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INVITATION TO COMMENT

CACI 20-02

Title

Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)

Action Requested

Review and submit comments by September 2, 2020

Proposed Rules, Forms, Standards, or Statutes

Add and revise jury instructions

Proposed Effective Date

November 15, 2020

Proposed by

Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

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Executive Summary and Origin

The Advisory Committee on Civil Jury Instructions has posted proposed additions and revisions to the Judicial Council of California Civil Jury Instructions (CACI). Under rule 10.58 of the California Rules of Court, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in the 2021 edition of the official LexisNexis Matthew Bender CACI publication.

Attachments

1. Table of Contents, Civil Jury Instructions (CACI 20-02), pages 2–3
2. Proposed revised and new instructions, pages 4–70

*This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee.
It is circulated for comment purposes only.*

CIVIL JURY INSTRUCTIONS (CACI 20–02)

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418. Presumption of Negligence per se

[Insert citation to statute, regulation, or ordinance] states:

If [name of plaintiff/defendant] proves ~~If you decide~~

1. That [name of plaintiff/defendant] violated this law and
2. That the violation was a substantial factor in bringing about the harm,

then you must find that [name of plaintiff/defendant] was negligent [unless you also find that the violation was excused].

If you find that [name of plaintiff/defendant] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [name of plaintiff/defendant] was negligent in light of the other instructions.

New September 2003; Revised December 2005, June 2011, November 2020

Directions for Use

This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (See *Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501 [225 P.2d 497].)

If a rebuttal is offered on the ground that the violation was excused, then the bracketed portion in the second and last paragraphs should be read. For an instruction on excuse, see CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused*.

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see CACI Nos. 420 and 421).

Sources and Authority

- Negligence per se. Evidence Code section 669.
- “Although compliance with the law does not prove the absence of negligence, violation of the law does raise a presumption that the violator was negligent. This is called negligence per se.” (*Jacobs*)

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Farm/Del Cabo, Inc. v. Western Farm Service, Inc. (2010) 190 Cal.App.4th 1502, 1526 [119 Cal.Rptr.3d 529]; see also Cal. Law Revision Com. com. to Evid. Code, § 669.)

- “The negligence per se doctrine is codified in Evidence Code section 669, subdivision (a), under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.’ ‘The burden is on the proponent of a negligence per se instruction to demonstrate that these elements are met.’ ” (*Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 596 [247 Cal.Rptr.3d 538], internal citations omitted.)
- “The first two elements are normally questions for the trier of fact and the last two are determined by the trial court as a matter of law. That is, the trial court decides whether a statute or regulation defines the standard of care in a particular case.” (*Jacobs Farm/Del Cabo, Inc., supra*, 190 Cal.App.4th at p. 1526, internal citation omitted; see also Cal. Law Revision Com. com. to Evid. Code, § 669.)
- “[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence.” (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 534 [238 Cal.Rptr.3d 528].)
- “Under the doctrine of negligence per se, the plaintiff ‘borrows’ statutes to prove duty of care and standard of care. [Citation.] The plaintiff still has the burden of proving causation.” (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584 [172 Cal.Rptr.3d 204].)
- “Where a statute establishes a party's duty, ‘proof of the [party's] violation of a statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation.’ This rule, generally known as the doctrine of negligence per se, means that where the court has adopted the conduct prescribed by statute as the standard of care for a reasonable person, a violation of the statute is presumed to be negligence.” (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263 [155 Cal.Rptr.3d 306], internal citation omitted.)
- “[I]n negligence per se actions, the plaintiff must produce evidence of a violation of a statute and a substantial probability that the plaintiff's injury was caused by the violation of the statute before the burden of proof shifts to the defendant to prove the violation of the statute did not cause the plaintiff's injury.” (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 371 [199 Cal.Rptr.3d 522].)
- “The significance of a statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is

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of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them [citations], except where they would serve to impose liability without fault.’ ” (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547 [25 Cal.Rptr.2d 97, 863 P.2d 167], internal citations omitted.)

- “There is no doubt in this state that a federal statute or regulation may be adopted as a standard of care.” (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [52 Cal.Rptr.2d 128].)
- “[T]he courts and the Legislature may create a negligence duty of care, but an administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature.” (*Cal. Serv. Station Etc. Ass’n v. Am. Home Assur. Co.* (1998) 62 Cal.App.4th 1166, 1175 [73 Cal.Rptr.2d 182].)
- “In combination, the [1999] language and the deletion [to Lab. Code, § 6304.5] indicate that henceforth, Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions.” (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [22 Cal.Rptr.3d 530, 102 P.3d 915].)
- “While courts have applied negligence per se to building code violations, it has only been applied in limited situations.” (*Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1212 [252 Cal.Rptr.3d 596].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1002–1028

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-H, *Negligence Predicated On Statutory Violation (“Negligence Per Se”)*, ¶ 2:1845 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8G-C, *Procedural Considerations—Presumptions*, ¶ 8:3604 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28–1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, §§ 3.10, 3.13 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, §§ 90.88, 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.04 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.50 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.70, 165.80, 165.81 (Matthew Bender)

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430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

New September 2003; Revised October 2004, June 2005, December 2005, December 2007, May 2018, May 2020, November 2020

Directions for Use

As phrased, this definition of “substantial factor” subsumes the “but for” test of causation, that is, “but for” the defendant’s conduct, the plaintiff’s harm would not have occurred. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Rest.2d Torts, § 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give this sentence. (See *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 572–573 [34 Cal.Rptr.2d 607, 882 P.2d 298]; Rest.2d Torts, § 432(1).)

“Conduct,” in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff’s alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The reference to “conduct” may be changed as appropriate to the facts of the case.

The “but for” test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes. (See also *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563] [court did not err in refusing to give last sentence of instruction in case involving exposure to carcinogens in cigarettes].)

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes*, should also be given.

~~In a case in which the plaintiff’s claim is that the plaintiff contracted cancer from exposure to the defendant’s asbestos-containing product, A case in which the plaintiff’s claim is based on disease resulting from asbestos exposure requires a different instruction. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679, 688 [254 Cal.Rptr.3d 377] requires a different instruction regarding exposure to a~~

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~~particular product.) Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims*, and do not give this instruction. (Cf. *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants].)~~

~~Under this instruction, a remote or trivial factor is not a substantial factor. This sentence could cause confusion in an asbestos case. “Remote” often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases. (See *City of Pasadena v. Superior Court (Jauregui)* (2017) 12 Cal.App.5th 1340, 1343–1344 [220 Cal.Rptr.3d 99] [cause of action for a latent injury or disease generally accrues when the plaintiff discovers or should reasonably have discovered the plaintiff has suffered a compensable injury].)~~

~~Although the court in *Rutherford* did not use the word “trivial,” it did state that “a force [that] plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor.” (*Rutherford, supra*, 16 Cal.4th at p. 969.) While it may be argued that “trivial” and “infinitesimal” are synonyms, a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault. (*Boekrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398].) In *Rutherford*, the jury allocated the defendant only 1.2 percent of comparative fault, and the court upheld this allocation. (See *Rutherford, supra*, 16 Cal.4th at p. 985.) Instructing the jury that a *de minimis* force (whether trivial or infinitesimal) is not a substantial factor could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum.~~

Sources and Authority

- “The test for joint tort liability is set forth in section 431 of the Restatement of Torts 2d, which provides: ‘The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.’ Section 431 correctly states California law as to the issue of causation in tort cases.” (*Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671–672 [271 Cal.Rptr. 876].)
- “California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the ‘but for’ rule of causation which states that a defendant’s conduct is a cause of the injury if the injury would not have occurred ‘but for’ that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the ‘but for’ test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact.” (*Rutherford, supra*, 16 Cal.4th at pp. 968–969, internal citations omitted.)
- “The term ‘substantial factor’ has not been judicially defined with specificity, and indeed it has been observed that it is ‘neither possible nor desirable to reduce it to any lower terms.’ This court has suggested that a force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term ‘substantial.’ For example, the substantial factor standard, formulated to aid plaintiffs as a broader

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rule of causality than the ‘but for’ test, has been invoked by defendants whose conduct is clearly a ‘but for’ cause of plaintiff’s injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test ‘undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.’ ” (*Rutherford, supra*, 16 Cal.4th at pp. 968–969, internal citations omitted.)

- “The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, ‘a force which plays only an “infinitesimal” or “theoretical” part in bringing about injury, damage, or loss is not a substantial factor’, but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault.” (*Bockrath, supra*, 21 Cal.4th at p. 79, internal citations omitted.)
- “[G]iving CACI No. 430, which states that a factor is not substantial when it is ‘remote or trivial,’ could be misleading in an asbestos case, where the long latency period necessitates exposures will have been several years earlier. Jury instructions therefore should not suggest that a long latency period, in which the exposure was temporally ‘remote,’ precludes an otherwise sufficient asbestos claim. “Remote” often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed, asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases.’ It was not error for the court to give CACI No. 435 alone instead of CACI No. 430.” (*Lopez, supra*, 41 Cal.App.5th at p. 688, internal citation omitted.)
- “The text of Restatement Torts second section 432 demonstrates how the ‘substantial factor’ test subsumes the traditional ‘but for’ test of causation. Subsection (1) of section 432 provides: ‘Except as stated in Subsection (2), the actor’s negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent.*’ ... Subsection (2) states that if ‘two forces are actively operating ... and each of itself is sufficient to bring about harm to another, the actor’s negligence may be found to be a substantial factor in bringing it about.’ ” (*Viner, supra*, 30 Cal.4th at p. 1240, original italics.)
- “Because the ‘substantial factor’ test of causation subsumes the ‘but for’ test, the ‘but for’ test has been phrased in terms of ‘substantial factor,’ as follows, in the context, as here, of a combination of causes dependent on one another: A defendant’s negligent conduct may combine with another factor to cause harm; if a defendant’s negligence was a substantial factor in causing the plaintiff’s harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff’s harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.” (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)
- “A tort is a legal cause of injury only when it is a substantial factor in producing the injury. If the external force of a vehicle accident was so severe that it would have caused identical injuries notwithstanding an abstract ‘defect’ in the vehicle’s collision safety, the defect cannot be considered a substantial factor in bringing them about. [¶] The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a ‘substantial factor’ in producing plaintiff’s ‘enhanced’ injuries. However, this instruction dealt only by ‘negative implication’ with [defendant]’s theory that any such defect was *not* a ‘substantial factor’ in this case because this particular accident would have broken plaintiff’s ankles in any event. As we have seen,

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[defendant] presented substantial evidence to that effect. [Defendant] was therefore entitled to its special instruction, and the trial court's refusal to give it was error.” (*Soule, supra*, 8 Cal.4th at p. 572–573, original italics, footnote and internal citations omitted.)

- “The first element of legal cause is cause in fact The ‘but for’ rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* ‘to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.’ ” (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)
- “If the accident would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause.” (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 [199 Cal.Rptr.3d 522].)
- “We have recognized that proximate cause has two aspects. ‘ “One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event.’ ” This is sometimes referred to as ‘but-for’ causation. In cases where concurrent independent causes contribute to an injury, we apply the ‘substantial factor’ test of the Restatement Second of Torts, section 423, which subsumes traditional ‘but for’ causation. This case does not involve concurrent independent causes, so the ‘but for’ test governs questions of factual causation.” (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 354 [188 Cal.Rptr.3d 309, 349 P.3d 1013], original italics, footnote omitted.)
- “The second aspect of proximate cause ‘focuses on public policy considerations. Because the purported [factual] causes of an event may be traced back to the dawn of humanity, the law has imposed additional “limitations on liability other than simple causality.” [Citation.] “These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy.” [Citation.] Thus, “proximate cause ‘is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.’ ” [Citation.]’ ” (*State Dept. of State Hospitals, supra*, 61 Cal.4th at p. 353, internal citation omitted.)
- “On the issue ... of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.” (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104 [236 Cal.Rptr.3d 128].)
- “ ‘Whether a defendant’s conduct actually caused an injury is a question of fact ... that is ordinarily for the jury’ [C]ausation in fact is ultimately a matter of probability and common sense: “[A plaintiff] is not required to eliminate entirely all possibility that the defendant’s conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular

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act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case.” ’ ... ‘ “A mere possibility of ... causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.” ’ ” (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 [68 Cal.Rptr.3d 897], internal citations omitted.)

- “Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. ... Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact.” (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 152 [241 Cal.Rptr.3d 209].)
- “[E]vidence of causation ‘must rise to the level of a reasonable probability based upon competent testimony. [Citations.] ‘A possible cause only becomes ‘probable’ when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action.’ [Citation.] The defendant’s conduct is not the cause in fact of harm “ ‘where the evidence indicates that there is less than a probability, i.e., a 50–50 possibility or a mere chance,’ ” that the harm would have ensued.’ ” (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312 [111 Cal.Rptr.3d 787].)
- “However the test is phrased, causation in fact is ultimately a matter of probability and common sense.” (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)
- “As a general matter, juries may decide issues of causation without hearing expert testimony. But ‘[w]here the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.’ ” (*Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284, 290 [236 Cal.Rptr.3d 802], internal citation omitted.)
- “The Supreme Court ... set forth explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials: A plaintiff must ‘allege that he was exposed to each of the toxic materials claimed to have caused a specific illness’; ‘identify each product that allegedly caused the injury’; allege ‘the toxins entered his body’ ‘as a result of the exposure’; allege that ‘he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness’; and, finally, allege that ‘each toxin he absorbed was manufactured or supplied by a named defendant.’ ” (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1194 [130 Cal.Rptr.3d 571], quoting *Bockrath, supra*, 21 Cal.4th at p. 80, footnote omitted.)
- “[M]ultiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two causes, partial combinations of which are sufficient to cause the harm. As such, the trial court did not err in refusing to instruct the jury with the but-for test.” (*Major, supra*, 14 Cal.App.5th at p. 1200.)

Secondary Sources

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6 Witkin, *Summary of California Law* (11th ed. 2017) Torts, §§ 1334–1341

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13–1.15

1 Levy et al., *California Torts*, Ch. 2, *Causation*, § 2.02 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.71 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.260–165.263 (Matthew Bender)

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435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[Name of plaintiff] may prove that exposure to asbestos from [name of defendant]’s **[product/property or operations]** was a substantial factor causing [his/her/nonbinary pronoun/[name of decedent]’s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her/nonbinary pronoun] risk of developing cancer.

New September 2003; Revised December 2007, May 2018, November 2018, May 2020, November 2020

Directions for Use

This instruction is to be given in a case in which the plaintiff’s claim is that the plaintiff contracted an asbestos-related disease from exposure to the defendant’s asbestos-containing product or asbestos-related activities. ~~This instruction is based on (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679, 688 [254 Cal.Rptr.3d 377] [addressing causation standard for exposure to asbestos from a defendant’s property or operation when the defendant is not a manufacturer or supplier of asbestos-containing products]), which addresses only exposure to asbestos from “defendant’s defective asbestos-containing products.” Whether the same causation standards from *Rutherford* would apply to defendants who are alleged to have created exposure to asbestos but are not manufacturers or suppliers of asbestos-containing products is not settled. However, at least one court has given CACI No. 435 with regard to a defendant other than an asbestos manufacturer or supplier, but there was no analysis of the issue on appeal. (See *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant]; see also *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236–1239 [142 Cal.Rptr.3d 678] [*Rutherford* causation standards cited in case against contractor alleged to have created exposure to asbestos at job site].) See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor*, with regard to whether CACI No. 430 may also be given.~~

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes*, may also be given.

Sources and Authority

- “In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant’s defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a ‘legal cause’ of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant’s product were the ones, or

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among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant’s product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff’s or decedent’s *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given.” (*Rutherford, supra*, 16 Cal.4th at pp. 982–983, original italics, internal citation and footnotes omitted.)

- “CACI No. 435 was developed to address the special considerations that apply when the injury was allegedly caused by asbestos exposure. These include the long latency period, the occupational settings that often expose workers to multiple forms and brands of asbestos, and, in a case of exposure to asbestos from multiple sources, the difficulty of proving that a plaintiff’s or decedent’s illness was caused by particular asbestos fibers traceable to the defendant. These considerations are similar whether the defendant was a manufacturer/supplier or otherwise created the exposure to asbestos.” (*Lopez, supra*, 41 Cal.App.5th at p. 687, internal citation omitted.)
- “The term ‘substantial factor’ has not been judicially defined with specificity, and indeed it has been observed that it is ‘neither possible nor desirable to reduce it to any lower terms.’ This court has suggested that a force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term ‘substantial.’ For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the ‘but for’ test, has been invoked by defendants whose conduct is clearly a ‘but for’ cause of plaintiff’s injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test ‘undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.’ ” (*Rutherford, supra*, 16 Cal.4th at p. 969, internal citations omitted.)
- “[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault.” (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)
- “Contrary to defendant’s assertion, the California Supreme Court’s decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that ‘the actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,’ ‘demonstrates how the “substantial factor” test subsumes the traditional “but for” test of causation.’ Defendant argues that *Viner* required plaintiffs to show that defendant’s product ‘independently caused [plaintiff’s] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.’ *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that ‘plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff’s exposure to defendant’s asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant’s particular product were the ones, or among the ones, that actually produced the malignant growth.’ ” *Viner* is consistent with *Rutherford*

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insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- “ ‘A threshold issue in asbestos litigation is exposure to the defendant's product. ... If there has been no exposure, there is no causation.’ Plaintiffs bear the burden of ‘demonstrating that exposure to [defendant’s] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff’s] risk of developing cancer.’ ‘Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].’ Therefore, ‘[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.’ ” (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)
- “[G]iving CACI No. 430, which states that a factor is not substantial when it is ‘remote or trivial,’ could be misleading in an asbestos case, where the long latency period necessitates exposures will have been several years earlier. Jury instructions therefore should not suggest that a long latency period, in which the exposure was temporally ‘remote,’ precludes an otherwise sufficient asbestos claim. ‘“Remote” often connotes a time limitation. Nothing in Rutherford suggests such a limitation; indeed, asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases.’ It was not error for the court to give CACI No. 435 alone instead of CACI No. 430.” (*Lopez, supra*, 41 Cal.App.5th at p. 688, internal citation omitted.)
- “Further, ‘[t]he mere “possibility” of exposure’ is insufficient to establish causation. ‘[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff’s] burden’ of persuasion.” (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)
- “[T]here is no requirement that plaintiffs show that [defendant] was the exclusive, or even the primary, supplier of asbestos-containing gaskets to PG&E.” (*Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 981 [227 Cal.Rptr.3d 321].)
- “[T]o establish exposure in an asbestos case a plaintiff has no obligation to prove a specific exposure to a specific product on a specific date or time. Rather, it is sufficient to establish ‘that defendant's product was definitely at his work site and that it was sufficiently prevalent to warrant an inference that plaintiff was exposed to it’ during his work there.” (*Turley, supra*, 18 Cal.App.5th at p. 985.)
- “To support an allocation of liability to another party in an asbestos case, a defendant must ‘present evidence that the aggregate dose of asbestos particles arising from’ exposure to that party's asbestos ‘constituted a substantial factor in the causation of [the decedent's] cancer.’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)
- “ ‘[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,’ our Supreme Court has held that a plaintiff ‘need *not* prove with medical

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exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.’ Rather, a ‘plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.’ ” (*Izell, supra*, 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)

- “Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff’s asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff’s injury. [Citations.] ‘Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.’ [Citation.] ” (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363–1364 [169 Cal.Rptr.3d 373].)
- “In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth ‘the requirement in *Rutherford* that causation be decided by taking into account “the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed.” ’ But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion.” (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)
- “Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure.” (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)
- “We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be ‘somebody with an M.D. after his name.’ The *Rutherford* court agreed with the *Lineaweaver* court that ‘the reference to “medical probability” in the standard “is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence.” [Citation.]’ The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor.” (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)
- “Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the ‘every exposure’ and ‘insignificant exposure’ camps, and recognizes that the conflict is one for the jury to resolve.” (*Izell, supra*, 231 Cal.App.4th at p. 977.)

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- “[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]’s statement that it ‘takes significant exposures’ to increase the risk of disease. This statement uses the plural ‘exposures’ and also requires that those exposures be ‘significant.’ The use of ‘significant’ as a limiting modifier appears to be connected to [expert]’s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum.” (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)
- “Nor is there a requirement that ‘specific words must be recited by [plaintiffs]’ expert.’ [¶] The connection, however, must be made between the defendant’s asbestos products and the risk of developing mesothelioma suffered by the decedent.” (*Paulus, supra*, 224 Cal.App.4th at p. 1364.)
- “We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker’s household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker’s home, it does not extend beyond this circumscribed category of potential plaintiffs.” (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

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440. ~~Unreasonable~~ Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

A law enforcement officer may use reasonable force to [arrest/detain/~~overcome resistance~~ by/prevent escape of/specify other conduct relating to seizure] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to accomplish the [arrest/detention/~~overcome resistance~~ by/prevent escape of/specify other conduct relating to seizure].

[Name of plaintiff] claims that [name of defendant] ~~was negligent in used~~ using unreasonable force ~~in~~ to [arresting/detaining/~~prevent escape/overcome resistance/specify other conduct~~]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] used force in [arresting/detaining] [name of plaintiff];
2. That the amount of force used by [name of defendant] was unreasonable;
3. That [name of plaintiff] was harmed; and
4. That [name of defendant]’s use of unreasonable force was a substantial factor in causing [name of plaintiff]’s harm.

In deciding whether [name of defendant] used unreasonable force, you must consider the totality of the circumstances of the [arrest/detention/~~specify other conduct~~] and determine what force a reasonable [insert type of officer] in [name of defendant]’s position would have used under the same or similar circumstances. “Totality of the circumstances” means all facts known to the officer at the time, including the conduct of [name of defendant] and [name of plaintiff] leading up to the use of force. Among the factors to be considered are the following:

- (a) Whether [name of plaintiff] reasonably appeared to pose an immediate threat to the safety of [name of defendant] or others;
- (b) The seriousness of the crime at issue; [and]
- (c) Whether [name of plaintiff] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]
- [(d) [Name of defendant]’s tactical conduct and decisions before using force on [name of plaintiff].]

[A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/prevent escape/overcome resistance/specify other conduct].]

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New June 2016; Revised May 2020, November 2020

Directions for Use

Use this instruction if the plaintiff makes a negligence claim under state law arising from the force used in effecting an arrest or detention. Such a claim is often combined with a claimed civil rights violation under 42 United States Code section 1983 (See CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.) It might also be combined with a claim for battery. See CACI No. 1305, *Battery by Peace Officer—Essential Factual Elements*. For additional authorities on excessive force by a law enforcement officer, see the Sources and Authority to these two CACI instructions.

For cases involving the use of deadly force by a peace officer, ~~Penal Code section 835a use CACI No. 441, *Unnecessary Use of Deadly Force by Peace Officer—Essential Factual Elements*. This instruction and CACI No. 441~~ may require modifications ~~to the instruction if the jury must decide whether the force used by the defendant was deadly or nondeadly force, or if the jury must decide whether the defendant was a peace officer.~~

Factors (a), (b), and (c) are often referred to as the “*Graham* factors.” (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) ~~661 F.3d 460, 467–468 673 F.3d 864, 872-~~); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to all three claims.

~~Give optional ffactor (d) is bracketed because no court has held that an officer’s tactical decisions before using nondeadly force can be actionable negligence. if the officer’s conduct leading up to the need to use force is at issue. It has been held that l~~iability can arise if the officer’s earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of deadly force was unreasonable. ~~In this respect, California negligence law differs from the federal standard under the Fourth Amendment.~~ (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (Cf. *County of Los Angeles v. Mendez* (2017) — U.S. —, 137 S.Ct. 1539, 1546–1547 [198 L.Ed.2d 52].)

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a(b).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).

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- “There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence.” (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- “The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt*.... This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate.” (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)
- “Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers’ actions in light of ‘the totality of the circumstances at the time,’ including ‘the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.’ The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California’s civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court’s instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder’s balancing of competing interests.” (*Hernandez, supra*, 46 Cal.4th at p. 514, internal citation omitted.)
- “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’” against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” (*Graham, supra*, 490 U.S. at p. 396, internal citations omitted.)
- “The most important of these [*Graham* factors, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances.” (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553].)
- “Plaintiff must prove unreasonable force as an element of the tort.” (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

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- “ ‘ “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... [T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. ...” ’ In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required.” (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)
- “ ‘[A]s long as an officer’s conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the “most reasonable” action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability for negligence.’ ” (*Hayes, supra*, 57 Cal.4th at p. 632.)
- “The California Supreme Court did not address whether decisions before non-deadly force can be actionable negligence, but addressed this issue only in the context of ‘deadly force.’ ” (*Mulligan v. Nichols* (9th Cir. 2016) 835 F.3d 983, 991, fn. 7.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 496

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.22 (Matthew Bender)

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441. Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements

[Name of plaintiff] claims that *[name of defendant]* was negligent in using deadly force to [arrest/detain/overcome resistance to/prevent escape of/specify other conduct] [him/her/nonbinary pronoun]. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* was a peace officer;
2. That *[name of defendant]* used deadly force on *[name of plaintiff]*;
3. That considering the totality of the circumstances, *[name of defendant]*'s use of deadly force was not necessary to defend human life;
4. That *[name of plaintiff]* was harmed; and
5. That *[name of defendant]*'s use of deadly force was a substantial factor in causing *[name of plaintiff]*'s harm.

[Name of defendant]'s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation as *[name of defendant]* would have believed, based on the totality of the circumstances known to or perceived by *[name of defendant]* at the time, that deadly force was necessary [either]:

[to defend against an imminent threat of death or serious bodily injury to [[*name of defendant*] [and/or] [another person]]]; or/.]

[to apprehend a fleeing person for any felony that [[threatened] [or] [resulted in]] death or serious bodily injury to another, so long as *[name of defendant]* reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended.]

[However, a peace officer must not use deadly force against a person based only on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.]

[Deadly force is force that creates a substantial risk of causing death or serious bodily injury. It is not limited to the discharge of a firearm.]

A threat of death or serious bodily injury is “imminent” if, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

“Totality of the circumstances” means all facts known to the peace officer at the time, including the

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conduct of [name of defendant] and [name of plaintiff] leading up to the use of deadly force. The following are among the factors you should consider in determining whether [name of defendant's] use of deadly force was necessary in defense of human life:

- (a) **Whether [name of plaintiff] reasonably appeared to pose an immediate threat of death or serious bodily injury to [name of defendant] or others;**
- (b) **The seriousness of the crime at issue; [and]**
- [(c) **Whether [name of plaintiff] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention] by flight[; and/.]**
- [(d) **[Name of defendant]'s tactical conduct and decisions before using deadly force on [name of plaintiff][; and/.]**
- [(e) **Whether [name of defendant] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to do so[; and/.]**
- [(f) **Whether [name of defendant] made reasonable efforts to identify [himself/herself/nonbinary pronoun] as a peace officer [and, if possible, to give warning that deadly force would be used].]**

[[A person who is employed as a police officer by [specify name of agency that employs police officer] is a peace officer.]/[A person employed by [specify name of agency that employs peace officer, e.g., "the Department of Fish and Wildlife"] is a peace officer if [describe facts necessary to make employee a peace officer, e.g., "designated by the director of the agency as a peace officer"].]

[A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose the right to self-defense by using objectively reasonable force to [arrest/prevent escape/overcome resistance].]

New November 2020

Directions for Use

Use this instruction for a negligence claim arising from a peace officer's use of deadly force. Penal Code section 835a preserves the "reasonable force" standard for nondeadly force, but creates a separate, higher standard that authorizes a peace officer to use deadly force only when "necessary in defense of human life." If the plaintiff claims that the defendant used both deadly and nondeadly force, or if the jury must decide whether the force used was deadly or nondeadly, this instruction may be used along with the corresponding essential elements for negligence involving nondeadly force. See CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*.

Element 1 may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must

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instruct the jury that the defendant was a peace officer. If there are contested issues of fact regarding element 1, include the specific factual findings necessary for the jury to arrive at a determination of whether the defendant was acting as a peace officer, including either of the options in the third bracketed paragraph.

Select either or both bracketed options concerning the justifications for using deadly force under Penal Code, § 835a(c) depending on the facts of the case. If only one justification is supported by the facts, omit the either/or language. Omit the bracketed sentence following the justifications if the plaintiff does not claim that the only threat posed was self harm.

“Deadly force” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) The definition may be omitted from the instruction if a firearm was used. Note that this definition does not require that the encounter result in the death of the person against whom the force was used.

Factors (a), (b), and (c) are often referred to as the “*Graham* factors.” (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to all three claims.

Give optional factor (d) if the officer’s conduct leading up to the need to use deadly force is at issue. Liability can arise if the earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of force was unreasonable. (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (Cf. *County of Los Angeles v. Mendez* (2017) — U.S. —, 137 S.Ct. 1539, 1546–1547 [198 L.Ed.2d 52].)

Give optional factors (e) and (f) depending on the facts of the case. If the peace officer’s encounter is with a person exhibiting suicidal tendencies, a different instruction will be required. A peace officer may not use deadly force against a person based on a danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person. (Pen. Code, § 835a(c)(2).)

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

Modify the instruction if the plaintiff is not the victim of deadly force.

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a(b).

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- When Use of Deadly Force is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- Peace Officer Defined. Penal Code section 830 et seq.
- “There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence.” (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- “The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt v. City of Los Angeles*, *supra*, 2 Cal.3d 575. ... This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate.” (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)
- “Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers’ actions in light of ‘the totality of the circumstances at the time,’ including ‘the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.’ The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California’s civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court’s instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder’s balancing of competing interests.” (*Hernandez*, *supra*, 46 Cal.4th at p. 514, internal citation omitted.)

Secondary Sources

Draft—Not Approved by Judicial Council

1305. Battery by Peace Officer—Essential Factual Elements

[Name of plaintiff] claims that *[name of defendant]* harmed *[him/her/nonbinary pronoun]* by using unreasonable force to *[arrest [him/her/nonbinary pronoun]/prevent [his/her/nonbinary pronoun] escape/overcome [his/her/nonbinary pronoun] resistance/[insert other applicable action]]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* intentionally touched *[name of plaintiff]* *[or caused [name of plaintiff] to be touched]*;
2. That *[name of defendant]* used unreasonable force to *[arrest/prevent the escape of/overcome the resistance of/[insert other applicable action] [name of plaintiff]*;
3. That *[name of plaintiff]* did not consent to the use of that force;
4. That *[name of plaintiff]* was harmed; and
5. That *[name of defendant]*'s use of unreasonable force was a substantial factor in causing *[name of plaintiff]*'s harm.

[A/An] *[insert type of peace officer]* may use reasonable force to arrest or detain a person when the officer has reasonable cause to believe that that person has committed a crime. **A peace officer may use deadly force only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by *[name of defendant]* at the time, that it was necessary in defense of human life.** Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force.

In deciding whether *[name of defendant]* used unreasonable force, you must determine the amount of force that would have appeared reasonable to *[a/an]* *[insert type of peace officer]* in *[name of defendant]*'s position under the same or similar circumstances. You should consider, among other factors, the following:

- (a) The seriousness of the crime at issue;
- (b) Whether *[name of plaintiff]* reasonably appeared to pose an immediate threat to the safety of *[name of defendant]* or others; and
- (c) Whether *[name of plaintiff]* was actively resisting arrest or attempting to evade arrest.

[[A/An] *[insert type of peace officer]* who makes or attempts to make an arrest is not required to retreat or cease from the officer's efforts because the person being arrested resists or threatens to resist. **["Retreat" does not mean tactical repositioning or other de-escalation tactics.]**

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New September 2003; Revised December 2012, May 2020, November 2020

Directions for Use

~~For additional authorities on excessive force, see the Sources and Authority for CACI No. 440, *Unreasonable Force by Law Enforcement in Arrest or Other Seizure—Essential Factual Elements*, and CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.~~

Include the first bracketed sentence For in cases involving the use of deadly force by a peace officer, Penal Code section 835a may require further modifications to the instruction. For example, if the defendant claims that the use of deadly force was justified because it was necessary in defense of human life, modify the instruction to include the first bracketed paragraph in CACI No. 441, *Negligent Use of Deadly Force by Peace Officer*. Select one or both options from the second paragraph depending on the justification(s) claimed.

~~For additional authorities on excessive force, see the Sources and Authority for CACI No. 440, *Unreasonable Force by Law Enforcement in Arrest or Other Seizure—Essential Factual Elements*, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, CACI No. 441, *Negligent Use of Deadly Force by Peace Officer*, and CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.~~

Sources and Authority

- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a.
- Duty to Submit to Arrest. Penal Code section 834a.
- “Plaintiff must prove unreasonable force as an element of the tort.” (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)
- “ ‘ “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... [T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. ...” ’ In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required.” (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)
- “A police officer’s use of deadly force is reasonable if ‘ ‘ ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.’ ...” ...’ ” (*Brown, supra*, 171 Cal.App.4th at p. 528.)
- “[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention” (*Evans*

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v. City of Bakersfield (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- “[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer unless excessive force is used or threatened; excessive force in that event triggers the individual’s right of self-defense.” (*Evans, supra*, 22 Cal.App.4th at p. 331, internal citation omitted.)
- “Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers’ actions in light of ‘the totality of the circumstances at the time,’ including ‘the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.’ The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California’s civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court’s instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder’s balancing of competing interests.” (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 496

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.22, 58.61, 58.92 (Matthew Bender)

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

1 California Civil Practice: Torts § 12:22 (Thomson Reuters)

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1814. Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act (Pen. Code, § 502(e)(1))

To recover damages for money spent to investigate or verify whether [name of plaintiff]’s computer system, computer network, computer program, or data {was or was not/~~were or were not~~} altered, damaged, or deleted by {name of defendant}’s access [specify wrongful conduct under section 502(c) that led to accessing the plaintiff’s computer system, computer network, or computer program], [name of plaintiff] must prove the amount of money reasonably and necessarily spent to conduct such an investigation.

New May 2020; Revised November 2020

Directions for Use

Give this instruction for violations of the Comprehensive Computer Data and Access Fraud Act in which there is evidence that the plaintiff spent money to investigate or verify the defendant’s wrongful conduct. (See Pen. Code, § 502; CACI No. 1812, *Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements*.) In some cases, it may be appropriate to tailor the instruction to specify the technology or data at issue (e.g., the name of a computer program or the plaintiff’s data files).

For other damages instructions, see the Damages series, CACI Nos. 3900 et seq.

Punitive or exemplary damages are available for willful violations. (Pen. Code, § 502(e)(4).) For instructions on punitive damages, see CACI Nos. 3940–3949.

Sources and Authority

- Compensatory Damages. Penal Code section 502(e)(1).

Secondary Sources

5 Witkin, California Criminal Law (4th ed. 2012) Crimes Against Property, § 229 et seq.

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2204. Negligent Interference With Prospective Economic Relations

[Name of plaintiff] claims that *[name of defendant]* negligently interfered with a relationship between *[him/her/nonbinary pronoun/it]* and *[name of third party]* that probably would have resulted in an economic benefit to *[name of plaintiff]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* and *[name of third party]* were in an economic relationship that probably would have resulted in a future economic benefit to *[name of plaintiff]*;
 2. That *[name of defendant]* knew or should have known of this relationship;
 3. That *[name of defendant]* knew or should have known that this relationship would be disrupted if *[he/she/nonbinary pronoun/it]* failed to act with reasonable care;
 4. That *[name of defendant]* failed to act with reasonable care;
 5. That *[name of defendant]* engaged in wrongful conduct through *[insert grounds for wrongfulness, e.g., breach of contract with another, misrepresentation, fraud, violation of statute]*;
 6. That the relationship was disrupted;
 7. That *[name of plaintiff]* was harmed; and
 8. That *[name of defendant]*'s wrongful conduct was a substantial factor in causing *[name of plaintiff]*'s harm.
-

New September 2003; Revised November 2020

Directions for Use

Regarding the fifth element, the judge must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the “wrongful conduct” standard. This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877]; *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740]; *Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757].) The jury must then decide whether the defendant engaged in the conduct as defined by the judge. If the conduct is tortious, judge should instruct on the elements of the tort.

Sources and Authority

- “The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition.” (*Settimo Associates, supra, v. Environ Systems, Inc.*

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~~(1993)~~ 14 Cal.App.4th 842, at p. 845 ~~[17 Cal.Rptr.2d 757]~~, internal citation omitted.)

- “The elements of negligent interference with prospective economic advantage are (1) the existence of an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant failed to act with reasonable care; (4) the defendant's failure to act with reasonable care; (5) actual disruption of the relationship; (6) and economic harm proximately caused by the defendant’s negligence.” (*Redfearn v. Trader Joe’s Co.* (2018) 20 Cal.App.5th 989, 1005 [230 Cal.Rptr.3d 98].)
- “The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship.” (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466].)
- “‘The tort of *negligent* interference with economic relationship arises only when the defendant owes the plaintiff a duty of care.’ ” (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348 [60 Cal.Rptr.2d 539], original italics, internal citation omitted.)
- “Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity.” (*J’Aire Corp., supra, v. Gregory* (1979) 24 Cal.3d 799 at p., 804 ~~[157 Cal.Rptr. 407, 598 P.2d 60]~~.)
- The trial court should instruct the jury on the “independently wrongful” element of the tort of negligent interference with prospective economic advantage. (*National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440 [72 Cal.Rptr.2d 720].)
- “Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement.” (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877], ~~supra, 45 Cal.App.4th at p. 603~~, internal citation omitted, disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159 fn. 11 [131 Cal.Rptr.2d 29, 63 P.3d 937].)
- “While the trial court and [defendant] are correct that a defendant incurs liability for interfering with another’s prospective economic advantage only if the defendant’s conduct was independently wrongful, we have been directed to no California authority, and have found none, for the trial court’s conclusion that the wrongful conduct must be intentional or willful. The defendant's conduct must ‘fall outside the boundaries of fair competition’ ... , but negligent misconduct or the violation of a

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statutory obligation suffice. The approved CACI No. 2204 does not indicate otherwise and, in fact, indicates that either a misrepresentation or ‘violation of statute’ is sufficient.” (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1079–1080 [66 Cal.Rptr.3d 432], internal citations omitted.)

- “The fact that the defendant's conduct was independently wrongful is an element of the interference cause of action itself. In addition, the wrongful interfering act can be independently tortious only as to a third party; it need not be independently wrongful as to the plaintiff. Accordingly, ... to state a cause of action for intentional or negligent interference with prospective economic advantage, it is not necessary to also plead a separate, stand-alone tort cause of action.” (*Redfearn, supra*, 20 Cal.App.5th at p. 1006, internal citations omitted.)
- ~~Notably, one of “[A]mong the [t]he~~ criteria for establishing [the existence of] a duty of care is the ‘blameworthiness’ of the defendant’s conduct. For negligent interference, a defendant’s conduct is blameworthy only if it was independently wrongful apart from the interference itself.” (*Lange v. TIG Insurance Co.* (1999) 68 Cal.App.4th 1179, 1187 [81 Cal.Rptr.2d 39].) ~~The Lange court stated that in a negligent interference case “a defendant’s conduct is blameworthy only if it was independently wrongful apart from the interference itself.” (*Ibid.*) Thus, the “independently wrongful” element may, in effect, be decided by the judge in the course of determining whether a duty of care was owed.~~
- ~~There is currently no cause of action for negligent interference with contractual relations (see *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636–637 [7 Cal.Rptr. 377, 354 P.2d 1073]): “Although the continuing validity of the so-called ‘Fifield rule’ is questionable in light of the California Supreme Court’s recognition in *J’Aire* of a cause of action for negligent interference with prospective economic advantage, the Supreme Court has yet to disapprove *Fifield*.” (*LiMandri, supra*, 52 Cal.App.4th at p. 349.)~~
- “Under the privilege of free competition, a competitor is free to divert business to himself as long as he uses fair and reasonable means. Thus, the plaintiff must present facts indicating the defendant’s interference is somehow wrongful—i.e., based on facts that take the defendant’s actions out of the realm of legitimate business transactions.” (*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1153–1154 [265 Cal.Rptr. 330], internal citations omitted.)
- “Since the crux of the competition privilege is that one can interfere with a competitor’s prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*’s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff’s burden to prove, as an element of the cause of action itself, that the defendant’s conduct was independently wrongful and, therefore, was not privileged rather than the defendant’s burden to prove, as an affirmative defense, that it’s [*sic*] conduct was not independently wrongful and therefore was privileged.” (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)
- ~~There are other privileges that a defendant could assert in appropriate cases, such as the “There are~~

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three formulations of the manager’s privilege: (1) absolute, (2) mixed motive, and (3) predominant motive.” manager’s privilege.” (See *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391–1392 [77 Cal.Rptr.2d 383].)

Secondary Sources

95 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~ 2017) Torts, §§ ~~751–754~~ 867–869

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.104 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.135 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.70 (Matthew Bender)

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2210. Affirmative Defense—Privilege to Protect Own ~~Financial~~Economic Interest

[Name of defendant] claims that there was no intentional interference with contractual relations because [he/she/nonbinary pronoun/it] acted only to protect [his/her/nonbinary pronoun/its] legitimate ~~financial~~economic interests. To succeed, [name of defendant] must prove all of the following:

1. That [name of defendant] had a [legitimate] ~~financial~~economic interest in the contractual relations because [specify ~~financial interest~~existing economic interest];
2. That [name of defendant] acted only to protect [his/her/nonbinary pronoun/its] own ~~financial~~economic interest;
3. That [name of defendant] acted reasonably and in good faith to protect it; and
4. That [name of defendant] used appropriate means to protect it.

New June 2016; Revised May 2020

Directions for Use

Give this instruction as an affirmative defense to a claim for intentional interference with contractual relations. (See CACI No. 2201.) The defense presents a justification based on the defendant's right to protect its own ~~financial~~economic interest.

In element 1, the jury should be told the specific ~~financial~~economic interest that the defendant was acting to protect. Include "legitimate" if the jury will be asked to determine whether that ~~financial~~economic interest was legitimate, as opposed perhaps to pretextual or fraudulent.

Sources and Authority

- "In harmony with the general guidelines of the test for justification is the narrow protection afforded to a party where (1) he has a legally protected interest, (2) in good faith threatens to protect it, and (3) the threat is to protect it by appropriate means. Prosser adds: 'Where the defendant acts to further his own advantage, other distinctions have been made. If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it; and for obvious reasons of policy he is likewise privileged to assert an honest claim, or bring or threaten a suit in good faith.'" (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73, 81 [159 Cal.Rptr. 285], internal citation omitted.)
- "Justification for the interference is an affirmative defense and not an element of plaintiff's cause

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of action.” (*Richardson, supra*, 98 Cal.App.3d at p. 80.)

- “Something other than sincerity and an honest conviction by a party in his position is required before justification for his conduct on the grounds of ‘good faith’ can be established. There must be an objective basis for the belief which requires more than reliance on counsel.” (*Richardson, supra*, 98 Cal.App.3d at pp. 82–83.)
- “A thoroughly bad motive, that is, a *purpose solely to harm the plaintiff*, of course, is sufficient to exclude any apparent privilege which the interests of the parties might otherwise create, just as such a motive will defeat the immunity of any other conditional privilege. If the defendant does not act in a bona fide attempt to protect his own interest or the interest of others involved in the situation, he forfeits the immunity of the privilege. . . . *Conduct is actionable, when it is indulged solely to harm another, since the legitimate interest of the defendant is practically eliminated from consideration.* The defendant's interest, although of such a character as to justify an invasion of another's similar interest, is not to be taken into account when the defendant acts, not for the purpose of protecting that interest, but *solely to damage the plaintiff.*” (*Bridges v. Cal-Pacific Leasing Co.* (1971) 16 Cal.App.3d 118, 132 [93 Cal.Rptr. 796], original italics.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~760~~876

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.119 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.137 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.42 et seq. (Matthew Bender)

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2511. Adverse Action Made by Decision Maker Without Animus (Cat's Paw)

In this case, the decision to [discharge/[other adverse employment action]] [name of plaintiff] was made by [name of decision maker]. Even if [name of decision maker] did not hold any [discriminatory/retaliatory] intent [or was unaware of [name of plaintiff]'s conduct on which the claim of retaliation is based], [name of defendant] may still be liable for [discrimination/retaliation] if [name of decision maker] followed a recommendation from or relied on facts provided by **another person supervisor** who had [discriminatory/retaliatory] intent.

To succeed, [name of plaintiff] must prove both of the following:

1. That [name of plaintiff]'s [specify protected activity or attribute] was a substantial motivating reason for [name of ~~supervisor~~other person]'s [specify acts ~~of supervisor~~ on which decision maker relied]; and
 2. That [name of ~~supervisor~~other person]'s [specify acts on which decision maker relied] was a substantial motivating reason for [name of decision maker]'s decision to [discharge/[other adverse employment action]] [name of plaintiff].
-

New December 2012; Revised June 2013, May 2020, November 2020

Directions for Use

Give this instruction if the “cat’s paw” rule is a factor in the case. Under the cat’s paw rule, the person who actually took the adverse employment action against the employee was not acting out of any improper animus. The decision maker, however, acted on information provided by **another person supervisor** who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision maker is referred to as the “cat’s paw” of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100 [16 Cal.Rptr.3d 717].)

The purpose of this instruction is to make it clear to the jury that they are not to evaluate the motives or knowledge of the decision maker, but rather to decide whether the acts of **the supervisor another person** with animus actually caused the adverse action. Give the optional language in the second sentence of the first paragraph in a retaliation case in which the decision maker was not aware of the plaintiff’s conduct that allegedly led to the retaliation (defense of ignorance). (See *Reeves, supra*, 121 Cal.App.4th at pp. 106–108.)

Element 1 requires that the protected activity or attribute be a substantial motivating reason for the retaliatory acts. Element 2 requires that the **supervisor’s other person’s** improper motive be a substantial motivating reason for the decision maker’s action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, “Substantial Motivating Reason” Explained.)

In both elements 1 and 2, all of the **supervisor’s other person’s** specific acts need not be listed in all cases. Depending on the facts, doing so may be too cumbersome and impractical. If the specific acts are listed,

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the list should include all acts on which plaintiff claims the decision maker relied, not just the acts admitted to have been relied on by the decision maker.

Sources and Authority

- “This case presents the question whether an employer may be liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, but the cause for discipline is separately investigated and the ultimate decision to discharge the plaintiff is made by a manager with no knowledge that the worker has engaged in protected activities. We hold that so long as the supervisor’s retaliatory motive was an actuating ... cause of the dismissal, the employer may be liable for retaliatory discharge. Here the evidence raised triable issues as to the existence and effect of retaliatory motive on the part of the supervisor, and as to whether the manager and the intermediate investigator acted as tools or ‘cat’s paws’ for the supervisor, that is, instrumentalities by which his retaliatory animus was carried into effect to plaintiff’s injury.” (*Reeves, supra*, 121 Cal.App.4th at p. 100.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a ‘but for’ cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, ... proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- “This concept—which for convenience we will call the ‘defense of ignorance’—poses few analytical challenges so long as the ‘employer’ is conceived as a single entity receiving and responding to stimuli as a unitary, indivisible organism. But this is often an inaccurate picture in a world where a majority of workers are employed by large economic enterprises with layered and compartmentalized management structures. In such enterprises, decisions significantly affecting personnel are rarely if ever the responsibility of a single actor. As a result, unexamined assertions about the knowledge, ignorance, or motives of ‘the employer’ may be fraught with ambiguities, untested assumptions, and begged questions.” (*Reeves, supra*, 121 Cal.App.4th at p. 108.)
- “[S]howing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus.” (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551 [87 Cal.Rptr.3d 99]).
- “[W]e accept Employee’s implicit legal premise that Employer could be liable for [the outside investigator’s] discriminatory motivation if the male executives who actually terminated

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Employee were merely the cat’s paws of a biased female investigator.” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1536 [152 Cal.Rptr.3d 154].)

- “Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation.” (*Reeves, supra*, 121 Cal.App.4th at p. 108.)
- “Here a rational fact finder could conclude that an incident of minor and excusable disregard for a supervisor’s stated preferences was amplified into a ‘solid case’ of ‘workplace violence,’ and that this metamorphosis was brought about in necessary part by a supervisor’s desire to rid himself of a worker who created trouble by complaining of matters the supervisor preferred to ignore. Since those complaints were protected activities under FEHA, a finder of fact must be permitted to decide whether these inferences should in fact be drawn.” (*Reeves, supra*, 121 Cal.App.4th at p. 121.)
- “Our emphasis on the conduct of *supervisors* is not inadvertent. An employer can generally be held liable for the discriminatory or retaliatory actions of supervisors. The outcome is less clear where the only actor possessing the requisite animus is a nonsupervisory coworker.” (*Reeves, supra*, 121 Cal.App.4th at p. 109 fn. 9, original italics, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1026, 1052, 1053

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶ 7:806.5 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][a] (Matthew Bender)

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**3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements
(42 U.S.C. § 1983)**

[Name of plaintiff] claims that [name of defendant] used excessive force in [arresting/detaining] [him/her/nonbinary pronoun] **in violation of the Fourth Amendment to the United States Constitution.** To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] used force in [arresting/detaining] [name of plaintiff];
2. That the force used by [name of defendant] was excessive;
3. That [name of defendant] was acting or purporting to act in the performance of [his/her/nonbinary pronoun] official duties;
4. That [name of plaintiff] was harmed; and
5. That [name of defendant]’s use of excessive force was a substantial factor in causing [name of plaintiff]’s harm.

Under the Fourth Amendment, Force is ~~not~~ excessive if it is **not** reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

- (a) Whether [name of plaintiff] reasonably appeared to pose an immediate threat to the safety of [name of defendant] or others;
 - (b) The seriousness of the crime at issue **or other circumstances known to [name of defendant] at the time force was applied;** ~~and~~
 - (c) Whether [name of plaintiff] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight] ~~and~~;
 - (d) **The amount of time [name of defendant] had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that time period;**
 - (e) **The type and amount of force used; and**
 - ~~(d)~~(f) [specify other factors particular to the case].
-

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised

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June 2015, June 2016, May 2020, November 2020

Directions for Use

The Fourth Amendment’s “objective reasonableness” standard applies to all claims of excessive force against law enforcement officers in the course of making an arrest, investigatory stop, or other seizure brought under Title 42 United States Code section 1983, whether deadly or not. (*Scott v. Harris* (2007) 550 U.S. 372, 381–385.)

The “official duties” referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

~~The three ffactors (a), (b), and (c) listed~~ are often referred to as the “*Graham* factors.” (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) ~~661 F.3d 460, 467–468.~~ 673 F.3d 864, 872.) Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. (*Id.*) These and other ~~a~~Additional factors may be added if appropriate to the facts of the case.

~~Claims of excessive force against law enforcement officers in the course of making an arrest, investigatory stop, or other seizure are analyzed under the Fourth Amendment’s “objective reasonableness” standard. (*Graham, supra*, 490 U.S. at pp. 388, 395 fn.10.)~~ Claims of excessive force brought by pretrial detainees are governed by the Fourteenth Amendment’s Due Process Clause and are also analyzed under an objective reasonableness standard. (*Kingsley v. Hendrickson* (2015) -- U.S. --, 135 S.Ct. 2466, 2473 [192 L.Ed.2d 416].) Modify the instruction for use in a case brought by a pretrial detainee involving the use of excessive force after arrest, but before conviction. For an instruction on an excessive force claim brought by a convicted prisoner, see CACI No. 3042, *Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Excessive Force*.

The legality or illegality of the use of deadly force under state law is not relevant to the constitutional question. (Cf. *People v. McKay* (2002) 27 Cal.4th 601, 610 [117 Cal.Rptr.2d 236, 41 P.3d 59] [“[T]he [United States Supreme Court] has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law”]; see also Pen. Code, § 835a.)

For ~~an~~ instructions for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Unreasonable-Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, and CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by Peace Officer—Essential Factual ~~Allegations~~Elements*.

Sources and Authority

- “In addressing an excessive force claim brought under § 1983, analysis begins by identifying the

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specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct.” (*Graham, supra*, 490 U.S. at p. 395, internal citations and footnote omitted.)

- “Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons ... against unreasonable ... seizures’ of the person.” (*Graham, supra*, 490 U.S. at p. 394.)
- “In deciding whether the force deliberately used is, constitutionally speaking, ‘excessive,’ should courts use an objective standard only, or instead a subjective standard that takes into account a defendant’s state of mind? It is with respect to *this* question that we hold that courts must use an objective standard.” (*Kingsley v. Hendrickson* (2015) -- U.S. --, 135 S.Ct. 2466, 2472–2473 [192 L.Ed.2d 416], original italics.)
- “[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.” (*Graham, supra*, 490 U.S. at p. 395.)
- “ ‘The intrusiveness of a seizure by means of deadly force is unmatched.’ ‘The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a “fundamental interest in his own life” and because such force “frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.” ’ ” (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1031.)
- “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” (*Graham, supra*, 490 U.S. at p. 396.)
- “Because ‘[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” (*Graham, supra*, 490 U.S. at p. 396, internal citation omitted.)
- “The most important of these [factors from *Graham*, above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances.” (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)
- “[The *Graham*] factors, however, are not exclusive. We ‘examine the totality of the circumstances and consider “whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*.” ’ Other relevant factors include the availability of less intrusive alternatives to the force

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employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed.” (*Glenn, supra*, ~~661 F.3d at p. 467~~ 673 F.3d at p. 872, internal citations omitted.)

- “With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct.” (*Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.)
- “Although officers are not required to use the least intrusive degree of force available, ‘the availability of alternative methods of capturing or subduing a suspect may be a factor to consider[.]’ ” (*Vos, supra*, 892 F.3d at p. 1033, internal citation omitted.)
- “Courts ‘also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff’s mental and emotional state.’ ” (*Brooks v. Clark County* (9th Cir. 2016) 828 F.3d 910, 920.)
- “Because the reasonableness standard ‘nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.’ ” (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)
- “Justice Stevens incorrectly declares [the ‘objective reasonableness’ standard under *Graham*] to be ‘a question of fact best reserved for a jury,’ and complains we are ‘usurp[ing] the jury’s factfinding function.’ At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]’s actions--or, in Justice Stevens’ parlance, ‘[w]hether [respondent’s] actions have risen to a level warranting deadly force,’ is a pure question of law.” (*Scott v. Harris* (2007) 550 U.S. 372, 381, fn. 8 [127 S. Ct. 1769; 167 L. Ed. 2d 686], original italics, internal citations omitted.)
- “Because there are no genuine issues of material fact and ‘the relevant set of facts’ has been determined, the reasonableness of the use of force is ‘a pure question of law.’ ” (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc).)
- “In assessing the objective reasonableness of a particular use of force, we consider: (1) ‘the severity of the intrusion on the individual’s Fourth Amendment rights by evaluating the type and amount of force inflicted,’ (2) ‘the government’s interest in the use of force,’ and (3) the balance between ‘the gravity of the intrusion on the individual’ and ‘the government’s need for that intrusion.’ ” (*Lowry, supra*, 858 F.3d at p. 1256.)
- “To be sure, the reasonableness inquiry in the context of excessive force balances ‘intrusion[s] on the individual’s Fourth Amendment interests’ against the government’s interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers’ favor.” (*Sandoval v. Las Vegas Metro. Police Dep’t* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

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- “The district court found that [plaintiff] stated a claim for excessive use of force, but that governmental interests in officer safety, investigating a possible crime, and controlling an interaction with a potential domestic abuser outweighed the intrusion upon [plaintiff]'s rights. In reaching this conclusion, the court improperly ‘weigh[ed] conflicting evidence with respect to . . . disputed material fact[s].’ ” (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 880.)
- “The Fourth Amendment’s ‘reasonableness’ standard is not the same as the standard of ‘reasonable care’ under tort law, and negligent acts do not incur constitutional liability.” (*Hayes v. County of San Diego* 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)
- “[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used.” (*Hayes, supra*, 57 Cal.4th at p. 639, internal citations omitted.)
- “We are cognizant of the Supreme Court’s command to evaluate an officer’s actions ‘from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.’ We also recognize the reality that ‘police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.’ This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim’s conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers’ conduct is ‘objectively reasonable’ in light of the facts and circumstances confronting them’ without regard for an officer’s subjective intentions.” (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)
- “Deadly force is permissible only ‘if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.’ ” (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)
- “[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force ‘[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.’ ” (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)
- “It is clearly established law that shooting a fleeing suspect in the back violates the suspect's Fourth Amendment rights. ‘Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.’ ” (*Foster v. City of Indio* (9th Cir. 2018) 908 F.3d 1204, 1211.)
- “ ‘[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.’ But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he

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may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting.” (*Zion v. County of Orange* (9th Cir. 2017) 874 F.3d 1072, 1076, internal citation omitted.)

- “Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance.” (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)
- “[T]he fact that the ‘suspect was armed with a deadly weapon’ does *not* render the officers’ response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat.” (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)
- “ ‘[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.’ Here, whether objective factors supported [defendant]’s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]’s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact.” (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)
- “An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.” (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)
- “Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself*, we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the ‘solution’ could be worse than the problem.” (*Glenn, supra*, ~~661 F.3d at p. 468~~ [673 F.3d at p. 872.](#))
- “This Court has ‘refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.’ The Court has, however, ‘found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.’ A reasonable jury could conclude, based upon the information available to

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[defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force.” (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- “By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force.” (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)
- “[P]reshooting conduct is included in the totality of circumstances surrounding an officer’s use of deadly force, and therefore the officer’s duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers’ preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers’ ultimate use of deadly force was reasonable.” (*Hayes, supra*, 57 Cal.4th at p. 632, internal citation omitted.)
- “A person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied.” (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)
- “The Supreme Court has interpreted the phrase ‘under “color” of law’ to mean ‘under “pretense” of law.’ A police officer’s actions are under pretense of law only if they are ‘in some way “related to the performance of his official duties.”’ By contrast, an officer who is ‘“pursuing his own goals and is not in any way subject to control by [his public employer],”’ does not act under color of law, unless he ‘purports or pretends’ to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not ‘purport[] or pretend[]’ to be officers, do not act under color of law.” (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)
- “We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.” (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)
- “*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a ‘judgment in favor of the plaintiff [in the

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section 1983 action] “necessarily imply” ... the invalidity of the prior conviction or sentence?” (3) ‘If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?’ ” (*Fetters, supra*, 243 Cal.App.4th at p. 834.)

- “The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only ‘consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.’ ” (*Fetters, supra*, 243 Cal.App.4th at p. 841, original italics.)
- “[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action.” (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)
- “[Plaintiff]’s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. ‘For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant’s attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.’ ” (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)
- “Plaintiffs contend that the use of force is unlawful because the arrest itself is unlawful. But that is not so. We have expressly held that claims for false arrest and excessive force are analytically distinct.” (*Sharp v. County of Orange* (9th Cir. 2017) 871 F.3d 901, 916.)
- “[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury’s province to decide. For instance, by taking from the jury the question whether [officer]’s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer’s lawful instructions. Presuming such resistance could certainly have influenced the jury’s assessment of ‘the need for force,’ as well as its consideration of the other *Graham* factors, including ‘whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]’s unlawful arrest claim, the district court impermissibly truncated the jury’s consideration of [plaintiff]’s excessive force claim.” (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1027, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 981, 985

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

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3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

Draft—Not Approved by Judicial Council

3801. Implied Contractual Indemnity

[Name of indemnitee] **claims that [he/she/nonbinary pronoun] [is/was/may be] required to pay [describe liability, e.g., “a court judgment in favor of plaintiff John Jones”] because [name of indemnitor] [failed to use reasonable care in performing work under an agreement with [name of indemnitee]/[specify other basis of responsibility]]. In order for [name of indemnitee] to recover from [name of indemnitor], [name of indemnitee] must prove both of the following:**

1. **That [name of indemnitor] [failed to use reasonable care in [performing the work/[describe work or services, e.g., testing the soil]] under an agreement with [name of indemnitee]/[specify other basis of responsibility]]; and**
2. **That [name of indemnitor]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**

[[Name of indemnitor] claims that [[name of indemnitee] [and] [insert identification of others]] contributed as [a] substantial factor[s] in causing [name of plaintiff]’s harm. To succeed, [name of indemnitor] must prove both of the following:

1. **That [[name of indemnitee] [and] [insert identification of others]] [was/were] [negligent/[specify other basis of responsibility]]; and**
2. **That [[name of indemnitee] [and] [insert identification of others]] contributed as [a] substantial factor[s] in causing [name of plaintiff]’s harm.**

You will be asked to determine the percentages of responsibility of [name of indemnitor][, and] [[name of indemnitee][, and] all other persons responsible] for [name of plaintiff]’s harm.

New September 2003; Revised December 2007, May 2020

Directions for Use

The party identifications in this instruction assume a cross-complaint between indemnitor and indemnitee defendants. In a direct action by the indemnitee against the indemnitor, “*name of plaintiff*” will refer to the person to whom the indemnitee has incurred liability.

Implied contractual indemnity may arise for reasons other than the indemnitor’s negligent performance under the contract. If the basis of the claim is other than negligence, specify the conduct involved. (See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 974 [56 Cal.Rptr.3d 177] [breach of warranty].)

Read the last bracketed portion if the indemnitor claims that the indemnitor was not the sole cause of the indemnitee’s liability or loss. Select options depending on whether the indemnitor alleges contributory conduct of the indemnitee, of others, or of both. Element 1 will have to be modified if there are different

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contributing acts alleged against the indemnitee and others; for example, if the indemnitee is alleged to have been negligent and another party is alleged to be strictly liable.

A special finding that an agreement existed may create a need for instructions, but it is a question of law whether an agreement implies a duty to indemnify. This instruction should be given only in cases in which the court has determined that the alleged indemnitor and the indemnitee have “a joint legal obligation to the injured party.” (*Prince v. Pacific Gas & Electric* (2009) 45 Cal.4th 1151, 1160 [90 Cal.Rptr.3d 732, 202 P.3d 1115].)

Sources and Authority

- “In general, indemnity refers to ‘the obligation resting on one party to make good a loss or damage another party has incurred.’ Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and (3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity). [¶] Although the foregoing categories of indemnity were once regarded as distinct, we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. Though not extinguished, implied contractual indemnity is now viewed simply as ‘a form of equitable indemnity.’” (*Prince, supra, v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, at p. 1157 [90 Cal.Rptr.3d 732, 202 P.3d 1115], internal citations omitted.)
- “The right to implied contractual indemnity is predicated upon the indemnitor’s breach of contract, ‘the rationale ... being that a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance absent any participation by the indemnitee in the wrongful act precluding recovery.’ ... ‘An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or upon any duty which the indemnitor owes to the injured third party. It is grounded upon the indemnitor’s breach of duty *owing to the indemnitee* to properly perform its contractual duties.’” (*West v. Superior Court* (1994) 27 Cal.App.4th 1625, 1633 [34 Cal.Rptr.2d 409], internal citations omitted, original italics.)
- “[A]n implied contractual indemnity claim, like a traditional equitable indemnity claim, is subject to the *American Motorcycle* rule that a party’s liability for equitable indemnity is based on its *proportional share of responsibility* for the damages to the injured party.” (*Prince, supra*, 45 Cal.4th at p. 1165, original italics.)
- “[O]ur recognition that ‘a claim for implied contractual indemnity is a form of equitable indemnity subject to the rules governing equitable indemnity claims’ corrects any misimpression that joint liability is not a component.” (*Prince, supra*, 45 Cal.4th at p. 1166, internal citation omitted.)
- “[U]nder [Code of Civil Procedure] section 877.6, subsection (c), ... an [implied contractual] indemnity claim, like other equitable indemnity claims, may not be pursued against a party who has entered into a good faith settlement.” (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1031 [269 Cal.Rptr. 720, 791 P.2d 290].)

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- “We conclude the trial court erred in denying [the indemnitee’s] implied contractual indemnity based on [indemnitee’s] failure to prove [the indemnitor’s] breach of warranty was the product of [indemnitor’s] failure to use reasonable care in performing its contractual duties. [Indemnitee] does not need to prove a negligent breach of contract to be entitled to implied contractual indemnity.” (*Garlock Sealing Technologies, supra*, 148 Cal.App.4th at p. 974, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th-11th~~ ed. ~~2005~~2017) Torts, §§ ~~118229, 178~~

Haning et al., California Practice Guide: Personal Injury, Ch. 4-D, *Techniques Where Settlement Not Forthcoming*, ¶ 4:~~189.6a-784~~ (The Rutter Group)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03[6] (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Contribution and Indemnity*, § 300.61[5] (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.91[3][a] (Matthew Bender)

~~+~~California Civil Practice: Torts § 4:13 (Thomson Reuters)

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3903C. Past and Future Lost Earnings (Economic Damage)

[Insert number, e.g., “3.”] [Past] [and] [future] lost earnings.

[To recover damages for past lost earnings, [name of plaintiff] must prove the amount of [insert one or more of the following: income/earnings/salary/wages] that [he/she/nonbinary pronoun] has lost to date.]

[To recover damages for future lost earnings, [name of plaintiff] must prove the amount of [insert one or more of the following: income/earnings/salary/wages] [he/she/nonbinary pronoun] will be reasonably certain to lose in the future as a result of the injury.]

New September 2003; Revised November 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage)*.

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.
- “We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations.” (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399].)
- “‘To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.’” (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- “‘Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery “on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury.” ’” (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)
- “Requiring the plaintiff to prove future economic losses are reasonably certain ‘ensures that the jury’s fixing of damages is not wholly, and thus impermissibly, speculative.’” (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 738 [214 Cal.Rptr.3d 113].)

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- “[T]he majority view is that no deduction is made for the injured party’s expected living expenses during the lost years.” (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1842, 1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.39–1.41

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10–52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.190 (Matthew Bender)

†California Civil Practice: Torts, § 5:15 (Thomson Reuters)

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3903D. Lost Earning Capacity (Economic Damage)

[Insert number, e.g., “4.”] **The loss of *[name of plaintiff]*’s ability to earn money.**

To recover damages for the loss of the ability to earn money as a result of the injury, *[name of plaintiff]* must prove:

- 1. That it is reasonably certain that the injury that *[name of plaintiff]* sustained will cause *[him/her/nonbinary pronoun]* to earn less money in the future than *[he/she/nonbinary pronoun]* otherwise could have earned; and**
- 2. The reasonable value of that loss to *[him/her/nonbinary pronoun]*.**

In determining the reasonable value of the loss, compare what it is reasonably probable that *[name of plaintiff]* could have earned without the injury to what *[he/she/nonbinary pronoun]* can still earn with the injury. [Consider the career choices that *[name of plaintiff]* would have had a reasonable probability of achieving.] It is not necessary that *[he/she/nonbinary pronoun]* have a work history.

New September 2003; Revised April 2004, April 2008, May 2017, [November 2020](#)

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, [Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender \(Economic Damage\)](#).

If lost profits are asserted as an element of damages, see CACI No. 3903N, *Lost Profits (Economic Damage)*.

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. The verdict form should ensure that the same loss is not computed under both standards.

In the last paragraph, include the bracketed sentence if the plaintiff is of sufficient age that reasonable probabilities can be projected about career opportunities.

Sources and Authority

- [Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.](#)
- “Before [lost earning capacity] damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the

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injury.” (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 887 [208 Cal.Rptr.3d 170].)

- “Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money.” (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)
- “Because these damages turn on the plaintiff’s earning capacity, the focus is ‘not [on] what the plaintiff would have earned in the future[,] but [on] what she could have earned.’ Consequently, proof of the plaintiff’s prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages, nor a cap on the amount of those damages. Indeed, proof that the plaintiff had any prior earnings is not required because the ‘vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,’ even if she had not done so previously.” (*Licudine, supra*, 3 Cal.App.5th at pp. 893–894, internal citations omitted.)
- “Such damages are ‘. . . awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring . . . [her] as nearly as possible to . . . [her] former position, or giving . . . [her] some pecuniary equivalent.’ Impairment of the capacity or power to work is an injury separate from the actual loss of earnings.” (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117], original italics, internal citations omitted.)
- “[T]he jury must fix a plaintiff’s future earning capacity based on what it is ‘reasonably probable’ she could have earned.” (*Licudine, supra*, 3 Cal.App.5th at p. 887.)
- “A plaintiff’s earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s).” (*Licudine, supra*, 3 Cal.App.5th at p. 894.)
- “How is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff’s earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving.” (*Licudine, supra*, 3 Cal.App.5th at p. 894.)
- “Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff’s prior earnings in that same career. As these options suggest, expert testimony is not always required.” (*Licudine, supra*, 3 Cal.App.5th at p. 897.)
- “[E]xpert testimony is not vital to a claim for loss of earning capacity.” (*Lewis v. Ukrán* (2019) 36 Cal.App.5th 886, 893 [248 Cal.Rptr.3d 839].)

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- “A trier of fact may draw the inference that the plaintiff has suffered a loss of earning capacity from the nature of the injury, but it is not required to draw that inference.” (*Martinez v. State Dept. of Health Care Services* (2017) 19 Cal.App.5th 370, 374 [227 Cal.Rptr.3d 483].)
- “ ‘Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery “on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury.” ’ ” (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)
- “[T]he majority view is that no deduction is made for the injured party’s expected living expenses during the lost years.” (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th-11th~~ ed. ~~2005~~2017) Torts, §§ ~~1666, 1667~~1842, 1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10, 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.140, 64.175 (Matthew Bender)

~~1~~California Civil Practice: Torts § 5:15 (Thomson Reuters)

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3906. Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage)

In determining a reasonable amount of [name of plaintiff]’s [[lost earnings] [and/or] [lost ability to earn money]], you must not use race, ethnicity, or gender as a basis for reducing [name of plaintiff]’s [[lost earnings] [and/or] [lost ability to earn money]].

New November 2020

Directions for Use

Give this instruction in cases in which the plaintiff seeks damages for lost earnings and/or lost earning capacity from personal injury or wrongful death. Depending on the circumstances, select the type(s) of damages at issue: lost earnings, lost ability to earn money, or both. If this instruction is used, it should follow the applicable instruction(s) in the items of economic damage series (see CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*; CACI No. 3903D, *Lost Earning Capacity (Economic Damage)*).

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.

Secondary Sources

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expense and Economic Loss*, § 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.45, 177.46 (Matthew Bender)

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4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc., § 1161(4))

[Name of plaintiff] **claims that** *[name of defendant]* **[and** *[name of subtenant]*, **a subtenant of** *[name of defendant],* **no longer [has/have] the right to occupy the property because** *[name of defendant]* **has [created a nuisance on the property/ [or] used the property for an illegal purpose]. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of plaintiff]* **[owns/leases] the property;**
2. **That** *[name of plaintiff]* **[rented/subleased] the property to** *[name of defendant];*
3. **That** *[name of defendant]* **[include one or both of the following:]**

created a nuisance on the property by *[specify conduct constituting nuisance];*

[or]

used the property for an illegal purpose by *[specify illegal activity];*
4. **That** *[name of plaintiff]* **properly gave** *[name of defendant]* **[and** *[name of subtenant]] **three days’ written notice to vacate the property; and***
5. **That** *[name of defendant]* **[or subtenant** *[name of subtenant]] **is still occupying the property.***

[A “nuisance” is anything that [is harmful to health] [or] [is indecent or offensive to the senses] [or] [is 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] [or] [is [a/an] [fire hazard/specify other potentially dangerous condition] to the property].]

New December 2010; Revised June 2011, December 2011, May 2020, November 2020

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select “owns” in element 1, and “rented” in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, “leases” in element 1, and “subleased” in element 2. (Code Civ. Proc., § 1161(3).)

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Include the optional last paragraph defining a nuisance if there is a factual dispute and the jury will determine whether the defendant’s conduct constituted a nuisance. Omit any bracketed definitional options that are not at issue in the case. For additional authorities on nuisance, see the Sources and Authority to CACI Nos. 2020, *Public Nuisance—Essential Factual Elements*, and 2021, *Private Nuisance—Essential Factual Elements*. Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord’s failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

The Tenant Protection Act of 2019, local law, and/or federal law may impose additional requirements for the termination of a rental agreement based on nuisance or illegal activity. (See Civ. Code, § 1946.2(a) [“just cause” requirement for termination of certain residential tenancies], (b) [“just cause” defined], (b)(1)(C) [nuisance is “just cause”], (b)(1)(I) [unlawful purpose is “just cause”].) This instruction should be modified accordingly if applicable.

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.

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- “Nuisance” Defined. Civil Code section 3479.
- “Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days’ notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do.” (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)
- “Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor’s right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained.” (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)
- “Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter’s residence or usual place of business *and* sending a copy through the mail to the tenant’s *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required.” (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)
- “In the cases discussed . . . , a finding of proper service turned on a party’s acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed.” (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- “[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: As explained in *Liebovich, supra*, . . . , ‘[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.’ ” (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

Secondary Sources

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12 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2006~~ 2017) Real Property, §§ ~~674, 726, 701, 759~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 200, *Termination of Tenancies*, § 200.38 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34:181 (Thomson Reuters)

4320. Affirmative Defense—Implied Warranty of Habitability

[Name of defendant] claims that [he/she/nonbinary pronoun] does not owe [any/the full amount of] rent because [name of plaintiff] did not maintain the property in a habitable condition. To succeed on this defense, [name of defendant] must prove that [name of plaintiff] failed to provide one or more of the following:

- a. **[effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors][./; or]**
- b. **[plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- c. **[a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]**
- d. **[heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- e. **[electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]**
- f. **[building, grounds, and all areas under the landlord’s control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]**
- g. **[an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]**
- h. **[floors, stairways, and railings maintained in good repair][./; or]**
- i. **[Insert other applicable standard relating to habitability.]**

[Name of plaintiff]’s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial. A condition that occurred only after [name of defendant] failed or refused to pay rent and was served with a notice to pay rent or vacate the property cannot be a defense to the previous nonpayment.

[Even if [name of defendant] proves that [name of plaintiff] substantially failed to meet any of these requirements, [name of defendant]’s defense fails if [name of plaintiff] proves that [name of defendant] has done any of the following that contributed substantially to the condition or interfered substantially with [name of plaintiff]’s ability to make the necessary repairs:

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[substantially failed to keep [his/her/*nonbinary pronoun*] living area as clean and sanitary as the condition of the property permitted][./; or]

[substantially failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permitted][./; or]

[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]

The fact that [*name of defendant*] has continued to occupy the property does not necessarily mean that the property is habitable.

New August 2007; Revised June 2010, June 2013, December 2014, November 2020

Directions for Use

This instruction applies only to residential tenancies. (See Code Civ. Proc., § 1174.2(a).)

The habitability standards included are those set forth in Civil Code section 1941.1. Use only those relevant to the case. Or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268]; see Health & Saf. Code, §§ 17920.3, 17920.10) or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342].)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905].) The law on a landlord's notice in the unlawful detainer context, however, remains unsettled. A landlord has a duty to maintain the premises in a habitable condition irrespective of whether the tenant knows about a particular condition. (*Knight, supra*, 29 Cal.3d at p. 54.)

Sources and Authority

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- Landlord’s Duty to Make Premises Habitable. Civil Code section 1941.
- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2.
- Untenantable Dwelling. Civil Code section 1941.1(a).
- Effect of Tenant’s Violations. Civil Code section 1941.2.
- Liability of Landlord Demanding Rent for Uninhabitable Property. Civil Code section 1942.4(a).
- “Once we recognize that the tenant’s obligation to pay rent and the landlord’s warranty of habitability are mutually dependent, it becomes clear that the landlord’s breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact ‘due and owing’ to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises.” (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)
- “We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that ‘bare living requirements’ must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord’s obligations under the common law implied warranty of habitability we now recognize.” (*Green, supra*, 10 Cal.3d at p. 637, footnotes omitted.)
- “It follows that substantial noncompliance with applicable code standards could lead to a breach of the warranty of habitability.” (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1298, fn. 9 [173 Cal.Rptr.3d 159].)
- “[U]nder *Green*, a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense.” (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)
- “[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant’s lack of knowledge of defects is not a prerequisite to the landlord’s breach of the warranty.” (*Knight, supra*, 29 Cal.3d at p. 54.)

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- “The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection.” (*Peterson, supra*, 10 Cal.4th at pp. 1205–1206, footnotes omitted.)
- “At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord’s breach of the implied warranty of habitability exists whether or not he has had a ‘reasonable’ time to repair. Otherwise, the mutual dependence of a landlord’s obligation to maintain habitable premises, and of a tenant’s duty to pay rent, would make no sense.” (*Knight, supra*, 29 Cal.3d at p. 55, footnote omitted.)
- “[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner.” (*Knight, supra*, 29 Cal.3d at p. 57.)
- “Without evaluating the propriety of instructing the jury on each item included in the defendants’ requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the ‘repair and deduct’ remedy has been used.” (*Knight, supra*, 29 Cal.3d at p. 58.)
- “The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)
- “In the event of a landlord's breach of the implied warranty of habitability, the tenant is not absolved of the obligation to pay rent; rather the tenant remains liable for the reasonable rental value as determined by the court for the period that the defective condition of the premises existed.” (*Erlach, supra*, 226 Cal.App.4th at p. 1297.)
- “In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires.” (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

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12 Witkin, Summary of California Law (~~10th~~11th ed. ~~2005~~2017) Real Property, § ~~625~~ 651

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-A, *Warranty Of Habitability—In General*, ¶ 3:1 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.109-8.112

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.64, 12.36–12.37

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 15

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

Miller & Starr, California Real Estate ~~4th~~Ch. 19, *Landlord-Tenant*, § 19:224 (Thomson Reuters)

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4560. Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b))

[Name of plaintiff] claims that [name of defendant] did not have a valid contractor's license during all times when [name of defendant] was [performing services/supervising construction] for [name of plaintiff] ~~under their contract~~. To establish this claim and recover all compensation paid for these services, [name of plaintiff] must prove all of the following:

1. That ~~there was a contract between~~ [name of plaintiff] ~~and~~ [engaged/hired] [or] [contracted with] [name of defendant] ~~under which [name of defendant] was required~~ to perform services for [name of plaintiff];
2. That a valid contractor's license was required to perform these services; and
3. That [name of plaintiff] paid [name of defendant] for ~~contractor~~ services that [name of defendant] performed ~~as required by the contract~~;

[[Name of plaintiff] is not entitled to recover all compensation paid if [Name of defendant] must then prove that at all times while [performing/supervising] these services, [he/she/nonbinary pronoun/it] had a valid contractor's license as required by law.]

New June 2016; Revised November 2020

Directions for Use

Give this instruction in a case in which the plaintiff seeks to recover money paid to an unlicensed contractor for service performed for which a license is required. (Bus. & Prof. Code, § 7031(b).) Modify the instruction if the plaintiff claims the defendant did not perform services or supervise construction, but instead agreed to be solely responsible for completion of construction services. (See *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 940 [29 Cal.Rptr.2d 669].) It may also be modified for use if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a).)

The burden of proof to establish licensure or proper licensure is on the licensee. Proof must be made by producing a verified certificate of licensure from the Contractors' State License Board. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) Modification to the optional paragraph may be required if substantial compliance with the licensing laws is alleged. (See Bus. & Prof. Code, § 7031(e).) Omit the final bracketed paragraph if the issue of licensure is not contested.

A corporation qualifies for a contractor's license through a responsible managing officer (RMO) or responsible managing employee (RME) who is qualified for the same license classification as the classification being applied for. (Bus & Prof. Code § 7068(b)(3).) The plaintiff may attack a contractor's license by going behind the face of the license and proving that a required RMO or RME is a sham. The burden of proof remains with the contractor to prove a bona fide RMO or RME. (*Buzgheia v. Leasco*

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Sierra Grove (1997) 60 Cal.App.4th 374, 385–387 [70 Cal.Rptr.2d 427].) Whether an RMO or RME is a sham can be a question of fact. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518 [192 Cal.Rptr.3d 600].)

Sources and Authority

- Action to Recover Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).
- Proof of Licensure. Business and Professions Code section 7031(d).
- “Contractor” Defined. Business and Professions Code section 7026.
- “The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business.” (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal.Rptr. 517, 803 P.2d 370], internal citations omitted.)
- “Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. ‘Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .’ ” (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)
- “The current legislative requirement that a contractor plaintiff must, in addition to proving the traditional elements of a contract claim, also prove that it was duly licensed at all times during the performance of the contract does not change this historical right to a jury trial.” (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518, fn. 2.)
- “[T]he courts may not resort to equitable considerations in defiance of section 7031.” (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)
- “In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. Section 7031(b) provides that ‘a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract’ unless the substantial compliance doctrine applies.” (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519 [100 Cal.Rptr.3d 434], internal citation omitted.)
- “It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short,

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those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLB's civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction.” (*White, supra*, 178 Cal.App.4th at p. 520.)

- “In most cases, a contractor can establish valid licensure by simply producing ‘a verified certificate of licensure from the Contractors’ State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action.’ [Contractor] concedes that if this was the only evidence at issue, ‘then—perhaps—the issue could be decided by the court without a jury.’ But as [contractor] points out, the City was challenging [contractor]’s license by going behind the face of the license to prove that [license holder] was a sham RME or RMO. (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518.)
- “[T]he determination of whether [contractor] held a valid class A license involved questions of fact. ‘[W]here there is a conflict in the evidence from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. [Citations.] This rule is clearly applicable to cases revolving around the disputed right of a party to bring suit under the provisions of Business and Professions Code section 7031.’ ” (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518.)
- “We conclude the authorization of recovery of ‘*all* compensation paid to the unlicensed contractor for performance of any act or contract’ means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided.” (*White, supra*, 178 Cal.App.4th at pp. 520–521, original italics, internal citation omitted.)
- “[A]n unlicensed contractor is subject to forfeiture even if the other contracting party was aware of the contractor’s lack of a license, and the other party’s bad faith or unjust enrichment cannot be asserted by the contractor as a defense to forfeiture.” (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)
- “Nothing in section 7031 either limits its application to a particular class of homeowners or excludes protection of ‘sophisticated’ persons. Reading that limitation into the statute would be inconsistent with its purpose of ‘detering unlicensed persons from engaging in the contracting business.’ ” (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 849 [219 Cal.Rptr.3d 775].)
- “By entering into the agreements to ‘improve the Property’ and to be ‘solely responsible for completion of’ infrastructure improvements—including graded building pads, storm drains, sanitary systems, streets, sidewalks, curbs, gutters, utilities, street lighting, and traffic signals—[the plaintiff] was clearly contracting to provide construction services in exchange for cash payments by [the defendants]. The mere execution of such a contract is an act ‘in the capacity of a contractor,’ and an unlicensed person is barred by section 7031, subdivision (a), from bringing

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claims based on the contract.” (*Vallejo Development Co., supra*, 24 Cal.App.4th at p. 940.)

- “[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no license was required.” (*Phoenix Mechanical Pipeline, Inc., supra*, 12 Cal.App.5th at p. 853.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)