	0.008150	90,133	735	89,766	2,067,385	22.9
62-63	0.009356	89,398	836	88,980	1,977,620	22.1
63-64	0.010029	88,562	888	88,118	1,888,640	21.3
64-65	0.011201	87,674	982	87,183	1,800,522	20.5
65-66	0.011923	86,692	1,034	86,175	1,713,339	19.8
66-67	0.012895	85,658	1,105	85,106	1,627,165	19.0

Table 3. Life table for females: United States, 2003—Con.

[Click here for spreadsheet version](#)

Age	Probability of dying between ages x to $x+1$	Number surviving to age x	Number dying between ages x to $x+1$	Person-years lived between ages x to $x+1$	Total number of person-years lived above age x	Expectation of life at age x
	$q(x)$	$l(x)$	$d(x)$	$L(x)$	$T(x)$	$e(x)$
67-68	0.014225	84,553	1,203	83,952	1,542,059	18.2
68-69	0.015455	83,351	1,288	82,706	1,458,107	17.5
69-70	0.016688	82,062	1,369	81,378	1,375,401	16.8
70-71	0.018890	80,693	1,524	79,931	1,294,023	16.0
71-72	0.020078	79,169	1,590	78,374	1,214,092	15.3
72-73	0.022156	77,579	1,719	76,720	1,135,718	14.6
73-74	0.024088	75,860	1,827	74,947	1,058,999	14.0
74-75	0.026516	74,033	1,963	73,051	984,052	13.3
75-76	0.029150	72,070	2,101	71,019	911,001	12.6
76-77	0.032215	69,969	2,254	68,842	839,981	12.0
77-78	0.035695	67,715	2,417	66,506	771,139	11.4
78-79	0.038807	65,298	2,534	64,031	704,633	10.8
79-80	0.043098	62,764	2,705	61,411	640,602	10.2
80-81	0.048423	60,059	2,908	58,605	579,191	9.6
81-82	0.053033	57,151	3,031	55,635	520,586	9.1
82-83	0.058390	54,120	3,160	52,540	464,951	8.6
83-84	0.067373	50,960	3,433	49,243	412,411	8.1
84-85	0.069965	47,526	3,325	45,864	363,168	7.6
85-86	0.077121	44,201	3,409	42,497	317,304	7.2
86-87	0.084936	40,792	3,465	39,060	274,807	6.7
87-88	0.093453	37,328	3,488	35,583	235,747	6.3
88-89	0.102719	33,839	3,476	32,101	200,164	5.9
89-90	0.112778	30,363	3,424	28,651	168,062	5.5
90-91	0.123671	26,939	3,332	25,273	139,411	5.2
91-92	0.135439	23,607	3,197	22,009	114,138	4.8
92-93	0.148116	20,410	3,023	18,899	92,129	4.5
93-94	0.161733	17,387	2,812	15,981	73,230	4.2
94-95	0.176314	14,575	2,570	13,290	57,249	3.9
95-96	0.191874	12,005	2,303	10,853	43,959	3.7
96-97	0.208419	9,702	2,022	8,691	33,106	3.4
97-98	0.225945	7,680	1,735	6,812	24,415	3.2
98-99	0.244433	5,945	1,453	5,218	17,603	3.0
99-100	0.263854	4,491	1,185	3,899	12,385	2.8
100+	1.00000	3,306	3,306	8,486	8,486	2.6

5002. Evidence

Sworn testimony, documents, or anything else may be admitted into evidence. You must decide what the facts are in this case from the evidence you have seen or heard during the trial, **including any exhibits that I admit into evidence**. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. [However, the attorneys for both sides have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.]

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness already answered, you must ignore the answer.

[During the trial I granted a motion to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.]

Directions for Use

~~Read last bracketed paragraph only if testimony was struck during the trial.~~ The Advisory Committee recommends that this instruction be read to the jury before reading instructions on the substantive law. **For a similar instruction to be given before trial, see CACI No. 106, Evidence.**

Include the bracketed language in the third paragraph if the parties have entered into any stipulations of fact.

Read the last bracketed paragraph if a motion to strike testimony was granted during the trial.

Sources and Authority

- Evidence Code section 140 defines “evidence” as “testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.”
- Evidence Code section 312 provides:

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

(a) All questions of fact are to be decided by the jury.

(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Evidence Code section 353 provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142 [199 P.2d 952].)
- Courts have held that “attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means.” (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)
- Courts have stated that “[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished.” (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 1997) Trial

(Revised April 2004)

(Revised February 2007)

5009. Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations. Also, do not immediately announce how you plan to vote. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. ~~Such~~ Your training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you or ask to see any exhibits admitted into evidence that have not already been provided to you. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the ~~[clerk-or/]~~ bailiff/court attendant. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

[At least nine jurors must agree on each verdict and on each question that you are asked to answer. However, the same jurors do not have to agree on each verdict or each question. Any nine jurors is sufficient. As soon as you have agreed on a verdict and answered all the questions as instructed, the presiding juror must date and sign the form(s) and notify the ~~[clerk/-or- the]~~ bailiff/court attendant.]

[or]

At least nine jurors must agree on a verdict. As soon as you have agreed on a verdict, the presiding juror must date and sign the form and notify the [clerk/bailiff/court attendant].

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then

make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

Directions for Use

The Advisory Committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

For the sixth paragraph, read the first option if a special verdict form is to be used and ~~The sixth paragraph is bracketed because this point appears in the special verdict form instructions. Read this paragraph if~~ the special verdict instruction (CACI No. 5012, *Introduction to Special Verdict Form*) is not also being read. Read the second option if a general verdict form is to be used.

Judges may want to provide each juror with a copy of the verdict forms so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Delete the reference to reading back testimony ~~in cases where~~if the proceedings are not being recorded.

Sources and Authority

- Code of Civil Procedure section 613 provides, in part: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court."
- Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."
- Code of Civil Procedure section 618 and article I, section 16, of the California Constitution provide that three-fourths of the jurors must agree to a verdict in a civil case.
- The prohibition on chance or quotient verdict is stated in Code of Civil Procedure section 657, which provides that a verdict may be vacated and a new trial ordered "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance." (See also *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064-1065 [18

Cal.Rptr.2d 106].)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)
- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 330, 336

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

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

(Revised October 2004)

(Revised February 2007)