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Preface

> Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.
>
> —Civil Code §3281

This second edition of California Tort Damages, like its predecessor, focuses on the kinds of detriment, harm, and loss for which damages may be recovered in a variety of personal injury, wrongful death, and property damage situations. Individual chapters discuss the elements or "measure" of damages—and other forms of relief—available for particular injuries and torts. The text also covers evidence, witnesses, and exhibits used to prove damages, as well as statutes and doctrines that limit recoveries.

The second edition integrates 14 years of statutory and decisional changes into a comprehensive text. The looseleaf format facilitates annual updating. The book is a practice tool for both plaintiffs' and defendants' attorneys. It can help the former to recognize all elements of damages recoverable for particular injuries; it alerts the latter to varieties of alleged detriment for which damages are not recoverable and to restrictions and limitations on recovery.

Coauthor Mary E. Wiss, Judge of the Superior Court in San Francisco, has written many of the book's recent updates and, during a distinguished career as a personal injury practitioner and mediator, wrote and lectured extensively on a variety of tort law and practice topics. Coauthor Paul Peyrat was the supervising legal editor for the first edition of this book and author of several of its updates, as well as other articles and books including the California Tort Guide, a useful companion to the present volume. Linda Compton was the project manager of the second edition, and the legal editor of key chapters in the first edition.

The authors and CEB gratefully acknowledge practical comments from consultants Arthur J. Casey of San Jose and Richard H. Schoenberger, Donald J. Sullivan, and Holiday Walsh of San Francisco. Thanks are also due to the authors of chapters in the first edition and its updates including: Lawrence R. Booth, Gail E. Chesney, Glenn M. Clark, Paul R. DePasquale, R. Jay Engel, James M. Fisher, Mary Gerber, William E. Gagen, Jr., Lyle F. Greenberg, Rex S. Heinke, Michael D. Herbert, Kirsten B. Hicks, Russell S. Kussman, Stanley F. Leal, Lorraine L. Loder, Kathleen P. March, Timothy J. Murphy, Frank M. Pitre, Judith J. Rentschler, Ronald B. Schwartz, Neil L. Shapiro, Evelyn Spirou, and G. Todd Withy.

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Selected Developments

January 2010 Update

Since Previous Update: A statutory attorney fee may be reduced to zero when necessary to ensure that an impecunious plaintiff receives at least part of awarded damages. See *Garcia v Santana* (2009) 174 CA4th 464, 94 CR3d 299, in §1.99.

The common fund doctrine applies to an automobile insurer's claim to be reimbursed from its insured's recovery from a third party for payments the insurer made to the insured under the policy's "medical pay" provisions. See *21st Century Ins. Co. v Superior Court (Quintana)* (2009) 47 C4th 511, 98 CR3d 516, in §§1.101, 16.6.

Emotional distress damages for a railroad worker's fear of future cancer after a diagnosis of asbestosis require, says a United States Supreme Court majority, evidence that the fear was "genuine and serious." See *CSX Transp., Inc. v Hensley* (2009) ___ US ___, 173 L Ed 2d 1184, 129 S Ct 2139, in §6.5.

A California Supreme Court majority has held that a man's statement to a woman that, in effect, he would eventually have sex with her did not constitute sufficiently extreme or outrageous conduct to warrant emotional distress damages. See *Hughes v Pair* (2009) 46 C4th 1035, 1050, 95 CR3d 636, in §6.17.

An Internet website (such as MySpace) is not liable to a person assaulted by someone met through the site. See *Doe II v MySpace, Inc.* (2009) 175 CA4th 561, 96 CR3d 148, in §7.9A.

It is slander per quod, not slander per se, to state that a person is dishonest, unless the statement tends to injure the person in his or her business or trade. See *Nethercut Collection v Regalia* (2009) 172 CA4th 361, 90 CR3d 882, in §8.5.

A school superintendent suing for defamation can defeat a defendant's anti-SLAPP motion by convincing the judge that the defendant maliciously told school board members that the superintendent was "Communist." See *Nguyen-Lam v Cao* (2009) 171 CA4th 858, 90 CR3d 205, in §8.22.

No disclosure-of-private-information invasion of privacy attaches to the publication of information taken from the plaintiff's own MySpace online journal. See *Moreno v Hanford Sentinal, Inc.* (2009) 172 CA4th 1125, 91 CR3d 858, in §9.8.

The "intrusion on solitude" form of privacy invasion may be based on the placement of a hidden camera in an employee's office, but the person suing must show that she herself was actually monitored or recorded. See *Hernandez v Hillsides, Inc.* (2009) 47 C4th 272, 97 CR3d 274, in §9.9.

The "single integrated publication" concept may overcome a statute of limitations defense. See *Christoff v Nestle USA, Inc.* (2009) 47 C4th 468, 97 CR3d 798, in §§8.25, 9.16.

In a malicious prosecution suit, a voluntary dismissal of the underlying lawsuit after appellate reversal of the original judgment does not constitute a favorable determination on the merits. See *Drummond v Desmarais* (2009) 176 CA4th 439, 98 CR3d 183, in §10.18.

Filing a lawsuit alleging misappropriation of trade secrets is protected activity that gives rise to liability for neither malicious prosecution nor abuse of process. See *Raining Data Corp. v Barrenechea* (2009) 175 CA4th 1363, 97 CR3d 196, in §§10.25A, 11.8A.

A federal law immunity that exonerates a criminal prosecutor does not necessarily exonerate others from false imprisonment liability to a person held in prison for 19 months after the statute under which he was convicted was declared unconstitutional. See *Cousins v Lockyer* (9th Cir 2009) 568 F3d 1063, in §§12.5, 12.11.

For punitive damages purposes, merely showing that an employer fired an employee in violation of public policy is insufficient to establish malice or oppression. See *Scott v Phoenix Schools, Inc.* (2009) 175 CA4th 702, 715, 96 CR3d 159, in §§14.5, 14.23.

The oppression necessary to support punitive damages against an insurer can be that of its hired third-party claims representative in delaying and denying payments to an insured whose house burned down. See *Major v Western Home Ins. Co.* (2009) 169 CA4th 1197, 1225, 87 CR3d 556, in §§14.7, 14.11.

Maritime employers that willfully and wantonly disregard their maintenance and cure obligations to injured maritime

employees are subject to punitive damages. See *Atlantic Sounding, Co. v Townsend* (2009) ___ US ___, 174 L Ed 2d 382, 129 S Ct 2562, in §14.20.

A building owner that has a nondelegable duty to maintain its elevators cannot obtain a reduction of noneconomic damages under Proposition 51 by seeking the allocation of a separate-fault percentage to the person it hired to do the maintenance. See *Koepnick v Kashiwa Fudosan Am., Inc.* (2009) 173 CA4th 32, 72 CR3d 453, in §15.16.

Similar to a medical provider's lien is a lien asserted by a person in the business of "factoring medical accounts." See *Gilman v Dalby* (2009) 176 CA4th 606, 98 CR3d 231, in §16.8.

The Hospital Lien Act does not entitle a hospital's assignee to a lien on money paid to an accident victim by her own automobile insurer under the policy's underinsured motorist provisions. See *Weston Reid, LLC v American Ins. Group, Inc.* (2009) 174 CA4th 940, 94 CR3d 748, in §16.15.

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Cutoff Dates and CEB Citation

Cutoff Dates

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Bodily Injury

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I. INTRODUCTION

§1.1 A. Scope of Chapter

This chapter discusses the damages that an individual may recover as compensation for bodily injury, including the pain, suffering, and emotional distress that frequently accompany physical injury to the tissues of the body.

NOTE: This chapter uses "bodily injury" in a general sense; when used in statutes, the term may encompass a narrower set of elements than it would under state common law. See, *e.g.,* §1.22 ("bodily injury" in federal statute does not include subcellular damage caused by radiation exposure that had not yet developed into cancer or other illness). Damages for emotional distress (with or without accompanying physical manifestations) caused by tortious conduct that does not result in direct physical contact with the injured person's body are discussed in chap 6 (emotional distress).

The recovery of bodily injury damages after the death of the injured person is discussed in chap 4 (survival actions). Damages recoverable by the spouse of the person who suffers a bodily injury are treated in chap 2 (loss of consortium).

The reduction of damages recoveries to satisfy statutory and contractual reimbursement claims and liens is the subject of chap 16.

NOTE: Procedural question involving damages that are not covered in the present book but in California Civil Procedure Before Trial (4th ed Cal CEB 2004) include (1) the court papers "Statement of Damages" and "Request for Statement of Damages"—used under CCP §425.11 when, under CCP §425.10, the amount of actual or punitive damages is not to be stated in the "demand for judgment" (*i.e.,* the prayer) in a superior court complaint for personal injury (or wrongful death) damages—and (2) procedures and criteria for designation of a lawsuit as "unlimited" when the court cannot determine that a verdict would be less than $25,000.

Code of Civil Procedure §425.115(b) provides procedures for a statement reserving the right to claim punitive damages on a default judgment. See §14.32.

This chapter and this book do not discuss the exemption, under CCP §704.140, of personal injury damages from execution or in bankruptcy proceedings. Nor does this book discuss the scope or meaning of the term "bodily injury" as it is used in insurance policies and other contracts. See, *e.g., Gravillis v Coldwell Banker Residential Brokerage Co.* (2006) 143 CA4th 761, 49 CR3d 531 (emotional distress and resultant diabetes not "bodily injury" within meaning of arbitration exclusion in residential purchase agreement). See Annos, 109 ALR5th 1 (2003) (status of personal injury damages proceeds as marital property), 25 ALR5th 568 (1994) (bodily injury damages recoverable in nuisance claim).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.2 B. Statutory Measure; Reasonableness

§1.2 B. Statutory Measure; Reasonableness

Under CC §3333, a person whose bodily injury is caused by the wrongful act or omission of another is entitled to recover as damages, except if otherwise expressly provided by the code,

> the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

The damages must be reasonable; no more than reasonable damages can be recovered. CC §3359; *Risley v Lenwell* (1954) 129 CA2d 608, 644, 277 P2d 897.

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C. Terminology

§1.3 1. Damages; Detriment; Actual Damages

"Damages" is the monetary compensation that a person who suffers "detriment" from the unlawful act or omission of another may recover from the person in fault. CC §3281.

"Detriment" is loss or harm suffered in person or property. CC §3282. The detriment for which damages may be awarded is not limited to earning capacity impairment or pain. *Lang v Barry* (1945) 71 CA2d 121, 126, 161 P2d 949.

Damages are not recoverable for harm or loss that is "speculative, remote, imaginary, contingent, or merely possible." *Piscitelli v Friedenberg* (2001) 87 CA4th 953, 989, 105 CR2d 88. See CACI 3900. Further, an injured person must prove "with as much certainty as the nature of the tort and the circumstances permit" the extent of the harm suffered and the amount of money that will be adequate compensation, but an injured person should "not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of the harm he has suffered." *Clemente v State* (1985) 40 C3d 202, 219, 219 CR 445. See §1.111 on the need to establish a causal connection between the wrongdoer's tort and the harm or loss for which damages are claimed.

NOTE: The term "actual damages," as used in Govt C §12987 (relating to housing discrimination), means compensatory damages that include both (1) special damages for out-of-pocket losses and (2) nonquantifiable general damages for emotional distress. *Walnut Creek Manor v Fair Employment & Hous. Comm'n* (1991) 54 C3d 245, 255, 284 CR 718, which notes (54 C3d at 255 n4) that "actual damages" is similarly construed under CC §52(a) (the Unruh Civil Rights Act). As used in 11 USC §362(k)(1), "actual damages," for harm caused by violation of a stay in a bankruptcy proceeding, includes damages for emotional distress. *Dawson v Washington Mut. Bank (In re Dawson)* (9th Cir 2004) 390 F3d 1139.

See §14.9 for discussion of actual damages in the context of the rule that actual damages must be sustained before punitive damages may be awarded.

For a holding that the term "damages" in an excess liability insurance policy does not include a sum agreed to be paid to settle pollution litigation, see *Aerojet-General Corp. v Commercial Union Ins. Co.* (2007) 155 CA4th 132, 65 CR3d 803.

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§1.4 2. Special, General

"Special damages" refers to out-of-pocket losses that can be documented by bills, receipts, canceled checks, and business and wage records. Special damages generally include medical and related expense, loss of income, and the loss or cost of services. See *Walnut Creek Manor v Fair Employment & Hous. Comm'n* (1991) 54 C3d 245, 255, 284 CR 718 (special damages are "pecuniarily measurable").

"General damages" refers to damages for harm or loss such as pain, suffering, emotional distress, and other forms of detriment that are sometimes characterized as "subjective" or not directly quantifiable. See *Walnut Creek Manor v Fair Employment & Hous. Comm'n, supra* (general damages characterized as "nonquantifiable").

When special damages for personal injury are proved, general damages are presumed, although the plaintiff need not prove special damages to recover general damages. *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 412, 196 CR 117.

The distinction between special and general damages may be significant at the pleading or default stages of a lawsuit. See *Plotitsa v Superior Court* (1983) 140 CA3d 755, 761, 189 CR 769. But see *Walton v Guinn* (1986) 187 CA3d 1354, 1361 n2, 232 CR 451, which questions whether there remains any requirement that damages be alleged in a complaint in order to be proved at trial or recovered in a default judgment.

Damages for impairment of earning capacity have been called general by some courts (see, *e.g., Hilliard v A. H. Robins Co., supra*), even when the claim is for actual lost wages, and special by others (see *Andalon v Superior Court* (1984) 162 CA3d 600, 613, 208 CR 899 (general damages limited to pain and suffering)).

Special damages have been described in the wrongful life context (see chap 5) as "tangible, economically quantifiable costs." *See Andalon v Superior Court, supra.*

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.5 3. Economic, Noneconomic

§1.5 3. Economic, Noneconomic

The term "economic damages" is defined in CC §1431.2(b)(1), for purposes of the Fair Responsibility Act of 1986 (CC §§1431-1431.5, commonly known as Proposition 51), as

> objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

A cotortfeasor remains jointly and severally liable for economic damages. CC §1431.2.

For discussion of economic damages in California, as part of a state-by-state series, see Barry Ben-Zion, *Assessing Economic Damages in Personal Injury and Wrongful Death Litigation: The State of California*, 17 Journal of Forensic Economics, No. 3 (Fall 2004) (Nat'l Assoc. of Forensic Economics 2005).

The term "noneconomic damages" is defined in CC §1431.2(b)(2), for purposes of the Proposition 51, as

> subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation.

A defendant is liable only for the amount of noneconomic damages allocated to that defendant "in direct proportion to that defendant's percentage of fault." CC §1431.2(a).

The economic damages defined in Proposition 51 are at least roughly equivalent to special damages, and the noneconomic damages are roughly equivalent to general damages. See §1.4. The constitutionality, operative date, and scope of the Proposition 51 are discussed in §15.8.

Under CC §3333.2, for purposes of limiting "noneconomic damages" recoveries (currently to $250,000) in actions based on the malpractice of health care providers, "noneconomic damages" are damages for "pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages." See §15.42 for discussion of CC §3333.2 and its constitutionality.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.6 4. Future Damages; Reasonable Certainty

§1.6 4. Future Damages; Reasonable Certainty

Damages may be recovered for detriment "certain to result in the future" (CC §3283) as well as for detriment sustained before suit was filed and before the date of the award or judgment. Damages for future detriment are recoverable only if there is a "reasonable certainty" that the claimed future harm or loss will be suffered. *Wiley v Young* (1918) 178 C 681, 686, 174 P 316. See *Blanton v Curry* (1942) 20 C2d 793, 807, 129 P2d 1 (failure to include "certain to result in the future" not necessarily fatal to jury instruction). See also Grassini, *The Requirement of Reasonable Certainty in Proving Future Damages*, 13 CTLA Forum 235 (Sept. 1983).

There is no clearly established definition of "reasonable certainty," but damages must not be given for conjectural, albeit possible, loss or harm. See §1.3. See also CACI 3903A-3903C. A jury may not consider consequences that are merely "likely" to occur; the likelihood must amount to such a degree of probability that the consequences are reasonably certain to occur. *Bellman v San Francisco High Sch. Dist.* (1938) 11 C2d 576, 588, 81 P2d 894. Future damages may be awarded even when the exact amount cannot be proved. *Zinn v Ex-Cell-O Corp.* (1944) 24 C2d 290, 297, 149 P2d 177.

Expert medical opinion testimony can establish that emotional distress is reasonably certain to be suffered in the future if the expert considers the plaintiff's particular circumstances and if the opinion is based on the expert's experience with similar cases. *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 995, 16 CR2d 787 (physician treating person who had been subjected to sexual harassment on former job testified that person continued for years to suffer "low-grade depression" and that such persons continue to be affected psychologically through life), disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109. Further, a jury may find reasonable certainty from medical expert testimony as to medical "probabilities." See *Ostertag v Bethlehem Shipbuilding Corp.* (1944) 65 CA2d 795, 805, 151 P2d 647. See generally Anno, 18 ALR3d 170 (1968) (sufficiency of evidence of permanence of injury to justify instruction).

TACTICS: A plaintiff's attorney might argue that damages should be awarded for a detriment more probable than not to occur in the future, *i.e.,* one for which there is a 51-percent chance of occurrence. A defense attorney might argue that reasonable certainty requires the trier of fact to believe that there is little chance that the detriment will not occur.

Damages for future detriment may be distinguished from damages for existing detriment that may cause suffering in the future.

TACTICS: A plaintiff's attorney might argue that the plaintiff's susceptibility to reinjury (see §1.87) is a present detriment for which damages may be recovered, even it if cannot be shown that reinjury is more likely than not to occur. A defense attorney willing to concede this point might still argue that any damages for a slightly increased susceptibility to reinjury must not include the projected cost of medical care to treat the possible reinjury, as the likelihood of future expense is not reasonably certain.

Damages for future economic detriment must be "discounted" to present value, *i.e.,* awarded in an amount that, prudently invested, will cover the necessary future expenses. See §1.108. On proof of future medical expense, see §1.21; on payment of future damages by installment, see §§15.34, 15.50-15.52; on proof of economic trends, see §1.107.

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§1.7 5. Quotient Verdicts

An impermissible "quotient verdict" is a damages amount arrived at by computing the average of all jurors' individually suggested sums (for all damages or for any individual element of damages, such as for economic damages or for impairment of earning capacity). *Chronakis v Windsor* (1993) 14 CA4th 1058, 18 CR2d 106 ("quotient verdict" is form of "resort to determination by chance," which, under CCP §657(2), is juror misconduct requiring new trial). See *Dixon v Pluns* (1893) 98 C 384, 387, 33 P 268 (chance and quotient verdicts denounced; cunning or unscrupulous juror could defeat justice with high or low estimate).

A verdict arrived at after each juror has put a suggested damages amount on a slip of paper, and the average of those amounts has been computed, is not a quotient verdict, however, if the jury then uses that average as a starting point for further "independent free consultation and consideration" that arrives at a different figure, albeit a sum "rounded up" from the average, which is then confirmed by vote. *Fredrics v Paige* (1994) 29 CA4th 1642, 1647, 35 CR2d 246. Similarly, it was not a reversible quotient verdict when jurors first agreed on a range (more than zero, less than $100,000), each submitted an estimate within that range, the high and the low estimates ($90,000 and $10,000) were disregarded, the remaining estimates were averaged, and nine jurors agreed on the resulting number. *Lara v Nevitt* (2004) 123 CA4th 454, 462, 19 CR3d 865.

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D. Choosing Plaintiffs

§1.8 1. Competent Adult; Spouse

A competent adult who suffers a bodily injury is normally the lead plaintiff, or the only plaintiff, in a lawsuit to recover damages for that injury and may recover all bodily injury damages available for that injury. See CCP §370. On suits by incompetent persons, see §1.12.

Forms of detriment for which the spouse of an injured person might seek recovery, as an alternative to recovery by the injured person, are noted in §§1.9-1.11.

The injured person's failure to sue for damages should not prevent a spouse from suing for his or her own losses that result from the injury. Further, the spouse who seeks damages for loss of consortium must do so as a named plaintiff. See chap 2.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.9 a. Medical Expense

§1.9 a. Medical Expense

The injured person can recover damages for the reasonable value of reasonably necessary medical treatment actually received, whether or not the injured person personally paid or became obligated to pay the expense. See §1.20.

Alternatively, a spouse who actually paid or became obligated to pay the injured person's medical expenses, even out of community funds, may, if named as a plaintiff, allege and recover damages for medical expenses. See *Follansbee v Benzenberg* (1954) 122 CA2d 466, 265 P2d 183 (wife's recovery for treatment furnished to injured husband).

TACTICS: A jury might be more sympathetic to the reasonableness of payments made by a spouse whose degree of comparative fault was nil or substantially less than that of the injured person. On whether medical expense damages recoverable by one spouse may be reduced by the fault percentage attributed to the other, see Fam C §§781-783, and on medical expense recoveries by parents, see §1.15. See generally §§15.2, 15.8.

See Annos, 21 ALR3d 1113 (1968) (recovery for medical expenses for injury to wife), 42 ALR2d 843 (1955) (recovery by wife for medical expenses for injury to husband).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.10 b. Earnings

§1.10 b. Earnings

The injured person normally seeks damages for his or her own loss of earnings and impairment of earning capacity. See §1.41.

TACTICS: There may be situations in which a family unit would benefit if an unemployed or unemployable injured person were to forego the right to recover for earning capacity loss and impairment to bolster a greater recovery by his or her spouse for loss of the injured person's services to the family. See §1.66.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.11 c. Care of Injured Person

§1.11 c. Care of Injured Person

The injured person may recover damages for the value of care and services furnished by his or her spouse and other relatives. See §1.23.

Alternatively, it appears that the injured person's spouse or relative could recover in his or her own name for the reasonable value of services rendered to the injured person if the recovery does not duplicate the injured person's. See *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 409, 115 CR 765. See also *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 661, 151 CR 399.

NOTE: Recovery by the spouse for services rendered to the injured person is limited to the reasonable value of the services rendered; it is not measured by the spouse's losses. For example, a spouse who retires or takes a leave of absence from a high-paying job to care for the injured spouse and thus loses substantial wages and benefits is limited to recovering reasonable wages as a nurse. In addition, loss of consortium damages recoverable by a spouse (see chap 2) are not to include compensation for personal services furnished by the spouse or the spouse's loss of income. See CACI 3920.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.12 2. Incompetent Person; Guardian or Conservator

§1.12 2. Incompetent Person; Guardian or Conservator

A lawsuit for damages for injury to an insane or incompetent person may be brought in the person's name by his or her guardian or conservator or by a guardian ad litem appointed by the court for the suit. CCP §§372, 373(c). On the appointment of guardians ad litem, with forms, see California Civil Procedure Before Trial, chap 9 (4th ed Cal CEB 2004).

Damages for the increased costs of care caused by the injury are recovered as damages for detriment suffered by the incompetent person, not for detriment suffered by the guardian, conservator, or estate. The recovery is usually set aside in a blocked account, disbursable for the benefit of the incompetent person only on court order.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.13 3. Minor; Parent or Guardian

§1.13 3. Minor; Parent or Guardian

An injured minor may enforce its rights by civil action (see Fam C §6601) and thereby recover damages for all detriment that results from his or her injury. An action in the minor's name must be maintained by a guardian ad litem or guardian of the estate (CCP §§372-373). On the appointment of guardians ad litem, with forms, see California Civil Procedure Before Trial, chap 9 (4th ed Cal CEB 2004).

Alternatively, the parents of an unemancipated minor (see Fam C §7002) may recover damages for certain forms of detriment. See CCP §376, which also provides that the mother of an illegitimate child may maintain the action, as may a father whose paternity was acknowledged in writing or judicially declared before the child was injured. See BAJI 14.30-14.32. Kinds of detriment for which a parent rather than the injured minor might seek recovery are noted in §§1.14-1.16.

TACTICS: A plaintiff's attorney should weigh the benefits and drawbacks of having the injured minor's parents sue for damages, either as an alternative to suit by the minor or as additional plaintiffs in the minor's lawsuit. A minor's recovery is generally placed in trust, and the minor cannot without court approval reimburse the parents for out-of-pocket expenses incurred by them. See Prob C §§3600-3612. Parents who expect to spend substantial sums for medical care or to remodel their home to accommodate a wheelchair-bound minor may not want to have to rely on obtaining a court order to be reimbursed from the minor's trust. On the other hand, jurors may feel more sympathy toward the injured minor's claim for the value of the nursing and other needed services than toward a parent's claim for the same expenditures, perhaps viewing the role of parenting as including providing all needed care.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.13A a. Effect of Settlements

§1.13A a. Effect of Settlements

A parent who, while acting as a minor child's guardian ad litem, agrees to a settlement of the child's cause of action that purports to cover "all damages" arising out of injury to the child is thereafter estopped from pursuing a separate cause of action to recover damages for medical expense that the parent will incur in the future or for other expenditures to "support" the child. See *Laughner v Bryne* (1993) 18 CA4th 904, 22 CR2d 671 (wording of settlement viewed as broad enough to cover medical and other expenses; parent's claims deemed subsumed in those of child even though settlement amount was less than past medical expense and settling insurer had indicated to a medical lienholder that insurer considered settlement to be for pain and suffering).

TACTICS: A plaintiff's attorney who intends that a settlement is to cover only part of the child's and parent's combined claims may wish to modify the wording of a "standard" settlement agreement or "release." At least in *Laughner* the settling insurer's "indication" that the settlement was for the *child's* pain and suffering was deemed insufficient to leave the insurer open to further liability for medical expense and services to the minor.

The father of an injured minor may not maintain an action to recover damages for past and future medical expenses paid and to be paid by the father if the minor's separate action (in which the mother acted as guardian ad litem) was dismissed following a settlement, even though the father was denied the right to intervene in the minor's action. See *Faitz v Ruegg* (1981) 114 CA3d 967, 171 CR 149 (father's remedy was to seek indemnity from the minor).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.14 b. Prenatal Injury

§1.14 b. Prenatal Injury

A minor can recover damages for injury caused by wrongful conduct that occurred while it was in its mother's womb or during its birth. CC §43.1 (child subsequently born deemed person from conception); CCP §340.4 (limitations periods on suits for prenatal and birth injuries); *Snyder v Michael's Stores, Inc.* (1997) 16 C4th 991, 996, 68 CR2d 476 (suit by child who was fetus in utero when mother breathed toxic fumes caused by her employer's negligence; workers' compensation exclusivity rule no bar to child's suit). See Anno, 40 ALR3d 1222 (1971) (liability for prenatal injuries). See also Anno, 91 ALR3d 316 (1979) (liability for child's personal injuries or death resulting from tort against mother before child was conceived).

Parents may seek the recovery of certain elements of damages for prenatal injury, as an alternative to a claim to such damages by the minor as a plaintiff through a guardian at litem, for the same reasons that parents of minors injured after birth may do so. See §§1.9-1.11. See §3.20 on prenatal injury that results in death. See chap 5 on damages recoverable for wrongful life or birth.

NOTE: Prenatal injury damages differ from damages for wrongful life or birth. In a prenatal injury case, the defendant's negligence during the child's gestation or birth caused the child's injury or disability. In a wrongful life or birth action, the child, disabled or not, would not have been born had the defendant not been negligent. See §5.1.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.14A c. Effect of Comparative Fault

§1.14A c. Effect of Comparative Fault

In a suit to recover medical expenses incurred by a minor, the damages may be reduced, under comparative fault principles, based on the percentage of negligence attributed to the minor. See *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 551, 138 CR 705 (pre-comparative fault case; minor's contributory negligence barred parent's recovery of medical expenses incurred in treating minor), disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607. Similarly, when a minor sues to recover damages for expenses made by a parent, the damages may be reduced based on the parent's negligence. See *Morningred v Golden State* Co. (1961) 196 CA2d 130, 138, 16 CR 219 (pre-comparative fault case; parents' negligence barred recovery of damages for medical expenses whether minor or parents sought recovery).

TACTICS: An argument that, for example, a fault-free parent who paid to treat a child's injuries should not have damages for such expenditures reduced in proportion to the child's negligence might be based on the statement in *Li v Yellow Cab Co.* (1975) 13 C3d 804, 829, 119 CR 858, that the damages awarded shall be diminished in proportion to the amount of negligence "attributable to the person recovering." See §15.2.

Negligence attributable to one parent can act to reduce the recovery of the other parent for medical expenses paid by the latter, at least if the negligent parent might thereby benefit from the recovery. See *Flores v Brown* (1952) 39 C2d 622, 630, 248 P2d 922 (decided under rules applicable before enactment of Fam C §§781-783). See also *Premo v Grigg* (1965) 237 CA2d 192, 199, 46 CR 683 (decided when personal injury damages were separate, not community, property). See Annos, 26 ALR4th 396 (1983); 21 ALR3d 469 (1968).

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§1.15 d. Medical Expense

The right to recover damages for medical expense incurred to treat a minor's injury belongs to both the minor and the parents. *White v Moreno Valley Unified Sch. Dist*. (1986) 181 CA3d 1024, 1030, 226 CR 742. An injured minor suing through a guardian ad litem may recover the reasonable value of medical expense required for treatment, even if the expenses were actually paid by a parent or guardian, provided there is evidence that the parent or guardian waived his or her cause of action to recover those expenses. Naming the parent or guardian as guardian ad litem in the complaint is sufficient evidence of waiver, although a declaration of waiver or other evidence should also suffice.

As an alternative, the parents or guardian of an injured minor may recover damages for the expenses of the minor's treatment (CCP §376) unless the expenses were actually paid from the minor's own funds. See §1.13 on possible advantages of having parents seek damages. The parents' withdrawal as parties and as guardians ad litem while the action is pending, as when the minor reaches majority, does not diminish the minor's right to prove medical expenses and to recover damages for those expenses. *White v Moreno Valley Unified Sch. Dist., supra.*

Damages for future medical expenses are recoverable by the child or, at least in some situations, by the parent. See *Turpin v Sortini* (1982) 31 C3d 220, 237 n11-12, 182 CR 337; *Laughner v Bryne* (1993) 18 CA4th 904, 909, 22 CR2d 671. See also §5.4.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.16 e. Earnings; Services to Parents

§1.16 e. Earnings; Services to Parents

An injured minor may recover damages for earnings lost during minority as well as for impairment of earning capacity during minority and majority. See generally §1.13.

As an alternative to recovery by the minor, parents may recover damages for loss of the minor's services during minority, including both the minor's loss of earnings and the parents' loss of the monetary value of other services the minor would have contributed to the family unit. See CCP §376; *Baxter v Superior Court* (1977) 19 C3d 461, 138 CR 315; *Girard v Irvine* (1929) 97 CA 377, 385, 275 P 840. See generally §1.13. Parents are not, however, entitled to recover damages for earnings a competent child will lose after attaining majority or emancipation.

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§1.17 f. Minor's Personal Care

An injured minor may recover damages for services needed to care for his or her injury, by whomever furnished. See generally §1.13.

Parents of an injured minor may pursue their own cause of action, as an alternative to recovery by the child, seeking damages for out-of-pocket expenses paid on behalf of the minor and the reasonable value of services rendered by the parents to the minor, including nursing care, home therapy, transportation, tutoring, or other services reasonably necessary and actually rendered. Care must be taken to ensure that the minor's and the parents' recoveries are not duplicative. *Faitz v Ruegg* (1981) 114 CA3d 967, 171 CR 149.

Damages recoverable by a mother who is a trained nurse for the "special care" she furnished to her injured minor child is limited to care that goes beyond the support, care, and attendance that, as a parent, she is required to furnish. *Bradford v Edmands* (1963) 215 CA2d 159, 30 CR 185. See Fam C §§3900-3910 on parents' duty to support minor child and incapacitated adult child.

NOTE: The continued viability of *Bradford* is noted in *Laughner v Bryne* (1993) 18 CA4th 904, 22 CR2d 671, which is discussed, on another point, in §1.13A.

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§1.18 4. Injured Person's Estate

The cause of action for some forms of bodily injury damages survives the injured person's death and may be maintained by the executor or administrator of the person's estate. See discussion in chap 4.

Generally, the personal injury damages recoverable by the estate include medical bills and other out-of-pocket expense, lost wages, and punitive damages, but not damages for pain, suffering, humiliation, or disfigurement.

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§1.19 5. Injured Person's Employer

A business entity may not recover damages for injury to the business, lost profits, or expenses resulting from injury to an employee (except to the extent that the Labor Code permits the employer to recover reimbursement for workers' compensation benefits it paid). See *I. J. Weinrot & Son, Inc. v Jackson* (1985) 40 C3d 327, 220 CR 103. There may be an exception for tortfeasor conduct that constitutes a "calculated disruption" of the business; otherwise, recovery is precluded even if the tortfeasor's conduct may be characterized as intentional or a reckless disregard of another's safety. See *Herrick v Superior Court (Diloia)* (1987) 188 CA3d 787, 790, 233 CR 675. See also *Offshore Rental Co. v Continental Oil Co.* (1978) 22 C3d 157, 167, 148 CR 867 (purported cause of action under CC §49(c) characterized as "obsolete," "archaic," and "outmoded"); *Knowlton v Pacific Southwest Airlines* (1980) 113 CA3d 152, 169 CR 668 (CCP §337 precludes action by employer for employee's death); *Owen v* U.S. (9th Cir 1983) 713 F2d 1461, 1468 (follows *Knowlton*).

For annotations discussing the right of a business entity, employer, or partner to sue for damages for losses incurred because of an injury to an employee, partner, officer, or owner, see Annos, 74 ALR3d 1129 (1976) (professional corporation's right to recover damages based on injury or death of attorney or doctor associate), 36 ALR3d 1375 (1971) (partnership's right to recover damages for injury to partner), 57 ALR2d 802 (1958) (employer's right of action against third person tortiously killing or injuring employee).

For discussion of an employer's right to recover reimbursement for workers' compensation from a third party tortfeasor, see California Workers' Damages Practice, chap 7 (2d ed Cal CEB 2001).

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II. MEDICAL EXPENSE

A. Standards of Proof

§1.20 1. Past Expense

The measure, or dollar amount, of damages recoverable for medical and related expenses incurred through the time of trial is the reasonable value of all services and supplies actually furnished to the injured person that were reasonably necessary for diagnosis, treatment, and care of conditions proximately (or legally) caused by defendant's actionable conduct. *Melone v Sierra Ry. Co.* (1907) 151 C 113, 115, 91 P 522. See *Nishihama v City & County of San Francisco* (2001) 93 CA4th 298, 307, 112 CR2d 861 (plaintiff ordinarily entitled to reasonable value of services received, including amounts paid by insurer or other collateral source (see below and §15.22)). See CACI 3903A.

Recoverable damages for past medical expense may be less than the amounts billed by the providers of medical services (or the amounts paid for them) if the reasonable value of services is less than the amount billed or paid. See *Gimbel v Laramie* (1960) 181 CA2d 77, 81, 5 CR 88. In addition, there are instances when the amount actually paid for past medical services (or the liability incurred to obtain them) sets a cap on their reasonable value. See *Hanif v Housing Auth.* (1988) 200 CA3d 635, 246 CR 192 (services cost plaintiff less than prevailing market rate).

NOTE: What is known as the *Hanif/Nishihama* procedure (or doctrine or reduction) says that when an injured plaintiff has medical insurance, damages for medical expenses are limited to the amount actually paid or incurred; damages are not to be awarded for any greater amount that a medical provider billed, even if the higher amount was reasonable. Under the procedure, the amount specified, payable, or paid for medical services under a contract between the provider and a health care plan (or HMO) sets a cap on the plaintiff's medical expense damages even if the provider stated a higher "normal rate" or customary charge for the services. See *Nishihama v City & County of San Francisco* (2001) 93 CA4th 298, 112 CR2d 861 (hospital received and accepted $3600 from Blue Cross to pay for services for which normal rate would have been $17,168; damages reduced accordingly). Perhaps the collateral source rule could be raised by a plaintiff to prevent the introduction of evidence of amounts actually paid to the provider for its services to the injured person. See Presiding Justice Moore's concurring opinion in *Olsen v Reid* (2008) 164 CA4th 200, 204, 79 CR3d 255 ("*Hanif/Nishihama* simply goes too far" and "without statutory authority or the Supreme Court's blessing" buries collateral source rule). See also §15.22. See §1.34 on using bills to prove medical expenses and "Tactics" in that section on defense procedures to invoke such a cap. Note also that damages recovered for medical expenses may be subject to the provider's reimbursement claim or lien. See chap 16. For a "Point-Counterpoint" discussion, see Barer, *The Collateral Conundrum:* Olsen v Reid *Frames the* Hanif/Nishihama *Controversy and Suggests How It Will Turn Out*, 21 California Litigation 3, p 5 (State Bar Litigation Section 2008), and Summer, *Medical Special Damages "Incurred" Under California Law: The Collateral Source Rule, Law of Contracts, and the Discount Myth*, 21 California Litigation 3, p 12 (State Bar Litigation Section 2008).

But see *Greer v Buzgheia* (2006) 141 CA4th 1150, 46 CR3d 780 (plaintiff entitled to introduce evidence of reasonable value of medical services (more than $211,000) even though his employer, responsible for furnishing treatment, settled with providers for less (about $133,000); special verdict form asking for combined sum for lost earnings plus medical expense prevented posttrial *Hanif/Nishihama* reduction). When medical providers sell, at a discount, the right to recover the value of medical services (by imposing a lien on the plaintiff's personal injury recovery) to a financial services company, however, the amount of medical expense is limited to the amount originally recoverable by the providers, not to the amount they received from the purchaser, given that the plaintiff remains liable to the purchaser for the higher amount. *Katiuzhinsky v Perry* (2007) 152 CA4th 1288, 62 CR3d 309 (judgment based on lower amount reversed).

Damages are recoverable for various services and supplies. See §§1.23-1.33. Defendants may be asked to stipulate or admit the value of particular services. Absent such an agreement, however, for each item for which compensation is

sought, the plaintiff must be prepared to establish:

- Its nature and its supplier or source;
- That it was actually furnished;
- That it was reasonably needed to diagnose or treat a condition proximately caused by the defendant (see *Calhoun v Hildebrandt* (1964) 230 CA2d 70, 73, 40 CR 690); and
- Its reasonable value, or its actual cost and the reasonableness of the cost.

To persuade the trier of fact or the court not to award damages for claimed past medical expense, a defendant may:

- Argue that the plaintiff failed to prove one of the essential elements of the claim;
- Present evidence to disprove one of those elements or to prove, *e.g.,* that:
- A claimed item was not actually received by the injured person;
- An item was not, from a medical standpoint, reasonably needed to diagnose or treat the plaintiff's condition;
- An item was not for treatment services, but was a consultation for litigation;
- The item was for treatment of a condition not caused by the defendant; or
- The reasonable value of the item was less than the charge for it or than the amount claimed; or
- Argue or prove that the injured person was a malingerer, was overtreated, or failed to mitigate damages (see §15.23).

The plaintiff must show that the injured person received each medical service or supply for which a sum is claimed. A bill or request for payment is evidence of the amount of the expense, and evidence that the bill was paid is evidence that the charge was reasonable. See §1.34. In some instances, on the other hand, evidence that a medical bill was not paid may be introduced to show that the amount charged was unreasonable. *Smalley v Baty* (2005) 128 CA4th 977, 984, 27 CR3d 575 (court noted, "There is no more acceptable form of proof that medical bills were paid than evidence that plaintiff, in fact, paid them."). See *Latky v Wolfe* (1927) 85 CA 332, 347, 259 P 470.

NOTE: The plaintiff does not always have to prove that he, she, or anyone else paid for the service or supply, or that the furnisher of the service or supply submitted a bill, asked for recompense, or even suggested its value. See §15.22 on the collateral source rule. For example, the injured person is entitled to the reasonable value of care, including attendant care, even if the injured person's spouse performed the same services free. *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 661, 151 CR 399.

There appear to be situations in which a defendant could object to damages for an item of medical expense on the ground that the cost of the procedure or service exceeds the damages that would be recoverable for harm the procedure treated (or would treat). See *Kleinclaus v Marin Realty Co.* (1949) 94 CA2d 733, 739, 211 P2d 582.

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Source: Torts/California Tort Damages/1 Bodily Injury/ 2. Future Expense/§1.21 a. Reasonable Certainty

2. Future Expense

§1.21 a. Reasonable Certainty

A plaintiff may recover damages for medical and related expenses that are reasonably certain (see §1.6) to be incurred after the time of the trial or award. *Mendoza v Rudolf* (1956) 140 CA2d 633, 637, 295 P2d 445. See CACI 3903A. For such damages, the plaintiff must be prepared to establish, for each item of projected expense:

- Its nature;
- That it is reasonably certain to be needed for a condition proximately caused by the defendant; and
- Its probable reasonable cost on the date it will be needed.

The defense may:

- Argue that the plaintiff has failed to prove one of the essential elements of the claim;
- Present evidence to disprove one of those elements or to prove, for example, that
- The projected future condition is unlikely (or at least less than reasonably certain) to occur;
- The claimed future service or supply will not be necessary or efficacious; or
- The probable cost of projected treatment is likely to be less than the amounts claimed; or
- Request that any damages awarded be reduced to present value (see §1.108).

See Annos, 89 ALR3d 87 (1979) (sufficiency of evidence to prove future medical expense for injury to head or brain), 88 ALR3d 117 (1978) (cost of future cosmetic plastic surgery as element of damages).

NOTE: Under the Federal Tort Claims Act (28 USC §§2671-2680), a plaintiff may recover damages from the government for future medical care that may be of a higher quality than the government would otherwise furnish the plaintiff at no cost; although 28 USC §2674 bars punitive damages, reasonable value damages are not punitive. *Molzof v U.S.* (1992) 502 US 301, 116 L Ed 2d 731, 112 S Ct 711, appeal after remand, 6 F3d 461 (damages would cover physical therapy, respiratory therapy, and weekly doctor visits not provided at veterans' hospital where government's negligence put surgical patient into permanent coma).

The status of a plaintiff as an illegal (or undocumented) alien may complicate the assessment of damages for future medical expense. See Dorny, *Illegal Aliens: Damages for Future Earnings and Medical Expenses*, 16 Cal Lit 1, p 13 (Cal State Bar Litigation Section 2003).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.22 b. Medical Monitoring

§1.22 b. Medical Monitoring

A plaintiff who has an increased risk of future illness because of exposure to toxins or carcinogens as a result of a defendant's tortious conduct may recover damages for "medical monitoring," *i.e.,* the expense of future periodic medical examinations intended to facilitate early detection and treatment of disease, even when no present disease has been detected and the plaintiff cannot prove that future injury is more likely than not to occur. *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 1006, 25 CR2d 550 (medical monitoring not new tort but simply compensable item of damages when liability established under traditional tort theories); *Miranda v Shell Oil Co.* (1993) 17 CA4th 1651, 15 CR2d 569 (expenditures for prospective medical testing and evaluation, made necessary by tortiously caused exposure to pollutants, is "detriment" although no present physical injury evident; recovery on showing that likelihood of future consequences "amounts to such a degree of probability that it is reasonably certain the aftereffect will come about"). See CACI 3903B. See also §1.2.

The plaintiff must prove not only exposure to toxic chemicals but also that the need for monitoring is a reasonably certain consequence of the exposure, based on a consideration of at least the following factors (see *Miranda,* 17 CA4th at 1657, and *Potter v Firestone Tire & Rubber Co., supra*):

- Significance and extent of the exposure;
- Relative toxicity of the chemicals;
- Seriousness of the diseases for which plaintiff is at increased risk;
- Relative increase in plaintiff's risk (compared to (a) plaintiff's risk absent the exposure, and (b) the general risk to the public at large of developing the disease); and
- Clinical value of early detection and diagnosis.

NOTE: Factors supporting the recovery of damages for medical monitoring costs have been listed, at least for purposes of federal liability, as (1) the plaintiff was significantly exposed to a proven hazardous substance through defendant's negligent actions; (2) the plaintiff suffers, from that exposure, a significantly increased risk of contracting a serious latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) monitoring and testing procedures exist that make the early detection and treatment of the disease possible and beneficial. See *In re Marine Asbestos Cases* (9th Cir 2001) 265 F3d 861, 866 (damages denied for absence of 4th factor); *In re Paoli R.R. Yard PCB Litig.* (3d Cir 1990) 916 F2d 829, 852 (rail yard workers exposed to PCBs stated cause of action).

The particular terms of a federal statute that governs a defendant's liability may allow or preclude damages for medical monitoring costs. See *Phillips v E.I. DuPont de Nemours & Co.* (9th Cir 2008) 521 F3d 1028 (not available under terms of Price-Anderson Act (42 USC §2014(q)), which is exclusive means of compensating victims of nuclear accident). See *Dumontier v Schlumberger Technol. Corp.* (9th Cir 2008) 543 F3d 567 (Price-Anderson Act does not authorize damage, such as for medical monitoring, for subcellular damage to DNA that has yet to manifest itself as cancer or other illness). But see *Durfey v E.I. DuPont de Nemours & Co.* (9th Cir 1995) 59 F3d 121, 125 (damages for medical monitoring available under 42 USC §9613(h) (Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA))).

The defendant in an asbestos injury case may be entitled to a jury instruction on the impact of preexisting conditions on the need for future medical monitoring. See *Guiterrez v Cassiar Mining Corp.* (1998) 64 CA4th 148, 75 CR2d 132.

A lawsuit asserting a cause of action seeking medical monitoring damages on behalf of all the large number of residents of an area is not entitled to certification as a class action absent proof by plaintiffs that common issues predominate. See *Lockheed Martin Corp v Superior Court (Carrillo)* (2003) 29 C4th 1096, 131 CR2d 1 (duration of exposure, and thus dosages, differed greatly among members of proposed class).

See Annos, 25 ALR5th 343 (1994) (smoking as basis for reducing damages), 17 ALR5th 327 (1993) (damages for medical monitoring expense).

See also §1.75 on psychogenic injury; §1.87 on damages for susceptibility to future injury; and §6.6 on damages for

fear of future illness.

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B. Particular Services and Supplies

§1.23 1. Medical Doctors and Other Practitioners

Damages are recoverable for the reasonable value of services furnished or to be furnished by physicians, surgeons, anesthesiologists, radiologists, psychiatrists, dentists, and other medical doctors. The plaintiff may also be able to establish the reasonable need for, and reliance on, the services of such other practitioners as psychologists, chiropractors, and acupuncturists.

TACTICS: Seeking damages for services supplied by a person outside the medical mainstream runs the risk that jurors, if they view it as overreaching, would discount the plaintiff's proof of traditional treatment or even of liability. Likely to be rejected as not reasonably necessary (see §1.20) are such expenses as payments for services provided in violation of the law; payments to a church or religious person for masses, prayers, or blessings; or payments to an unlicensed therapist, cultist, or guru. A plaintiff who seeks damages for payments to an herbalist, hypnotist, ordained faith healer, or Christian Science practitioner should be prepared to offer evidence of the treatment's efficacy, and, perhaps, the failure of treatment by mainstream practitioners.

The defendant may introduce expert testimony to prove that the services were unnecessary or were unduly prolonged by the practitioner through incompetence or for personal gain. The defendant may also introduce evidence that the charges exceeded those customarily charged for reasonably necessary treatment. See §1.20.

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§1.24 2. Hospitals; Other Institutions

The past or prospective charges of a hospital, clinic, convalescent home, nursing home, or similar health care institution are medical expenses for which damages may be recovered. These charges typically cover the services of employed residents, interns, nurses, and other personnel, as well as laboratory services and other supplies furnished to the patient and expended in the treatment.

If the injured person is an inpatient at the institution, part of the charges will cover the patient's food and lodging. These charges are a proper basis for damages, and no deduction need be made for the value to the patient of the food and lodging. See *Tomey v Dyson* (1946) 76 CA2d 212, 221, 172 P2d 739; Anno, 18 ALR2d 659 (1951).

TACTICS: An injured person sometimes chooses the more expensive of available institutions and the more expensive of accommodations within an institution (*e.g.,* a private room instead of a ward). Defense arguments that damages for hospital charges should be held to the costs of the least expensive room necessary for the patient's treatment have met with little success, but luxurious accommodations may be seen as excessive. The plaintiff's attorney may argue that the better accommodations can contribute to the injured person's recovery, especially if they are in keeping with his or her normal life style.

The defendant's attorney may have greater success arguing against the award of damages to cover charges for such optional amenities as private telephones and television sets and special food service.

NOTE: A hospital or other institution that furnishes emergency or ongoing care to a person injured in an accident may enforce a lien for reasonable and necessary charges against any damages recovered by the patient. See CC §§3045.1-3045.6. See chap 16 on reimbursement claims and liens against personal injury recoveries.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.25 3. Nursing and Attendant Care

§1.25 3. Nursing and Attendant Care

Damages are ordinarily recoverable for the reasonable value of nursing services, if the services were or will be reasonably necessary in the treatment of the injured person. The person furnishing the services may be:

- A registered nurse or other nursing professional;
- A family member with nursing training (see *Kimball v Northern Elec. Co.* (1911) 159 C 225, 231, 113 P 156 (mother was registered nurse); *Ciriniconi v Green* (1959) 175 CA2d 812, 816, 346 P2d 867 (daughter was vocational and practical nurse);
- A relative not trained as a nurse (*Large v Williams* (1957) 154 CA2d 315, 320, 315 P2d 919 (mother); *Seedborg v Lakewood Gardens Civic Ass'n* (1951) 105 CA2d 449, 454, 233 P2d 943 (sister-in-law, husband); *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 661, 151 CR 399 (wife); or
- Any other person.

Damages for nursing and attendant services are normally recovered by the injured person rather than by the person providing the services. See §§1.11, 1.17. Damages can be recovered for the value of nursing services even though they were gratuitous. *Fifield Manor v Finston* (1960) 54 C2d 632, 637, 7 CR 377. Of course, the recovery is for the reasonable value of the services.

Damages are recoverable for nursing or attendant care rendered by a family member, as by a wife to her disabled husband, to the extent that the services exceed those that the family member would have provided had the person not been injured. Such damages are not, however, measured by the loss of income from employment given up by a spouse in order to care for the injured person. *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 409, 115 CR 765. See *Hanif v Housing Auth.* (1988) 200 CA3d 635, 246 CR 192 (damages recoverable for reasonable value of reasonably competent nursing and attendance required by defendant's tortious conduct even when rendered by family members without expectation of payment and under spouse's legal obligation to render them).

An economist may be used to estimate the value of past and future services, including anticipated increases in attendants' wages. *Rodriguez v McDonnell Douglas Corp*. (1978) 87 CA3d 626, 661, 151 CR 399 (past and future care for 22-year-old triplegic estimated at $690,000 to $925,000, depending on amount of care needed in later life, assuming annual 5-percent increases in attendants' wages). See §1.107. See Anno, 49 ALR5th 685 (1997) (valuing gratuitously rendered nursing and medical care).

Defense counsel may argue that damages should not be awarded for services that are not necessary to treatment but are received more for personal convenience or gratification.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.26 4. Physical Therapy

§1.26 4. Physical Therapy

Damages should be recoverable for the reasonable value of physical therapy given in treatment of the injured person. Recoverable physical therapy charges include services of the physician who prescribes and supervises the therapy, services of a licensed, trained, or supervised therapist, and any reasonable additional charges for equipment and supplies used.

TACTICS: Defense counsel might argue, if physical therapy has continued over an extended period with no perceptible improvement in the patient's condition, that the therapy ceased after a certain point to be necessary to the treatment—*i.e.,* that it merely gratified the patient rather than improving his or her condition—and that damages should not be given for therapy performed after it became apparent that it was not reasonably likely to be beneficial. Defense counsel may also argue that some forms of claimed therapy, such as visits to massage parlors, were not reasonably necessary to treatment, or that the supposed therapist was not sufficiently trained to warrant the award of damages for the services.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.27 5. Psychotherapy

§1.27 5. Psychotherapy

Damages are recoverable for the reasonable value of treatment for mental and emotional detriment, such as a neurosis, psychosomatic disorder, mania, or phobia that proximately results from a personal injury. See *Di Mare v Cresci* (1962) 58 C2d 292, 300, 23 CR 772 (damages for severe mental disorder; fall resulting from defendant's negligence aggravated plaintiff's latent schizophrenia). See generally chap 6.

Recoverable medical expenses for the treatment of mental and emotional disorders include the value of the services of psychoanalysts, psychiatrists, and psychologists and the cost of residence in hospitals and other institutions.

TACTICS: Plaintiffs may sometimes recover for the services of hypnotists and other therapists and for the cost of group therapy sessions. But see TACTICS in §1.23. Defense counsel can be expected to object, arguing that they are not reasonably necessary to treatment (see §1.20), to claims for costs of "encounter" and similar groups, residence in communes or philosophical or religious centers, or services of unlicensed therapists or "leaders" not supervised by a licensed therapist.

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§1.28 6. Rehabilitation; Retraining

Part of the detriment from a bodily injury for which damages should be recoverable is the expense of training to live with disabilities that proximately resulted from the injury (*e.g.,* training to walk with crutches, to use an artificial limb, or to get around with a guide dog) and the expense of learning new employment skills consistent with these disabilities.

To be reimbursable, retraining expenses must be reasonable in view of the injured person's abilities and skills before injury. Thus, the defendant may be required to reimburse a paraplegic former construction worker for the cost of retraining as an assembly line worker or telephone operator, but not as a physicist or lawyer.

Damages paid for job retraining are often more than offset if retraining leads to the reduction of damages recoverable for the injured person's impaired earning capacity. See §1.41.

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§1.29 7. X-Rays; Laboratory Tests; Other Diagnostic Procedures

Damages may be recovered for the medical expense of all procedures reasonably necessary to diagnose conditions caused by the wrongdoer's tort. For certain injuries, doctors may order extensive diagnostic procedures to detect possible internal injury and to rule out possible causes of the patient's symptoms. (For example: Damages should be recoverable for overnight hospitalization to observe a plaintiff who received a chest-wall contusion, to rule out more serious cardiac damage, even if no heart injury is found.)

TACTICS: The defense might argue that it should not be required to pay for an expensive procedure if a cheaper one would have done as well, or that the procedures ordered had more to do with the doctor's desire to build up treatment expenses or to avoid any remote possibility of malpractice than with the requirements of the patient's condition. However, a plaintiff whose reliance on the doctor's skill is not unreasonable may argue against being penalized for the doctor's treatment choices.

On damages for the cost of medical monitoring in the future to detect disease not yet present, see §1.22.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.30 8. Drugs; Medication

§1.30 8. Drugs; Medication

Recoverable medical expense includes the cost of both prescription and nonprescription drugs.

TACTICS: The defense may argue against damages for drugs that were placebos or mere palliatives, were purchased on the patient's impetus, rather than the doctor's, or were used in excessive amounts on the ground that they were not reasonably necessary to treatment. The claimed expense of medication can also be challenged if the drug was readily available in a less expensive version.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.31 9. Prostheses; Aids to Function; Equipment

§1.31 9. Prostheses; Aids to Function; Equipment

Damages are ordinarily recoverable for the costs of artificial limbs and other prostheses reasonably necessary to help restore function and cosmetic appearance. Also recoverable are reasonable rental and purchase expenditures for crutches, canes, walkers, cervical collars, braces, and other appliances, whether for temporary or permanent use, as well as equipment for rehabilitative exercise that is reasonably necessary to relieve spasms and pain and to restore normal feeling and function. See Riley, *Projecting Prosthetic Costs*, 25 California Lawyer no. 6, p. 22 (June 2005).

TACTICS: Defense attorneys may question the need for overly ornamental aids or equipment that seems more recreational than rehabilitative. Damages may be denied unless the plaintiff provides evidence of reasonable need by way of a physician's prescription or medical testimony showing that a device or installation was significantly better for the plaintiff than conventional therapy. For example, a plaintiff who proved significant discomfort in dressing for and driving to daily prescribed whirlpool therapy might seek damages for installation of a home spa that lessened the pain and period of disability.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.32 10. Modified or Special Vehicles or Dwellings

§1.32 10. Modified or Special Vehicles or Dwellings

Damages are recoverable for the cost of changing automobile controls so that the vehicle can be operated by a partially disabled person. The plaintiff may also seek damages for the periodic projected cost to replace the vehicle in the future.

TACTICS: The defense may challenge a claim for damages for the cost of a new or special vehicle if other alternatives are available or if its cost is unreasonable.

The same principles apply to recovery of the cost of reasonable changes in a residence, such as installing ramps, widened doorways, or an elevator.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.33 11. Travel Expense

§1.33 11. Travel Expense

Damages are recoverable for the expense of traveling to obtain medical treatment. Recoverable travel expenses include trips both to a local doctor or therapist and to another city, *e.g.,* for evaluation and treatment by a specialist. Damages may also be sought for parking costs, the cost of a person accompanying the injured person if required for assistance, and the expense of child care while obtaining treatment.

TACTICS: A plaintiff who seeks damages for travel to a different climate for health or recuperative reasons must be prepared to make a strong showing of therapeutic necessity.

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Source: Torts/California Tort Damages/1 Bodily Injury/ C. Witnesses and Exhibits/§1.34 1. Medical Bills; Receipts; Treatment Records

C. Witnesses and Exhibits

§1.34 1. Medical Bills; Receipts; Treatment Records

The bills submitted by persons and entities that furnished medical services and supplies may be used to show, insofar as they do, what services were actually rendered and the amounts charged.

NOTE: A receipt given on payment of a bill may sometimes be used in place of the bill to show the service or supply and its cost. Defense counsel should be careful not to let the use of both a bill and a receipt for the same charge result in duplicated damages.

Proving that a medical bill was paid supports an inference that the charge was reasonable. *Dewhirst v Leopold* (1924) 194 C 424, 433, 229 P 30; *Malinson v Black* (1948) 83 CA2d 375, 379, 188 P2d 788. See *Smalley v Baty* (2005) 128 CA4th 977, 984, 27 CR3d 575 (also noted in §1.20). See Anno, 12 ALR3d 1347, 1377 (1967). However, the payment (or rendering) of a medical bill is not always sufficient to support an award of damages. See *McAllister v George* (1977) 73 CA3d 258, 264, 140 CR 702 (bill from dental school insufficient to prove what part of treatment shown, if any, was required for injuries caused by defendant). As is discussed in §1.20, absent a stipulation or agreement, the plaintiff must further establish that:

- The amount of the charge was reasonable;
- The treatment was rendered for a condition proximately caused by defendant's tort; and
- The services covered were reasonably necessary to treat the condition.

Reasonableness and necessity may be established by expert medical testimony, stipulation, or admission. Proof that the treatment was for the injury caused by the defendant may be established through the testimony of the injured person or the provider or by medical records.

Medical bills may be admitted in evidence as exhibits either by stipulation or by a showing through the testimony of:

- The person billed, that they are the bills received from the indicated person or institution for services rendered;
- The person who issued the bills, that they are the bills issued for services rendered; or
- The issuer's record keeper, that they are the originals or copies of bills from the issuer's files that were made and kept in the ordinary course of business.

See California Personal Injury Proof, chap 14 (Cal CEB 1970) for examples of foundational testimony.

TACTICS: Providers that are paid through a government program (such as Medicare or MediCal) or by a health maintenance organization (HMO) may prepare an itemized list showing the value of each service furnished, anticipating the recovery of such amounts through a statutory reimbursement claim or lien (see chap 16). Counsel must review such lists to ensure that all reasonable expenses are included, and that items for which damages are not recoverable are excluded. Defense counsel seeking to limit medical expense damages to the actual dollar amount paid by a governmental entity, HMO, or insurer for the services provided to the injured person may seek a stipulation on the amount of such damages or, perhaps, a post trial hearing for a reduction of the special verdict amount allocated to medical expense. See §1.20 on limiting damages to the dollar amount the provider accepted from an HMO under their contract. The plaintiff can be advised to maintain a medical treatment file in which to record all visits to medical personnel and all services rendered. Counsel may corroborate what the plaintiff has recorded by obtaining from each provider a copy of the plaintiff's medical record. The provider will ordinarily furnish a listing showing each service and the provider's assessment of its reasonable value. Absent a listing of services or a stipulation, the necessity for each service and its reasonable value may need to be established through the testimony of a medical expert.

Introduction of medical bills as exhibits has been eased in arbitrations under Cal Rules of Ct 3.810-3.829. If proper notice has been given before the arbitration, the bills may be introduced without foundational testimony. Cal Rules of Ct

3.823(b)(1).

TACTICS: When preparing to introduce medical bills at trial, the attorney should carefully review each bill for extraneous, irrelevant, and potentially prejudicial information. A bill often reflects payment by an insurance company, a fact that may be excluded under the collateral source rule (see §15.13). In this situation, a motion in limine should be made, to delete the extraneous information. A copy of the bill can be made after covering or excising the entry, and the copy substituted for the original. Defense counsel should be provided an opportunity to compare the original with the copy before the copy is offered, to avoid any appearance of impropriety before the jury. See Evid C §§1520-1523.

Charges for treatment unrelated to the injury should either be deleted from bills or be clearly marked as unrelated and unclaimed, to avoid giving an impression of overreaching to the jury. Unless these items are segregated, it is error to award damages based on such bills, because the plaintiff's burden of establishing damages with reasonable certainty is unmet. *Ciriniconi v Green* (1959) 175 CA2d 812, 816, 346 P2d 867.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.35 2. Injured Person

§1.35 2. Injured Person

The injured person can testify about visits to a doctor and receipt of medical bills relating to those visits, laying a foundation for introduction of the bills or receipts.

The testimony can also show:

- The nature of the injuries as the plaintiff experienced and understood them (but not a "self-diagnosis" unless the injured person is qualified as a medical expert);
- The lay opinion that those injuries were caused by the defendant's acts or omissions or contact with the defendant's product (although such an opinion may be excluded in litigation involving exposure to toxic chemicals, drugs, or medical devices);
- The nature and details, as the plaintiff understood them, of the medical services and supplies received;
- The amount of the bills received for those services and supplies; and
- Payment of the bills as evidence that they were reasonable.

Testimony by the injured person sometimes provides a sufficient basis for an award of damages for medical expenses. Expert medical testimony may be required, however, to establish the need to treat the injuries complained of (particularly when the treatment is nontraditional, such as chiropractic or herbal treatment) and the causal connection between the injuries and the defendant's wrongdoing.

If the injured person did not receive bills for some services or supplies, another witness (*e.g.,* a doctor) must testify to the reasonable value of those services. Bills that the injured person received, but did not pay, can be shown to be reasonable by evidence that they were paid by someone else or by a doctor's or economist's opinion testimony that they were reasonable or were typical charges for the type of treatment rendered.

A plaintiff or claimant who is not the person who suffered the bodily injury may testify about:

- Observations of the nature of the injuries and of the treatment given;
- The amount of bills received for medical services and supplies furnished to the injured person; and
- Payment of the bills as evidence of their reasonable value.

Other evidence would be required to show causal connection, need for treatment, reasonable value of unbilled services and supplies, and, if the claimant did not pay the bills, reasonableness of the charges.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.36 3. Doctors; Other Practitioners

§1.36 3. Doctors; Other Practitioners

The injured person's own medical doctors can testify to the foundational facts necessary to introduce the medical bills, *i.e.,* that the bills represent charges for services rendered. Their testimony can show that they actually provided the described services, which were reasonably necessary to treat the plaintiff's injuries, and that the amount charged was reasonable. Likewise, a physical therapist, nurse, or other health care provider can lay the foundation for introduction and recovery for their own billings.

Any licensed physician or surgeon, whether a treating physician or an expert engaged for trial, can give testimony that:

- Specified services and supplies were reasonably necessary to treat the described injuries;
- The charges made for specified services and supplies by him or her or another doctor or entity were reasonable (or, if no charge was stated, what the reasonable value of the services and supplies would be);
- The injured person is reasonably certain to need medical services and supplies in the future and what the nature and projected reasonable value would be; and
- The described trauma can cause injuries like those claimed.

A medical witness who treated the injured person can also give testimony:

- Describing the nature of the injuries;
- Showing that the injuries were or could have been caused by the claimed trauma;
- Describing the treatment prescribed and rendered and stating that it was reasonably necessary; and
- Stating the amount of charges for his or her services and the need for the services.

A medical witness who was not a treating doctor may offer an opinion that the injuries were or could have been caused by the claimed trauma; to support the opinion, he or she may be allowed to testify in detail about the nature of the injuries and the treatment required for them. See *Guzman v Superior Court* (1993) 19 CA4th 705, 23 CR2d 585, holding that a trial judge who concludes that there was insufficient expert medical evidence of a causal connection between the plaintiff's original injury and later symptoms, and for that reason orders a new trial on damages, should then permit the plaintiff to designate new expert witnesses for the new trial even if the plaintiff could have avoided the new trial by agreeing to a reduction of the jury's award.

WARNING: Attorneys who plan to call medical witnesses to give medical testimony must be sure to have complied with the requirements of CCP §§2034.010-2034.730 on the pretrial submission of expert witness declarations. See *Fairfax v Lords* (2006) 138 CA4th 1019, 41 CR3d 850 (defense judgment reversed where defendant delayed furnishing experts' names until 20 days after "simultaneous" exchange); *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293 (treating physician who gives opinion testimony is expert percipient witness, not "retained" expert under CCP §2034.210). For discussion of this procedure, see California Civil Discovery Practice, chap 11 (4th ed Cal CEB 2006); California Expert Witness Guide §§10.1-10.25 (2d ed Cal CEB 1991).

See Anno, 77 ALR4th 463 (1990) (adverse inference based on party's failure to produce or question examining doctor).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.37 4. Stipulation

§1.37 4. Stipulation

A defendant's written stipulation to the amount of medical expenses is of limited value unless the defendant also stipulates that the charges are reasonable and were for injuries proximately caused by the accident in question. See §1.20.

TACTICS: Obtaining a stipulation is not always the more effective way of proving damages. It may be more advantageous to introduce the bills themselves, which the jury may take into deliberations. The actual billings provide more compelling evidence of the injuries than a mere stipulated sum. For example, medical bills setting out each date of treatment, laboratory work, X-rays, and the like may be used as a basis to argue that the injured plaintiff lost additional wages after returning to work in order to attend to continuing medical care or that the frequency of medical care and the degree to which the care interfered with normal life reflects the extent of pain and suffering the plaintiff has suffered.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.38 5. Request for Admission

§1.38 5. Request for Admission

The request for admission procedure in CCP §§2033.010-2033.740 can be used in several ways to prove medical expenses. For discussion of this procedure, with forms, see California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006).

TACTICS: Sometimes, a set of requests for admission is used only to authenticate a series of bills and receipts. Witnesses are then asked to testify to reasonable need for the services, causal connection to the subject occurrence, and reasonableness of the charges. At other times, requests for admission are used to obviate the need for the testimony.

Each defendant may be served with a set of requests for admission that asks the defendant to admit that each of the bills or receipts attached to the set is genuine. For example:

You are requested to admit that the original of each of the following documents, a copy of which is attached, is genuine:

1. Medical bill _ _[*dated*]_ _ from Dr. _ _[*name*]_ _.

2. Medical bill _ _[*dated*]_ _ from _ _[*name*]_ _ Hospital.

3. Medical bill _ _[*dated*]_ _ from Mr. _ _[*name*]_ _, Physical Therapist.

4. Receipt _ _[*dated*]_ _ from _ _[*name*]_ _, for _ _[*specify*]_ _.

5. Receipt _ _[*dated*]_ _ from _ _[*name*]_ _ Rental, for _ _[*specify*]_ _.

Alternatively, each defendant can be asked to admit:

- The amount of the charge made by each provider of services and supplies;
- The reasonable need for services and supplies to diagnose or treat conditions resulting from the accident sued on; and
- The reasonableness of each charge.

See §1.20. Each of these elements can be covered in a separately numbered request to avoid the objection that the request is compound or conjunctive. See CCP §2033.060; Civil Discovery §9.16. A responding party who does not object to the charge, however, may be willing to answer a conjunctive request such as:

You are requested to admit the truth of each of the following:

1. Dr._ _[*name*]_ _ charged the plaintiff _ _[*dollar amount*]_ _, which was a reasonable charge, for services reasonably necessary to diagnose and treat conditions caused by _ _[*e.g., the accident of July 10, 2001*]_ _.

TACTICS: Code of Civil Procedure §§2033.010-2033.740 does not limit the number of requests to admit the genuineness of documents that may be directed to each responding party. There is a presumptive limit on the number of requests relating to truth that may be posed, although this limit may be bypassed by attaching a Declaration for Additional Discovery. See form in Civil Discovery §9.87.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.39 6. Economist

§1.39 6. Economist

An economist or similar professional who is shown to have special knowledge, skill, experience, training, or education on the subject of medical costs can testify about the probable costs of described medical services and supplies in the future or about overall price trends in medical expenses, indicating the present sum of money that will pay the equivalent of projected future expenses. See *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 661, 151 CR 399. See also *Niles v City of San Rafael* (1974) 42 CA3d 230, 116 CR 733.

TACTICS: Attorneys can obtain from certain firms relatively low cost, computer-generated estimates of such economic data as future costs of medical treatment and future earning capacity loss. These estimates can be quite useful in settlement negotiations, although an expert economist may have to be hired to furnish trial testimony and exhibits. These trial experts may rely on the computer-generated statistics in testimony.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.40 7. Family Member or Other Provider of Services

§1.40 7. Family Member or Other Provider of Services

A family member or other person who provided nursing or related medical services to the injured person can testify to the nature, frequency, and duration of the services. A witness who is also a trained nurse or other health practitioner can state an opinion of the reasonable value of the services.

TACTICS: The witness who rendered a bill for services can also testify to the foundational facts necessary for its admission, including testimony that the charges were reasonable. If the person who furnished the services is not a trained health care provider, supportive testimony about the reasonable value of the services may be elicited from a physician or an economist.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.40A 8. Accident Reconstruction and Other Experts

§1.40A 8. Accident Reconstruction and Other Experts

The testimony of a biomechanical expert (and "accident reconstructionist") that the low speeds involved in a rear-end collision were unlikely to have caused the knee and shoulder injury injuries claimed by a car driver supported a jury finding that defendant's negligence was not a substantial factor in causing any harm to the driver. See *DePalma v Rodriguez* (2007) 151 CA4th 159, 59 CR3d 479.

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III. LOST EARNINGS; IMPAIRED EARNING CAPACITY

A. Standards of Proof

§1.41 1. Earnings Loss and Impairment

The plaintiff can recover damages both for lost earnings and for impairment of the ability or capacity to earn that are the proximate result of injury caused by tortious conduct. That is, impairment of the capacity or the power to work can be viewed as an injury or loss separate from an actual loss of earnings. See *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 656, 151 CR 399; CACI 3903C.

NOTE: The term "impaired earning capacity" is used in a broad sense to cover all forms of past and future earnings losses. See also BAJI 14.11.

Damages for lost earnings compensate for the full value to the injured person of the time he or she was caused to lose from work. See §1.42. Such damages are sometimes characterized as "special damages." See §1.4. However, a demand (or prayer) for general damages should be viewed as covering all aspects of earning capacity loss, past and future, including actual lost earnings. Note that CC §1431.2(b)(1) defines "economic damages" to include "loss of earnings," "loss of employment," and "loss of business or employment opportunities," and does not distinguish between lost earnings and impaired earning capacity. See §1.5.

Damages for impairment of the capacity to earn compensate for past and future diminution in the injured person's work skills, strength, or abilities resulting from injury. See §1.4. Such a loss of earning power is an element of general damages, and may be inferred from the nature of the injury, with or without proof that the person had actual earnings or income either before or after the injury. *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 412, 196 CR 117.

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Source: Torts/California Tort Damages/1 Bodily Injury/ 2. Lost Earnings/§1.42 a. Past Loss

2. Lost Earnings

§1.42 a. Past Loss

Earnings loss from the date of injury through the time of trial includes (1) the value of the time lost from work because of the injury at the injured person's then rate of pay, (2) loss due to missed or delayed raises or promotions reasonably likely to have been received, (3) other losses such as lost commissions, and (4) any diminution in benefits. Damages are measured not necessarily by actual unpaid wages but by the value of the time the injured person would have worked but could not because of the injury. See *Connolly v Pre-Mixed Concrete Co.* (1957) 49 C2d 483, 489, 319 P2d 343; CACI 3903C, 3903D.

The lost time for which damages can be recovered includes (1) time lost because the nature of the injuries physically prevented the injured worker from doing his or her job without unusual difficulty, pain, or discomfort and (2) time lost for reasonably necessary medical appointments, treatment, and therapy.

An injured person who returns to work on a part-time or light-duty basis may claim damages for any difference between actual earnings (excluding collateral source items) and earnings from his or her regular, full-time job.

TACTICS: The defendant may dispute the time lost from work. The plaintiff should be prepared to substantiate with medical testimony the need for the lost time. The defendant may also contend that the plaintiff failed to mitigate damages by failing or refusing to take alternative employment. See §15.22.

The award for lost wages or earnings is based on the plaintiff's gross earnings, regardless of after-tax net. *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 151 CR 399. Thus, in California the trier of fact cannot discount a past-loss award to reflect after-tax earnings; nor can it consider the tax consequences of the award. generally. The rule is different, however, in actions based on federal statutory liability, whether tried in state or federal courts. *Norfolk & W. Ry. v Liepelt* (1980) 444 US 490, 62 L Ed 2d 689, 100 S Ct 755 (FELA case); see *Burlington N., Inc. v Boxberger* (9th Cir 1975) 529 F2d 284.

EXAMPLE: Plaintiff worked as a typist at a gross salary of $2400 per month ($100 per working day) when he was injured on March 15. He had been promised a promotion to administrative assistant on April 1, with a raise in pay to $2880 per month ($120 per day). He was cleared by his doctor to return to work half-time on May 1. The promised administrative assistant position had been filled during his absence; he returned at his previous rate of pay ($50 for each half day). He was able to work full-time from June 1, still at the old rate. On July 1, he received the expected promotion and raise.

His wage losses may be computed as follows:

March 15-March 31 (loss: $100 per day, 12 days)	$ 1200
April 1-April 30 (loss: $120 per day, 24 days)	$ 2880
May 1-May 31 (loss: $70 per day, 24 days)	$ 1680
June 1-June 30 (loss: $20 per day, 24 days)	$ 480
Total Wage Loss	$ 6240

Damages for wage and earnings losses are not diminished by compensation received from any source wholly independent from the defendants. Thus, the loss is computed without deducting sick leave pay or time, vacation pay or time, employer payments made voluntarily or under a wage continuation plan, or disability or income insurance benefits. See Annos, 7 ALR3d 516 (1966) (payments by employer), 52 ALR2d 1451 (1957) (vacation time, sick leave, etc.). See generally §§15.22 and 15.48 on the collateral source rule.

Thus, in the foregoing illustration the wage loss damages would not be reduced because, for example:

- The employee's take-home pay was considerably less than $100 or $120 per working day because of tax and social security withholding; deductions for employee medical, life, or disability insurance; deductions for contributions to pension and profit-sharing plans; or deductions for union dues;

- The employee actually received a full paycheck for March by using 6 days' sick leave and 6 days' vacation time; or
- The employee took a correspondence course and attended classes during April (although his injuries prevented him from working), thus qualifying him to take a $140-per-day position on July 1 instead of the $120-per-day position he would otherwise have taken.

The plaintiff need not prove the amount of actual earnings at the time of injury in order to recover for past earnings loss. See *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 656, 151 CR 399 (because plaintiff was an apprentice at time of injury, proof of actual earnings would have been misleading). Such proof is normally helpful to juries, however.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.43 b. Future Loss

§1.43 b. Future Loss

Damages for earnings reasonably certain to be lost in the future must be supported by evidence of the likely duration of the plaintiff's disability, which may be established by medical testimony. See CACI 3903C, 3903D. If the disability is permanent, the standard mortality tables are used to establish the preinjury life expectancy, and work-life expectancy is then computed. See tables accompanying CACI 3932.

Damages for future earnings loss are based on preinjury work-life expectancy, undiminished by any shortening of that expectancy caused by the injury. *Fein v Permanente Med. Group* (1985) 38 C3d 137, 153, 211 CR 368. That is, future economic damages include amounts the plaintiff would have earned during the period his or her life expectancy was shortened, *i.e.,* "lost years" damages. These include the loss of pension, Social Security, and household services benefits. *Overly v Ingalls Shipbuilding, Inc.* (1999) 74 CA4th 164, 171, 87 CR2d 626. Further, in personal injury actions seeking future economic damages, there is no deduction for the plaintiff's prospective personal consumption (unlike wrongful death actions, in which the plaintiff recovers for lost support). 74 CA4th at 176.

NOTE: A defendant who has evidence proving that the injured person is an undocumented alien subject to deportation may seek to convince the trial judge that any future earnings loss must be based on prospective earnings in the nation where the person is a citizen. See *Alonso v State* (1975) 50 CA3d 242, 123 CR 536. The plaintiff's attorney may counter such a claim with evidence that the person is now, or soon will be, able to work in the United States. See *Rodriguez v Kline* (1986) 186 CA3d 1145, 1149, 232 CR 157. See also *Clemente v State* (1985) 40 C3d 202, 219 CR 445. For more on the assessment of damages future earnings, see Dorny, Deborah, *Illegal Aliens: Damages for Future Earnings and Medical Expenses*, 16 Cal Lit 1, p 13 (Cal State Bar Litigation Section 2003).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.44 3. Impaired Earning Capacity

§1.44 3. Impaired Earning Capacity

Damages are recoverable for loss of the ability to earn money. *Connolly v Pre-Mixed Concrete Co.* (1957) 49 C2d 483, 489, 319 P2d 343, 346; *Gargir v B'Nei Akiva* (1998) 66 CA4th 1269, 1280, 78 CR2d 557 (expert testimony not required). The test is not what the plaintiff would have earned in the future but what he or she could have earned; even a plaintiff who was not working, or was earning nothing, may recover general damages for impaired earning capacity. *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 412, 196 CR 117.

A plaintiff may recover damages for impairment of earning capacity if physical or mental injury caused by a defendant:

- Requires the plaintiff to change to less remunerative work;
- Shortens the years the plaintiff will be able to work;
- Reduces the likelihood that a person of the plaintiff's age at the time of recovery from injury will be able to reenter the work force (see *Neumann v Bishop* (1976) 59 CA3d 451, 464, 130 CR 786);
- Requires the plaintiff to work reduced hours or to forgo the usual overtime (see *Robison v Atchison, T. & S.F. Ry.* (1962) 211 CA2d 280, 287, 27 CR 260; *Ostertag v Bethlehem Shipbuilding Corp.* (1944) 65 CA2d 795, 807, 151 P2d 647);
- Prevents the plaintiff from taking expected promotions and raises (see §1.51); or
- Prevents the plaintiff from pursuing an intention and ability to take different, more remunerative employment (see *Zibbell v Southern Pac. Co.* (1911) 160 C 237, 249, 116 P 513).

A plaintiff seeking damages for impairment of earning capacity may need medical testimony to establish the extent of his or her disability (compared to preinjury abilities) and its likely duration or the extent to which it is likely to get better or worse. See §1.65. In addition, an economist or other expert (see §1.64) may be needed to establish:

- Probable future earnings for the duration of the plaintiff's work-life expectancy of the job the plaintiff held at the time of injury, and of positions the plaintiff is likely to have taken but for the injury;
- Probable future earnings of a person with the plaintiff's disability; and
- Probable future availability of work that the plaintiff is suited to perform.

TACTICS: A plaintiff seeking damages for a loss of earnings due to inability to pursue a different occupation should present evidence of plans to enter into the new line of work and steps taken to prepare for it, or evidence that he or she was qualified by past experience to do it and that the position would have been available had he or she not been injured. Testimony solely about intention to change employment may be insufficient; damages based on mere intention would be speculative. See Annos, 7 ALR6th 1 (2005) (admissibility of evidence of prospective earnings from position for which person had not fulfilled educational, training, or other eligibility requirement), 23 ALR3d 1189 (1969) (admissibility of evidence of intention to enter occupation other than that engaged in at time of injury or death).

Consideration of inflation in computing future earnings is discretionary. *Maheu v Hughes Tool Co.* (9th Cir 1977) 569 F2d 459. It is not usually reversible error to give, or to refuse to give, instructions to the jury on the declining value of the dollar. See *Chadek v Spira* (1956) 146 CA2d 360, 368, 303 P2d 879. Any award for future earnings loss or impaired earning capacity must be reduced to present cash value. See §1.107.

NOTE: It was not deemed to be juror misconduct that would require a new trial that the jury, when considering damages for impairment of earning capacity, discussed whether a 72-year-old plaintiff's previous sale of a business gave her enough money to have retired from work even had she not been injured. See *Chronakis v Windsor* (1993) 14 CA4th 1058, 1069, 18 CR2d 106 (jurors could have been considering how much of plaintiff's probable future work life had actually been interrupted rather than improperly considering collateral source income). See also *English v Lin* (1994) 26 CA4th 1358, 31 CR2d 906 (juror's statements about how much his brother-in-law earned as a commercial artist did not require vacation of judgment for plaintiff whose injury denied

him the means, a football scholarship, to obtain a commercial art degree inasmuch as plaintiff did not ask for damages for future loss of earnings as either commercial artist or football player).

Another factor affecting damages for impairment of earning capacity is the possibility that a person of the plaintiff's citizenship status might be forced to return to a country with lower wage rates (and, perhaps, diminished employment possibilities). See *Metalworking Mach., Inc. v Superior Court* (1977) 69 CA3d 791, 138 CR 369. See also final Note in §1.43.

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B. Specific Losses

1. Employed Person

§1.45 a. Regular Salary; Wages

Normally, damages for lost wages and impaired earning capacity can be expected to at least equal the gross salary or wages the injured person has already lost as a proximate result of injuries and the present cash value of income he or she is reasonably certain to lose in the future.

An employed person's lost wages damages are for the value of lost work time at the gross rate of pay; they are not limited to net or actual earnings loss; nor are losses reduced by use of sick time, vacation pay, or the like. See §1.42.

The plaintiff need not prove that he or she had actual preinjury earnings to recover damages for lost wages. *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 412, 196 CR 117; *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 151 CR 399. See generally §1.55.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.46 b. Commissions; Bonuses

§1.46 b. Commissions; Bonuses

Earning capacity is lost to the extent that an injury prevents an employee from earning commissions in addition to or in place of salary or wages. The same is true of bonuses that the employee would otherwise have received from the employer as a reward for work, as an incentive, or as a goodwill gesture.

TACTICS: Defense attorneys may question whether the amount of work the employee would have been expected to do, even if uninjured, would have earned the amount of commissions and bonuses he or she claims to have lost. The defense may also look to prior employment records, or bonus or incentive plans applicable to coworkers for the time period in question, to contend that the bonuses would not have been earned or paid.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.47 c. Tips

§1.47 c. Tips

Damages may be recovered for tips and gratuities lost due to the injury. Because tips may vary from day to day, depending on the number and whims of customers, the plaintiff may have difficulty proving how much he or she would have earned in tips had he or she not been injured.

TACTICS: A plaintiff's attorney might argue that money reported as tips for income tax purposes represents an average worked out between the employer and the taxing authorities and is less than the amount the injured person actually earned. The employee is entitled to damages for actual earnings loss, although attempts to prove losses based on income greater than reported may alienate the jury.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.48 d. Overtime Pay

§1.48 d. Overtime Pay

Earnings are lost when an injury prevents an employee from earning reasonably anticipated overtime pay. The injured person must prove, however, that the work was available and that he or she would likely have done it.

Evidence of a prior history of frequent overtime work lends support to a plaintiff's claim of such earnings loss. It is also helpful to show that the employer required or expected overtime work, or that the work was anticipated because of the nature of upcoming contracts. Employer or coworker testimony that overtime work was available during the period of disability is probative evidence of plaintiff's loss.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.49 e. Lost Benefits

§1.49 e. Lost Benefits

Some employment benefits are earned in proportion to the time worked, *e.g.,* vacation time, sick leave, and employer contributions to insurance coverage, pensions, and profit-sharing or retirement plans. The value of any benefits lost or diminished because the injury prevents the person from working is a recoverable earning capacity loss.

Expert economic or actuarial testimony, based on the plaintiff's employment contract, benefit package, or the employer's testimony concerning the items may be necessary to assess properly their present cash value.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.50 f. Sick Leave; Vacation Time

§1.50 f. Sick Leave; Vacation Time

An employee who misses work because of an injury suffers recoverable earning capacity loss, even if he or she continues to be paid by using sick leave, vacation time, disability benefits, or a continued-compensation plan. Sick leave, vacation time, and the like are benefits from a collateral source. See §15.22.

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§1.51 g. Lost or Delayed Promotions, Increases, and Opportunities

Damages may be awarded for earning capacity loss when an injury either (1) delays the date on which the person could reasonably have expected a raise, (2) diminishes the physical or mental abilities that the employee would need for advancement to higher-paid jobs, (3) removes the employee from the workplace at the time a position becomes available, or (4) otherwise postpones the employee's career advancement.

Damages are recoverable for loss of a higher-paid position only if the position was reasonably within the expectations of a person with the plaintiff's preinjury abilities: The person's ambitions must be realistic, not merely hopeful or speculative. The plaintiff's employer may testify about the likelihood of advancement or availability of better paying positions for which the plaintiff was previously qualified or could have been expected to qualify. See Anno, 7 ALR6th 1 (2005) (admissibility of evidence of prospective earnings from position for which person had not fulfilled educational, training, or other eligibility requirement).

An injured person who claims that the injury will preclude or delay taking a higher-paying position in the future, *i.e.,* after the trial, must show the earning capacity loss with reasonable certainty. See §1.42. For example, it must be shown to be reasonably certain that the person would have received the increased earnings at particular dates and that because of the injuries the person will not receive the increased earnings at all, or not until a later date.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.52 2. Self-Employed Person

§1.52 2. Self-Employed Person

"Self-employed person" is used in this section to include:

- A person who owns and operates or is a partner in a business, occupation, or professional practice;
- A person who sells work on a commission basis, such as an artist or a writer;
- A person whose relation to an entity is more that of an independent contractor than an employee (such as a sales representative with an exclusive territory working strictly on commission); and
- Any other person to whom the discussion of an employee's earning capacity in §§1.45-1.51 does not fully apply.

Counsel and the court must consider what evidence most clearly and fairly shows the monetary extent to which a self-employed person's earning capacity has been diminished as a proximate result of the injury. The evidence may vary according to such factors as the nature of the business and the extent to which business profits depend on the person's endeavors (instead of capital or the labor of others).

TACTICS: Some self-employed persons have few, if any, credible records that show the value of work time lost, and may thus be vulnerable to defense cross-examination. Thus, it is sometimes useful to offer income tax returns as evidence, waiving the privilege that otherwise would preclude disclosure.

If the claimant's activities were the major factor in the business's profitability, evidence of past profits can be used to establish the value of time lost from the plaintiff's employment. The person's value to the business may be best reflected in the earnings of the business rather than in the compensation taken as a draw or salary from the business. If others were employed in the business, however, lost profits may not be a good measure of plaintiff's lost earnings, and plaintiff must offer other proof of the reasonable value of his or her services to the business. *Pretzer v California Transit Co.* (1930) 211 C 202, 207, 294 P 382. See Anno, 45 ALR3d 345 (1972) (profits of business as factor in determining loss of earnings or earning capacity).

A self-employed person who hires a substitute or assistant to perform business functions while he or she is disabled may offer evidence of the cost of the substitute or assistant to show earning capacity loss or the value of plaintiff's services to the business.

Because damages are awarded for the injured person's loss of earning capacity, damages may also be recovered if the injured person had definite plans to leave the business and enter a more lucrative trade or business (see §1.44) or to engage in activities that would have increased business profitability.

An injured artist, artisan, or professional may continue to receive income from work performed before the injury or from projects begun by the injured person and completed by others. Long-range projections of lost income and earnings attributable to loss of goodwill, termination of work in progress, loss of customers, and loss of momentum in a career based on constant public exposure must be carefully evaluated.

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§1.53 a. Sole Proprietor

If the income of a business results primarily from the skills and efforts of an owner who is disabled from pursuing the business, the past and reasonably certain future profits of the business are proper factors to consider in determining the owner's earning capacity loss. *Osterode v Almquist* (1948) 89 CA2d 15, 200 P2d 169. See Anno, 45 ALR3d 345 (1972) (business profits).

Because the endeavors of a business owner are directed both to deriving immediate income from the business and to building up the value of the business entity, the compensation actually taken by the owner as a draw or salary may be less than his or her loss when injury prevents working. An owner who gives fewer hours and less effort to the business after being injured, but who does not proportionally reduce his or her draw from it, must show that any diminution in the value of the business was not due to extrinsic factors such as depressed market conditions or the inattention of employees.

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§1.54 b. Partner

The earning capacity loss suffered by an injured partner in a business may sometimes be proved by showing that a certain decrease in the profits of the business resulted directly from the injury. A reduction in the injured partner's draw from the partnership may demonstrate lost earning capacity if it can be established that the draw before the injury accurately reflected his or her contribution to the business and that the reduction after the injury was in proportion to the reduced contribution. See Anno, 82 ALR2d 679 (1962) (drawings as evidence of earning capacity).

The loss of a key partner may reduce partnership profits out of proportion to the partner's ownership interest or apparent contribution. For example, injury to an attorney who was the "rainmaker" in a partnership, responsible for bringing in new business by engaging in activities that were not computed as billable hours, may result in the loss of both new and old business. The decrease in partnership profits overall may then be considered, as well as any decrease in the partner's draw during the period of disability.

On the right of a partnership as an entity to recover damages against a wrongdoer who harmed one partner, see §1.19.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.55 3. Unemployed Person

§1.55 3. Unemployed Person

Damages are awarded for the loss of the ability to earn money, which may be inferred from the injury without proof of prior or subsequent actual earnings. *Connolly v Pre-Mixed Concrete Co.* (1957) 49 C2d 483, 319 P2d 343; *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 412, 196 CR 117. Thus, a person may recover damages for impairment of earning capacity even though not gainfully employed at the time he or she was injured. *Tornell v Munson* (1947) 80 CA2d 123, 125, 181 P2d 112. The amount of the earning capacity loss may be inferred by the trier of fact from the nature of the injuries and from evidence of the person's prior work history, rates of pay, plans, and abilities. Of course, damages for lost earning capacity cannot be based on mere speculation and conjecture.

A person who had the physical ability to work before being injured may testify about the intention to obtain employment, the reason for unemployment at the time of the injury, and reasons for expecting that changes in circumstances or the labor market would have allowed him or her to find work but for the injuries. For example, a person who was laid off may establish a general improvement in the business climate in a line of work, a seasonal worker may establish the cyclic nature of the trade, or a student may establish an anticipated date for completion of studies and the availability of work in the intended field. This evidence may be introduced through expert testimony of an economist or labor analyst, employment agency representative, prospective employer in the plaintiff's chosen field, or even a union official.

TACTICS: A defendant may argue that the plaintiff must meet the burden of proving that the claimed loss of earnings was due to injury caused by the defendant and not to other factors such as a depressed market for employees in jobs for which the plaintiff is qualified. The plaintiff may respond that the defendant should not be permitted to profit from such conditions as the labor market, over which the plaintiff has no control; that damages are recoverable for impairment of the ability to work; and that it should be presumed that, without the injury, the plaintiff would have found work. This argument is strengthened if the plaintiff can establish a prior work history of continued or substantially steady employment even during periods of depressed market conditions.

Proof of the income that the plaintiff would have earned but for the injury may be based on past employment history and pay rates and on pay rates and benefits established by experts, persons employed in the field, union pay scales, and similar evidence.

Past earnings do not impose a limit on damages for loss of earning capacity. The injured person can sometimes establish that he or she was preparing for more lucrative work or was qualified for and, were it not for the injury, could have obtained a better paying job than those held in the past. See §1.44.

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4. Minor

§1.56 a. Employed and Employable Youth

Minority does not prevent a young person from recovering damages to compensate for the amount he or she could have expected to earn if uninjured, taking into account age, abilities and interests, and available kinds of employment. See *Girard v Irvine* (1929) 97 CA 377, 385, 275 P 840; Anno, 15 ALR2d 418 (1951) (proof of prospective earning capacity of student or trainee).

Damages are recoverable, whether the minor was actually employed, full or part time, at the time of the injury, or intended to obtain work during summer vacation or after school. See *Lang v Barry* (1945) 71 CA2d 121, 126, 161 P2d 949. If the minor is unemployed, prior vacation or after-school work history, availability of work for minors, and the other factors applicable to unemployed adult claimants apply to establishing the claim. See §1.55.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.57 b. Young Child

§1.57 b. Young Child

A minor of any age may recover damages for impairment of future earning capacity (see §1.44) and interference with long term career choices. See *Niles v City of San Rafael* (1974) 42 CA3d 230, 242, 116 CR 733 (lost future earnings from age 18 to age 65 recoverable by 11-year-old boy).

Special problems of proof arise for injured minors who are too young to have a work history, to have demonstrated employment abilities, or even to have indicated a career goal. The plaintiff may begin proof of earning capacity impairment with medical and other evidence (which may include the results of intelligence and psychological testing) of the child's general abilities before and after the injury, and of the prognosis of the child's condition. Evidence of parents' or siblings' abilities, work experience, educational background, ability to provide for the child's higher education, and other factors may also be useful.

An economist can testify, usually based on labor department or other demographic studies, to the child's possible careers and earnings. For instance, when an injury has caused brain damage and diminished intelligence, an expert might testify about the educational level likely to be achieved by persons of the child's socioeconomic status and prior IQ, and projected income levels for such persons. A comparison can then be made to the earnings achieved by workers at the educational and skill levels that the child is likely to reach. See *Niles v City of San Rafael, supra*.

On the recovery of damages for loss of the minor's services to the family, see §1.16.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.58 5. Homemaker

§1.58 5. Homemaker

The contribution of one spouse, either a man or a woman, to a marital partnership is often to maintain the family home and provide services to the family while the other spouse works outside the home or operates a business. The recovery by the homemaker of damages for the value of services that injury prevents the person from providing to the family (see §1.66) may be viewed as the equivalent of recovery by the person of damages for lost earnings.

A homemaker may also prove impairment of earning capacity, although not employed outside the home, by showing the intention and ability to take paid employment in the future, as when children are older.

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C. Witnesses and Exhibits

§1.59 1. Employment Records

Either party may offer in evidence the wage or salary records kept by the injured person's employer. If a proper foundation is laid, these records can be received as business records kept in the ordinary course of business. Evid C §§1271, 1560-1566. See California Personal Injury Proof §§11.16-11.22 (Cal CEB 1970).

These records may be difficult for a jury to understand. A witness such as the injured person, the record keeper, or the employer's personnel director can explain them and state what wage loss they show.

Copies of documents, such as an employment contract, a compensation plan, a retirement or pension plan, or a union contract, demonstrating benefits lost as a result of injury may also be used. The injured employee's employment contract may be useful and necessary to establish the terms of the compensation package, particularly when compensation is based in whole or in part on commissions or business profits. It may also be necessary to call a witness such as a union official or an administrator of a benefits program to explain the terms of the benefits package.

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§1.60 2. Statement From Employer

To facilitate settlement, the plaintiff's lawyers often obtain from the injured person's employer a letter or statement of the person's rate of pay at the time of the injury and the number of hours or days he or she missed from work on and after the date of injury. The written statement is admissible in evidence at trial only by stipulation because it is hearsay and not an ordinary business record.

NOTE: During arbitrations, less stringent evidentiary rules apply. Thus, an employer statement may be received, especially if made as a declaration under penalty of perjury, and appropriately identified before the date of arbitration. See generally CCP §1283 and Cal Rules of Ct 3.823(b) on the rules of evidence applicable in arbitration proceedings.

When requesting an earnings loss statement from an employer, a plaintiff's attorney should specify that it show only the gross rate of pay and time lost. Otherwise, the employer's statement may show wages lost on a net basis, after application of sick leave, vacation pay, or deduction of other collateral source benefits.

A defense attorney should not stipulate to the admission of an employer's statement unless certain that the stated time loss resulted from the injury and not some other cause.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.61 3. Income Tax Returns

§1.61 3. Income Tax Returns

A plaintiff may introduce his or her income tax returns as evidence of income before and after the injury.

On the other hand, a plaintiff can assert a privilege against revealing tax returns and W-2 forms or their contents. *Webb v Standard Oil* Co. (1957) 49 C2d 509, 319 P2d 621; *Brown v Superior Court* (1977) 71 CA3d 141, 139 CR 327. Thus a defendant cannot compel disclosure or obtain tax returns through pretrial discovery or subpoena. Nor can a defendant show or comment on the plaintiff's failure to produce tax returns (Evid C §913) unless the plaintiff is held to have waived the rule against comment.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.62 4. Injured Person

§1.62 4. Injured Person

An injured person can testify about his or her own loss of earnings up to the date of trial and in support of a claim for a future earning capacity loss. The person may also lay the foundation for introduction of income tax returns, pay stubs, an employment contract or benefit package, and other documentary evidence.

A defense attorney can object to the injured person's testimony that is speculative or conjectural, or that embodies opinions about labor market conditions or other matters on which he or she is not an expert, such as present cash value of benefits lost. See Evid C §§702, 800; California Trial Objections, chap 20 (Cal CEB Annual).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.63 5. Employer; Coworker

§1.63 5. Employer; Coworker

The plaintiff's employer or an officer, supervisor, or personnel department employee can often give testimony on the injured person's rate of pay, time, and benefits lost due to the injury and the amount the person could have earned if uninjured. The witness may also lay the foundation to introduce wage and salary records, a benefits package, W-2 forms, and other documentary evidence maintained at the injured person's place of employment.

An employer may testify as an expert about such matters as anticipated promotions and raises, available alternative positions, diminished ability or capacity as a result of the injury, and likely future earnings given the disability. See *Neumann v Bishop* (1976) 59 CA3d 451, 130 CR 786.

Coworkers' testimony about their own advancement, overtime hours, and the like may demonstrate that the plaintiff's expectations about advancement and earnings were reasonable and attainable but for the injury.

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§1.64 6. Economists and Other Experts

Certain economists, labor analysts, rehabilitation counselors, and other persons can be qualified by training and experience as experts on employment and earning capacity and can give expert testimony on the degree to which a person's earning capacity was impaired by an injury. See Anno, 79 ALR2d 275 (1961) (testimony of actuary or mathematician on present value). These opinions may be based on tests taken and skills demonstrated by the injured individual both before and after the injury and on an assessment of the present and future labor market potentials for persons whose abilities correspond to those of the injured person.

A qualified actuary's or economist's opinion on future economic conditions can be shown to be not improperly speculative, and actuarial charts may be used to compute lost future earnings. *Neumann v Bishop* (1976) 59 CA3d 451, 463, 130 CR 786 (58-year-old woman shown to be medically unemployable; testimony of future wage loss included both future increase and discount to present value). See *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 656, 151 CR 399 (economist projected apprentice's future earnings on basis of present union pay scales, assuming normal advancement and hours of work); *Niles v City of San Rafael* (1974) 42 CA3d 230, 242, 116 CR 733 (projecting discounted present value of paralyzed 11-year-old boy's lost earnings from age 18 to 65, based on U.S. Department of Labor study of national average lifetime income). See Anno, 18 ALR3d 88 (1968) (instructions to jury on sufficiency of evidence to prove impairment of earning capacity).

NOTE: Jurors are not required to make an all-or-nothing award based on a plaintiff's expert's testimony on economic damages but may evaluate the testimony based on their independent consideration of the evidence, even if the defendant argues the issue but offers no expert. *Abbott v Taz Express* (1998) 67 CA4th 853, 79 CR2d 360.

Some accounting and other firms can provide relatively low-cost, computer-generated estimates of such economic data as future cost of medical treatment and future earning capacity loss. These estimates can be useful in settlement negotiations, although expert economists may have to be hired to furnish trial testimony and exhibits.

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§1.65 7. Medical Testimony and Reports

A doctor's testimony about an injured person's present health and need for future treatment, remedial surgery, or susceptibility to future injury can form part of the basis of an employment professional's opinion of the person's future employability. See *Neumann v Bishop* (1976) 59 CA3d 451, 130 CR 786.

A doctor's testimony may also be necessary to establish the nature of the disability and its anticipated duration to support a claim for future earning capacity loss. See §1.43.

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IV. SERVICES

§1.66 A. Family's Loss

Damages may be recovered by an injured person for the detriment suffered by family members when injury prevents the injured person from contributing some or all of his or her customary services to the family unit. *Overly v Ingalls Shipbuilding, Inc.* (1999) 74 CA4th 164, 171 n5, 87 CR2d 626 (damages may include recovery for loss of household services plaintiff would have performed during "lost years" that result from injury-shortened life expectancy). For example, the injury may cause the family to lose the person's services as a cook, housekeeper, gardener, driver, host, etc. On whether loss of services damages should be sought by the injured person, or alternatively by the person who supplied or paid for substitute services, see §§1.11, 1.17.

NOTE: Damages recoverable for a family's loss of the injured person's services are distinguishable from, and in addition to, damages for the distress suffered by the injured person over his or her inability to provide services and guidance to the family (see §1.74) and from the personal care services that the injured person must, because of the injury, obtain from others (see §1.69).

Damages for loss of the injured person's services appear to be recoverable whether:

- The services are provided without charge by other family members;
- Someone is hired to provide the services; or
- The services go unprovided.

TACTICS: Defense attorneys must be sure that damages claimed for lost services do not duplicate damages claimed by the injured person for either the cost of substitute services or earning capacity loss. Similarly, a spouse's recovery for loss of services should duplicate neither items for which the injured person has received damages nor damages for loss of consortium. See *Kellogg v Asbestos Corp. Ltd.* (1996) 41 CA4th 1397, 1408, 49 CR2d 256 (cost of substitute domestic services); CACI 3920.

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§1.67 1. Nature and Extent of Services

The injured person and family members can testify about the nature of each service the injured person customarily provided to the family and the time devoted to those services before the injury, and the expected future duration of each service, as contrasted with the services performed after the injury and expected in the future. From this, the trier of fact can infer the value of the lost services. See §1.68.

TACTICS: Some plaintiffs enumerate individual services—*e.g.*, cook, driver, gardener—separately, assigning a daily or weekly number of hours worked, and wage rate, to each. Professionals such as home economists can supply information and testimony about the domestic services normally provided in similar circumstances by husbands, wives, and children.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.68 2. Cost or Value

§1.68 2. Cost or Value

The value of services provided by family members (and services forgone) may be shown by testimony from the injured person and family members, based on their general knowledge of rates for comparable services or from inquiries about hiring someone to perform them. See California Personal Injury Proof §§1.16-1.18 (Cal CEB 1970). Employment counselors, domestic help agencies, and similar professionals can testify as experts on the value of particular services.

To the extent that persons have been hired to provide services that the injured person became unable to provide, the fees charged by those persons can be proved as a measure of damages for loss of services. The "costs of obtaining substitute domestic services" is "economic damages" under Proposition 51. CC §1431.2(b)(1).

TACTICS: When loss of services damages are not based on the cost of obtaining substitute services, the plaintiff's counsel may wish to argue that such damages are nevertheless, perhaps by analogy, to be viewed as economic. Under Proposition 51, it is only economic damages that are fully recoverable from a cotortfeasor whose fault percentage is less than 100.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.69 B. Personal Care

§1.69 B. Personal Care

Damages may be recovered for the reasonable cost or value of personal care and other services made necessary by the injury. Such services may include assistance in dressing, eating, bathing, personal hygiene, and in getting about, as when someone is needed to push a wheelchair or to drive the injured person to and from work or medical appointments.

Damages for some of these services may be recovered as a medical expense for nursing care. Damages for the cost or value of personal services seem to be recoverable, whether the services were provided by a hired person or by a family member. See §1.25.

Damages may also be claimed for the cost of child or dependent care needed when the injured person must leave the home to obtain treatment for tort-caused injuries.

TACTICS: To avoid appearing to overreach, many attorneys do not claim damages for the cost of child care when the injured person attends meetings with lawyers, depositions, and other appointments, even when such absences from the home are required to pursue the action.

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V. PAIN AND SUFFERING

§1.70 A. Standards of Proof

Damages recovered for pain and suffering compensate the injured person for all the physical, mental, and emotional suffering and distress that attend on and follow a bodily injury. See CACI 3905A. For most purposes, "pain" includes "suffering" and vice versa; both terms include elements of mental and emotional distress. See §§1.72-1.75. Further, because damages for loss of enjoyment of life may be a component of pain and suffering damages, instructions should be crafted to prevent the jury from awarding damages that are essentially duplicative. See §1.72.

A verdict that awards no pain and suffering damages despite a serious physical injury can be inadequate as a matter of law. See *Dodson v J. Pac., Inc.* (2007) 154 CA4th 931, 64 CR3d 920 (jury found that defendant's negligence caused plaintiff to undergo surgery for removal of herniated spinal disc and insertion of metal plate and awarded medical expense damages but no noneconomic damages).

The trier of fact must place a monetary value on pain and suffering, and an appellate court cannot measure the validity of an award by making comparisons with other cases. *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 655, 151 CR 399 ($4.7 million total award to 22-year-old triplegic not excessive). See *Niles v City of San Rafael* (1974) 42 CA3d 230, 244, 116 CR 733 ($1.6 million for general damages to paralyzed 11-year-old not excessive). A verdict that fails to provide compensation for pain and suffering has been held to be inadequate as a matter of law. *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 893, 103 CR 856. It is not necessary to introduce medical bills or even medical testimony to support an award for pain and suffering. See *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 413, 196 CR 117.

The trier of fact may infer from the nature of the injuries and from evidence of past suffering that the person is reasonably certain to experience pain and suffering in the future. See §1.6 on proof of future damages generally. See Anno, 18 ALR3d 10 (1968) (sufficiency of evidence to prove future pain and suffering).

Pain and suffering can be both a primary form of detriment, *i.e.,* an aspect of bodily injury, and a cause of further detriment, such as pain that requires additional treatment or prevents the person from returning to work. See §§1.72-1.75.

There is a ceiling on the dollar amount that may be awarded for pain and suffering damages in medical negligence cases. See §15.42.

NOTE: Damages may be recovered for pain and suffering resulting from harm other than bodily injury. See *Warren v Merrill* (2006) 143 CA4th 96, 116, 49 CR3d 122 (pain and suffering resulting from being defrauded out of money, evicted, and "losing all his worldly possessions" supported award of noneconomic damages that were, in turn, "actual damages" needed to justify award of punitive damages). See §§6.7, 14.9.

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§1.71 B. Permissible Claimants

Only the injured person may recover damages for pain, suffering, and emotional distress. Damages for these forms of detriment cannot be recovered by the parent or spouse of the injured person.

Similarly, it is the injured minor or incompetent, not the guardian ad litem, who recovers these damages, even though custody and control of the money may be retained by the guardian subject to court supervision. See §1.13.

NOTE: A person who suffers emotional distress from witnessing injury to another is an "injured person" and may sometimes recover damages for that suffering in a separate cause of action. See chap 6.

If the injured person dies before judgment, damages for his or her predeath pain, suffering, and disfigurement cannot be recovered by his or her estate or heirs. See chap 4.

A person may not recover pain and suffering or other forms of noneconomic damages in an action for damages arising out of operation of a motor vehicle if the person was convicted of driving under the influence, was the owner of a vehicle involved in the accident if that vehicle was not insured, or was the operator of the vehicle and cannot establish financial responsibility as required by law. CC §3333.4. See §§15.26-15.32. A person convicted of a felony may not recover damages of any kind for injuries in any way caused by his or her commission of, or flight from, a felony. CC §3333.3. See §15.25. See generally California Tort Guide §4.81 (3d ed Cal CEB 1996).

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C. Terminology

§1.72 1. Pain

"Pain" is usually thought of as "physical" or having its origin in a particular bodily injury or condition. Thus, when a person's foot is struck, nerve impulses are transmitted to the brain, and the person experiences a distressing sensation at the site of the blow (*i.e.,* feels pain in the foot).

"Phantom pain" is a sensation of pain in an organ or part that the person no longer possesses. To the injured person, the sensation is the same; the nerve pathways that ordinarily transmit to the amputated limb or organ still transmit the impulse, which the brain translates as "pain." Thus, a person may feel pain in his or her foot, even though the foot has been amputated; *i.e.,* the person's brain still identifies the site of the pain as "foot."

"Psychogenic" pain is a sensation of pain when there is no bodily injury or physical condition that accounts for it; it is therefore characterized as having its origin in the mind. Thus, a person may feel pain in a joint long after any physical derangement of the joint has been corrected and the joint has returned to its preinjury condition.

The plaintiff's description of the nature, extent, and duration of the pain (*e.g.,* excruciating, throbbing, stabbing, dull ache, constant, disabling, overwhelming) and the doctor's characterization of the patient's pain (*e.g.,* chronic, radiating, intermittent, acute) will greatly assist the trier of fact in assessing damages to be awarded. See §§1.77-1.81 on proof.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.73 2. Suffering

§1.73 2. Suffering

"Suffering" includes both physical pain and many mental components that can be characterized as emotional distress, such as fright, shock, nervousness, anxiety, worry, grief, embarrassment, humiliation, mortification, indignity, apprehension, fear, terror, and ordeal. See *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 892, 103 CR 856. For example, damages may be recovered for anxiety that a present injury may lead to further disease, disability, or death. See *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 413, 196 CR 117 (fear of giving birth to defective child following pain, discomfort, and multiple surgeries). See Anno, 71 ALR2d 338 (1960).

TACTICS: Mild neuroses, phobias, and conversion reactions that follow serious physical injuries can be viewed as aspects or forms of mental suffering, and damages for these forms of detriment are recoverable as part of damages for pain and suffering. When these mental conditions are serious, however, perhaps outweighing attendant physical injuries, damages for their treatment and the disabilities they produce are usually sought separately. See §1.75.

The plaintiff may argue that mental suffering and emotional distress also include the distress resulting from the burden an injured person feels himself or herself to be to the family and from his or her diminished ability to provide comfort, society, and companionship to the family. See §§1.66, 2.6.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.74 3. Emotional Distress

§1.74 3. Emotional Distress

Damages for emotional distress are recoverable in ordinary negligence actions for physical injury as an item of "parasitic" damages. See *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 981, 25 CR2d 550 (court declined to decide whether immune system impairment, cellular damage, or enhanced susceptibility or risk for developing cancer and other maladies, in persons exposed to contaminated well water would be "physical injury" that would support emotional distress damages).

NOTE: Also discussed in *Potter* are medical monitoring (see §1.22), psychogenic injury (see §1.75), impaired enjoyment of life (see §1.86), susceptibility to future injury or harm (see §1.87), and fear of future illness (see §6.6). See also §§6.16, 6.24.

In addition to denoting the emotional distress that is a frequent component of the pain and suffering that accompanies bodily injury (see §1.73), the term "emotional distress" describes mental and psychological suffering caused by offensive conduct or shocking situations that do not involve any physical contact and that may or may not result in physical injury. Special liability and damages problems that arise in these "no-impact" situations that cause emotional distress are discussed in chap 6.

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§1.75 4. Psychogenic Injury

Damages for mental and emotional problems that follow a bodily injury may be recovered even when the problem is a neurotic or psychotic reaction, traumatic neurosis, or mental illness, induced by a traumatic event or injury, that seems disproportionate to the physical injury. See *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 980, 25 CR2d 550 (emotional distress award may have included "psychiatric illness" component; psychiatric illness deemed distinct from fear of cancer; see §6.6 on damages for fear of future illness). Damages for transitory emotional problems may be sought as part of the plaintiff's pain and suffering, although damages for more serious psychogenic injury may be the person's principal injury.

"Neuroses" and "psychoses" range from harmful changes in personality or in a person's ability to get along in the world to mental illnesses requiring institutionalization. Neuroses include "phobias" (*i.e.,* abnormal fears such as the fear of riding in a car after an automobile accident) and "conversion reactions" (*i.e.,* conversion hysteria or functional disorder), in which the person experiences paralysis, immobility, hypersensitivity, numbness, or other psychogenic conditions.

TACTICS: If the plaintiff claims damages for psychogenic injury, a defendant may seek to discover all records pertaining to prior psychological and psychiatric care. See *Brut v Superior Court* (1978) 20 C3d 844, 862, 143 CR 695. On the other hand, a claim of damages for pain, suffering, and emotional distress does not result in an automatic waiver of the privilege for psychiatric and psychological records. The difference is often one of degree. A plaintiff whose overall case might be harmed by the revelation of prior psychotherapy may thus limit claims for psychogenic injury.

See Annos, 52 ALR5th 1 (1997) (mental or psychological injuries), 51 ALR5th 467 (1997) (injuries to nerves or nervous system), 50 ALR5th 1 (1997) (head or brain injuries).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.76 D. Computation; Argument

§1.76 D. Computation; Argument

The plaintiff must establish by competent evidence that he or she experienced pain and suffering as the proximate result of actionable conduct. No particular kind of factual or opinion evidence is necessary, however, and the jury can infer pain and suffering from the nature of the symptoms, the extent of hospitalization and treatment, and the observations of others, even when the injured person cannot testify. See *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 103 CR 856 (newborn infant).

There is no fixed method for determining how much money should be awarded for pain and suffering and no limitation on the method of computation suggested to, or used by, the trier of fact. See CACI 3900. Whatever method of calculation is proposed by counsel or used by the jury, the verdict must meet the test of reasonableness. CC §3359; *Beagle v Vasold* (1966) 65 C2d 166, 179, 53 CR 129.

If the jury's award is unreasonable, the trial court must reduce it, and the appellate court can review the result. *Neumann v Bishop* (1976) 59 CA3d 451, 490, 130 CR 786 ($362,000 verdict for unhealed fracture of femur reduced to $280,000 because of evidence that corrective surgery was likely to be effective). See *Dizon v Pope* (1974) 44 CA3d 146, 118 CR 465 (that plaintiff's soft tissue injury was not permanent was insufficient grounds for remittitur from $50,000 to $35,000).

TACTICS: Counsel may argue for recovery of pain and suffering damages on a per diem basis, whereby a sum is sought for each day (or other time period) the pain was or will be experienced; the suggested sums varying according to the nature and intensity of the suffering during successive time periods. *Beagle v Vasold, supra*. See Anno, 3 ALR4th 940 (1981) (per diem or similar statistical basis for fixing damages for pain and suffering). See generally Broillet, *Conveying Pain and Suffering Through Words and Images*, 34 CAOC Forum 4, p 21 (May 2004). However, the so-called golden rule argument is not permitted. An attorney should not suggest that jurors measure damages for pain and suffering by asking themselves what sum they would take to endure what the plaintiff has and will endure. See *Neumann v Bishop* (1976) 59 CA3d 451, 484, 130 CR 786 (counsel's conduct disapproved, but not grounds for reversal).

A defendant may seek to demonstrate that the plaintiff's pain and suffering was exaggerated—that the claimed pain and suffering was disproportionate to the physical injury. This defense may backfire, however, if the plaintiff can establish a peculiar susceptibility to injury, pain, or emotional trauma, even if the particular susceptibility is the result of a prior injury. See *Ng v Hudson* (1977) 75 CA3d 250, 259, 142 CR 69, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607; CACI 3927.

The defendant may also establish that the plaintiff failed to seek available relief or treatment that could have alleviated the claimed suffering, unless the plaintiff can show that such treatment carried with it unacceptable risks. See §§15.22-15.23.

The defendant may also seek to show that the plaintiff engaged in levels of activity inconsistent with the claim of pain and suffering. Evidence may be generated by observation of the plaintiff and through a defense medical examination. In serious cases, it may be worthwhile to have an investigator observe, and perhaps record on film or videotape, the plaintiff in his or her daily activities.

NOTE: It can be reversible error for the plaintiff's attorney to state for the first time during the rebuttal closing argument a suggested amount greater than that stated in a previously served statement of damages. See *Cortez v Macias* (1980) 110 CA3d 640, 657, 167 CR 905. For discussion of the pleading of personal injury damages in superior court cases and of statements of damages, see California Civil Procedure Before Trial §15.8 (4th ed Cal CEB 2004).

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E. Witnesses and Exhibits

§1.77 1. Injured Person

The injured person is in the best position to testify about his or her pain, specifying:

- The time of onset, location, duration, persistence, severity, and character of each area of pain;
- Events or activities that bring the pain on, aggravate it, or induce particular suffering;
- Treatment sought and received; and
- Effects (*e.g.,* nausea) of the pain (or the treatment).

The testimony can detail each area of the body at all stages, from the moment of injury through treatment to the time testimony is given.

TACTICS: Although no one can truly communicate to another what his or her pain is like, the injured person can try to describe the nature and severity of the pain in terms that will remind jurors of pain they have suffered or imagined. Greatest impact can be achieved by specific, descriptive language and anecdotal examples of events that produce pain. For example, a pain can be described as sharp, dull, deep, throbbing, shooting, tingling, like a toothache, cramping, or "like a 10-ton weight dropped on my head." The intensity of the pain may be illustrated by the plaintiff's response, *e.g.,* "it was so sharp and sudden it doubled me over" or "it made me dizzy so that I had to lie down." The plaintiff can also describe whether the pain was constant, intermittent, or associated with factors like movement, fatigue, sitting, or damp weather.

The plaintiff's testimony must be carefully developed. Jurors can be alienated by or disbelieve a plaintiff who whines, complains unduly, or is perceived to overstate the problem.

TACTICS: The plaintiff's counsel should ensure that evidence supports his or her complaints: Did the plaintiff see a doctor? In the hospital did he or she call the nurses for help? What drugs or therapy did he or she receive? Did they help?

Claims of emotional injury or trauma, like claims of suffering, require concrete buttressing testimony to persuade the trier of fact. Any claim of emotional injury, pain, or suffering is more persuasive and evocative if illustrated by examples of specific events.

TACTICS: A man who claims a back injury, for example, may make his suffering more real to jurors by describing the distress experienced from being unable to play with his children. A woman whose injury or pain prevents or deters her from bearing children may enhance her damages recovery by describing her reactions when her family or friends question her about her plans to have children.

The plaintiff may also introduce a diary or calendar kept contemporaneously, which can provide examples of the nature of his or her suffering. Care should be taken, however, to avoid giving the impression that the plaintiff's life was centered around detailing every ache or pain for the purpose of proving it at trial.

Defendants may respond to long and detailed testimony of pain by arguing that the plaintiff increased his or her own suffering by focusing on it and suggesting that the plaintiff is a chronic complainer who overstates his or her ailments.

Special problems arise when the injured plaintiff is an infant or young child who either cannot articulate his or her suffering or does not remember the events surrounding the injury. Family members and other observers can testify to the child's suffering. See §1.79. In addition, after the fact of injury is established, the jury may infer pain and suffering and award damages accordingly. See *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 103 CR 856; *Curlender v Bio-Science Labs.* (1980) 106 CA3d 811, 831, 165 CR 477.

See Anno, 82 ALR4th 980 (1990) (permissibility of in-court demonstration to show effect of injury).

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§1.78 2. Doctors; Medical Personnel

Doctors, nurses, physical and occupational therapists, and other medical personnel who have observed the injured person can testify that he or she appeared to be in pain. A doctor or other person who can qualify as an expert witness can also state an opinion about the nature and severity of the pain the injured person has experienced and is reasonably certain to experience in the future.

See Annos, 20 ALR5th 1 (1994) (need for expert testimony on permanence of injury and future pain and suffering), 77 ALR4th 463 (1990) (adverse inference based on party's failure to produce or question examining doctor). See also discussion in §1.36 on testimony by treating medical personnel.

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§1.79 3. Family Members; Coworkers; Friends

Members of the injured person's family, as well as coworkers, friends, and neighbors, can testify about their observations of the person's apparent manifestation of pain, suffering, and distress. See *Dodrill v Shalala* (9th Cir 1993) 12 F3d 915 (disability insurance claim; testimony of family members and friends, based on their independent observations of claimant's pain and other symptoms, not to be rejected solely because they must rely to some extent on what claimant told them).

See Anno, 90 ALR2d 1071 (1963) (admissibility of lay testimony about another's expressions of pain). See also California Personal Injury Proof §§1.16-1.18, 7.4 (Cal CEB 1970).

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§1.80 4. Medical Records

Entries in hospital and doctor's records may show the pain and distress experienced by the plaintiff. For example, the patient's medical history may record his or her statements when seeking treatment, and a doctor's progress notes or office records may contain observations of the patient's conduct during examinations and the course of hospitalization.

Nurses' notes may be a rich source of information about the plaintiff's suffering, or lack thereof. Frequent requests for pain medication, poor appetite, tears, and anxiety recorded by a nurse may buttress the plaintiff's testimony about the nature of the pain and distress. Conversely, unlimited ambulation, hearty and untroubled eating, and good sleep patterns may demonstrate an absence of suffering.

Records showing that pain relievers were prescribed, and that the patient took the medication, are also evidence that the person experienced pain.

For the procedure for introducing hospital and medical records in evidence, with forms, and a discussion of their use at trial, see California Personal Injury Proof §§13.1, 13.13-13.19, 13.41-13.47 (Cal CEB 1970).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.81 5. Photographs

§1.81 5. Photographs

Photographs showing the plaintiff's bodily injuries (and facial expressions) made soon after the accident and during the period of recovery may bolster claims of pain and suffering. Trials may take place years after the initial trauma, when scars have healed and faded and the injured person has learned to tolerate suffering and the ill effects of the injury. See §1.84 on disfigurement.

On the introduction and use of photographs, see California Personal Injury Proof, chap 15 (Cal CEB 1970).

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VI. OTHER ELEMENTS OF RECOVERY

§1.82 A. Alternative Forms of Detriment

Civil Code §3333 provides that damages may be recovered for all *detriment* proximately caused by the defendant's breach of a noncontractual duty, whether it could have been anticipated or not. Plaintiffs' lawyers have argued that this language justifies the recovery of damages for types of detriment not included in the traditional categories discussed previously in this chapter (in §§1.20-1.81).

TACTICS: Plaintiff's counsel may propose jury instructions that add these additional elements of damages to the general instruction in CACI 3900. At least, counsel may argue that the forms of detriment discussed in the following sections are part of the pain, suffering, and emotional distress. See CACI 3905A.

Defense counsel should be alert to ensure that damages claimed for these additional forms of detriment do not duplicate those claimed under the usual instructions.

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§1.83 1. Fact of Injury

Plaintiffs' counsel have argued that the invasion or interference with a person's bodily integrity is itself a form of detriment, independent of the specific costs and losses incurred, and that a sum should be awarded to the injured person for the very fact that he or she sustained a bodily injury. This argument could be particularly appropriate when medical expense is small in relation to the seriousness of the condition (as when there is no treatment available, such as for loss of a finger or limb), when evidence of lost earning capacity is weak or confusing, or when the injured person's pain is well tolerated and without lasting consequences. Damages for the fact of injury should be greater when the injury is accompanied or followed by disfigurement or disability.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.84 2. Disfigurement

§1.84 2. Disfigurement

Damages for disfiguring scars, lumps, and loss of body tissue or parts are usually awarded as damages for embarrassment, humiliation, and emotional distress, for impairment of employment opportunities, or for loss of the ability to enjoy life. Disfigurement, however, whether temporary or permanent, can be viewed as a form of detriment even when it does not cause the injured person humiliation or interfere with his or her activities.

TACTICS: Proof of the plaintiff's embarrassment over disfigurement is often best accomplished with specific examples, for instance, efforts to conceal a scar (makeup, long sleeves, avoidance of bikini or lingerie) or specific instances of particular humiliation (*e.g.*, insensitive questioning about the disfigurement).

Photographs of the injured person that show the disfigurement are useful as evidence particularly when the appearance has changed over time with healing, when the plaintiff is particularly sensitive about displaying the disfigurement, or when it is in a normally concealed part of the anatomy, such as scarring on the breasts from implant failure. Scars and discolorations sometimes appear less visible in amateur photographs than they do to the eye. Professional photographers can use filtering and other techniques to reproduce what the eye sees. On the introduction and use of photographs, see California Personal Injury Proof, chap 15 (Cal CEB 1970).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.85 3. Disability

§1.85 3. Disability

Damages for disability (impairment of function), temporary or permanent, are frequently recovered as damages for emotional distress or for impairment of earning capacity or of the ability to enjoy life. However, the very fact that an injury has diminished a person's ability to function or engage in an activity, even if limited to hobbies, may itself be a detriment for which damages can be sought.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.86 4. Impaired Enjoyment of Life

§1.86 4. Impaired Enjoyment of Life

A person temporarily or permanently disabled by bodily injury and the emotional consequences of injury may seek damages for loss of the capacity to live and enjoy a normal life. *Huff v Tracy* (1976) 57 CA3d 939, 943, 129 CR 551. This form of detriment has several aspects:

- Inconvenience in carrying out normal activities, such as eating, dressing, shopping, or getting about;
- Decrease in sexual ability or interest;
- Decrease in ability to give comfort, society, or companionship to a spouse or child (see §1.73);
- Interference with the ability to engage in customary sports and recreational activities;
- Interference with avocations or hobbies from which the person had previously derived pleasure; and
- Loss of sense of taste or smell.

See Anno, 34 ALR4th 293 (1984) (loss of enjoyment of life as distinct damages factor).

TACTICS: Defense counsel may take steps to ensure that damages for loss of enjoyment are not given for the same detriment as damages for impairment of earning capacity (§1.44), emotional distress (§1.74), or the fact of injury (§1.83).

Damages for loss of enjoyment of life (sometimes called "hedonic" damages) are properly viewed as a component of pain and suffering damages. See *Loth v Truck-A-Way Corp.* (1998) 60 CA4th 757, 766, 70 CR2d 571 (improper to instruct separately on "loss of enjoyment of life" and "pain and suffering" if doing so would invite double compensation; further, enjoyment of life is not subject so beyond common experience that expert testimony is permitted under Evid C §801). Thus, a plaintiff's attorney may argue loss of capacity to enjoy life as an element of general damages, but any jury instruction must be carefully tailored to prevent duplication of damages; a jury may not be instructed to award damages for impaired enjoyment of life in addition to general damages. See *Akers v Kelley Co.* (1985) 173 CA3d 633, 654, 219 CR 513, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561, 66 CR2d 454; *Huff v Tracy, supra*.

Under the Federal Tort Claims Act (28 USC §§2271-2680), a plaintiff may recover damages from the government for loss of enjoyment of life if such damages are permitted under state law.

NOTE: In *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 980, 25 CR2d 550, the court mentions, but does not rule on the correctness of, an award of damages "for the general disruption to plaintiffs' lives" resulting from the contamination of their drinking water caused by the defendant's tortious conduct. It appears that "disruption" damages were claimed in addition to damages for emotional distress, psychiatric illness (see §1.75), and fear that cancer would develop in the future (see §6.6).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.87 5. Susceptibility to Future Injury or Harm

§1.87 5. Susceptibility to Future Injury or Harm

Even though an injury heals, to the extent that function is restored and symptoms disappear, the injured organ or area may be more susceptible to reinjury, to a new injury, or to the development of disabling conditions such as arthritis. This increased susceptibility to reinjury is a form of detriment for which damages can be recovered, even if the injured person has not yet sustained such a reinjury or disabling condition by the time of trial and might never have one. Damages for increased susceptibility should be based on medical testimony that the injured organ or part is more fragile or vulnerable than it was before the injury.

TACTICS: The plaintiff may argue that it need not be proved that reinjury to the part is reasonably certain. Increased susceptibility to reinjury is a present detriment to the injured person; of course, the more probable future injury is, the greater might be the damages. See §1.6. Note however, that in *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 984 n8, 25 CR2d 550, the court indicated that the plaintiffs did not challenge, in the supreme court, a court of appeal ruling that an increased risk of disease is not a present physical injury and is not compensable absent evidence that it is probable that the disease will occur.

Damages for increased susceptibility are distinct from those that may be awarded for the injured person's anxiety that the injury will result in future pain, injury, disease, or death. See §6.6 on whether a plaintiff who manifests no detectable signs of present injury may nonetheless recover damages for the emotional distress resulting from a fear that a defendant's tortious conduct has left the plaintiff with an increased vulnerability to future disease or injury.

See Annos, 59 ALR5th 535 (1998) (fear of contracting AIDS), 71 ALR2d 338 (1960) (anxiety about future detriment).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.88 6. Aggravation of Preexisting Condition

§1.88 6. Aggravation of Preexisting Condition

Damages may be recovered for all the detriment resulting from the defendant's fault, even though a preexisting condition in the injured person made the consequences of the injury more serious than they would otherwise have been. See *Deevy v Tassi* (1942) 21 C2d 109, 123, 130 P2d 389; *Lewetzow v Sapiro* (1961) 188 CA2d 841, 11 CR 126. Defendants are not liable, however, for losses, expenses, and suffering that the preexisting condition would have caused had the plaintiff not been injured by the defendant's legal fault. See CACI 3927.

TACTICS: Plaintiffs can argue that when a tort-caused injury makes symptomatic a condition that was previously asymptomatic, damages should be recoverable for all the postinjury symptomatology. Defendants could counter with medical evidence showing that some of the postinjury detriment suffered by the plaintiff would have resulted from the underlying condition at some time, even if the tort-caused injury had not occurred.

Refusal to instruct that a plaintiff is entitled to damages for the aggravation of a preexisting condition can be reversible error; a general instruction on proximate cause is insufficient. See *Ng v Hudson* (1977) 75 CA3d 250, 255, 142 CR 69, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607. See also *Fox v City & County of San Francisco* (1975) 47 CA3d 164, 174, 120 CR 779 (plaintiff's preaccident mental deficiency made psychotherapy treatment ineffective in treating new psychosomatic symptoms).

See generally Bahr & Graham, *The Thin Skull Plaintiff Concept*: *Evasive or Persuasive*, 15 Loy LA L Rev 409 (1982); King, *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisiting Conditions and Future Consequences*, 90 Yale LJ 1353 (1981).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.89 7. Exposure to Additional Harm

§1.89 7. Exposure to Additional Harm

Damages may be recovered for additional harm to which the injured person was exposed due to the original injury. *Campbell v Southern Pac. Co.* (1978) 22 C3d 51, 59, 148 CR 596. For example, it is a long-standing rule that a tortfeasor responsible for an injury-causing accident is liable for injury or death occurring during the course of the medical treatment of the original injury. *Ash v Mortensen* (1944) 24 C2d 654, 150 P2d 876; *Maxwell v Powers* (1994) 22 CA4th 1596, 1606, 28 CR2d 62; *Hastie v Handeland* (1969) 274 CA2d 599, 604, 79 CR 268 (liability not limited to negligently caused additional harm). Similarly, an original tortfeasor who is responsible for injuries or death suffered in an accident is also liable for injuries or death suffered during transportation of the victim to a medical facility for treatment of those injuries. See *Anaya v Superior Court* (2000) 78 CA4th 971, 973, 93 CR2d 228 (person injured in car crash killed in crash of helicopter that was transporting her to medical facility; allegations of negligent maintenance or strict liability against suppliers of helicopter did not establish superseding cause that would relieve original tortfeasor from liability for victim's death). See CACI 3929.

Thus, damages may be recovered for:

- Disease contracted by the injured party because of lowered vitality (or immunity) that resulted from the tortious injury, rendering the injured person peculiarly susceptible to new disease;
- Aggravation of the original injury or additional injury caused by negligent medical care of the original injury; and
- Injury sustained in a subsequent incident that is a normal consequence of an impaired physical condition caused by the original injury, and that would not have occurred if the plaintiff's physical condition had not been impaired.

On the right of the original tortfeasor to claim a Proposition 51 limitation on noneconomic damages liability for a subsequent tortfeasor's fault, see California Tort Guide §9.78 (3d ed Cal CEB 1996); see also discussion in §15.8.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.90 8. Shortened Life Expectancy

§1.90 8. Shortened Life Expectancy

Medical testimony that an injury has shortened the injured person's life expectancy can provide a basis for opposing argument.

The plaintiff may argue that proof of a diminution in the plaintiff's life expectancy shows a cognizable injury for which damages may be recovered. See, with respect to medical malpractice liability, California Tort Guide §9.24 (3d ed Cal CEB 1996). The plaintiff can further argue that, to the extent that an injury has shortened the injured person's life expectancy, it has impaired the plaintiff's earning capacity, and the family has therefore sustained a greater loss of his or her services, and that such a loss is a present detriment to the injured person and impairs his or her enjoyment of life. See §§1.43 and 1.66 on damages for "lost years." See §§3.48, 3.49 on proof of life expectancy in wrongful death cases.

TACTICS: Particularly for youthful plaintiffs, it could be argued that damages are recoverable by a plaintiff denied the opportunity to marry, raise a family, go to college, or live the life he or she could otherwise have expected.

Defense counsel, on the other hand, can invoke medical evidence of a decrease in the plaintiff's life expectancy to limit damages for future medical care and for the duration of future suffering. See CACI 3932.

See Anno, 131 ALR 1351 (1941) (shortening of life expectancy as element of damages). See also Anno, 86 ALR4th 1135 (1991) (admissibility, on issue of life expectancy, of evidence of injured person's use of intoxicants or illegal drugs).

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§1.91 9. Lost Chance for Survival or Recovery

Plaintiffs have claimed damages for the "injury" of a lost chance for survival or recovery on the basis, for example, that a doctor's negligent failure to timely detect a latent condition such as cancer diminished (*e.g.,* from 40 percent to 10 percent) the plaintiff's chances of surviving the illness or of recovering as well as would otherwise have been possible. See California Tort Guide §9.24 (3d ed Cal CEB 1996). It appears that such a claim may be maintained, if at all, only if medical evidence shows that the plaintiff had a greater than 50 percent chance of surviving the underlying condition at the time of the alleged negligence. See *Dumas v Cooney* (1991) 235 CA3d 1593, 1 CR2d 584 (delay in informing plaintiff of cancer). See also *Bromme v Pavitt* (1992) 5 CA4th 1487, 7 CR2d 608 (partial nonsuit in wrongful death action for physician's alleged negligent failure to detect cancer); *Duarte v Zachariah* (1994) 22 CA4th 1652, 28 CR2d 88.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.92 B. Punitive Damages

§1.92 B. Punitive Damages

Punitive (exemplary) damages may be recovered by an injured person in addition to actual damages when, in the conduct that causes the injury, the defendant was guilty of oppression, fraud, or malice. CC §3294.

The measure and proof of punitive damages is covered in chap 14.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.93 C. Treble Damages

§1.93 C. Treble Damages

A person who is injured as the result of the provision of goods or services by a defendant who failed to obtain a required professional or business license may be entitled to treble damages for the injury, plus a discretionary award of costs and attorney fees, under CCP §1029.8(a). Damages in excess of actual damages awarded under §1029.8(a), however, may not exceed $10,000. CCP §1029.8(c).

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Source: Torts/California Tort Damages/1 Bodily Injury/ D. Interest/§1.94 1. After CCP §998 Settlement Offer

D. Interest

§1.94 1. After CCP §998 Settlement Offer

Civil Code §3291 provides that a plaintiff seeking "damages for personal injury" may pray for and recover interest at the rate of 10 percent per year on the amount of the judgment, computed from the date that the plaintiff first made a CCP §998 settlement offer that (a) was not accepted by the defendant within 30 days (or before trial, if sooner) and (b) was more favorable than the amount of the judgment. See *Cadlo v Metalclad Insulation Corp.* (2009) 172 CA4th 1040, 91 CR3d 653 (two asbestos suppliers that had rejected settlement offers jointly liable for one prejudgment interest amount; for earlier decision in this case, involving survival of pain and suffering damages, see §4.14).

Section 3291 prejudgment interest may be recovered even when the injury results in death and is recoverable on wrongful death damages. *McKinney v California Portland Cement Co.* (2002) 96 CA4th 1214, 1229, 117 CR2d 849. See *Berg v Darden* (2004) 120 CA4th 721, 15 CR3d 829 (rejecting defendant's contention that offer lacked specificity and clarity); *Deocampo v Ahn* (2002) 101 CA4th 758, 125 CR2d 79 (rejecting defendant's various arguments to avoid paying prejudgment interest from date of offer to date of judgment). It is not imposed, however, on public entities or public employees. On procedures and forms for making and responding to CCP §998 offers, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004).

Thus, an automobile collision victim who seeks damages for the emotional distress flowing from both (1) the physical injury received in the accident (under a negligence theory) and (2) the defendants' intentional misconduct in responding to her claim (under an intentional infliction theory) is entitled to prejudgment interest from the date of a CCP §998 offer that was more favorable to the defendants than the ultimate judgment. *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 657, 25 CR2d 109. For interest calculation purposes, the plaintiff has the burden of proving the dollar amount of the judgment that was for personal injury (including emotional distress) as opposed to amounts that were for property damage and for punitive damages. 6 C4th at 658.

NOTE: In determining whether the judgment was more favorable than the CCP §998 offer, the total of the lump-sum offer is compared to the total judgment, including amounts awarded for property damage and punitive damages. *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 662 n13, 25 CR2d 109. But otherwise recoverable interest on the judgment is not added to the judgment in determining whether the judgment is less favorable than the plaintiff's settlement offer. *Wilson v Wal-Mart Stores, Inc.* (1999) 72 CA4th 382, 85 CR2d 4.

A plaintiff who obtains a more favorable judgment than either of two rejected CCP §998 offers is entitled to interest from the date of the offer that was made first. *Ray v Goodman* (2006) 142 CA4th 83, 47 CR3d 659 (result not affected by death of injured person and substitution of survivors between first and second offers).

Prejudgment interest under CC §3291 is not recoverable by an insured whose CCP §998 offer was exceeded by an uninsured/underinsured motorist arbitration award under Ins C §11580.2; the arbitration proceeding is the equivalent of a suit for breach of contract, even though the recovery is measured by the insured's personal injury damages. *Pillimai v Farmers Ins. Exch. Co.* (2006) 39 C4th 133, 147, 45 CR3d 760 (see §1.106A on the recovery of enhanced costs following a CCP §998 offer). Further, the "damages for personal injury" on which prejudgment interest under CC §3291 may be based, does not include damages recovered for breach of an insurance contract or breach of the implied covenant of good faith and fair dealing. *Gourley v State Farm Mut. Auto. Ins. Co.* (1991) 53 C3d 121, 129, 3 CR2d 666 (bad faith suit is primarily an action to recover economic loss caused by tortious interference with a property right; any damages recovered for emotional distress (a personal injury) in such an action are incidental).

Courts have concluded that a CCP §998 offer that was not made in good faith—*i.e.,* was not realistically reasonable under the circumstances of the case, or was made with no expectation that it would be accepted—cannot be the basis for the section's benefits. See *Arno v Helinet Corp.* (2005) 130 CA4th 1019, 1024, 30 CR3d 669 (affirming award of more than $3.5 million in prejudgment interest following $13 million verdict; plaintiff's $1 million offer to settle with each of two defendants, both insured by same insurer, held not to have been unreasonable).

Prejudgment interest is not recoverable in a damages lawsuit pursued under the Federal Employers' Liability Act

(FELA) (45 USC §§51-60). *Lund v San Joaquin Valley R.R.* (2003) 31 C4th 1, 13, 1 CR3d 412.

A defense judgment that is reversed on appeal does not extinguish a previously made CCP §998 offer, and prejudgment interest is recoverable after a second trial, in which the judgment is more favorable to the plaintiff than the offer. *Saakyan v Modern Auto, Inc.* (2002) 103 CA4th 383, 126 CR2d 674.

Under CCP §3291, the judgment (if more favorable that the plaintiff's CCP §998 offer) bears interest "at the legal rate of 10 percent per annum" from the date of the offer until the judgment is satisfied, although the trial judge must calculate the amount of that judgment without including interest for the period from the date of the offer to the date judgment is rendered. *Hess v Ford Motor Co.* (2002) 27 C4th 516, 530, 117 CR2d 220 (defendant not required to pay "interest on interest").

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§1.95 a. Judgment More Favorable Than Offer

When calculating whether interest is available under CC §3291, statutory costs that are included in a plaintiff's judgment are added to damages in determining whether the plaintiff's judgment is more favorable than the CCP §998 offer. *Stallman v Bell* (1991) 235 CA3d 740, 748, 286 CR 755. But see *Wagy v Brown* (1994) 24 CA4th 1, 5, 29 CR2d 48 (interest not available because amount of offer to settle equaled amount of judgment following judicial arbitration award, with "each side to bear its own costs"). The costs so added apparently are not to include postoffer costs (see CCP §998(c)(2)(A)), although awarded attorney fees may be added (see CCP §998(c)(2)(B)).

Voluntary payments made by a defendant after a plaintiff's CCP §998 offer has expired are considered part of the plaintiff's judgment. *Arias v Katella Townhouse Homeowners Ass'n* (2005) 127 CA4th 847, 26 CR3d 113 (toxic mold from failure to maintain and repair real property).

The determination whether a plaintiff recovered more, or less, than the amount offered by a defendant under CCP §998 takes into account settlements entered while the offer was outstanding, but not settlements not yet reached. *Guerrero v Rodan Termite Control, Inc.* (2008) 163 CA4th 1435, 78 CR3d 344 (noting that determinations made under CCP §998 may differ from those made under CCP §1032).

Punitive damages are included in a judgment for purposes of determining whether the judgment is more favorable than a §998 offer. But prejudgment interest under CC §3291 does not accrue on the punitive damages portion of a judgment. *Steinfeld v Foote-Goldman Proctologic Med. Group, Inc.* (1997) 60 CA4th 13, 70 CR2d 41. See *Barella v Exchange Bank* (2000) 84 CA4th 793, 101 CR2d 167 (confidentiality condition, which could not be assigned monetary value, invalidated compromise offer in defamation action).

A plaintiff's right to recover prejudgment interest from the date of a CCP §998 offer (as well as expert witness costs incurred after that date) is preserved when the denial of a Proposition 51 apportionment of damages, based on a finding that the plaintiff's injury was partially the result of the defendant's intentional misrepresentation, keeps the plaintiff's recovery more favorable than the offer. See *Thomas v Duggins Constr. Co*. (2006) 139 CA4th 1105, 1113, 44 CR3d 66 (also discussed in §§1.106A, 15.18A).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.95A (1) Offers by Multiple Plaintiffs

§1.95A (1) Offers by Multiple Plaintiffs

Prejudgment interest is available from the date of two plaintiffs' combined CCP §998 offer if the judgment for one plaintiff exceeds the amount of the combined offer. See *Fortman v Hemco, Inc.* (1989) 211 CA3d 241, 259 CR 311. See also *Johnson v Pratt & Whitney Canada, Inc.* (1994) 28 CA4th 613, 628, 34 CR2d 26 (defendant in wrongful death and survival action that suffered adverse verdict of $2.1 million in favor of all heirs after having rejected offer by all plaintiffs to settle for $1 million was liable for prejudgment interest from date of offer).

NOTE: The *Johnson* court followed *Stallman v Bell* (1991) 235 CA3d 740, 286 CR 755, and rejected contrary suggestions in *Gilman v Beverly Cal. Corp.* (1991) 231 CA3d 121, 283 CR 17).

Further, a statutory limitation on the amount recoverable by one of two plaintiffs who make a joint offer may support a conclusion that the judgment in favor of the other plaintiff was more favorable than the latter's presumed portion of the offer. See *Deocampo v Ahn* (2002) 101 CA4th 758, 125 CR2d 79. But see *Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 254 CR 840 (§998 offer by three plaintiffs jointly to defendant was ineffective because there was no way to determine with respect to each plaintiff whether award received was greater than offer).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.95B (2) Offers to Multiple Defendants

§1.95B (2) Offers to Multiple Defendants

A §998 offer submitted to more than one defendant must be sufficiently specific to permit an affected defendant to determine the exact amount the plaintiff is seeking from that defendant. See *Burch v Children's Hosp.* (2003) 109 CA4th 537, 544, 135 CR2d 404 (no prejudgment interest or expert witness costs recoverable on basis of unapportioned offer made to vehicle owner, driver, and driver's employer; defendants not necessarily jointly liable for noneconomic damages); *Taing v Johnson Scaffolding Co.* (1992) 9 CA4th 579, 586, 11 CR2d 820 (no prejudgment interest or expert witness costs recoverable on basis of unapportioned offer by injured employee of one subcontractor against construction site owner, general contractor, and another subcontractor). There are instances in which an unapportioned offer submitted to multiple defendants sued under a common liability theory for a single injury, and in which the defendants would be jointly and severally liable, can be valid to trigger prejudgment interest. See *Steinfeld v Foote-Goldman Proctologic Med. Group, Inc.* (1996) 50 CA4th 1542, 58 CR2d 371 (complaint for medical malpractice against physician and medical group alleging single cause of action and containing agency allegation asserting that each defendant was liable for the other's acts; case preceded Proposition 51 (CC §1431.2)); *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 998, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109 (employee's sexual harassment suit against employer and coworkers; see §1.96).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.96 b. Sexual Harassment Damages

§1.96 b. Sexual Harassment Damages

Interest on compensatory damages awarded for sexual harassment in the workplace in violation of the Fair Employment and Housing Act (Govt C §§12900-12996) is recoverable under CC §3291 from the date of the plaintiff's CCP §998 offer. Such damages are for a "personal injury." *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 1004, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 662, 25 CR2d 109 (prejudgment interest is not recoverable on punitive damages; see §14.43).

Attorney fees and litigation costs that a plaintiff is entitled to recover in addition to compensatory damages for sexual harassment are included when ascertaining whether the plaintiff's judgment exceeded a defendant's CCP §998 settlement offer. *Wilson v Safeway Stores, Inc.* (1997) 52 CA4th 267, 60 CR2d 532.

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§1.97 2. On Damages Certain; Jury Discretion

The plaintiff is entitled to interest under CC §3287(a) on damages that are certain, or capable of being made certain by calculation, calculated from the date they are reasonably ascertainable. See *Currie v WCAB* (2001) 24 C4th 1109, 1115, 104 CR2d 392 (CC §3287 authorized prejudgment interest on Workers' Compensation Appeals Board's award of lost back pay to employee discriminated against by his employer even absent prejudgment interest provision in statute sued under, Lab C §132a). Section 3287 applies if the parties do not dispute the basis for computing damages, and dispute liability only. *Esgro Cent., Inc. v General Ins. Co. of Am.* (1971) 20 CA3d 1054, 1060, 98 CR 153.

NOTE: The court in *Currie* reasoned that its decision did not violate the rule that an administrative agency cannot create a remedy that the legislature has withheld. See 24 C4th at 1117. On that rule, see *American Fed'n of Labor v Unemployment Ins. Appeals Bd.* (1996) 13 C4th 1017, 56 CR2d 109 (administrative law judges in unemployment insurance proceedings have no authority to award interest on retroactive benefits). But see *San Diego County Deputy Sheriffs Ass'n v San Diego County Civil Service Comm'n* (1998) 68 CA4th 1084, 1095, 80 CR2d 712 (*American Fed'n* held not to bar commission from awarding interest on wrongfully withheld salary).

Civil Code §3288 authorizes juries, at their discretion, to award interest in actions for breach of noncontractual obligations and "in every case of oppression, fraud, or malice." Prejudgment interest may not be assessed against a tortfeasor under CC §3288 on a claim for general damages for physical, mental, or emotional suffering. *Greater Westchester Homeowners Ass'n v City of Los Angeles* (1979) 26 C3d 86, 102, 160 CR 733 (personal injuries and emotional distress caused by airport noise).

NOTE: Prejudgment interest awarded under CC §3288 is "interest awarded as damages," and may be calculated as the statutory percentage times the amount of the loss (specified by the judgment in the lawsuit), from the date of the judgment, except that the amount of the loss will be deemed to be reduced by the amount of each prejudgment settlement as of the date of each such settlement. See *Newby v Vroman* (1992) 11 CA4th 283, 14 CR2d 44 (damage to property).

A plaintiff could thus ask a jury under CC §§3287 and 3288 to award prejudgment interest on damages that are certain or capable of being made certain on a particular day, such as medical expense (from date of payment), lost wages, and the cost of substitute services. See Comment, *The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases*, 6 U San Francisco L Rev 325 (1982). Interest cannot be awarded under CC §3288 for future economic losses. *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 528, 196 CR 82.

NOTE: Prejudgment interest awards are not authorized in Federal Employers' Liability Act (45 USC §§51-60) actions. See *Monessen Southwestern Ry. v Morgan* (1988) 486 US 330, 100 L Ed 2d 349, 108 S Ct 1837. But see second note in §1.94 on FELA case recovery of prejudgment interest under CCP §998. Interest may, however, be recoverable in actions for a wrongful discharge from employment under 42 USC §2000e-16 (the federal Civil Rights Act of 1991; Pub L 102-166, 105 Stat 1071) See *Reynolds v Martin* (9th Cir 1993) 985 F2d 470.

See Anno, 40 ALR4th 147 (1985) (validity and construction of state statute allowing or changing rate of prejudgment interest in tort actions).

See §3.19 on prejudgment interest in wrongful death actions.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.98 3. Postjudgment

§1.98 3. Postjudgment

A judgment debtor must pay interest on the amount of the judgment until it is paid. See Cal Const art XV, §1. This provision has been applied to judgments for personal injury damages and to judgments against the state and other public entities. See *Munoz v City of Union City* (2009) 173 CA4th 199, 92 CR3d 527 (interest payable from date of original judgment, not from later corrected judgment); *Straughter v State* (1980) 108 CA3d 412, 169 CR 471; *Harland v State* (1979) 99 CA3d 839, 160 CR 613. Interest is not payable on damages that, under the periodic payment provisions for medical malpractice damages in CCP §667.7, are not payable until future dates. See *Schiernbeck v Haight* (1992) 7 CA4th 869, 9 CR2d 716 (noted in §15.52).

Interest on any judgment, for any period of time, cannot exceed 10 percent per year (Cal Const art XV, §1), and 10 percent is the rate of interest on most judgments currently set by CCP §685.010. Under Govt C §970.1, the rate of interest on a judgment against a public entity is 7 percent, a rate that also applies to a judgment against a defendant that the entity is required to indemnify. See *Scott v County of Los Angeles* (1994) 27 CA4th 125, 155, 32 CR2d 643. Postjudgment interest is payable from the date judgment was entered on a verdict even if, after an appeal, a later judgment was entered on remittitur. *Ehret v Congoleum Corp.* (2001) 87 CA4th 202, 104 CR2d 370 (wrongful death damages).

Interest recoverable under CCP §685.010 for the period of time from entry of judgment until the judgment is satisfied is not added to interest recoverable under CC §3291 (see §1.94) for the same time period. *Mendez v Kurten* (1985) 170 CA3d 481, 215 CR 924.

Prejudgment interest awarded under §3291 is not an element of damages and therefore does not become part of the judgment for purposes of calculation of CCP §685.010 postjudgment interest. *Steinfeld v Foote-Goldman Proctologic Med. Group, Inc.* (1997) 60 CA4th 13, 70 CR2d 41 (to do so would amount to double interest on postjudgment portion).

NOTE: An award of postjudgment interest under 28 USC §1961 in a federal personal injury lawsuit may be calculated from the date of the original judgment even if, after appeal, that judgment is reduced by a fault percentage assigned, on remand, to the plaintiff. See *Tinsley v Sea-Land Corp.* (9th Cir 1992) 979 F2d 1382 (interest calculated on amount of reduced judgment). In diversity actions, state law determines the rate of prejudgment interest, while postjudgment interest is governed by federal law. See *AT&T v United Computer Sys., Inc.* (9th Cir 1996) 98 F3d 1206.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.99 E. Attorney Fees

§1.99 E. Attorney Fees

Generally, the fees that plaintiffs become obligated to pay to their attorneys are not recoverable from a tortfeasor except under contract (CC §1717) or under a statute that specifically provides for their recovery (CCP §1021). Thus, in the typical bodily injury case, attorney fees ordinarily cannot be recovered. See *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 506, 198 CR 551. See also *Fairchild v Park* (2001) 90 CA4th 919, 109 CR2d 442 (in property damage suit, plaintiffs are entitled to attorney fees under contract provision but not to expert witness fees and other costs). There are circumstances, however, under which attorney fees may be sought, even in bodily injury cases. See §§1.100-1.106. See also Alexander and Hensley, *When the American Rule Doesn't Apply: Attorney's Fees as Damages in California Litigation*, 21 California Litigation 3, p 19 (State Bar Litigation Section 2008).

Further, there are cases involving particular torts in which a plaintiff may recover attorney fees. For example, attorney fees have been recovered in cases involving false imprisonment (*Nelson v Kellogg* (1912) 162 C 621, 123 P 1115), malicious prosecution (*Stevens v Chisholm* (1919) 179 C 557, 178 P 128), fraud (*Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 198 CR 551), legal malpractice based on fraud and negligent representation (*Roberts v Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 CA3d 104, 128 CR 901), and insurance bad faith (*Essex Ins. Co. v Five Star Dye House, Inc.* (2006) 38 C4th 1252, 45 CR3d 362 (*Brandt* fees recoverable by assignee); *Cassim v Allstate Ins. Co.* (2004) 33 C4th 780, 16 CR3d 374 (fees recoverable as damages limited to those attributable to attorney's efforts to obtain improperly rejected insurance payment), and *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211 (fees recoverable as damages do not include attorney fees on appeal)). But see *Baron v Fire Ins. Exch.* (2007) 154 CA4th 1184, 1197, 65 CR3d 502 (*Brandt* fees recoverable by appellate attorney in suit to obtain rejected fire insurance policy benefits). See also CACI 2350.

NOTE: When an attorney advises a client to accept a settlement, one component of which is the payment by the defendant to the attorney of a sum for attorney fees (as an element of the client's recovery that is separate from other damages), there may need to be an examination of the settlement by an impartial tribunal to ensure that the client's interests have been forcefully represented; the attorney will have the burden of establishing that the attorney's own pecuniary interest did not interfere with the duty to promote the client's best interests. See *Ramirez v Sturdevant* (1994) 21 CA4th 904, 26 CR2d 554 (wrongful employment termination case).

Attorney fees awarded under a statutory provision are ordinarily payable directly to the injured person's attorney, not to the injured client. *Flannery v Prentice* (2001) 26 C4th 572, 577, 110 CR2d 809 (fee awarded under Govt C §12965(b) to attorneys for victim of employment discrimination). Even if a statute provides for an attorney fee award, the *priority* for providing access to justice for self-represented litigants may require that such an award be nominal. See *Garcia v Santana* (2009) 174 CA4th 464, 94 CR3d 299 (landlord-tenant dispute).

An attorney who defends himself or herself against a frivolous or meritless lawsuit is not entitled to recover an attorney fee as a sanction under CCP §128.7. *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475 (wording of CCP §128.7 suggests that party and attorney are different persons).

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§1.100 1. Public Interest Issue (Private Attorney General)

A court may award attorney fees to a successful party in an action that has resulted in enforcing an important right affecting the public interest. CCP §1021.5. Such a recovery is most appropriate when the harm to a class of individuals is pervasive and of such a nature that individual litigants have little incentive (usually because of small individual economic losses) to pursue their rights. See *Serrano v Priest* (1977) 20 C3d 25, 43, 141 CR 315 (attorney fees for public interest law firms permitted in California when federal law would not). See also *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 1362, 100 CR2d 491 (attorney fee awarded to union challenging worker's termination after positive drug test).

A plaintiff does not become entitled to an attorney fee under CCP §1021.5 merely by obtaining an appellate reversal of an adverse summary judgment; such a reversal does not "secure" a benefit for the plaintiff, and it cannot be said to have vindicated an important right of the plaintiff or others absent a showing that the lawsuit was a primary catalyst in motivating an actual change of behavior by persons in the defendants' positions. See *Urbaniak v Newton* (1993) 19 CA4th 1837, 24 CR2d 333 (plaintiff alleged that doctor and opposing counsel and insurer in workers' compensation case had wrongfully disclosed plaintiff's positive HIV status); see discussion of earlier appellate decision in the same case in §§9.2, 9.19, 9.21. See also *Flannery v California Highway Patrol* (1998) 61 CA4th 629, 71 CR2d 632 (in suit alleging FEHA violations (see §1.102), FEHA attorney fee provisions prevail over private attorney general theory, particularly absent showing of significant benefit to general public or large class of persons).

NOTE: The recovery of attorney fees by a "catalyst" litigant who motivates change for the public good was upheld in cases that did not involve personal injuries in *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 21 CR3d 331 (suit that induced manufacturer to respond better to customer complaints about vehicle's towing capacity), and *Tipton-Whittingham v City of Los Angeles* (2004) 34 C4th 604, 21 CR3d 371 (suit that induced city to change policy on responding to sexual discrimination complaints).

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§1.101 2. Common Fund Doctrine

When litigation results in establishment of a fund for the benefit of others, as in a class action, attorney fees may be awarded from the fund. See *Serrano v Priest* (1977) 20 C3d 25, 35, 141 CR 315. Thus, the plaintiff who is required by statute (such as the workers' compensation laws) to reimburse, from the plaintiff's damages recovery, a person or entity that had previously furnished medical or other benefits to the plaintiff, may be entitled to "recover" an attorney fee and certain litigation costs. See extended discussion in California Workers' Damages Practice §§2.2, 3.17, 7.22-7.25, 9.25 (2d ed Cal CEB 2001).

NOTE: The injured person's "recovery" of an attorney fee in workers' compensation situations can be accomplished by means of a proportional reduction of the amount of the reimbursement that would otherwise have to be paid to the employer that furnished benefits for the injury. This rule may be applied (a) to damages recoveries by judgment or settlement, (b) when the prior benefits were paid for injury to a person from whom the plaintiff's claim derives, and (c) when the original furnisher of benefits has assigned the reimbursement claim to someone else, including the defendant being sued by the plaintiff.

The common fund doctrine applies to an automobile insurer's claim to be reimbursed from its insured's recovery from a third party (*e.g.*, the other driver whose fault caused the insured's injury) for payments the insurer made to the insured under the policy's "medical pay" provisions. *21st Century Ins. Co. v Superior Court (Quintana)* (2009) 47 C4th 511, 98 CR3d 516 (insurer's recovery reduced to pay part of insured's attorney fees and costs in obtaining the settlement money from which reimbursement paid; see §16.6).

The common fund doctrine, however, does not apply to personal injury medical lienholders because the plaintiff and the lienholders do not have a common interest in settlement proceeds but rather a debtor-creditor relationship. *Lovett v Carrasco* (1998) 63 CA4th 48, 56, 73 CR2d 496 (court may not reduce amount of lien by apportioning attorney fees under common fund doctrine). See also *City & County of San Francisco v Sweet* (1995) 12 C4th 105, 48 CR2d 42 (common fund doctrine not applicable to county's right, under Govt C §23004.1, to recover from third party tortfeasor treatment costs that county was authorized or required to incur; county can recover full amount of benefits paid without any reduction for attorney fees).

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§1.102 3. FEHA Actions

Government Code §12965(b), a part of the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), provides for the recovery of an attorney fee by certain persons who prove that they were discriminated against or harassed because of race, religious creed, color, national origin, ancestry, age, physical or mental disability, medical condition, marital status, sex, or sexual orientation. See *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1170, 74 CR2d 510 (sexual harassment). See also *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 997, 16 CR2d 787 (jury had awarded $1.5 million compensatory and $500,000 punitive damages; award of attorney fee of more than $150,000, based on hourly rate of $450, was "at the high end" but not "off the scale"), disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109.

A plaintiff who accepts a settlement under a defendant's CCP §998 offer is entitled to an attorney fee under Govt Code §12965(b), and to have that fee and statutory costs added to the judgment, when the settlement offer failed to state that such fees and costs were included in the offer. *Engle v Copenbarger & Copenbarger* (2007) 157 CA4th 165, 68 CR3d 461.

The plaintiff who prevails on one of the counts or claims pursued may recover an attorney fee based on all work done for him or her even if the jury rejects recovery on other interrelated theories or claims. See *Greene v Dillingham Constr. N.A., Inc.* (2002) 101 CA4th 418, 124 CR2d 250 (recovery of compensatory damages for racial harassment; retaliation and punitive damages claim rejected).

Because FEHA provides for attorney fees in specified situations, it would be improper, in a suit alleging violations of the Act, to award fees under the private attorney general doctrine. See *Flannery v California Highway Patrol* (1998) 61 CA4th 629, 71 CR2d 632 (noted in §1.100).

A plaintiff who pursues a FEHA lawsuit but fails to obtain a judgment better than the defendant's CCP §998 settlement offer may be liable to pay the defendant a reasonable attorney fee under Govt C §12965(b), but only if the lawsuit is found by a court to have been unreasonable, frivolous, meritless, or vexatious. *Mangano v Verity, Inc.* (2008) 167 CA4th 944, 84 CR3d 526 (CCP §998 attorney fee provisions do not prevail over rule that treats losing FEHA plaintiffs less punitively than losing FEHA defendants); *Cummings v Benco Bldg Servs.* (1992) 11 CA4th 1383, 1387, 15 CR2d 53. The standard is set forth in *Christiansburg Garment Co. v EEOC* (1978) 434 US 412, 416, 54 L Ed 2d 648, 653, 98 S Ct 694 (federal discrimination case).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.103 4. Worker's Action Against Uninsured Employer

§1.103 4. Worker's Action Against Uninsured Employer

Under Lab C §3709, when an employee, injured while working for an employer that had failed to secure the payment of workers' compensation, obtains a judgment against the uninsured employer, the judgment shall include a reasonable attorney fee "fixed by the court." For extended discussion of such suits, see California Workers' Damages Practice §§4.60-4.63 (2d ed Cal CEB 2001).

This fee is not subject to a local court rule that no fee "shall be allowed in excess of the amount agreed by the plaintiff to be paid to plaintiff's attorney." *Cortez v Bootsma* (1994) 27 CA4th 935, 33 CR2d 20.

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§1.104 5. Defendant's Tortious Conduct Was Felonious

In an action for damages caused by a defendant's commission of a felony for which he or she has been convicted, reasonable attorney fees may be awarded to the plaintiff. CCP §1021.4.

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.105 6. Cross-Complaint for Implied Indemnity

§1.105 6. Cross-Complaint for Implied Indemnity

A party who must bring or defend an action because of a third party's tort may be able to recover attorney fees. See *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 30 CR 821; *Isthmian Lines, Inc. v Schirmer Stevedoring Co.* (1967) 255 CA2d 607, 612, 63 CR 458 (only necessary defensive fees and expenses recoverable). A party who pursues a claim on a cross-complaint for implied indemnity (the "indemnitee") may, on motion, recover attorney fees under CCP §1021.6 if the court finds each of the following facts:

- The indemnitor's tort required the indemnitee to bring or defend an action brought by a third party to protect the indemnitee's interests;
- The indemnitor was notified of the demand to bring or defend the action and failed or refused to do so; and
- The indemnitee was without fault, as determined by a jury verdict, summary judgment, nonsuit, or directed verdict exonerating the indemnitee.

See *John Hancock Mut. Life Ins. Co. v Setser* (1996) 42 CA4th 1524, 50 CR2d 413 (attorney fee recovery for party resisting other defendants' CCP §877.6 motion for "good faith settlement" determination). A defendant who has been exonerated from liability in a commonplace, multiparty tort action, however, cannot necessarily recover attorney fees by seeking indemnity from the tortfeasor. See *Watson v Department of Transp.* (1998) 68 CA4th 885, 894, 80 CR2d 594 (to hold that liability for implied indemnity may be founded on one codefendant's absence of fault would go a long way toward abrogating American rule that each party bear his or her own attorney fees). But see *Uniroyal Chem. Co. v American Vanguard Corp.* (1988) 203 CA3d 285, 249 CR 787, in which the court allowed a fault-free defendant, whose cross-complaint for implied indemnity became moot when it obtained a defense verdict in the main lawsuit, to recover for attorney fees under CCP §1021.6 from the defendant found at fault in the action.

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§1.106 7. As Sanction for Discovery Abuse

Under CCP §2033.420, a party can recover the fee paid to an attorney to prove a fact that the opposing party improperly had refused to admit in response to a request for admission. See *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 650, 25 CR2d 109. See also *Barnett v Penske Truck Leasing* (2001) 90 CA4th 494, 108 CR2d 821 (attorney fee recovered for establishing, as basis for summary judgment, previously denied facts). But see *Wagy v Brown* (1994) 24 CA4th 1, 6, 29 CR2d 48 (attorney fee not recoverable for cost of preparing to prove fact after other party's admission of negligence removed that fact from contention; "proves" in code section requires finding by trier of fact).

NOTE: A "pro se lawyer" acting as his or her own attorney cannot recover attorney fees for dealing with an opponent's abuse of discovery provisions, although certain reasonable expenses, including costs of photocopying and computer-assisted legal research, may be recovered. *Kravitz v Superior Court* (2001) 91 CA4th 1015, 111 CR2d 385. An indigent party represented for no fee by a pro bono attorney, however, may recover an attorney fee as a discovery sanction. See *Do v Superior Court (Nguyen)* (2003) 109 CA4th 1210, 1217, 135 CR2d 855.

On discovery sanctions under federal rules, see *Marchand v Mercy Med. Ctr.* (9th Cir 1994) 22 F3d 933 (sanction under Fed R Civ P 37(c) for failure to admit facts).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.106A F. Expert Witness Costs

§1.106A F. Expert Witness Costs

Under CCP §1033.5, the prevailing party in tort litigation may recover as costs certain expert witness fees as well as ordinary witness fees (as defined in CCP §1986.5 and Govt C §68093) incurred in presenting and deposing witnesses. See *Anthony v City of Los Angeles* (2008) 166 CA4th 1011, 83 CR3d 306 (plaintiff who failed to request expert witness fees in memorandum of costs may nevertheless recover them under separate statute allowing such costs). The prevailing party may not recover, however, a treating physician's reasonable and customary hourly or daily fee that must, under CCP §2034.430, be paid for his or her deposition. *Baker-Hoey v Lockheed Martin Corp.* (2003) 111 CA4th 592, 3 CR3d 593 (also, no abuse of discretion in denying recovery of costs of discovery referee).

NOTE: The California Supreme Court has agreed to review a case in which the court of appeal ruled that when pretrial settlement receipts exceed the amount of a plaintiff's verdict, resulting in judgment for the defendant, the latter is the prevailing party for costs purposes. See *Goodman v Lozano* (review granted June 18, 2008, S162655; superseded opinion at 159 CA4th 1313, 72 CR3d 272).

A plaintiff whose uninsured/underinsured motorist arbitration award under Ins C §11580.2 exceeds his or her previously made CCP §998 offer is entitled to expert deposition and exhibit preparation costs enumerated in CCP §1033.5 from his or her own insurer, and such costs are recoverable even though, when added to the awarded damages, the total exceeds the policy limit on the insurer's uninsured/underinsured liability. *Pillimai v Farmers Ins. Exch. Co.* (2006) 39 C4th 133, 151, 45 CR3d 760 (see §1.94 on recovery of enhanced costs following CCP §998 offer).

A plaintiff who revokes a CCP §998 offer before the statutory time limit to accept it has expired is not entitled to recover expert witness costs under CCP §998(d). *Marcey v Romero* (2007) 148 CA4th 1211, 56 CR3d 402.

A plaintiff who rejects a settlement offer made under CCP §998, and who then fails to obtain a more favorable judgment (see §§1.94-1.95) may be required, at the court's discretion, to pay a reasonable sum to cover the defendant's costs of expert witness services actually incurred and reasonably necessary in preparation (or during trial or arbitration) of defendant's case. CCP §998(c)(1); *Hartline v Kaiser Found. Hosps.* (2005) 132 CA4th 458, 33 CR3d 713 (offer to waive costs not unreasonable or made in bad faith). Expert witness fees may be based on a single §998 offer made to a widow who sought loss of consortium, survivorship, and wrongful death damages. *Peterson v John Crane, Inc.* (2007) 154 CA4th 498, 506, 65 CR3d 185 (widow was one party despite claims for differing damages). Such costs are not recoverable, however, if the offer to compromise was not unconditional. *Menees v Andrews* (2004) 122 CA4th 1540, 19 CR3d 664.

A plaintiff's right to recover expert witness costs from the date of a CCP §998 offer (as well as prejudgment interest from the date of the offer) is preserved when the denial of a Proposition 51 apportionment of damages, based on a finding that the plaintiff's injury was partially the result of a defendant's intentional misrepresentation, keeps the plaintiff's recovery more favorable than the offer. See *Thomas v Duggins Constr. Co*. (2006) 139 CA4th 1105, 113, 44 CR3d 66 (also discussed in §§1.95, 15.18A).

Courts have concluded that a CCP §998 offer that was not made in good faith—*i.e.,* was not realistically reasonable under the circumstances of the case, or was made with no expectation that it would be accepted—cannot be the basis for the section's benefits. See *Arno v Helinet Corp.* (2005) 130 CA4th 1019, 1024, 30 CR3d 669 (affirming award of $160,875 for expert witness fees and other costs following $13 million verdict; plaintiff's $1 million offer to settle with each of two defendants, both insured by same insurer, held not to have been unreasonable).

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VII. FACTORS AFFECTING RECOVERY

§1.107 A. Economic Trends

An injured person who establishes that he or she is reasonably certain to suffer detriment in the future should be entitled to introduce evidence and argue that, *e.g.,* the costs of medical care are increasing and will be higher in the future, the value of the dollar is decreasing, and there is an upward trend in salaries and wages. A trier of fact may consider estimates of future changes in the purchasing power of the dollar and inflation in computing damages if those estimates are based on "sound and substantial economic evidence." *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 662, 151 CR 399. See *Niles v City of San Rafael* (1974) 42 CA3d 230, 243, 116 CR 733 (expert testimony on probable rate of increase of medical costs for paralyzed 11-year-old boy supported approximately $1.5 million as future medical and attendant care portion of $4 million dollar verdict). See also *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 454, 120 CR 787.

See Anno, 63 ALR5th 285 (1998) (asking potential jurors about their knowledge of literature about damages awards).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.108 B. Discounting to Present Value

§1.108 B. Discounting to Present Value

The defense is entitled to an instruction, and to argue, that an award of damages for future economic loss must be only for its present cash value. See CACI 3904. See also BAJI 14.70. That is, the amount of money payable for a future detriment must be discounted or reduced to the present value of the money that would compensate for the future loss. See *Salgado v County of Los Angeles* (1998) 19 C4th 629, 639, 80 CR2d 46 (jury to be instructed to determine present value of future noneconomic detriment; absent instruction, finding presumed to state present value unless record shows otherwise; full value to be used as basis for periodic payment or annuity (see §15.34)). See also *Scognamillo v Herrick* (2003) 106 CA4th 1139, 131 CR2d 393 (reversal of default judgment required on damages issue because trial judge did not reduce future medical expense and lost earnings damages to present cash value).

TACTICS: A present value table, of which the court may take judicial notice, is found in BAJI, App B. In practice, however, the table is unintelligible to most jurors and, if the future economic losses are substantial, probably should not be relied on without explanation by an economist.

An expert economist is helpful both to explain discounting and to offer an opinion about the present value of future damages. The expert may also factor in the rate of inflation (see §1.107), which may balance the discount rate and substantially diminish or even nullify the impact of discounting to present value.

TACTICS: Counsel may find it convenient to argue that the expected rate of wage and price increase equals and offsets the prevailing discount rate. See Franz, *Simplifying Future Lost Earnings*, 13 Trial 34 (Aug. 1977). On establishing a constant between the two rates, see Formuzis & O'Donnell, *Inflation and the Valuation of Future Economic Losses*, 38 Mont L Rev 297 (1977); Sherman, *Projection of Economic Loss: Inflation v Present Value*, 14 Creighton L Rev 723 (1981).

Bases for computing present value are discussed in *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 521, 196 CR 82 (wrongful death case). See also *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 658, 151 CR 399 (6-percent discount rate used); *Niles v City of San Rafael* (1974) 42 CA3d 230, 241, 116 CR 733 (5-percent discount rate used).

NOTE: Under federal law, there is no single mandatory method for calculating present value; such calculation must take into consideration inflation, other sources of wage increases, and rate of interest. *Jones & Laughlin Steel Corp. v Pfeifer* (1983) 462 US 523, 547, 76 L Ed 2d 768, 103 S Ct 2541. See also *St. Louis S. W. Ry. v Dickerson* (1985) 470 US 409. 84 L Ed 2d 303, 105 S Ct 1347 (FELA case). A trier of fact may adjust an award for an inflation rate or by a discount rate only if competent evidence of the rate has been presented. See *Alma v Manufacturers Hanover Trust Co.* (9th Cir 1982) 684 F2d 622 (economist's testimony that two rates were "essentially equal" was insufficient). See also *Larez v Holcomb* (9th Cir 1994) 16 F3d 1513, 1518 (improper indemnification argument).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.109 C. Effect of Tax Laws

§1.109 C. Effect of Tax Laws

Evidence or argument about the effect of tax laws on personal injury damages may be excluded as too speculative, whether or not the defendant seeks to show that:

- The jury award itself is not subject to income taxation;
- The ordinary person's future earnings are realistically his or her net, not gross, earnings; or
- Awards may be invested in ways that produce tax-free returns.

Rodriguez v McDonnell Douglas Corp. (1978) 87 CA3d 626, 664, 151 CR 399 (trial court did not err by refusing to admit evidence of future tax consequences to affect determination of amount of awards to plaintiffs). See *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 539, 196 CR 82, 100 (speculative nature of evidence of possible future income tax rates requires computation of future income loss to be based on before-tax earnings).

California state courts, and federal courts applying California law, have held that it is not error to refuse to instruct the jury that personal injury damages are not taxable; whether to give such an instruction lies within the trial court's discretion. See *Fox v Pacific Southwest Airlines* (1982) 133 CA3d 565, 570, 184 CR 87; *Henniger v Southern Pac. Co.* (1967) 250 CA2d 872, 878, 59 CR 76; *Anderson v United Airlines* (SD Cal 1960) 183 F Supp 97. See also *Tramell v McDonnell Douglas Corp.* (1984) 163 CA3d 157, 172, 209 CR 427 (implied agreement among jurors to inflate verdict to compensate for attorney fees and taxes was misconduct); *Irwin v Pacific Southwest Airlines* (1982) 133 CA3d 709, 717, 184 CR 228 (wrongful death); *Diede v Burlington N. R.R.* (9th Cir 1985) 772 F2d 593 (evidence of nontaxability of proposed annuity excluded under Fed R Evid 403).

In federal courts, when a personal injury claim is based on federal law, jury instructions on the taxability of damage awards and estimated future earnings must be given on request. *Norfolk & W. Ry. v Liepelt* (1980) 444 US 490, 62 L Ed 2d 689, 100 S Ct 755 (Federal Employers' Liability Act (45 USC §§51-60) case). See CACI 2940. In the Ninth Circuit, the rule applies to all cases in which the question is one of federal law or the applicable state law is silent. See *Rudelson v U.S.* (9th Cir 1979) 602 F2d 1326, 1331 (federal Tort Claims Act death case); *Burlington N., Inc. v Boxberger* (9th Cir 1975) 529 F2d 284, 298 n18. Compare *Burlington* with *Diede v Burlington N. R.R.* (9th Cir 1985) 772 F2d 593 (evidence of nontaxability of proposed annuity excluded under Fed R Evid 403).

NOTE: A lump-sum award in a wrongful death action under the Federal Tort Claims Act (28 USC §§2671-2680) must include an amount to compensate for taxes on income that will be earned by investing the award, even though state law is applied under the Act. *DeLucca v U.S.* (9th Cir 1982) 670 F2d 843. The *DeLucca* rule has been indirectly applied in California in at least one case, although it is unclear whether the rule is mandatory. See *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 523, 196 CR 82. The Ninth Circuit has also allowed an award to be based on present net income in a federal Tort Claims Act case. *U.S. v Furumizo* (9th Cir 1967) 381 F2d 965.

See Anno, 16 ALR4th 589 (1982) (propriety of considering income tax in fixing personal injury and wrongful death damages).

Under California law, a taxpayer cannot be compelled to produce copies of federal or state income tax returns unless a statute provides otherwise or the privilege is waived. See *Webb v Standard Oil Co.* (1957) 49 C2d 509, 319 P2d 621; *Sav-On Drugs, Inc. v Superior Court* (1975) 15 C3d 1, 123 CR 283. Otherwise, federal tax returns do not enjoy an absolute privilege from discovery. *Premium Serv. Corp. v Sperry & Hutchinson Co.* (9th Cir 1975) 511 F2d 225. See Fam C §3552 (production of tax returns in spousal and child support matters).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.110 D. Assignment of Damages on Dissolution of Marriage

§1.110 D. Assignment of Damages on Dissolution of Marriage

Personal injury damages recovered by a married person for that person's injuries are usually assigned to that person on dissolution of the marriage, and the assignment does not affect the equal division of the spouses' other community property. See Fam C §§780-783. When circumstances and the interests of justice require a different result, not less than half the personal injury damages must be assigned to the injured party. Fam C §2603(b); *Marriage of Morris* (1983) 139 CA3d 823, 189 CR 80. See also *Marriage of Klug* (2005) 130 CA4th 1389, 1397, 31 CR3d 327 (under Fam C §781, tort damages are separate property of injured person living separate from spouse when cause of action "arose"); *Marriage of Jacobsen* (1984) 161 CA3d 465, 473, 207 CR 512 (under Fam C §781, damages received after separation are separate property; not subject to equal division).

For purposes of calculating child support:

- The entire amount of an undifferentiated personal injury recovery is not "income."
- The trial judge has discretion to treat a part of the recovery as income.

Marriage of Heiner (2006) 136 CA4th 1514, 39 CR3d 730. See *Marriage of Rothrock* (2008) 159 CA4th 223, 70 CR3d 881 (payments received by father in settlement of personal injury suit not included in his income when fixing child support).

See Annos, 80 ALR5th 533 (2000) (separate or community status of personal injury recovery or cause of action), 59 ALR5th 489 (1998) (effect of personal injury recovery on alimony or child support), 33 ALR4th 82 (1984) (assignability of proceeds of claim for personal injury or death).

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Source: Torts/California Tort Damages/1 Bodily Injury/§1.111 E. Causation

§1.111 E. Causation

The detriment for which personal injury damages may be awarded must have been "proximately" caused by the wrongdoer's tort. CC §3333. See *Chaparkas v Webb* (1960) 178 CA2d 257, 260, 2 CR 879 (causal connection must exist between defendant's wrongful act or omission and harm or loss sustained by plaintiff; detriment must be natural and probable result of defendant's conduct). The right to recover damages requires the establishment of three links in a causal chain:

- The wrongdoer's act or omission was a substantial contributing factor in causing the injured person to receive a blow or actionable shock.
- The impact or the shock resulted in the detrimental bodily conditions complained of.
- The bodily conditions were the cause or occasion for the expenses, losses, suffering, and other detriment for which damages are sought.

Causation, as a necessary element of legal liability to pay damages for personal injury or death is discussed comprehensively in California Tort Guide §§1.13-1.17 (3d ed Cal CEB 1996).

TACTICS: The defendant may limit, or eliminate, damages by showing a break in the causal chain. It may be shown, for example, that there is no physiological relationship between the trauma experienced in an accident and a bodily condition that later developed. The defendant may use discovery to obtain medical records relating to prior injuries or complaints and may be able to show that treatment for which damages are presently claimed was actually rendered to care for a condition not caused by the defendant's fault. See §1.88.

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VIII. TAX CONSEQUENCES

§1.112 A. To Plaintiff

A plaintiff need not declare, as taxable income, "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." IRC §104(a)(2).

NOTE: The qualifier "physical" was added to IRC §104(a)(2) in 1996. At the same time, Congress also added that "emotional distress shall not be treated as a physical injury or physical sickness." A panel of the United States Court of Appeals for the District of Columbia Circuit, reversing its own earlier decision in the same case, has held that damages received for emotional distress and injury to reputation can be taxed as ordinary income; such damages were not "received… on account of personal physical injuries," and taxing them as income is within Congress's power. *Murphy v IRS* (DC Cir 2007) 493 F3d 170. The rationale underlying the pre-1996 version of IRC §104(a)(2) was that the recovery did not generate a gain but merely made the taxpayer whole by restoring personal capital after a tortious loss. Thus, most damages for bodily injury were excludable, including damages for wrongful death and loss of consortium. See Rev Rul 65-29, 1965-1 Cum Bull 59. Also excludable from gross income were damages awarded to compensate the plaintiff for such elements of harm and loss that commonly accompany and follow bodily injury as medical expense, lost earnings (if paid as part of a lump sum), impairment of earning capacity, loss of services, and pain, suffering, and emotional distress. See, *e.g.,* Rev Rul 85-97, 1985-2 Cum Bull 50. See, however, §1.113 on medical expense. Generally, amounts received through accident or health insurance were excluded from income. IRC §104(a)(3). However, the exclusion has been denied when no legitimate injuries actually occurred. *Dodge v Commissioner* (8th Cir 1992) 981 F2d 350. California law conforms to IRC §104. Rev & T C §17131. Generally, California also follows federal regulations and case law. See *Appeal of Sharon L. Hayden* (SBE 1988) CCH Cal Tax Rep ¶401-667.

IRS regulations have defined "damages received" as amounts received "through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 CFR §1.104-1(c). The taxpayer has been required to show both that (1) the underlying cause of action was tort-like within the meaning of *U.S. v Burke* (1992) 504 US 229, 119 L Ed 2d 34, 112 S Ct 1867, and (2) the damages were received "on account of" the taxpayer's personal injury. See *Chamberlain v U.S.* (5th Cir 2005) 401 F3d 335, 341 (taxpayer has same burden under amended IRC §104(a)(2)).

TACTICS: Subject to taxation are punitive damages and, perhaps, compensatory damages for discrimination, employment torts, and torts incident to contractual disputes. To protect the nontaxability of certain recoveries for emotional distress, practitioners may wish to prepare allegations and settlement agreements that emphasize physical symptoms. See §6.52.

When personal and nonpersonal injury claims are mingled, the taxpayer has the burden of proving the amount allocable to personal injuries. The intent of the payor is the most important factor in determining the nature of the claim being settled. *Knuckles v Commissioner* (10th Cir 1965) 349 F2d 610. However, testimony of the payor is not controlling. See *Wallace R. Noel,* TC Memo 1997-113. Further, the IRS has taken the position that the portion of a settlement payment that "purchased" a plaintiff's agreement to keep the amount of the settlement confidential is taxable.

See generally Wood, *Taxing Matters in Settling Cases*, California Lawyer (June 2007).

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§1.113 1. Tax Benefit Rule (Medical Expense)

If a taxpayer recovers an amount for which a tax benefit has already been received, the amount is includable in income. IRC §104(a). For example, amounts received as reimbursement for medical expenses are taxable to the extent the plaintiff deducted the medical expenses in a prior year. 26 CFR §1.104-1(a).

TACTICS: A settlement or judgment can specify the amount paid for past medical expenses. When no allocation is made, the amount received will be attributed first to previously deducted medical expenses and will be taxable to that extent. Rev Rul 75-230, 1975-1 Cum Bull 93.

The IRS has taken the position that, when sums are allocated to future medical expenses, the payee cannot claim any medical deduction until more than the allocated amount has been expended. Rev Rul 75-232, 1975-1 Cum Bull 94. When sums are not specifically allocated to future medical expenses, but future medical expenses were claimed by the taxpayer during trial, the IRS has taken the position that it may allocate a proper amount to future medical expenses and then disallow a deduction for future medical expenses to the extent they do not exceed the allocable amount. Rev Rul 79-427, 1979-2 Cum Bull 120. The Ninth Circuit, however, has taken the opposite position and has refused to allow the IRS to allocate any portion of a lump-sum award to future medical expenses. *Niles v U.S.* (9th Cir 1983) 710 F2d 1391.

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§1.114 2. Wage and Benefit Payments

Wages are normally taxable, but if a portion of a lump-sum settlement payment for a bodily injury includes lost wages, the wages are not taxable. Rev Rul 85-97, 1985-2 Cum Bull 50. However, if a court allocates a settlement to various recoveries, taxable income may result. Payments made to an individual as specific court-awarded damages for back pay, unpaid life insurance premiums, and unpaid health insurance premiums are taxable. Rev Rul 85-44, 1985-1 Cum Bull 22. Interest on those amounts is also taxable. IRS General Counsel Memorandum 39353.

If lost wages are paid, it is essential to consider both federal and California employment tax issues such as FICA, FUTA, SDI, and withholding from both the employer's and employee's perspective. See IRC §§3101-3509; Un Ins C §§901-1243, 13000-13101. For discussion of allocation of taxable and nontaxable claims, see §8.50.

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§1.115 3. Interest and Periodic Payments

Interest accruing on a tax-free recovery is taxable. Rev Rul 76-133, 1976-1 Cum Bull 34; Rev Rul 65-29, 1965-1 Cum Bull 59. Thus, the Tax Court has ruled that interest on an otherwise excludable personal injury recovery is not excludable. See *Rosemary Kovacs* (1993) 100 TC 124. Similarly, statutorily mandated prejudgment interest on personal injury damages is taxable. *Brabson v U.S.* (9th Cir 1996) 73 F3d 1040. But see *Frank T. McShane,* TC Memo 1987-151, in which a personal injury verdict for the taxpayer was appealed, but the case was settled before final decision on the appeal. Although under state law the taxpayer was entitled to interest on the verdict, the parties stipulated in their settlement agreement that lump sums to be paid to the taxpayer were to be without costs and interest. The court concluded that no part of the payments to the taxpayer was for interest and that the entire payment was thus excludable from gross income.

When periodic payments for personal injuries are made, the interest element can be made nontaxable. Internal Revenue Code §104, as amended by Pub L 97-473, 96 Stat 2605 (1983), expressly authorizes full exclusion of deferred payments for personal injuries. This legislative action confirmed a series of IRS rulings that had allowed full exclusion of deferred payments for personal injuries. See Rev Rul 79-220, 1979-2 Cum Bull 74; Rev Rul 79-313, 1979-2 Cum Bull 75. For the tax treatment of the insurance company in a structured settlement, see IRC §130.

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§1.116 4. Attorney Fees and Costs

Under IRC §62(a)(20), a plaintiff's gross (taxable) income does not include attorney fees and court costs paid in connection with suits for unlawful discrimination (as defined in IRC §62(e)), under 31 USC §3721-3733, or under 42 USC §1395y(b)(3)(A). See Winning a Suit Without Losing Your Shirt: Tax Relief for Successful Civil Rights Plaintiffs, 35 Forum, No. 7 p 30 (Consumer Attorneys of California 2005). Previously, except to the extent that a recovery was not deemed to be for a physical injury (see §1.112), the plaintiff was taxed on the full amount of the recovery and attorney fees were deductible subject to the 2-percent floor on miscellaneous itemized deductions for individuals. See *Biehl v Commissioner* (9th Cir 2003) 351 F3d 982. See also IRC §§63, 67, 162, 212. See Rev Rul 80-364, 1980-2 Cum Bull 294, Situations 1 and 2. See also IRS Letter Ruling 8352033. If the attorney fees recovered are incurred by a third party (*e.g.,* a union), the fees may not be includable in the taxpayer's income. See Rev Rul 80-364, 1980-2 Cum Bull 294, Situation 3.

NOTE: It appears that the new law, which seeks to end "double taxation" on certain tort recoveries, is not to be applied to damages recovered before its effective date. See *Commissioner v Banks* (2005) 543 US 426, 160 L Ed 2d 859, 125 S Ct 826.

For a plaintiff subject to the alternative minimum tax, a fee paid for an attorney's services in obtaining a damages recovery may be treated as a taxable part of that recovery. See *Jalali v Root* (2003) 109 CA4th 1768, 1 CR3d 689 (contingent fee attorney's advice about nontaxability of part of recovery for racial discrimination and sexual harassment was not basis for legal malpractice liability).

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§1.117 5. Workers' Compensation and Other Employment Benefits

Internal Revenue Code §104(a)(1) excludes from taxable income amounts received under a workers' compensation act as compensation for personal injuries or sickness. If disability benefits are received under any workers' compensation act, or under a statute in the nature of a workers' compensation act (providing compensation to employees only for personal injuries or sickness incurred in the course of employment), they qualify for the IRC §104(a)(1) exclusion. 26 CFR §1.104-1(b); Rev Rul 80-14, 1980-1 Cum Bull 33.

Internal Revenue Code §104(a)(1) does not apply to retirement, pension, or annuity payments to the extent the payment is determined by reference to the employee's age, length of service, or prior contributions, even though the employee's retirement is caused by an occupational injury or sickness. 26 CFR §1.104-1(b); Rev Rul 85-104, 1985-2 Cum Bull 52.

Internal Revenue Code §104(a)(1) also does not apply to amounts that are received as compensation for a nonoccupational injury or sickness or to amounts received as compensation for an occupational injury or sickness to the extent that they are in excess of the amount provided in the applicable workers' compensation act. 26 CFR §1.104-1(b); Rev Rul 85-104, 1985-2 Cum Bull 52.

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§1.118 6. Discrimination

Back pay and liquidated damages paid in settlement of a claim under the Age Discrimination in Employment Act (ADEA) (29 USC §§621-634) are taxable income. *Commissioner v Schleier* (1995) 515 US 323, 132 L Ed 2d 294, 115 S Ct 2159 (ADEA settlement for back pay and liquidated damages not excludable from gross income; damages were not result of personal injury; employee's claim of emotional distress damages insufficient to characterize payment as settlement for personal injury). Settlement proceeds from an ADEA lawsuit ordinarily are not excludable from gross income even though the taxpayer characterized the settlement as "lost pension and insurance benefits" rather than back pay. *Gray v Commissioner* (10th Cir 1997) 104 F3d 1226. See *Sinyard v Commissioner* (9th Cir 2001) 268 F3d 756 (amount deducted from taxpayer's ADEA recovery as attorney fee allocation for recovery of taxable back wages and tort damages was taxable; commissioner conceded, however, exclusion of attorney fee amount allocated to recovery of nontaxable personal injury damages).

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§1.119 7. Wrongful Termination

Except to the extent that the suit may be subject to the provisions of IRC §62(a)(20), discussed in §1.116, it appears that the full amount of the damages received for wrongful termination are gross income to the plaintiff, and no deduction is allowed for the amount paid to the attorney in accordance with a contingent fee agreement. See *Benci-Woodward v Commissioner* (9th Cir 2000) 219 F3d 941 (applying California law that attorney lien does not confer any ownership interest nor grant attorney any right, court held portion of punitive damages award retained by attorney in accordance with contingent fee agreement must be included in taxpayer's gross income).

Because legal expenses are not enumerated in 26 USC §67(b), they are classified as miscellaneous itemized deductions. Section 56(b) provides that no deduction from gross income is allowed for such deductions. See also *Coady v Commissioner* (9th Cir 2000) 213 F3d 1187 (full amount of plaintiff's back pay and benefits must be included in gross income). See also Wrongful Employment Termination Practice (2d ed Cal CEB 1997).

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§1.120 B. To Defendant

The general rule is that the payor may deduct a judgment or settlement payment arising from a claim related to trade or business or related to the production of income. IRC §§162(a), 212. See *Trust of Bingham v Commissioner* (1945) 325 US 365, 89 L Ed 1670, 65 S Ct 1232. Thus, a defendant may deduct from taxable income damages paid to compensate a plaintiff for bodily injury if the payment is an ordinary and necessary business expense but not if it is a personal expense. To claim the deduction, the defendant must establish that the conduct that gave rise to the need to pay the damages was related to the defendant's trade or business or to the production of income or the managing, conserving, or maintaining of income-producing property. See IRC §212.

Except in highly unusual circumstances, a claim arising from business operations will not be a personal expense. For example, when a corporate automobile was negligently lent to the son of a shareholder, the corporation's payment of damages arising from an accident caused by the son was nevertheless held to be a deductible business expense of the corporation. *Kopp's Co. v U.S.* (4th Cir 1980) 636 F2d 59. An employee's payment of expense on behalf of the employer is generally not deductible, because it usually is not an expense of the employee's trade or business. *Fischer v U.S.* (7th Cir 1973) 490 F2d 218. However, such a payment by an employee may be deductible if he or she can show that the payment was made to preserve the employee's job. *James O. Gould* (1975) 64 TC 132.

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§1.121 1. Timing of Income and Deductions

A cash-basis taxpayer must report taxable payments as income in the year in which they are actually or constructively received. An accrual-basis taxpayer reports income when the right to the payment is fixed and the amount is certain or reasonably ascertainable. 26 CFR §1.451-1(a).

A cash-basis taxpayer can deduct payments under IRC §§162 and 212 in the year in which the payments are made. An accrual-basis taxpayer has a deduction in the year in which liability is certain, the amount of payment can be determined with reasonable accuracy, and payment of the tort liability is made. IRC §461(h)(2)(C); 26 CFR §1.461-1(a).

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§1.122 2. Penalties and Disclosure

If an unallocated settlement is received or if the taxability of a particular portion of the settlement is unclear (*e.g.,* punitive damages) and the recipient excludes a portion from his or her gross income, a penalty may be imposed for substantial underpayment of tax. The penalty can be avoided if substantial authority exists for the taxpayer's position or adequate disclosure is made on the tax return. See *Frank E. Rickel* (1989) 92 TC 510, aff'd in part and rev'd in part (3d Cir 1990) 900 F2d 655.

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2

Loss of Consortium

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§2.1 I. NATURE OF CAUSE OF ACTION

Loss of consortium is a common-law cause of action that may be brought by one spouse (claimant spouse) for loss or harm he or she suffered as a result of bodily injury caused to the other spouse (injured spouse) by the defendant's legal fault. *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 115 CR 765. For discussion of other potential plaintiffs, see §§2.3-2.5. The claimant spouse's cause of action for loss of consortium damages is usually pleaded in the same complaint as the injured spouse's cause of action for bodily injury damages. See §2.10.

A spouse may recover on a claim for loss of consortium damages only if the injured spouse has a viable tort cause of action. *Blain v Doctor's Co.* (1990) 222 CA3d 1048, 1067, 272 CR 250. Otherwise, a spouse's loss of consortium cause of action is wholly separate and distinct from the injured spouse's causes of action. *Evans v Dayton Hudson Corp.* (1991) 234 CA3d 49, 285 CR 550. Thus, the claim must be pleaded and timely brought within the statute of limitations. Dismissal of a loss of consortium cause of action based on dismissal of the injured spouse's cause of action for a particular tort does not preclude a second loss of consortium claim based on a different injury to the injured spouse. See *Migliori v Boeing N. Am., Inc.* (CD Cal 2000) 97 F Supp 2d 1001, 1005.

NOTE: A statutory preclusion may bar a claimant spouse from recovering loss of consortium damages. For example, CC §3333.4(a)(2), which precludes the recovery of noneconomic damages by the owner of a vehicle that was uninsured when it was in a collision, has been held to bar recovery by a claimant spouse. See *Honsickle v Superior Court* (1999) 69 CA4th 756, 766, 82 CR2d 36 (husband barred when wife, not covered by husband's policy, was injured while driving car).

Federal maritime law, at least in some situations, appears to preclude the recovery of loss of consortium damages. See *Chan v Society Expeditions* (9th Cir 1994) 39 F3d 1398, 1407 (passenger injured at sea); *Smith v Trinidad Corp.* (9th Cir 1993) 992 F2d 996 (injured seaman suing under Jones Act (46 USC §§30104-30105)).

NOTE: *Chan* and *Smith* cite the maritime wrongful death case, *Miles v Apex Marine Corp.* (1990) 498 US 19, 30, 112 L Ed 2d 275, 111 S Ct 317, discussed in §3.57. *Miles* is viewed as limiting the suggestion in *American Export Lines, Inc. v Alvez* (1980) 446 US 274, 64 L Ed 2d 284, 100 S Ct 1673, that loss of consortium damages may be recovered by the spouse of a longshore and harbor worker injured in territorial waters. See *Kelly v Bass Enters. Prod. Co.* (ED La 1998) 17 F Supp 2d 591, 598 (recovery by spouse of "nonseaman"). See also *Rebstock v Sonat Offshore Drilling* (ED La 1991) 764 F Supp 75 (sailor's spouse may pursue a loss of consortium claim in a negligence lawsuit brought under general maritime law).

On a related matter, see *Perry v Metro-North Commuter R.R.* (D Conn 1989) 716 F Supp 61 (no loss of consortium claim under Federal Employers' Liability Act (FELA) (45 USC §§51-60)).

Each parent may suffer a loss of his or her spouse's companionship, society, and affection following the birth of an unwanted or severely impaired child, born as the result of another's actionable conduct. See chap 5 for discussion of damages in wrongful life and birth cases.

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II. PLAINTIFFS

§2.2 A. Spouse; Domestic Partner

The wife or husband of an injured person has a cause of action to recover damages for loss of consortium. *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 115 CR 765. A spouse cannot, however, recover loss of consortium damages for harm or loss resulting from an injury to the other spouse that occurred before the two were married. *Zwicker v Altamont Emergency Room Physicians Med. Group* (2002) 98 CA4th 26, 118 CR2d 912.

NOTE: The California Supreme Court has granted review of *Boeken v Philip Morris USA, Inc.* (review granted May 21, 2008, S162029; superseded opinion at 159 CA4th 1391, 72 CR3d 454), noting that it raises the question whether res judicata barred a widow's claim for noneconomic damages in a wrongful death suit when she had dismissed with prejudice a claim for loss of consortium while decedent was alive.

A spouse may pursue loss of consortium damages even after the injured spouse has dismissed his or her injury lawsuit. *Hahn v Mirda* (2007) 147 CA4th 740, 54 CR3d 527 (after operating on wife to remove suspected cancer in her breast, doctors allegedly failed to tell her that postoperation biopsy revealed no cancer, leaving spouses to believe for 2 years that she had terminal illness).

Under Fam C §§297-299.6, domestic partners have the right to recover damages, to the same extent as a spouse, for a copartner's wrongful death (see §3.4 and CCP §377.60) and for negligently inflicted emotional distress (see §6.24 and CC §1714.01). Arguably, loss of consortium damages are sufficiently similar to emotional distress damages to fall within the authorization for recovery in CC §1714.01. Conversely, it could be argued that a domestic partner is precluded from recovering loss of consortium damages by the statement in Fam C §299.5(a) that registration as a domestic partner does not "establish any rights under law other than those expressly provided" by a "provision of law specifically referring to domestic partners."

NOTE: Clearly, loss of consortium damages are recoverable by a spouse in a legally recognized and still existing marriage. Such damages would seem to be unavailable if a judgment of dissolution had been entered before the bodily injury occurred. Less clear is whether the entry of a judgment of separation or dissolution after the bodily injury occurred would defeat the spouse's claim to such damages. Such a spouse might argue for loss of consortium for the period from the date of injury to date of judgment of separation or dissolution.

It is not clear whether a loss of consortium claim may be asserted by a person claiming putative or de facto spouse status (*i.e.,* one claiming to have a good faith belief that a valid marriage existed). See Fam C §§2251-2252. Arguably, the holding in *Elden v Sheldon* (1988) 46 C3d 267, 279, 250 CR 254, that *cohabitants* cannot recover for loss of consortium (see §2.3), does not directly preclude recovery by a putative spouse.

A person who establishes that a common-law marriage was validly created under the laws of a state that recognizes common-law marriages may maintain an action for loss of consortium. *Ledger v Tippitt* (1985) 164 CA3d 625, 633, 210 CR 814, disapproved on other grounds in *Elden v Sheldon* (1988) 46 C3d 267, 277, 250 CR 254; *Etienne v DKM Enters., Inc.* (1982) 136 CA3d 487, 186 CR 321.

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§2.3 B. Cohabitant

Claims for loss of consortium damages are denied to unmarried cohabitants. *Elden v Sheldon* (1988) 46 C3d 267, 279, 250 CR 254 ("consortium" damages sought for death of cohabitant). The court cited the state's interest in promoting marriage and the difficulty in assessing the relationship of the cohabiting parties to determine whether their arrangement was the equivalent of marriage.

See §2.3 on the possibility of recovery by a registered domestic partner or other cohabitant who is not part of a California-licensed marriage.

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Source: Torts/California Tort Damages/2 Loss of Consortium/§2.4 C. Parent

§2.4 C. Parent

A parent may not recover loss of consortium damages for injury to his or her child. *Baxter v Superior Court* (1977) 19 C3d 461, 138 CR 315; *Tullai v Homan* (1987) 195 CA3d 1184, 241 CR 255 (injury to son).

NOTE: *Baxter* cited the policy considerations discussed in *Borer v American Airlines, Inc.* (1977) 19 C3d 441, 138 CR 302, discussed in §2.5.

A parent may recover emotional distress (not loss of consortium) damages for injury to a minor child in his or her legal custody from one who, with no right to custody, abducts or entices the child away. CC §49(a); *Surina v Lucey* (1985) 168 CA3d 539, 543, 214 CR 509 (damages recoverable for mental anguish and wounded feelings as well as for loss of services, if any, plus punitive damages if interference with parent-child relationship was malicious; *Borer* distinguishable because parent's abduction claim based on statute and, more importantly, on intentional tort).

As between two parents, even if one parent interferes with the other's custody or visitation rights, if there is no physical abduction from the lawful custody of the parent, the proper remedy is relief under Fam C §§3000-3465. There is a recognized cause of action in this situation either for loss of filial consortium or for emotional distress. *Marriage of Segel* (1986) 179 CA3d 602, 224 CR 591.

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Source: Torts/California Tort Damages/2 Loss of Consortium/§2.5 D. Child

§2.5 D. Child

A child may not recover loss of consortium damages for injury to his or her parent. *Borer v American Airlines, Inc.* (1977) 19 C3d 441, 447, 138 CR 302. Policy considerations against the creation of a parent-child cause of action for loss of consortium include the following: Damages would be difficult to assess because the loss is intangible and nonpecuniary; the difficulty in quantifying damages would lead to the risk of double recovery; and a proliferation of potential causes of action would lead to higher insurance premiums and increased costs of administration.

NOTE: *Borer* was followed, but questioned, in *Nix v Preformed Line Prods. Co.*(1985) 170 CA3d 975, 986, 216 CR 581, which noted academic criticism of *Borer* as well as contrary conclusions reached in other states.

The equivalent of loss of consortium damages may be available to a child whose parent died as a result of violation of the parent's civil rights under 42 USC §1983. *Smith v City of Fontana* (9th Cir 1987) 818 F2d 1411 (14th Amendment substantive due process rights include constitutional interest in familial companionship and society), overruled on other grounds in *Hodgers-Durgin v De La Vina* (9th Cir 1999) 199 F3d 1037, 1041 n1.

NOTE: *Smith* relied on *Morrison v Jones* (9th Cir 1979) 607 F2d 1269, which recognized a mother's constitutionally protected relationship with her son, who had been transported to Germany by public officials. By analogy, *Morrison* may provide a rationale for recovering damages for loss of filial consortium when a child is severely injured by public authorities under circumstances that violate substantive due process. Although the provider of parental consortium was killed in the *Smith* case, that court's reliance on *Morrison* indicates that it might recognize 42 USC §1983 actions by children deprived of the companionship and support of a severely injured parent. Accordingly, in a suit against a public official for denial of substantive due process, a §1983 action might circumvent California's bar of damages for loss of parental and filial consortium.

The Longshore and Harbor Workers' Compensation Act (33 USC §§901-950) §905(b) does not permit an injured worker's child to recover loss of consortium damages. *Robertson v Arco Oil & Gas Co.* (WD La 1991) 766 F Supp 535, 538.

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III. DAMAGES

§2.6 A. Recoverable

Damages for loss of consortium may be awarded to compensate for such harm and loss as:

- Loss of love, companionship, affection, society, solace, and comfort;
- Loss of moral support;
- Loss of sexual relations or diminished frequency; and
- Reduction of physical assistance in maintaining and operating the home.

Carlson v Wald (1984) 151 CA3d 598, 602, 199 CR 10 (no requirement that loss of consortium be complete; diminution of claimant spouse's rights enough to support claim). It has been suggested, however, that the conjugal relationship must be more than superficially or temporarily impaired. *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 933, 167 CR 831. See CACI 3920.

Loss of consortium has been described as "principally a form of mental suffering." *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 401, 115 CR 765. An important aspect of damages is the loss of the moral support that each spouse has given the other "through the triumph and despair of life." 12 C3d at 405. Recognizing their predominantly subjective, noneconomic nature, loss of consortium damages are expressly characterized as "non-economic damages" in CC §1431.2(b)(2) for comparative fault purposes. On the effect of this characterization, see §§2.17, 15.8.

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§2.7 B. Limits on Recoverable Damages

When damages for loss of financial support and services or for other economic loss are claimed as part of the injured person's case, they must be not also be sought or awarded as a part of a spouse's loss of consortium claim. See *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 404, 115 CR 765 (wife's claim for reasonable value of the nursing services she provided her husband and for her loss of earnings and earning capacity incurred when she quit her job to care for her husband could not be maintained, because husband, were he to prevail in his case, would be entitled to recover cost of nursing services). Juries can be instructed that a loss of consortium award should not include compensation for losses recoverable by the injured spouse. *Wilson v John Crane, Inc.* (2000) 81 CA4th 847, 862, 97 CR2d 240. See CACI 3920.

NOTE: A double recovery is not permitted, but it is unclear whether the reasonable value of nursing services provided by the claimant to the injured person and loss of earnings and earning capacity of the claimant who quits a job to care for the injured person may be recovered by *only* the injured spouse and not by the claimant spouse or whether *either* may claim such damages as long as the other does not. See §1.11.

Loss of consortium damages do not include the claimant's grief, distress, humiliation, and embarrassment over the injured person's scars. *Park v Standard Chem. Way Co.* (1976) 60 CA3d 47, 131 CR 338 (such elements are not within *Rodriguez* formulation of consortium damages). *Park* thus suggests that the immediate emotional impact of witnessing harm suffered by a loved one, as in *Dillon v Legg* (1968) 68 C2d 728, 69 CR 72, does not automatically give rise to damages for loss of consortium. See §§6.5-6.10.

Damages for loss of consortium, like other damages, must be reasonable. See §1.2.

See §§15.41-15.58 on limitations in medical malpractice actions. See Anno, 61 ALR4th 309 (1988) (excessiveness or adequacy of noneconomic damages for spouse's personal injury).

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IV. BRINGING THE ACTION

§2.8 A. Statute of Limitations

Loss-of-consortium lawsuits are governed by the 2-year limitations period specified in CCP §335.1. The claimant's cause of action for loss of consortium accrues at the time of the original injury to the injured person even if the full extent of the injuries is not originally known. *Priola v Paulino* (1977) 72 CA3d 380, 140 CR 186. Factors that toll the running of a limitations period against the injured spouse may also toll the period on the claimant spouse's loss of consortium claim. See *Migliori v Boeing N. Am., Inc.* (CD Cal 2000) 114 F Supp 2d 976, 986 n6.

NOTE: An insurer's advance payment to an injured husband, tolling his statute of limitations under Ins C §11583, does not toll the statute on a wife's loss of consortium claim; even though the wife's cause of action is derivative in the sense of being based on bodily injury to the husband, it is entirely separate and distinct and may be brought as a separate action. *Evans v Dayton Hudson Corp.* (1991) 234 CA3d 49, 54, 285 CR 550.

Even if both spouses file suit for their own personal injuries within the limitations period for the date they sustain bodily injury, the claimant spouse cannot amend the complaint after that period has passed to state a cause of action for loss of consortium; although based on the same general set of facts, the amendment does not relate back to the original filing date. *Shelton v Superior Court* (1976) 56 CA3d 66, 128 CR 454.

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Source: Torts/California Tort Damages/2 Loss of Consortium/§2.9 B. Showing Seriousness of Injured Spouse's Injury

§2.9 B. Showing Seriousness of Injured Spouse's Injury

For a claimant spouse to recover loss of consortium damages, the injured spouse's injury, whether physical, emotional, or psychological must be "sufficiently serious and disabling to raise the inference that the conjugal relationship is more than superficially or temporarily impaired." See *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 933, 167 CR 831. Whether the injury to the spouse is sufficiently severe is a matter of proof.

TACTICS: Some practitioners think it better to forego claims for loss of consortium damages unless the injured spouse has suffered a severe disabling injury. If jurors conclude that the claimant spouse should have simply adjusted to a spouse's relatively minor injury, they may be skeptical about both spouses' claims, perhaps even denying them the benefit of the doubt in a weak liability case.

WARNING: When advising a client to forego a potential loss of consortium claim, an attorney does well to obtain the consent of both spouses. See *Meighan v Shore* (1995) 34 CA4th 1025, 1042, 40 CR2d 744 (attorney has duty to inform spouse of potential loss of consortium claim).

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Source: Torts/California Tort Damages/2 Loss of Consortium/§2.10 C. Stating Separate Causes of Action; Joinder

§2.10 C. Stating Separate Causes of Action; Joinder

Joinder in the injured spouse's lawsuit is the preferred method for asserting a claim for loss of consortium, although an independent lawsuit may be maintained. *Evans v Dayton Hudson Corp.* (1991) 234 CA3d 49, 54, 285 CR 550. Because the claim for loss of consortium is a separate and distinct cause of action against the tortfeasor, it should be separately pleaded in the complaint.

If the loss of consortium action is brought separately, the defendant may require consolidation for trial so that all claims will be decided at the same time, thus eliminating the possibility of duplicative recoveries. *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 407, 115 CR 765.

NOTE: Some counties have local rules that require counsel to advise the court of any related actions.

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§2.11 D. Pleading Damages

In pleading damages for loss of consortium, the claimant should allege, as applicable, loss of society, sexual relations, love, comfort, affection, companionship, solace, and moral support—the words used in *Rodriguez v Bethlehem Steel Corp.* (1974) 12 C3d 382, 115 CR 765.

Allegations of grief, distress, humiliation, and embarrassment, which might support a cause of action for emotional distress, have been held insufficient to allege a cause of action for loss of consortium. *Park v Standard Chem. Way Co.* (1976) 60 CA3d 47, 131 CR 338.

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E. Proving Damages

§2.12 1. Preparing for Deposition

The compensable elements of loss of consortium should be discussed with both spouses early in the representation. Each spouse should be prepared to describe his or her own detriment as well as the detriment observed in the other. Counsel should be prepared to explore the relationship and the activities of the parties, both work and leisure. Visiting the couple at their home can help the attorney in analyzing what the injured spouse can no longer contribute to the marriage.

Discussion of the loss of sexual relationship may be embarrassing to the parties. Some parties may agree to drop any claim relating to reduction or loss of sexual relationship without waiving other aspects of a loss of consortium claim.

TACTICS: Failure to discuss the details of the injured person's personal life before the deposition can result in both the plaintiff's inability adequately to describe all elements of his or her loss and reluctance to discuss such matters as affection and sexual activities.

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Source: Torts/California Tort Damages/2 Loss of Consortium/§2.13 2. Witnesses

§2.13 2. Witnesses

Usually, the spouses themselves are the primary witnesses on loss of consortium damages. In addition, other family members, friends, neighbors, or co-workers can be helpful by testifying to their observations of changes in the relationship between the spouses. See generally §§1.77-1.81.

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§2.14 3. Showing Impairment of Relationship

The spouses may be asked to contrast their relationship and activities before the injury and afterward. The claimant should present evidence describing the closeness, attitudes, experiences, activities, and enjoyment of life before the injury as well as postinjury changes in the relationship and subsequent difficulties.

The impairment of the conjugal relationship must be shown to be more than superficial or temporary. *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 167 CR 831.

NOTE: In *Da Silva v Pacific King, Inc.* (1987) 195 CA3d 1, 240 CR 395, for example—based on evidence that during the spouses' 20-year marriage, the injured spouse, a fisherman, had regularly been away from home on fishing trips lasting 2 to 3 months, with intervals between trips of 2 to 3 weeks—the court concluded that the jury could have found that the spouse claiming loss of consortium damages did not lose any of the society, comfort, and companionship she would otherwise have expected from her husband. The *Da Silva* court distinguished *Smith v Covell* (1980) 100 CA3d 947, 161 CR 377, in which a court set aside as inadequate a jury verdict that failed to award loss of consortium damages when liability was found and damages were awarded to the injured person.

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V. FACTORS AFFECTING RECOVERY

§2.15 A. Insurance Policy Limits

Counsel must examine applicable liability insurance policies carefully for definitions of "per person" and "per occurrence" limits. The words in an insurance policy will establish whether the sum of the damages separately awarded to the injured person and to the loss of consortium claimant exceed the amount the insurer is required to pay.

Cases that have ruled that the "per person" limit applicable to the injured spouse's damages claim does not preclude the claimant spouse from recovering additional loss of consortium damages (subject to the "per occurrence" limit) include:

- *Abellon v Hartford Ins. Co.* (1985) 167 CA3d 21, 26, 212 CR 852 (policy did not define "per person" damages as including damages for care and loss of services; loss of consortium claim deemed personal and not merged with injured spouse's claim; to merge claims would make loss of consortium case derivative and noncompensable, defeating public policy of recognizing loss of consortium as distinct and individual injury);
- *Allstate Ins. Co. v Fibus* (9th Cir 1988) 855 F2d 660 (policy language that does not conspicuously aggregate the loss of consortium claim with the underlying bodily injury claim allows application of separate "per person" limits).

Cases which have held that an insurance policy's "per person" limit applies to the combined recovery of both spouses include:

- *Mercury Ins. Co. v Ayala* (2004) 116 CA4th 1198, 11 CR3d 158 (policy stated that uninsured motorist liability limit to "bodily injury sustained by any one person" deemed to include damages for "care, loss of consortium and injury to any interpersonal relationship sustained by others");
- *Hauser v State Farm Mut. Auto. Ins. Co.* (1988) 205 CA3d 843, 252 CR 569 (policy set $25,000 as the "amount of coverage for all damages due to bodily injury to one person"; "bodily injury to one person" was defined to include "all injury and damages to others resulting from this bodily injury");
- *State Farm Mut. Auto. Ins. Co. v Ball* (1981) 127 CA3d 568, 570, 179 CR 644 (policy provided that "bodily injury sustained by one person" includes "all injury and damages sustained by others as a consequence of such bodily injury");
- *United Servs. Auto. Ass'n v Warner* (1976) 64 CA3d 957, 961 135 CR 34 (policy stated that "the limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence");
- *Safeco Ins. Co. v Simmons* (ND Cal 1986) 642 F Supp 305, 308 (policy defined "per person" damages as including loss of services).

TACTICS: In interpreting the language of insurance liability policies, the *Abellon v Hartford Ins. Co.* court indicated that the doctrine of reasonable expectations, which is applicable to contracts of adhesion such as automobile insurance policies, applies in determining whether per-person policy limits apply in claims for loss of consortium. It may be argued that, to the layperson, the words "per person" mean each individual who has suffered damage unless the policy clearly defines "bodily injury sustained by one person" to include all claims resulting from the bodily injury, including claims for loss of consortium.

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§2.16 B. Effect of Worker's Compensation Lien

When an injured spouse who was provided workers' compensation benefits for the injury then seeks personal injury damages from a third party tortfeasor, the worker's employer may seek reimbursement for such payments from the third party or from the worker's recovery from the third party. See California Workers' Damages Practice, chap 7 (2d ed Cal CEB 2001). The loss of consortium damages recovery payable to the injured person's spouse is not subject to reduction to reimburse the employer. *Gapusan v Jay* (1998) 66 CA4th 734, 740, 78 CR2d 250.

If the spouses' separate claims are settled with an unsegregated sum, determination of the employer's reimbursement claim requires a determination of the amount of the settlement that represents the injured worker's recovery (and not the spouse's loss of consortium recovery). 66 CA4th at 742.

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§2.16A C. Effect of Preverdict Settlement

A spouse's loss of consortium damages can be reduced by the part of the preverdict settlement monies received by spouses that the court allocates to such damages. See §15.12. The percentage of the preverdict settlement monies that reduces the loss of consortium damages judgment is calculated by dividing the total damages awarded to both spouses by the amount awarded as loss of consortium damages even when the result differs from a percentage specified in the settlement agreement. *Jones v John Crane, Inc.* (2005) 132 CA4th 990, 1007, 35 CR3d 144 (calculation, based on jury findings, allocated 9.9 percent of prior settlement money to loss of consortium damages although settlement agreement had specified 20 percent); *Hackett v John Crane, Inc.* (2002) 98 CA4th 1233, 1243, 120 CR2d 662 (noted on a related point in §15.12).

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Source: Torts/California Tort Damages/2 Loss of Consortium/§2.17 D. Comparative Fault and (Equitable) Indemnity

§2.17 D. Comparative Fault and (Equitable) Indemnity

Under CC §1431.2, a defendant is not responsible to pay loss of consortium damages to the extent that the fault of either the claimant spouse or the injured spouse contributed to causing the injury. *Craddock v KMart Corp.* (2001) 89 CA4th 1300, 1309, 107 CR2d 881. Thus, there is ordinarily no reason for the defendant to seek comparative (equitable) indemnity from the injured person. (Note that CC §1431.2 includes loss of consortium in the definition of "noneconomic damages," for which each defendant is liable only in direct proportion to that defendant's percentage of fault.)

EXAMPLE: Mr. Smith is injured in an automobile accident and sues the other driver (the defendant) for personal injury damages. Mrs. Smith joins in the lawsuit as a plaintiff, seeking loss of consortium damages from the defendant. The jury assigns fault percentages: 20 percent to Mr. Smith, 10 percent to Mrs. Smith (on grounds, for example, that she negligently failed to tell her husband that their car's turn signal was not working), and 70 percent to the defendant. The jury determines that Mr. Smith has suffered $4000 in economic damages and $6000 in noneconomic damages and that Mrs. Smith has suffered $5000 in loss of consortium damages (all noneconomic).

Judgment for Mrs. Smith: The trial judge renders a judgment for Mrs. Smith against the defendant for $3500 (70 percent of $5000, the defendant's percentage share of her loss of consortium damages). Given the reduction of Mrs. Smith's recovery, there is no basis for the defendant to obtain comparative indemnity from Mr. Smith.

Judgment for Mr. Smith: The trial judge renders a judgment for Mr. Smith, the defendant, for $3200 in economic damages (having reduced $4000 by Mr. Smith's 20-percent fault percentage), plus $4200 in noneconomic damages (70 percent of $6000).

Comparative indemnity judgment for the defendant against Mrs. Smith: If the defendant had cross-complained for comparative indemnity against Mrs. Smith, the trial judge might either (1) render a comparative indemnity judgment in favor of the defendant against Mrs. Smith for $400 (representing her 10-percent share of the economic damages suffered by Mr. Smith), (2) deduct this $400 from Mr. Smith's judgment, or (3) decide that a loss of consortium recovery is not subject to a comparative indemnity reduction.

Before the 1986 enactment of CC §1431.2 (as part of Proposition 51, the Fair Responsibility Act of 1986), courts had held that a defendant could claim equitable indemnity against a negligent spouse for his or her share of fault in producing the other spouse's loss of consortium damages. See *Ambriz v Kress* (1983) 148 CA3d 963, 196 CR 417; *Lantis v Condon* (1979) 95 CA3d 152, 157 CR 22. On the other hand, a federal court later declined to follow *Ambriz* and *Lantis*. See *General Motors Corp. v Doupnik* (9th Cir 1993) 1 F3d 862 (court reasoned that defendant can obtain comparative indemnity only from "concurrent tortfeasor"; spouse who suffered bodily injury that gave rise to other spouse's loss of consortium is not legally liable to other spouse for that loss; injured spouse is thus not concurrent tortfeasor with defendant.) As noted above, under Proposition 51, such a comparative indemnity claim against the injured spouse is no longer necessary; the third party's liability to the claimant spouse has already been reduced to reflect fault percentages attributed to both the injured and the claimant spouse. The final part of the above illustration indicates alternative approaches to comparative indemnity that might be argued if any part of the injured spouse's damages was economic damages.

TACTICS: A tortfeasor who seeks comparative indemnity from a claimant spouse to whom a fault percentage has been attributed might argue that the *Ambriz* and *Lantis* reasoning supports such a recovery and that the *Doupnik* reasoning is inapplicable because the claimant spouse should be regarded as a cotortfeasor with respect to the injured spouse's injury.

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§2.18 VI. TAX CONSEQUENCES

Payments received for personal physical injuries or physical sickness, whether by suit, settlement, or as a lump sum or periodic payments, are excludable from gross income (*i.e.,* are not taxable). IRC §104(a)(2). Arguably, most or all loss of consortium damages fall outside this exclusion, although it could be argued that the recovery should not be taxed because it does not generate a gain but merely makes the taxpayer whole by restoring personal capital after a tortious loss. See note in §1.112 and §§1.112-1.122 generally.

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Wrongful Death

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I. INTRODUCTION

§3.1 A. Scope of Chapter

This chapter discusses damages that qualified survivors may recover for the detriment they suffered because a family member (including a domestic partner) was killed by the wrongful act or neglect of another. See CCP §377.60. These wrongful death damages are distinct from bodily injury damages (see chap 1), even if a bodily injury lead to the death.

A wrongful death action brought by a decedent's survivor (or survivors) is distinct from, but may be joined and tried with, a survival action brought by a decedent's personal representative under CCP §377.30 for decedent's predeath harm and loss arising out of the same wrongful act or neglect. CCP §377.62. See chap 4 on an action by the decedent's personal representative or successor in interest for damages for detriment suffered by the decedent from the moment of injury until the moment of death.

NOTE: The cause of action for wrongful death exists today "only by virtue of legislative grace"; previously, personal injury claims expired when the victim (or the tortfeasor) died; it is a new cause of action that arises on a decedent's death, is vested in statutorily specified survivors, and is distinct from causes of action that survive the decedent. See *Quiroz v Seventh Ave. Ctr.* (2006) 140 CA4th 1256, 1263, 45 CR3d 222 (timely filed wrongful death action does not save, under "relation-back doctrine," late filed survivor (see chap 4) suit).

The court papers titled "Statement of Damages" and "Request for Statement of Damages," used in place of a "prayer" or "demand for judgment" in a superior court complaint for wrongful death (or personal injury) damages, are discussed in California Civil Procedure Before Trial §15.9 (4th ed Cal CEB 2004).

On venue in wrongful death actions, see Anno, 58 ALR5th 535 (1998).

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.2 B. Measure of Wrongful Death Damages

§3.2 B. Measure of Wrongful Death Damages

Successful wrongful death plaintiffs are entitled to recover damages that "under all the circumstances of the case, may be just." CCP §377.61 (excluding damages recoverable in a survival action). In considering what dollar amount would be just, it may be noted that:

- Damages are a compensation in money for detriment (CC §3281);
- Detriment is a loss or harm suffered in person or property (CC §3282);
- The measure of damages for the breach of an obligation not arising from contract is the amount that will compensate for all detriment proximately caused by the breach, whether or not it could have been anticipated (CC §3333);
- Damages can be recovered for future detriment only if the detriment is certain to result in the future (CC §3283; see §3.14); and
- Damages must be reasonable (CC §3359).

Wrongful death damages compensate "qualified survivors" (see §§3.3-3.11) for benefits they could reasonably have expected to receive from a decedent had he or she lived. See *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 520, 196 CR 82; *Allen v Toledo* (1980) 109 CA3d 415, 423, 167 CR 270.

Survivors are not limited to damages for pecuniary loss. *Krouse v Graham* (1977) 19 C3d 59, 67, 137 CR 863 (abolishing former restriction; spouse can recover not only for loss of support and other pecuniary items, but also for detriment similar to loss of consortium). See *DiRosario v Havens* (1987) 196 CA3d 1224, 1238, 242 CR 423 (parents' loss of comfort and society due to daughter's death). See §§3.29-3.33 on "loss of society" damages.

NOTE: By choosing not to limit the measure of wrongful death damages, California has chosen to strengthen the deterrent aspect of the civil sanction (in that the sting of unlimited recovery more effectively penalizes the culpable defendant and deters culpable conduct) rather than to protect defendants from excessive financial burdens. See *Hurtado v Superior Court* (1974) 11 C3d 574, 584, 114 CR 106 (policies behind wrongful death statute are (1) compensation for survivors, (2) deterrence of conduct, and (3) limiting recoverable damages).

See also *Barrett v Superior Court* (1990) 222 CA3d 1176, 1185, 272 CR 304 (wrongful death cause of action purely statutory; policies include compensating survivors, deterring wrongful conduct, and regulating amount of recoverable damages). Instructions on wrongful death damages include CACI 3921 (adult) and 3922 (minor).

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§3.3 C. Who May Recover: Qualified Survivors

Code of Civil Procedure §377.60 lists the persons entitled to recover wrongful death damages as:

> (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.
> (b) Whether or not qualified in category (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents.
> (c) A minor, whether or not qualified under categories (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for at least half of the minor's support.

A wrongful death action in California is wholly statutory; only those who are described in CCP §377.60 are proper claimants. See *Phraner v Cote Mark, Inc.* (1997) 55 CA4th 166, 63 CR2d 740 (noted in §3.5). Qualified survivors are not always subject to defenses that would have barred or limited a personal injury recovery by the decedent. See, *e.g.,* §15.27.

Under the statute, more than one person can be a qualified survivor entitled to participate in pursuing wrongful death damages. See, *e.g., Desplancke v Wilson* (1993) 14 CA4th 631, 17 CR2d 586 (section restates law of former section and clearly refers to both surviving spouse *and* children). See §3.17 on apportioning lump-sum awards.

A defendant's settlement of one survivor's wrongful death claim does not preclude liability in a later suit filed by another survivor. *Romero v PG&E* (2007) 156 CA4th 211, 67 CR3d 236 (mother settled with defendant; father, named as "nominal defendant" but never served, could sue settling defendant).

NOTE: Former law, through 1992, used the term "heirs" to specify the persons entitled to recover wrongful death damages. Now, the terms "qualified survivors" or "survivors" seem better suited to encompass the specifically described persons authorized by CCP §377.60 to pursue a claim for wrongful death damages. Of course, plaintiffs' attorneys have long preferred to use "survivor" rather than "heir" to avoid any suggestion that the plaintiff might inherit a substantial estate from the decedent.

The specification in CCP §377.60 of persons who may recover for the wrongful death of another does not include a person or entity whose only relation to the decedent is as employer. See *Knowlton v Pacific Southwest Airlines* (1980) 113 CA3d 152, 169 CR 668; *Owen v U.S.* (9th Cir 1983) 713 F2d 1461, 1468.

On whether the decedent's agreement to arbitrate certain claims (*e.g.,* for medical malpractice) binds a survivor to arbitrate a wrongful death damages claim (before pursuing a lawsuit for such damages), see California Tort Guide §9.75 (3d ed Cal CEB 1996). See also *Goliger v AMS Props., Inc.* (2004) 123 CA4th 374, 19 CR3d 819 (nursing home resident did not sign admission form containing arbitration clause nor authorize daughter to arbitrate; daughter's signature on form as "responsible party" did not require her to arbitrate).

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§3.4 1. Spouse; Domestic Partner

Wrongful death damages are recoverable by a surviving spouse or a surviving domestic partner. CCP §377.60(a). A person seeking wrongful death damages as the domestic partner of the decedent must meet detailed criteria for domestic partner status listed in Fam C §297. See CCP §377.60(f). For a death that occurred before January 1, 2002, if other criteria have been met, registration as domestic partners with the Secretary of State is not a necessary prerequisite to suit. CCP §377.60(f)(2); *Armijo v Miles* (2005) 127 CA4th 1405, 26 CR3d 623. See also *Holguin v Flores* (2004) 122 CA4th 428, 18 CR3d 749 (not unconstitutional to deny right to sue for wrongful death damages to domestic partner of decedent of opposite sex when neither partner was at least 62 years old).

NOTE: It appears that if the decedent had no surviving issue, a surviving spouse or domestic partner would ordinarily be entitled to wrongful death damages both in such status and as a person entitled to decedent's property by intestate succession.

A former spouse cannot recover wrongful death damages, being neither an intestate heir nor a putative spouse. *Villacampa v Russell* (1986) 178 CA3d 906, 224 CR 73 (statute does not deny equal protection; immaterial that decedent was obligated by dissolution judgment to pay spousal support during claimant's life or otherwise to make property division payments).

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§3.5 2. Child; Issue of Deceased Child

Wrongful death damages are recoverable by each of the decedent's natural or adopted children, and each child or other issue of a child who predeceased the decedent, whether a minor or an adult, and whether or not the decedent was survived by a spouse or domestic partner. CCP §377.60(a).

The fact that decedent's child was himself so mentally disabled that he could not understand that his father was dead does not preclude that child from recovering wrongful death damages. See *Knowles v Superior Court (Labo)* (2004) 118 CA4th 1290, 1302, 13 CR3d 700 (also noted in §§3.16, 3.29).

NOTE: After a mother's death, a court may prefer to name her mother as guardian ad litem for her minor children, rather than (1) the children's father, whose own lawsuit against the alleged tortfeasor raises the possibility of a conflict of interest, or (2) the father's parents. See *Williams v Superior Court (Mayes)* (2007) 147 CA4th 36, 54 CR3d 13.

A legally adopted child may recover damages for the wrongful death of an adopting parent, but a child adopted by persons other than his or her biological parent may not recover damages for a biological parent's death. *Phraner v Cote Mark, Inc.* (1997) 55 CA4th 166, 63 CR2d 740 (not enough that child knew biological mother and communicated with her). Further, a court order terminating a biological mother's parental rights leaves her child without standing to recover wrongful death damages for the mother's later death. *Jackson v Fitzgibbons* (2005) 127 CA4th 329, 25 CR3d 478.

A child born out of wedlock after his or her father's death may recover wrongful death damages by establishing paternity by clear and convincing evidence. See *Cheyanna M. v A.C. Nielsen Co.* (1998) 66 CA4th 855, 78 CR2d 335 (interpreting and applying Prob C §6453; not required that father had openly held out child as his own).

NOTE: The equal protection clause of the 14th Amendment to the United States Constitution requires that heirs be defined to include a father's unadopted, unacknowledged, illegitimate children. *Arizmendi v System Leasing Corp.* (1971) 15 CA3d 730, 737, 93 CR 411. Statutory changes have eliminated former distinctions between succession rights of illegitimate and legitimate children. See Prob C §§6450-6455; Fam C §§7600-7730 (Uniform Parentage Act).

The fact that the decedent bequeathed his or her entire estate, which was all community property, to the surviving spouse does not prevent the decedent's nondependent adult children from recovering wrongful death damages with the spouse. *Desplancke v Wilson* (1993) 14 CA4th 631, 635, 17 CR2d 586 (recovery not limited to persons who in fact *had* inherited from decedent, but includes those who would have inherited under rules of intestate succession; CCP §377.60 restates law of former section and clearly refers to both surviving spouse *and* children).

See Annos, 87 ALR3d 849 (1978) (action against one parent by unemancipated minor for wrongful death of other parent), 78 ALR3d 1230 (1977) (right of illegitimate child to recover for wrongful death of putative father).

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§3.6 3. Putative Spouse; Putative Spouse's Child; Stepchild

Wrongful death damages are recoverable by, if they were dependent on the decedent, (1) a "putative spouse" (a "surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid"), (2) a putative spouse's child, and (3) the decedent's stepchild. CCP §377.60(b). (Absent dependence, such a person's wrongful death damages claim could only be based, under CCP §377.60(a), on being entitled to the decedent's property by intestate succession.)

A woman who exchanges personal marriage vows with a man, believing in good faith that she is creating a valid marriage, and then lives with the man, holding herself out as married, is a putative spouse and is, if dependent on him, entitled to damages for his wrongful death. See *Wagner v County of Imperial* (1983) 145 CA3d 980, 193 CR 820 (no actual solemnization ceremony required).

The good faith of a claimant's belief that there was a valid marriage is tested by an objective standard; the belief must have been reasonable. See *Estate of DePasse* (2002) 97 CA4th 92, 118 CR2d 143 (survivor could not have had objectively reasonable, good faith belief that marriage ceremony conducted by hospital chaplain day before decedent's death created lawful marriage absent previously issued marriage license); *Welch v State* (2000) 83 CA4th 1374, 1377, 100 CR2d 430 (claimant and decedent made no attempt to procure marriage license or formally solemnize their union; although sharing income, expenses, and property, reasonable person in claimant's position would not have believed they were lawfully married); *Centinela Hosp. Med. Ctr. v Superior Court* (1989) 215 CA3d 971, 263 CR 672 (plaintiff could not reasonably have believed that common-law marriage in California was valid).

TACTICS: Counsel who cannot establish that a survivor is a spouse, domestic partner, or putative spouse (or the child of a putative spouse) may yet be able to prove that a couple's relationship qualified as a valid common-law marriage recognized in a jurisdiction in which a couple lived. Further, the minor children of a common-law spouse may qualify as wrongful death action plaintiffs under CCP §377.60(c) if they lived in the decedent's household for 180 days before the death and were dependent on the decedent for one half or more of their support. See §3.8.

Standing to seek wrongful death damages is not held by a woman whose legal relationship to the decedent was a union recognized under Mexican law as "concubinage," even though the couple had lived together for years, had children together, and otherwise acted as if they were married. *Rosales v Battle* (2003) 113 CA4th 1178, 7 CR3d 13 (legal relationship of concubinage did not amount to common-law marriage).

A plaintiff cannot ordinarily recover damages for the wrongful death of a nonspouse or non-domestic partner (see §3.4), even though the two lived together for years, pooled earnings, agreed to share property equally, bought a house together, were engaged to be married, and had set a wedding date. See *Garcia v Douglas Aircraft Co.* (1982) 133 CA3d 890, 184 CR 390 (no denial of equal protection); *Harrod v Pacific Southwest Airlines* (1981) 118 CA3d 155, 173 CR 68 (in barring meretricious spouse from recovery, predecessor statute not unconstitutional); *Aspinall v McDonnell Douglas Corp.* (9th Cir 1980) 625 F2d 325 (decedent's common-law wife and her children not entitled to recover wrongful death damages for his death, even though decedent and plaintiff had lived together as man and wife for 4 years, he had been essentially her sole source of support, he had no living parents, issue, or collateral heirs, he left his entire estate to her by will, and he named her as executor). See also *Nieto v City of Los Angeles* (1982) 138 CA3d 464, 188 CR 31 (barring wrongful death damages to mother of decedent's publicly acknowledged child not unconstitutional).

See Anno, 68 ALR3d 1220 (1976) (action by stepchild for wrongful death of stepparent).

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.7 4. Parent

§3.7 4. Parent

The parent of a deceased person may recover wrongful death damages if he or she would be entitled to the decedent's property by intestate succession. CCP §377.60(a). See *Coats v K-Mart Corp.* (1989) 215 CA3d 961, 969, 264 CR 12 (mother had to show that decedent had no surviving spouse, child, adopted or illegitimate child, or issue of child). Alternatively, a parent may recover wrongful death damages by establishing dependence on the decedent. CCP §377.60(b). A stepparent who is neither an heir nor a dependant is excluded. See *California State Auto. Ass'n v Jacobson* (1972) 24 CA3d 850, 101 CR 366.

A father may recover damages for the wrongful death of his illegitimate child even if the father had not acknowledged paternity in writing before the child's death. See *Lozano v Scalier* (1996) 51 CA4th 843, 59 CR2d 346 (father had otherwise acknowledged his paternity and was person entitled to child's property by intestate succession).

The survival of the decedent's child—even for a short time—ordinarily precludes a parent who was not dependent on the decedent from recovering wrongful death damages. See *Chavez v Carpenter* (2001) 91 CA4th 1433, 1443, 111 CR2d 534 (child died 1 month after decedent without having filed suit; fact question whether parent could recover as dependent on decedent who gave them money and services).

NOTE: The *Chavez* court suggested that the decedent's child's survival by more than 120 hours would be enough to preclude recovery as the decedent's heir. The court conceded that, as the statute is worded, the child's death gave the defendant who caused her father's death an "undeserved windfall" inasmuch as little in wrongful death damages could be recovered by the child's estate for the month that the child outlived her father.

A person suing as a dependent must show some actual dependence on the decedent for the "necessaries of life"—*i.e.,* for such things as shelter, clothing, food, and medical treatment—and not merely the receipt of emotional support or even of financial support that makes available to the parent some of the "niceties of life" that the parent could not otherwise afford. *Perry v Medina* (1987) 192 CA3d 603, 610, 237 CR 532 (evidence that son gave $50 each month plus some food to mother whose income was $400 per month raised factual question of dependence). See also *Hazelwood v Hazelwood* (1976) 57 CA3d 693, 698, 129 CR 384 (decedent was survived by wife and child; parents' dependence on him for comfort, affection, and future pecuniary advantages not enough to make them dependents).

A parent's action for wrongful death damages must be consolidated with an action brought by other survivors or by a personal representative. *Mayerhoff v Kaiser Found. Health Plan, Inc.* (1977) 71 CA3d 803, 138 CR 319. See *Estate of Kuebler v Superior Court* (1978) 81 CA3d 500, 146 CR 481 (right of one parent to maintain action for death of children after other parent had agreed to settlement).

A "putative parent" cannot recover wrongful death damages. See *Reynolds v City of Los Angeles* (1986) 176 CA3d 1044, 222 CR 517 (man who, with wife, took custody of 3-day-old child but never adopted her precluded when child killed at age 17; immaterial whether adoption was pending or, had there been adoption, parent would have been child's sole intestate heir). See also *California State Auto. Ass'n v Jacobson* (1972) 24 CA3d 850, 101 CR 366 (stepparent precluded from wrongful death recovery). See §3.6 on recovery right of dependent stepchild.

See Anno, 26 ALR4th 396 (1983) (effect on one parent's right to recover of other parent having contributed to causing child's death).

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.8 5. Minor Who Lived With Decedent

§3.8 5. Minor Who Lived With Decedent

Wrongful death damages are recoverable by a minor who, when the decedent died, had resided in the decedent's household for the previous 180 days and had been dependent on the decedent for at least one-half of his or her support. CCP §377.60(c). See *Smallwood v American Trading & Transp. Co.* (ND Cal 1994) 868 F Supp 280, 283 (no recovery by children who lived with decedent absent proof that he furnished at least one-half their support).

TACTICS: Counsel must be sure to ask a surviving spouse or child whether nieces, nephews, or other minors may have been living with and supported by the decedent, as is not uncommon in many cultures.

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§3.9 6. Grandparent, Sibling, or Other Intestate Heir

Wrongful death damages may be recovered by a decedent's grandparent who would be entitled to the decedent's property by intestate succession. CCP §377.60(a). See *Frazier v Velkura* (2001) 91 CA4th 942, 110 CR2d 918 (grandparents of 3-year-old born with serious congenital disabilities who had obtained court order terminating parents' parental rights).

TACTICS: Whether or not there was a surviving spouse, if no children (issue) survived the decedent, it could be prudent to name the decedent's brothers and sisters (and nieces and nephews) as plaintiffs. Under Prob C §6401(c)(2)(B), such persons—at least if it can be shown that the decedent died possessed of separate property—qualify under CCP §377.60(a) as intestate successors "if there is no surviving issue of the decedent." See also §§3.10-3.11.

See Anno, 84 ALR5th 687 (2000) (nonparent's recovery of loss of consortium damages on minor's death).

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.10 7. Heir by Disclaimer

§3.10 7. Heir by Disclaimer

Under California inheritance law, estate beneficiaries may disclaim their interest in the decedent's estate. Prob C §275. The disclaiming party is treated as if he or she predeceased the decedent, so that those next in line as interested heirs are entitled to inherit the disclaimed interest unless the decedent otherwise provided by will under Prob C §§6100-6390.

Code of Civil Procedure §377.60 permits wrongful death recoveries by persons who would be entitled to the property of the decedent by intestate succession (in the absence of a surviving spouse, child, or issue).

NOTE: Before 1997, it was the rule that an heir who could claim a probate estate only by reason of another's disclaimer was *not* entitled to sue for the decedent's wrongful death. See *Lewis v Regional Center of E. Bay* (1985) 174 CA3d 350, 220 CR 89 (grandparents who raised child could not sue for his wrongful death even though child's parents and half-brothers had filed written disclaimers of heirship).

A rationale for the rule has been that a disclaimer of interest in the decedent's property did not waive other indices of heirship—including the right to sue for wrongful death. See *Mayo v White* (1986) 178 CA3d 1083, 224 CR 373 (sisters and brother of child who died at age three could not maintain action for wrongful death, even though child's parents had renounced heirship; but special administrator of child's estate permitted to amend complaint to name parents as heirs). See §3.11.

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§3.11 8. Personal Representative

The decedent's personal representative may, under CCP §377.60, pursue a wrongful death cause of action "on … behalf" of the persons specified in the section. See §3.3 for a list of such persons. Any damages recovered, however, are for the detriment suffered by the qualified survivors; they are not an asset of the estate and must be distributed to or held for the benefit of such survivors. *Mayo v White* (1986) 178 CA3d 1083, 1091, 224 CR 373.

A personal representative who brings a wrongful death action on behalf of supposed heirs (*e.g.,* the siblings of a minor decedent) may sometimes later amend to substitute the names of the actual heirs (*e.g.,* the parents). See *Mayo v White, supra* (amended complaint "relates back").

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D. Limits on Damages

§3.12 1. Excessiveness; Foreign Law Limits

A verdict or judgment for wrongful death damages can be set aside or reversed if the damages are based on inapplicable factors or are otherwise excessive. See, *e.g., Tramell v McDonnell Douglas Corp.* (1984) 163 CA3d 157, 171, 209 CR 427 (evidence that jurors inflated award (1) in the mistaken belief that the award was taxable income to the survivors and (2) to provide for payment of attorney fees). See Annos, 45 ALR4th 1076 (1986) (excessive damages for minor's death), 48 ALR4th 229 (1986) (excessive damages for death of retired persons).

A former limitation, that wrongful death damages could be recovered only for pecuniary loss, has been abolished. *Krouse v Graham* (1977) 19 C3d 59, 67, 137 CR 863. See §3.2 on the currently applicable measure of wrongful death damages. See §§3.21-3.37 on elements for which damages may be recovered.

NOTE: In contrast to wrongful death damages under CCP §377.61, a claimant for benefits under the Victims of Crime Act (Govt C §§13959-13969.2) must prove out-of-pocket pecuniary loss resulting in serious financial hardship. *Blazevich v State Bd. of Control* (1987) 191 CA3d 1121, 1126, 237 CR 35 (no recovery, other than funeral expenses, for death of unemployed mother absent showing of expenditures for substitute services).

Monetary limitations placed on the amount of wrongful death damages by the laws of other states and countries are not applied to limit the recoveries of the survivors of persons from such jurisdictions who sue California defendants for a death that occurs here. See *Hurtado v Superior Court* (1974) 11 C3d 574, 114 CR 106. But see *Harris v Polskie Linie Lotntcze (Polish Airline Lot)* (9th Cir 1987) 820 F2d 1000 (Polish damages law limited survivors to funeral expense and lost financial support, past and future).

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§3.13 2. Medical Malpractice Liability

Civil Code §3333.2(b) limits noneconomic losses to $250,000 in any action for personal injury or wrongful death against a health care provider based on professional negligence. See §15.42.

The $250,000 limit is not applied to each survivor in the wrongful death action individually, but to all survivors in the aggregate. *Yates v Pollock* (1987) 194 CA3d 195, 200, 239 CR 383.

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.14 3. Future Detriment: Discounting to Present Value

§3.14 3. Future Detriment: Discounting to Present Value

A qualified survivor can recover damages for all detriment certain to result in the future, *i.e.,* subsequent to the time that proof of damages is made. CC §3283. "Certain to result in the future" means that the plaintiff must prove that the future damages are reasonably certain to occur. Damages must not be given for possible, but conjectural, loss or harm. *Varjabedian v City of Madera* (1977) 20 C3d 285, 294, 142 CR 429 (trial court properly treated certainty of future loss of loan as question of fact for jury, which was properly submitted in terms of "reasonable certainty"). See CACI 3903A-3903C. See generally §1.108.

TACTICS: It can be argued that, in a sense, all wrongful death damages except funeral and related expenses are prospective in that they are measured according to each survivor's reasonable expectation of benefit at the time of the decedent's death. The need to show reasonable certainty applies to the detriment to be suffered after trial.

Probable future benefits include the value of future contributions; of any personal service, advice, or training that probably would have been given; and of the decedent's society, companionship, comfort, and protection. *Syah v Johnson* (1966) 247 CA2d 534, 546, 55 CR 741.

The jury must reduce wrongful death damages, including damages awarded for future lost support, to present value. *Fox v Pacific Southwest Airlines* (1982) 133 CA3d 565, 569, 184 CR 87. The defendant must be permitted to present expert testimony on the proper discount rate to be used. When an actuary or economist testifies to present value, however, that evidence is not conclusive. Other factors must be considered also, *e.g.,* the decedent's health or likelihood of living as long as the average person. *Emery v Southern Cal. Gas Co.* (1946) 72 CA2d 821, 165 P2d 695. See CACI 3904. See generally §1.90.

Damages for total future support that survivors expected from a decedent "must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 521, 196 CR 82. A discount rate derived from evidence of the probable return on investments in taxable securities is then used to determine the present value of future support. See 148 CA3d at 523 n4. For discussion of cases excluding tax consequences from jury's consideration, see concurring opinion at 148 CA3d at 539.

Although the value of money and future earnings will be affected by fluctuating economic conditions, they are the subject of scholarly analysis, recordation, and prediction. An appellate court upholding the amount of an award may properly consider the reduced purchasing power of the dollar and a recent sharp increase in wages that may be expected to continue. *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 454, 120 CR 787 ($50,000 to teenage sons living with former wife of deceased railroad worker not excessive). There must be competent evidence, however, concerning the effect of inflation. See *Vesey v U.S.* (9th Cir 1980) 626 F2d 627, 631.

On effect of economic trends in personal injury actions, see §1.107.

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E. Procedural Considerations

§3.15 1. Joining All Qualified Survivors

The action authorized by CCP §377.60 is single, joint, and indivisible, and is to be exercised by all survivors; the single-action rule requires that all wrongful death claimants be joined in one action. See *Ruttenberg v Ruttenberg* (1997) 53 CA4th 801, 807, 62 CR2d 78 (wrongful death plaintiffs who knew of another possible qualified survivor, but who do not include that person in lawsuit, subject to excluded survivor's later damages claim).

TACTICS: Plaintiffs' counsel sometimes face the problem of ensuring the inclusion of all potential qualified survivors in a single suit without unnecessarily endangering or diluting a client's recovery. A survivor who declines to be included as a plaintiff can be named as a defendant. The attorney for one client (or group of clients) who knows of rival claimants represented by another attorney (*e.g.,* children of former spouse versus later spouse and children) may again name the rivals as defendants. Suits based on the same death will be consolidated. Generally, the attorney retained by one parent to pursue an action for the wrongful death of a child owes no duty to notify the other parent of the suit. See *Hall v Superior Court (Lindrum)* (2003) 108 CA4th 706, 133 CR2d 806 (parents were spouses living separately when attorney consulted by wife and when suit commenced).

A defendant who settles a lawsuit brought by several heirs, knowing that another heir exists, may be liable to the other heir in a separate lawsuit. *Valdez v Smith* (1985) 166 CA3d 723, 212 CR 638. See *Gonzales v Southern Cal. Edison Co*. (1999) 77 CA4th 485, 91 CR2d 530 (defendants who knew of omitted heir's existence but failed to include him in settlement of initial wrongful death action precluded from later invoking one-action rule to terminate omitted heir's claim). But see *Smith v Premier Alliance Ins. Co.* (1995) 41 CA4th 691, 48 CR2d 461 (defendant's insurer that paid policy limits to settle with one heir not subject to further claims by other heirs).

NOTE: The "each person" limit in a defendant's liability insurance policy limits the insurer's obligation to indemnify for the death of one person even if there are multiple survivors whose combined awards exceed that limit. See *United Servs. Auto. Ass'n v Lilly* (1990) 217 CA3d 1396, 266 CR 691.

See Anno, 21 ALR4th 275 (1983) (effect of settlement with one wrongful death beneficiary on tortfeasor's liability to other beneficiaries).

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§3.16 2. Meeting Time Requirements

Ordinary wrongful death lawsuits are governed by the 2-year limitations period in CCP §335.1. The 2-year period only applies to an injury that occurred on or after January 1, 2002. *Andonagui v May Dep't Stores Co.* (2005) 128 CA4th 435, 27 CR3d 145. A wrongful death cause of action ordinarily accrues on the date of death. *Norgart v Upjohn Co.* (1999) 21 C4th 383, 404, 87 CR2d 453 (dictum suggests that some wrongful death causes of action may accrue on later date plaintiff "comes at least to suspect, or have reason to suspect, a factual basis for its elements").

Lawsuits for death caused by alleged medical malpractice are subject to limitations periods specified in CCP §340.5. See *Knowles v Superior Court (Labo)* (2004) 118 CA4th 1290, 13 CR3d 700 (survivors suspected that death was caused by medical negligence and sued some defendants; separate suit filed against present defendant more than 1 year after initial knowledge). On limitations in medical malpractice cases, see generally California Tort Guide §§9.67-9.72 (3d ed Cal CEB 1996).

Under CCP §340.8(b), which was enacted with a legislative intent to codify the rulings in *Norgart* and other cases, an action for wrongful death based on exposure to a hazardous or toxic substance (other than asbestos—see CCP §340.2) must be commenced no later than 2 years from the later of (1) the date of death, or (2) the first date on which the plaintiff became (or reasonably should have become) aware of (a) the physical cause of the death and (b) "sufficient facts to put a reasonable person on inquiry notice that the death was caused or contributed to by another."

Each qualified survivor must assert his or her cause of action for wrongful death damages within the applicable limitations period. *San Diego Gas & Elec. Co. v Superior Court (Harris)* (2007) 146 CA4th 1545, 1552, 53 CR3d 722 ("relation back" doctrine inapplicable to allow surviving spouse, after 2-year limitations period on her claim had expired, to be added as plaintiff in wrongful death lawsuit timely filed by decedent's parents; spouse may, however, seek to show that running of period was otherwise tolled). See *Andersen v Barton Mem. Hosp.* (1985) 166 CA3d 678, 212 CR 626 (3-year malpractice statute (CCP §340.5); person claiming to be heir can be barred from untimely intervention in timely action filed by other heirs).

Before a public entity can be sued for wrongful death damages, a timely claim for each claimant must have been presented to the entity (ordinarily within 6 months of the decedent's death). See *Norwood v Southern Cal. Rapid Transit Dist.* (1985) 164 CA3d 741, 211 CR 6 (first heir given benefit of later timely claim filed for all heirs; 6-month statute of limitations for filing complaint after claim presented began to run when claim by all heirs rejected, not when earlier claim by one heir rejected). See generally California Tort Guide §8.57 (3d ed Cal CEB 1996).

A separate time requirement is that a lawsuit must be brought to trial within 5 years after the complaint was filed (excluding periods during which the running of the period was tolled). See CCP §§583.310 and 583.360. The filing of a complaint by an injured person who dies of the injury before trial does not, however, start the running of the period as to survivors' wrongful death damages claims. *Brumley v FDCC Cal., Inc.* (2007) 156 CA4th 312, 67 CR3d 292 (see also §4.1).

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§3.17 3. Apportioning Lump-Sum Award

Each qualified survivor has a separate cause of action for the decedent's death and must prove the extent of loss personally suffered because of the death, but all survivors' causes of action against each defendant are to be tried together in a single or consolidated action. See *Valdez v Smith* (1985) 166 CA3d 723, 212 CR 638 (noted in §3.15). See also *Helling v Lew* (1972) 28 CA3d 434, 104 CR 789 (settlement by all heirs with one defendant does not preclude maintenance of action against another defendant).

Damages for all heirs are awarded in a lump sum. See CACI 3921, 3922. The trial court retains jurisdiction and has a duty to conduct a separate proceeding to apportion the lump-sum judgment among the heirs according to the loss proved for each. *Watkins v Nutting* (1941) 17 C2d 490, 498, 110 P2d 384. The damages are not divided according to the laws of intestate succession. *Estate of Riccomi* (1921) 185 C 458, 462, 197 P 97.

TACTICS: An attorney who represents two or more qualified survivors must sometimes use care and skill to assure a fair division among them, or must, having presented to the jury the strongest case for each survivor's individual loss, refrain from recommending an apportionment, leaving that task entirely to the trial judge. See *Collins v Hemet Valley Hosp. Dist.* (1986) 186 CA3d 922, 231 CR 92 (on petition for approval of minor's settlement, trial court lacked authority to rule that decedent's parents were not dependent, and thus to award entire settlement to decedent's child, but court could make apportionment different from proposed 50-50 split, one that reflected minimal nature of parent's dependence). See also *Hernandez v Fujioka* (1974) 40 CA3d 294, 114 CR 844 (no error in allocating award one-third to father and one-third to each child, and providing for payment of attorney fees from children's shares).

Apportionment of a jury's lump-sum award among claimants is properly done by the trial judge, as is contemplated by CCP §377.61, which states that the court shall determine the respective rights in an award of the persons entitled to assert the wrongful death cause of action, rather than the jury; this is consistent with the efficient administration of justice and not a denial of the claimants' right to jury trial. See *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 529, 196 CR 82 (in appropriate cases trial court can (1) submit special interrogatories requesting jury to allocate lump sum to individual claimants, with jury's findings binding on court if so stipulated, or (2) instruct jury to return separate verdicts (148 CA3d at 536)). The *Canavin* court noted the drawbacks of placing on jurors the added burden of allocating a total award among possibly contentious plaintiffs. See 148 CA3d at 535. See also *Kim v Yi* (2006) 139 CA4th 543, 42 CR3d 841 (survivors who settled wrongful death claim not entitled to apportionment of proceeds by jury).

A superior court judge has jurisdiction to divide wrongful death settlement proceeds (as well as damages awarded by verdict) between a decedent's surviving spouse and the decedent's surviving adult daughter from a previous marriage; the judge's division may be based on a variety of considerations, including evidence that decedent was contemplating divorce from the spouse. *Corder v Corder* (2007) 41 C4th 644, 61 CR3d 660 (reversing allocation of 90 percent to daughter and 10 percent to spouse based on statements made by daughter's witnesses; judge should have looked for corroborating evidence, such as whether decedent had contacted divorce lawyer, and should recognize surviving spouse's right to support).

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§3.18 4. Reducing Damages for Comparative Fault

The damages awarded for each qualified survivor must be reduced by the percentage of any legal fault attributed to that survivor that contributed to causing the decedent's death. See *Li v Yellow Cab Co.* (1975) 13 C3d 804, 829, 119 CR 858 (damages "shall be diminished in proportion to the amount of negligence attributable to the person recovering"). Damages awarded for one heir's loss should not be reduced, however, because of another heir's negligence. See *Kasunich v Kraft* (1962) 201 CA2d 177, 185, 19 CR 872, 877 (under pre-*Li* contributory fault rule, heir's contributory negligence barred, rather than reduced, damages awarded for that heir's claim).

Courts have ruled that even after *Li,* heirs' damages are to be reduced in proportion to the decedent's contributory fault. See *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 138 CR 705, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607; *Lemos v Eichel* (1978) 83 CA3d 110, 147 CR 603. See CACI 407. Note that before *Li*, the decedent's contributory negligence was a defense to a wrongful death action. See *Buckley v Chadwick* (1955) 45 C2d 183, 201, 288 P2d 12, 289 P2d 242 (dissenting opinion). For further discussion, see §§15.3, 15.8, 15.11.

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.19 5. Recovering Prejudgment Interest

§3.19 5. Recovering Prejudgment Interest

Plaintiffs in a wrongful death action are entitled under CC §3288 to recover prejudgment interest on those portions of wrongful death damages attributable to an ascertainable economic value (*e.g.,* funeral and related expenses, loss of household services, loss of earnings), although not on those portions attributable to noneconomic mental or emotional loss (*e.g.,* loss of comfort, society, companionship, care, or protection). *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 527, 196 CR 82 (prejudgment interest recoverable from date of death to date of verdict). See *In re Pago Pago Aircrash* (CD Cal 1981) 525 F Supp 1007, 1018. See also §§1.91-1.93.

TACTICS: Counsel may request that the trial court ask the jury to answer a special interrogatory on the amount awarded for past economic loss (from date of death to date of verdict) and then to award, in its discretion, prejudgment interest on that amount. See *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 528, 196 CR 82.

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§3.20 F. Death During or Before Birth

An action may be maintained by qualified survivors for the wrongful death of a child who is born alive, even if death occurred shortly after birth and resulted from an injury inflicted before birth or during the birth process. See *Sesma v Cueto* (1982) 129 CA3d 108, 113, 181 CR 12. For extended discussion, see chap 5.

California does not, however, permit the recovery of wrongful death damages for the death of a fetus, even a viable fetus, that is not born alive. *Justus v Atchison* (1977) 19 C3d 564, 577, 139 CR 97, disapproved on other grounds in *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661; *Bayer v Suttle* (1972) 23 CA3d 361, 100 CR 212. See Anno, 15 ALR3d 992 (1967). A fetus, even one that could have lived had it been removed from the womb, is not a "person" under CCP §377.60. *Reyna v City & County of San Francisco* (1977) 69 CA3d 876, 138 CR 504. See Anno, 84 ALR3d 411 (1978) (right to recover damages for death of unborn child).

NOTE: Parents in such situations may have a cause of action for emotional distress damages, under principles governing recovery by "bystanders" who perceive injury to a loved one and negligent infliction of emotional distress, if, *e.g.*, the parents were present when the fetus was injured through medical malpractice. For extended discussion, see chap 6.

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II. RECOVERABLE ELEMENTS

§3.21 A. Financial Support; Contributions

A survivor is entitled to damages for the financial contributions expected from the decedent that are lost by the decedent's death. *Carr v Pacific Tel. Co.* (1972) 26 CA3d 537, 545, 103 CR 120. The trier of fact may consider the decedent's earning capacity (see §3.50), not merely the decedent's actual earnings, as well as the decedent's work life expectancy (see §3.48), in determining the amount of support the decedent would have contributed to heirs during the decedent's life and theirs. *Weiand v Southern Pac. Co.* (1939) 34 CA2d 500, 510, 93 P2d 1023.

TACTICS: A plaintiff may argue that damages for loss of financial support should not be narrowly construed to mean only what would have been expended for food, clothing, housing, medical care, and other necessities. It includes all financial contributions the decedent could have been expected to make to and on behalf of the survivor for each of the years of their joint expected lives, whether the decedent was obligated to make the payments or not. See §3.53.

A plaintiff's evidence of lost financial support may include evidence of pension and social security benefits the decedent received before death, even if, under pension terms and social security law all or part of such benefits continue to be paid to the plaintiff; further, the collateral source rule (see §15.22) precludes the defendant from (a) introducing evidence of such continued payments to the plaintiff and (b) setting off the amount of such payments against damages for lost support. *McKinney v California Portland Cement Co.* (2002) 96 CA4th 1214, 1222, 117 CR2d 849. A decedent's retirement income from a pension or social security can be considered in determining probable contributions to survivors. See *McQuillan v Southern Pac. Co.* (1974) 40 CA3d 802, 115 CR 418 (state pension benefits not to be deducted from heir's recovery even though state is defendant). See Anno, 81 ALR2d 949 (1962).

The value of lost support should be based on the decedent's projected gross earnings, not on net earnings after taxes. *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 539, 196 CR 82.

Loss of future financial support must be reduced to present cash value. See *Smith v Moffat* (1977) 73 CA3d 86, 140 CR 566; *Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 454, 120 CR 787. See §3.14 on discounting to present value.

NOTE: Damages for financial support based on evidence of the decedent's total earning capacity appear to be subject to reduction for what would have been the decedent's own personal consumption, *i.e.,* the part of the income that would not ordinarily have supported the surviving heirs. See *Howard v Crystal Cruises, Inc.* (9th Cir 1994) 41 F3d 527 (applying personal consumption reduction in case brought under federal Death on the High Seas Act (46 USC §§30302-30308); *U.S. v English* (9th Cir 1975) 521 F2d 63, 70 (noted in §3.50). But see, for a contrary argument, Engel, *Consumption Reduction Is Not Relevant in a Wrongful Death Action*, 25 CAOC Forum 16 (Apr. 1995).

TACTICS: Facts to consider in computing the future earnings of a decedent whose income comes from managing the decedent's own investments are discussed in *Vesey v U.S.* (9th Cir 1980) 626 F2d 627. On decedent's personal consumption, an economist testifying for the plaintiff can be asked to estimate the decedent's personal consumption based on national averages according to the family's income. The surviving spouse can testify that most household expenses remain the same despite the decedent's death or, in fact, that some expenses, such as home maintenance, have increased. It is usually impractical, and awkward, to ask the surviving spouse and children to compute the portion of the family's expenses relating to, *e.g.,* food, housing, or transportation that are saved because the decedent is dead.

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§3.22 1. By Spouse

A wife, whatever her own earnings or earning capacity, is entitled to damages for the loss of that part of her deceased husband's prospective earnings that would have supported her and enhanced the quality of her life. A wife's loss of financial contributions is based on the present value (see §3.14) of the earnings the husband would have contributed to the family during his life expectancy. *Syah v Johnson* (1966) 247 CA2d 534, 547, 55 CR 741.

The same rule applies when a husband sues for the wrongful death of his wife. Even though the husband's earnings are adequate to support, and have been supporting, the family, he is entitled to damages for loss of that portion of his wife's earnings that would have allowed his earnings to be used for savings or for living a more interesting and comfortable life. See *Martin v Mansfeldt* (1950) 100 CA2d 327, 223 P2d 501.

TACTICS: Note that although the discussion in *Steed v Imperial Airlines* (1974) 12 C3d 115, 115 CR 329, of who may recover damages for a wrongful death has been superseded by the legislation discussed in §§3.3-3.11, *Steed* still provides some authority for an argument that a *spouse's* recovery for loss of financial contributions may include the amount of contributions expected to be made by the decedent to the support of a nonheir who is dependent on the surviving spouse.

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§3.23 2. By Child

A child is entitled to damages for loss of either parent's expected financial contributions during each year of their joint expected lives. See *Syah v Johnson* (1966) 247 CA2d 534, 547, 55 CR 741. During the time the child would have been dependent on the parent for principal support, the child may measure financial loss as a share of the deceased parent's likely earnings.

Substantial dependence on a parent does not necessarily end when a child reaches majority if the child is a student or is disabled. Even an adult child who is a wage earner suffers damage when the death of a parent cuts off financial contributions the parent was expected to make or to continue making. *Peters v Southern Pac. Co.* (1911) 160 C 48, 68, 116 P 400.

Any probable dependency on the deceased parent past a child's majority or other financial expectations that can be proved (*e.g.,* costs of housing, automobile, insurance, or loans without interest) can be recovered as part of the child's loss of support. When a child is self-supporting or marries and is supported by a spouse, the child's claim for damages for loss of financial contributions must be based on evidence that the contributions could be expected to have been made. *Duclos v Tashjian* (1939) 32 CA2d 444, 453, 90 P2d 140.

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§3.24 3. By Parent

The loss of financial contributions or benefits suffered by a parent because of the death of a child must be determined according to the circumstances of each case. *Daggett v Atchison, T. & S.F. Ry.* (1957) 48 C2d 655, 666, 313 P2d 557.

Parents of an unemancipated minor child may introduce evidence of the child's earning capacity on the theory that they would have been entitled to their child's earnings during his or her minority, or at least that they would have shared in the financial benefits to the family unit resulting from those earnings. Parents may show that they were actually receiving financial contributions from a deceased child, whether minor or adult, and that they could reasonably have expected to continue receiving the contributions had the child lived. *Karwoski v Grant* (1938) 30 CA2d 171, 179, 85 P2d 944. Parents may also recover for the support and financial benefit it is reasonably certain they would have received after the child's majority during the period of their common life expectancy. See CACI 3922.

A surviving parent need not show dependence on the child, except to the extent that a parent who is not a sole heir must show dependence in order to have a cause of action under CCP §377.60. See §3.7. Even parents who seem fully able to support themselves may encounter adversity and have to rely on the financial contributions of a child, and damages for the child's wrongful death may reflect the loss of this potential security. See *Little v Yanagisawa* (1924) 70 CA 303, 307, 233 P 357. See generally Anno, 49 ALR3d 934 (1973) (damages for minor's death).

TACTICS: Presenting such a claim at trial could be time-consuming and counterproductive absent clear evidence of a child's disproportionate earning power, the parents' disability, or some other factor that makes future dependency on the child for support a likely and provable item of damages. The amount recoverable for loss of financial support would be so small in comparison to potential noneconomic damages for loss of the love and companionship of the child as to undermine the plaintiff's credibility. Thus, the plaintiff should consider waiving these damages, even though provable, and instead emphasize damages based on the close relationship that actually existed between the parent and child. See §§3.29, 3.32.

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.25 4. By Other Survivor

§3.25 4. By Other Survivor

A brother, sister, or other heir entitled to the decedent's property by intestate succession (see §3.9) may prove damages by showing an expectation of financial contributions from the decedent. Nominal damages only may be given to an heir who proves no other loss. See *Wilson v City & County of San Francisco* (1951) 106 CA2d 440, 444, 235 P2d 81 (sister as housekeeper and heir of her priest brother, proved dependence on decedent for financial support, society, comfort, and protection).

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§3.26 B. Loss of Services

A qualified survivor is entitled to damages for the loss of the decedent's services. Services are distinct from financial contributions and are those activities of the decedent that would have saved the survivor time and effort or the expense of hiring someone to perform or that would have enhanced the survivor's life. See *McKinney v California Portland Cement Co.* (2002) 96 CA4th 1214, 1228, 117 CR2d 849 (family members' testimony provided sufficient support for expert's testimony about value of decedent's services). Damages for lost services can be recovered even though the survivor did not hire or find a substitute to perform the services and did not perform them himself or herself. The pecuniary value of lost services can usually be shown by evidence of the actual or probable cost of hiring someone else to perform them. For discussion of lost services to the family, see §§1.64-1.66.

The cost of obtaining substitute domestic services is defined as economic damages under CC §1431.2(b)(1). See *McKinney v California Portland Cement Co., supra* (damages for loss of man's household services are economic damages). Arguably, the loss of certain services could be viewed as noneconomic, especially if not "objectively verifiable monetary losses." For further discussion of economic and noneconomic damages, see §1.5.

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§3.27 1. By Spouse

A surviving spouse is entitled to damages for the pecuniary value of the decedent's services to the spouse and for a share of the decedent's services to the family, even if the decedent was employed outside the home and the surviving spouse claims damages for the loss of financial contributions. See *Tomes v City of Los Angeles* (1962) 58 C2d 35, 54, 22 CR 866. For example, when a husband dies, a wife may lose the benefit of services such as house upkeep and repair, lawn mowing and yard work, automobile maintenance, and driving.

Damages for the death of a homemaker, especially if not employed outside the home, are often based on the pecuniary value of those services performed for the family. See §§1.64-1.66.

TACTICS: Plaintiffs' attorneys must be careful not to base claims for lost services on outdated statistics and studies that place unrealistically low values on the replacement cost of household services, particularly the services of a spouse employed outside the home. Expert witnesses can be questioned about the sources of their assessments before their testimony is used.

A trier of fact may use its general knowledge to assess the value of lost services. No special evidence of the value of nontechnical services is required. *Burke v City & County of San Francisco* (1952) 111 CA2d 314, 317, 244 P2d 708. Economists and other expert witnesses, however, may be called to testify on the value of services, particularly when the decedent was a homemaker and not a wage earner.

TACTICS: Several studies have shown the high cost of replacing a homemaker's services. See Annos, 77 ALR3d 1175 (1977) (proof of value of housewife's services in wrongful death action), 47 ALR3d 971 (1973) (damages for death of woman engaged in homemaking). In proving a claim for lost services of a decedent homemaker, expert testimony on these studies may educate the jury on the pecuniary value of such services and substantially affect the size of the award.

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§3.28 2. By Child, Parent, or Other Survivor

A child, particularly one living at home, benefits from services by both parents and is entitled to damages for the loss of all services to the child individually and for the child's share of services to the family generally. See §§1.64-1.66.

Sometimes a loss of services by a survivor other than a spouse or child may be demonstrated. For example, a child living separately may have worked regularly on the parents' yard or house, or one sibling may have done housework and laundry for another. See *Swails v General Elec. Co.* (1968) 264 CA2d 82, 87, 70 CR 143 (mother showed that her adult son often shopped for her, painted and kept up her house, built patio, got her car repaired, and performed other services).

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§3.29 C. Society, Comfort, Care, Protection, Companionship, and Consortium

A qualified survivor may recover damages for "loss of love, companionship, comfort, affection, society, solace, or moral support, any loss of the enjoyment of sexual relations, [and] any loss of …physical assistance in the operation or maintenance of the home." *Krouse v Graham* (1977) 19 C3d 59, 67, 137 CR 863 (no need to justify such losses as "pecuniary"; see §3.2); *Rufo v Simpson* (2001) 86 CA4th 573, 614, 103 CR2d 492 (noted in §3.32). Damages for such personal aspects of each survivor's loss and harm may be the chief component of a wrongful death recovery.

There is no absolute yardstick to measure the value of the loss of comfort and society. See *Fagerquist v Western Sun Aviation, Inc.* (1987) 191 CA3d 709, 728, 236 CR 633 (child's recovery of 15 times decedent father's projected lifetime earnings for "loss of support, comfort, love, affection and guidance" not excessive when child was 10 years old, mentally retarded, and physically handicapped and father had "special" ability to communicate with her).

TACTICS: It is important to use objective, graphic evidence (*e.g.,* photographs) showing the decedent and the plaintiff in close family situations such as vacation outings and holiday celebrations. If the life expectancy of either the decedent or the survivors is called into question, the photographs and other memorabilia, particularly if focused on rigorous outdoor activity, will reinforce an impression of health and longevity. Testimony by nonheirs (*e.g.,* friends, neighbors, public officials, professional colleagues), showing that the decedent was a valuable, contributing member of the community, can help to bolster the plaintiff's claim for these damages.

The fact that a survivor was so mentally disabled that he or she could not comprehend that decedent was dead does not preclude the recovery of damages for loss of *e.g.,* society and comfort. See *Knowles v Superior Court (Labo)* (2004) 118 CA4th 1290, 1302, 13 CR3d 700 (also noted in §§3.5, 3.29).

Damages for loss of society and companionship and loss of consortium are noneconomic damages as that term is used in CC §1431.2. See CACI 3921. The cost of substitute services, however, is an item of economic damages. See §3.26.

NOTE: The California Supreme Court has granted review of *Boeken v Philip Morris USA, Inc.* (review granted May 21, 2008, S162029; superseded opinion at 159 CA4th 1391, 72 CR3d 454), noting that it raises the question whether res judicata barred a widow's claim for noneconomic damages in a wrongful death suit when she had dismissed with prejudice a claim for loss of consortium while decedent was alive.

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§3.30 1. By Spouse

A spouse's wrongful death damages claim is akin to a claim for loss of consortium damages. See *Krouse v Graham* (1977) 19 C3d 59, 70, 137 CR 863, noted in §§3.2, 3.29. On loss of consortium damages, see chap 2.

A plaintiff seeking such damages may have to answer questions about his or her extramarital sexual conduct before the other spouse's death; the information is deemed relevant to the extent of the loss of love, companionship, comfort, affection, society, solace, moral support, or enjoyment of sexual relations attributable to the decedent's death. See *Morales v Superior Court* (1979) 99 CA3d 283, 160 CR 194 (information about dates and sexual relations with other women during 2 years before wife's death is discoverable, but identity of other women is not).

TACTICS: In practice, counsel often battle over the scope of evidence admissible to establish the nature of the decedent's relationship with the surviving spouse. Typically, both sides present motions under Evid C §352, requesting the court to exercise its discretion in either restraining the plaintiff's sentimental presentations of the marital relationship or barring the defendant's attacks on the decedent's character.

See Anno, 61 ALR4th 309 (1988) (excessiveness or adequacy of noneconomic damages for death of spouse).

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§3.31 2. By Child

A minor child is said to suffer a special loss, in addition to the loss of financial support, from the death of a father (*Syah v Johnson* (1966) 247 CA2d 534, 547, 55 CR 741) or mother (*Lasater v Oakland Scavenger Co.* (1945) 71 CA2d 217, 162 P2d 486). See §3.34 on the loss of training and advice.

A mentally retarded child's loss from a father's death is not less than a normal child's loss; indeed, such a child may be more seriously damaged over its life than a child who might be able to compensate for the deprivation through normal maturation. *Fagerquist v Western Sun Aviation, Inc.* (1987) 191 CA3d 709, 729, 236 CR 633 ($1.5 million to child with 69-year life expectancy not excessive; see §3.29). Indeed, a child's permanent disability may be shown as evidence that the child would have received a greater than usual measure of comfort, care, and assistance from a deceased parent. *Gregoriev v Northwestern Pac. R.R.* (1928) 95 CA 447, 450, 273 P 84.

Children who have married and are living with their own spouses and children may nevertheless suffer a loss of society, comfort, and protection because of a parent's death. *Duclos v Tashjian* (1939) 32 CA2d 444, 453, 90 P2d 140. Even children who contribute to a parent's support are entitled to more than nominal damages for loss of the comfort, protection, and society they could have expected from the parent during the remainder of the parent's life. See *Griott v Gamblin* (1961) 194 CA2d 577, 15 CR 228 (father of seven adults); *Gibson v State* (1960) 184 CA2d 6, 11, 7 CR 315 (mother of single adult man).

TACTICS: A defendant may seek evidence showing an absence of closeness between the child and the decedent. See, however, *Sinacore v Superior Court* (1978) 81 CA3d 223, 146 CR 302, in which the court held that county welfare records relating to the child were confidential and privileged by statute (Welf & I C §10850) and thus not discoverable to show absence of society, comfort, and protection in the child's action for the mother's death.

See Anno, 61 ALR4th 251 (1988) (excessiveness or adequacy of noneconomic damages for death of parent).

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.32 3. By Parent

§3.32 3. By Parent

A parent is entitled to damages for loss of love, companionship, comfort, affection, society, solace, moral support, and protection that the child could have been expected to give (*Tyson v Romey* (1948) 88 CA2d 752, 758, 199 P2d 721) throughout the parent's expected life (*Ure v Maggio Bros.* (1938) 24 CA2d 490, 75 P2d 534), but not damages for either the parents' grief or sorrow or the decedent's predeath pain and suffering. See *Rufo v Simpson* (2001) 86 CA4th 573, 614, 103 CR2d 492 ($8.5 million awarded to parents of 26-year-old waiter). However, a parent who all but abandons a child before the child's death may be unable to show any loss of expected comfort or society from the child. See Anno, 53 ALR3d 566 (1973) (effect of parent's desertion, abandonment, or failure to support minor child on recovery for child's wrongful death).

The trier of fact must consider a parent's past and future loss of the minor's "love, companionship, comfort, care, assistance, protection, affection, society, and moral support," offset by the present cash value of the probable costs of the child's support and education, had the child lived. See CACI 3922.

The loss to the parents from a child's death varies, depending on such factors as the child's age; the child's disposition to be kindly, affectionate, or otherwise; and whether there are other children in the family. See §§3.49, 3.52.

TACTICS: If the conduct causing a child's injuries and eventual death is particularly outrageous or potentially inflammatory, the defense may wish to admit liability in order to avoid the jury's consideration of evidence that might significantly increase the award.

When a child survives tortious conduct that eventually leads to its death, and evidence supports a claim for punitive damages, a survival action under CCP §377.34, permitting recovery of punitive damages, may also be filed. See §3.42. For general discussion of survival actions, see chap 4.

See Annos, 77 ALR4th 411 (1990) (damages for loss of consortium resulting from child's death), 61 ALR4th 413 (1988) (excessiveness or adequacy of damages).

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§3.33 4. By Other Intestate Heir

A brother or sister who is a qualified survivor (see §3.9), and who has kept in touch with a decedent, is entitled to damages for loss of a sibling's comfort and society (*Robison v Leigh* (1957) 153 CA2d 730, 734, 315 P2d 42), particularly if their relationship was close. *Wilson v City & County of San Francisco* (1951) 106 CA2d 440, 235 P2d 81 (heir was sister, housekeeper, and companion of decedent priest).

TACTICS: The more remote the qualified survivor, the more important it is to show evidence of personal closeness and, if possible, of geographical proximity. When the decedent and a survivor were geographically remote, objective evidence such as letters, telephone bills, and testimony about trips to visit each other can reinforce the heir's claim for damages.

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§3.34 D. Training and Advice

A decedent's death can deprive both a spouse and a child of advice they might otherwise have received from the decedent. See *Syah v Johnson* (1966) 247 CA2d 534, 547, 55 CR 741. Part of the wrongful death damages recoverable by a minor child are for the loss of moral and practical training, even discipline, that the child could have expected to receive from a deceased mother or father. See *Johnson v Southern Pac. R.R.* (1908) 154 C 285, 298, 97 P 520 (nurture, moral and physical instruction, and intellectual training).

TACTICS: Advice and training are listed in this chapter as separate elements on which damages may be based, although in court opinions they are sometimes lumped with either lost services (see §3.26) or loss of comfort, society, care, and protection (see §3.29). Total damages, however, are often increased by itemization. The survivor's demonstration of separate items of loss (*e.g.,* loss of support, loss of training and advice) along with a general claim for loss of comfort and society may effectively increase the total recovery.

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§3.35 E. Funeral and Burial Expense

Survivors may recover as damages the amount of any reasonable expense paid out by them, or for which they are liable, for the decedent's burial and for funeral services in the decedent's memory. *Adams v Southern Pac. Co.* (1935) 4 C2d 731, 743, 53 P2d 121; *Vander Lind v Superior Court* (1983) 146 CA3d 358, 364, 194 CR 209; *Francis v Sauve* (1963) 222 CA2d 102, 124, 34 CR 754. In determining whether the claimed expense is reasonable, the trier of fact may consider evidence of the decedent's station in life and the financial condition of the estate. Evidence that a funeral bill was paid is some evidence that it was reasonable. *Francis v Sauve, supra.*

Burial costs are specified in CC §1431.2(b)(1) as an item of economic damages. See CACI 3921.

The payment of funeral expenses out of the decedent's estate does not diminish a survivor's right to recover damages for those expenses to the extent that the survivor's inheritance was reduced by the payments. *Gibson v State* (1960) 184 CA2d 6, 11, 7 CR 315.

A person who is not an heir but who has paid funeral or burial expenses may be able to recover damages for the payments. See Anno, 3 ALR2d 932 (1949). These damages are normally recoverable even though paid by insurance or some other outside source under the collateral source rule. See §15.13. See also §§15.17 (medical malpractice cases), 15.21 (lawsuits against public entities).

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.36 F. Prospective Gifts From Decedent

§3.36 F. Prospective Gifts From Decedent

A survivor may show that it is reasonably certain that, had he or she lived, the decedent would have made gifts to the survivor. The value of these gifts is part of the survivor's pecuniary loss unless the prospective gift would have been an advance of amounts expected to be received by will or succession. The defendant, however, may introduce evidence that the asset value of the decedent's estate was such that the claimed gifts were not likely to be given. See *Stathos v Lemich* (1963) 213 CA2d 52, 28 CR 462.

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.37 G. Other Elements

§3.37 G. Other Elements

Designating all possible recoverable elements of loss in a wrongful death action is impractical; the jury should consider a broad range of evidence in ascertaining what damages are just. *Simoneau v Pacific Elec. Ry.* (1911) 159 C 494, 504, 115 P 320 (damages for care of children includes special amounts required because of their physical disabilities). See CACI 3921.

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III. NONRECOVERABLE ELEMENTS

§3.38 A. Detriment Suffered by Decedent Before Death

A qualified survivor cannot recover damages for detriment suffered by the decedent before death. See *Bond v United R.R. of San Francisco* (1911) 159 C 270, 277, 113 P 366, 369. Thus, an heir cannot recover damages for pain, suffering, or anguish experienced by the decedent. *Parsons v Easton* (1921) 184 C 764, 770, 195 P 419, 421. Such damages must be sought in a survival action. See chap 4.

Aggravation of a preexisting condition of the decedent is not compensable in a wrongful death action. *Vecchione v Carlin* (1980) 111 CA3d 351, 358, 168 CR 571 (no error in refusal to give BAJI 14.65).

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§3.39 B. Decedent's Medical Expenses

A survivor cannot recover damages in a wrongful death action for expenditures, including medical expenses, incurred before the decedent's death. *Gallup v Sparks-Mundo Eng'r Co.* (1954) 43 C2d 1, 10, 271 P2d 34. However, the executor or administrator of the decedent's estate may recover damages for medical expenses in a survival action under CC §377.34. See chap 4. Also, a survivor who actually paid or became obligated to pay the expense of treatment given the decedent before death has a separate cause of action to recover those expenses.

TACTICS: Making a claim for medical expenses in a survival action may be particularly important when the medical expenses are large and the decedent is a child—the type of case in which, at least traditionally, wrongful death damages may not be substantial. Even though the survival and wrongful death actions are technically separate actions consolidated for trial, large special damages in the form of medical expenses in the survival action may also influence the jury's evaluation of wrongful death damages.

On the possibility of a state Department of Health Services lien on a wrongful death damages recovery for the value of medical services furnished to the decedent, see Note in §16.10.

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§3.40 C. Survivor's Grief, Sorrow, Anguish, and Mental Suffering

A survivor is not entitled to damages in a wrongful death action for his or her own grief, mental suffering, sorrow, anguish, or sad emotions over the decedent's death or for the sentimental value of the loss. *Krouse v Graham* (1977) 19 C3d 59, 70, 137 CR 863 (damages for heirs' mental and emotional distress, including grief, sorrow, and suffering, not recoverable in wrongful death action; confusing instructions required reversal); *Nelson v County of Los Angeles* (2003) 113 CA4th 783, 793, 6 CR3d 650 ($2-million award to parents who had not seen decedent for 20 years reversible as including damages for parent's emotional distress and amount intended to punish defendant); *Zeller v Reid* (1940) 38 CA2d 622, 101 P2d 730. See *Hiser v Bell Helicopter Textron, Inc.* (2003) 111 CA4th 640, 658, 4 CR3d 249 (testimony about survivor's grief and sorrow excludable as irrelevant, but failure to exclude not reversible error; testimony also tended to show survivor's loss of love, companionship, *etc.*).

NOTE: In *Jeld-Wen, Inc. v Superior Court* (Keener) (2005) 131 CA4th 853, 861, 32 CR3d 351, the court cited the present text in support of a statement that "ordinary wrongful death damages …will not include punitive damages, nor any other special or separately arising damages to the heirs that might conceivably be separately attributable to the acts of the employer in negligently entrusting a vehicle to an allegedly accident-prone driver." On negligent entrustment liability, see California Tort Guide §4.58 (3d ed Cal CEB 1996).

The decision in *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 930, 167 CR 831, which held that a cause of action may be stated for negligent infliction of serious emotional distress, did not change the rule for wrongful death damages. *Canavin v Pacific Southwest Airlines* (1983) 148 CA3d 512, 519, 196 CR 82 (value of decedent's life to heirs, not heirs' own emotional distress, compensable).

See Anno, 45 ALR4th 234 (1986) (recovery of damages for grief or mental anguish resulting from death of child).

A person who witnesses the death of a close relative and suffers emotional distress resulting in a physical or nervous disorder may bring his or her own personal injury action for damages for such emotional distress and bodily injury. See §§6.8-6.13.

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.41 D. Decedent's Prospective Savings; Expectancy of Inheritance

§3.41 D. Decedent's Prospective Savings; Expectancy of Inheritance

The plaintiff in a wrongful death action is not ordinarily entitled to damages for the loss of savings or assets that the decedent would have accumulated had he or she lived and that the survivor would later have inherited. See *Bradford v Brock* (1934) 140 CA 47, 34 P2d 1048. For cases to the contrary in other jurisdictions, see Anno, 91 ALR2d 477 (1963).

Similarly, loss of inheritance is not generally a recoverable item. See *Berns v Pan Am. World Airways, Inc.* (9th Cir 1982) 667 F2d 826 (no reversible error in ruling that, if plaintiffs introduced evidence on such loss, defendants could introduce evidence of heirs' actual inheritance from decedent).

TACTICS: A survivor might argue that neither *Bradford* nor *Berns* retains precedential value; namely, that *Bradford* does no more than rule, as a general proposition, that speculative damages cannot be recovered (*i.e.,* that an actual loss must be proved before there can be a recovery for an expected inheritance), and that *Berns* merely notes that it is unclear whether "loss of inheritance is a recoverable item in California" as part of its discussion of federal evidence law. In support of the view that California law permits the recovery of wrongful death damages for the loss of an expected inheritance, counsel might cite *Wilson v City & County of San Francisco* (1951) 106 CA2d 440, 444, 235 P2d 81, and *Griffey v Pacific Elec. Ry.* (1922) 58 CA 509, 516, 209 P 45. In addition, counsel might argue that allowing the recovery of damages is consonant with the "deterrence" aspect of the wrongful death statute. See §3.2.

See Anno, 42 ALR5th 465 (1996) (damages for loss of expectancy of inheritance).

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.42 E. Punitive Damages

§3.42 E. Punitive Damages

Punitive damages are not recoverable in a wrongful death action, even if the defendant was guilty of willful or wanton misconduct. *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 450, 131 CR 14; *Doak v Superior Court* (1968) 257 CA2d 825, 834, 65 CR 193. See Anno, 27 ALR3d 1375 (1969). The exception to this rule is that punitive damages can be recovered in a wrongful death action under CCP §377.60 against a person convicted of felony homicide in the decedent's death. Civil Code §3294(d).

The rule that punitive damages may not be recovered in a wrongful death action has been held not to violate the California and United States Constitutions. See *Vander Lind v Superior Court* (1983) 146 CA3d 358, 194 CR 209. See also *In re Paris Air Crash* (9th Cir 1980) 622 F2d 1315, cert denied (1981) 449 US 976.

NOTE: In *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 832, 174 CR 348, the court said that, because the decedent lived long enough after the accident to have acquired a cause of action for which a personal representative could have sought punitive damages, it was not a denial of equal protection to prohibit the decedent's heirs from obtaining punitive damages in their wrongful death action. Judges have questioned the constitutionality, however, of disallowing punitive damages when they are sought by the survivors of a decedent who died instantaneously (see 119 CA3d at 833), while permitting a personal representative to recover punitive damages for the estate of a decedent who lived long enough after injury to have acquired a cause of action (119 CA3d at 834). See dissenting opinion in *Ford Motor Co. v Superior Court* (1981) 120 CA3d 748, 753, 175 CR 39. The opinion in *Grimshaw* suggests that the availability of punitive damages actions to personal representatives may ameliorate their nonavailability to heirs inasmuch as it may be "a medical rarity for death to occur simultaneously with the infliction of a death-causing injury." 119 CA3d at 833 n28. See also 119 CA3d at 835 n30.

An action for personal injuries that partially survives the death of the decedent can be maintained by the decedent's personal representative under CCP §377.34. See chap 4. The right to damages for the decedent's pain, suffering, or disfigurement is extinguished but the decedent's estate can recover special damages such as medical expenses and loss of earnings as well as punitive damages. Punitive damages can be awarded in an action by the executor or administrator of the estate of a decedent who lived long enough after injury to suffer a detriment for which punitive damages may be recovered. *Pease v Beech Aircraft Corp.* (1974) 38 CA3d 450, 460, 113 CR 416, disapproved on other grounds in *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 877 n21, 239 CR 626.

A survival action will be consolidated for trial with the wrongful death case or may be joined as an additional cause of action in the wrongful death complaint from its inception. CCP §377.62.

TACTICS: The advantages of a claim for punitive damages at trial include recovering them for their own sake and preventing the defense from admitting liability and thus keeping the potentially inflammatory nature of the defendant's conduct away from the trier of fact.

Tactics to consider when these two separate actions are consolidated for trial include:

- When in a wrongful death action the damages for support or the damages for loss of society and companionship are relatively minimal (*e.g.,* the marriage or other relationship between the decedent and the heirs was poor), the estate under the consolidated survival action may still recover substantial punitive damages based on the nature of the defendant's conduct.
- If a defendant's conduct causes injury to a decedent who survives for some period of time, even a brief period, and the trier of fact determines that the injury and conduct of the defendant was not a legal cause of the decedent's death, it may still award punitive damages under the survival action for personal injury. The law does not require any compensatory damages; it is sufficient to show that the defendant committed a tortious act. See *Esparza v Specht* (1976) 55 CA3d 1, 127 CR 493 (action for fraud); *Topanga Corp. v Gentile* (1967) 249 CA2d 681, 691, 58 CR 713 (action for fraud).

The trial strategy in claiming punitive damages in a survival action must take into account the defendant's potential to

offer evidence of relatively minimal net worth, which may have an overall dampening effect on damages. Because punitive damages normally are not covered by liability insurance, sometimes the better strategy if the defendant's financial status is uncertain is not to pursue a survival action in connection with the wrongful death action.

See *McClelland & Truett, Survival of Punitive Damages in Wrongful Death Cases*, 8 U San Francisco L Rev 585 (1974). See Anno, 35 ALR4th 441, 485 (1985) (punitive damages awarded in personal injury or death cases). On survival actions brought by decedent's personal representative under Prob C §573, see chap 4. For a general discussion of punitive damages, see chap 14.

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IV. FACTORS AFFECTING DAMAGES

§3.43 A. Date of Fatal Injury

Wrongful death damages are assessed on the basis of the conditions that existed when the death occurred. Evidence of changes in the status of a survivor occurring after the decedent's death is inadmissible. *Riley v California Erectors, Inc.* (1973) 36 CA3d 29, 32, 111 CR 459; *Cherrigan v City & County of San Francisco* (1968) 262 CA2d 643, 652, 69 CR 42.

See Anno, 88 ALR4th 851 (1991) (fraudulent concealment of wrongful death as affecting limitations period).

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§3.44 1. Survivor's Marital Status; Remarriage

The rule that damages are based on the survivor's status at the time of the decedent's death has been applied to exclude evidence that the decedent's surviving spouse has remarried. *Barth v RE Goodrich Tire Co.* (1968) 265 CA2d 228, 241, 71 CR 306; *Benwell v Dean* (1967) 249 CA2d 345, 355, 57 CR 394. A widow may maintain the action in the name she used at the time of the spouse's death, and defense counsel may not refer to her by her new married name (*Cherrigan v City & County of San Francisco* (1968) 262 CA2d 643, 652, 69 CR 42), nor may counsel argue that there is a strong possibility that the surviving spouse will remarry (*Wood v Alves Serv. Transp., Inc.* (1961) 191 CA2d 723, 13 CR 114). See Anno, 87 ALR2d 252 (1963). See §3.52 on the effect of the state of the decedent's marriage before death.

Similarly, a defendant may not introduce either (1) evidence that the decedent's parent has married subsequent to the wrongful death or (2) evidence of the new spouse's earnings. *Riley v California Erectors, Inc.* (1973) 36 CA3d 29, 32, 111 CR 459 (decedent's mother was widow at time of death).

See Annos, 88 ALR3d 926 (1978) (admissibility and propriety of comment of plaintiff spouse's remarriage or possibility of remarriage in action for death of other spouse), 69 ALR3d 1038 (1976) (remarriage of surviving parent in action for wrongful death of child), 69 ALR3d 1046 (1976) (right of spouse to maintain action for wrongful death when injury resulting in death occurred before marriage).

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§3.45 2. Survivor's Prejudgment Death

Although a survivor's right to wrongful death damages is usually determined as of the time of decedent's death, the executor or administrator of a survivor who died after the decedent but before entry of judgment may maintain an action to recover damages only for the detriment suffered between the death dates of the decedent and the survivor. See §4.3.

See Anno, 73 ALR4th 441 (1989) (effect of beneficiary's death on damages). See generally Anno, 43 ALR2d 1291 (1955).

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B. Predeath Personal Injury Judgment

§3.46 1. Decedent's Damages Recovery

In the rare case in which the decedent obtains a judgment for personal injury damages before death, that part of the damages that represents lost earning capacity and lost services should not be duplicated in the heir's recovery for the wrongful death. See *Blackwell v American Film Co.* (1922) 189 C 689, 702, 209 P 999, in which, contrary to the usual rule, the jury was instructed to consider the disability caused to the decedent by the accident that ultimately resulted in his death in determining what financial contributions his widow could reasonably have expected had he lived.

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.47 2. Defense Judgment

§3.47 2. Defense Judgment

Survivors may be collaterally estopped from pursuing a wrongful death lawsuit against defendants who were found, in the decedent's predeath personal injury suit, not liable for an injury that later proved fatal. *Brown v Rahman* (1991) 231 CA3d 1458, 1463, 282 CR 815 (heirs had sufficient identity of interest with decedent to be estopped from relitigating defendants' liability).

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C. Decedent's and Survivor's Life Expectancies

§3.48 1. Using Mortality Tables

A survivor may recover wrongful death damages for benefits he or she would have received during the years that both the survivor and the decedent are expected to have lived. The trier of fact must limit damages according to the shorter of the two life expectancies, the decedent's or the survivor's. *Parsons v Easton* (1921) 184 C 764, 770, 195 P 419; *Francis v Sauve* (1963) 222 CA2d 102, 120, 34 CR 754; *Christiansen v Hollings* (1941) 44 CA2d 332, 339, 112 P2d 723. See CACI 3921.

Life expectancies taken from mortality tables may be used to establish the number of years a survivor could have expected to receive benefits from the decedent. Mortality tables are printed following CACI 3932 and in BAJI, App A. Such a table is not conclusive, however; the trier of fact must read it in the light of evidence about the individual's state of health, occupation, habits, and surroundings. *Allen v Toledo* (1980) 109 CA3d 415, 424, 167 CR 270. See *Christiansen v Hollings, supra* (mortality table evidence could be considered even though there was evidence that decedent was in poor health).

The trier of fact is not limited by a mortality table figure and may find that a person's life would have been, or will be, longer than is indicated by the table. *Coughman v Harman* (1933) 135 CA 49, 58, 26 P2d 851. Thus, introduction of a mortality table is not essential. The trier of fact may base a finding of a decedent's or survivor's life expectancy on such evidence as age, medical status and history, and, when a survivor is present in the courtroom, physical appearance. See §3.49.

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.49 2. Decedent's and Survivor's Ages and Health

§3.49 2. Decedent's and Survivor's Ages and Health

An estimate of the decedent's life expectancy can be based on evidence of age at the time of the fatal injury along with evidence of the decedent's health status and history to that time, or, absent evidence to the contrary, the assumption that the decedent was in normal good health. *Francis v Sauve* (1963) 222 CA2d 102, 121, 34 CR 754; *Dallas v De Yoe* (1921) 53 CA 452, 457, 200 P 361. Jurors may also base a life expectancy estimate of a survivor who appears in court on an approximation of his or her age and apparent state of health. *Rickards v Noonan* (1940) 40 CA2d 266, 274, 104 P2d 839; *Francis v Sauve, supra*.

TACTICS: It could be argued that—inasmuch as survivors' wrongful death recoveries are for the loss of expectations they had at the time of the decedent's death (see *Cervantes v Maco Gas Co.* (1960) 177 CA2d 246, 251, 2 CR 75)—the claimant's life expectancy should not be considered shortened, nor his or her damages lessened, by an injury or illness that manifested itself after the decedent's fatal injury or death. But see *Kawamura v Honek* (1932) 127 CA 509, 16 P2d 150, in which testimony of injuries received by the heir in the accident that killed the decedent was deemed relevant.

Evidence of the *decedent's* ill health before the fatal injury tends to show not only the prospect of a shorter than average life expectancy but also an impaired ability to contribute financially to survivors. Evidence of a *survivor's* ill health before the decedent's death tends to show both a shorter than average life expectancy and that the survivor could have expected more financial assistance and more comfort, care, and protection from the decedent than a healthy survivor would have expected. See *Gregoriev v Northwestern Pac. R.R.* (1928) 95 CA 447, 273 P 84; *Meier v Golden Auto Tour Corp.* (1920) 50 CA 277, 195 P 290.

TACTICS: In practice, the health of the decedent or of a survivor may be a major item of contention, especially if the decedent was elderly. The defense may wish to avoid, however, what may be viewed as heartless claims of limited health or life expectancy; the plaintiff may counter that the defendant is merely trying to escape full responsibility for the consequences of his or her tortious conduct.

See Anno, 52 ALR3d 1289 (1973) (damages awarded for personal injuries resulting in death of retired persons).

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§3.50 D. Decedent's Earning Capacity

The trier of fact can base its determination of a survivor's loss of expected financial support and contributions in part on evidence of a decedent's earnings and earning capacity. *Olson v Meacham* (1933) 129 CA 670, 676, 19 P2d 527; *Robertson v Weingart* (1928) 91 CA 715, 725, 267 P 741.

The trier of fact may also consider that a decedent who had lived would have consumed part of his or her earnings himself or herself, on other persons, or for purposes other than the support and benefit of the survivors who are claiming damages. See *U.S. v English* (9th Cir 1975) 521 F2d 63, 70. See also Note in §3.21.

See discussion on computing earning capacity in §§1.43-1.56. The use of witnesses and exhibits to prove earning capacity loss is discussed in §§1.57-1.63.

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§3.51 E. Decedent's Moral Character and Habits

The plaintiff may introduce evidence of the decedent's good moral character and habits of temperance, industry, and thrift to show that the decedent would have continued to bestow financial benefits and good society on the survivors. *Barboza v Pacific Portland Cement Co.* (1912) 162 C 36, 42, 120 P 767; *Taylor v Western Pac. R.R.* (1873) 45 C 323, 334.

A defendant may introduce evidence of the decedent's bad moral habits, intemperance, gambling, lack of thrift, and possibly even criminal tendencies to show that the decedent's life had little value to the survivors. See *McDonald v Price* (1947) 80 CA2d 150, 153, 181 P2d 115. But see *Carr v Pacific Tel. Co.* (1972) 26 CA3d 537, 544, 103 CR 120, in which evidence of the decedent's prior extramarital affair and imprisonment were held to be excludable as irrelevant, although it could be shown that the decedent was not home and not supporting the family during those periods.

The extent to which evidence of bad moral habits is admissible is governed by the trial court's discretion under Evid C §352. See Anno, 99 ALR2d 972 (1965) (admissibility of evidence of decedent's sobriety or morality).

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§3.52 F. Decedent's Disposition Toward Survivor

A survivor can introduce evidence that the decedent was warm, kind, affectionate, loving, and attentive, and that family life was happy, to help show the extent of the survivor's loss of financial support, services, and society. See *Benwell v Dean* (1967) 249 CA2d 345, 57 CR 394.

The defendant may offer evidence, if not too remote or outweighed in probative value by a danger of prejudice (see Evid C §352), to show that the decedent did not have a warm or close relationship with the family, was not kindly disposed toward one or more survivors, or was about to leave a spouse. See *Benwell v Dean, supra.* See also Anno, 79 ALR2d 819 (1961) (admissibility of evidence of decedent's abandonment or nonsupport of children).

Although a person married to a decedent remain a qualified spouse until a final judgment of dissolution is entered, the defense can show a marital separation, or the entry of an interlocutory decree before the fatal injury, as evidence of limits on the amount of financial contributions and society that the spouse could expect from the decedent. See *Luis v Cavin* (1948) 88 CA2d 107, 115, 198 P2d 563, 569. The spouse in turn can introduce evidence to show reconciliation. See *Rickards v Noonan* (1940) 40 CA2d 266, 273, 104 P2d 839.

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§3.53 G. Decedent's Obligation to Support

A survivor need not establish that the decedent had a legal obligation to furnish support or other benefits for the loss of which damages are sought; the survivor's reasonable expectation of benefits during the decedent's lifetime may originate in a purely moral obligation. *Swails v General Elec. Co.* (1968) 264 CA2d 82, 86, 70 CR 143. Furthermore, a survivor is entitled to damages for loss of the benefits that the decedent is reasonably likely to have bestowed, whether the decedent was obligated to do so or not. See *Karwoski v Grant* (1938) 30 CA2d 171, 180, 85 P2d 944.

A survivor's right to expect support is not destroyed by the fact that he or she does not need it or that the decedent has not provided it. See *Gilmore v Los Angeles Ry.* (1930) 211 C 192, 197, 295 P 41; *Cannon v Kemper* (1937) 23 CA2d 239, 244, 73 P2d 268.

A spouse's waiver of the right to inherit from the decedent does not destroy the spouse's right to damages for loss of financial support even after entry of an interlocutory divorce decree. *Luis v Cavin* (1948) 88 CA2d 107, 118, 198 P2d 563.

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Source: Torts/California Tort Damages/3 Wrongful Death/§3.54 H. Value of Decedent's Estate; Amount of Survivor's Inheritance or Death Benefits

§3.54 H. Value of Decedent's Estate; Amount of Survivor's Inheritance or Death Benefits

Generally, the following are not relevant to damages issues in wrongful death cases:

- The value of the decedent's estate and the fact that a survivor will inherit from the decedent (see *McLaughlin v United R.R.* (1915) 169 C 494, 147 P 149);
- The fact that a survivor benefits from joint tenancies held with the decedent (*Wilson v City & County of San Francisco* (1951) 106 CA2d 440, 445, 235 P2d 81); or
- The fact that the survivor is the beneficiary of insurance payable on the decedent's death.

Nor are a survivor's damages reduced by sums received from a collateral source, such as social security benefits (see Anno, 84 ALR2d 764 (1962)) or a pension (see Anno, 75 ALR2d 885, 890 (1961)).

See, however, *Stathos v Lemich* (1963) 213 CA2d 52, 28 CR 462, in which evidence of the value of the decedent's estate was admitted to show that the decedent would have been unable to make gifts as claimed by the heirs.

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§3.55 I. Survivor's Reduced Support Expenses

The damages suffered by a survivor are mitigated by the reduction in the expense of raising, caring for, or supporting the decedent had he or she lived. *Daggett v Atchison, T. & S.F. Ry.* (1957) 48 C2d 655, 666, 313 P2d 557; *Fields v Riley* (1969) 1 CA3d 308, 315, 81 CR 671.

If the decedent was a minor, a defendant is entitled to have the trier of fact deduct from damages for the parent's loss of benefits, services, and society the prospective costs of the child's care, maintenance, and education, even though there is no evidence of the amounts of those expenses. See *Wiezorek v Ferris* (1917) 176 C 353, 357, 167 P 234.

Evidence of the amount that a survivor was required by court order to pay for the support of a decedent child can be introduced to show the amount of reduced expense that may be offset against any damages shown by the survivor. *Fields v Riley, supra*.

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§3.56 J. Survivor's Wealth or Poverty

Evidence that a survivor is wealthy or poor, depended on the decedent for support, or has no means of self-support is irrelevant to damages issues in wrongful death cases. See *Fox v Pacific Southwest Airlines* (1982) 133 CA3d 565, 571, 184 CR 87 (parent did not open issue by testifying about conversations with son); *Webb v Van Noon* (1966) 239 CA2d 472, 479, 48 CR 823; *Shebley v Peters* (1921) 53 CA 288, 293, 200 P 364. But see *Johnson v Western Air Express Corp.* (1941) 45 CA2d 614, 622, 114 P2d 688 (admissibility of evidence of injured heir's earning capacity in personal injury action does not prevent consolidation of that action with heir's wrongful death action). See CACI 3921.

Evidence that after the decedent-parent's death the minor children lived in separate homes is irrelevant to the issue of their damages. See *Nitta v Haslam* (1934) 138 CA 736, 743, 33 P2d 678.

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§3.57 K. Federal Law Limitations; DOHSA and ERISA Preemption

Provisions of the federal Death on the High Seas Act (DOHSA) (46 USC §§30302-30308) preclude the recovery of wrongful death damages under state law when the death occurred on foreign or international waters. *Beckett v MasterCraft Boat Co.* (2005) 126 CA4th 1045, 24 CR3d 490 (15-year old passenger's death from carbon monoxide poisoning while in boat on inland Mexican river; $100,000 settlement paid by other alleged tortfeasors exceeded $1700 pecuniary loss recoverable under DOHSA).

Some federal statutes limit wrongful death damages to pecuniary loss. See *Mobil Oil Corp. v Higginbotham* (1978) 436 US 618, 56 L Ed 2d 581, 98 S Ct 2010 (action under DOHSA). See also *Dooley v Korean Air Lines Co.* (1998) 524 US 116, 141 L Ed 2d 102, 118 S Ct 1890 (no recovery for decedent's predeath pain and suffering; see §4.15).

Ludahl v Seaview Boat Yard, Inc. (1994) 869 F Supp 825 concludes that claims for loss of consortium, loss of accumulation of estate, and loss of inheritance cannot be brought in an action under DOHSA (following *Davis v Bender Shipbuilding & Repair Co.* (9th Cir 1994) 27 F3d 426, 430).

Damages for loss of a decedent's society (and the like) are not recoverable in a suit under the Jones Act (46 USC §§30104-30105), DOHSA, or federal maritime common law. *Miles v Apex Marine Corp.* (1990) 498 US 19, 112 L Ed 2d 275, 111 S Ct 317 (damages limited to pecuniary loss). A cruise ship passenger's acceptance of a ticket referring to the "Convention Relating to the Carriage of Passengers and Their Luggage at Sea of 1976 (Athens Convention)," however, is not sufficient to limit DOHSA damages to $60,000. *Wallis v Princess Cruises, Inc.* (9th Cir 2002) 306 F3d 827.

NOTE: *Miles v Apex Marine Corp.* (1990) 498 US 19, 30, 112 L Ed 2d 275, 289, 111 S Ct 317, limits to cases in which a longshore worker was injured in territorial waters the holding in *Sea-Land Servs., Inc. v Gaudet* (1974) 414 US 573, 39 L Ed 2d 9, 94 S Ct 806, that a longshore worker's widow may maintain a maritime wrongful death action for unseaworthiness despite the decedent's predeath recovery of personal injury damages, when her damages for loss of support did not duplicate his recovery for future wage loss. But see *Norfolk Shipbuilding & Drydock Corp. v Garris* (2001) 532 US 811, 150 L Ed 2d 34, 121 S Ct 1927 (maritime death caused by negligence [is/is not] basis for wrongful death damages).

Wrongful death lawsuits against health insurers may be barred as preempted by the federal Employee Retirement Income Security Act (ERISA). See, *e.g., Spain v Aetna Life Ins. Co.* (9th Cir 1993) 11 F3d 129 (surviving spouse and child claimed that death was caused by insurer's negligent delay in authorizing payment for medical procedure). See also *Ardary v Aetna Health Plans* (9th Cir 1996) 98 F3d 496 (state wrongful death suit against Medicare provider not preempted by Medicare Act (42 USC §§1395-1395dd)). See §16.16 on Medicare reimbursement claims.

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§3.58 L. Decedent's Felonious Killer Excluded

Probate Code §258 provides that a person who feloniously and intentionally kills the decedent is not entitled to bring an action for the wrongful death of the decedent or to benefit from the action brought by the decedent's personal representative; the persons who may bring a wrongful death action are determined as if the killer had predeceased the decedent.

Probate Code §258 supersedes the rule of *Marks v Lyerla* (1991) 1 CA4th 556, 2 CR2d 63, which held that if a decedent's parent is still living, the decedent's grandparent cannot recover wrongful death damages, even if the grandparent alleges that the parent murdered the decedent.

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V. PROVING DAMAGES

§3.59 A. Witnesses and Exhibits

In many wrongful death cases, testimony is supplied by (1) the survivors themselves, close relatives, and employers who testify on past earning capacity, and (2) such people as the parish priest, community leaders, and other public officials who testify to the decedent's moral character and reputation.

TACTICS: Counsel should carefully evaluate all potential witnesses, but particularly those who are in the latter category. Witnesses who testify about the decedent's life in the community should be knowledgeable of the decedent's public reputation and be able to give specific examples of the nature of the decedent's character, charitable attitude toward others, and other personal traits.

In practice, the use of objective physical evidence (*e.g.*, photographs of the survivors and the decedent together, or awards and citations received for the decedent's professional, charitable, or civic activities) may have a more favorable effect on the jury than does verbal testimony alone.

Each side may call an economist or similar professional to educate the jury on the issue of "reduction to present value" (see §3.14). The chief concepts usually include the earning power of money over time, the tendency of the economy toward increased inflation, and discounting of the decedent's prospective earnings to present value. See generally §1.108.

TACTICS: When loss of support is not a major factor, or is not a long-term future factor, such expert testimony may be counterproductive. A jury that becomes schooled in the earning power of lump-sum awards invested to yield high-return rates and the effect of tax laws on the awards, even if instructed otherwise, may apply such knowledge when awarding noneconomic damages. For example, when the decedent is retired or has only a few years left before retirement, it may be preferable to avoid the use of an economist, or even to waive loss of support in favor of emphasizing noneconomic damages.

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§3.60 B. Closing Argument

In closing argument, plaintiff's attorneys often aim to humanize the decedent so that the jurors feel that they know the person and can appreciate the loss suffered by the survivors.

Defense counsel frequently take the position that loss of life can never really be compensated They may argue, particularly if the decedent was a child, that the survivors are seeking to recover for a loss that is essentially noneconomic.

The plaintiff's attorney may argue that limiting damages to loss of support or some figure not substantially greater than the loss of support is the equivalent of reducing the decedent to a unit of economic production, a concept foreign to a democratic society in which the worth of an individual from a humanistic standpoint is emphasized. This approach promotes the idea that loss of support is only one factor in damages for wrongful death and may even be a minor factor in the jury's consideration of the total award.

The plaintiff's attorney should exercise caution in determining what items of damages to emphasize in argument or even to claim in the trial itself. For example, if the decedent has a poor work record, it might be wise to waive damages for loss of support entirely so that this claim will not adversely affect the chief claim for noneconomic damages. Accordingly, if a survival cause of action is possible because the decedent survived for some period of time and the defendant's conduct justifies punitive damages, emphasis on the defendant's conduct rather than the decedent's worth may be appropriate, particularly if the decedent's public service or reputation has not been ideal.

The jury normally returns one verdict in a single lump sum for all the qualified survivors, and the trial judge apportions the award among them; however, if all plaintiffs waive this judicial apportionment, the trial court has discretion to instruct the jury to return separate verdicts. See §3.17. Even without a waiver, the jury can be instructed to return special findings that are advisory to the judge. The plaintiff's attorney may find it advantageous to request separate verdicts or special findings if there are a large number of survivors because the jury may award a larger total sum when it is required to itemize damages or to determine separate damages for a large number of plaintiffs.

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§3.61 VI. TAX CONSEQUENCES

Before a 1996 amendment of IRC §104(a)(2), damages recovered under CCP §377.60, by settlement or judgment, to compensate survivors for detriment resulting from a wrongful death, were viewed as "damages … on account of personal injuries" that were excludable from the recipient's gross income. See Rev Rul 84-108, 1984-2 Cum Bull 32. Section 104(a)(2) now exempts from income "damages … on account of personal physical injuries or physical sickness." Arguably, many elements of wrongful death damages fall outside this exclusion, although it could be argued that the recovery should not be taxed because it does not generate a gain but merely makes the taxpayer whole by restoring personal capital after a tortious loss. See Note in §1.112. See generally §§1.112-1.122 (tax treatment of bodily injury damages), 14.47-14.48 (tax treatment of punitive damages).

See §3.14 on use of the decedent's projected pretax gross earnings as a basis for determining present value of lost financial support.

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Survival Actions

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IV. TAX CONSEQUENCES §4.17

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Source: Torts/California Tort Damages/4 Survival Actions/ I. NATURE OF SURVIVAL ACTIONS/§4.1 A. Survival Action Situations

I. NATURE OF SURVIVAL ACTIONS

§4.1 A. Survival Action Situations

When a person having a cause of action dies (assuming that no judgment has been entered), the decedent's personal representative or successor in interest may bring an action to recover damages sustained by the decedent before death, including punitive damages. CCP §§377.10-377.50. The survival statutes do not create a cause of action but merely prevent the abatement of the decedent's cause of action for certain damages decedent could have recovered. *San Diego Gas & Elec. Co. v Superior Court (Harris)* (2007) 146 CA4th 1545, 53 CR3d 722 (survival action seeks damages, including punitive damages but not damages for pain and suffering, for harm or loss decedent sustained before death; question for trial court is whether addition of surviving spouse, after limitation period on her wrongful death claim had expired, to survival suit timely filed by decedent's parents was proper; see §3.16).

The person entitled to bring or continue such an action is the personal representative of the decedent's estate or, if there is no personal representative, the decedent's "successor in interest." CCP §377.31. When there is no personal representative of the estate, a successor in interest may file an affidavit or declaration under CCP §377.32 for permission to proceed on behalf of the successor in interest and other beneficiaries of the decedent's estate. See §4.4.

Situations in which a survival action may be pursued include:

(1) The decedent dies after having filed a lawsuit for personal injury damages (but before judgment has been entered). The personal representative (or successor in interest) may move to be substituted for the decedent as the plaintiff in the pending lawsuit.

(a) If the decedent's death was caused by the tortious conduct alleged in the pending lawsuit, the personal representative may

- File a new lawsuit under CCP §377.60, on behalf of "qualified survivors" (and at their request), to recover wrongful death damages;
- Move, with such survivors' permission, to amend the complaint in the pending lawsuit to state a cause of action for wrongful death damages; or
- Move to consolidate the pending lawsuit with any wrongful death action filed by such survivors.

(b) If the decedent's death was caused by tortious conduct unrelated to the cause of action in the pending lawsuit, the personal representative may

- File a new lawsuit under CCP §377.60, on behalf of qualified survivors (and at their request), to recover wrongful death damages.

(2) The decedent, to whom a cause of action for damages has accrued, dies before suit for such damages has been filed. A personal representative or the successors in interest may seek to recover, for the estate, damages for harm or loss sustained before death by

- Filing a lawsuit on behalf of the estate;
- Filing a lawsuit under CCP §377.60, on behalf of qualified survivors (and at their request), to recover wrongful death damages, stating an additional cause of action for predeath damages; or
- Moving to join or intervene in any wrongful death lawsuit filed by survivors.

NOTE: When the plaintiff in a personal injury lawsuit dies after the evidentiary stage of trial has been completed but before the jury begins deliberating, there must be a determination of the amount of economic damage suffered by the plaintiff during his or her lifetime. The trial judge cannot, by the device of waiting for the verdict and then entering judgment nunc pro tunc, include in the judgment (1) noneconomic damages for pain and suffering or (2) economic damages that it is anticipated the plaintiff's estate will suffer. *Williamson v Plant Insulation Co.* (1994) 23 CA4th 1406, 28 CR2d 751. Note, however, that *Williamson* does not decide whether loss of future earning

capacity is an element of recoverable damages.

An attorney retained by a decedent's survivor to pursue a claim for wrongful death damages should determine whether a lawsuit for predeath damage is pending and whether to add a cause of action to the wrongful death complaint to recover predeath damages for the decedent's estate.

Like other lawsuits, a decedent's suit, filed before he or she died, may be dismissed if not brought to trial within the 5-year period specified in CCP §§583.310 and 583.360, although, if the survivor has him- or herself substituted in the suit and amends the complaint to include causes of action for loss of consortium and wrongful death damages, a new 5-year period begins to run on the survivor's claims. See *Brumley v FDCC Cal., Inc.* (2007) 156 CA4th 312, 67 CR3d 292 (dictum suggests that when survivors file new lawsuit they can have decedent's suit consolidated with it, thus gaining additional time to bring survivorship claims to trial; see also §3.16).

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B. Relationship to Wrongful Death Actions

§4.2 1. Persons Entitled to Recover

A cause of action that survives the death of the person entitled to commence an action passes to the decedent's successor in interest. CCP §377.30. The "decedent's successor in interest" means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of the cause of action. CCP §377.11.

The "beneficiary of the decedent's estate" means, under CCP §377.10, either:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeed to a cause of action, or to a particular item of property that is the subject of the cause of action, under the decedent's will; or

(b) If the decedent died without a will, then the persons who succeed to the estate or the particular item of property that is the subject of a cause of action under the laws of intestate succession. Prob C §§6401-6402. A registered domestic partner may succeed to a decedent's estate under the laws of intestate succession. Prob C §6401.

By contrast, the persons entitled to recover in a wrongful death action are the survivors specified in CCP §377.60.

NOTE: Successors in interest and survivors are not always the same people. If a married person, for example, leaves a portion of the residue of his or her estate to a nonrelative friend by a testamentary document, that friend may have an interest in the survival action but not in wrongful death damages. If unrelated minors resided with the decedent for 6 months before the decedent's death and were dependent on the decedent for one half or more of their support, they qualify as survivors under §377.60 but would not be entitled to any portion of the recovery in the survival action unless the decedent provided for them by will or other testamentary document.

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§4.3 2. Nature of Recoverable Damages

The damages recoverable in a survivor action are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages the decedent would have been entitled to recover had he or she lived, but not damages for pain, suffering, or disfigurement. CCP §377.34. Thus, survival action damages may include medical expenses incurred by the decedent, loss of earning capacity to the date of death, and punitive damages, none of which are recoverable in a wrongful death action (except that heirs may recover punitive damages for death resulting from a homicide for which the defendant has been convicted of a felony (CC §3294(d))).

NOTE: An exception to the rule that damages for a decedent's predeath pain, suffering, and disfigurement cannot be recovered in a survival lawsuit is provided by Welf & Inst C §15657, part of the Elder Abuse and Dependent Adult Civil Protection Act (Welf & Inst C §§15600-15675), which allows such damages on proof by clear and convincing evidence that the defendant is liable for physical abuse as defined in the Act and was guilty of recklessness, oppression, fraud, or malice in the commission of the abuse. See *Quiroz v Seventh Ave. Ctr.* (2006) 140 CA4th 1256, 1265, 45 CR3d 222 (noted in §§3.1, 4.6). See also *Perlin v Fountain View Mgmt., Inc.* (2008) 163 CA4th 657, 664, 77 CR3d 743 (proof of causation by clear and convincing evidence required to support attorney fee claim).

Damages recoverable under CCP §377.34 are not recoverable in the wrongful death action. CCP §377.61. See *DeMeo v St. Francis Hosp.* (1974) 39 CA3d 174, 114 CR 280. Similarly, damages that are recoverable under CCP §377.60 (including funeral and burial expenses, the present value of future contributions and personal services, advice, or training from the decedent to the survivors, and the value of the decedent's society and companionship) are not recoverable in a survival action. See *Vander Lind v Superior Court* (1983) 146 CA3d 358, 364, 194 CR 209; *Carr v Pacific Tel. Co.* (1972) 26 CA3d 537, 545, 103 CR 120.

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II. BRINGING THE ACTION; JOINDER WITH RELATED ACTIONS

§4.4 A. Persons Entitled to Bring or Continue Decedent's Survival Action

The survival action may be brought or continued by the personal representative of the decedent's estate or by the decedent's "successors in interest."

NOTE: Code of Civil Procedure §377.31 provides that on "motion after the death of a person who commenced an action, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest."

Successors in interest may commence or continue a pending action but must execute and file a declaration under penalty of perjury (or an affidavit) setting forth factors enumerated in CCP §377.32. These include:

- The decedent's name;
- The date and place of the decedent's death;
- A statement that no proceeding is now pending in California for administration of the decedent's estate;
- If the decedent's estate was administered, a copy of the final order showing the distribution of the decedent's cause of action to the successor in interest;
- A statement that:
- The declarant is the decedent's successor in interest, as defined in CCP §377.11, and succeeds to the decedent's interest in the action or proceeding; or
- The declarant is authorized to act on behalf of the decedent's successor in interest, as defined in §377.11 with respect to the decedent's interest in the action or proceeding;
- A statement that no other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding;
- The declarant affirms the above is correct; and
- A certified copy of the death certificate is attached.

A court is authorized to make any order concerning parties that is appropriate to ensure proper administration of justice in the survival action, including appointment of the decedent's successor in interest as a special administrator or guardian ad litem. CCP §377.33.

On whether the decedent's agreement to arbitrate certain claims (*e.g.,* for medical malpractice) binds a personal representative or successor in interest to arbitrate a survival action (before pursuing a lawsuit for such damages), see California Tort Guide §9.75 (3d ed Cal CEB 1996). See also *Goliger v AMS Props., Inc.* (2004) 123 CA4th 374, 19 CR3d 819 (nursing home resident did not sign admission form containing arbitration clause nor authorize daughter to arbitrate; daughter's signature on form as "responsible party" did not require her to arbitrate).

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§4.5 B. Substitution; Filing New Complaint

If a person files suit and dies before a judgment is entered, the decedent's personal representative may move to be substituted as the plaintiff in the pending case. *Majors v County of Merced* (1962) 207 CA2d 427, 434, 24 CR 610 (decided under predecessor statute).

When no complaint was filed before the injured party died, and the cause of action arose during the decedent's lifetime, the personal representative or successor in interest may bring a survival action. *Dunwoody v Trapnell* (1975) 47 CA3d 367, 120 CR 859.

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Source: Torts/California Tort Damages/4 Survival Actions/§4.6 C. Statute of Limitations

§4.6 C. Statute of Limitations

Because the cause of action sued on in a survival action belonged to the decedent, the applicable statute of limitations is the one that would have applied had the plaintiff lived; *i.e.,* except as is noted below, the statute of limitations is not based on the date of the decedent's death but on the date on which the decedent's action accrued. *Dominguez v City of Alhambra* (1981) 118 CA3d 237, 173 CR 345; *DeMeo v St. Francis Hosp.* (1974) 39 CA3d 174, 114 CR 280. If the cause of action is for personal injury, for example, the limitations period for actions would ordinarily be 2 years from the date of injury. CCP §335.1.

The limitations period may be extended under CCP §366.1, which states that a survival action for a person who died before the applicable limitations period expired can be commenced before the *later* of (1) 6 months after the person's death or (2) the date the period would have expired had the person lived.

TACTICS: Claimants who wish to bring or pursue a survival action against a public entity or employee must comply with Government Code requirements for timely presentation of a claim (see Govt C §911.2) and timely filing of a suit after a claim has been rejected (see Govt C §945.6(a)(1). See *Dominguez v City of Alhambra, supra*.

The filing of a timely wrongful death lawsuit does not extend the time within which a survival lawsuit must be filed; the two causes of action are different and the "relation-back doctrine" does not apply. *Quiroz v Seventh Ave. Ctr.* (2006) 140 CA4th 1256, 1273, 45 CR3d 222 (survivor damages precluded whether action was for negligence or for statutory dependent-adult abuse).

It has been held that a survival lawsuit filed within an applicable limitations period by a person not then qualified to bring a survival action does not escape the statute of limitations bar even if the person bringing the action later becomes qualified to do so. See *Coats v K-Mart Corp.* (1989) 215 CA3d 961, 967, 264 CR 12 (former CCP §340(3) held to bar survival action filed by parent who was not appointed administrator until some 6 years later; appointment did not "relate back" to date complaint was filed). But see criticism of *Coats* in *Cloud v Northrop Grumman Corp.* (1998) 67 CA4th 995, 1008, 79 CR2d 544.

Unlike a survival action, a wrongful death action accrues on the date of death. See §3.16. Thus, if the date of death is, for example, more than 2 years from the date of a personal injury, and the decedent failed to file a complaint for personal injury within that time, a wrongful death action may be filed, but a survival action would be barred by the statute of limitations. See *DeMeo v St. Francis Hosp., supra*. Similarly, even if a wrongful death action is filed within 2 years after a personal injury accident, a motion to amend the complaint to add a survival cause of action that is filed after the statutory period has run, but not within 6 months after the person's death, could be denied. CCP §366.1; *Dominguez v City of Alhambra, supra*.

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§4.7 D. Joinder; Related Causes of Action

A personal representative may bring both a survival action under CCP §377.30 and a wrongful death action on behalf of the decedent's survivors under §377.60 and may, but is not required to, join the two causes of action in one complaint. Actions under §§377.30 and 377.60 arising out of the same wrongful act or neglect may be joined. CCP §377.62(a).

A survival action under §377.31 may be consolidated for trial with a separate wrongful death action under §377.60 if the two suits arise out of the same wrongful act or neglect. CCP §377.62(b). On consolidation generally, see CCP §1048(a) and California Civil Procedure Before Trial, chap 44 (4th ed Cal CEB 2004).

The parent or spouse of a decedent may recover emotional distress damages if the death occurred under certain circumstances. See chap 6. A spouse or parent who is the personal representative of the decedent's estate and who seeks damages for his or her own emotional distress may join such a cause of action with the statutory causes of action under §§377.30 and 377.60 but should make clear in the pleadings the various capacities in which he or she sues.

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E. Causes of Action That Survive

§4.8 1. Decedent's Causes of Action

As a general rule, a personal representative can seek damages for detriment incurred by the decedent before death, whether the harm or loss was the result of an intentional tort, negligence, or nontortious actions, such as those based on contracts or rights in real property. Code of Civil Procedure §377.20(a) provides that, except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death.

A cause of action for another's wrongful death, held by a decedent at the time of his or her death, survives and may be pursued by the decedent's personal representative or successor in interest. See *Chavez v Carpenter* (2001) 91 CA4th 1433, 1443, 111 CR2d 534 (child who survived her father by a month entitled to sue for his wrongful death; child's death gave defendant who caused father's death an "undeserved windfall" inasmuch as little in wrongful death damages could be recovered by child's estate).

For a discussion of survival of actions and damages for civil rights violations under 42 USC §1983, see §10.2; for invasion of privacy, see chap 9.

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§4.9 2. Causes of Action Against Decedent

When an action that could have been prosecuted against a decedent is pursued against the decedent's personal representative or successor in interest, all damages are recoverable that might have been recovered against the decedent had decedent lived, except damages recoverable under CC §3294 or other punitive or exemplary damages. CCP §377.42.

However, a punitive damages award survives if the defendant dies during or pending appeal. *Whelan v Rallo* (1997) 52 CA4th 989, 60 CR2d 876.

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III. PERSONAL INJURY DAMAGES

A. Damages That Survive Death

§4.10 1. Punitive Damages

Punitive damages that the decedent would have been entitled to recover had he or she lived may be recovered under CCP §377.30 (although generally not in a CCP §377.60 wrongful death action). Relatively minor compensatory damages (*e.g.,* for damage to decedent's clothing and personal property as he or she was being killed) can be the springboard for substantial punitive damages. *Rufo v Simpson* (2001) 86 CA4th 573, 616, 103 CR2d 492 ($12.5 million each to estates of waiter and defendant's wife). An essential requirement of survival damages is that the loss or damage must have occurred before the decedent's death. CCP §377.34. Therefore, in making a claim for punitive damages, the representative must allege in the pleadings that the actionable conduct that is to be punished occurred before the decedent's death.

NOTE: Two cases illustrate that the damage must occur before the decedent's death. In *Pease v Beech Aircraft Corp.* (1974) 38 CA3d 450, 459, 113 CR 416, disapproved on other grounds in *Abbott Ford, Inc. v Superior Court* (1987) 43 C3d 858, 877 n21, 239 CR 626, the plaintiff personal representative stipulated that death occurred during an airplane crash. Thus, there could be no recovery of punitive damages based on the loss of personal effects in the crash because no cause of action for that loss arose during the decedent's lifetime. By contrast, in *Stencel Aero Eng'g Corp. v Superior Court* (1976) 56 CA3d 978, 985, 128 CR 691, the personal representative expressly pleaded that a $200 loss of personal property occurred before death, although the property damage loss occurred in the same accident in which the decedent died. See Anno, 75 ALR4th 151 (1990) (when is death "instantaneous").

There is a narrow exception to the rule that the injured party must survive the fatal injury, no matter how briefly. The exception is when the death resulted from a homicide for which the defendant was convicted of a felony. The exception applies whether the decedent died instantly or survived the fatal injury for a period of time. CC §3294(d).

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§4.11 2. Medical and Related Expenses

Medical and related expenses incurred by the decedent from the time of injury until the date of death are recoverable in a CCP §377.30 action. *Vander Lind v Superior Court* (1983) 146 CA3d 358, 364, 194 CR 209. See also *DeMeo v St. Francis Hosp.* (1974) 39 CA3d 174, 114 CR 280.

On the survival of medical expenses in certain medical malpractice actions, see §15.45.

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§4.12 3. Loss of Earnings

Damages for loss of earnings incurred by the decedent are recoverable only for the interim period between the decedent's injury and death. CCP §377.34. Note that only persons suing under CCP §377.60 appear able to recover for postdeath profits or earnings. See §3.21.

Under federal maritime law, the estate of a deceased seaman who died on the high seas cannot recover damages for loss of the decedent's future earnings. *Miles v Apex Marine Corp.* (1990) 498 US 19, 112 L Ed 2d 275, 111 S Ct 317; *Davis v Bender Shipbuilding & Repair Co.* (9th Cir 1994) 27 F3d 426. However, survival claims for lost future earnings may be pursued if the case involves the death of a non-seaman in state territorial waters. *Sutton v Earles* (9th Cir 1994) 26 F3d 903.

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§4.13 4. Expenses of Personal and Substituted Services

Damages may be recovered for the reasonable cost or value of personal services to the decedent between the time of injury and the date of death. These services include such things as assistance in dressing, eating, bathing, or in use of a wheelchair. They are recoverable whether provided by a hired person or a family member. For further discussion of specific items of personal and substituted services and methods of proof, see §§1.66-1.69.

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§4.14 5. Effect of Plaintiff's Death After Verdict or Judgment

The death of a plaintiff after judgment does not affect the judgment, even though the judgment is for damages on a cause of action that would not survive the person's prejudgment death. And the death of a plaintiff while his or her case is on appeal after a trial court judgment does not abate an award for pain and suffering or emotional distress. *Sullivan v Delta Air Lines, Inc.* (1997) 15 C4th 288, 63 CR2d 74.

The death of a plaintiff after a verdict for personal injury damages has been returned but before judgment on the verdict had been rendered or entered does not prevent the trial judge from rendering a nunc pro tunc predeath judgment several months later. See *Cadlo v Metalclad Insulation Corp.* (2007) 151 CA4th 1311, 61 CR3d 104 (damages for pain and suffering preserved; for later decision in this case, involving prejudgment interest, see §1.94). But see *Kellogg v Asbestos Corp. Ltd.* (1996) 41 CA4th 1397, 49 CR2d 256, 61 CCC 49 (plaintiff's death after trial concluded but before judgment rendered nullified award of pain and suffering damages).

TACTICS: Code of Civil Procedure §36 lists situations in which a trial-setting preference may be obtained. Cases have underlined the desirability, in order to preserve pain and suffering damages, of obtaining early trials and judgments for persons whose injuries or illnesses leave them with limited projected life spans. See, *e.g., Gailing v Rose, Klein & Marias* (1996) 43 CA4th 1570, 51 CR2d 381 (malpractice claim for attorney's failure to seek trial preference).

The CCP §377.34 ban on the recovery by a decedent's estate of damages for pain and suffering applies to allegations that sexual harassment by coemployees caused a worker to suffer emotional distress, whether the claim is based on a violation of state law or a violation of the federal civil rights statute. See *County of Los Angeles v Superior Court (Schonert)* (1999) 21 C4th 292, 87 CR2d 441. See also *Garcia v Superior Court* (1996) 42 CA4th 177, 49 CR2d 580 (recovery limitations in CCP §377.34 do not violate requirements of 42 USC §1983).

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B. Damages That Do Not Survive Death

§4.15 1. Pain, Suffering, Disfigurement; Emotional Distress

Under CCP §377.34, damages for pain, suffering, or disfigurement are not recoverable. Although the statutory language in CCP §377.34 expressly excludes only damages for pain, suffering, or disfigurement, it is generally understood to exclude general damages for all aspects of what is referred to as pain and suffering, including damages for pain, suffering, emotional distress, mental anguish, mental disturbances, fright, shock, disfigurement, humiliation, worry, grief, indignity, and mortification. See *Neal v Farmers Ins. Exch.* (1978) 21 C3d 910, 920 n3, 148 CR 389 (under former survival statute, damages for decedent's emotional distress not recoverable). For cases and discussion of these aspects of pain and suffering, see §§1.70-1.81.

A personal representative's allegations that a defendant intentionally subjected the decedent to emotional distress alleges a wrong for which damages are not recoverable; the purported cause is subject to dismissal and cannot serve as the basis for punitive damages (see §14.9). *Berkley v Dowds* (2007) 152 CA4th 518, 534, 61 CR3d 304.

Predeath pain and suffering and nonpecuniary damages are not recoverable in survival actions under the Death on the High Seas Act (DOHSA) (46 USC §§30302-30308). *Dooley v Korean Air Lines Co.* (1998) 524 US 116, 141 L Ed 2d 102, 118 S Ct 1890.

Evidence that could be introduced to establish predeath pain and suffering absent eyewitness descriptions of the decedent's last hours, minutes, or seconds is discussed in *In re Petition of Carolyn Jean, Inc. v Schmitt* (9th Cir 1995) 73 F3d 884 (no survivors of lost fishing boat).

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§4.16 2. Other Nonrecoverable Damages

Included among the noneconomic damages that are not recoverable in a survival action are (although not specifically mentioned in CCP §377.34) damages for disability, impairment of enjoyment of life, susceptibility to future injury, aggravation of prior condition, and shortened life expectancy. Such damages are awarded as part of emotional distress or pain and suffering damages. See §§1.82-1.91.

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§4.17 IV. TAX CONSEQUENCES

In an action for survival damages, brought or pursued on behalf of a decedent, a recovery is excluded from gross income if the origin of the claim was a personal physical injury. IRC §104(a)(2). See Note in §1.112.

If the decedent previously deducted medical expenses for accident-related injuries and the estate recovers under CCP §§377.30-377.35, a portion of the settlement may be taxable. See §1.113. Punitive damages may be includable in gross income. See §14.48.

Taxable damages (*e.g.,* allocated lost wages) recovered in a survival action are considered "income in respect of a decedent" (IRD) under IRC §691(a)(1) and must be included in the gross income of the persons who are entitled to receive, and who do receive, the recovery. IRC §691(a)(1). The value of the recovery will also be an asset of the estate subject to estate tax. However, an itemized deduction is allowed to a person reporting IRD for any estate tax attributable to an item of IRD. IRC §691(c). The 2-percent limitation on itemized deductions does not apply to such a deduction. IRC §67(b)(7).

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5

Wrongful Life and Birth

I. IMPAIRED CHILD
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    - b. Parent §5.3
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II. UNWANTED, UNIMPAIRED CHILD
- A. Child's Cause of Action §5.13
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  - 1. Liability §5.14
  - 2. Damages §5.15

III. TAX CONSEQUENCES §5.16

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I. IMPAIRED CHILD

A. Child's Cause of Action: Wrongful Life

§5.1 1. Liability

The term "wrongful life" identifies the cause of action asserted by a congenitally impaired child who would not have been born but for a defendant's negligence. "Wrongful birth" refers to the cause of action, discussed in §§5.10-5.12, asserted by the parents of a congenitally impaired child, although the term has also been applied to a parent's cause of action, discussed in §§5.13-5.15, arising out of the birth of an unimpaired, but unwanted child.

A child born with a congenital impairment may recover damages from a health care provider, laboratory, or biological testing service whose negligence deprived the child's parents of the opportunity to choose not to conceive, or not to give birth to, the child. *Turpin v Sortini* (1982) 31 C3d 220, 230, 182 CR 337 (congenital impairment, if child would not have been born but for defendant's negligence, is "legally cognizable injury" that satisfies "injury" element of negligence cause of action). See *Gami v Mullikin Med. Ctr.* (1993) 18 CA4th 870, 22 CR2d 819 ("wrongful life" is medical negligence claim brought by impaired child who would not have been born but for defendant's negligence, seeking special damages—extraordinary medical expenses to ameliorate impairment). The child's compensatory damages may be limited to compensation for "extraordinary expense." See §§5.4-5.8.

NOTE: *Gami* reasoned that nothing in *Roe v Wade* (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, relating to the constitutionality of anti-abortion laws, negated the cause of action. This chapter uses "congenital" (existing at birth) to include "hereditary" or "genetic," and "impairment" to include "defect," "ailment," or "disability."

The birth of a child with serious abnormalities does not require the imposition of liability; the child must prove that the abnormalities were the result of someone's negligence. See *Ermoian v Desert Hosp.* (2007) 152 CA4th 475, 61 CR3d 754 (child's condition could not have been prevented, treated, or cured in utero; no showing that hospital or nurse violated any statute or regulation; no evidence that nurse, hospital, or doctors saw, before birth, anything negative in ultrasounds; no liability for failing, after fetus became viable, to suggest or recommend abortion). See also *Barragan v Lopez* (2007) 156 CA4th 997, 68 CR3d 73 (obstetrician/gynecologist had no duty to tell expectant mother that she had right to abort her pregnancy).

A child's action for wrongful life, discussed in this chapter, differs from a child's action for prenatal injury, discussed in §1.14. The essence of a wrongful life action is wrongful interference with reproductive choice: A congenitally impaired child has been subjected to a lifetime of disability and extraordinary expense as a proximate result of the defendant's negligent failure to have given the child's parents the opportunity to avoid either conceiving the child or allowing it to be born. In a prenatal injury case, damages are sought by a child born with a bodily injury who would have been born without impairment except for wrongful conduct by the defendant that caused disruption of the child's normal development.

NOTE: The policy considerations supporting recoveries for wrongful life or for prenatal injuries do not support recovery from a fertility clinic by an unimpaired child conceived through artificial insemination on allegations that the clinic's failure to confirm that the mother's husband had consented to the procedure permitted the husband to obtain a decree freeing him from any obligation to support the child. See *Alexandria S. v Pacific Fertility Med. Ctr.* (1997) 55 CA4th 110, 64 CR2d 23.

On health care providers' liability in reproductive situations, see California Tort Guide §§9.21-9.22 (3d ed Cal CEB 1996). See generally Annos, 111 ALR5th 459 (2003) (state birth-related neurological injury compensation programs), 83 ALR3d 15 (1978) (tort liability for wrongfully causing one to be born).

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§5.2 a. Health Care Provider or Service

A doctor may be liable for professional negligence committed before the child was conceived, such as:

- Failure to detect a congenital condition in a parent that might surface as an impairment in the parent's child;
- Failure to inform the parents of the possible effects of a known parental condition on the child's congenital health;
- Failure to detect, or inform of, a condition in an older child that might be repeated in a subsequent child of the same parents (see, *e.g., Turpin v Sortini* (1982) 31 C3d 220, 182 CR 337, in which doctors failed to detect hereditary deafness in plaintiff's older sister).

A doctor consulted by a pregnant woman may also be liable for medical negligence committed after the child has been conceived, such as:

- Failure to advise the mother about tests or other procedures that would detect congenital or developmental defects in the fetus (see, *e.g., Galvez v Fields* (2001) 88 CA4th 1410, 1421, 107 CR2d 50 (child entitled to negligence per se instruction on allegations that doctor's failed to advise mother about test that screens for neural tube defects as required by regulation); *Call v Kezirian* (1982) 135 CA3d 189, 185 CR 103 (allegation that doctor failed to perform amniocentesis on middle-aged mother));
- Failure to take an adequate family medical history to determine whether the child might be at congenital risk;
- Failure to inform the mother during pregnancy that she had contracted an illness that could affect the developing child or to warn of the risk of adverse effects on the child (see, *e.g., Robak v U.S.* (7th Cir 1981) 658 F2d 471);
- Failure to take, or to advise the mother about, corrective or ameliorative steps after examination or testing has detected problems in the fetus's condition or development.

A medical testing service or laboratory may be liable for failing to detect or to report congenital risk factors in tissues and fluids being tested. See *Curlender v Bio-Science Labs.* (1980) 106 CA3d 811, 165 CR 477, in which a medical laboratory allegedly failed to properly perform prenatal tests that would have detected Tay-Sachs disease. See also *Gami v Mullikin Med. Ctr.* (1993) 18 CA4th 870, 22 CR2d 819, in which a child born with a congenital impairment sought damages from a clinic that negligently failed to obtain from the mother, during the pregnancy, a second blood sample (after the first blood sample submitted by the mother proved unsuitable for testing) from which the impairment would have been detected, permitting the mother to terminate the pregnancy (as she would have done).

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§5.3 b. Parent

A child cannot maintain a cause of action against its parent by claiming that the parent should not have conceived the child or should not have allowed the child to be born alive. CC §43.6(a).

Similarly, a doctor or other defendant sued by a child cannot defend against the child's action (nor, presumably, recover comparative indemnity from the parents) on the theory that the parents should not have conceived the child or permitted it to be born, and the parent's failure or refusal is not to be considered in awarding damages. CC §43.6(b).

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Source: Torts/California Tort Damages/5 Wrongful Life and Birth/ 2. Damages/§5.4 a. Extraordinary Expense

2. Damages

§5.4 a. Extraordinary Expense

The child who establishes a right to recover for wrongful life may recover, as special damages, the extraordinary expenses necessary to:

- Treat the congenital condition;
- Provide specialized teaching and training;
- Provide specialized equipment; and
- Compensate for other extraordinary out-of-pocket expense.

See *Turpin v Sortini* (1982) 31 C3d 220, 237, 182 CR 337. See §5.11 on the recovery of these same special damages by the parents as an alternative to recovery by the child.

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Source: Torts/California Tort Damages/5 Wrongful Life and Birth/§5.5 b. Impaired Earning Capacity

§5.5 b. Impaired Earning Capacity

A child suing for a negligently caused genetic disability cannot recover damages for impairment of earning capacity. See *Johnson v Superior Court* (2002) 101 CA4th 869, 888, 124 CR2d 650 (child born with genetic kidney disorder could not recover earning capacity impairment damages from sperm bank and doctors that supplied sperm from donor with history of kidney disease); *Andalon v Superior Court* (1984) 162 CA3d 600, 614, 208 CR 899 (child born with Down's Syndrome).

TACTICS: The court in *Johnson v Superior Court, supra,* reasons that it was the defective gene in the donor's sperm that caused the child's kidney disorder, not the negligence of the doctors or the bank in failing to tell the child's parents of the donor's illness, saying that the particular child would not have been born at all absent the alleged negligence. Apparently unavailing is an argument that the California Supreme Court did not expressly rule out recovery for earning capacity impairment in *Turpin v Sortini* (1982) 31 C3d 220, 231, 182 CR 337, when it disapproved of *Curlender v Bio-Science Labs.* (1980) 106 CA3d 811, 831, 165 CR 477, which suggested that a child could sue for the full panoply of tort damages. On the recovery for lost earning capacity in an action for prenatal injury, see §1.14.

In the usual bodily injury case, damages are recoverable for the difference between what the plaintiff would have earned without the injury and with the injury. In a wrongful life case, absent the injury, the child would not have been born and would have no earnings. See *Saunders v U.S*. (9th Cir 1995) 64 F3d 482, in which the court distinguished both *Curlender* and *Turpin* as wrongful life cases in which no baby would have been born if the defendant had not been negligent.

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§5.6 c. Pain, Suffering, and Emotional Distress

A child who sues for negligence that resulted in its having been born with a congenital defect cannot recover damages for "pain and suffering or other general damages." *Turpin v Sortini* (1982) 31 C3d 220, 235, 182 CR 337 (disapproving the holding in *Curlender v Bio-Science Labs.* (1980) 106 CA3d 811, 831, 165 CR 477, that child may recover damages for pain and suffering to be endured during its life span, inasmuch as (1) it is impossible to determine that in being born impaired, rather than not being born, plaintiff suffered injury, and (2) it would be impossible to assess general damages in any fair, nonspeculative manner); *Johnson v Superior Court* (2002) 101 CA4th 869, 888, 124 CR2d 650 (child born with genetic kidney disorder could not recover earning capacity impairment damages from sperm bank and doctors that supplied sperm from donor with history of kidney disease); *Call v Kezirian* (1982) 135 CA3d 189, 194, 185 CR 103. See §5.12 on parents' right to recover damages for emotional distress.

TACTICS: A plaintiff seeking a change in the rule precluding pain and suffering damages might base an argument on Justice Mosk's dissent in *Turpin v Sortini* (1982) 31 C3d 220, 240, 182 CR 337. General damages have always been difficult to quantify, but this difficulty should not prevent their recovery. In response, defense counsel would point out that the defendant's negligence did not subject the child to the difference between an impaired life and a healthy life, but to the difference between an impaired life and no life at all.

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§5.7 d. Shortened Life Expectancy

It does not appear that damages can be recovered by a child born with a congenital condition for the fact that the condition shortens the child's life expectancy. See discussion in §5.6. See §1.90 on shortened life expectancy damages for a person who suffers bodily injury.

Proof that the child's expected life span will be shorter than that of a "normal" child should result in a proportional reduction of damages for extraordinary expense. See *Curlender v Bio-Science Labs*. (1980) 106 CA3d 811, 830, 165 CR 477.

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§5.8 e. Punitive Damages

A child born with a genetic defect may seek punitive damages from a defendant whose wrongful conduct shows oppression, fraud, or malice. See *Curlender v Bio-Science Labs*. (1980) 106 CA3d 811, 832, 165 CR 477, which saw "no reason in public policy or legal analysis for exempting from liability for punitive damages a defendant who is sued for committing a 'wrongful-life' tort."

NOTE: The disapproval in *Turpin v Sortini* (1982) 31 C3d 220, 235, 182 CR 337, of certain aspects of the damages discussion in *Curlender* (see §5.6) might arguably also apply to punitive damages.

A plaintiff seeking punitive damages from a sperm bank and the doctors alleged to have concealed a sperm donor's kidney disease must comply with the procedural requirements of CCP §425.13. *Johnson v Superior Court* (2002) 101 CA4th 869, 886, 124 CR2d 650. For discussion of the general requirements for pleading and proving a cause of action for punitive damages, see §§14.29, 15.53-15.54.

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§5.9 3. Argument Relating to Damages

Defense attorneys may seek to emphasize that the child born with a congenital impairment can nevertheless live a satisfying (and, sometimes, productive) life and that the trier of fact must not let sympathy for the child's condition influence its assessment of the actual extraordinary expense that will be required for reasonable care. Even an impaired child can experience joy and may bring satisfaction and comfort to the parents that they would not have experienced had the child not been born.

Plaintiffs' attorneys may argue that the child is entitled to an award that will permit the child (a) to afford all the care reasonably necessary to minimize the pain, discomfort, frustration, and humiliation of living with the defect and (b) to develop his or her human potential to the fullest extent permitted by the condition. Plaintiffs' counsel must counter any suggestion that the parents must shoulder some blame for the child's condition, *i.e.,* that they should not have permitted the child to be born.

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B. Parents' Cause of Action: Wrongful Birth

§5.10 1. Liability

The parents of a child born with a congenital impairment who would not have been born except for a defendant's actionable fault (see §5.1) may recover damages for extraordinary expense as an alternative to recovery by the child. See *Turpin v Sortini* (1982) 31 C3d 220, 238, 182 CR 337. See §5.1 on the child's cause of action.

NOTE: Medical testimony may defeat the parents' cause of action by establishing, for example, that a doctor's failure to recommend a genetic screening test for parents, or to tell them of the possible risks of not taking a nonrecommended test, was not contrary to standards of practice. See *Munro v Regents of Univ. of Cal.* (1989) 215 CA3d 977, 263 CR 878 (summary judgment against parents upheld when medical expert's unopposed declaration said that it was within standard of care not to recommend or perform Tay-Sachs disease screening test when neither parent was of Jewish descent).

The parent's cause of action is called "wrongful birth," paralleling the impaired child's cause of action for "wrongful life." Parents can sue for damages they suffer as a result of the tortious acts of a defendant who denied the mother an opportunity to avoid or terminate pregnancy when there was a risk that the child would be born with a congenital impairment. See *Robak v U.S.* (7th Cir 1981) 658 F2d 471 (child born with Rubella Syndrome); *Phillips v U.S.* (D SC 1983) 575 F Supp 1309 (child born with Down's Syndrome).

Just as a child cannot sue its parent for wrongful life (see §5.3), one parent cannot sue the other for the wrongful birth of their child. CC §43.6(a); *Barbara A. v John G.* (1983) 145 CA3d 369, 379 n9, 193 CR 422 (tort actions based on intraparental misrepresentation are contrary to public policy). The aim of CC §43.6 is to decrease economic pressure that might induce a couple to abort, or decline to conceive, a potentially defective child. See *Turpin v Sortini* (1982) 31 C3d 220, 228, 182 CR 337.

On a mother's cause of action for her own emotional distress on learning that injury to her child had been caused by a doctor's negligence, see §6.12.

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Source: Torts/California Tort Damages/5 Wrongful Life and Birth/ 2. Damages/§5.11 a. Extraordinary Expense

2. Damages

§5.11 a. Extraordinary Expense

Parents suing for the wrongful birth of an impaired child may recover all the damages for extraordinary expense that the child could have recovered had the lawsuit been pursued by the child. See §5.4. If the child and the parents join as plaintiffs in the same suit, care must be taken that their recoveries are not duplicative. *Turpin v Sortini* (1982) 31 C3d 220, 238, 182 CR 337.

TACTICS: Defense counsel may argue that the damages for the expense of raising a congenitally impaired child must be reduced by the projected cost of raising a normal child. See *Phillips v U.S.* (D SC 1983) 575 F Supp 1309, in which the estimated cost of home attendant care for a Down's Syndrome child to age 18 of $450,202 was reduced by $62,500 as the cost of raising a normal child to the same age.

A plaintiff might argue that the parents are entitled to recover the entire expense of raising the impaired child without a reduction for the expense of raising a normal child. See Fam C §3910, which provides that the father and mother have an equal responsibility, "to the extent of their ability," to maintain a child of whatever age who is incapacitated from earning a living and is "without sufficient means."

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§5.12 b. Emotional Distress

Parents who, because of a defendant's negligence, have given birth to a congenitally impaired child may recover damages for emotional distress as "direct victims" of the defendant's negligence. See *Andalon v Superior Court* (1984) 162 CA3d 600, 611, 208 CR 899 (negligent failure of physician to warn parents of possibility that child would be born with Down's Syndrome or to test for or detect Down's Syndrome in utero). See §6.24 on recovering damages for negligent infliction of emotional distress. See also *Newton v Kaiser Found. Hosps.* (1986) 184 CA3d 386, 228 CR 890, on recovery of emotional distress damages by parents whose child was injured during birth.

TACTICS: Under *Andalon,* both the mother and the father may maintain causes of action for emotional distress resulting from a health care provider's negligence that interfered with their roles as participants in the couple's reproductive life.

To recover damages for emotional distress, the parents of the congenitally impaired child must allege and prove facts establishing that the defendant's negligent conduct affected their lawful reproductive choices or otherwise affected the "end and aim" of their contract with the defendant. *Martinez v County of Los Angeles* (1986) 186 CA3d 884, 891, 231 CR 96. The parents' damages must not include compensation for "restructuring their lives" to care for the disabled child (which might duplicate damages recoverable by either the child or the parents for extraordinary expense), or for loss of consortium (the difference between the amount of love, support, and companionship they will receive from the impaired child and the amount they would have received from an unimpaired child). 186 CA3d at 894.

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II. UNWANTED, UNIMPAIRED CHILD

§5.13 A. Child's Cause of Action

A "normal" or "healthy" child cannot recover damages from the doctor whose negligence resulted in the child's being born. *Stills v Gratton* (1976) 55 CA3d 698, 705, 127 CR 652 (being born illegitimate after attempted therapeutic abortion is not in itself a cognizable injury). See *Foy v Greenblott* (1983) 141 CA3d 1, 14, 190 CR 84 (unimpaired child born to mentally impaired mother was not permitted to maintain action for damages against custodians who allegedly failed to guard mother's right to reproductive choice).

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B. Parent's Cause of Action

§5.14 1. Liability

A person who becomes pregnant, or a parent, as the result of medical negligence may recover damages for all harm or loss proximately caused by that negligence, even if the resulting child is "healthy" or "normal." *Stills v Gratton* (1976) 55 CA3d 698, 127 CR 652 (failed abortion); *Custodio v Bauer* (1967) 251 CA2d 303, 59 CR 463 (failed sterilization).

NOTE: Courts have rejected suits in which the plaintiff alleged that he was not actually the parent of a healthy child born to his spouse. See California Tort Guide §1.2 (3d ed Cal CEB 1996).

The statute of limitations for a cause of action for negligently performing a vasectomy on a father begins to run when the mother discovers she is pregnant, not when the child is born. *Christ v Lipsitz* (1979) 99 CA3d 894, 160 CR 498.

See Annos, 89 ALR4th 632 (1991) (recoverability of cost of raising normal, healthy child born as result of physician's negligence or breach of contract or warranty), 74 ALR4th 798 (1990) (damages for mental anguish or emotional distress), 93 ALR3d 218 (1979) (statute of limitations; sterilization or birth control procedures), 27 ALR3d 906 (1969) (measure and elements of damages; sterilization or birth control procedures).

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Source: Torts/California Tort Damages/5 Wrongful Life and Birth/§5.15 2. Damages

§5.15 2. Damages

Damages recoverable for experiencing an unwanted pregnancy, birth, and parenthood, caused by a physician's negligence, may include compensation for such items as:

- Fees or price paid for unsuccessful sterilization or abortion procedure or device;
- Medical expenses for prenatal care and delivery;
- Impairment of the mother's earning capacity;
- Costs of raising the unwanted child;
- Mother's pain and suffering during pregnancy and delivery;
- Both parents' emotional distress at frustration of their desire not to have the child;
- Mother's lessened ability to supply services to other members of the family or to lead the life that a successful sterilization or abortion would have assured; and
- Father's loss of consortium.

See *Custodio v Bauer* (1967) 251 CA2d 303, 318, 59 CR 463. See also *Stills v Gratton* (1976) 55 CA3d 698, 707, 127 CR 652.

NOTE: *Custodio* reviewed numerous decisions from other jurisdictions and concluded that both general and special damages can be recovered by the parents for a failed sterilization. *Stills* determined that defendants were liable for a failed abortion and that the measure of damages recoverable by the parent should be in accord with normal tort principles (see CC §3333), without any further limitation or restriction. *Stills* denied recovery to the child, but held that the parent, "in the event the triers of fact find in her favor on the liability issue, should be permitted to recover all damages to which she is entitled under ordinary tort principles." 55 C3d at 709.

Although parents may be damaged by the undesired pregnancy, they may also benefit by it, and defendants are entitled to an offset to the extent of that benefit. See *Phillips v U.S.* (D SC 1983) 575 F Supp 1309, 1319. Thus, the defendant may employ ordinary tort principles to prove any offset for benefits conferred, and any amounts chargeable to plaintiffs under their duty to mitigate damages, although the duty to mitigate damages does not include a duty to abort an unwanted pregnancy or to place the child for adoption. See *Stills v Gratton, supra*. See also *Morris v Frudenfeld* (1982) 135 CA3d 23, 36, 185 CR 76 (verdict of $1708 for medical expenses connected with the delivery of healthy child to unmarried mother after faulty tubal ligation not inadequate).

A mother who is herself mentally impaired and becomes pregnant and bears a healthy and unimpaired child may recover damages from those whose negligence permitted the unsought pregnancy and birth; her damages may include both those listed above and damages for her custodians' failure to provide prenatal care. See *Foy v Greenblott* (1983) 141 CA3d 1, 13, 190 CR 84.

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§5.16 III. TAX CONSEQUENCES

Income tax may be assessed on damages recovered in a lawsuit for wrongful life, wrongful birth, or the birth of an unwanted child, except to the extent that the recovered amounts are characterized as recovery for personal physical injury, and have not previously been deducted as medical expenses. See discussion of IRC §104(a)(2) in §§1.112-1.116.

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6

Emotional Distress

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Source: Torts/California Tort Damages/6 Emotional Distress/ I. PRELIMINARY CONSIDERATIONS/§6.1 A. Scope of Chapter

I. PRELIMINARY CONSIDERATIONS

§6.1 A. Scope of Chapter

This chapter discusses the recovery of damages for emotional distress that is not an adjunct or consequence of bodily injury. The recovery of damages for the emotional distress that accompanies or follows bodily injury is discussed in §1.74.

The "emotional distress" discussed in this chapter includes any "highly unpleasant mental reaction, such as fright, [horror,] grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." *Fletcher v Western Nat'l Life Ins. Co.* (1970) 10 CA3d 376, 397, 89 CR 78. See CACI 1604. See generally §6.40.

Sections 6.3-6.8, 6.16, and 6.24 of this chapter specify contexts or situations in which a plaintiff who cannot show that his or her emotional distress accompanied or resulted from a bodily injury may nonetheless recover damages for emotional distress.

Sections in other chapters discuss damages for emotional distress connected with the torts discussed in those chapters:

- Wrongful life and birth (§§5.6, 5.12);
- Assault and battery (§7.15);
- Defamation (§8.8);
- Invasion of privacy (§9.17);
- Malicious prosecution (§10.34);
- Abuse of process (§11.9);
- False arrest and imprisonment (§12.19); and
- Damage to personal property (§13.17).

Emotional distress caused by a wrongful termination of employment is discussed in Wrongful Employment Termination Practice (2d ed Cal CEB 1997). On recovery of emotional distress and other damages for violations of the antidiscrimination provisions of the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), see *Konig v FEHC* (2002) 28 C4th 743, 123 CR2d 1, and California Workers' Damages Practice §§4.74-4.83 (2d ed Cal CEB 2001).

Emotional distress that results from a wrongful denial of statutory rights or benefits can be the basis for damages. See, *e.g., Blanchard v Morton Sch. Dist.* (9th Cir 2005) 420 F3d 918 (mother alleged emotional distress from school district's denial of special educational services to her autistic son in violation of the Individuals with Disabilities Education Act (IDEA) (20 USC §§1400-1482)). Willful violation of an automatic stay in a bankruptcy proceeding can be the basis of emotional distress damages. *Dawson v Washington Mut. Bank (In re Dawson)* (9th Cir 2004) 390 F3d 1139 (debtor may not recover emotional distress damages under 11 USC §362(k)(1) for creditor's violation of automatic stay that follows from filing of bankruptcy petition); *Stinson v Bi-Rite Restaurant Supply Inc. (In re Stinson)* (9th Cir BAP 2005) 128 Fed Appx 30, 2005 US App 5449 (unpublished; emotional distress damages recoverable even absent economic damages finding).

On the constitutionality of punitive damages in emotional distress cases, see §14.127.

NOTE: Emotional distress that does not result from bodily injury is not itself, at least in some situations, a "bodily injury" as that term is used in liability insurance policies. See *Ticor Title Ins. Co. v Employers Ins. of Wausau* (1995) 40 CA4th 1699, 1704, 48 CR2d 368 (emotional distress over investment loss); *Chatton v National Union Fire Ins. Co.* (1992) 10 CA4th 846, 13 CR2d 318 (emotional distress following alleged securities fraud); *Aim Ins. Co. v Culcasi* (1991) 229 CA3d 209, 219, 280 CR 766 (employee's emotional distress following employer's failure to obtain medical insurance for employee, as promised, not covered by employer's policy; in policy, "bodily injury" means physical injury and its consequences and is distinct from injuries that are purely mental, emotional, or spiritual). See also *Uhrich v State Farm Fire & Cas. Co.* (2003) 109 CA4th 598, 617, 135 CR2d 131 ("breach of contract operating under cover of tort claim" for negligent infliction of emotional distress (NIED) provided no basis for

insurance coverage).

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§6.2 B. Establishing Genuineness of Claim

Basic to the recovery of damages for emotional distress (as for the recovery of damages for other forms of harm and loss) is the principle stated in CC §1714: "Everyone is responsible… for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person" as well as for "the result of his or her willful acts." Thus, the first step in recovering emotional distress damages that are not an adjunct to or result of bodily injury is to establish a defendant's legal liability to the plaintiff for the defendant's act or omission. On the elements of tort liability, see California Tort Guide (3d ed Cal CEB 1996).

In addition, courts have been reluctant to permit a plaintiff who did not experience an actual harmful physical contact with his or her body to recover damages for claimed emotional distress, reasoning that:

- Such damages are difficult to measure and to prove;
- Permitting recovery might encourage fictitious claims and create a flood of litigation; and
- Defendants would be subject to liability for the remote consequences of their conduct.

Thus, a second step in recovering damages for emotional distress that does not accompany a bodily injury is to present evidence that gives "some guarantee of genuineness in the circumstances of the case." See *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 926, 167 CR 831. See also *Di Loreto v Shumake* (1995) 38 CA4th 35, 41, 45 CR2d 22 (rejecting emotional distress damages for interference with economic advantage; not all mental anguish is compensable; emotional distress is part of human condition).

TACTICS: A plaintiff seeking damages for emotional distress should begin by pleading and proving the elements of one of the recognized contexts in which courts have permitted such recoveries. See §§6.3-6.8, 6.16, 6.24. The last of these contexts (negligent infliction of emotional distress) might be viewed as a context of last resort, to be pursued only if the elements of one of the others cannot be established. Of course, a court might also be persuaded to recognize other circumstances in which recovery would be just. On "new torts," see California Tort Guide §1.2 (3d ed Cal CEB 1996).

A defendant seeking to prevent recovery may begin by reverting to a traditional duty analysis, arguing that, in the circumstances, the defendant owed no duty to the plaintiff, that no duty was breached, that any breach was not the legal cause of the claimed emotional distress, and that the claimed distress was fictional or so trivial that damages should not be recoverable. See, *e.g., Martinez v County of Los Angeles* (1986) 186 CA3d 884, 894, 231 CR 96 (court declined to permit parents to pursue cause of action for being forced by injury to their child to "restructure their lives"). On the elements of a negligence cause of action and the role of duty, see Tort Guide §§1.4-1.18.

See Anno, 89 ALR5th 545 (2001) (need to show physical impact or zone of danger for recovery based on witnessing injury to another).

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II. CIRCUMSTANCES SUPPORTING LIABILITY

§6.3 A. Impact (Unwanted Contact)

A person who has experienced an unwanted and distressing touching of his or her body (*i.e.,* "contact" or "impact") by another person, object, substance, (*e.g.,* liquid or gas), or emanation (*e.g.,* odor or loud noise) may recover damages for the resulting emotional distress from a defendant whose wrongful conduct produced the physical impact. See *Di Mare v Cresci* (1962) 58 C2d 292, 300, 23 CR 772 (plaintiff does not need to show that defendant should have foreseen extent of emotional distress if it was foreseeable that defendant's conduct would result in unwanted contact). See also *Easton v United Trade Sch.* (1916) 173 C 199, 159 P 597 (emotional distress following miscarriage caused by fear for safety of fetus and others following slight physical injury in car accident).

NOTE: Although recovery for trivial or nominal distress should not be permitted, it does not appear that the impact need to have caused a bodily condition that occasioned a need for medical treatment, loss of time from work, or feelings of physical pain. See §6.3. The statement in some cases that California is a "no impact" jurisdiction (see, *e.g., Vanoni v Western Airlines* (1967) 247 CA2d 793, 795, 56 CR 115) means only that there are situations in which emotional distress damages can be recovered without showing an unwanted touching of the plaintiff's body. The recovery of emotional distress damages in such "no impact" contexts is covered below.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.4 B. 'Physical' Injury or Disorder

§6.4 B. "Physical" Injury or Disorder

Some appellate opinions have permitted the pursuit of emotional distress damages when the defendant's tortious conduct was viewed as having caused a "physical disorder" or "disorder of the nervous system." See *e.g., Vanoni v Western Airlines* (1967) 247 CA2d 793, 795, 56 CR 115 (passengers alleging that airline employees' conduct made them fear that crash was immanent permitted to pursue suit for "severe shock to [their] nerves and nervous system[s]").

Other decisions have denied the recovery of emotional distress damages on the ground that the plaintiff failed to prove that his or her emotional distress amounted to a physical injury. See, *e.g.*, *Espinosa v Beverly Hosp.* (1952) 114 CA2d 232, 234, 249 P2d 843 (parents negligently given wrong baby when they left hospital failed to convince jurors they had suffered "actual physical injury").

TACTICS: It is probable that *Vanoni* would now be analyzed as falling within the context of "fear for own safety" (see §6.8). That is, a plaintiff's efforts might well better be directed toward establishing the elements of one of the factual contexts that has been held to indicate the genuineness of the claim (see §6.2) than toward trying to base liability on establishing that the plaintiff's emotional distress amounted to a physical or nervous disorder. Any "physical" aspects of sequelae of the plaintiff's distress would bolster the recoverable damages. By the same token, plaintiffs in a similar situation to that in *Espinosa* might today seek to recover emotional distress damages by establishing the elements for recovery in the "negligent infliction of emotional distress" context. See §6.24.

See Anno, 69 ALR5th 411 (1999) (physical injury requirement for emotional distress from false positive result on medical test).

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§6.5 C. Fear for Own Safety; Zone of Danger

A person who is in the "zone of danger" created by tortious conduct and who experiences fear for his or her own safety may recover damages for emotional distress whether or not the disorder requires treatment or causes disability. See *Krouse v Graham* (1977) 19 C3d 59, 74, 137 CR 863 (husband sitting in parked car saw defendant's car on collision course with his car; see §6.11). See also *In re Air Crash Disaster Near Cerritos* (9th Cir 1992) 973 F2d 1490, 1492 (persons in house who heard what sounded like sonic booms caused by mid-air collision allowed to pursue emotional distress claims; plaintiffs viewed as within "zone of danger" created by defendants' alleged negligence and thus not required to meet criteria for "bystander" (see §6.8) recovery). But see *Lawson v Management Activities, Inc.* (1999) 69 CA4th 652, 81 CR2d 745 (*Air Crash Disaster Near Cerritos* reasoning rejected; airlines have no duty of care that encompasses emotional distress suffered by physically untouched spectators of plane crashes, even if they, for brief moment, reasonably feared for their own safety); *Robinson v U.S.* (ED Cal 2001) 175 F Supp 2d 1215 (homeowners warned to evacuate before out-of-control prescribed fire reached their houses not entitled to emotional distress damages because they were not subject to specific threat of personal injury).

It appears not, or at least no longer, necessary that a plaintiff placed in fear for his own safety show that the fear was accompanied or followed by a physical disorder. See *Vanoni v Western Airlines* (1967) 247 CA2d 793, 795, 56 CR 115 (passenger, because he alleged "severe shock to his nerves and nervous system," permitted to pursue emotional distress damages resulting from airline employee conduct that made him fear an imminent crash). See note in §6.8.

NOTE: Recovery for emotional distress damages in a lawsuit brought under the Federal Employers' Liability Act (FELA) (45 USC §§51-60) is limited by the "zone of danger" test; emotional distress damages may be recovered by a plaintiff who (1) sustained a physical impact as a result of the defendant's negligent conduct (see §6.3) or (2) was placed in immediate risk of physical harm by that conduct. *Consolidated Rail Corp. v Gottshall* (1994) 512 US 532, 554, 129 L Ed 2d 427, 447, 114 S Ct 2396 (rejecting "relative bystander" (see §6.8) and broader tests over three justices' dissent). Thus, a railway worker cannot recover for negligent infliction of emotional distress from risk of disease due to simple physical contact with a substance (asbestos) that might cause a disease at a later time. See *Metro-North Commuter R.R. Co. v Buckley* (1997) 521 US 424, 138 L Ed 2d 560, 117 S Ct 2113 ("zone of danger" test requires that plaintiffs sustain physical impact as result of defendant's negligence or be placed in immediate risk of physical harm by that conduct; physical contact that amounts to no more than exposure to a substance that poses some future risk of disease is insufficient). But a worker who has actually contracted a disease of condition such as asbestosis may recover damages—as part of the pain, suffering, and emotional distress damages for the condition—on demonstrating a reasonable fear of cancer stemming from the present disease. *Norfolk & W. Ry. Co. v Freeman Ayers* (2003) 538 US 135, 155 L Ed 2d 261, 274, 123 S Ct 1210. In an FELA case, a state court trial judge's failure to instruct a jury that a presently disease-free worker must prove that his fear of developing cancer was genuine and serious may require reversal of a state court judgment for the worker. *CSX Transp., Inc. v Hensley* (2009) ___ US ___, 173 L Ed 2d 1184, 129 S Ct 2139.

Stated another way, a plaintiff who is subjected to an unreasonable risk of personal injury through a defendant's negligence may recover damages for serious emotional distress if a reasonable person in the same situation would have suffered such distress. See *Wooden v Raveling* (1998) 61 CA4th 1035, 71 CR2d 891 (plaintiff, standing on her property, put in fear of being injured when cars collided and defendant's car sped onto property; no need for plaintiff to show, as might be required in other negligent infliction of emotional distress contexts (see §§6.24-6.39), a preexisting relationship with defendant or that defendant's conduct was outrageous).

See Anno, 59 ALR5th 535 (1998) (fear of contracting HIV or AIDS).

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.6 D. Fear of Future Illness

§6.6 D. Fear of Future Illness

A plaintiff exposed, through a defendant's legal fault, to toxic or carcinogenic substances (*i.e.,* to substances that increase the risk that the plaintiff will develop an illness in the future) may recover damages to compensate for a fear of future illness even if the plaintiff has yet to develop a present physical injury or illness. *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 997, 25 CR2d 550. Such a plaintiff must, however, plead and prove either:

- The fear stems from a knowledge, corroborated by reliable medical and scientific opinion, that it is more likely than not that the feared illness will develop in the future due to the exposure; or
- The conduct of the defendant that resulted in the exposure amounts to "oppression, fraud, or malice" as defined in CC §3294, and the plaintiff's fear is serious, genuine, and reasonable (*i.e.,* that the defendant's conduct significantly increased the risk to the plaintiff of future illness (beyond the level of remote possibility), in which case the plaintiff need not prove knowledge that the feared future illness is more likely than not to develop).

TACTICS: In *Potter,* the defendant knowingly sent toxic waste to an illegal dumpsite, contaminating the plaintiff's drinking water supply with carcinogens. Under the first alternative, above, a plaintiff would be required to prove more than mere knowledge of a toxic ingestion and an increased risk of disease. 6 C4th at 997. To base liability on the second alternative, above, the plaintiff would be required to prove by a preponderance of evidence, not that the defendant's conduct was intentional, but that the defendant acted, albeit negligently, with oppression, fraud, or malice, and that the defendant's acts actually and significantly increased the plaintiff's risk of future illness. 6 C4th at 998.

The *Potter* analysis has been applied to deny emotional distress damages to some plaintiffs. See, *e.g.*:

- *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 55 CR2d 724 (plaintiffs tried to circumvent *Potter* by alleging nuisance, inverse condemnation, and trespass against electric utility, alleging that electric and magnetic fields (EMFs) caused by electric power lines impaired their use and enjoyment of property due to fear that EMFs would cause them physical harm; Public Utilities Commission concluded that evidence did not support reasonable belief of substantial risk of physical harm; findings required for damages would be inconsistent with PUC's conclusion; until evidence supports such belief, utilities were not required to take action to reduce EMF fields);
- *Kerins v Hartley* (1994) 27 CA4th 1062, 33 CR2d 172 (plaintiff alleged emotional distress on learning (1) at time of her extensive intraabdominal surgery, surgeon was infected with human immunodeficiency virus (HIV), and (2) later, that surgeon had died of acquired immune deficiency syndrome (AIDS); no evidence that surgeon had breached duty to use due care during surgery or had failed to comply with prevailing Center for Disease Control (CDC) guidelines on using appropriate barrier precautions; no proof that plaintiff could reasonably have believed that she was more likely than not to suffer HIV infection or AIDS);
- *Herbert v Regents of Univ. of Cal.* (1994) 26 CA4th 782, 31 CR2d 709 (mother alleged fear that her son would develop AIDS after she saw that he had scratched himself with hypodermic needle he found in used needle box under sink at Medical Center and learned that "AIDS clinic" had been held at center previous day, even though doctor assured her that risk to son was less than 0.5 percent);
- *Macy's Cal., Inc. v Superior Court* (1995) 41 CA4th 744, 48 CR2d 496 (store customer alleged finger pricked by hypodermic needle in pocket of jacket returned to store by another customer held not to have met standard that it was more likely than not she would become ill, or requirement of physical injury);
- *Khan v Shiley, Inc.* (1990) 217 CA3d 848, 266 CR 106 (artificial heart recipient alleged distress on learning that model he received had statistically high risk of failure; he could not establish breach of duty by defendant—*i.e.,* establish that implant was defective product—absent actual malfunction of his implant);

NOTE: The *Potter* opinion, in footnote 11, distinguishes *Khan* on the ground that in *Khan* the plaintiff could not establish any breach of duty because a legally cognizable injury had not yet occurred, whereas in *Potter* the defendant did not challenge the finding that it was negligent.

- *Robinson v U.S.* (ED Cal 2001) 175 F Supp 2d 1215 (homeowners warned to evacuate before out-of-control prescribed fire reached their houses not entitled to emotional distress damages because they were not, as were the plaintiffs in *Potter*, subject to specific threat of personal injury).

Under CCP §340.8, an action for injury or wrongful death based on exposure to hazardous material or toxic substance (other than asbestos—see CCP §340.2) must be commenced no later than 2 years from the later of (1) the date of the injury or death, or (2) the first date on which the plaintiff became (or reasonably should have become) aware of (a) the physical cause of the injury or death and (b) "sufficient facts to put a reasonable person on inquiry notice that the [injury or death] was caused or contributed to by another." See Annos, 11 ALR5th 438 (1993) (statute of limitations in tort actions for injury from underground flow of contaminants), 6 ALR5th 162 (1992) (infliction of emotional distress: toxic exposure).

See §§1.22 on recovery of damages for cost of future medical monitoring, §1.74 on damages for emotional distress that is "parasitic" to present physical injury, §1.75 on damages for psychogenic injury, §1.86 on damages for impaired enjoyment of life, §1.87 on damages for susceptibility to future injury, §6.5 on fear of future injury damages in FELA cases, §6.16 on intentional infliction of emotional distress, and §6.24 on negligent infliction of emotional distress.

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§6.7 E. Nuisance; Trespass; Uninhabitability; Fraud

Damages for mental suffering and emotional distress may be recovered under a nuisance theory. See *Lew v Superior Court* (1993) 20 CA4th 866, 873, 25 CR2d 42 (75 plaintiffs sued apartment house owners in small claims court for emotional distress caused by owner permitting house to be used for drug dealing). See also *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 337, 5 CR 686 (emotional distress damages recoverable in private nuisance action; see also §6.36). But see *Robinson v U.S.* (ED Cal 2001) 175 F Supp 2d 1215 (homeowners warned to evacuate before out-of-control prescribed fire reached their houses not entitled, under nuisance or trespass theories, to emotional distress damages because they were not subject to specific threat of personal injury).

The uninhabitability of rental units may be the basis for landlord liability for which emotional distress damages are recoverable, and such damages are "actual damages" (see §14.9) that may serve as a basis for punitive damages. See *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429.

Damages may be recovered for the pain and suffering resulting from being defrauded out of money, being evicted, and "losing all his worldly possessions." See *Warren v Merrill* (2006) 143 CA4th 96, 116, 49 CR3d 122 ($15,000 in noneconomic damages were "actual damages" needed to justify an award of punitive damages). See §§1.70, 14.9.

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§6.8 F. Bystander's Perception of Loved One's Injury

A person may recover damages for the "emotional trauma and physical injury" that result from seeing or perceiving the tortiously caused injury to or death of a loved one even if the person was not himself or herself physically injured or threatened with bodily injury (*i.e.,* was not within the zone of danger). *Dillon v Legg* (1968) 68 C2d 728, 730, 69 CR 72 (mother experienced shock and distress on seeing her child struck and killed by negligently driven car).

NOTE: *Dillon v Legg* listed three factors for determining whether the defendant should have foreseen that the "bystander" would suffer emotional distress (68 C2d at 740): (1) whether the plaintiff was near the scene of the accident, not distant from it; (2) whether the shock resulted from a direct emotional impact on the plaintiff from the sensory and contemporaneous observance of the accident, not from learning of it from others after it occurred; and (3) whether the plaintiff and the victim were closely related.

Subsequent cases, somewhat modifying the *Dillon* factors, have stated a "three-part test" for recovery of emotional distress damages by a bystander who witnesses injury to another without personally suffering physical injury or impact. See *Thing v La Chusa* (1989) 48 C3d 644, 647, 257 CR 865; *Campanano v California Med. Ctr.* (1995) 38 CA4th 1322, 1328, 45 CR2d 606. Under this restated three-part test, a plaintiff seeking recovery as a bystander must:

- Be closely related to the injury victim (see §6.9);
- Be present at the scene of the injury-producing event at the time it occurs and be aware that it is causing injury to the victim (see §6.10); and
- Suffer, as a result, emotional distress beyond that which would be anticipated in a disinterested witness. (see §6.13).

TACTICS: A plaintiff who cannot satisfy *Dillon* or *Thing* criteria may be able to recover emotional distress damages under another theory such as fear for his or her own safety (see §6.5) or as a direct victim of negligent conduct (see §6.26 and discussion of *Kately v Wilkinson* (1983) 148 CA3d 576, 195 CR 902, in §6.37).

A plaintiff who personally suffers direct injury at the time of perceiving injury to another may be able, even required, to recover all damages, including those for emotional distress, in a single cause of action. See *Sesma v Cueto* (1982) 129 CA3d 108, 115, 181 CR 12 (mother alleged lack of care during labor leading to death of child); *Johnson v Superior Court* (1981) 123 CA3d 1002, 177 CR 63 (mother alleged that defendant's negligent prolongation of her labor caused her to feel fetus die in womb). See also *Rowland v Superior Court* (1985) 171 CA3d 1214, 217 CR 786 (cause of action for emotional distress damages "relates back" and may be added to wrongful death complaint by amendment even after limitations period has run).

Strict product liability, as well as negligence, may be the basis for recovery of damages for injuries flowing from the emotional trauma of observing the injury or death of a close relative. *Shepard v Superior Court* (1977) 76 CA3d 16, 142 CR 612. See §6.37.

See Annos, 95 ALR5th 107 (2002) (recovery under rule of *Dillon v Legg* or refinements thereof), 91 ALR5th 545 (2001) (distress caused by witnessing treatment of pet or animal), 90 ALR5th 179 (2001) (witnessing injury to another from defective product), 31 ALR4th 162 (1984) (bystander recovery for emotional distress under strict products liability or breach of warranty).

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§6.9 1. Close Relationship

Persons outside such close family relationships as husband-wife, domestic partner (see note, below), parent-child, or brother-sister have been barred from recovering damages for emotional distress caused by witnessing the death or injury of another regardless of the emotional closeness of their relationship to the victim. See *Elden v Sheldon* (1988) 46 C3d 267, 274, 250 CR 254 (policy considerations preclude unmarried cohabitant from recovering damages for emotional distress from seeing other cohabitant being injured); *Moon v Guardian Postacute Serv., Inc.* (2002) 95 CA4th 1005, 116 CR2d 218 (son-in-law, despite alleged close relationship with mother-in-law); *Drew v Drake* (1980) 110 CA3d 555, 168 CR 65 (unmarried cohabitant who had lived with victim for 3 years).

NOTE: A "domestic partner" (a status for which the criteria are specified in Fam C §297) is entitled to recover damages for the negligent infliction of emotional distress to the same extent as a spouse. CC §1714.01. See §3.4 on a domestic partner's right to recover wrongful death damages. See also §6.26. *Elden* disapproves, to the extent that it is inconsistent, *Ledger v Tippitt* (1985) 164 CA3d 625, 643, 210 CR 814, in which the court upheld the right of an unmarried mother to sue for injury caused by seeing the father of her child, with whom she was living, stabbed to death by the defendant, noting the couple's frustrated attempts to marry legally, their establishment of a home with their child, the brutality of the attack, and the fact that the victim died in the woman's arms. Counsel seeking a recovery for a "de facto spouse" might argue that *Dillon v Legg* (1968) 68 C2d 728, 740, 69 CR 72, does not explicitly restrict recovery to the legal spouse, parent, or child of the victim, but requires, as a factor supporting recovery, that the relationship be "close" as contrasted with "absent" or "distant."

"Bystander" emotional distress damages have been denied to persons whose relationship to a victim was close, but not that of husband-wife, parent-child, or brother-sister. See *Rodriguez v Kirchhoefel* (2005) 128 CA4th 427, 26 CR3d 891 (14-year-old plaintiff and 15-year-old victim not related by blood, but such close friends that they called themselves sisters); *Trapp v Schuyler Constr.* (1983) 149 CA3d 1140, 197 CR 411 (children's first cousin who was like sibling); *Kately v Wilkinson* (1983) 148 CA3d 576, 581, 195 CR 902 (14-year-old friend described as "filial member" of family, like claimants' sister and daughter). But see *Kriventsov v San Rafael Taxicabs, Inc.* (1986) 186 CA3d 1445, 229 CR 768 (uncle, who was living in same household with nephew and nephew's parents and grandmother, pleaded sufficiently close relationship with nephew to recover damages for emotional distress experienced when observing nephew's hit-and-run death). The court in *Moon v Guardian Postacute Serv., Inc., supra,* suggested that "living in same household" was a factor that made *Kriventsov* distinguishable from *Moon*.

See Anno, 94 ALR3d 486 (1979) (relationship between victim and plaintiff-witness as affecting right to recover damages).

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Source: Torts/California Tort Damages/6 Emotional Distress/ 2. Presence and Awareness/§6.10 a. Presence at Time of Injury

2. Presence and Awareness

§6.10 a. Presence at Time of Injury

The person seeking emotional distress damages as a bystander may be barred if he or she was not in a position to observe both (1) the event or conduct that causes serious injury and (2) the injury itself. *Thing v La Chusa* (1989) 48 C3d 644, 667, 257 CR 865 (recovery denied to mother who was at home when daughter came from scene and said that son had been hurt; mother saw injured son at accident scene but did not see or hear accident or defendant's tortious conduct).

NOTE: Nearness to the scene is one of three factors listed in *Dillon v Legg* (1968) 68 C2d 728, 740, 69 CR 72. See §6.8. Subsequent cases appear to have translated this "nearness" requirement into a requirement of presence at the scene, including a personal and contemporaneous perception of the injury-causing event. See §6.11.

Cases in which emotional distress damages, sought under a "bystander" theory, have been denied to plaintiffs who were not literally and immediately at the scene of an injury include:

- *Bird v Saenz* (2002) 28 C4th 910, 916, 123 CR2d 465 (daughters not present in operating room when mother's artery was unintentionally cut; not enough that they saw her, attended by numerous hospital staff and in obvious physical distress, being rushed to another room and to surgery);
- *Hoyem v Manhattan Beach City Sch. Dist.* (1978) 22 C3d 508, 522, 150 CR 1 (mother saw injured child in hospital several hours after child was hit by motorcycle);
- *Ra v Superior Court (Presidio Int'l Inc.)* (2007) 154 CA4th 142, 64 CR3d 539 (not enough that wife knew husband was in area of store from which loud crash emanated and believed it more likely than not that he had been injured);
- *Hathaway v Superior Court* (1980) 112 CA3d 728, 169 CR 435 (parents who learned of son's electrocution when only short distance away, almost immediately saw him in distressed state, and observed efforts to save his life);
- *Cortez v Macias* (1980) 110 CA3d 640, 167 CR 905 (mother paying hospital bill in another room when child died from alleged inadequate treatment), disapproved on other grounds in *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661;
- *Parsons v Superior Court* (1978) 81 CA3d 506, 512, 146 CR 495, 498 (plaintiffs who did not see or hear car accident in which daughters and sisters were killed, but arrived shortly afterward); and
- *Arauz v Gerhardt* (1977) 68 CA3d 937, 137 CR 619 (mother arrived several minutes after car hit son).

Emotional distress damages may be recovered when the observed event was not a sudden or single occurrence and when the plaintiff was voluntarily present at the location where the distressing events occurred. See *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661 (recovery permitted to mother who observed, over period of days at juvenile hall, son's deteriorating health and inadequacy of medical care given him, but not to father who heard about it from mother); *Zuniga v Housing Auth.* (1995) 41 CA4th 82, 48 CR2d 353 (plaintiff arrived at scene while fire was still causing damage and possibly injury to relatives, and witnessed rescue efforts and futile attempts to extinguish fire); *Ortiz v HPM Corp.* (1991) 234 CA3d 178, 186, 285 CR 728 (coemployee wife who came to scene after husband had been trapped in machine saw his limp body between moving and stationary parts of still running machine, blood running down his arm, and his failure to respond when spoken to, although she did not fully "perceive" that he was being damaged by lack of oxygen); *Budavari v Barry* (1986) 176 CA3d 849, 853 n4, 222 CR 446 (course of medical negligence lasting over several hours, witnessed by plaintiff).

See Anno, 99 ALR5th 301 (2002) (immediacy of observation of injury as affecting right to recover damages for shock or mental anguish).

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.11 b. Personal Contemporaneous Perception

§6.11 b. Personal Contemporaneous Perception

Cases have stated that a plaintiff must have "personally and contemporaneously perceive[d] the injury-producing event and its traumatic consequences" to be entitled to recover emotional distress damages under the "bystander" theory. See *Thing v La Chusa* (1989) 48 C3d 644, 666, 257 CR 865; *Golstein v Superior Court* (1990) 223 CA3d 1415, 1427, 273 CR 270 (plaintiff must "experience a contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury").

NOTE: *Thing v La Chusa* reformulated the "personal and contemporaneous perception" requirement stated in earlier cases into a "bright line rule" that the plaintiff be present at the scene of the injury-producing event at the time it occurs and be aware that it is causing injury to the victim. See *Johnson v County of Ventura* (1994) 29 CA4th 1400, 35 CR2d 150 (no recovery for family members who were outside house and did not see assailant enter, stab victim, and exit).

Emotional distress damages have been denied for absence of a personal contemporaneous perception (or "sensory awareness"). See, *e.g.:*

- *Bird v Saenz* (2002) 28 C4th 910, 916, 123 CR2d 465 (described in §6.10);
- *Justus v Atchison* (1977) 19 C3d 564, 582, 139 CR 97 (father in delivery room did not see child die; knew it was dead only when doctor told him), disapproved on other grounds in *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661;
- *Steven F. v Anaheim Union High Sch. Dist.* (2003) 112 CA4th 904, 911, 6 CR3d 105 (parents learned of teenage daughter's sexual relationship with teacher by discovering letters from teacher to daughter; also noted in §6.28);
- *Fife v Astenius* (1991) 232 CA3d 1090, 1093, 284 CR 16 (father heard vehicles crash and saw debris fly above wall separating him from street, but did not know daughter was in car until he climbed wall and saw her still in passenger seat);
- *Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 254 CR 840 (parents perceived danger when, after some delay, mother was moved to surgery for caesarian section, but did not perceive injury to their child);
- *Scherr v Hilton Hotels Corp.* (1985) 168 CA3d 908, 214 CR 393 (wife saw hotel fire on live television, but did not witness husband being injured);
- *Ebarb v Woodbridge Park Ass'n* (1985) 164 CA3d 781, 210 CR 751 (minor kept away from pool where her brother had drowned until at least 20 minutes after she knew he was dead);
- *Madigan v City of Santa Ana* (1983) 145 CA3d 607, 609, 193 CR 593 (parent and stepparent were told of automobile accident minutes after it happened and arrived at scene 15 minutes later);
- *Martin v U.S.* (9th Cir 1993) 984 F2d 1033, 1036 (neither sister who was in same play group as abducted child, nor mother who learned of it later, were contemporaneous witnesses of child's rape by third party due to group leader's alleged negligence).

It is not necessary, however, that the personal and contemporaneous perception have been direct and visual. See *Krouse v Graham* (1977) 19 C3d 59, 137 CR 863 (husband who was sitting in parked car while wife removed groceries from trunk saw defendant's speeding car on collision course with wife, but did not see actual impact). See also *Wilks v Hom* (1992) 2 CA4th 1264, 3 CR2d 803 (mother who, in the living room, heard and felt explosion that blew her out of house deemed sufficiently close to accident to be "contemporaneously aware" that daughters in their bedrooms were being injured, although she could neither see nor hear them).

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§6.12 c. Awareness of Injury-Producing Event and Injury

A bystander seeking emotional distress damages must show a contemporaneous sensory awareness that a loved one was being injured, but need not show an awareness that a defendant's tortious conduct caused the injury. See *Hedlund v Superior Court* (1983) 34 C3d 695, 706, 194 CR 805 (child sitting next to mother when she was shot by mental patient after psychologists had failed to warn mother of patient's threats); *Austin v Regents of Univ. of Cal.* (1979) 89 CA3d 354, 152 CR 420 (father in delivery room as doctors refused to deliver live fetus from dead mother), disapproved on other grounds in *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661.

More specifically, *Thing v La Chusa* (1989) 48 C3d 644, 666, 257 CR 865 (see §§6.10-6.11) requires that the bystander plaintiff be aware of the connection between the injury-producing event and the injury. *Bird v Saenz* (2002) 28 C4th 910, 921, 123 CR2d 465 (described in §6.10).

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§6.13 3. Distress Related to Relationship

Dillon v Legg (1968) 68 C2d 728, 730, 69 CR 72 (see §6.8), does not say that bystander recovery needs to be based on emotional distress of a particular nature or severity. The statement of criteria for recovery stated in *Thing v La Chusa* (1989) 48 C3d 644, 647, 257 CR 865 (see §6.10), however, includes "emotional distress beyond that which would be anticipated in a disinterested witness."

NOTE: Of course, a trier of fact would rarely not view a spouse, domestic partner, parent, child, or sibling (see §6.8) as having suffered emotional distress greater than what would be anticipated in a disinterested witness.

At one point, the *Thing* opinion refers to "the traumatic emotional effect… that causes serious injury to a close relative." 48 C3d at 667. The court may be suggesting that damages would not be recoverable for a bad reaction to a close relative's *minor* injury. But the words "traumatic emotional effect" do not seem intended to require that the plaintiff's distress must have been "severe" or "serious," in additional to greater than that to be expected of a nonrelative. See §§6.19, 6.29 on the need to show serious or severe emotional distress in other contexts.

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4. Defenses

§6.14 a. Defendant Not Liable to Primary Victim

To establish a "bystander" cause of action, the plaintiff must plead and prove that the defendant breached a duty to the primary victim of the accident; a defendant who is not liable for causing the primary victim's injury or death is not liable to the bystander. See *Allen v Toten* (1985) 172 CA3d 1079, 1084, 218 CR 725; *Wynne v Orcutt Union Sch. Dist.* (1971) 17 CA3d 1108, 95 CR 458.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.15 b. Employer's Immunity

§6.15 b. Employer's Immunity

A defendant sued for emotional distress damages by the close relative of the primary victim of the defendant's tortious conduct may also invoke statutory immunities from liability to that victim. See *Williams v Schwartz* (1976) 61 CA3d 628, 131 CR 200 (employer whose alleged negligence resulted in employee's on-the-job death protected by workers' compensation exclusivity immunity under Lab C §§3600, 3602 from liability to employee's wife, who witnessed death). See generally California Workers' Damages Practice §4.6 (2d ed Cal CEB 2001).

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Source: Torts/California Tort Damages/6 Emotional Distress/ G. Intentional Infliction of Emotional Distress (IIED)/§6.16 1. Nature and Elements of Recovery

G. Intentional Infliction of Emotional Distress (IIED)

§6.16 1. Nature and Elements of Recovery

A person may recover damages for emotional distress intentionally caused by a defendant by establishing the following elements:

- Outrageous conduct by the defendant;
- Intention of causing, or reckless disregard of the probability of causing, emotional distress;
- Severe emotional suffering;
- Actual and proximate causation of the emotional distress by the defendant's outrageous conduct; and
- Absence of any privilege authorizing the defendant's conduct.

See *Cole v Fair Oaks Fire Protection Dist.* (1987) 43 C3d 148, 155 n7, 233 CR 308; *Davidson v City of Westminster* (1982) 32 C3d 197, 209, 185 CR 252. See also *Mitchell v Superior Court* (1984) 37 C3d 591, 608, 208 CR 886 (evidence of defendant's conduct guarantees genuineness of plaintiff's claim); *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 927, 167 CR 831 (intentional torts support damages for emotional distress without physical harm in cases involving extreme and outrageous intentional invasions of mental and emotional tranquility; outrageous conduct ensures that plaintiff experienced serious mental suffering); CACI 1600.

NOTE: The elements of liability for intentional infliction of emotional distress (IIED) are stated in *Christensen v Superior Court* (1991) 54 C3d 868, 903, 2 CR2d 79, as (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. See *Cochran v Cochran* (1998) 65 CA4th 488, 494, 76 CR2d 540, and *KOVR-TV, Inc. v Superior Court* (1995) 31 CA4th 1023, 1028, 37 CR2d 431, both discussed in §6.17.

Reckless infliction of emotional distress is an aspect of the tort of intentional infliction of emotional distress, which is entirely different from negligent infliction of emotional distress. See *Ess v Eskaton Props., Inc.* (2002) 97 CA4th 120, 129, 118 CR2d 240 (alleged nonfeasance of skilled nursing facility that permitted intruder to sexually assault patient not sufficiently reckless to permit suit by patient's sister).

Proving that a defendant is liable for one of the traditional intentional torts (see chaps 7-12) normally entitles the plaintiff to recover damages for the emotional distress caused by the tortious conduct. See *Huntingdon Life Sciences, Inc. v Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 CA4th 1228, 29 CR3d 521 (allegations of trespass on real property, invasion of privacy, and CCP §527.6 harassment stated causes of action not subject to being stricken under SLAPP statutes (see §8.22)). In addition, intentionally inflicted emotional distress damages are recoverable in a variety of situations that may not be encompassed by traditional intentional torts. See, *e.g.:*

- *Agarwal v Johnson* (1979) 25 C3d 932, 160 CR 141 (directing racial epithet to employee), disapproved on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19;
- *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 118 CR 184 (malicious prosecution; see chap 10);
- *Lingenfelter v County of Fresno* (2007) 154 CA4th 198, 64 CR3d 378 (nonsuit inappropriate following allegations of actions by her son's foster parents and county that diminished mother's participation in son's funeral);
- *Carney v Rotkin, Schmerin & McIntyre* (1988) 206 CA3d 1513, 254 CR 478 (attorney's debt-collection tactics; see §6.35);
- *Miller v National Broad. Co.* (1986) 187 CA3d 1463, 1487, 232 CR 668 (camera crew, without asking permission and with "little or no thought" of propriety, accompanied paramedics into private home, filmed husband's dying moments, and later broadcast and rebroadcast the film despite wife's protests; see chap 9 on invasion of privacy);
- *Robinson v Hewlett-Packard Corp.* (1986) 183 CA3d 1108, 1127, 228 CR 591 (racial insults by employee's

supervisor);

- *Wayte v Rollins Int'l, Inc.* (1985) 169 CA3d 1, 17, 215 CR 59 (employer's false statement to employee's wife that company insurance would not cover paraplegic son's medical expenses);
- *Bundren v Superior Court* (1983) 145 CA3d 784, 791, 193 CR 671 (hospital's bill-collection practices);
- *Delia S. v Torres* (1982) 134 CA3d 471, 482, 184 CR 787 (rape; victim's damages for emotional distress (pain, discomfort, fears, anxiety, etc.) as well as for battery (see §§7.3-7.9) and victim's spouse's damages for both emotional distress and loss of consortium), disapproved on other grounds in *Christensen v Superior Court* (1991) 54 C3d 868, 905 n28, 2 CR2d 79;
- *Godfrey v Steinpress* (1982) 128 CA3d 154, 180 CR 95 (real estate broker's concealment and misrepresentation of termite damage);
- *Kinnamon v Staitman & Snyder* (1977) 66 CA3d 893, 136 CR 321 (attorneys' debt-collection tactics), disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638; but see *Ross v Creel Printing & Pub'g Co.* (2002) 100 CA4th 736, 747, 122 CR2d 787;
- *Sabow v U.S.* (9th Cir 1996) 93 F3d 1445, 1455 (army general screamed at junior officer and his wife, calling officer "crook" and "felon," possibly to prevent junior officer and wife from going public with concerns about general's conduct).

On the other hand, it has been held that damages are not recoverable for distress resulting from "mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities, or threats… [that] amount to nothing more than mere annoyances." *Yurick v Superior Court* (1989) 209 CA3d 1116, 1128, 257 CR 665, disapproved on other grounds in *Carmichael v Alfano Temp Personnel* (1991) 233 CA3d 1126, 1130, 285 CR 143.

For a series of annotations collecting cases on the liability of employers, supervisors, and managers for intentionally inflicting emotional distress in a variety of contexts, see Annos, 21 ALR6th 375 (2007) (accusation or implication of employee dishonesty), 20 ALR6th 1 (2007) (sexual harassment and discrimination, accusations of sexual conduct or orientation), 19 ALR6th 1 (2006) (ethnic, racial, or religious harassment or discrimination), 11 ALR6th 447 (2006) (age discrimination), 10 ALR6th 375 (2006) (disability discrimination). See also Annos, 8 ALR6th 399 (2005) (vicarious or imputed IIED liability to nonemployee plaintiffs), 125 ALR5th 133 (2005) (parent's liability for sexual abuse of minor child), 110 ALR5th 371 (2003) (IIED in marital context), 99 ALR5th 445 (2002) (IIED actions against paramours), 38 ALR4th 998 (1985) (modern status of IIED as independent tort of "outrage").

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Source: Torts/California Tort Damages/6 Emotional Distress/ 2. Factors Affecting Liability/§6.17 a. Outrageous Conduct by Defendant

2. Factors Affecting Liability

§6.17 a. Outrageous Conduct by Defendant

Traditionally, to be a basis for liability for intentional infliction of emotional distress (IIED), a defendant's tortious conduct must have been "extreme and outrageous"—*i.e.,* "so extreme as to exceed all bounds that are usually tolerated in a civilized community." *Hughes v Pair* (2009) 46 C4th 1035, 1050, 95 CR3d 636; *Davidson v City of Westminster* (1982) 32 C3d 197, 209, 185 CR 252. See CACI 1602.

A variety of cases have denied IIED recoveries on the ground that the conduct alleged or proved was not sufficiently outrageous. See, *e.g.:*

- *Hughes v Pair*, *supra* (man's explicit statements to woman that he would eventually have sex with her);
- *Ochoa v Superior Court* (1985) 39 C3d 159, 165 n5, 216 CR 661 (intentional infliction damages cannot be awarded for distress resulting from negligent acts, no matter how great the distress);
- *McMahon v Craig* (2009) 176 CA4th 222, 97 CR3d 555, modified at 176 CA4th 1502 (negligently rendering veterinary care and lying to cover up malpractice);
- *Ross v Creel Printing & Pub'g Co.* (2002) 100 CA4th 736, 747, 122 CR2d 787 (allegation that attorneys violated ethical rule by threatening criminal prosecution to gain advantage in civil case);
- *Cochran v Cochran* (1998) 65 CA4th 488, 494, 76 CR2d 540 (defendant left message on answering machine saying he would deliver plaintiff ticket for airline that had recently had crash);
- *Bartling v Glendale Adventist Med. Ctr.* (1986) 184 CA3d 961, 970, 229 CR 360 (hospital's refusal to discontinue efforts to keep patient alive);
- *Melorich Builders, Inc. v Superior Court* (1984) 160 CA3d 931, 935, 207 CR 47 (action done in good faith on advice of attorney not outrageous, as a matter of law);
- *Girard v Ball* (1981) 125 CA3d 772, 786, 178 CR 406 (two letters and several telephone demands for payment);
- *Cortez v Macias* (1980) 110 CA3d 640, 651, 167 CR 905 (doctor's failure to come to hospital not outrageous), disapproved on other grounds in *Ochoa v Superior Court* (1985) 39 C3d 159, 171, 216 CR 661;
- *Pardi v Kaiser Permanente Hosp., Inc.* (9th Cir 2004) 389 F3d 840 (hospital employee failed to show that employer's retaliatory conduct was outrageous);
- *Schneider v TRW, Inc.* (9th Cir 1991) 938 F2d 986, 992 (supervisor's yelling at employee during criticism of her performance could not have been found to be so extreme and outrageous as to permit recovery, nor could remark not directly communicated to her).

Whether a defendant's conduct was so outrageous or extreme as to support an IIED recovery is ordinarily a triable issue of fact; the standard for judging whether conduct is outrageous—whether it is so extreme as to exceed all bounds usually tolerated in a civilized community—does not provide a "bright line" separating actionable from nonactionable conduct. *KOVR-TV, Inc. v Superior Court* (1995) 31 CA4th 1023, 37 CR2d 431 (jury should be permitted to determine whether it was outrageous for television reporter, with microphone in hand and backed by camera operator, to knock on door next to house where double homicide and suicide had occurred and, when door was answered by children aged 11, 6, and 3, to ask them if they knew what had happened to their playmates and then to say, "Well, the mom has killed the two little kids and herself"); *Angie M. v Superior Court* (1995) 37 CA4th 1217, 1226, 44 CR2d 197 (jury question whether 48-year-old doctor's extended sexual relationship with minor to whom he supplied alcohol and drugs was outrageous conduct). See also *Molko v Holy Spirit Ass'n* (1988) 46 C3d 1092, 252 CR 122 (triable issues arose from Unification Church's allegedly fraudulent and coercive tactics in recruitment and treatment of its members; fraudulent misrepresentations, even if part of "intensive religious practices," not protected under First Amendment).

Conduct that might not otherwise be outrageous may become so if done by a person who (1) has actual or apparent power or authority over another, or power to affect the other's interests, (2) should know that the other is peculiarly susceptible to emotional distress because of a physical or mental condition or other circumstances, or (3) recognizes that his or her acts are likely to result in illness through mental distress. See *Molko v Holy Spirit Ass'n* (1988) 46 C3d

1092, 1122, 252 CR 122; *McDaniel v Gile* (1991) 230 CA3d 363, 372, 281 CR 242 (client alleged she suffered emotional distress when her divorce attorney failed to perform legal services after she rejected his sexual advances); CACI 1602. See also *Angie M. v Superior Court, supra* ("special relationship" and "special susceptibility" are factors, but not requirements, in determining outrageousness). The "sources and authorities" accompanying CACI 1602 include cases said to show "[r]elationships that have been recognized as significantly contributing to the conclusion that particular conduct was outrageous," including employer-employee, insurer-insured, landlord-tenant, hospital-patient, attorney-client, creditor-debtor, and clergy-parishioner. See §6.16.

TACTICS: A plaintiff facing a ruling that the defendant's conduct was not so outrageous or extreme as to warrant recovery for IIED might contend that outrageousness is no longer a key factor, arguing along the following lines: Characterizing the defendant's conduct as outrageous has been viewed as an alternative to showing physical contact or physical disorder; *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 167 CR 831, recognized that the direct victim of negligently inflicted emotional distress may recover emotional distress damages without having to show physical impact or a resultant physical disorder; thus *Molien* eliminated the requirement that a plaintiff prove that the defendant's conduct was either intentional or outrageous. See concurring and dissenting opinion of Chief Justice Bird in *Ochoa v Superior Court* (1985) 39 C3d 159, 196 n13, 216 CR 661.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.18 b. Conduct Directed at Plaintiff

§6.18 b. Conduct Directed at Plaintiff

Intentional infliction of emotional distress (IIED) liability is said to require pleading and proof that the defendant's conduct was not only intentional and outrageous, but also directed at the plaintiff or done in the presence of a plaintiff the defendant knew was there. See *Christensen v Superior Court* (1991) 54 C3d 868, 902, 2 CR2d 79 (allegations that defendant mortuary and crematorium operators secretly removed and sold organs and body parts before cremating human remains and then took metals from the ashes and mingled ashes before inurnment failed to state IIED cause of action absent allegations that defendants intended to cause emotional distress to close relatives or that acts were done in their presence). In this sense, the requirement that the defendant's conduct be directed primarily at the plaintiff is a factor that distinguishes IIED from negligent infliction of emotional distress (NIED), under which liability in *Christensen* could be based (see 54 C3d at 903). See also *Conroy v Regents of Univ. of Cal.* (2009) 45 C4th 1244, 1251, 91 CR3d 532 (plaintiff failed to show that spouse's remains were among those allegedly mishandled); *Smith v Pust* (1993) 19 CA4th 263, 23 CR2d 364 (no showing that possibly outrageous conduct of defendant, a therapist who had sexual relations with plaintiff's wife, was "directed" at plaintiff); *Richard P. v Superior Court* (1988) 202 CA3d 1089, 1095, 249 CR 246 (husband had no cause of action for IIED against wife's lover, who fathered two children born during marriage).

NOTE: *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 1002, 25 CR2d 550, applied the *Christensen* reasoning, noted above, in concluding that a defendant that intentionally and illegally consigned carcinogenic wastes to a dumpsite, knowing that the dumpsite was not certified as one that would keep contaminants from going into the groundwater, would be liable under the IIED theory to persons whose drinking water was contaminated by such leakage only if the defendant knew that there were persons whose drinking water would be contaminated by the wastes. The defendant would be charged with knowing that such persons would experience severe emotional distress resulting from fear of cancer on learning of the contamination. The plaintiffs, on the other hand, if they showed that the defendant's conduct was intentional, outrageous, and directed toward them, would not have to show that their fear of future illness was medically corroborated. See §6.6 on criteria for recovering emotional distress damages for fear of future illness. A person who could not show that the defendant, like the one discussed in *Potter*, knew or should have known that he or she drew drinking water affected by the site the defendant was contaminating might still recover by showing that the defendant's negligent conduct caused that person a "reasonable" and medically corroborated fear of future illness; *i.e.,* that it was more likely than not that the toxic exposure would result in cancer. 6 C4th at 1003. See also *In re Louie (Robinson v Louie)* (Bankr ND Cal 1997) 213 BR 754 (no claim for IIED or fraud allowed for fear of developing HIV/AIDS when fear was not reasonable, but plaintiff could state claim for sexual battery). See discussion in §6.6.

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§6.19 c. Severe Emotional Suffering

To recover damages for intentionally inflicted emotional distress, the plaintiff must plead and prove facts showing that he or she suffered "severe" emotional distress. *Angie M. v Superior Court* (1995) 37 CA4th 1217, 1227, 44 CR2d 197 (error not to permit amendment of complaint so that minor, who alleged unlawful seduction and sexual abuse by doctor, could allege specific facts sufficient to show the severity of her alleged emotional distress).

To be severe or serious, emotional distress must be substantial or enduring rather than trivial or transitory. See *Bogard v Employers Cas. Co.* (1985) 164 CA3d 602, 617, 210 CR 578 (complaint must allege facts showing nature or extent of mental suffering caused by insurer's outrageous conduct toward policy holder).

Severe emotional distress is of "such substantial or enduring quality that no reasonable [person] in a civilized society should be expected to endure it." See *Hughes v Pair* (2009) 46 C4th 1035, 1050, 95 CR3d 636 (plaintiff's assertions that defendant's statements caused her discomfort, worry, anxiety, upset stomach, concern, and agitation insufficient); *Girard v Ball* (1981) 125 CA3d 772, 787, 178 CR 406 (noted in §6.17); *Schild v Rubin* (1991) 232 CA3d 755, 762, 283 CR 533. See also CACI 1602. Note, however, the court in *Rodrigues v State* (Haw 1970) 472 P2d 509 stated that serious mental distress may be found when "a reasonable man, normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case." 472 P2d at 520.

TACTICS: A plaintiff may argue that the supreme court has not defined "serious" or "severe" and that, under general tort principles, a plaintiff's preexisting disabilities do not defeat liability. Thus, if the plaintiff, whether a bystander or a direct victim, has preexisting emotional problems making him or her vulnerable to further emotional distress, once liability is established, damages may be awarded for any aggravation of the plaintiff's preexisting condition. Further, a defendant who is aware of the plaintiff's vulnerability should be liable for all consequences. See CACI 1602.

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3. Defenses

§6.20 a. Statute of Limitations

The 2-year limitations period in CCP §335.1 governs emotional distress causes of action if the distress resulted from an assault, battery, or other wrongful act or neglect. *Pugliese v Superior Court* (2007) 146 CA4th 1444, 1450, 53 CR3d 681. A 1-year period applies to distress resulting from libel, slander, false imprisonment, and other causes of action specified in CCP §340.

The statute of limitations on an action for intentional infliction of emotional distress begins to run when severe distress is experienced, even though that time may be later than when the defendant's acts took place. *Kiseskey v Carpenters' Trust for South Cal.* (1983) 144 CA3d 222, 231, 192 CR 492 (action filed more than 1 year after last threatening telephone call but less than 1 year after resulting heart attack). See *Scannell v County of Riverside* (1984) 152 CA3d 596, 605, 199 CR 644 (accrual of statute for false imprisonment, intentional infliction of emotional distress, and malicious prosecution).

An action alleging that the defendant sexually abused a minor must be brought within 3 years after the date the plaintiff reasonably should have discovered that his or her postmajority psychological injury was caused by the sexual abuse (or within 8 years after attaining majority if that occurs later). CCP §340.1. Further, such an action must be brought before the victim's 26th birthday unless the victim can show that an employer defendant "knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct by that person." CCP §340.1(b)(2); *Doe v City of Los Angeles* (2007) 42 C4th 531, 67 CR3d 330 (statute is remedial and to be construed broadly, but present plaintiffs made insufficient showing). Section 340.1 does not extend the time for presenting a government tort claim to a public entity. *Shirk v Vista Unified Sch. Dist.* (2007) 42 C4th 201, 64 CR3d 210.

See *Wilson v Phillips* (1999) 73 CA4th 250, 256, 86 CR2d 204 (court rejected argument that statute provides inadequate protection against false claims). An action for intentionally inflicted emotional distress, battery, and assault damages brought by a 37-year-old woman, alleging sexual abuse by her parents during her minority, is not time barred if the woman first saw the connection between her psychological ailments and the abuse when she entered therapy less than a year before filing suit. See *Sellery v Cressey* (1996) 48 CA4th 538, 546, 55 CR2d 706 (running of statute not triggered by interim memory of some acts of abuse if most profound acts were repressed until therapy). See also *Tietge v Western Province of Servites* (1997) 55 CA4th 382, 64 CR2d 53 (statute applied retroactively to priest but not to religious order); *Doyle v Fenster* (1996) 47 CA4th 1701, 55 CR2d 327 (certificate of merit as well as complaint must be filed within statutory period); *Lent v Doe* (1995) 40 CA4th 1177, 47 CR2d 389 (plaintiff's allegations that he suffered actual and appreciable injury at time of abuse and that he did not repress memories of it did not disqualify him from invoking delayed discovery statute).

However, an allegation by a 32-year-old plaintiff that she was unaware until shortly before filing suit that molestation by her stepfather ending when she was 17 caused her injury does not satisfy the statute. See *Marsha V. v Gardner* (1991) 231 CA3d 265, 281 CR 473 (plaintiff failed to allege that for all that time she was unaware that defendant committed acts, that she was unaware that they were unlawful, or that she forgot or suppressed any act).

An action for recovery of damages resulting from domestic violence must be brought before the later of (1) 3 years from the date of the last domestic violence or (2) 3 years from the date the plaintiff discovered or reasonably should have discovered that an injury or illness resulted from an act of domestic violence by the defendant against the plaintiff. CCP §340.15.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.21 b. Privilege

§6.21 b. Privilege

There is an absolute bar to actions for intentional infliction of emotional distress (IIED) arising from activity in a judicial proceeding. CC §47(b); *Silberg v Anderson* (1990) 50 C3d 205, 215, 266 CR 638. See *Foothill Fed. Credit Union v Superior Court (King)* (2007) 155 CA4th 632, 66 CR3d 249 (all elements of litigation privilege satisfied by credit union that produced personal records in response to subpoena); *California Physicians' Serv. v Superior Court* (1992) 9 CA4th 1321, 12 CR2d 95 (CC §47(b) provides complete defense to claims for intentional infliction of emotional distress, breach of implied covenant of good faith and fair dealing, and defamation based on filing of, or statements in, allegedly bad faith or malicious defensive pleading); *Nagy v Nagy* (1989) 210 CA3d 1262, 258 CR 787 (absolute privilege applied when plaintiff discovered during wife's deposition in marital dissolution action that "his" child was fathered by another man); *Williams v Coombs* (1986) 179 CA3d 626, 645, 224 CR 865 (absolute privilege for publication in judicial proceeding provides defense to cause of action for IIED caused by filing of lawsuit, even if complaint was false and filing malicious). But see *Jeffrey H. v Imai, Tadlock & Keeney* (2000) 85 CA4th 345, 359, 101 CR2d 916 (policies underlying litigation privilege outweighed by plaintiff's constitutional right to privacy when law firm revealed his HIV status in paper submitted to arbitrator).

NOTE: Just as the "litigation privilege" does not shield an attorney from a malpractice suit by a client, it does not shield a firm providing litigation support services to a litigant or an expert witness hired by the litigant from a later separate suit by the litigant. *Mattco Forge, Inc. v Arthur Young & Co.* (1992) 5 CA4th 392, 6 CR2d 781.

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§6.22 c. Underlying Cause of Action Untenable

When an intentional infliction of emotional distress (IIED) count accompanies allegations of the defendant's commission of a traditional intentional tort (*e.g.,* assault and battery), defeat of the traditional cause of action may be a defense to the IIED claim. See, *e.g., Flynn v Higham* (1983) 149 CA3d 677, 681, 197 CR 145 (defense to defamation action held to be defense to action for intentional infliction; IIED claim cannot be based on defendant's publication of defamatory statements about plaintiff's deceased father).

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§6.23 d. Employer's Immunity

An employer alleged to have intentionally inflicted emotional distress on an employee may assert workers' compensation exclusivity immunity under Lab C §§3600 and 3602 as a defense. See *Miklosy v Regents of Univ. of Cal.* (2008) 44 C4th 876, 902, 80 CR3d 690 (alleged retaliation against whistleblower). To the extent, however, that the defendant's conduct is judged to be "outside the workers' compensation bargain," exclusivity immunity is no defense. See *Murray v Oceanside Unified Sch. Dist.* (2000) 79 CA4th 1338, 1362, 95 CR2d 28 (harassment based on sexual orientation).

Factual situations in which IIED damages have been sought from an employer, and whether the defense did or did not protect the defendant, are discussed at length in California Workers' Damages Practice §§4.67-4.86 (2d ed Cal CEB 2001).

See Anno, 7 ALR6th 563 (2005) (employer's supervisor's or manager's liability for intentionally or recklessly causing emotional distress—discharge or forced resignation).

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H. Negligent Infliction of Emotional Distress (NIED)

§6.24 1. Nature and Elements of Recovery

As is briefly stated in *Molien v Kaiser Found. Hosps*. (1980) 27 C3d 916, 922, 167 CR 831, a plaintiff may recover damages for serious emotional distress that proximately results from the wrongful conduct of a defendant who should have foreseen that the conduct would cause such distress.

NOTE: In *Molien,* a husband was permitted to sue medical providers, who had incorrectly told his wife that she had syphilis, for damages for extreme emotional distress (apparently including feelings of anxiety, suspicion, and hostility, which led to a breakup of the marriage) and for medical expenses incurred for counseling in an effort to save the marriage. Under such circumstances, the medical providers owed a duty to the husband to exercise care and skill in diagnosing the wife; they should have foreseen that both husband and wife would experience distress from a faulty diagnosis. Thus, it appears that the circumstances of the particular case must supply the guarantee of genuineness (see §6.2) required for the recovery of damages for emotional distress (1) that does not accompany or result from a bodily injury (see §§1.74-1.75) (2) in situations in which the criteria for other bases for recovery (see §§6.3-6.23) cannot be established. See *Friedman v Merck & Co.* (2003) 107 CA4th 454, 474, 131 CR2d 885 (manufacturer of tuberculosis test containing animal product could have foreseen that administration to "strict ethical vegan" would cause distress, but not that distress would be "serious").

Negligent infliction of emotional distress (NIED) is not an independent tort; the tort is *negligence* with its elements of duty, breach of duty, causation, and damages; "negligent infliction of emotional distress" is merely a convenient term to describe the context in which negligent conduct occurred. *Christensen v Superior Court* (1991) 54 C3d 868, 884, 2 CR2d 79 ("negligent mishandling of human remains" also describes context rather than separate tort; see §6.27). See *Huggins v Longs Drug Stores, Inc.* (1993) 6 C4th 124, 129, 24 CR2d 587, discussed in §6.26; *Burgess v Superior Court* (1992) 2 C4th 1064, 9 CR2d 615, discussed in §6.26; *Martin v U.S.* (9th Cir 1993) 984 F2d 1033, 1036, discussed in §6.11. See also *Fawkner v Atlantis Submarines, Inc.* (D Haw 2001) 135 F Supp 2d 1127, 1134 (claim for NIED cognizable under general maritime law).

NOTE: The majority in *Burgess v Superior Court* (1992) 2 C4th 1064, 1074, 9 CR2d 615, in dictum, (1) recognized the "sound" principle in *Molien* that "a cause of action to recover damages for negligently inflicted emotional distress will lie, notwithstanding the criteria imposed upon recovery by bystanders, in cases where a duty arising from a preexisting relationship is negligently breached," but (2) asserted that *Molien*'s discussion of duty is "limited to its facts" to the extent it stands for the proposition that there is a new method for determining duty, limited only by the concept of foreseeability. See also Mosk, J, concurring, in 2 C4th at 1085.

Some courts have analyzed NIED liability by using a traditional "duty analysis," *i.e.,* by reviewing the traditional factors for establishing liability for negligence. See, *e.g.*:

- *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 985, 25 CR2d 550 (plaintiff must prove that defendant breached legal duty (other than supposed duty to avoid causing emotional distress), that breach threatened physical injury (not simply damage to property or financial interests), and that breach proximately caused emotional distress; see discussion in §6.31);
- *Gu v BMW of N. Am., LLC* (2005) 132 CA4th 195, 210, 33 CR3d 617 (seller of allegedly defective automobile owed no duty to buyer to avoid causing her emotional distress that ensued from learning, after fact, that her sister (fatally) and parents had been injured in accident while sister was driving);
- *Lawson v Management Activities, Inc.* (1999) 69 CA4th 652, 81 CR2d 745 (airlines have no duty of care that encompasses emotional distress suffered by physically untouched spectators of plane crashes; see §6.5);
- *Adams v City of Fremont* (1998) 68 CA4th 243, 80 CR2d 196 (police officers responding to armed person threatening suicide not subject to wrongful death or NIED liability);

- *Fluharty v Fluharty* (1997) 59 CA4th 484, 69 CR2d 244 (because father owed no duty to son, son could not state NIED cause of action against father, who summoned son to scene where father had just murdered son's mother, threatened suicide, and injured son's wife by shotgun blast);
- *Klein v Children's Hosp. Med. Ctr.* (1996) 46 CA4th 889, 54 CR2d 34 (medical providers owed duty of care in diagnosis to child patient, not to child's parents, even though parents had contract with providers and it was foreseeable that they would suffer distress on being told, mistakenly, that child had cancer; unlike *Molien* situation, misdiagnosis here did not make parents apprehensive about their own health).

For extended discussion of the elements of a negligence cause of action and the role of duty and foreseeability, see California Tort Guide §§1.4-1.18 (3d ed Cal CEB 1996).

Other courts have proposed a "two-pronged" test for imposing liability for NIED, saying that the plaintiff must plead and prove:

- A preexisting, consensual relationship between the plaintiff and the offending defendant; and
- Conduct on the part of the defendant that was "outrageous," as that term is used in intentional infliction of emotional distress cases (see §6.17), *i.e.,* conduct that has risen to that level where, as a policy matter, liability should attach.

See *Bro v Glaser* (1994) 22 CA4th 1398, 1416, 27 CR2d 894 (analyzing 26 post-*Molien* NIED appellate opinions and denying recovery because defendant obstetrician's conduct—nicking baby on cheek with scalpel and presenting injured baby to parents—could not be deemed outrageous). See also *Krupnick v Hartford Acc. & Indem. Co.* (1994) 28 CA4th 185, 34 CR2d 39 (applying two-pronged test to deny damages to plaintiffs whose distress was caused by manner in which tortfeasor's liability insurer handled settlement negotiations in personal injury action against tortfeasor; plaintiffs not direct victims of insurer's conduct, because no preexisting, consensual relationship between plaintiffs and insurer). But see *Wooden v Raveling* (1998) 61 CA4th 1035, 71 CR2d 891 (rejecting *Bro*'s two-pronged test in fear of injury case (see §6.5)); *Mercado v Leong* (1996) 43 CA4th 317, 320, 50 CR2d 569 (NIED plaintiff not required to plead or prove that defendant's conduct was outrageous; link between tortious conduct and distress of mother whose child was injured during delivery assures genuineness of claim (see §6.2); mother was direct victim of obstetrician's negligence).

TACTICS: Because appellate panels have differed on what a plaintiff must plead and prove when pursuing damages for negligently inflicted emotional distress, it may be wise to rely on this liability theory only when the elements of one of the more settled bases for recovery discussed in chap 1 and §§6.3-6.23 cannot be met.

The factors that courts have considered when deciding whether damages are recoverable in NIED contexts are discussed in §§6.25-6.29.

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2. Factors Affecting Liability

§6.25 a. Foreseeability of Injury

According to *Molien v Kaiser Found. Hosps*. (1980) 27 C3d 916, 922, 167 CR 831, a critical inquiry in imposing liability for negligent infliction of emotional distress (NIED) is whether an ordinary person in the defendant's position should reasonably have *foreseen* that his or her conduct would cause serious distress to another. See *Friedman v Merck & Co.* (2003) 107 CA4th 454, 474, 131 CR2d 885 (manufacturer of tuberculosis test containing animal product could have foreseen that administration to "strict ethical vegan" would cause distress, but not that distress would be "serious"). It has been said, on the other hand, that in "purely emotional distress cases," foreseeability often is not a useful guideline in defining the presence of duty, because it is always foreseeable that the plaintiff will be distressed. See *Marlene F. v Affiliated Psychiatric Med. Clinic, Inc.* (1989) 48 C3d 583, 588, 257 CR 98 (foreseeability of harm is only one factor to be weighed along with policy considerations when court considers whether defendant owed duty of care to plaintiff; no cause of action exists for NIED based solely on foreseeability that emotional distress might result from defendant's conduct).

In some circumstances, courts have based the denial of recovery on the absence of foreseeability. See, *e.g., Soto v Royal Globe Ins. Co*. (1986) 184 CA3d 420, 432, 229 CR 192 (insurer's failure to pay timely benefits was not "abnormal event" that would foreseeably cause emotional distress).

Further, not all foreseeable injuries are actionable; the social utility of the defendant's conduct may outweigh the likelihood and probable extent of harm to the plaintiff. See, *e.g., Allen v Toten* (1985) 172 CA3d 1079, 1088, 218 CR 725 (police officers were held not liable for distress experienced by wife they brought to place where armed husband was threatening suicide although they might well have foreseen doing so would cause her distress; utility of conduct (possibly saving life of husband and others) outweighed likelihood of threatened harm (wife's emotional distress when police shot and wounded husband in her presence)).

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.26 b. Plaintiff a 'Direct Victim'

§6.26 b. Plaintiff a "Direct Victim"

Molien v Kaiser Found. Hosps. (1980) 27 C3d 916, 923, 167 CR 831, states that the plaintiff in that case was "himself a direct victim of the assertedly negligent act." This statement has raised the question of whether damages are recoverable in the negligently inflicted emotional distress (NIED) context *only* when the plaintiff was such a direct victim.

NOTE: The suggestion that the plaintiff seeking emotional distress damages must have been a "direct victim" of the defendant's tortious conduct may mean nothing more than that the plaintiff must prove that there was a preexisting relationship of a consensual nature between the plaintiff and the defendant. See *Bro v Glaser* (1994) 22 CA4th 1398, 1414, 27 CR2d 894, discussed in §6.24. On the other hand, the provision in CC §1714.01 that a "domestic partner" (a status for which the criteria are specified in Fam C §297) is entitled to recover damages for negligent infliction of emotional distress to the same extent as a spouse (see §6.9) suggests that a person's NIED recovery may be based on the spouse's or domestic partner's consensual relationship with the defendant. See §6.27.

A plaintiff can be the "direct victim" of a defendant's conduct even though the conduct was not "directed at" the plaintiff, at least in the sense that the conduct was not intended to cause injury to the plaintiff. See, *e.g.*:

- *Burgess v Superior Court* (1992) 2 C4th 1064, 1083, 9 CR2d 615 (mother was direct victim of physician's negligence that injured her child; presence of preexisting relationship between parties defines "direct victim");
- *Christensen v Superior Court* (1991) 54 C3d 868, 903, 2 CR2d 79 (deceased's relatives were direct victims of alleged mishandling of deceased's remains; see §6.17);
- *Marlene F. v Affiliated Psychiatric Med. Clinic, Inc.* (1989) 48 C3d 583, 257 CR 98 (parent was direct victim when therapist molested child; professional relationship involved both mother and son);
- *Zavala v Arce* (1997) 58 CA4th 915, 68 CR2d 571 (mother was direct victim of obstetrician's negligence that injured postterm fetus in utero; damages for mother's own emotional distress but not for loss of filial consortium);
- *Mercado v Leong* (1996) 43 CA4th 317, 320, 50 CR2d 569 (mother was direct victim of obstetrician's negligence that injured child during delivery);
- *Jacoves v United Merchandising Corp.* (1992) 9 CA4th 88, 109, 11 CR2d 468 (parents who were "instrumentalities" in medical treatment of schizophrenic son were direct victims of medical negligence that allegedly resulted in son's suicide);
- *Long v PKS, Inc.* (1993) 12 CA4th 1293, 1298, 16 CR2d 103 (person injured while driving automobile was direct victim of other driver's negligence and could recover damages for emotional distress resulting from seeing that her passenger, her foster child, had been injured).

Conversely, emotional distress damages sought in the NIED context have been denied when, in a court's view, the plaintiff was not a direct victim of the defendant's wrongful conduct. See, *e.g.:*

- *Huggins v Longs Drug Stores, Inc.* (1993) 6 C4th 124, 131, 24 CR2d 587 (parents of 2-month-old not direct victims of negligence of pharmacist who wrote instructions that called for administering five times prescribed dosage; "end and aim" of prescription was treatment of infant; immaterial that parents took prescription to pharmacist, paid for it, and administered it);
- *Ochoa v Superior Court* (1985) 39 C3d 159, 172, 216 CR 661 (doctors' failure to diagnose seriousness of child's illness was directed toward child, not toward parents);
- *Spates v Dameron Hosp. Ass'n* (2003) 114 CA4th 208, 215, 7 CR3d 597 (daughter whose last contact with hospital was 9 months before mother's death was not direct victim of hospital's disposal of mother's remains without daughter's consent);
- *Ess v Eskaton Props., Inc.* (2002) 97 CA4th 120, 127, 118 CR2d 240 (plaintiff who placed elderly sister in skilled nursing facility to obtain temporary respite from caregiving not a direct victim of conduct that injured sister);
- *Evan F. v Hughson United Methodist Church* (1992) 8 CA4th 828, 839, 10 CR2d 748 (sister of boy allegedly molested by church employee not direct victim);

- *Schwarz v Regents of Univ. of Cal.* (1990) 226 CA3d 149, 276 CR 470 (father who took son to medical center for treatment of emotional difficulties, but was not himself being treated there, not direct victim of staff therapist's having (1) encouraged and permitted child's mother to remove him from country and (2) concealed child's whereabouts from father);
- *Kossel v Superior Court* (1986) 186 CA3d 1060, 1065, 231 CR 183 (wife not direct victim of doctor's misdiagnosis of husband's condition);
- *Martinez v County of Los Angeles* (1986) 186 CA3d 884, 888, 231 CR 96 (parents not direct victims of doctors' negligent treatment of child; no cause of action for causing parents to "restructure their lives");
- *Budavari v Barry* (1986) 176 CA3d 849, 853, 222 CR 446 (wife not direct victim of doctors' failure to diagnose husband's lesion);
- *Goodwin v Reilley* (1985) 176 CA3d 86, 94, 221 CR 374 (parents not direct victims of drunk driving that caused son's injuries);
- *Wiggins v Royale Convalescent Hosp.* (1984) 158 CA3d 914, 206 CR 2 (wife, not present when husband fell from hospital bed, not "direct victim" of hospital's failure to put up bedrails);
- *Accounts Adjustment Bureau v Cooperman* (1984) 158 CA3d 844, 204 CR 881 (misdiagnosis of child as suffering from organic brain syndrome).

Claiming to be a "direct victim" of another's legal fault does not, by itself, establish a basis recovering damages for negligent infliction of emotional distress. See *Gu v BMW of N. Am., LLC* (2005) 132 CA4th 195, 203, 33 CR3d 617 (seller of convertible automobile owed no duty to buyer whose sister and parents were injured, allegedly due to defective head protection system, in accident at which buyer was not present).

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§6.27 c. Preexisting or Special Relationship

Courts have said that the plaintiff seeking damages for negligently inflicted emotional distress (NIED) must prove that there was a preexisting, consensual relationship between the plaintiff and the offending defendant. See *Bro v Glaser* (1994) 22 CA4th 1398, 1416, 27 CR2d 894 (absent such relationship, plaintiff is not "in the class of persons who have protected interest in being free" of NIED). See also *Burgess v Superior Court* (1992) 2 C4th 1064, 1083, 9 CR2d 615, discussed in §6.26 (presence of preexisting relationship between parties defines "direct victim"; liability based on relationship between health care provider and patient).

The existence of a "special relationship" between the tortfeasor and the plaintiff that was deemed sufficient to provide a basis for NIED recoveries has been noted in several cases. See, *e.g.*:

- *Christensen v Superior Court* (1991) 54 C3d 868, 890, 2 CR2d 79 (mortuary and crematorium operators who handle and dispose of human remains assume special relationship with decedent's close relatives, although not with relatives, however close, who were infants, unborn, or unaware of death; see §6.18); but see *Melican v Regents of Univ. of Calif.* (2007) 151 CA4th 168, 59 CR3d 672 (university that received body under willed body program not liable when cremated remains were mingled with those of others);
- *Saari v Jongordon Corp.* (1992) 5 CA4th 797, 7 CR2d 82 (decedent's companion could recover emotional distress damages for crematorium's mishandling of ashes for breach of contract, and decedent's mother and sister could recover because of close family relationship to decedent);
- *Phyllis P. v Superior Court* (1986) 183 CA3d 1193, 228 CR 776 (mother was direct victim of school authorities' negligent decision not to tell her that her 8-year-old daughter had reported being molested by another student).
- *Ledger v Tippitt* (1985) 164 CA3d 625, 643, 210 CR 814 (unmarried mother permitted to maintain negligent infliction of emotional distress cause of action against man who, in dispute over driving courtesies, stabbed her quasi-spouse, her child's father, in her presence), disapproved on other grounds in *Elden v Sheldon* (1988) 46 C3d 267, 277, 250 CR 254;
- *Bock v County of Los Angeles* (1983) 150 CA3d 65, 72, 197 CR 470 (detrimental reliance on coroner's conduct may create special relationship).

Conversely, the recovery of emotional distress damages has been denied to plaintiffs who failed to plead or to prove a sufficient preexisting relationship with the negligent defendant. See, *e.g.*:

- *Aguirre-Alvarez v Regents of Univ. of Cal.* (1998) 67 CA4th 1058, 79 CR2d 580 (no special relationship between decedent's relatives and hospital where he died while in constructive police custody);
- *Lubner v City of Los Angeles* (1996) 45 CA4th 525, 53 CR2d 24 (no special relationship between homeowner and city whose truck crashed into his house, destroying prized paintings).

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§6.28 d. Outrageous Conduct

Courts have said that the plaintiff seeking damages for negligently inflicted emotional distress (NIED) must establish that the defendant's conduct that caused the emotional distress was "outrageous" as that term is defined in intentional infliction of emotional distress (IIED) cases (see §6.17), *i.e.,* that the conduct rose to that level where, as a policy matter, liability should attach. See *Bro v Glaser* (1994) 22 CA4th 1398, 1438, 27 CR2d 894 (recovery denied because defendant obstetrician's conduct—nicking baby on cheek with scalpel and presenting injured baby to parents—could not be deemed outrageous). See also *Steven F. v Anaheim Union High Sch. Dist.* (2003) 112 CA4th 904, 913, 6 CR3d 105 (although conduct of teacher who had sexual relationship with teenage student was outrageous, conduct of other teachers and school district employees who failed to notice or report was not; also noted in §6.11).

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§6.29 e. Serious or Severe Distress

Molien v Kaiser Found. Hosps. (1980) 27 C3d 916, 922, 167 CR 831, refers to the recovery of damages for "serious" emotional distress. See *Friedman v Merck & Co.* (2003) 107 CA4th 454, 474, 131 CR2d 885 (manufacturer of tuberculosis test containing animal product could have foreseen that administration to "strict ethical vegan" would cause distress, but not that distress would be "serious").

This reference to "serious" emotional distress in the negligent infliction of emotional distress context may mean that the plaintiff must show the same degree of distress as a plaintiff suing for intentional infliction of emotional distress—substantial or enduring rather than trivial or transitory. See *Bogard v Employers Cas. Co.* (1985) 164 CA3d 602, 617, 210 CR 578 (complaint must allege facts showing nature or extent of mental suffering caused by insurer's outrageous conduct toward policy holder).

See generally the discussion in §6.18.

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3. Defenses

§6.30 a. Statute of Limitations

The 2-year limitations period in CCP §335.1 governs emotional distress causes of action if the distress resulted from an assault, battery, or other wrongful act or neglect. *Pugliese v Superior Court* (2007) 146 CA4th 1444, 1450, 53 CR3d 681. A 1-year period applies to distress resulting from libel, slander, false imprisonment, and other causes of action specified in CCP §340.

The limitations period begins to run when the plaintiff perceives or experiences the event from which the distress flowed. See *Campanano v California Med. Ctr.* (1995) 38 CA4th 1322, 45 CR2d 606 (in claim under "bystander" theory, mother's and sister's emotional distress causes of action accrued when improperly placed intravenous line was causing patient's arm to swell, not later when arm became gangrenous and was amputated).

On statutes that set other accrual dates, as for childhood sexual abuse, see §6.20.

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§6.31 b. Distress Not Caused by Invasion of Personal Interest

Courts have stated that damages for emotional distress cannot be recovered when the interest invaded is primarily economic. See *Branch v Homefed Bank* (1992) 6 CA4th 793, 798, 8 CR2d 182 (emotional distress damages unavailable to employee who recovered economic damages from bank that deceptively induced him to accept employment); *Merenda v Superior Court* (1992) 3 CA4th 1, 10, 4 CR2d 87 (attorney's malpractice prevented plaintiff from recovering on underlying claim), disapproved on other grounds in *Ferguson v Lief, Cabraser, Heimann & Bernstein, LLC* (2003) 30 C4th 1037, 1053, 135 CR2d 46. See also *Robinson v U.S.* (ED Cal 2001) 175 F Supp 2d 1215 (homeowners warned to evacuate before out-of-control prescribed fire reached their houses not entitled to emotional distress damages because they were not subject to specific threat of personal injury).

By contrast, emotional distress damages may be recoverable when the defendant's conduct invades a primary interest that naturally entails significant emotional distress. See *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 985, 25 CR2d 550, in which the court seems to indicate that the plaintiff may recover if the defendant assumed, then breached, a duty to the plaintiff "in which the emotional condition of the plaintiff was an object," even though the invasion was of a property or financial interest. See §6.6.

See §6.39 on need to show economic loss to support emotional distress damages from insurer's bad faith conduct.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.32 c. Privilege

§6.32 c. Privilege

An action for infliction of emotional distress cannot be based on a statement, however false or outrageous, made in a judicial proceeding. See *Begier v Strom* (1996) 46 CA4th 877, 881, 54 CR2d 158 (applying privilege in CC §47(b) to bar recovery based on accusation in marital dissolution action that other spouse had molested child, but permitting suit based on same false accusation, as not unqualifiedly privileged under CC §47(c) or Pen C §11172(a) as it then read).

For more on privilege as a defense, see §8.19.

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4. Particular Situations

§6.33 a. Breach of Statutory Duty

Damages for negligently inflicted emotional distress have been deemed recoverable in a variety of situations in which the defendant's breach of a duty imposed by statute resulted in the plaintiff's distress. See, *e.g.*:

- *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 985, 25 CR2d 550 (defendant that, contrary to statute and regulation, sent toxic wastes to unsuitable dumpsite, resulting in contamination of drinking water, was liable for plaintiffs' fear of future cancer; defendant breached statutory duty leading directly to plaintiffs' ingestion of known and suspected carcinogens and thus to fear of very harm statute sought to avoid; NEID liability for breach of statute requires threat of physical injury (not simply damage to property or financial interests)). See §§1.22 on damages for cost of future medical monitoring, 1.75 on damages for psychogenic injury, 1.86 on damages for impaired enjoyment of life, 1.87 on damages for susceptibility to future injury, 6.4 on fear of future illness, and 6.36 on invasion of property interests.
- *Davila v County of Los Angeles* (1996) 50 CA4th 137, 57 CR2d 651 (coroner alleged to have breached mandatory duty to make reasonable efforts to locate decedent's next of kin before interment).
- *Pintor v Ong* (1989) 211 CA3d 837, 259 CR 577 (bank breached duty under CC §2941 to reconvey deed of trust; homeowners elected to sue in tort, rather than for breach of contract); but see *Panagotacos v Bank of America* (1998) 60 CA4th 851, 70 CR2d 595 (bank reconveyed within few days; evidence failed to show failure to reconvey was cause of emotional distress).
- *Young v Bank of America* (1983) 141 CA3d 108, 113, 190 CR 122 (bank that was notified that card was stolen breached Civil Code section as well as contract by seeking to impose more than $50 liability on cardholder; emotional distress and other damages recoverable).

There are situations in which a statute's remedy provisions may preclude the recovery of emotional distress damages. See *Bishop v Hyundai Motor Am.* (1996) 44 CA4th 750, 758, 52 CR2d 134 (consumer warranty act limited nature of recoverable compensatory damages). See *Berg v E.I. DuPont de Nemours & Co.* (9th Cir 2002) 293 F3d 1127, 1132 (not available under terms of 42 USC §2014(q) (Price-Anderson Act)). But see *Golden v CH2M Hill Hanford Group, Inc.* (9th Cir 2008) 521 F3d 681, 684 (no Price-Anderson preemption to extent plaintiff can show emotional distress from exposure to nonradioactive materials).

On recovery of emotional distress and other damages for violations of the antidiscrimination provisions of the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), see *Konig v FEHC* (2002) 28 C4th 743, 123 CR2d 1, and California Workers' Damages Practice §§4.74-4.83 (2d ed Cal CEB 2001). Note that the FEHA does not provide the exclusive remedy for emotional distress damages resulting from discrimination in employment. *Rojo v Kliger* (1990) 52 C3d 65, 82, 276 CR 130.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.34 b. Breach of Contract

§6.34 b. Breach of Contract

The general rule is that damages are not recoverable for mental suffering resulting from a breach of contract. Cases that preclude emotional distress damages include:

- *Erlich v Menezes* (1999) 21 C4th 543, 87 CR2d 886 (homeowner could not recover damages for emotional distress based on contractor's breach of contract);
- *Butler-Rupp v Lordeaux* (2005) 134 CA4th 1220, 36 CR3d 685 (business tenant could not recover emotional distress damages from landlord who failed to make promised improvements);
- *Sutherland v Barclays American/Mortgage Corp.* (1997) 53 CA4th 299, 316, 61 CR2d 614 (allegations that defendant handled her request for payment moratorium after earthquake incompetently or ineptly no basis for emotional distress damages);
- *Kwan v Mercedes-Benz of N. Am., Inc.* (1994) 23 CA4th 174, 190, 28 CR2d 371 (contract for sale of automobile not essentially tied to buyer's mental or emotional well-being; emotional distress damages not available for violation of Song-Beverly Consumer Warranty Act);
- *Selden v Dinner* (1993) 17 CA4th 166, 173, 21 CR2d 153 (physician's breach of contract to provide medical services by failure to perform surgery on agreed day; court noted that, because of surgeon's own emotional state, to have attempted to operate on that day would have violated standard of care imposed on surgeons); and
- *Harris v Atlantic Richfield Co.* (1993) 14 CA4th 70, 77, 17 CR2d 649 (general rule: no general or punitive damages for breach of commercial contract other than employment contract; here, breach of franchise agreement).

Similarly, courts have not permitted the recovery of emotional distress damages from a defendant who interfered with another's economic advantage or contract, at least absent a showing of extreme and outrageous conduct. See *Di Loreto v Shumake* (1995) 38 CA4th 35, 41, 45 CR2d 22 (not all mental anguish is compensable; emotional distress is part of the human condition).

Emotional distress damages may be recoverable for a breach of contractual obligations if the defendant's conduct invades a primary interest that naturally entails significant emotional distress, or if the contract, by its terms or subject matter, directly concerns the comfort, happiness, or personal welfare of a party or is such as to move the affection or tender feelings of a party. See *Ross v Forest Lawn Mem. Park* (1984) 153 CA3d 988, 203 CR 468 (interference with right to dispose of body); *Wynn v Monterey Club* (1980) 111 CA3d 789, 168 CR 878 (defendant breached oral agreement to bar plaintiff's spouse from defendant's gambling establishment); *Allen v Jones* (1980) 104 CA3d 207, 163 CR 445 (negligent mishandling of corpse); *Windeler v Scheers Jewelers* (1970) 8 CA3d 844, 88 CR 39 (jeweler's negligent loss of rings that had sentimental value).

If an act constitutes both a breach of contract and a tort, the plaintiff can elect to sue in tort and recover general damages for mental distress. In that situation, the significance of the contract is in its creation of a duty on the part of the defendant. *Sprague v Frank J. Sanders Lincoln Mercury, Inc.* (1981) 120 CA3d 412, 174 CR 608.

See Annos, 86 ALR5th 693 (2001) (hospital liability for negligent handling, transportation, or disposition of corpse), 53 ALR4th 394 (1987) (liability for improper manner of reinterment), 53 ALR4th 360 (1987) (liability of undertaker in connection with transportation, burial, or safeguarding of body), 34 ALR4th 688 (1984) (recovery for emotional distress resulting from statement of medical practitioner or official).

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§6.35 c. Misrepresentation

Ordinarily, damages are not recoverable for emotional distress resulting from a negligent misrepresentation, at least when the only other injury is economic. See *Branch v Homefed Bank* (1992) 6 CA4th 793, 8 CR2d 182. *Branch* recognizes, however, that damages may be recovered for emotional distress, even though the distress is not accompanied by physical injury, in cases of "intentional misrepresentation." See *Finch v Brenda Raceway Corp.* (1994) 22 CA4th 547, 554, 27 CR2d 531 (defendant knowingly made false statement that employment would be long-term). See also *Toscano v Ameriquest Mortgage Co.* (ED Cal 2007) 2007 US Dist Lexis 81884 (no basis in California law for barring emotional distress damages to plaintiff alleging misrepresentation of terms of mortgage).

Similarly, a person who suffers emotional distress as a foreseeable consequence of an attorney's false statements may recover emotional distress damages. See *Carney v Rotkin, Schmerin & McIntyre* (1988) 206 CA3d 1513, 254 CR 478 (creditor's attorney in debt collection matter falsely told 74-year-old widow that bench warrant had been issued because of her failure to appear and that she would be subject to arrest unless she paid $1000 on debt; attorney later sent letter confirming that conversation).

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§6.36 d. Damage to Real or Personal Property

A plaintiff may recover mental distress damages caused by an invasion of interests in real property. See *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 5 CR 686. Physical damage to real property, however, may be a basis for emotional distress damages only if it is the result of an intentional tort (see below) or there was a special relationship (see §6.27) between the owner and the defendant. See *Lubner v City of Los Angeles* (1996) 45 CA4th 525, 53 CR2d 24 (no emotional distress damages when city truck crashed into house, destroying prized paintings); *Cooper v Superior Court* (1984) 153 CA3d 1008, 200 CR 746 (no emotional distress damages when tractor rolled into residence).

Negligence concepts that might prevent the recovery of emotional distress damages when the plaintiff's only other injury was economic may be inapplicable when a plaintiff suffers emotional distress from a defendant's commission of the distinct tort of trespass, nuisance, or conversion. See *Gonzales v Personal Storage, Inc.* (1997) 56 CA4th 464, 65 CR2d 473 (defendant storage facility converted plaintiff's personal property).

Mental distress damages may be awarded for damage to personal property. See *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 921, 114 CR 622. See generally §13.17.

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§6.37 e. Product Defects

The users of a defective product that malfunctions and causes injury to a third person can recover damages for their emotional distress resulting from witnessing the injury or death even though the third person was not a close relative and the distress is not accompanied by a physical disorder. See *Kately v Wilkinson* (1983) 148 CA3d 576, 588, 195 CR 902 (water-ski boat operator and rider observing skier's safety were direct victims of boat malfunction that resulted in skier's injury and death; unnecessary that persons who observe injuries to another caused by defective product be purchasers of that particular product).

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§6.38 f. Attorneys' Professional Negligence

Attorneys sued for negligently failing to pursue a client's valid claim or to achieve an expected recovery have been able to avoid additional liability to pay damages for emotional distress claimed by such clients on a variety of grounds. See *e.g.*, *Merenda v Superior Court* (1992) 3 CA4th 1, 10, 4 CR2d 87 (client would be required to show that emotional distress resulted in physical injury or was intentionally caused by attorney), disapproved on other grounds in *Ferguson v Lief, Cabraser, Heimann & Bernstein, LLC* (2003) 30 C4th 1037, 1053, 135 CR2d 46. See also *Pleasant v Celli* (1993) 18 CA4th 841, 22 CR2d 663 (emotional distress is not foreseeable consequence of ordinary legal malpractice), disapproved on other grounds in *Adams v Paul* (1995) 11 C4th 583, 591 n4, 46 CR2d 594; *Holliday v Jones* (1989) 215 CA3d 102, 264 CR 448 (malpractice suit by two children alleging emotional distress from incarceration of their father due to attorney's incompetence; foreseeability of harm cannot be sole basis for recovery).

Similarly, legal malpractice that results in the client paying higher taxes or getting less from a divorce settlement may not be subject to the client's claim of damages for emotional distress. See *Camenish v Superior Court* (1996) 44 CA4th 1689, 52 CR2d 450 (law does not recognize protectable interest in freedom from emotional distress attendant on paying taxes, even taxes that might have been avoided through better legal advice); *Smith v Superior Court* (1992) 10 CA4th 1033, 13 CR2d 133 (emotional distress damages not recoverable for attorney's allegedly negligent handling of divorce property settlement).

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.38A g. Malpractice in Criminal Cases

§6.38A g. Malpractice in Criminal Cases

A client convicted of a crime may recover damages—presumably including damages for emotional distress—on establishing that he or she was "actually innocent" of the crime as well as that the conviction resulted from the professional negligence of his or her attorney. See *Wiley v County of San Diego* (1998) 19 C4th 532, 79 CR2d 672 (noting that most legal malpractice damages are "fungible" in the sense that the client is seeking money that was lost through the attorney's negligence, whereas damages for criminal malpractice are harder to quantify); *Salisbury v County of Orange* (2005) 131 CA4th 756, 31 CR3d 831 (client entitled to jury trial on "actual innocence" element).

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§6.39 h. Insurance Bad Faith

Emotional distress damages are recoverable from a plaintiff's own insurer if the plaintiff suffers an economic loss through an insurer's breach of the implied covenant of good faith and fair dealing said to be inherent in insurance contracts. See *Moradi-Shalal v Fireman's Fund Ins. Cos.* (1988) 46 C3d 287, 250 CR 116 (precluding bad faith action by third party); *Crisci v Security Ins. Co.* (1967) 66 C2d 425, 433, 58 CR 13 (insurer failed to agree to settlement within policy limits of third party's claim against insured); *Major v Western Home Ins. Co.* (2009) 169 CA4th 1197, 1216, 87 CR3d 556 (insurer's delays and refusals after house destroyed in fire; on punitive damages in this case, see §§14.7, 14.11, 14.24).

Tort damages are not recoverable, however, if the alleged bad faith was retroactively billing for an excessive premium. *Jonathon Neil & Assocs., Inc. v Jones* (2004) 33 C4th 917, 16 CR3d 849. On actions against insurers for intentional or negligent infliction of emotional distress, see California Liability Insurance Practice: Claims & Litigation, chap 28 (Cal CEB 1991).

To recover damages for emotional distress resulting from a defendant's negligent breach of an insurance contract (or breach of the implied covenant), the plaintiff must show that the defendant's conduct resulted in an economic loss to the plaintiff. See *Waters v United Serv. Auto. Ass'n* (1996) 41 CA4th 1063, 48 CR2d 910 (delay in payment to reconstruct fire-damaged house with amount demanded by plaintiff eventually paid); *Continental Ins. Co. v Superior Court* (1995) 37 CA4th 69, 43 CR2d 374 (delay in paying policy benefits, even if unreasonable, does not itself establish financial loss to insured).

The plaintiff who shows economic loss from an insurer's bad faith conduct need not show that such loss was "substantial" or "severe," nor prove a causal link between the financial loss and the emotional distress. See *Clayton v United Serv. Auto. Assn.* (1997) 54 CA4th 1158, 63 CR2d 419 (insurer's attempt to settle underinsured motorist claim for death of policyholder's 15-year-old child).

Emotional distress damages that an insured recovered from a third party are deemed to be collateral source payments (see §15.22) and do not reduce emotional distress damages that the insured is entitled to recover from his or her own insurer for the latter's bad faith. *Kardly v State Farm Mut. Auto. Ins. Co.* (1989) 207 CA3d 479, 487, 255 CR 40.

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III. DAMAGES

§6.40 A. Characteristics of Emotional Distress

Emotional distress includes all highly unpleasant mental reactions, including fright, shock, nervousness, anxiety, worry, horror, grief, mortification, humiliation, embarrassment, indignity, apprehension, fear, terror, and ordeal. *Capelouto v Kaiser Found. Hosps.* (1972) 7 C3d 889, 892, 103 CR 856. See *Vinson v Superior Court* (1987) 43 C3d 833, 837, 239 CR 292 (plaintiff alleged damages for "emotional distress, loss of sleep, anxiety, mental anguish, humiliation, reduced self-esteem, and other consequences"). See also definition in §6.1.

For jury instructions, see CACI 1604.

TACTICS: The defendant's attorney must be sure that a "bystander" plaintiff does not recover damages for feelings of anger, retribution, grief, or sorrow over the injury to or death of the loved one. See *Krouse v Graham* (1977) 19 C3d 59, 77, 137 CR 863 (noted in §6.11).

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§6.41 B. Physical Injury or Symptoms

Before the decision in *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 167 CR 831 (see §6.24), many courts, to justify the award of emotional distress damages, went out of their way to find some physical manifestation of the emotional distress. *Molien* abolished the previous physical injury requirement as unwarranted and substituted "some guarantee of genuineness in the circumstances of the case." 27 C3d at 926. Thus, the broad language of *Molien* suggests that a showing of physical injury is not required in any emotional distress case. See *Hedlund v Superior Court* (1983) 34 C3d 695, 706 n8, 194 CR 805 (bystander plaintiff need not show physical injury to recover).

Of course, any physical manifestations or results of mental suffering may be shown both to increase the amount of damages and to furnish a further demonstration of the genuineness of the claim.

TACTICS: The plaintiff might show a physical disorder and the seriousness of the injury with evidence of immediate and transitory sensations such as fright, shock, anger, or weakness, as well as such bodily reactions as faster pulse rate, rise in blood pressure, nausea, release of adrenalin, or incontinence, and such consequent conditions as loss of sleep, nervousness, neuroses, conversion reactions, phobias, or miscarriage.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.42 C. Special Damages

§6.42 C. Special Damages

Emotional distress may give rise to such other harm and loss as:

- Medical and incidental expenses;
- Wage loss and loss of earning capacity;
- Loss of services; and
- Other related expenses.

See chap 1 for discussion of damages for these forms of detriment.

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§6.43 D. Punitive Damages

Punitive damages may be recovered for either intentional or negligent infliction of emotional distress on a showing of malice, oppression, or fraud. See *Slaughter v Legal Process & Courier Serv.* (1984) 162 CA3d 1236, 209 CR 189. Malice exists when the defendant intends to cause injury to the plaintiff or engages in despicable conduct with willful and conscious disregard of the rights and safety of others. CC §3294(c)(1). See *Angie M. v Superior Court* (1995) 37 CA4th 1217, 1228, 44 CR2d 197 (jury question whether 48-year-old doctor's extended sexual relationship with minor to whom he supplied alcohol and drugs was sufficiently despicable to support punitive damages).

For detailed discussion of punitive damages, see chap 14.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.44 IV. PLEADING

§6.44 IV. PLEADING

Although the facts giving rise to emotional distress must be specifically pleaded (see *Deboe v Horn* (1971) 16 CA3d 221, 94 CR 77), damages are usually alleged in a general manner, *e.g.:*

- The defendants knew, or in the exercise of reasonable care should have known, that their conduct would cause the plaintiff to suffer humiliation, mental anguish, and emotional and physical distress; or
- As a direct and proximate result of the defendants' negligence, the plaintiff sustained serious emotional distress and mental suffering, all of which has caused and will continue to cause plaintiff great physical and mental pain and suffering.

Special and punitive damages are stated separately.

TACTICS: In pleading a cause of action for negligent infliction of emotional distress, the plaintiff's attorney should be careful to cover all the acts that gave rise to or could have increased the plaintiff's mental suffering. See discussion in §6.16 of *Delia S. v Torres* (1982) 134 CA3d 471, 483, 184 CR 787, disapproved on other grounds in *Christensen v Superior Court* (1991) 54 C3d 868, 905 n28, 2 CR2d 79.

Emotional distress can be pleaded in a cross-complaint. See *Saret-Cook v Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 88 CR2d 732 (attorney sued for sex harassment by former employee recovered compensatory and punitive damages and attorney fees on proof of plaintiff's conduct outside lawsuit).

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V. PROVING EMOTIONAL DISTRESS

A. Witnesses

§6.45 1. Plaintiff

The plaintiff ordinarily testifies about his or her own mental distress. The jury will want to see and hear from the plaintiff how the accident or event happened, where the plaintiff was at the time, and how closely related the plaintiff is or was to the primary victim (if at all). The plaintiff may be asked to explain in detail how the accident or event changed his or her life. The plaintiff's testimony should include specific examples of the emotional problems, and any physical manifestations, suffered as a result of the defendant's conduct.

TACTICS: The plaintiff's attorney must prepare carefully when examining a plaintiff whose recollection of the events may result in further emotional distress. It may also be difficult to elicit testimony from a stoic plaintiff or one who is too frightened to realistically describe the pain and suffering.

Defense counsel sometimes prefer not to cross-examine the plaintiff at all, but, to avoid alienating the jury, to express sympathy for the plaintiff's suffering while focusing the argument on liability.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.46 2. Family and Friends

§6.46 2. Family and Friends

Family members and friends may testify about the quality and quantity of the mental distress suffered by the plaintiff. This testimony may be particularly effective if the witness can explain and describe the plaintiff's before-and-after reactions to everyday events and his or her ability to accomplish the same tasks before the event. For example, these witnesses might be able to testify that, before the accident, the plaintiff was a happy, optimistic person, played golf or tennis every day, but afterwards became totally listless and pessimistic, refusing to engage in any activities or leave the house.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.47 3. Coworkers

§6.47 3. Coworkers

Changes in a plaintiff's attitude and ability to maintain job performance may be an important indicator of serious emotional distress. In addition to other records such as employee evaluations, coworkers can give a more personal description of the plaintiff's problems in coping with everyday matters.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.48 4. Medical Professionals

§6.48 4. Medical Professionals

Expert medical opinion based on the plaintiff's particular circumstances and the expert's experience with similar cases is sufficient to establish that emotional distress is reasonably certain to be experienced in the future. *Bihun v AT&T Info. Sys.* (1993) 13 CA4th 976, 996, 16 CR2d 787, disapproved on other grounds in *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109.

TACTICS: The plaintiff's physician, particularly one who treated the plaintiff before the accident or event, may be called to give objective medical evidence about any physical manifestations incurred by the plaintiff. The attorney should go over the physician's medical records carefully and note before-and-after indications of mental distress.

The plaintiff is sometimes referred to a psychiatrist or psychologist to obtain expert testimony regarding mental distress. This testimony may be persuasive, particularly if the witness is shown to be trained to seek out the various causes of mental distress. The witness can also testify regarding the future prognosis for the plaintiff's treatment.

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B. Exhibits

§6.49 1. Medical, Employment, and School Records

Evidence relating to emotional injury may be found in records made both before and after the injury, including:

- Medical and psychiatric records;
- School records; and
- Employment records.

A diary kept by the plaintiff may also provide evidence of his or her mental and emotional condition, although a diary may also contain irrelevant and highly personal matter.

The plaintiff may also introduce bills, receipts, and records showing medical and psychotherapy expenses, wage loss, and the like, not only to recover these expenses, but to establish the serious nature of the plaintiff's mental distress. See §§1.75-1.79.

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Source: Torts/California Tort Damages/6 Emotional Distress/§6.50 2. Photographs

§6.50 2. Photographs

Photographs of the accident scene, autopsy photographs showing the nature and extent of the victim's injuries, and perhaps before-and-after photographs of the plaintiff may aid the jury in understanding the case. See *Krouse v Graham* (1977) 19 C3d 59, 137 CR 863, explaining the admissibility of some of these photographs in a bystander case in which the defendant admitted liability but did not stipulate to the seriousness of the plaintiff's emotional distress.

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§6.51 3. Plaintiff's Financial Records

Evidence of the plaintiff's financial status can be relevant as showing the basis for emotional distress, just as evidence of the defendant's wealth is relevant in determining the appropriate amount of punitive damages. *Wayte v Rollins Int'l, Inc.* (1985) 169 CA3d 1, 20, 215 CR 59.

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§6.52 VI. TAX CONSEQUENCES

Under IRC §104(a)(2), damages received as a result of personal physical injuries or physical sickness, in a lump sum or by periodic payments, whether by suit or settlement, are excludable from gross income. Section 104 states that "emotional distress shall not be treated as a physical injury or physical sickness." See Note in §1.112, and generally §§1.113-1.122.

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7

Assault and Battery

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III. TAX CONSEQUENCES §7.20

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I. LIABILITY

A. Assault

§7.1 1. Defined

An assault occurs when the plaintiff is placed in imminent apprehension of harmful or offensive contact by the defendant. Restatement (Second) of Torts §§21-34 (1965). See *Lowry v Standard Oil Co.* (1944) 63 CA2d 1, 7, 146 P2d 57 ("A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm").

NOTE: The legal definition of "assault" differs from common parlance in which "assault" and "assault and battery" connote a physical battering of the person. This chapter uses "assault" in the narrower sense to refer to the apprehension of a harmful or unwanted contact, reserving "battery" for the harmful contact itself (see §7.3). Thus, "assault and battery" includes both kinds of harm; a battery is preceded by an assault whenever the plaintiff "saw it coming," and an assault is not always followed by a battery. See *People v Helbing* (1882) 61 C 620; *People v Mueller* (1956) 147 CA2d 233, 238, 305 P2d 178.

Damages recoverable for an assault include compensation for (1) the fear and other emotional distress resulting from the apprehension of a harmful or offensive contact and (2) any physical harm that results from such fear and distress. See §§7.10-7.19.

TACTICS: When an assault is coupled with a battery, damages are recoverable for both the harm resulting from the apprehension and, separately, for the harm resulting from the contact. If the contact (the battery) causes serious harm, and the harm resulting from the apprehension (the assault) pales in comparison, it can be wise to concentrate on damages for the battery, especially if seeking separate damages for the assault might appear to a jury to be overreaching.

An employer can be liable for an assault committed by an employee acting within the scope of his or her employment; rarely, if ever, could the employer be liable under the theory that it failed to properly train its employees not to attack customers. *Flores v AutoZone W., Inc.* (2008) 161 CA4th 373, 74 CR3d 178. On assault and battery in workplace settings, including discussion of assaults by employers on employees as an exception to workers' compensation exclusivity immunity, see California Workers' Damages Practice §§4.37-4.40 (2d ed Cal CEB 2001).

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§7.2 2. Elements of Cause of Action

To recover damages on a cause of action for assault, the plaintiff must establish that:

- The defendant intended to cause harmful or offensive contact, or imminent apprehension of such contact; and
- The plaintiff was put in imminent apprehension of harmful or offensive contact.

See Restatement (Second) of Torts §21 (1965).

NOTE: The plaintiff in a civil damages lawsuit, unlike a criminal prosecutor, need not establish that the defendant had a present ability to commit the harmful or offensive contact; it is the plaintiff's imminent apprehension of such contact that is crucial and must be established. See Pen C §240 ("an assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another"). For example, a civil defendant is liable for an assault if he or she points an unloaded gun at the plaintiff in a threatening manner and the plaintiff believes that the gun is loaded. *Lowry v Standard Oil Co.* (1944) 63 CA2d 1, 7, 146 P2d 57.

Mere words alone, without other acts or circumstances that reasonably place another in imminent apprehension of harmful or offensive contact, do not give rise to an assault. Sufficiently threatening or abrasive words, however, could justify recovery on another basis such as intentional infliction of emotional distress (see §6.16) or defamation (see chap 8).

TACTICS: In some situations, damages that could be recovered for assault or battery might better be pursued under a negligence theory, such as negligent infliction of emotional distress (see §6.24), if doing so might help the plaintiff to avoid insurance policy exclusions for assault, battery, or intentional acts. See *California Auto. Ins. Co. v Hogan* (2003) 112 CA4th 1292, 5 CR3d 761 (no coverage under uninsured motorist provisions for death following altercation while exchanging information after traffic accident); *Blue Ridge Ins. Co. v Stanewich* (9th Cir 1998) 142 F3d 1145 (no coverage under "accident" policy for injury from assault and attempted robbery). See also *Zelda, Inc. v Northland Ins. Co.* (1997) 56 CA4th 1252, 66 CR2d 356 (assault and battery exclusion negated insurer's duty to defend). See Anno, 44 ALR5th 91 (1996) (effect of assault and battery exclusion in insurance policy). In addition, an insurer does not have a duty to defend an action for assault, under a policy covering injury for an "accident," when the complaint alleges the insured was acting under an unreasonable and negligent belief that he was defending himself. See *Delgado v Interinsurance Exch. of the Auto. Club* (2009) 47 C4th 302, 97 CR3d 298 (homeowner's policy). See also *State Farm Fire & Cas. Co. v Superior Court (Wright)* (2008) 164 CA4th 317, 78 CR3d 828 (throwing someone in swimming pool without intent to injure was "accident" when victim injured by hitting concrete step).

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Source: Torts/California Tort Damages/7 Assault and Battery/ B. Battery/§7.3 1. Defined

B. Battery

§7.3 1. Defined

A cause of action for battery arises when the plaintiff receives an intentional, unlawful (*i.e.,* unconsented to), harmful, or offensive physical contact by the defendant. Restatement (Second) of Torts §§13, 18 (1965). See CACI 1300 (requiring plaintiff offended, rather than harmed, by contact to prove that reasonable person in his or her situation would have been offended by it). A battery is a violation of an individual's interest in freedom from offensive contact with his or her person. *Rains v Superior Court* (1984) 150 CA3d 933, 938, 198 CR 249 (lack of consent is essential element); *Ashcraft v King* (1991) 228 CA3d 604, 613, 278 CR 900 (element of intent satisfied by evidence showing willful disregard of plaintiff's right to give conditional consent).

NOTE: In legal discussions (and in this chapter), a battery differs from an assault, although a single act by a defendant may amount to both an assault and a battery. See §7.1. For criminal law purposes, Pen C §242 defines a battery as a "willful and unlawful use of force or violence upon the person of another."

The definition of battery as any intentional, unlawful, and harmful contact is not necessarily incorrect, but circumstances may require the trial judge to give a further instruction on the meaning of "unlawful," such as: "A contact is unlawful if it is unconsented to." *Barouh v Haberman* (1994) 26 CA4th 40, 45, 31 CR2d 259 (dispute over whether defendant's touching of side of plaintiff's head was "love tap" or "hard wallop").

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Source: Torts/California Tort Damages/7 Assault and Battery/§7.4 2. Elements of Cause of Action

§7.4 2. Elements of Cause of Action

To recover for a battery, the plaintiff must establish that:

- The defendant touched the plaintiff, or caused the plaintiff to be touched, with the intent to harm or offend;
- The plaintiff did not consent to be touched; and
- The plaintiff was harmed or offended by the contact (a touching being offensive if it offends a reasonable sense of personal dignity).

See CACI 1300. See also Restatement (Second) of Torts §§13, 18 (1965), which states that one is subject to liability to another for battery if "(1) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (2) a harmful, offensive, contact with the person of the other directly or indirectly results."

Principles of comparative fault do not ordinarily apply to reduce the damages recoverable by the victim of an assault. See *Heiner v K-Mart Corp.* (2000) 84 CA4th 335, 342, 100 CR2d 854. In addition, a trial judge has discretion to exclude evidence that the victim was involved in physical and verbal altercations other than the one sued on. 84 CA4th at 350.

There can be circumstances in which a person can be liable for a negligent failure to prevent battery on another person by a third person. See *Robertson v Cusack* (ND Cal 2007) 2007 US Dist Lexis 47523 (prison guards' alleged failure to follow prescribed procedures permitted one inmate to stab another inmate).

TACTICS: As with suits based on assaults in some situations, damages that could be recovered for battery might better be pursued under a negligence theory, such as negligent infliction of emotional distress (see §6.24), if doing so might help the plaintiff to avoid insurance policy exclusions for assault, battery, or intentional acts. See Tactics Note in §7.2.

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Source: Torts/California Tort Damages/7 Assault and Battery/§7.5 a. Intention

§7.5 a. Intention

Ordinarily, a plaintiff must prove that the defendant acted with an intent to harm or offend. See CACI 1300. In some situations, however, the intent that a battery plaintiff must establish is not the defendant's intent to cause harm to the plaintiff, but rather the defendant's intent to do the act that causes harm. See *Singer v Marx* (1956) 144 CA2d 637, 641, 301 P2d 440 (9-year-old child throwing rocks). A person is presumed to intend the natural and probable consequences of his or her acts. *Lopez v Surchia* (1952) 112 CA2d 314, 318, 246 P2d 111.

NOTE: In *Lopez,* the court noted that intent is the gist of the action only when the defendant performs an act that is not unlawful. If a battery is committed during an unlawful or wrongful act that is likely to injure another, the defendant's intent to injure is immaterial and the defendant is liable for the consequences that directly and naturally result from his or her conduct even though the defendant did not intend the injury that followed. 112 CA2d at 318.

If a defendant has unlawfully aimed a gun or thrown a rock at one person, but hit another, the defendant is liable for assault and battery to the person hit because the injury is a direct, natural, and probable consequence of the wrongful act. See *Singer v Marx* (1956) 144 CA2d 637, 642, 301 P2d 440; *Lopez v Surchia, supra*. In such instances it is often stated that the defendant is liable under the doctrine of "transferred intent." See *Singer v Marx, supra*.

A surgical operation performed without consent, beyond the scope of consent, or when consent is obtained without adequate disclosure, may give rise to liability for battery. See California Tort Guide §9.16 (3d ed Cal CEB 1996). See also §14.29. The battery theory should be reserved, however, for circumstances in which a doctor has performed an operation to which the patient has not consented; the separate cause of action for lack of informed consent, pursued when the patient has consented to an operation but claims that he or she did so without having received adequate information about the risks of the surgery, should be pleaded as negligence. See *Saxena v Goffney* (2008) 159 CA4th 316, 71 CR3d 469 (battery and lack of informed consent are separate causes of action).

On consent as a defense to a claim for battery generally, see §7.9. See also *Friedman Prof. Mgmt. Co. v Norcal Mut. Ins. Co.* (2004) 120 CA4th 17, 15 CR3d 359 (claim for battery damages based on allegations that defendant doctor should not himself have been in operating room "at all" when he touched patient in effort to stem vaginal bleeding).

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§7.6 b. Harmful or Offensive Contact

A bodily contact is deemed offensive "if it offends a reasonable sense of personal dignity." Restatement (Second) of Torts §19. See CACI 1300 (touching is offensive if it offends reasonable sense of personal dignity). See also BAJI 7.51 (a contact is offensive if it is "of a character that would offend a person of ordinary sensitivity, and be unwarranted by the social usages prevalent at the time and place at which the contact is made").

See Anno, 46 ALR5th 813 (1997) (secondary smoke as battery).

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C. Defenses

§7.7 1. Statute of Limitations

The 2-year limitations period in CCP §335.1 governs causes of action for assault or battery. A 3-year limitations period applies to actions for damages resulting from domestic violence. CCP §340.15. Thus, a victim who files a timely suit may recover damages for all continuous abuse during marriage. *Pugliese v Superior Court* (2007) 146 CA4th 1444, 1451, 53 CR3d 681 (legislature made domestic violence "continuing tort" as to which 3-year statute of limitations did not begin to run until "last act" of violence).

The running of the applicable period may be tolled during the plaintiff's minority or insanity. CCP §352. See *Sosnick v Sosnick* (1999) 71 CA4th 1335, 84 CR2d 700 (assault and battery claim for spousal abuse).

NOTE: A limitations period of 1 year after judgment is pronounced applies to a damages action against a defendant who is convicted of a felony unless a longer period applies to the specific action. See CCP §340.3; *Guardian N. Bay, Inc. v Superior Court* (*Spencer)* (2001) 94 CA4th 963, 114 CR2d 748. Perhaps CCP §335.1 can be read to provide a longer period for felonious assaults.

On the statute of limitations in lawsuits for sexual abuse of a minor, see §6.20 (intentional infliction of emotional distress). See also §6.30 (negligent infliction of emotional distress).

See Anno, 88 ALR4th 1063 (1991) ("discovery rule" as postponing running of limitations against action for assault damages).

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§7.8 2. Self-Defense; Reasonable Force

Civil Code §50 provides that "any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest." See CACI 1304. Self-defense is an affirmative defense that must be established by a preponderance of the evidence. *Bartosh v Banning* (1967) 251 CA2d 378, 386, 59 CR 382.

A defendant's use of force in excess of that which (as determined by a trier of fact) is reasonably necessary or justified can subject the defendant to liability. See *Yount v City of Sacramento* (2008) 43 C4th 885, 76 CR3d 787 (police officer, meaning to taser DUI arrestee, mistakenly shot him with pistol); *Cavillo-Silva v Home Grocery* (1998) 19 C4th 714, 80 CR2d 506, disapproved on other grounds in *Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 854 n19, 107 CR2d 841. On battery by a police officer who uses more force than is reasonably necessary to effect a lawful arrest, see CACI 1305.

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Source: Torts/California Tort Damages/7 Assault and Battery/§7.9 3. Consent

§7.9 3. Consent

Although the plaintiff's consent to an assault or battery may be asserted defensively, in actuality, the absence of consent is part of the plaintiff's case—it is one of the elements that the plaintiff must plead and prove (see §§7.2, 7.4). See *Lyons v Williams* (9th Cir 1996) 91 F3d 1308, 1311 (rule apples even when offensive touching amounts to rape). See generally CC §3515 ("He who consents to an act is not wronged by it").

A person may place conditions on a consent and a defendant who exceeds the terms or conditions of the consent can be liable for the excessive act. *Ashcraft v King* (1991) 228 CA3d 604, 609, 278 CR 900.

A plaintiff's consent may be expressed by words or acts and in some situations by silence or inaction. CACI 1302.

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Source: Torts/California Tort Damages/7 Assault and Battery/§7.9A 4. Immunity

§7.9A 4. Immunity

The "judicial immunity" that exonerates judges and other persons acting in a judicial capacity from liability for injury caused by the exercise of judicial functions does not protect such a person from liability for detriment caused by nonjudicial activities. *Regan v Price* (2005) 131 CA4th 1491, 33 CR3d 130 (attorney acting as discovery referee not immune from alleged battery on litigant at site of deposition). See also *Davis v City of Las Vegas* (9th Cir 2007) 478 F3d 1048 (state law battery and 42 USC §1983 liability of police officer alleged to have broken neck of arrestee); *Tekle v U.S.* (9th Cir 2006) 511 F3d 839 (federal immunity did not protect narcotics officers alleged to have used excessive force in arresting and detaining unarmed 11-year-old; child could pursue Federal Tort Claims Act (28 USC §1346(b)) suit under cause of action created in *Bivens v Six Unknown Named Agents of the Fed. Bureau of Narcotics* (1971) 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999).

NOTE: The Communications Decency Act (CDA) (47 USC §230) immunizes an Internet website against liability from a person assaulted by another person met through the website. See *Doe II v MySpace, Inc.* (2009) 175 CA4th 561, 96 CR3d 148.

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II. DAMAGES

§7.10 A. General Rule

Under CC §3333, the amount that is recoverable as damages for an assault or a battery "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Thus, in addition to recovering damages for medical expense (see §7.12), lost earnings (see §7.13), loss of earning capacity (see §7.14), and other special damages (see §9.19), the plaintiff may recover damages for "pain, discomfort, fears, anxiety and other mental and emotional distress (see §7.15) and for similar suffering reasonably certain to be experienced in the future." In an appropriate case, plaintiff may also recover punitive damages (see §7.19).

Evidence of assault or battery damages may be excluded if the plaintiff did not respond, as required by CCP §425.11, to a request for statement of damages. See *Argame v Werasophon* (1997) 57 CA4th 616, 67 CR2d 281 (plaintiff alleged unwanted sexual touching and verbal abuse; defendant's failure to move to compel statement waived right to exclude damages evidence).

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§7.11 B. Maximizing Recovery

In many assault and battery cases, a significant portion of the compensatory damages recovered are for emotional distress and for pain and suffering when there has been physical injury. A jury that has concluded that a defendant has violated the plaintiff's rights and that the violation has been violent or offensive may react strongly against the defendant and be sympathetic to a plaintiff with emotional distress injuries. The foundation for a significant emotional distress award is:

- Effective testimony from the plaintiff, painting a dramatic before-and-after picture (see §7.16);
- Probative testimony from family members, friends, coworkers, and acquaintances who are difficult to impeach and who confirm the plaintiff's story (see §7.17); and
- Expert testimony that validates in medical terms the fact that emotional distress following an assault or battery is an expected medical problem and requires treatment for some period of time (see §7.18).

TACTICS: Although general damages for emotional distress are often the most significant, the traditional elements of special damages, including medical expense (see §7.12), lost earnings (see §7.13), and lost earning capacity (see §7.14), should not be ignored. These items can be carefully developed to provide a significant "springboard" for an argument on emotional distress damages. As in evaluations of all plaintiffs' cases, the larger the special damages award, the more comfortable a jury will be with a large emotional distress claim. Nor should the availability of punitive damages in appropriate cases be ignored. See §7.19.

When a battery or assault is committed by a law enforcement officer, the claim for assault and battery damages may be coupled with a claim for relief under 42 USC §1983, which may include the recovery of attorney fees. See *Santos v Gates* (9th Cir 2002) 287 F3d 846 (jury question whether arresting officers' conduct amounted to excessive force that violated federal civil rights); *McFadden v Villa* (2001) 93 CA4th 235, 113 CR2d 80 (after recovery on state law battery claim but rejection of federal civil rights claim, attorney fee award was improper).

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§7.12 1. Medical Expense

Medical expenses that are directly related to the assault or the battery are recoverable as damages. The plaintiff should offer proof of all medical services and supplies reasonably needed to diagnose and treat the plaintiff's injuries and all expenses incurred, including transportation to and from medical appointments, child care associated with hospitalizations, medications, laboratory fees, home care expenses, and physicians' bills.

NOTE: The restitution order in a criminal case suggests that the victims of a physical assault may recover, in addition to the usual expenses of medical treatment, the cost of healing ceremonies and herbal medicines that are traditional in their ethnic group. See *People v Keichler* (2005) 129 CA4th 1039, 29 CR3d 120 (restitution for expenses, including cost of cow killed in Hmong "calling ceremony"). See also *In re K.F.* (2009) 173 CA4th 655, 662, 92 CR3d 784 (restitution order; collection letter stating victim was "billed" for stated amount was substantial evidence of charges incurred).

Evidence of treatment by a psychiatrist or a psychologist may be used to support a claim for emotional distress damages (discussed in §§7.15-7.18). On referral to a psychiatrist or a psychologist, see §7.18.

On damages for medical expense incurred in the treatment of bodily injuries, see §§1.20-1.33.

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§7.13 2. Lost Earnings

Physical injury or emotional distress that the plaintiff suffers as a result of an assault or battery may cause the plaintiff to lose time from employment. Time may also be lost to obtain medical treatment or rehabilitation.

Compensatory damages may be awarded for the victim's loss of earnings or loss of business profits. See *Heiner v K-Mart Corp.* (2000) 84 CA4th 335, 344, 100 CR2d 854 (trial court did not abuse discretion by excluding evidence that victim was operating his business in violation of certain laws nor by excluding certain defense testimony about future profits).

On damages for lost earnings, see §§1.42-1.44.

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§7.14 3. Impaired Earning Capacity

Often in assault and battery cases, a diminution of earning capacity goes hand in hand with a serious emotional distress claim. The common types of claims made in these cases include anxiety, stress, humiliation, inability to concentrate, depression, reduced self-esteem, and other types of emotional distress that inhibit a person's ability to work on certain jobs.

Thus, the plaintiff's counsel should be aware of situations in which the continuing emotional distress resulting from an assault or battery affects the plaintiff's ability to work in certain situations. Reduced self-esteem or an inability to deal with stress are continuing problems that limit the ability to handle certain jobs or to be promoted in a regular fashion. The anxiety of merely being around individuals who remind the plaintiff of the assault or battery might even inhibit the plaintiff from taking or holding certain positions. In an appropriate case, a psychologist or psychiatrist may testify that the plaintiff developed phobias, posttraumatic stress disorder, or other disabilities. All these examples of emotional distress can result in a loss of earning capacity that translates into very real damages to a victim of an assault or battery.

TACTICS: Consultation with the treating psychologist or psychiatrist, or with an occupational rehabilitation expert, may enhance the claim for loss of earning capacity. The expert's testimony can explain the extent of the plaintiff's impairment.

On damages for impairment of earning capacity, see §§1.41, 1.44.

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§7.15 4. Emotional Distress

Emotional distress in assault and battery cases may accompany a bodily injury (see §1.74) or may be experienced absent bodily injury (chap 6).

Establishing emotional distress can be a sensitive, time-consuming portion of any trial. The plaintiff's attorney may break the proof into three separate areas: (1) narrative testimony by the plaintiff (see §7.16); (2) testimony by friends, coworkers, and family (see §7.17); and (3) expert testimony by both treating psychiatrists or psychologists and independent experts (see §7.18).

Substantial emotional distress damages may be awarded to a plaintiff who can demonstrate that his or her life has been altered significantly as a result of the assault or battery, *e.g.,* from being a happy, normal individual who was an effective parent, a productive worker, and a friend to a person who can no longer function in those capacities.

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Source: Torts/California Tort Damages/7 Assault and Battery/§7.16 a. Plaintiff's Testimony

§7.16 a. Plaintiff's Testimony

A key to developing damages for emotional distress is to show the contrast in the plaintiff's life before and after the tort. The sharper the contrast between a normal existence before the assault or battery occurred and an existence overwhelmed by fear and self-doubt afterward, the greater are likely to be the emotional distress damages.

Thus, the plaintiff's testimony should carefully outline his or her normal, everyday life before the tort and paint a picture with sufficient detail, using photographs or videotapes from family vacations or holiday celebrations to provide visual support for the plaintiff's version of his or her otherwise normal existence.

The plaintiff's testimony should also describe his or her immediate reaction to the assault or battery and what immediately transpired thereafter. If the facts warrant, the plaintiff's testimony should cover such things as immediate medical treatment, hospitalization, and conversations with law enforcement officers.

After depicting the norm and what immediately transpired after the assault or battery, the plaintiff can then establish the contrast. Selecting a number of examples of the plaintiff's reactions to situations following the assault or battery can be effective in maximizing an award. For example, if justified by the facts, any of the following situations can be used to dramatize the changes in the plaintiff's life:

- A reluctance to venture out at night for fear of another assault;
- A fear of crowds that precludes attendance at public events;
- An adverse reaction to the geographical location where the assault or battery took place;
- Avoidance of individuals who were present when the tort occurred or have some other first-hand knowledge;
- Inability to return to work in same office or the same situation.

In addition to testifying to the above, the plaintiff may testify to emotional distress that is more subjective and internalized, such as loss of self-esteem and confidence, especially if it has impaired the plaintiff's ability to work or succeed at employment. Expert testimony can buttress the plaintiff's testimony in this area. See §7.18.

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Source: Torts/California Tort Damages/7 Assault and Battery/§7.17 b. Other Lay Witness Testimony

§7.17 b. Other Lay Witness Testimony

Successful "before and after" damage presentation (see §7.16) often include testimony from family members, friends, or coworkers and, if available, independent witnesses to add to and corroborate the plaintiff's emotional distress testimony. Even casual acquaintances and coworkers may be able to testify to the plaintiff's manifestations of emotional distress.

TACTICS: Counsel may ask the plaintiff to supply a list of people with whom he or she has had everyday exposure before and after the tort. Counsel should, however, interview those persons to determine who would be the best witnesses, testifying to the most dramatic examples of emotional distress, while being the least subject to impeachment.

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Source: Torts/California Tort Damages/7 Assault and Battery/§7.18 c. Expert Testimony

§7.18 c. Expert Testimony

Testimony from a psychologist or psychiatrist can buttress the plaintiff's description of the harm suffered (see §7.16), although it is not ordinarily required. See, *e.g., Young v Bank of America* (1983) 141 CA3d 108, 115, 190 CR 122 (credit-card case). That is, expert testimony coupled with the testimony of friends, family members, coworkers, and independent witnesses (see §7.17) may validate in the jurors' minds the emotional distress testified to by the plaintiff and others. See §6.48 on psychiatric testimony about the probable effects of a sexual assault.

TACTICS: A plaintiff's claim for damages for the emotional distress that is normally attendant on an assault, with or without a bodily injury, does not ordinarily justify inquiry into, or discovery of, the plaintiff's history of psychiatric or related treatment. Such discovery, including a defense psychiatric examination, could be justified, however, by a claim for damages for the expense of psychiatric treatment or of serious psychiatric injury.

A practical consideration is whether the plaintiff's attorney should refer the plaintiff to a psychiatrist or psychologist who is experienced with emotional distress claims. Jurors will usually be made aware of such a referral during the course of the trial. The perceived lack of independence in the jurors' eyes between the attorney, the plaintiff, and the psychiatrist or psychologist may weigh against the value of the emotional distress claims.

TACTICS: Some plaintiffs' practitioners suggest referral to a psychologist rather than a psychiatrist—at least to one who uses traditional methods of diagnosis and treatment—believing that a psychologist will be more sympathetic concerning anxiety problems resulting from assault and battery, and that jurors will relate better to a psychologist's testimony.

It can be a good practice to encourage the client to consult with a family physician or a community resource facility for the names of several psychiatrists or psychologists. The attorney and the client can then consult on the choice of a psychiatrist or psychologist who will combine the best therapy with the best presentation at trial.

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§7.19 5. Punitive Damages

Under CC §3294, a plaintiff may recover punitive damages on a showing by clear and convincing evidence that the defendant is guilty of malice, oppression, or fraud. Malice is defined as conduct on the defendant's part that is intended to cause the plaintiff injury, or "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." CC §3294(c)(1). Oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." CC §3294(c)(2). On definition of fraud, see CC §3294(c)(3).

The employer of the person who committed a battery is liable for punitive damages only if it ratified or condoned an agent's or employee's tortious act. See CC §3294(b); *Cruz v HomeBase* (2000) 83 CA4th 160, 168, 99 CR2d 435 (insufficient evidence to show ratification).

For further discussion of punitive damages, see chap 14.

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Source: Torts/California Tort Damages/7 Assault and Battery/§7.20 III. TAX CONSEQUENCES

§7.20 III. TAX CONSEQUENCES

Under IRC §104(a)(2), damages received because of personal physical injuries or physical sickness, in a lump sum or by periodic payments, whether by suit or settlement, are excludable from gross income. See Note in §1.112. On the taxability of punitive damages recoveries, see §14.48.

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8

Defamation

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I. LIABILITY FACTORS

§8.1 A. Defining "Libel" and "Slander"

Damages are recoverable for two forms of defamation: libel and slander. CC §44. Each form presumes the defendant's publication or utterance of a "false and unprivileged publication." CC §§45-46. See §§8.19-8.20 on privilege and truth as defenses to defamation suits.

Libel is effected "by writing, printing, picture, effigy, or other fixed representation to the eye," which exposes a person to "hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." CC §45. Libel, as defined by the statute, appears to include statements posted on an Internet bulletin board or website. See Note in §§8.6 and 8.26.

Slander is effected by oral utterance (including a "communication by radio or any mechanical or other means"), which, briefly stated, (1) imputes (a) criminality, (b) disease, (c) occupational incompetence or dishonesty, or (d) impotence or want of chastity, or which (2) causes actual damage. CC §46. See §8.5. Slander includes defamatory statements made on television broadcasts. See *Lieberman v Fieger* (9th Cir 2003) 338 F3d 1076, 1079 (statements on "Court TV" by attorney about former expert witness viewed, however, as nonactionable opinion). But see *Polygram Records, Inc. v Superior Court* (1985) 170 CA3d 543, 549, 216 CR 252 (questioning categorization).

NOTE: In some situations, an alternative to suing for defamation damages is to sue under 42 USC §1983 for a denial of due process of law. See, *e.g., Board of Regents v Roth* (1972) 408 US 564, 572, 33 L Ed 2d 548, 92 S Ct 2701 (charging employee, to justify firing, with conduct that would seriously foreclose his freedom to obtain other employment); *Campanelli v Bockrath* (9th Cir 1996) 100 F3d 1476 (accusing coach of psychologically damaging players; truth of statements was jury question). For more on 42 USC §1983 claims, see California Government Tort Liability Practice, chap 13 (4th ed Cal CEB 1999). Another alternative, false light invasion of privacy, is discussed in §§9.4-9.5.

On the recovery of damages for defamation in employment termination situations, see Wrongful Employment Termination Practice §§7.2-7.19 (2d ed Cal CEB 1997).

See Annos, 42 ALR6th 353 (2009) (defamation by television—actual malice), 40 ALR6th 231 (2009) (defamation by radio—actual malice), 16 ALR6th 1 (2006) (disparagement of physician's character, competence, or conduct as defamation), 7 ALR6th 135 (2005) (imputation of homosexuality as defamation), 3 ALR6th 153 (2005) (defamation in electronic communications, including e-mail, internet, and websites), 2 ALR6th 657 (2005) (defamation of veterinarian or animal trainer), 109 ALR5th 541 (2003) (defamation of church member by church official), 108 ALR5th 495 (2003) (defamation of clergy member), 106 ALR5th 475 (2003) (defamation of building contractor), 94 ALR5th 149 (2001) (defamatory statements in labor relations disputes), 45 ALR5th 739 (1997) (statement that plaintiff breached contract or failed to perform).

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B. Need to Plead and Prove Special Damage

§8.2 1. Libel: Per Se and Per Quod

A plaintiff does not need to plead or prove "special damage" to recover damages for a written publication that is "libel per se" or "libel on its face," *i.e.,* "defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact." CC §45a.

Conversely, the plaintiff must plead and prove special damage to recover damages for a publication that is not libel on its face (*i.e.,* is libel per quod) but requires explanatory matter to show that it is libelous. CC §45a; *Forsher v Bugliosi* (1980) 26 C3d 792, 807, 163 CR 628. See *Palm Springs Tennis Club v Rangel* (1999) 73 CA4th 1, 86 CR2d 73 ("per quod" means, literally, "whereby"; no libel if no reasonable reader of publication could impute to it meaning that tended to harm plaintiff's reputation). Damages for libel per quod are recoverable only if the plaintiff pleads and proves (1) the explanatory matter and (2) that he or she has suffered "special damage" as a proximate result of the libel. CC §45a. See *MacLeod v Tribune Publ'g Co.* (1959) 52 C2d 536, 549, 343 P2d 36; *Gomes v Fried* (1982) 136 CA3d 924, 940, 186 CR 605 (special damage must be pleaded precisely).

NOTE: The term "special damage" is said in CC §45a to be defined in CC §48a, which defines "special damages" as injury or harm to the plaintiff's "property, business, trade, profession or occupation" caused by a libel (or slander), including amounts of money the plaintiff expends as a result of it. See §8.9 on special damages.

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§8.3 a. Natural and Probable Interpretation

In determining whether a libel is defamatory on its face, courts look to the natural and probable effect that the publication has on the mind of the average reader. *MacLeod v Tribune Publ'g Co.* (1959) 52 C2d 536, 547, 343 P2d 36. See *Couch v San Juan Unified Sch. Dist.* (1995) 33 CA4th 1491, 1500, 39 CR2d 848 (average readers, students and teachers at high school, could only have seen statements in school paper as parody, not as imputation of criminality).

A statement that is susceptible of an innocent meaning as well as a defamatory meaning may nevertheless be libel per se if it can reasonably be understood to be defamatory. See 52 C2d at 548. See also *Williams v Daily Review, Inc.* (1965) 236 CA2d 405, 410, 46 CR 135, disapproved on other grounds in *Brown v Kelly Broad. Co.* (1989) 48 C3d 711, 732 n18, 257 CR 708.

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§8.4 b. Examples of Libel Per Se

Falsely charging that the plaintiff is a member of the Communist Party was, at least in the 1950s, libelous per se. *MacLeod v Tribune Publ'g Co.* (1959) 52 C2d 536, 546, 343 P2d 36. On the other hand, not libelous per se was a statement, in 1964, that the plaintiff was a member of the John Birch Society and an extremist. See *Washburn v Wright* (1968) 261 CA2d 789, 798, 68 CR 224 (libelous per se to wrongly accuse someone of being Ku Klux Klan member).

Falsely charging a person with a violation of a confidence reposed in him is libel per se. *Selleck v Globe Int'l, Inc.* (1985) 166 CA3d 1123, 1132, 212 CR 838 (magazine article falsely ascribed to plaintiff statements about his actor son's personal life). Statements that charge a person with a crime (see *Ray v Citizen-News Co.* (1936) 14 CA2d 6, 57 P2d 527) or with unchastity (see *Mortensen v Los Angeles Examiner* (1931) 112 CA 194, 296 P 927, disapproved on other grounds in *Lipman v Brisbane Elementary Sch. Dist.* (1961) 55 C2d 224, 233, 11 CR 97), or that charge an employer with mistreating its employees (see *Di Giorgio Fruit Corp. v AFL-CIO* (1963) 215 CA2d 560, 30 CR 350) also have been held to be libel per se.

Describing a woman as a call girl can be libelous per se. See *Montandon v Triangle Publications, Inc.* (1975) 45 CA3d 938, 944, 120 CR 186. See also *White v Valenta* (1965) 234 CA2d 243, 255 n10, 44 CR 241 (actionability of "son of a bitch," rejecting holding in earlier case that referring to a woman as a bitch is not libelous per se).

A person may be defamed by a writer who attributes to the person a statement that the person did not make, as when the writer puts quotation marks around words that substantially differ from the words the person actually uttered. See *Masson v New Yorker Magazine, Inc.* (1991) 501 US 496, 517, 115 L Ed 2d 447, 111 S Ct 2419.

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§8.5 2. Slander: Per Se and Per Quod

A plaintiff is not required to plead or prove special damage to recover damages for a false oral utterance that is slanderous per se. See *Albertini v Schaefer* (1979) 97 CA3d 822, 829, 159 CR 98. An oral utterance is slander per se if it fits within one of the first four categories listed in CC §46. Under CC §46, a slander is actionable per se if it:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in [the person] the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure [the person] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; [or]
4. Imputes to [the person] impotence or a want of chastity.

Conversely, the plaintiff must plead and prove special (or actual) damage (see Note in §8.2) in order to pursue and recover damages for a statement that is slander "per quod." See *Correia v Santos* (1961) 191 CA2d 844, 852, 13 CR 132. Slander per quod is slander that does not fit within the first four categories listed in CC §46, but does fit within a fifth category—oral communication which "by natural consequence, causes actual damage."

NOTE: The criterion separating slander per se from slander per quod differs from the criterion separating libel per se (libel on its face without explanatory matter) from libel per quod (explanatory matter needed). See also Note in §8.2 on what is special damage (or damages).

For a statement that charges a person with a crime to be slanderous per se, the crime usually must be one involving moral turpitude that is indictable or punishable by either death or imprisonment. Further, a general charge of dishonesty not amounting to a crime is not slanderous per se unless it imputes dishonesty in business and thus tends to injure the plaintiff in his or her business or trade. See *Nethercut Collection v Regalia* (2009) 172 CA4th 361, 90 CR3d 882 (statements that plaintiff demanded finder's fee not owed him and was fired because other employers could not work with him were slander per quod, not per se).

Charges of unchastity are slanderous per se in California regardless of whether they charge the plaintiff with homosexual or heterosexual conduct. *Schomer v Smidt* (1980) 113 CA3d 828, 835, 170 CR 662, disapproved on other grounds in *Miller v Nestande* (1987) 192 CA3d 191, 200 n7, 237 CR 359.

If a reasonable person would understand the defendant's statement as a joke, it is not slanderous per se. See *Arno v Stewart* (1966) 245 CA2d 955, 965, 54 CR 392 (statement that plaintiff was "iron-clad singing member of the Mafia," greeted by laughter, not slanderous per se). But even a statement made in a humorous manner may be slanderous if it is reasonably understood to be defamatory. See 245 CA2d at 962.

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§8.6 C. Publication; Republication

Defamation liability requires that the defendant have published or communicated the defamatory matter to at least one person other than the person defamed. *Kelly v General Tel. Co.* (1982) 136 CA3d 278, 284, 186 CR 184 (no defense that defendant communicated to coemployee). Because the allegedly defamatory words are "operative facts," publication can be proved by what would otherwise be hearsay evidence. *Russell v Geis* (1967) 251 CA2d 560, 571, 59 CR 569.

Faxing a letter or document to an attorney's office, using a fax number on the attorney's letterhead, does not constitute publication of the document's contents to third persons even if others in the office can and do read it. *Martinelli v International House* (2008) 161 CA4th 1332, 75 CR3d 186 (attorney's letter to defendant effectively invited response; not responder's burden to determine who had access to attorney's fax machine).

Publication includes the republication of a defamatory statement originally made by another person. *Khawar v Globe Int'l Inc.* (1998) 19 C4th 254, 268, 79 CR2d 178 (subsequent publisher can be liable with original publisher; "neutral reportage privilege" not applicable when defamed person was private figure).

NOTE: Under 47 USC §230(c)(1), an Internet service provider is not to be treated as the publisher of information from an Internet content provider. See *Barrett v Rosenthal* (2006) 40 C4th 33, 51 CR3d 55 (operator of Internet discussion group on women's health not liable as "distributor" for postings in which site visitors impugned character and competence of operators of sites devoted to exposing health frauds); *Delfino v Agilent Technols., Inc.* (2006) 145 CA4th 790, 52 CR3d 376 ("interactive computer service provider" not liable for former employee's e-mails and Internet bulletin board postings); *Carafano v Metrosplash.com, Inc.* (9th Cir 2003) 339 F3d 1119 (online matchmaking service not responsible for false content in dating profile provided by person posing as another). See also *Grace v EBay Inc.* (review dismissed Dec. 1, 2004, and remanded to court of appeal; superseded opinion at 120 CA4th 984, 16 CR3d 192), in which the court of appeal ruled that (1) federal law did not immunize a distributor of information who knew or had reason to know that the information was defamatory, but (2) the written exculpatory (release) form agreed to by the plaintiff relieved the distributor from liability.

Constitutional considerations and First Amendment principles may be invoked by an Internet service provider to avoid revealing the identities of anonymous posters. See *Krinsky v Doe 6* (2008) 159 CA4th 1154, 72 CR3d 231 (decision based on "weighing" competing interests).

Each repetition of a defamatory statement in a separate publication gives rise to a new cause of action. *Schneider v United Airlines, Inc.* (1989) 208 CA3d 71, 77, 256 CR 71. Liability for multiple publications can, however, be limited by the single-publication rule. See §§8.25-8.26.

The person who has published defamatory matter can be liable for damages resulting from each republication of it by others that the person could reasonably have foreseen. *Di Giorgio Corp. v Valley Labor Citizen* (1968) 260 CA2d 268, 273, 67 CR 82. Similarly, a republisher can be liable for damages resulting from subsequent publications. *Khawar v Globe Int'l Inc., supra*; *Frommoethelydo v Fire Ins. Exch.* (1986) 42 C3d 208, 217, 228 CR 160.

Further, the original publisher of a defamatory statement can be liable for damages resulting from the defamed person's republication of it if the latter was under a strong compulsion to disclose it to a third person, as when, *e.g.,* a job seeker might have to tell a prospective employer about it to counter a negative reference. See *Live Oak Publ'g Co. v Cohagan* (1991) 234 CA3d 1277, 1285, 286 CR 198. See also *Schneider v United Airlines, Inc.* (1989) 208 CA3d 71, 75, 256 CR 71 (defendant had reason to know that republication was likely to occur). But see *Davis v Consolidated Freightways* (1994) 29 CA4th 354, 373, 34 CR2d 438 (no liability; plaintiff's republications were not to prospective employers, but made to gain support against defamer).

On the effect of republication on the statute of limitations defense, see §8.21.

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§8.7 D. Employers' and Coemployees' Liability

The employer of a defamer can be vicariously liable to the defamed person under the respondeat superior doctrine for defamatory statements made within the scope of an employee's or agent's employment. See *Rivera v National R.R. Passenger Corp.* (9th Cir 2003) 331 F3d 1074, 1080 (defamatory statements need not have been known to employer or made for its benefit); *Sanborn v Chronicle Publ'g Co.* (1976) 18 C3d 406, 411, 134 CR 402 (agent); *Kelly v General Tel. Co.* (1982) 136 CA3d 278, 284, 186 CR 184 (employee). On respondeat superior liability generally (in motor vehicle cases), see California Tort Guide §§4.45-4.62 (3d ed Cal CEB 1996).

An employer that ratifies the employee's defamatory conduct can also be liable to the person defamed. See *Roberts v Ford Aerospace & Communications Corp.* (1990) 224 CA3d 793, 801, 274 CR 139. See generally (in employer assault cases) California Workers' Damages Practice §§4.38-4.40 (2d ed Cal CEB 2001).

Being the coemployee of the person defamed does not exonerate the defamer. See *Sheppard v Freeman* (1998) 67 CA4th 339, 342, 79 CR2d 13. Exoneration of the alleged defamer, however, also exonerates the employer from vicarious respondeat superior liability. See *Shaw v Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1347, 100 CR2d 446.

An employer responsible (whether vicariously or directly) for defaming its own employee is not immunized from damages liability by the workers' compensation exclusive remedy rule. See Workers' Damages §§4.48-4.50. See also *Golden Eagle Ins. Co. v Rocky Cola Cafe, Inc.* (2001) 94 CA4th 120, 114 CR2d 16 (employer's commercial general insurer had duty to defend ex-employee's defamation suit despite "employment-related practices" exclusion). See Workers' Damages §7.63. But see *Low v Golden Eagle Ins. Co.* (2002) 104 CA4th 306, 315, 128 CR2d 423 (*Rocky Cola Cafe* case distinguished; employment-related practices exclusion exonerated insurer from defending defamation claim by present employee against his employer).

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II. DAMAGES AND OTHER RELIEF

A. Damages

§8.8 1. General Damages; Per Se Presumption

In defamation contexts, general damages are damages for "loss of reputation, shame, mortification and hurt feelings." CC §48a(4)(a). Thus, general damages essentially compensate the defamed plaintiff for emotional distress and damage to reputation. See *Douglas v Janis* (1974) 43 CA3d 931, 940, 118 CR 280; *Correia v Santos* (1961) 191 CA2d 844, 856, 13 CR 132. See generally Sanford, Libel and Privacy (2d ed 1991).

NOTE: The defamation law concept of general damages does not always parallel what is meant by "general damages" in other contexts. See, *e.g.,* §1.4 (general damages for bodily injury).

If defamatory language is libel per se or slander per se (see §§8.2, 8.5) the trier of fact is allowed to presume general damages from the mere publication of the defamatory words. *Contento v Mitchell* (1972) 28 CA3d 356, 358, 104 CR 591. In such cases, the plaintiff is required to prove that the defamatory statement was published but is neither obliged (nor barred) from proving actual injury to his or her reputation. *Contento v Mitchell, supra*.

A plaintiff cannot recover damages for the emotional distress that an alleged libel has caused others, including the plaintiff's relatives. *Stevens v Snow* (1923) 191 C 58, 65, 214 P 968 (to admit evidence that plaintiff's family suffered from publication would make defendant's liability hinge on libel's effect on strangers to action). See *Blatty v New York Times Co.* (1986) 42 C3d 1033, 1044, 232 CR 542 (tort of defamation or injurious falsehood is personal to person directly defamed; only damages sustained by that person are recoverable). See also *Sommer v Gabor* (1995) 40 CA4th 1455, 1477, 48 CR2d 235 (plaintiff's testimony that her own emotional distress was increased by knowledge of her mother's distress could have been excluded as irrelevant, but was not likely to have resulted in unwarranted damages).

NOTE: Cases in other states have elaborated on the denial of emotional distress damages to relatives of the defamed person. See, *e.g.*, *Coulon v Gaylord Broad.* (La Ct App 1983) 433 So2d 429 (nondefamed person, even if indirectly damaged, cannot recover for defamatory statement made about another); *Wildstein v New York Post Corp.* (Sup Ct 1963) 243 NYS2d 386 (although close relatives of person libeled will feel its impact, libel is not actionable by them unless it was published about them); *Thorson v Albert Lea Publ'g Co.* (Minn 1933) 251 NW 177, 179 (plaintiff's testimony about libel's effects on wife and daughter was excludable); *Bishop v New York Times Co.* (NY App 1922) 135 NE 845 (mother's testimony on child's distress not admissible to show mother's distress).

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§8.9 2. Special Damages

In defamation contexts, "special damages" are damages the plaintiff alleges and proves "in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel." CC §48a(4)(b) (libel by newspaper and slander by radio broadcast).

NOTE: The defamation law concept of special damages differs somewhat from what is meant by special damages in other contexts. See, *e.g.,* §1.4 (special damages for bodily injury).

Special damages compensate the plaintiff for actual pecuniary loss suffered as a direct and proximate result of the defamatory publication. *Childers v San Jose Mercury Printing & Publ'g Co.* (1894) 105 C 284, 288, 38 P 903. See also Sack on Defamation: Libel, Slander, and Related Problems (3d ed 1999); Sanford, Libel and Privacy (2d ed 1991).

Examples of special damages are a reduction in the number of new clients (see *MacLeod v Tribune Publ'g Co.* (1959) 52 C2d 536, 548, 343 P2d 36), loss of clients, and loss of employment with a specific employer (see *Pridonoff v Balokovich* (1951) 36 C2d 788, 792, 228 P2d 6). Special damages do not include general allegations of prospective loss of employment, loss of reputation, or hurt feelings. *Gomes v Fried* (1982) 136 CA3d 924, 940, 186 CR 605.

On constitutional limitations on the recovery of special damages, see §§8.38-8.41. On the effect of CC §48a (correction statute), see §§8.27-8.32.

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§8.10 3. Nominal Damages

At common law, a plaintiff who was not injured by a defamatory publication was nevertheless entitled to nominal damages—a few cents or dollars. Nominal damages are not available when other damages are imposed, but allow the plaintiff to vindicate his or her reputation through a favorable court judgment, even though suffering no demonstrable loss. See *Contento v Mitchell* (1972) 28 CA3d 356, 359, 104 CR 591; Restatement (Second) of Torts §620, Comment a (1977). See also Sack on Defamation: Libel, Slander, and Related Problems (3d ed 1999); Sanford, Libel and Privacy (2d ed 1991).

Nominal damages are not recoverable for statements that are not libelous per se or slanderous per se. See §§8.2, 8.5. Nominal damages provide a basis for punitive damages. See §§8.11-8.12.

On constitutional limitations on the recovery of nominal damages, see §8.39. On the effect of CC §48a (correction statute) on recovery of nominal damages, see §§8.27-8.32.

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4. Punitive (Exemplary) Damages

§8.11 a. Recoverability

Punitive damages can be recovered for defamation if special criteria are met. See *Agarwal v Johnson* (1979) 25 C3d 932, 947, 160 CR 141, disapproved on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563, 574 n4, 88 CR2d 19. In defamation cases, exemplary (*i.e.,* punitive) damages are "damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant." CC §48a(4)(c). See *Schomer v Smidt* (1980) 113 CA3d 828, 836, 170 CR 662 (punitive damages are for purpose of punishing wrongdoer and deterring further misconduct), disapproved on other grounds in *Miller v Nestande* (1987) 192 CA3d 191, 200 n7, 237 CR 359.

Punitive damages are generally awarded in addition to, not in place of, general, special, or nominal damages. See *Kluge v O'Gara* (1964) 227 CA2d 207, 209, 38 CR 607 (legal malpractice action). If the defamation is libel or slander per se (see §§8.2, 8.5) and general damages are presumed (see §8.40), courts have reasoned that "it is a useless act to require a token award of nominal damages in order to support the award of punitive damages." *Contento v Mitchell* (1972) 28 CA3d 356, 358, 104 CR 591.

The recovery of punitive damages in defamation cases generally requires a showing that the defendant acted with (1) "malice" (or oppression or fraud), as defined in CC §3294(c)(1), (2) "actual malice," as defined in CC §48a(4)(d), in suits against newspapers and broadcasters, and (3) the constitutionally required "knowing falsity or reckless disregard for the truth" (sometimes referred to as "constitutional actual malice") if defamation damages would inhibit constitutionally protected speech. See §§8.33-8.41.

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§8.12 b. Proving Amount

The trier of fact may take into account the wealth of the defendant when determining the appropriate amount of a punitive damages award. *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 65, 118 CR 184 ("the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective"); *Roemer v Retail Credit Co.* (1975) 44 CA3d 926, 937, 119 CR 82. See generally §14.38.

The trier of fact also may consider the reprehensibility of the defendant's acts and the amount of actual damages that the plaintiff suffered. *Burnett v National Enquirer, Inc.* (1983) 144 CA3d 991, 1011, 193 CR 206.

On what constitutes an acceptable relationship between punitive and compensatory damages, see §14.11.

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§8.13 5. Plaintiff's Proof

Damages for loss of reputation, shame, mortification, and hurt feelings (*i.e.*, general damages) can be established through the plaintiff's own testimony (see *Time, Inc. v Firestone* (1976) 424 US 448, 47 L Ed 2d 154, 96 S Ct 958; *Burnett v National Enquirer, Inc.* (1983) 144 CA3d 991, 193 CR 206) and the testimony of friends, fellow workers, relatives, and those providing medical treatment for mental suffering, as long as the evidence is limited to the reputational and emotional harm that the plaintiff suffered directly and personally from the defamation. See §8.8. See §8.38 on proof of damages for "actual injury" under *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997.

Special damages, based on actual out-of-pocket losses must be pleaded and proved with particularity. See §8.9. The plaintiff's showing of actual pecuniary harm generally must be specific and measurable, *e.g.,* documented loss of customers, loss of a job, and similar specific pecuniary loss. An economist may be useful as an expert witness to help prove such damages.

NOTE: Counsel should note that, when alleged defamatory matter involves a matter of public concern, the plaintiff must prove the constitutionally required "knowing falsity or reckless disregard for the truth" with convincing clarity (*i.e.,* by clear and convincing proof). See §8.34.

Evidence introduced to prove knowing falsity or reckless disregard for the truth may also prove the "actual malice," defined in CC §48a(4)(d) as a state of mind arising from hatred or ill will, that must be proved to recover punitive damages in suits against newspapers and broadcasters (see §§8.27-8.32). See *McCoy v Hearst Corp.* (1986) 42 C3d 835, 871, 231 CR 518. Evidence tending to show ill will includes evidence of a willingness to vex, harass, and annoy. See *Burnett v National Enquirer, Inc.* (1983) 144 CA3d 991, 1009, 193 CR 206.

Further, evidence that tends to show knowing falsity or reckless disregard for the truth or actual malice also tends to show the malice (or oppression or fraud) required under CC §3294 to support punitive damages. See §§14.5-14.8 on showing malice in cases that do not involve matters of public interest or newspapers or broadcasters. See §14.38 on showing defendant's wealth.

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§8.14 6. Defendant's Proof

A defendant may seek to limit the amount of general damages by introducing evidence that the plaintiff's reputation was such that it suffered little or no harm from the defamation. See, *e.g., Corabi v Curtis Publ'g Co.* (Pa 1971) 273 A2d 899 (evidence of previous statements published about plaintiff relevant to show bad general reputation and character). See §8.23 on the libel-proof plaintiff doctrine.

As in other personal injury cases, expert witnesses may be used to contest the plaintiff's claims for such damages as medical costs, loss of business earnings, and loss of future profits. See §§1.34-1.40, 1.59-1.65.

A newspaper or broadcaster may limit its liability to special damages by showing that it published a correction complying with CC §48a, thus precluding an award of general or punitive damages. See §§8.27-8.30. Similarly, evidence of a correction by a defendant who does not fall within the provisions of CC §48a can be considered in mitigation of damages. See *Montandon v Triangle Publications, Inc.* (1975) 45 CA3d 938, 950, 120 CR 186.

A defendant can defeat some recoveries by showing the absence of the constitutionally required "knowing falsity or reckless disregard for the truth" with evidence tending to show that the defendant (1) had no knowledge of the statement's falsity nor any subjective awareness of its probable falsity and (2) believed the statement to be true. See §§8.33-8.34. Such evidence may include reporters' and editors' testimony documenting the newsgathering process, the checking of facts, and the use of reliable sources. See, *e.g., McCoy v Hearst Corp.* (1986) 42 C3d 835, 231 CR 518; *Masson v New Yorker Magazine, Inc.* (ND Cal 1993) 832 F Supp 1350, 1357. The defendant also may introduce evidence of reasonable newsgathering methods and evidence of similar statements, such as news items published by others known to be generally accurate, to establish lack of knowing falsity or reckless disregard for the truth. See, *e.g., Dupler v Mansfield Journal Co.* (Ohio 1980) 413 NE2d 1187 (reliance on two previous accurate news reports showed lack of actual malice).

To defeat a punitive damages claim under CC §48a, defendants also may introduce evidence (*e.g.,* the testimony of those involved in publication of the alleged defamation) to establish that the publisher harbored no ill will or animus toward the plaintiff and acted in good faith. Similarly, defendants may introduce evidence through those involved in the publication to establish that the defendants were not guilty of the fraud, oppression, or malice required for punitive damages under CC §3294.

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§8.15 B. Injunctive Relief

Publication of a libelous or slanderous statement can be enjoined only if the plaintiff has met the heavy burden of showing a compelling justification for imposing such a prior restraint. See *New York Times Co. v U.S.* (1971) 403 US 713, 29 L Ed 2d 822, 91 S Ct 2140 (asserted national security interest did not justify enjoining publication of Pentagon Papers); *Near v Minnesota* (1931) 283 US 697, 718, 75 L Ed 1357, 51 S Ct 625 (statute that allowed injunctions to restrain publication of any "defamatory" newspaper is unconstitutional; public officers' remedy for false accusations is action under libel laws "for redress and punishment," not proceeding to restrain publication). See *Evans v Evans* (2008) 162 CA4th 1157, 76 CR3d 859 (order enjoining plaintiff's ex-wife and her mother from publishing false and defamatory statements on Internet, publishing confidential information, and calling his employer was overbroad prior restraint).

California now permits limited injunctions that forbid a person from repeating statements that have been determined at a trial to be defamatory. *Balboa Island Village Inn, Inc. v Lemen* (2007) 40 C4th 1141, 57 CR3d 320 (right to free speech not violated by enjoining adjacent property owner from making specified statements about restaurant and its employees and from taking photographs or movies within 25 feet of it). Formerly, California courts followed the traditional rule that injunctive relief against a libelous or slanderous statement is not permitted. See, *e.g., Wilson v Superior Court* (1975) 13 C3d 652, 658, 119 CR 468 (truth or falsity of statement on public issue is irrelevant to whether publication should be enjoined); *Northwestern Pac. R.R.. v Lumber & Sawmill Workers' Union* (1948) 31 C2d 441, 448, 189 P2d 277. See also *Gilbert v National Enquirer, Inc.* (1996) 43 CA4th 1135, 51 CR2d 91 (celebrity's right of privacy does not justify enjoining ex-husband from expressing uncensored opinions about her conduct); *Rosicrucian Fellowship v Rosicrucian Fellowship Non-Sectarian Church* (1952) 39 C2d 121, 145, 245 P2d 481 (injunction will not be granted when restraint interferes with freedom of speech).

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§8.16 C. Declaratory Relief

A defamation suit may be treated as an action for declaratory relief if it is brought solely for nominal damages and expressly states that it is brought to vindicate the plaintiff's reputation and not to recover compensatory damages. See Restatement (Second) of Torts §623, Special Note on Remedies (1977).

Alternatively, a plaintiff may be able to obtain a formal declaration that a defamatory statement about him or her was false by means of a special verdict that requires separate answers on the elements of the cause of action. See Special Note to Restatement §623. See also *Philadelphia Newspapers, Inc. v Hepps* (1986) 475 US 767, 89 L Ed 2d 783, 106 S Ct 1558.

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§8.17 D. Removal From Elected Office

A person elected to political office who is found liable in a civil action for making libelous or slanderous statements against an opposing candidate during a campaign may not retain the seat to which he or she was elected if the libel or slander was "a major contributing cause" in the opponent's defeat. Cal Const art VII, §10(a).

On the other hand, damages are not ordinarily recoverable for loss of an election to a political office. See *Southwestern Publ'g Co. v Horsey* (9th Cir 1956) 230 F2d 319, 322 (damages would be difficult to prove, uncertain, and speculative). Proof of such claims might also violate the sanctity of the secret ballot. See *Bush v Head* (1908) 154 C 277, 282, 97 P 512. But see *Gold v Los Angeles Democratic League* (1975) 49 CA3d 365, 375, 122 CR 732 (cause of action stated for intentional interference with plaintiff's opportunity to be elected to office of city controller; analogized to action for inducing breach of contract).

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§8.17A E. Attorney Fees

A peace officer, and an officer's public employer, sued for defamation damages (or for damages arising out of the performance of a peace officer's duties) may be awarded reasonable attorney fees, at the court's discretion, on a finding by the court that the lawsuit was not filed or maintained in good faith and with reasonable cause. CCP §1021.7. This statute does not authorize the recovery of attorney fees by defendants other than peace officers and their public employers. *Martin v Szeto* (2004) 32 C4th 445, 9 CR3d 687.

Otherwise, defamation cases are subject to the general rule that a plaintiff, or a defendant other than a peace officer, is not entitled to attorney fees in addition to awarded damages. See §1.99.

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III. FACTORS RESTRICTING RECOVERY

A. General Defenses

§8.18 1. Consent; "Ministerial Exception"

A plaintiff who consented to the publication of a defamatory statement cannot ordinarily recover damages or obtain other relief; consent is a complete defense. See *Royer v Steinberg* (1979) 90 CA3d 490, 498, 153 CR 499 (plaintiff caused previously confidential letter to be published). See also *Rudnick v McMillan* (1994) 25 CA4th 1183, 1191, 31 CR2d 193 (statements printed in "letter to the editor" that was responding to reporters' articles that plaintiff had invited). Consent does not exist, however, when a plaintiff republishes defamatory matter under a strong compulsion to disclose it. See §8.6 on such "compelled republication."

Statements made by church officials in connection with the firing of employees who have the religious duties of ministers are not, under the "ministerial exception," a basis for defamation damages. *Gunn v Mariners Church, Inc.* (2008) 167 CA4th 206, 84 CR3d 1 (firing explained to congregation as for "sinful" conduct; invasion of privacy and intentional infliction of emotional distress theories also dismissed).

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Source: Torts/California Tort Damages/8 Defamation/§8.19 2. Privilege

§8.19 2. Privilege

Civil Code §47 lists and defines categories of privileged publications and broadcasts, stating exceptions to their application. A defendant who can establish that the alleged libelous or slanderous publication was covered by one of these privileges establishes a complete defense to defamation liability.

NOTE: A plethora of cases have considered and applied the privileges listed in CC §47. It is beyond the scope of this book to review and discuss them. A few examples of such cases follow, however, to give an idea of how privileges are raised in defending defamation claims. Establishing that a privilege defeats a defamation claim appears also to defeat a claim based on the same facts for infliction of emotional distress. See Note in §8.20.

Under CC §47(a), a statement made in the proper discharge of an official duty is privileged. See *Maranantha Corrections, LLC v Department of Corrections & Rehabilitation* (2008) 158 CA4th 1075, 70 CR3d 614 (department director's statement that private contractor had "misappropriated" public funds protected by privilege); *Tutor-Saliba Corp. v Herrera* (2006) 136 CA4th 604, 39 CR3d 21 (privilege applied to city attorney's comments about contractor's business practices, made in speech to express his professional opinion about merits of litigation with contractor). An official's routine, ministerial acts, however, ordinarily fall outside the privilege. See *Copp v Paxton* (1996) 45 CA4th 829, 843, 52 CR2d 831 (republication of staff memorandum was not county officer's exercise of executive function).

Under CC §47(b), a publication made in a judicial, legislative, or other official proceeding is privileged. See *Hagberg v California Fed. Bank* (2004) 32 C4th 350, 7 CR3d 803 (privilege negates defamation liability for statements made by citizen to law enforcement personnel concerning another's suspected criminal activity unless plaintiff can establish elements of malicious prosecution liability); *Moore v Conliffe* (1994) 7 C4th 634, 653, 29 CR2d 152 ("litigation privilege" protects from defamation liability a person who made allegedly defamatory statement while testifying as witness at deposition taken in private, contractual arbitration); *Dible v Haight Ashbury Free Clinics* (2008) 170 CA4th 843, 88 CR3d 464 (ex-employer's statements made to Employment Development Department in connection with employee's unemployment insurance claim); *Neville v Chudacoff* (2008) 160 CA4th 1255, 73 CR3d 383 (attorney's letter to client's fired employee about latter's alleged breach of contract and misappropriation of trade secrets protected by privilege when client was seriously and in good faith contemplating suit against employee); *Rohde v Wolf* (2007) 154 CA4th 28, 37, 64 CR3d 348 (attorney's voicemail messages to opposing party's property listing agent protected by privilege); *Kashian v Harriman* (2002) 98 CA4th 892, 930, 120 CR2d 576 (attorney's letter to clients, mentioning suits he had initiated, privileged under CC §47(b)(3)); *Sacramento Brewing Co. v Desmond, Miller & Desmond* (1999) 75 CA4th 1082, 89 CR2d 760 (misidentification of innocent person as "debtor" in bankruptcy proceeding). See also *Brown v Department of Corrections* (2005) 132 CA4th 520, 33 CR3d 754 (privilege bars damages recovery from defendant alleged to have filed unfounded police report in retaliation for plaintiff's having reported defendant's alleged misconduct); *Bardin v Lockheed Aeronautical Sys. Co.* (1999) 70 CA4th 494, 82 CR2d 726 (CC §47(b) applied to statements made by job applicant's former employer in response to enforcement agency's background investigation).

Showing that alleged defamatory statements were privileged supports the CCP §425.16 (SLAPP) motion (see §8.22) requirement that plaintiff failed to show a probability of prevailing. See, *e.g., Fontani v Wells Fargo Invs.* (2005) 129 CA4th 719, 28 CR3d 833, disapproved on other grounds in *Kibler v Northern Inyo County Local Hosp. Dist.* (2006) 39 C4th 192, 203 n5, 46 CR3d 41.

The CC §47(b) privilege is overridden by Pen C §11172(a) in the Child Abuse Neglect and Reporting Act (Pen C §§11164-11174.3), which permits damages recovery from persons who make false reports of child abuse (*Siam v Kilzilbash* (2005) 130 CA4th 1563, 31 CR3d 368 (see §§10.7, 10.11)), but the privilege prevails when it is the victim of the alleged abuse that has reported it (*Chabak v Monroy* (2007) 154 CA4th 1502, 65 CR3d 641).

The privilege does not, however, cover statements that are not directed toward achieving the objects of the litigation or that have no logical relation to the proceeding. *Silberg v Anderson* (1990) 50 C3d 205, 212, 266 CR 638; *Eisenberg v Alameda Newspapers, Inc.* (1999) 74 CA4th 1359, 1376, 88 CR2d 802 (statements made in newspaper's "retraction"); *Nguyen v Proton Technol. Corp.* (1999) 69 CA4th 140, 81 CR2d 392 (statements made in prelitigation demand letters and telephone calls). Nor does the privilege apply to statements made in a press conference about an official

proceeding. *Rothman v Jackson* (1996) 49 CA4th 1134, 57 CR2d 284 (statement accusing potential plaintiff of extortion). The CC §47(b) privilege does not retroactively protect any and all communication preceding the litigation; the privilege applies from the point litigation is seriously proposed in good faith for purposes of resolving the dispute. *Ruiz v Harborview Community Ass'n* (2005) 134 CA4th 1456, 1473, 37 CR3d 133 (also noted in §8.20).

NOTE: Courts of appeal have disagreed on whether a CC §47.5's exception to the "official proceeding" privilege (CC §47(b)), which permits a peace officer against whom a complaint is filed to sue the complainer for defamation, is an unconstitutional violation of the right to free speech. Compare *Loshonkohl v Kinder* (2003) 109 CA4th 510, 135 CR2d 114 (§47.5 is constitutional) with *Walker v Kiousis* (2001) 93 CA4th 1432, 114 CR2d 69 (section is unconstitutional). See *People v Stanistreet* (2002) 29 C4th 497, 127 CR2d 633, upholding the constitutionality of Pen C §148.6 (misdemeanor to file knowingly false misconduct allegation against peace officer). But see *La France Hamilton v City of San Bernardino* (CD Cal 2004) 325 F Supp 2d 1087, 1090 (disagreeing with *Stanistreet*).

Civil Code §47(c) creates a privilege for a communication made without malice by one interested person to another. See *Taus v Loftus* (2007) 40 C4th 683, 722, 54 CR3d 775 (showing researcher's determination to debunk another researcher's report and displeasure at plaintiff's having filed ethics complaint against her insufficient to establish actual malice needed to overcome privilege); *Noel v River Hills Wilsons, Inc.* (2003) 113 CA4th 1363, 1366, 7 CR3d 216 (communication solicited by prospective employer from former employer; no evidence from which reasonable jury could infer malice; use of "based on credible evidence" in statute did not authorize suit based on mere negligence); *Bierbower v FHP, Inc.* (1999) 70 CA4th 1, 82 CR2d 393 (privilege covers private employers' investigations of sexual harassment claims). See also *SDV/ACCI v AT&T Corp.* (9th Cir 2008) 522 F3d 955 (common interest privilege overcome on showing that alleged defamer acted with malice and without good faith belief in truth of statements).

Civil Code §47(d) creates a privilege for fair and true reports in, or communications to, a public journal of a legislative, judicial, or other official proceeding (except as specified). See, *e.g.*, *Sipple v Foundation for Nat'l Progress* (1999) 71 CA4th 226, 83 CR2d 677 (privilege applied to article about custody dispute, revealing testimony that plaintiff had abused earlier wives; article did not alter gist and sting of testimony, although it expanded on specific instances of abuse).

Other code sections also create privileges that provide defenses to defamation suits. For example, CC §43.8 creates a privilege for communications to hospitals and other bodies about the qualifications of health care providers. See *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 3 CR3d 623 (privilege is qualified, not absolute).

On the privilege defense in employment termination situations, see Wrongful Employment Termination Practice §§7.11-7.12 (2d ed Cal CEB 1997).

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Source: Torts/California Tort Damages/8 Defamation/§8.20 3. Truth of Facts; Nonactionability of Opinion

§8.20 3. Truth of Facts; Nonactionability of Opinion

Truth is an absolute defense to a defamation action. *Smith v Maldonado* (1999) 72 CA4th 637, 646, 85 CR2d 397 (highlighting or emphasizing facts or stating them forcefully does not create defamatory innuendo). The defendant need not justify the literal truth of every word of the allegedly defamatory matter, so long as the substance, the "gist or sting" of the statement, is true. *Raghavan v The Boeing Co.* (2005) 133 CA4th 1120, 1132, 35 CR3d 397 (statement that employee had engaged in "misrepresentative behavior"). See *Hughes v Hughes* (2004) 122 CA4th 931, 19 CR3d 247 (evidence of past pimping activity sufficient to establish truth of son's statement, "Our dad's a pimp"; no need to show pimping activity at time statement was made); *Francis v Dun & Bradstreet, Inc.* (1992) 3 CA4th 535, 4 CR2d 361 (truthful credit report not defamatory even if it causes harm).

A person is not libeled by an attribution to him of his "own words," even if there are minor inaccuracies that do not affect the gist of the statements quoted. *Van Buskirk v Cable News Network, Inc.* (9th Cir 2002) 284 F3d 977 (no libel in television broadcast and magazine article that repeated substance of plaintiff's statements, even if reporters used "aggressive and abrasive tactics" to obtain statements; see also §8.30). See *Balzaga v Fox News Networkassan v Mercy Am. River Hosp.* (2009) 173 CA4th 1325, 93 CR3d 782 (caption "MANHUNT AT THE BORDER" at bottom of TV screen showing plaintiffs' pictures not actionable for implying that law enforcement was hunting for them).

A false assertion of fact can be libelous even if couched in terms of opinion. *Moyer v Amador Valley Joint Union High Sch. Dist.* (1990) 225 CA3d 720, 733, 275 CR 494. Even if a speaker states the facts on which an opinion is based, if those facts are incorrect or incomplete, or if his assessment of them is erroneous, the statement may imply a false assertion of fact. *Milkovich v Lorain Journal Co.* (1990) 497 US 1, 19, 111 L Ed 2d 1, 18, 110 S Ct 2695; *Rodriguez v Panayiotou* (9th Cir 2002) 314 F3d 979, 986 (singer's statements in interviews that arresting officer had engaged in illegal conduct could be actionable as "impl[ying] a provably false factual assertion," but statement that officer had entrapped him was opinion, being layperson's interpretation of statute's meaning). See *Kahn v Bower* (1991) 232 CA3d 1599, 1606, 284 CR 244 (*Milkovich* rejects purported rule that no opinion is actionable); *Gardner v Martino* (9th Cir 2009) 563 F3d 981, 987 (after *Milkovich*, threshold question is whether reasonable factfinder could conclude that contested statement implies assertion of objective fact; statement that seller had lied not actionable under First Amendment).

In determining whether a statement is actionable, the question is not strictly whether it is one of fact or opinion, but rather whether a reasonable fact finder could conclude that it declares or implies a provably false assertion of fact. *Ruiz v Harborview Community Ass'n* (2005) 134 CA4th 1456, 1472, 37 CR3d 133 (statements in letter that plaintiff was reprehensible, engaged in unconscionable conduct, bullied laypersons, and violated his statutory duty as an attorney to be truthful were actionable, not mere hyperbole, epithets, or figurative statements). See *Nygard, Inc. v Uusi-Kerttula* (2008) 159 CA4th 1027, 72 CR3d 210 (statements by fired employee to magazine that working conditions were "horrible" and that he was "used by the employer" are of opinion, not provably false statements of fact); *Carver v Bonds* (2005) 135 CA4th 328, 347, 37 CR3d 480 (to establish defamatory nature of defendant's statement to newspaper reporter that "He's a liar," plaintiff must make prima facie showing that statement was substantially false).

Not actionable as libel or trade libel are opinions stated in e-mail messages, when the messages "fully disclosed provably true facts on which the opinions were based," even though that disclosure was by a direction to the plaintiff's website that contained a "link" to another company's website. *Franklin v Dynamic Details, Inc.* (2004) 116 CA4th 375, 378, 10 CR3d 429 (court, seeking to apply principles of *Milkovich v Lorain Journal Co., supra,* to strike balance between constitutional guarantees of free speech and prevention of attacks on reputation, notes that reader of otherwise libelous e-mails could view websites and accept or reject e-mailer's opinions).

Further, liability for defamation does not ordinarily arise from the expression of an opinion; the words "false… publication" in the statutory definitions of libel and slander cannot meaningfully be applied to statements that are incapable of being proved false or true. *Savage v PG&E* (1993) 21 CA4th 434, 445, 26 CR2d 305. See *Seelig v Infinity Broad. Corp.* (2002) 97 CA4th 798, 808, 119 CR2d 108 (statements during radio call-in show referring to plaintiff, after her refusal to be contestant on "Who Wants to Marry a Millionaire," as "local loser," "chicken butt," and "big skank" were of opinion, not fact); *Copp v Paxton* (1996) 45 CA4th 829, 837, 52 CR2d 831 (whether alleged defamatory statement

was of fact or of opinion is question of law for court); *Campanelli v Regents of Univ. of Cal.* (1996) 44 CA4th 572, 578, 51 CR2d 891 (statements of opinion cannot be basis of defamation recovery even if objectively unjustified or made in bad faith); *Rudnick v McMillan* (1994) 25 CA4th 1183, 1191, 31 CR2d 193 (statements in "letter to the editor"); *Jensen v Hewlett-Packard Co.* (1993) 14 CA4th 958, 965, 18 CR2d 83 (employer's opinions about employee's performance even though objectively wrong and not supported by concrete, provable facts). See also *Gregory v McDonnell Douglas Corp.* (1976) 17 C3d 596, 601, 131 CR 641 (statements generally considered to be statements of fact, if made in context of public debate, labor dispute, or other setting in which audience may anticipate efforts to persuade by epithets, fiery rhetoric, and hyperbole, may assume character of opinion).

The First Amendment (see §8.37) shields statements of opinion on matters of public concern that do not contain or imply a provable factual assertion. *Lieberman v Fieger* (9th Cir 2003) 338 F3d 1076, 1080 (attorney, reacting on television to being served with complaint for fees by expert psychiatric witness, not subject to liability for saying or suggesting that she was "mentally unbalanced," "crazy," "Looney Tune," "nut growing on trees," and "a terrible witness disliked by the jury"; such statements could be viewed as opinion and hyperbole related to legal dispute between them). See *Knievel v ESPN* (9th Cir 2005) 393 F3d 1068, 1070 (in context of website's tone of humor and appeal to youth, photo caption of sports figure with arms around two women, "never too old to be a pimp," was not defamatory as matter of law).

A defendant who asserts truth as a defense ordinarily has the burden of proving the substantial truth of the allegedly defamatory statement. See *Gantry Constr. Co. v American Pipe & Constr. Co.* (1975) 49 CA3d 186, 194, 122 CR 834. The defendant need not, however, prove the literal truth of every word of the alleged defamation, but only the substantial truth of its substance. See *Emde v San Joaquin County Central Labor Council* (1943) 23 C2d 146, 160, 143 P2d 20; *Stoneking v Briggs* (1967) 254 CA2d 563, 573, 62 CR 249.

When the defaming statement is a matter of "public concern," it appears that the plaintiff must prove its falsity. See *Melaleuca Inc. v Clark* (1998) 66 CA4th 1344, 1355, 78 CR2d 627; *Nizam-Aldine v City of Oakland* (1996) 47 CA4th 364, 54 CR2d 781. See §8.36 on matters of public concern. The plaintiff's proof of falsity, when required, is by a preponderance of the evidence, not by clear and convincing evidence. *Christian Research Inst. v Alnor* (2007) 148 CA4th 71, 81, 55 CR3d 600. Similarly, truth need not be proved by clear and convincing evidence. See *Rattray v City of Nat'l City* (9th Cir 1994) 51 F3d 793. See §§8.33-8.34 on public figures' need to prove actual malice by clear and convincing evidence.

NOTE: Defeating a defamation claim by establishing the truth of the matter stated (or the applicability of a privilege) may also preclude the plaintiff from recovering damages for infliction of emotional distress. See *Reader's Digest Ass'n v Superior Court* (1984) 37 C3d 244, 265, 208 CR 137 (if cause of action for defamation cannot be sustained, neither can cause of action for emotional distress); *Flynn v Higham* (1983) 149 CA3d 677, 682, 197 CR 145 (to allow independent cause of action for intentional infliction of emotional distress, based on acts that would not support defamation action, would allow plaintiffs to do indirectly what they could not do directly and also render meaningless any defense of truth or privilege). See also *Hustler Magazine v Falwell* (1988) 485 US 46, 99 L Ed 2d 41, 108 S Ct 876 (to recover for intentional infliction of emotional distress, public figures and public officials must show that publication contains false statement of fact made with knowing falsity or reckless disregard for truth).

On the actionability of opinions about an employee's performance, see Wrongful Employment Termination Practice §7.14 (2d ed Cal CEB 1997). See Anno, 54 ALR5th 443 (1997) (liability for publishing defamatory letter to editor).

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§8.21 4. Statute of Limitations

Generally, a lawsuit seeking damages for defamation must be filed within 1 year from the date the defamatory matter was published. CCP §340(c). *Knoell v Petrovich* (1999) 76 CA4th 164, 168, 90 CR2d 162 (statute began to run when alleged defamatory statements published; no tolling provision applied). However, a defendant who has concealed his or her identity so that the plaintiff cannot, through the exercise of reasonable diligence, discover it may be equitably estopped from asserting the statute of limitations defense. *Bernson v Browning-Ferris Indus.* (1994) 7 C4th 926, 936, 30 CR2d 440.

The statute of limitations ordinarily begins to run on a libel cause of action at the moment that the publication becomes available to the public, even if the plaintiff did not then discover that he or she had been defamed. *Shively v Bozanich* (2003) 31 C4th 1230, 7 CR3d 576 (cause of action accrued when book containing alleged defamatory statement circulated to public, even though plaintiff unaware until later that book contained statement; further, book's recounting of earlier private statements of same matter dispelled possibility of extending period for later discovery of private statements). This rule also applies to publications that are not widely distributed. *Hebrew Academy of San Francisco v Goldman* (2007) 42 C4th 883, 70 CR3d 178 (statements contained in transcript of oral history, of which only 10 copies were published, and of which plaintiff learned a decade later). See *McGuiness v Motor Trend Magazine* (1982) 129 CA3d 59, 61, 180 CR 784. There remain situations in which a libel action may accrue on discovery if the publication was not made to the public. See *Manguso v Oceanside Unified Sch. Dist.* (1979) 88 CA3d 725, 152 CR 27 (alleged defamatory statements in letter placed in plaintiff's confidential personnel file in district personnel office in August 1960 not seen by plaintiff until May 1976; cause of action accrued on discovery).

NOTE: A later republication of defamatory matter is a separate tort that starts its own new limitations period. See *Schneider v United Airlines, Inc.* (1989) 208 CA3d 71, 77, 256 CR 71 (each repetition of defamatory statement in separate publication gives rise to new cause of action). But see *Canatella v Van de Kamp* (9th Cir 2007) 486 F3d 1128 (date summary of lawyer's "disciplinary sanction" published in bar journal and online was accrual date and barred later action under 42 USC §1983 for reference to it in court costs proceeding). See §8.6 on publication and republication. Liability for multiple publications can, however, be limited by the single-publication rule. See §§8.25-8.26.

The date printed on the publication's cover is immaterial. See *Strick v Superior Court* (1983) 143 CA3d 916, 922, 192 CR 314 (earliest date on which allegedly defamatory information is substantially and effectively communicated to meaningful mass of readers is determinative factor); *Fleury v Harper & Row, Publishers, Inc.* (9th Cir 1983) 698 F2d 1022, 1028 (publication occurs when libel is actually communicated, not cover date of newspaper, magazine, or other printed matter); *Morrissey v William Morrow & Co.* (4th Cir 1984) 739 F2d 962, 967 (use of arbitrary official publication dates is not determinative of date of publication). But see *Dominiak v National Enquirer, Inc.* (Pa 1970) 266 A2d 626, 629 (plaintiff may choose any publication as single publication that represents his single cause of action).

Adding a negligence or other tort cause of action to a libel claim does not avoid application of the libel statute of limitations if both causes arose out of the same mass communication. See *McGuiness v Motor Trend Magazine* (1982) 129 CA3d 59, 63, 180 CR 784. See discussion of the single-publication rule in §§8.25-8.26.

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§8.22 5. Anti-SLAPP Law

A person served with a complaint containing allegations that seek defamation damages may sometimes use a special motion to strike such allegations under CCP §425.16, which provides a measure of protection against SLAPP (Strategic Lawsuit Against Public Participation) lawsuits. To succeed, the moving party must convince a judge that the statements or acts complained of were "in furtherance of the [party's constitutional] right of petition or free speech… in connection with a public issue." See *Nguyen-Lam v Cao* (2009) 171 CA4th 858, 90 CR3d 205 (probable that plaintiff would prevail on allegations defendant told school board members by telephone she was "Communist"). The plaintiff defeats the motion by convincing the judge that "there is a "probability that the plaintiff will prevail on the claim." See also CCP §425.17 (restrictions to prevent abusive use of anti-SLAPP motions) and CCP §425.18 (restrictions on "SLAPPback" lawsuits for malicious prosecution or abuse of process).

NOTE: Filing an anti-SLAPP motion to strike has become a first line of defense in a wide variety of defamation situations. See Moneer, *Two SLAPPs Don't Make a Right (But They Do Clog Our Courts)*, 20 Cal Litig 1, p 20 (2007). It is beyond the scope of this book to review and discuss the many cases that have considered the application of CCP §425.16. The following, however, are cases that illustrate applications of the motion.

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Source: Torts/California Tort Damages/8 Defamation/§8.22A 6. Examples of Anti-SLAPP Cases

§8.22A 6. Examples of Anti-SLAPP Cases

Examples of Anti-SLAPP cases include:

- *Flatley v Mauro* (2006) 39 C4th 299, 46 CR3d 606 (defendant whose assertedly protected speech was illegal as matter of law, because it constituted criminal extortion, cannot use anti-SLAPP motion to strike complaint);
- *Varian Med. Sys., Inc. v Delfino* (2005) 35 C4th 180, 25 CR3d 298 (appeal from the denial of anti-SLAPP motion stays all further court proceedings on causes of action seeking damages from and injunctions against former employees posting alleged defamatory statements on website);
- *Navellier v Sletten* (2002) 29 C4th 82, 89, 124 CR2d 530 (cause of action is subject to being stricken only if it "arises from protected speech or petitioning *and* lacks even minimal merit);
- *Ketchum v Moses* (2001) 24 C4th 1122, 1130, 104 CR2d 377 (attorney fee allocation after allegations stricken from complaint under anti-SLAPP law);
- *Paterno v Superior Court (Ampersand Publ'g)* (2008) 163 CA4th 1342, 78 CR3d 244 (plaintiff who failed to prove that defamatory statements were provably false factual assertions not entitled to conduct discovery concerning actual malice);
- *Gilbert v Sykes* (2007) 147 CA4th 13, 22, 53 CR3d 752 (cosmetic surgery patient who posted before and after pictures and information on her website entitled to dismissal of her surgeon's defamation suit; surgeon deemed limited purpose public figure who needed to show actual malice (see §8.35));
- *Contemporary Servs. Corp. v Staff Pro Inc.* (2007) 152 CA4th 1043, 1047, 61 CR3d 434 (statements in emails not within commercial speech exception in CCP §425.17(c));
- *Healy v Tuscany Hills Landscape & Recreation Corp.* (2006) 137 CA4th 1, 39 CR3d 547 (anti-SLAPP motion used to strike defamation cross-complaint; statements protected by litigation privilege in CC §47(b));
- *Olaes v Nationwide Mut. Ins. Co.* (2006) 135 CA4th 1501, 38 CR3d 467 (defamatory statements made during investigation of employee not protected by anti-SLAPP law);
- *Ghafur v Bernstein* (2005) 131 CA4th 1230, 32 CR3d 626 (public charter school superintendent was limited public official who failed to show that malice motivated defendants' letter to Department of Education);
- *Ampex Corp. v Cargle* (2005) 128 CA4th 1569, 27 CR3d 863 (publicly traded company that had inserted itself into public arena by posting press releases on the Internet was limited purpose public figure subject to anti-SLAPP motion when it sued ex-employee for alleged defamatory postings on Internet message board);
- *Gallagher v Connell* (2004) 123 CA4th 1260, 20 CR3d 673 (probability of prevailing can be shown by evidence that is not objected to, although otherwise inadmissible);
- *Wilbanks v Wolk* (2004) 121 CA4th 883, 17 CR3d 497 (business owner showed probability of prevailing on allegations that business was defamed on defendant's Internet website);
- *Mann v Quality Old Time Serv., Inc.* (2004) 120 CA4th 90, 100, 15 CR3d 215 (plaintiff entitled to proceed on cause of action if any theory for recovery has merit);
- *Annette F. v Sharon S.* (2004) 119 CA4th 1146, 15 CR3d 100 (limited purpose public figure failed to establish likelihood of proving defendant's actual malice);
- *Fashion 21 v Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 CA4th 1138, 12 CR3d 493 (plaintiff's failure to show falsity of statements justified dismissal);
- *Garment Workers Ctr. v Superior Court (Fashion 21, Inc.)* (2004) 117 CA4th 1156, 12 CR3d 506 (good cause for lifting ban on discovery not shown);
- *Wilkerson v Sullivan* (2002) 99 CA4th 443, 121 CR2d 275 (attorney fees for party successfully asserting anti-SLAPP defense);
- *Kashian v Harriman* (2002) 98 CA4th 892, 928, 120 CR2d 576 (action alleging defamation when letter was published in newspaper subject to anti-SLAPP defense based on defendant's unrefuted denial, by declaration, that he had not given letter to newspaper);
- *Seelig v Infinity Broad. Corp.* (2002) 97 CA4th 798, 806, 119 CR2d 108 (plaintiff could not establish likelihood of prevailing when defendants' statements during radio call-in show were of opinion, not fact; see §8.20);

- *Rosenaur v Scherer* (2001) 88 CA4th 260, 105 CR2d 674 (defamation action based on political opponent calling candidate "thief" stricken under anti-SLAPP law; defendant entitled to attorney fee despite being represented pro bono).

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§8.23 7. Plaintiff's Bad ("Libel-Proof") Reputation

A plaintiff whose reputation for specific conduct, or general reputation for honesty and fair dealing, is "sufficiently low in the public's estimation" may be regarded as "libel proof" and thus only eligible to receive, at most, nominal damages for defamatory statements. *Wynberg v National Enquirer, Inc.* (CD Cal 1982) 564 F Supp 924, 928.

Plaintiffs who sue over articles describing their criminal actions and convictions are particularly vulnerable to a "libel-proof plaintiff" defense. See, *e.g., Cardillo v Doubleday & Co.* (2d Cir 1975) 518 F2d 638, 639 (libel complaint dismissed when court found that plaintiff was unlikely to be able to recover more than nominal damages because truth of past criminal record was as damaging as alleged falsehoods); *Ray v U.S. Dep't of Justice* (ED Mo 1981) 508 F Supp 724, aff'd (8th Cir 1981) 658 F2d 608 (libel complaint of imprisoned pro se plaintiff dismissed; plaintiff was libel-proof with regard to article describing his background and criminal activities).

The libel-proof defense also has been applied when the challenged article did not involve the plaintiff's criminal actions or convictions. See, *e.g., Guccione v Hustler Magazine, Inc.* (2d Cir 1986) 800 F2d 298, 303 (summary judgment awarded defendant magazine on basis of plaintiff's notoriety for adultery; court noted that "a plaintiff's reputation… may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject" and that "the doctrine is not limited to plaintiffs with criminal records").

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§8.24 8. Incremental Harm Doctrine

Defendants have argued that damages should not be awarded for the actionable statements in a publication if the truthful, or otherwise nonactionable, statements in the publication leave little of the plaintiff's reputation to be harmed. See, *e.g.*, *Simmons Ford, Inc. v Consumers Union* (SD NY 1981) 516 F Supp 742 (plaintiff car manufacturer, who challenged as libelous only one statement regarding car safety even though article contained several derogatory statements, could not expect more than nominal damages; plaintiff's reputation could not be harmed by challenged portion of article beyond harm caused by balance of article). See also *Masson v New Yorker Magazine, Inc.* (1991) 501 US 496, 522, 115 L Ed 2d 447, 476, 111 S Ct 2419.

The Ninth Circuit has concluded that the incremental harm doctrine is not an element of California libel law. See *Masson v New Yorker Magazine, Inc*. (9th Cir 1992) 960 F2d 896, which questions the continued validity of *Simmons Ford, Inc. v Consumers Union* (SD NY 1981) 516 F Supp 742.

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B. Single-Publication Rule

§8.25 1. Statutory Basis

Under the Uniform Single Publication Act (CC §§3425.1-3425.5) (known as the single publication rule):

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

CC §3425.3. See *Christoff v Nestle USA, Inc.* (2009) 47 C4th 468, 97 CR3d 798 (single publication rule applies to suits for unauthorized commercial use of likeness in violation of CC §3344); *Shively v Bozanich* (2003) 31 C4th 1230, 1243, 7 CR3d 576 (history and rationale of single publication rule). See §8.21 on its application on statute of limitations questions.

In adopting CC §3425.3, the legislature "intended to abrogate the right to bring a separate action based upon defamatory matter appearing in several editions of a newspaper or magazine, where… all of the editions comprise a single issue of a particular date." *Belli v Roberts Bros. Furs* (1966) 240 CA2d 284, 287, 49 CR 625.

At common law, each copy of a newspaper or other publication containing defamatory material was viewed as a separate publication that gave rise to a separate cause of action. See *Fleury v Harper & Row, Publishers, Inc.* (9th Cir 1983) 698 F2d 1022, 1026. Thus, a libel plaintiff could maintain "countless separate causes of action [for any mass communication] together with virtual immunity from the bar of any statute of limitations," *e.g.,* by the continuing sales of a book. *Belli,* 240 CA2d at 288.

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§8.26 2. Applicability

The single-publication rule in CC §3425.3 does not protect separate aggregate publications of the material claimed to be defamatory. See *Kanarek v Bugliosi* (1980) 108 CA3d 327, 332, 166 CR 526 (republication of hardcover book in paperback is new issue of book that gives rise to new cause of action, because it was intended to reach, and reached, new group of readers). See also *Johnson v Harcourt, Brace, Jovanovich, Inc.* (1974) 43 CA3d 880, 895 n14, 118 CR 370 (dictum that, if defendants reprinted challenged textbook, statute of limitations would start running again from reprinting). See also Restatement (Second) of Torts §577A (1977).

For a single, integrated publication, however, a cause of action accrues on the first general distribution of the publication to the public, even though the publication consists of thousands of copies widely distributed. *Fleury v Harper & Row, Publishers, Inc.* (9th Cir 1983) 698 F2d 1022, 1027; *McGuiness v Motor Trend Magazine* (1982) 129 CA3d 59, 62, 180 CR 784. See *Belli v Roberts Bros. Furs* (1966) 240 CA2d 284, 289, 49 CR 625 (various editions of newspaper on 1 day comprised "a single integrated publication, namely the issue of the newspaper for that date"). See §8.21 on the statute of limitations on defamation.

Posting a statement on an Internet website is deemed to be a publication as of the date of that posting, and the single publication rule applies even though the statement remains on the site and is viewed by others later. See *Traditional Cat Ass'n v Gilbreath* (2004) 118 CA4th 392, 13 CR3d 353 (statute of limitations on defamation claim began to run no later than date on which site was last altered by person maintaining it; complaint subject to statute of limitations defense can be stricken under SLAPP motion (see §8.22)).

The single-publication restriction on defamation claims may also restrict the pursuit of other tort causes of action arising from the same publication. See *Strick v Superior Court* (1983) 143 CA3d 916, 924, 192 CR 314 (single-publication rule barred causes of action for fraud and deceit based on same matter as libel action). See also *McGuiness v Motor Trend Magazine* (1982) 129 CA3d 59, 63, 180 CR 784 (plaintiff not permitted to evade libel statute of limitations by also stating negligence count when both based on same mass communication).

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C. Defendant's Correction or Retraction

1. By Newspaper or Broadcaster

§8.27 a. Forestalling General and Punitive Damages

Under CC §48a, a newspaper sued for libel, or a radio broadcaster sued for slander, may assert as a defense to liability for both general damages and exemplary (punitive) damages that (1) the plaintiff failed to serve a sufficient demand for correction, or (2) the defendant published or broadcast a sufficient correction. As a further defense to liability for exemplary damages, the defendant may assert that the publication or broadcast was not made with "actual malice," as defined in §48a(4)(d). On the related concept of "knowing falsity or reckless disregard for the truth," see §§8.33-8.36.

NOTE: Television broadcasters may also invoke CC §48a. See CC §48.5(4), which provides that "the terms 'radio,' 'radio broadcast,' and 'broadcast' are defined to include both visual and sound radio broadcasting." See also *White v Valenta* (1965) 234 CA2d 243, 248, 44 CR 241 (persons speaking through television "may be in the same position, legally, as newspaper writers"). The protection afforded by CC §48a also covers those who participate in a publication or broadcast, "including reporters, columnists, authors, critics, and editors." *Field Research Corp. v Superior Court* (1969) 71 C2d 110, 114, 77 CR 243. Such persons may invoke CC §48a even if the publisher or broadcaster is not a party defendant. *Pridonoff v Balokovich* (1951) 36 C2d 788, 791, 228 P2d 6. On persons not covered, see §8.31.

To recover more than special damages (see §8.9), the plaintiff in a libel action against a newspaper, or in a slander action against a broadcaster, must show that he or she served on the publisher at the place of publication, or on the broadcaster at the place of broadcast, within 20 days after the plaintiff first learned of the publication or broadcast, a written notice specifying the claimed libelous statements and demanding a correction. CC §48a(1). On serving the correct person, see §8.28. On sufficiency of the notice and demand, see §8.29. On statute of limitations questions when the single-publication rule is involved, see §8.26.

Even if the plaintiff served a sufficient and timely notice and demand, the defendant may avoid liability for general and exemplary damages by publishing or broadcasting a sufficient correction no later than 3 weeks after being served with the plaintiff's notice and demand. CC §48a(2)-(3). See *Fellows v National Enquirer, Inc.* (1986) 42 C3d 234, 228 CR 215; *Werner v Southern Cal. Assoc. Newspapers* (1950) 35 C2d 121, 128, 216 P2d 825 (CC §48a is constitutional). On sufficiency of defendant's correction, see §8.29.

Not barred from recovering general and punitive damages (as well as special damages) is a plaintiff who pleads and proves (1) service on the defendant of a sufficient notice and demand for correction, and (2) the defendant's failure to publish or broadcast a sufficient correction. CC §48a(2). However, the plaintiff who seeks exemplary damages must also prove that the defendant made the publication or broadcast with "actual malice," defined in CC §48a(4)(d) as

> that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

See Annos, 22 ALR6th 329 (2007) (newspaper liability for libel and slander—21st century cases), 13 ALR6th 111 (2006) (neutral reportage privilege cases).

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b. Plaintiff's Notice and Demand for Correction

§8.28 (1) Service

To avoid preclusion from claiming general and exemplary damages, the plaintiff's written notice and demand must be served on the newspaper publisher, not on the author of the article or on the editor approving the article. See *Field Research Corp. v Superior Court* (1969) 71 C2d 110, 115, 77 CR 243 (CC §48a requires service on publisher or broadcaster).

NOTE: *Field Research Corp.* disapproved on other grounds the decisions in *Larrick v Gilloon* (1959) 176 CA2d 408, 420, 1 CR 360 (correction demand served on publisher satisfied CC §48a even though publisher was not party to action and defendant who authored defamatory material was never served with demand), and *Farr v Bramblett* (1955) 132 CA2d 36, 44, 281 P2d 372 (demand served on editors insufficient). 71 C2d at 114 n4.

The service requirement is satisfied by service on a person designated by the publisher to receive such notices or on an employee of the publisher if the publisher gains actual knowledge of the demand within the statutory time limit. *Freedom Newspapers, Inc. v Superior Court* (1992) 4 C4th 652, 656, 14 CR2d 839.

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Source: Torts/California Tort Damages/8 Defamation/§8.29 (2) Sufficiency

§8.29 (2) Sufficiency

Civil Code §48a(1) requires that the plaintiff's notice and correction demand specify the statements claimed to be libelous. The purpose of this specificity requirement is to enable the publisher (or broadcaster) to investigate fully the alleged libelous statements and determine whether a correction is necessary. *Kapellas v Kofman* (1969) 1 C3d 20, 30, 81 CR 360 (crucial issue in evaluating the adequacy of notice is whether publisher should reasonably have comprehended which statements plaintiff protested and wished corrected).

NOTE: The plaintiff in *Kapellas,* a candidate for city council, objected to an article that listed various criminal offenses allegedly committed by three of her six minor children. Her demand that "every statement concerning the conduct of [her] children" be corrected was held to be sufficiently specific because, "given the nature of the statements in the article and the notice, the publisher should reasonably have 'realize[d] what language plaintiff objected to and wished corrected.'" 1 C3d at 32.

How specific the plaintiff must be in the notice to the defendant to meet the requirements of CC §48a depends largely on the content of the allegedly libelous article. See, *e.g.*, *Anderson v Hearst Publ'g Co*. (SD Cal 1954) 120 F Supp 850, 852 (article contained eight separate references to plaintiff; statement in demand that contained "certain statements regarding me which are untrue, libelous and damaging" deemed insufficient because it failed to specify the statements plaintiff claimed were libelous); *Gomes v Fried* (1982) 136 CA3d 924, 938, 186 CR 605 (article contained several pictures of and references to plaintiff; demand referring only to libelous "statements" deemed insufficiently specific to notify defendant that plaintiff objected to one photograph and its caption).

In addition to identifying the allegedly defamatory statements, a retraction demand must sufficiently identify the person or entity claiming to have been defamed. *Anschutz Entertainment Group, Inc. v Snepp* (2009) 171 CA4th 598, 90 CR3d 133 (general damages not available to parent company when only wholly-owned subsidiary named in demand).

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§8.30 c. Defendant's Correction; Sufficiency

To be sufficient to forestall liability for general and punitive damages, the defendant's correction must be published (1) within 3 weeks of the plaintiff's demand, (2) in a regular issue of the publication or broadcast, and (3) in "substantially as conspicuous a manner" as were the statements claimed to be libelous. CC §48a(2).

The sufficiency of a correction or retraction is a factual question to be decided by the trier of fact. *Pierce v San Jose Mercury News* (1989) 214 CA3d 1626, 263 CR 410; *Twin Coast Newspapers, Inc. v Superior Court* (1989) 208 CA3d 656, 256 CR 310 (rule that sufficiency is jury question not changed by 1945 amendment of CC §48a). See *Turner v Hearst* (1896) 115 C 394, 47 P 129; *Behrendt v Times-Mirror Co.* (1938) 30 CA2d 77, 88, 85 P2d 949 (jury's duty is to determine whether retractions were fair and complete and to what extent they mitigated plaintiff's injury). But see *Burnett v National Enquirer, Inc.* (1983) 144 CA3d 991, 1012, 193 CR 206 (on basis of its own review, court concluded that correction was "legally insufficient").

The party publishing a retraction can be liable for stating it in a way that is itself defamatory. See *Van Buskirk v Cable News Network, Inc.* (9th Cir 2002) 284 F3d 977, 980 (broadcaster, in retracting story that had proved to inaccurate, referred to source of story as drug user; see also §8.20).

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§8.31 2. Persons Not Protected by CC §48a

Defendants who are not in the publishing or broadcasting business are not normally protected by the correction or retraction provisions of CC §48a. See *Denney v Lawrence* (1994) 22 CA4th 927, 939, 27 CR2d 556 (protection does not extend to writer of "letter to the editor" published in newspaper). See also, *e.g.*, *Field Research Corp. v Superior Court* (1969) 71 C2d 110, 115, 77 CR 243 (CC §48a did not apply to defendant, a gubernatorial candidate, who made several allegedly defamatory statements that were published in newspapers and broadcast by radio, because he was not participant in publishing or broadcasting business; legislative intent was to protect publishers and broadcasters whose daily occupation or business is to collect, evaluate, reduce to communicable form, and communicate news); *Dietrich v Litton Indus., Inc.* (1970) 12 CA3d 704, 711, 90 CR 856 (person who arranged for press release not participant in news disseminating enterprise and therefore not protected).

The publishers of magazines have been denied CC §48a protection. See *Burnett v National Enquirer, Inc.* (1983) 144 CA3d 991, 1000, 193 CR 206 (better view is that CC §48a should apply only to those engaged in immediate dissemination of news); *Montandon v Triangle Publications, Inc.* (1975) 45 CA3d 938, 949, 120 CR 186 (CC §48a held inapplicable to magazines); *Alioto v Cowles Communications, Inc.* (9th Cir 1975) 519 F2d 777 (same). But see *Briscoe v Reader's Digest Ass'n* (1971) 4 C3d 529, 93 CR 866 (suggesting, in action against magazine for invasion of privacy based on false light, which is essentially equivalent to libel claim, that CC §48a protects magazines in libel cases), overruled on other grounds in *Gates v Discovery Communication, Inc.* (2004) 34 C4th 679, 697 n9, 21 CR3d 663.

The website of a corporation that also publishes a periodical has been held not to be a newspaper entitled to CC §48a protection. See *Condit v National Enquirer, Inc.* (ED Cal 2002) 248 F Supp 2d 945.

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Source: Torts/California Tort Damages/8 Defamation/§8.32 3. Effect of Correction When CC §48a Not Applicable

§8.32 3. Effect of Correction When CC §48a Not Applicable

Even when the California correction statute (CC §48a; see §§8.27-8.32) does not apply, the prompt retraction or correction of a defamatory statement can be considered by the jury in mitigation of the plaintiff's damages. *Turner v Hearst* (1896) 115 C 394, 402, 47 P 129; *Montandon v Triangle Publications, Inc.* (1975) 45 CA3d 938, 950, 120 CR 186.

Evidence of a retraction or correction is also admissible as tending to negate the presence of the malice that would support an award of punitive damages. See *Turner v Hearst, supra*; *Burnett v National Enquirer, Inc.* (1983) 144 CA3d 991, 1012, 193 CR 206. On malice and other bases for punitive damages, see §14.5.

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D. First Amendment Restrictions

§8.33 1. Public Figure's Need to Prove "Actual Malice"

A plaintiff who is a "public official," seeking damages for a defamatory falsehood relating to his or her official conduct, must plead and prove that the defendant made the defamatory statement with "actual malice." *New York Times Co. v Sullivan* (1964) 376 US 254, 279, 11 L Ed 2d 686, 706, 84 S Ct 710 (actual malice showing required by First Amendment).

NOTE: Actual malice in the public figure context—sometimes called "constitutional actual malice"—refers to the need to plead and prove "knowing falsity or reckless disregard for the truth." See *Masson v New Yorker Magazine, Inc.* (1991) 501 US 496, 511, 115 L Ed 2d 447, 469, 111 S Ct 2419. That is, "actual malice" is shorthand to describe First Amendment protections for injurious statements; it is not equivalent to evil intent or a motive arising from spite or ill will. 501 US at 509, 115 L Ed 2d at 468 (jury instructions should refer to publication of statement with knowledge of its falsity or with reckless disregard of whether it is true).

A public official must establish the constitutionally required knowing falsity or reckless disregard for the truth whenever the defendant's defamatory statement related to a matter of public concern, even if it could be said to have related to private, unofficial conduct rather than to official conduct. See *Miller v Nestande* (1987) 192 CA3d 191, 199, 237 CR 359. See also *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* (1985) 472 US 749, 86 L Ed 2d 593, 105 S Ct 2939.

Similarly, a plaintiff who is a "public figure" (although not a public official), seeking damages for a defamatory falsehood relating to a matter of public concern, must plead and prove that the defendant made the defamatory statement with the same constitutional actual malice. *Curtis Publ'g Co. v Butts* (1967) 388 US 130, 155, 18 L Ed 2d 1094, 87 S Ct 1975; *D.A.R.E. Am. v Rolling Stone Magazine* (CD Cal 2000) 101 F Supp 2d 1270, 1277, aff'd (9th Cir 2001) 270 F3d 793.

Public officials and public figures need to plead and prove constitutional actual malice whether or not the defendant is a newspaper, broadcaster, or other "media defendant." See *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* (1985) 472 US 749, 86 L Ed 2d 593, 105 S Ct 2939; *Miller v Nestande* (1987) 192 CA3d 191, 200, 237 CR 359.

A writer's actual malice is not automatically imputed to the writer's publisher if the writer was an independent contractor. See *Masson v New Yorker Magazine, Inc.* (ND Cal 1993) 832 F Supp 1350, 1355, aff'd (9th Cir 1996) 85 F3d 1394 (magazine publisher not liable for defamatory statements originating with author; court must independently review evidence to ensure that judgment does not constitute forbidden intrusion on field of free expression); *D.A.R.E. Am. v Rolling Stone Magazine* (CD Cal 2000) 101 F Supp 2d 1270, 1278, aff'd (9th Cir 2001) 270 F3d 793 (when only one inference could be drawn from facts, court may decide whether writer was publisher's employee for purposes of vicarious liability or was independent contractor).

NOTE: Proof of the knowing falsity or reckless disregard for the truth required by the First Amendment when the plaintiff is a public figure does not necessarily constitute proof of (1) the "actual malice" that any plaintiff must establish under CC §48a when the defendant is a newspaper or broadcaster (see §8.27), (2) the "malice" that would defeat the privilege in CC §47(c) for a communication by a person interested in the communication to another interested person (see §8.19), or (3) the "malice" which, under CC §3294, would enable the plaintiff to recover punitive damages (see §14.6).

A public figure who establishes a publisher's actual malice can recover for defamation by implication. See *Thomas v Los Angeles Times Communications, LLC* (CD Cal 2002) 189 F Supp 2d 1005, 1012, aff'd (9th Cir 2002) 45 F App 801 (unpublished) (but suit of subject of book who cooperated with author in its publication was subject to SLAPP dismissal (see §8.22)).

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Source: Torts/California Tort Damages/8 Defamation/§8.34 a. Proving 'Constitutional Actual Malice'

§8.34 a. Proving "Constitutional Actual Malice"

A plaintiff establishes that the defendant's statement was made with what has been called "constitutional actual malice" (see Note in §8.33) by showing that it was made with knowing falsity or in reckless disregard for the truth. *New York Times Co. v Sullivan* (1964) 376 US 254, 279, 11 L Ed 2d 686, 706, 84 S Ct 710; *Khawar v Globe Int'l Inc.* (1998) 19 C4th 254, 277, 79 CR2d 178 (evidence supported inference that publisher purposely avoided truth and published despite serious doubts about truth of statements).

Common-law malice—the defendant's state of mind arising from hatred or ill will toward the plaintiff—and bad motives are not necessarily elements of constitutional actual malice. *McCoy v Hearst Corp.* (1986) 42 C3d 835, 872, 231 CR 518. Actual malice is based on the defendant's subjective attitude toward the truth or falsity of the material published, not on the defendant's attitude toward the plaintiff. *Widener v PG&E* (1977) 75 CA3d 415, 434, 142 CR 304, disapproved on other grounds in *McCoy v Hearst Corp.* (1986) 42 C3d 835, 847 n9, 231 CR 518. See Note in §8.33.

NOTE: A defendant's deliberate attribution to the plaintiff of words different from those the plaintiff actually uttered does not by itself constitute actual malice, if the alteration does not materially change the meaning of the altered statement. *Masson v New Yorker Magazine, Inc.* (9th Cir 1996) 85 F3d 1394.

Any competent evidence, direct or circumstantial, can be used to establish constitutional actual malice. *Herbert v Lando* (1979) 441 US 153, 164 n12, 60 L Ed 2d 115, 99 S Ct 1635. Thus, to establish reckless disregard for the truth, the plaintiff may present evidence from which the trier of fact could infer that the defendant, at the least, entertained serious doubts about the truth of the statement. See *St. Amant v Thompson* (1968) 390 US 727, 731, 20 L Ed 2d 262, 267, 88 S Ct 1323. See also *Philadelphia Newspapers, Inc. v Hepps* (1986) 475 US 767, 89 L Ed 2d 783, 106 S Ct 1558 (aspect of proving constitutional actual malice is proving defamatory statement); *D.A.R.E. Am. v Rolling Stone Magazine* (CD Cal 2000) 101 F Supp 2d 1270, 1277, aff'd (9th Cir 2001) 270 F3d 793 (reckless disregard for truth is established by evidence that defendant (1) had high degree of awareness of probable falsity of publication or serious doubts as to its truth, or (2) had obvious reasons to doubt veracity, but engaged in purposeful avoidance of truth).

The constitutionally required knowing of falsity or reckless disregard for the truth must be shown by clear and convincing evidence. *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 342, 41 L Ed 2d 789, 94 S Ct 2997; *Eastwood v National Enquirer, Inc.* (9th Cir 1997) 123 F3d 1249 (actor failed to establish actual malice when there was evidence newspaper believed interview to be genuine, but newspaper acted with actual malice in labeling interview as exclusive); *Tague v Citizens for Law & Order, Inc.* (1977) 75 CA3d Supp 16, 25, 142 CR 689 (mere preponderance of evidence insufficient). See *D.A.R.E. Am. v Rolling Stone Magazine* (CD Cal 2000) 101 F Supp 2d 1270, 1278, aff'd (9th Cir 2001) 270 F3d 793 (clear and convincing evidence is evidence sufficient both for trier of fact to find actual malice and for appellate court to determine that judgment for plaintiff is not forbidden intrusion on free expression).

Thus a public figure (or official) must prove by clear and convincing evidence that the defendant published the defamatory statement with actual malice (*i.e.,* with knowledge that it was false or with reckless disregard of whether it was true or false); mere negligence does not suffice; the plaintiff must demonstrate that the author, *e.g.,* in fact entertained serious doubts as to the truth of the publication. *Masson v New Yorker Magazine, Inc.* (1991) 501 US 496, 510, 115 L Ed 2d 447, 468, 111 S Ct 2419. See *McCoy v Hearst Corp.* (1986) 42 C3d 835, 860, 231 CR 518 (to establish reckless disregard for truth, there must be sufficient evidence to permit conclusion that defendant in fact entertained serious doubts about truth of publication); *Christian Research Inst. v Alnor* (2007) 148 CA4th 71, 84, 55 CR3d 600 (defendant entitled to SLAPP dismissal (see §8.22)); *Kaelin v Globe Communications Corp.* (9th Cir 1998) 162 F3d 1036 (clear and convincing evidence showed that headline, "Cops Think Kato Did It," was susceptible of false and defamatory meaning and that it was published with reckless disregard for truth); *Gertz v Robert Welch, Inc.* (7th Cir 1982) 680 F2d 527, 538 (recklessness means publisher in fact entertained serious doubts about truth of publication or had subjective awareness of probable falsity).

The plaintiff may introduce evidence showing the defendant's state of mind at the time of publication. Such evidence might show, *e.g.,* (1) the defendant's sources were disreputable and the defendant concealed facts tending to impugn the sources' credibility (see *Barry v Time, Inc.* (ND Cal 1984) 584 F Supp 1110, 1122), (2) the defendant was told of

the information's falsity but did not investigate further (see *Bindrim v Mitchell* (1979) 92 CA3d 61, 155 CR 29, disapproved on other grounds in *McCoy v Hearst Corp.* (1986) 42 C3d 835, 847 n9, 231 CR 518), (3) the defendant made virtually no effort to check the validity of statements that were plainly defamatory (see *Gertz v Robert Welch, Inc., supra*), or (4) the defendant relied on sources known to be wholly unreliable (see *Curtis Publ'g Co. v Butts* (1967) 388 US 130, 157, 18 L Ed 2d 1094, 87 S Ct 1975). See also *Hunt v Liberty Lobby* (11th Cir 1983) 720 F 2d 631, 645 (inference of malice when defamatory statement contradicts known information despite belief statement was consistent with facts).

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§8.35 b. Defining "Public Figure"

Public figures include persons who thrust themselves into the vortex of an important public controversy to influence the resolution of that issue (voluntary limited-purpose public figures), and persons whose fame or notoriety command a general and continuing public interest (all-purpose public figures). *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 351, 41 L Ed 2d 789, 812, 94 S Ct 2997; *Reader's Digest Ass'n v Superior Court* (1984) 37 C3d 244, 254, 208 CR 137. See *Gilbert v Sykes* (2007) 147 CA4th 13, 22, 53 CR3d 752 (cosmetic surgeon who wrote articles and appeared on television "touting the virtues" of cosmetic surgery sued patient who had posted before and after pictures and information on her website (see §8.22)); *Cepeda v Cowles Magazines & Broad., Inc.* (9th Cir 1968) 392 F2d 417, 419 (public figures are "persons who, though not public officials, are 'involved in issues in which the public has a justified and important interest'… and include artists, athletes, business people, dilettantes, anyone who is famous, or infamous, because of who he is or what he has done").

A person who invites media coverage of a private controversy becomes a limited-purpose public figure who can recover defamation damages only by proving constitutional actual malice (see Note in §8.33). See *Rudnick v McMillan* (1994) 25 CA4th 1183, 31 CR2d 193 (rancher in dispute with Bureau of Land Management and Nature Conservancy invited reporters to tour ranch and write about it; also noted in §8.20 on nonactionability of statements of opinion); *Thomas v Los Angeles Times Communications, LLC* (CD Cal 2002) 189 F Supp 2d 1005, 1011, aff'd (9th Cir 2002) 45 F App 801 (unpublished) (subject of book who cooperated with author in its publication thereby became public figure).

Even persons whose acts involuntarily invite comment and discussion, such as the relatives of famous people, must prove constitutional actual malice in order to recover defamation damages although they did not voluntarily seek public attention and may be called "involuntary public figures." See *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 345, 41 L Ed 2d 789, 808, 94 S Ct 2997 (expressly recognizing that private individual can attain involuntary public figure status). See also *Marcone v Penthouse Int'l Magazine for Men* (3d Cir 1985) 754 F2d 1072, 1084 n9 (person who attains public figure status by position, status, or notorious act might be considered involuntary public figure).

Determining whether the plaintiff is a "public figure" is a question of law to be determined by the court. *Khawar v Globe Int'l Inc.* (1998) 19 C4th 254, 265, 79 CR2d 178 (to be "involuntary public figure," person must have acquired sufficient public prominence to effectively counter media-published defamation; photographer who had his picture taken with Robert Kennedy properly held not to be involuntary public figure). See *Stolz v KSFM 102 FM* (1994) 30 CA4th 195, 35 CR2d 740 (person doing business as radio station was limited-purpose public figure, required to prove both falsity and constitutional actual malice). See *Nadel v Regents of Univ. of Cal.* (1994) 28 CA4th 1251, 34 CR2d 188 (activists in antidevelopment movement were limited-purpose public figures; government entity defendant was entitled to *New York Times* constitutional protections); *Denney v Lawrence* (1994) 22 CA4th 927, 27 CR2d 556 (person who made statements to press concerning his twin brother's guilt became limited-purpose public figure).

See Annos, 44 ALR5th 193 (1996) (who is "public official"), 19 ALR5th 1 (1994) (who is "public figure").

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§8.36 c. Defining "Matter of Public Concern"

For a public official, personal conduct or characteristics that could affect his or her ability to perform the duties of the office are generally viewed as matters of public concern; that is, public officials are rarely able to avoid the need to prove the constitutionally required knowing falsity or reckless disregard for the truth inasmuch as almost anything said about them could be deemed a matter of public concern. See *Monitor Patriot Co. v Roy* (1971) 401 US 265, 275, 28 L Ed 2d 35, 42, 91 S Ct 621 (charge of candidate's prior criminal conduct); *Ocala Star-Banner Co. v Damron* (1971) 401 US 295, 300, 28 L Ed 2d 57, 62, 91 S Ct 628 (public discussion about candidate's qualifications presents probably strongest possible case for requiring showing of constitutional actual malice).

Determining whether the alleged defamatory statement related to a matter of public concern is a mixed question of law and fact to be determined by the court. See *Stolz v KSFM 102 FM* (1994) 30 CA4th 195, 35 CR2d 740 (statements concerning plaintiff's employee's on-air statements derogating homosexuals and other station misconduct were matters of public concern; plaintiff station owner required to prove both falsity of defendants' statements and that they were made with malice).

Whether a statement is about a matter of public or private concern depends on the context, form, and content of the statement. *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* (1985) 472 US 749, 761, 86 L Ed 2d 593, 604, 105 S Ct 2939 (statements in credit report that plaintiff had filed for bankruptcy not matter of public concern; report was "solely in the individual interest of the speaker and its specific business audience"; report was not widely circulated, consisted of objectively verifiable facts, and concerned no public issue). See *Connick v Myers* (1983) 461 US 138, 146, 75 L Ed 2d 708, 719, 103 S Ct 1684 (in employee discharge case, statement can be characterized as constituting speech on matter of public concern if, when fairly considered, it relates to "matter of political, social, or other concern to the community").

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§8.37 2. Private Figure's Need to Prove Fault

The First Amendment to the United States Constitution does not require a private figure (a person who is not a public official or a public figure) suing over a defamatory statement that does not involve a matter of public concern to plead and prove the constitutionally required "knowing falsity or reckless disregard for the truth," but does require proof of some degree of legal fault. *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 347, 41 L Ed 2d 789, 810, 94 S Ct 2997 (states can establish own standards to govern liability for defamation of private individuals, "so long as they do not impose liability without fault"). See also *Philadelphia Newspapers, Inc. v Hepps* (1986) 475 US 767, 768, 89 L Ed 2d 783, 787, 106 S Ct 1558 (when "a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false").

In California, a private-figure plaintiff can satisfy the constitutional fault requirement by proving that the defendant *negligently* published or uttered the defamatory statement. *Khawar v Globe Int'l Inc.* (1998) 19 C4th 254, 274, 79 CR2d 178 (but showing of actual malice needed to recover punitive or presumed damages). A showing of actual malice is required if the defendant (1) is a newspaper or broadcaster protected by CC §48a (see §§8.27-8.32), or (2) has asserted as a defense the privilege in CC §47(c) for communications from one interested person to another (see §8.19). See, *e.g., Lundquist v Reusser* (1994) 7 C4th 1193, 31 CR2d 776 (malice needed to overcome privilege, but trial judge's instructional error did not require reversal when plaintiff's proof of malice as basis for punitive damages also established malice to defeat privilege); *Brown v Kelly Broad. Co.* (1989) 48 C3d 711, 728, 257 CR 708. The kind of malice that must be established, at least if the defendant is a newspaper or broadcaster, is defined in CC §48a(4)(d). See §8.27.

NOTE: Other states have responded to *Gertz* by requiring private-figure plaintiffs to prove negligence to establish liability. See, *e.g., Peagler v Phoenix Newspapers, Inc.* (Ariz 1977) 560 P2d 1216; *Cahill v Hawaiian Paradise Park* (Haw 1975) 543 P2d 1356; *Troman v Wood* (Ill 1975) 340 NE2d 292. A minority of states apply an intermediate standard of gross irresponsibility (see *Chapadeau v Utica Observer-Dispatch, Inc.* (NY App 1975) 379 NYS2d 61, 341 NE2d 569) or the "knowing falsity or reckless disregard for the truth" standard (see *Diversified Mgmt., Inc. v Denver Post, Inc.* (Colo 1982) 653 P2d 1103; *Cochran v Indianapolis Newspapers, Inc.* (Ind App 1978) 372 NE2d 1211).

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§8.38 3. Need to Prove Actual Injury

A plaintiff who does not plead and prove the constitutionally required "knowing falsity or reckless disregard for the truth" can only recover damages that are sufficient to compensate him or her for "actual injury." *Gertz v Robert Welch, Inc*. (1974) 418 US 323, 349, 41 L Ed 2d 789, 811, 94 S Ct 2997 (actual injury is harm actually suffered and proved; damages not limited to out-of-pocket loss but may include customary elements of "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering"). Thus, "actual injury" can include general damages (*i.e.,* damage to reputation and emotional distress (see §8.8)) as well as special damages (*i.e.,* out-of-pocket economic losses (see §8.9)), but not punitive or presumed damages (see §§8.40-8.41).

The *Gertz* rule does not preclude a private figure from recovering presumed or punitive damages if the defamatory publication involves a matter of private concern. *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* (1985) 472 US 749, 86 L Ed 2d 593, 105 S Ct 2939. See §§8.33-8.36.

Damages for "actual injury" must be established through "competent evidence." *Gertz v Robert Welch, Inc., supra*. This does not mean, however, that the plaintiff must produce evidence that "assigns an actual dollar value to the injury" (except when special damages are sought). *Gertz v Robert Welch, Inc., supra*. See *Time, Inc. v Firestone* (1976) 424 US 448, 460, 47 L Ed 2d 154, 96 S Ct 958 (competent evidence requirement satisfied when plaintiff simply produced witnesses who testified about plaintiff's mental anguish and pain).

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§8.39 a. For Nominal Damages

Nominal damages, by definition, are given only if the plaintiff has suffered no actual injury. See §8.10. The *Gertz v Robert Welch, Inc.* (1974) 418 US 323, 349, 41 L Ed 2d 789, 811, 94 S Ct 2997, rule that requires a showing of actual injury (see §8.38), appears to have no impact on the common-law rules concerning nominal damages, inasmuch as nominal damages cannot realistically overcompensate the plaintiff. See *Philadelphia Newspapers, Inc. v Hepps* (1986) 475 US 767, 779 n4, 89 L Ed 2d 783, 106 S Ct 1558 See generally Sack on Defamation: Libel, Slander, and Related Problems (3d ed 1999).

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§8.40 b. For Presumed (General) Damages

Gertz v Robert Welch, Inc. (1974) 418 US 323, 349, 41 L Ed 2d 789, 811, 94 S Ct 2997, by requiring a showing of actual injury (see §8.38) and by saying that "a state may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," raises a question of when, if at all, presumed general damages (see §8.8) are constitutionally available. See, *e.g., Maheu v Hughes Tool Co.* (9th Cir 1977) 569 F2d 459, 477 (court apparently assumed that presumed damages were not available).

Gertz does not preclude presumed damages to any plaintiff who establishes the constitutionally required knowing falsity or reckless disregard for the truth. See *Carson v Allied News Co.* (7th Cir 1976) 529 F2d 206, 214 (presumed damages available when constitutional actual malice shown). See also *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* (1985) 472 US 749, 86 L Ed 2d 593, 105 S Ct 2939.

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§8.41 c. For Punitive Damages

Gertz v Robert Welch, Inc. (1974) 418 US 323, 349, 41 L Ed 2d 789, 811, 94 S Ct 2997, by requiring a showing of actual injury (see §8.38) and by saying that "a state may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," raises a question of when, if at all, punitive damages are constitutionally available.

The recovery of punitive damages is constitutional when the plaintiff can prove the constitutionally required knowing falsity or reckless disregard for the truth. See, *e.g., Maheu v Hughes Tool Co.* (9th Cir 1977) 569 F2d 459, 479 (public figure case; "[t]o us, the implication of [*Gertz*] is that punitive damages may be permitted when actual malice is proven"). See *Harte-Hanks Communications, Inc. v Connaughton* (1989) 491 US 657, 105 L Ed 2d 562, 109 S Ct 2678 (affirming award of punitive damages against public figure in libel case in which actual malice was shown); *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* (1985) 472 US 749, 86 L Ed 2d 593, 105 S Ct 2939.

In California, a public official or public figure plaintiff (and perhaps even a private figure plaintiff) who establishes constitutional actual malice (see §8.34) must also meet the "actual malice" requirement of CC §48a when a newspaper or broadcaster is the defendant. See *McCoy v Hearst Corp.* (1986) 42 C3d 835, 871, 231 CR 518. If a CC §48a defense is not applicable, malice as defined in CC §3294 must be established by clear and convincing evidence. See *Burnett v National Enquirer, Inc.* (1983) 144 CA3d 991, 1008, 193 CR 206 (state may, under *Gertz*, apply its own law concerning punitive damages as long as constitutional actual malice test is satisfied).

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§8.42 IV. CONFLICT OF LAWS

Choice of law issues can arise in defamation actions, particularly when allegedly defamatory material is disseminated in more than one state and the single-publication rule (see §§8.25-8.26) applies. Restatement (Second) of Conflict of Laws §149, Comment b (1971) sets forth the following examples of choice of law issues that may arise in a defamation action:

> whether a given communication is in fact defamatory and, if so, whether it constitutes libel or slander, whether proof of special damages is essential to the plaintiff's recovery, what persons are protected by the law of defamation, what constitutes the publication of defamatory matter, whether the publisher of defamatory matter is strictly liable or whether he is liable only if he published the defamatory matter intentionally or negligently, the circumstances under which publication of defamatory matter is protected by an absolute or by a qualified privilege, whether truth is a defense and what matters may be considered a partial defense in mitigation of damages.

California has adopted the "governmental interest" approach to conflicts of laws. *Fleury v Harper & Row, Publishers, Inc.* (9th Cir 1983) 698 F2d 1022, 1025. See generally *Bernhard v Harrah's Club* (1976) 16 C3d 313, 128 CR 215; *Hurtado v Superior Court* (1974) 11 C3d 574, 114 CR 106; *Reich v Purcell* (1967) 67 C2d 551, 63 CR 31. To choose the appropriate law under this approach, a court examines the policy underlying the laws of the states involved "to determine which states are 'interested' in having their laws applied to the issue in question." *Fleury v Harper & Row, Publishers, Inc., supra.* A state will be deemed to have an interest in having its laws applied "if the policies underlying the law would be thereby advanced." *Fleury v Harper & Row, Publishers, Inc., supra.*

In libel and invasion of privacy cases, the law of the forum usually will be applied if another jurisdiction does not have a strong governmental interest. *Fleury v Harper & Row, Publishers, Inc., supra.* Other states are in accord. See, *e.g., Reeves v American Broad. Cos.* (2d Cir 1983) 719 F2d 602 (in diversity action brought by California plaintiff against New York-based defendant, California law properly applied under New York's conflicts doctrine because plaintiff would suffer most damage to his reputation in California; California's statutory privilege mandated summary judgment for defendant).

When defamatory matter has been disseminated in several states and the California statute of limitations has expired and would be held to apply if suit were instituted in California, a plaintiff may be able to institute suit successfully in another state with a longer statute of limitations if the defamatory material has been disseminated there. See, *e.g., Keeton v Hustler Magazine, Inc.* (1984) 465 US 770, 778 n10, 79 L Ed 2d 790, 800 n10, 104 S Ct 1473 (New York resident may sue Ohio-based publisher in New Hampshire to take advantage of New Hampshire's unusually long statute of limitations even though only a few copies of publication were disseminated there; under traditional choice of law rules, forum's state law governs on procedural matters; New Hampshire considers statute of limitations procedural).

NOTE: On California's application of the governmental interest approach to statutes of limitations, see *Ashland Chem. Co. v Provence* (1982) 129 CA3d 790, 181 CR 340 (statute of limitations on promissory note). But see *Hambrecht & Quist Venture Partners v American Med. Int'l, Inc.* (1995) 38 CA4th 1532, 46 CR2d 33 (questioning reasoning, but not result, in *Ashland*).

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§8.43 V. APPELLATE REVIEW

An award of damages is conclusive on appeal unless the amount of the award "is so grossly excessive that it can be reasonably imputed solely to [the jury's] passion or prejudice." *Douglas v Janis* (1974) 43 CA3d 931, 940, 118 CR 280. The appellate court will examine the entire record, as viewed most favorably to the judgment, to determine whether an award is so excessive as to indicate that it is the result of the jury's passion or prejudice. See *Burnett v National Enquirer, Inc.* (1983) 144 CA3d 991, 1012, 193 CR 206 (punitive damages award excessive, requiring either reduction in its amount or, if plaintiff did not consent to reduced amount, new trial on that issue; punitive damages were nearly half of defendant's net annual income). See also *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 65 n12, 118 CR 184 (court must base reversal for excessiveness on entire record, when viewed most favorably to the judgment); *Weller v American Broad. Cos., Inc.* (1991) 232 CA3d 991, 1013, 283 CR 644.

Note that, on the issue of constitutional actual malice (see §8.34), an appellate court independently reviews the whole record to make certain that the judgment does not violate constitutional principles. See *Bose Corp. v Consumers Union* (1984) 466 US 485, 499, 80 L Ed 2d 502, 515, 104 S Ct 1949, in which the Supreme Court stated that

> in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression."

The facts that are germane to the issue of constitutional actual malice "must be sorted out and reviewed de novo, independently of any previous determinations by the trier of fact." *McCoy v Hearst Corp.* (1986) 42 C3d 835, 842, 231 CR 518 (appellate court must make independent assessment of entire record as it pertains to actual malice, but "[i]ssues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review"). See also *Newton v National Broad. Co.* (9th Cir 1990) 930 F2d 662, 669 (in public figure defamation cases, appellate court constitutionally required to review jury findings of "actual malice," and need not give the same deference to trier of fact's finding as is given in other instances).

Other constitutional issues in a defamation action apparently are also subject to independent appellate review. See *New York Times Co. v Sullivan* (1964) 376 US 254, 285, 11 L Ed 2d 686, 709, 84 S Ct 710 (court's duty not limited to elaboration of constitutional principles; "we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied").

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VI. INJURIOUS FALSEHOOD

§8.44 A. Distinguished From "Personal" Defamation

"Injurious falsehood" is an umbrella term describing the separate torts of "slander of title" (see §8.45) and "disparagement of quality" (more commonly referred to as "trade libel"; see §8.46). The injurious falsehood tort consists of injury to the plaintiff's protected interest in property, real or personal, tangible or intangible. See Restatement (Second) of Torts §623A (1977); Sack on Defamation: Libel, Slander, and Related Problems (3d ed 1999).

The torts of slander of title and trade libel differ somewhat from other forms of defamation in that they are designed to protect the plaintiff's interest in the vendibility of property, not the plaintiff's interest in his or her personal reputation. *Shores v Chip Steak Co.* (1955) 130 CA2d 627, 630, 279 P2d 595 (libel concerns plaintiff's person or reputation, trade libel relates to his goods). See *Barnes-Hind, Inc. v Superior Court* (1986) 181 CA3d 377, 385, 226 CR 354 (unless publications at issue in and of themselves are reasonably interpreted to impute fraud, dishonesty, or questionable business methods to seller of merchandise, not actionable as libel per se).

First Amendment restrictions on recovery for personal defamation (see §§8.33-8.41) also apply to any cause of action whose gravamen is the alleged injurious falsehood of published or broadcast statement; it is immaterial whether the statement at issue relates to the plaintiff personally or to his or her property. *Blatty v New York Times Co.* (1986) 42 C3d 1033, 1042, 232 CR 542 (causes of action for trade libel and interference with prospective economic advantage).

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Source: Torts/California Tort Damages/8 Defamation/§8.45 B. Slander of Title

§8.45 B. Slander of Title

Generally, slander of title is a false and unprivileged oral or written statement disparaging a person's title (or other interest such as a leasehold interest) in property that results in actual pecuniary damage. See 5 Witkin, Summary of California Law, *Torts* §642 (10th ed 2005); Sack on Defamation: Libel, Slander, and Related Problems (3d ed 1999); Restatement (Second) of Torts §§623A, Comment d, 624 (1977).

NOTE: Pursuing a form of legal relief that would, if successful, mitigate slander of title damages, tolls the 3-year statute of limitations (see CCP §338(g)) on a slander of title action. *Stalberg v Western Title Ins. Co.* (1994) 27 CA4th 925, 32 CR2d 750 (plaintiff sought to quiet title before suing for slander of title).

The tort's reach is not limited to real property. For example, a cause of action exists for the disparagement of a security interest in chattels or intangible things. See *Chrysler Credit Corp. v Ostly* (1974) 42 CA3d 663, 117 CR 167; Restatement §624. The most common claim for slander of title results from the filing of a written instrument that places a cloud on the plaintiff's title. See, *e.g., Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902 (easement).

Filing a notice of lis pendens against real property can be the basis for a slander of title suit. See *Palmer v Zaklama* (2003) 109 CA4th 1367, 1381, 1 CR3d 116 (also noted in §§10.23, 11.4).

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§8.46 C. Trade Libel: Disparagement of Quality

Trade libel is an intentional disparagement of the quality of property, which results in pecuniary damage to plaintiff. *Erlich v Etner* (1964) 224 CA2d 69, 73, 36 CR 256. See Restatement (Second) of Torts §626 (1977). The action arises to protect the plaintiff's economic interests against pecuniary loss and lies if the statements at issue call into question the quality of a plaintiff's business or goods. See *Polygram Records, Inc. v Superior Court* (1985) 170 CA3d 543, 549, 216 CR 252.

A cause of action for trade libel requires (1) a false publication that induces others not to deal with the plaintiff, (2) the defendant's knowledge of the statement's falsity or that the defendant acted with reckless disregard concerning it, and (3) proof of special damages. *Polygram Records, Inc. v Superior Court, supra.* The plaintiff must show pecuniary loss and identify particular customers and transactions of which it was deprived as a result of the libel; it is not enough to show only a general decline in business. *Mann v Quality Old Time Serv., Inc.* (2004) 120 CA4th 90, 109, 15 CR3d 215 (trade libel cause of action properly stricken under SLAPP motion (see §8.22) when plaintiff presented no evidence it suffered any pecuniary loss).

The plaintiff suing for disparagement of its product is a public figure who must prove by clear and convincing evidence that the defendant published disparaging statements with actual malice. *Suzuki Motor Corp. v Consumers Union of U.S., Inc.* (9th Cir 2003) 330 F3d 1110, 1119 (evidence of publisher's financial motive to print "blockbuster story," and of rigging test to show product's propensity to roll over, sufficient to raise fact question on actual malice). It is insufficient to allege that the disparagement caused a general decline in business without establishing loss of particular customers and specific transactions (*Erlich v Etner, supra*) or the certainty of lost profits (*Bose Corp. v Consumers Union* (D Mass 1973) 57 FRD 528).

NOTE: The element of a defendant's knowledge of falsity or reckless disregard for truth is, of course, imposed by the First Amendment (see §8.33). See *Blatty v New York Times Co.* (1986) 42 C3d 1033, 1042, 232 CR 542 (discussed in §8.44). At common law, a defendant could be held liable for acting with ill will toward the plaintiff (malice) or if the defendant intended to interfere in the plaintiff's economic interests in an unprivileged manner. See *Polygram Records, Inc. v Superior Court, supra.* Restatement §623A, Comment d, points out that it is uncertain today whether either of such common-law grounds are sufficient to establish liability in place of the knowledge or reckless disregard element. On the possibility of liability for negligent disparagement, see *Nichols v Great Am. Ins. Cos.* (1985) 169 CA3d 766, 773, 215 CR 416 (not absolutely necessary that disparaging publication be intentionally designed to injure).

In some instances, disparagement of a business person's goods may imply business dishonesty, giving rise to a cause of action for libel per se (see §§8.2-8.4) under CC §§45-45a, for which special damages need not be alleged or proved. *Erlich v Etner, supra.*

See Anno, 104 ALR5th 523 (2002) (defamation of manufacturer regarding product).

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§8.47 D. Recoverable Damages

Pecuniary loss is an essential element of an injurious falsehood claim; thus a plaintiff must prove that the offensive statement resulted in special damages. *Erlich v Etner* (1964) 224 CA2d 69, 73, 36 CR 256 (trade libel claim could not be sustained absent proof of specific losses caused by alleged disparagement of goods). See also Restatement (Second) of Torts §623A (1977). Recovery is available only for special damages directly and immediately resulting from the disparagement. *Frank Pisano & Assocs. v Taggart* (1972) 29 CA3d 1, 105 CR 414; Restatement §633.

Recovery has been allowed for the diminution in market value of the property, the cost of litigation to remove a cloud on title, the loss of particular customers, and the loss of a market. See, *e.g., Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902; *Baker v Kale* (1947) 83 CA2d 89, 189 P2d 57; *Davis v Wood* (1943) 61 CA2d 788, 143 P2d 740.

Punitive damages are recoverable in actions based on injurious falsehood. *Spencer v Harmon Enters., Inc.* (1965) 234 CA2d 614, 44 CR 683 (punitive damages under CC §3294 for fraud). In addition to meeting the requirements of CC §3294, however, the Constitution may require that knowing falsity or reckless disregard for the truth be proved before punitive damages can be imposed. See *Blatty v New York Times Co.* (1986) 42 C3d 1033, 1043, 232 CR 542 (various limitations rooted in First Amendment apply to all injurious falsehood claims, not solely those labeled "defamation"; see §8.44). See also Restatement §623A (liability for injurious falsehood will be imposed if (1) defendant intended that publication of statement would result in pecuniary harm to plaintiff, or recognized or should have recognized that it was likely to do so, and (2) defendant knew that that the statement was false or acted in reckless disregard of its truth or falsity).

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VII. TAX CONSEQUENCES

§8.48 A. Compensatory Damages

A plaintiff need not declare, as taxable income, "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." IRC §104(a)(2), as amended in 1996. It appears that damages for injury to reputation are not to be deemed "on account of personal physical injuries." See *Murphy v IRS* (DC Cir 2007) 493 F3d 170. See Note in §1.112. See also *Polone v Commissioner* (9th Cir 2007) 505 F3d 966 (defamation plaintiff's settlement money, received after 1996 amendment of IRC §104(a)(2), taxable as ordinary income even though settlement itself executed before amendment took effect).

NOTE: Under California law before the 1996 amendment, defamation of an individual was viewed as a personal injury and general damages recovered by an individual were thus not subject to income tax. See *Roemer v Commissioner* (9th Cir 1983) 716 F2d 693, 700 (defamation by false credit report injured plaintiff's business reputation; lump-sum jury award that did not distinguish between damages for injury to personal reputation and damages for injury to professional and business reputation not taxable; damages were not for disparagement or trade libel). See *Bent v Commissioner* (3d Cir 1987) 835 F2d 67 (schoolteacher's settlement of claim for damages for violation of free speech rights excludable from taxable income as damages received for personal injuries, even though settlement partly based on teacher's lost wages); *Wade E. Church* (1983) 80 TC 1104 (newspaper's calling Arizona Attorney General a communist destroyed his political career, but thrust of case was personal injury, and the amount received as compensatory damages was nontaxable). See also *Threlkeld v Commissioner* (6th Cir 1988) 848 F2d 81 (under Tennessee law, recovery for malicious prosecution for alleged real estate fraud was personal injury).

A corporation by its nature can never suffer a personal injury. *Roemer v Commissioner* (9th Cir 1983) 716 F2d 693, 699 n4. See *Boyett Coffee Co. v U.S.* (WD Tex 1991) 775 F Supp 1001 (corporation cannot claim exclusion for personal injury damages; damages received in lawsuit for injury to business reputation not excludable from income).

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Source: Torts/California Tort Damages/8 Defamation/§8.49 B. Punitive Damages

§8.49 B. Punitive Damages

Punitive damages received in connection with defamation damages appear not to be excludable from gross income under IRC §104(a)(2) and are therefore taxable. See Rev Rul 85-98, 1985-2 Cum Bull 51 (plaintiff in defamation action must include in gross income any amount received in settlement that can be attributable to punitive damages).

See generally §§14.47-14.48 on the tax consequences of the payment and the recovery of punitive damages.

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§8.50 C. When Personal and Nonpersonal Injury Claims Involved

Under pre-1996 law that exempted personal injury damages from taxation (see §8.48), the taxpayer had the burden of proving the amount allocable to personal injuries. Thus, if there were claims for both personal and nonpersonal injuries, the taxpayer had to prove the nontaxable amount. If the taxpayer could not show an intent by the payor that supported allocation to personal injuries, the entire recovery was taxable. *Knuckles v Commissioner* (10th Cir 1965) 349 F2d 610. The best evidence of the payor's intent available under the circumstances was used to allocate a lump-sum recovery between personal and nonpersonal injuries. See, *e.g., Ana Maria Metzger* (1987) 88 TC 834, aff'd (3d Cir 1988) 845 F2d 1013.

TACTICS: Factors used by the IRS before 1996 when seeking to allocate all or part of a defamation damages recovery to taxable income included the allegations in the pleadings, the evidence presented at trial, the terms of a written settlement agreement, and the intent of the payor. Thus, a properly drafted and documented settlement agreement might prevent the IRS from seeking to allocate a lump-sum settlement between compensatory damages (which are nontaxable) and punitive damages (which may be taxable). See Rev Rul 85-98, 1985-2 Cum Bull 51 (allocation on basis of prayer for relief in complaint). See *e.g.*, *Dudley G. Seay* (1972) 58 TC 32 (letter to taxpayer explicitly allocating portion of settlement to personal injuries deemed sufficient); *Wallace R. Noel,* TC Memo 1997-113 (plaintiff in underlying action released all claims and causes of action; tax court, rejecting payor's testimony that settlement was for stock, concluded that part was for plaintiff's emotional distress). But see *Rhoda E. Nussbaum,* TC Memo 1982-725 (settlement agreement referred only to "all claims"; no portion specifically allocated to personal injury claim; entire lump sum included in income because claims' predominant nature was for reinstatement of employment, seniority, and breach of contract, and settlement agreement was silent on mental anguish claim); *Laszlo Fono* (1982) 79 TC 680 (retroactive modification of settlement for cancellation of employment contract to allocate portion to personal injuries deemed ineffective; entire settlement deemed taxable).

The nature of the claim (personal or business), and hence its taxability, depended on the parties' intent in making the settlement. Intent was determined by a consideration of all the factors surrounding the payment. *Lawryn W. McKim,* TC Memo 1980-93. In the absence of unambiguously expressed intent of the parties in their settlement agreement, the intent of the payor controls. A payor's intent as reflected in a release carries greater weight than the complaint. See *Ana Maria Metzger, supra*.

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9

Invasion of Privacy

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Source: Torts/California Tort Damages/9 Invasion of Privacy/ I. INTRODUCTION/§9.1 A. Categories of Privacy Invasions

I. INTRODUCTION

§9.1 A. Categories of Privacy Invasions

Damages are recoverable from a defendant whose conduct:

- Places another in a false light in the public eye (see §§9.4-9.5);
- Discloses private, embarrassing facts (see §§9.6-9.8);
- Intrudes on another's solitude, seclusion, or private concerns (see §§9.9-9.12); or
- Misappropriates another's name or likeness for commercial purposes (see §§9.13-9.16).

See *Kapellas v Kofman* (1969) 1 C3d 20, 35 n16, 81 CR 360. Damages claims for invasion of privacy are supported by the California Constitution (see §9.2), case law, and particular criminal and civil statutes.

A plaintiff's cause of action for invasion of privacy may encompass more than one of the above-listed categories. See *M.G. v Time Warner, Inc.* (2001) 89 CA4th 623, 630, 107 CR2d 504 (plaintiff's allegations stated one cause of action expressing four different theories).

Privacy is a purely personal right that generally does not survive death. See *Flynn v Higham* (1983) 149 CA3d 677, 683, 197 CR 145. But see §9.15.

For extended coverage of privacy compliance laws and regulations (state and federal), the protection of consumers' and employees' personal information, website privacy, and causes of action when personal information has been misused, lost, or stolen, see Privacy Compliance & Litigation in California (Cal CEB 2008).

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Source: Torts/California Tort Damages/9 Invasion of Privacy/§9.2 B. Constitutional Privacy Protection

§9.2 B. Constitutional Privacy Protection

Added to the California Constitution in 1974 was the provision that "[a]ll people … have inalienable rights … [including] pursuing and obtaining … privacy." Cal Const art I, §1. Elevation of the right of privacy to constitutional stature was apparently intended to expand the right. *Porten v University of San Francisco* (1976) 64 CA3d 825, 829, 134 CR 839.

The constitutional provision is self-executing in that it creates a legal and enforceable right of privacy for every Californian. See *White v Davis* (1975) 13 C3d 757, 775, 120 CR 94, according to which the provision is directed at four principal mischiefs: (1) government snooping and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose (such as the use of it for another purpose or the disclosure of it to some third party); and (4) the lack of a reasonable check on the accuracy of existing records. Thus, for example, the constitutional privacy right protects the anonymous political writer from having to reveal his or her identity. See *Rancho Publications v Superior Court* (1999) 68 CA4th 1538, 81 CR2d 274.

The constitutional right to privacy is not absolute; on occasion it must give way to an opponent's right to discover facts necessary to establishing a cause of action. *John B. v Superior Court (Bridget B.)* (2006) 38 C4th 1177, 1199, 45 CR3d 316 (right of wife claiming to have been infected with HIV by husband to discover his past medical records and sexual contacts). See *Pioneer Electronics USA, Inc. v Superior Court (Olmstead)* (2007) 40 C4th 360, 53 CR3d 513 (privacy rights of customers who had complained about defective DVD players not violated by disclosure of their names in class action); *Tien v Superior Court (Tenet Healthcare Corp.)* (2006) 139 CA4th 528, 43 CR3d 121 (privacy right of employees not to be identified prematurely as interested in class action against employer outweighed employer's right to discover those names). Further, the constitutional privacy right does not furnish a basis for a damages recovery by an employee fired for dating a subordinate. See *Barbee v Household Automotive Fin. Corp.* (2003) 113 CA4th 525, 6 CR3d 406 (employee had no reasonable expectation of privacy in pursuing intimate relationship with coemployee).

The constitutional privacy right may require a public entity that collects personal information before issuing a license to notify a licensee before making such information available to another. See *Gilbert v City of San Jose* (2003) 114 CA4th 606, 7 CR3d 692 (city required information from persons licensed as gambling establishment employees, but lacked procedures to protect information).

A damages cause of action for invasion of privacy may be stated under Cal Const art I, §1 even if the facts might not fit any of the four situations listed in §9.1. See, *e.g., Porten v University of San Francisco* (1976) 64 CA3d 825, 830, 134 CR 839 (defendant wrongfully disclosed admission applicant's college transcript to scholarship body, despite assurances that it would not do so; cause of action for improper use of information properly obtained despite absence of public disclosure of private facts). Thus, the form of invasion of privacy characterizable as "improper use of information properly obtained" has served as the basis for pursuing a damages action against a doctor when the plaintiff, while being examined by the doctor as part of a workers' compensation proceeding, told the doctor's staff that he had tested positive for HIV and the doctor put that information in a medical report that was sent to counsel for the employer's insurer, who forwarded copies that reached others. *Urbaniak v Newton* (1991) 226 CA3d 1128, 1141, 277 CR 354 (CC §47(b) privilege for publications in judicial proceeding did not protect doctor but immunized insurer and its counsel).

NOTE: An employer is not immunized from liability for an invasion of an employee's privacy by the workers' compensation exclusive remedy rule. *Operating Eng'rs Local 3 v Johnson* (2003) 110 CA4th 180, 1 CR3d 552. See Anno, 18 ALR6th 1 (2006) (expectation of privacy in the workplace).

The constitutional right to privacy, in addition to providing a basis for a damages recovery (the subject of the present chapter), has also been asserted as a defense to prosecution for alleged violation of a statute. See, *e.g.*, *American Academy of Pediatrics v Lungren* (1997) 16 C4th 307, 332, 66 CR2d 210, which notes that the right to privacy includes "interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'), and interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." Autonomy privacy includes a pregnant woman's right to choose whether or not to

terminate a pregnancy. Thus, absent a showing of a compelling interest, a statute that requires a pregnant minor to secure parental consent or judicial authorization before obtaining an abortion cannot be enforced.

The constitutional privacy right can also be asserted when seeking to enjoin enforcement of a statute. See, *e.g.*, *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 39, 26 CR2d 834, in which the elements of a right to privacy claim under the California Constitution were characterized as (1) a specific, legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) the invasion of privacy must be sufficiently serious in nature, scope, and impact to constitute an egregious breach of social norms. In *Hill,* the court concluded (7 C4th at 9) that a "student athlete's already diminished expectation of privacy is outweighed by the [National Collegiate Athletic Association's] legitimate regulatory objectives in conducting testing for proscribed drugs." See also *Hansen v Department of Corrections* (ND Cal 1996) 920 F Supp 1480 (correctional officer subjected to direct observation of urination during drug testing); *Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696 (city's drug testing of newly hired employees did not violate California Constitution, but drug testing of current employees who applied for and were offered promotion violated U.S. Constitution's Fourth Amendment).

The constitutional privacy right may be abridged to protect an opposing state interest. See *Ombudsman Servs. of N. Cal. v Superior Court (Coleman)* (2007) 154 CA4th 1233, 1249, 65 CR3d 456 (discovery of long-term care facility's records restricted to those relating to person whose death was basis for survivor's wrongful death and elder abuse suit).

The constitutional right to privacy does not serve as the basis for a wrongful termination of employment claim against an employer that fired an employee on discovering his off-duty, off-premises use of marijuana. *Ross v RagingWire Telecommunications, Inc.* (2008) 42 C4th 920, 932, 70 CR3d 382.

A corporation appears to have no standing to assert a right of privacy under Cal Const art I, §1. See *Roberts v Gulf Oil Corp*. (1983) 147 CA3d 770, 795, 195 CR 393 (corporation retains general privacy rights, via combination of Fourth, Fifth, and Fourteenth Amendments). A partnership may be able to state a cause of action for invasion of privacy. See *H & M Assocs. v City of El Centro* (1980) 109 CA3d 399, 167 CR 392.

Damages for invasion of privacy are recoverable under the United States Constitution, Amendment IV and 42 USC §1983 for warrantless and unjustified police entry into and search of a house. See, *e.g.*, *Frunz v City of Tacoma* (9th Cir Nov. 13, 2006) 468 F3d 1141. On federal civil rights actions for false arrest or imprisonment, see §12.33.

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§9.3 C. Relation to Defamation

A lawsuit for invasion of privacy seeks to protect a plaintiff's right to solitude or right "to be let alone," and concerns the plaintiff's own peace of mind, whereas a suit for defamation seeks to protect the plaintiff's reputation. See *Fairfield v American Photocopy Equip. Co.* (1955) 138 CA2d 82, 86, 291 P2d 194. Except for the false-light (see §9.4) form of the tort, an action for breach of the right of privacy can be based in part on truthful publications.

A defendant may be liable for invading another's privacy without having defamed that person. Nevertheless, several rules applicable to damages for defamation (see chap 8) are also applied in invasion of privacy cases. For example, a defendant that has invaded another's privacy by publishing information about that person may be exonerated from damages liability unless the plaintiff establishes by clear and convincing evidence that the defendant acted with "constitutional actual malice." See *Hoffman v Capital Cities/ABC, Inc.* (9th Cir 2001) 255 F3d 1180 (discussed in §9.16). See generally §§8.33-8.34.

Defamation action rules on the single publication act (see §§8.25-8.26) and on conflict of laws (see §8.42) may be applied in invasion of privacy actions. See *Long v Walt Disney Co.* (2004) 116 CA4th 868, 10 CR3d 836 (publication of computer-altered likeness on nationally broadcast television program was publication that could not be sued on 2 years later; see §9.16).

Similarly, an invasion of privacy plaintiff may be required to overcome an anti-SLAPP motion to strike (see §8.22). See *M.G. v Time Warner, Inc.* (2001) 89 CA4th 623, 629, 107 CR2d 504 (plaintiff's suit not barred by CCP §425.16). See also *Novartis Vaccines & Diagnostics, Inc. v Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 CA4th 1284, 50 CR3d 27 (injunction to prevent defendants from invading privacy of, and otherwise harassing employees not subject to anti-SLAPP motion). But see *Four Navy SEALS & Jane Doe v Associated Press* (SD Cal 2005) 413 F Supp 2d 1136 (anti-SLAPP motion by news service granted, striking complaint that asserted privacy was invaded by locating photographs posted on a publicly accessible website and distributing them with an article about treatment of Iraqi prisoners).

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II. LIABILITY FACTORS

A. Placing Plaintiff in False Light

§9.4 1. Elements

To recover damages for being placed in a false light, the plaintiff must plead and prove publication by the defendant to a third party of false, erroneous, or fictionalized material that places the plaintiff in a false and derogatory light and, if matters of public interest are involved, must further plead and show that the defendant had knowledge that the published material was false or that the defendant acted in reckless disregard of the truth. *Cantrell v Forest City Publ'g Co.* (1974) 419 US 245, 42 L Ed 2d 419, 95 S Ct 465; *Time, Inc. v Hill* (1967) 385 US 374, 17 L Ed 2d 456, 87 S Ct 534; *Forsher v Bugliosi* (1980) 26 C3d 792, 811 n7, 163 CR 628. To be actionable, "the false light in which the plaintiff is placed must be highly offensive to a reasonable person." *Fellows v National Enquirer, Inc.* (1986) 42 C3d 234, 238, 228 CR 215.

NOTE: The "false-light" tort is described in Restatement (Second) of Torts §652E (1977) as follows: "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

The tort of false-light invasion of privacy is closely akin to the tort of defamation. See *Fellows v National Enquirer, Inc.* (1986) 42 C3d 234, 251, 228 CR 215 (need to plead and prove special damages (see §§9.19-9.20) when false-light claim based on defamation described in CC §45a; plaintiff need not be defamed to state false-light cause of action, but publicity that places person in highly offensive false light is usually also defamatory); *Werner v Times-Mirror Co.* (1961) 193 CA2d 111, 14 CR 208, disapproved on other grounds in *Kapellas v Kofman* (1969) 1 C3d 20, 35 n17, 81 CR 360. See also *Solano v Playgirl, Inc.* (9th Cir 2002) 292 F3d 1078, 1083 (actor depicted barechested on magazine cover with words suggesting he would be seen inside in sexually revealing poses; actual damages and damages for humiliation and mental anguish available).

On choice of law and the single-publication rule, see §§8.25-8.26, 8.42.

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§9.5 2. Defenses

Because false-light invasion of privacy is so similar to defamation, courts have generally applied to the former the same qualifications and defenses that apply to the latter. See, *e.g., Kapellas v Kofman* (1969) 1 C3d 20, 35 n16-17, 81 CR 360 (CC §48a applies to false-light invasion of privacy). See also *Fellows v National Enquirer, Inc.* (1986) 42 C3d 234, 228 CR 215 (CC §45a requirement to plead and prove special damages when false-light claim is based on defamatory language within meaning of CC §45a).

Similarly, a defendant's knowledge of fictionalization, or reckless disregard with respect to it, is virtually identical to the constitutional malice requirement in public official and public figure defamation cases. See *Cantrell v Forest City Publ'g* Co. (1974) 419 US 245, 42 L Ed 2d 419, 95 S Ct 465. See also *O'Hilderbrandt v Columbia Broad. Sys.* (1974) 40 CA3d 323, 114 CR 826 (truthful publication constitutionally protected if it is newsworthy and does not reveal facts so offensive as to shock community's notions of decency; former motion picture actress who had terminated her career nearly 50 years earlier had no false-light cause of action when her name appeared in television program about murder involving women). On public officials or public figures and constitutional actual malice in defamation cases generally, see §§8.14-8.17.

The litigation privilege in CC §47(b) provides a complete bar to breach of privacy liability that might otherwise arise from the filing of a letter in a family law proceeding accusing another of sexual misconduct. *Jacob B. v County of Shasta* (2007) 40 C4th 948, 56 CR3d 477; *Foothill Fed. Credit Union v Superior Court (King)* (2007) 155 CA4th 632, 66 CR3d 249 (all elements of litigation privilege satisfied by credit union that produced personal records in response to subpoena). See §8.19 on privilege as a defense in defamation cases.

A defendant's anti-SLAPP motion under CCP §425.16 to strike a complaint in which an individual alleged that he had been portrayed in a false light in a movie can be denied on the ground that the individual's right is not a matter of public interest. See *Dyer v Childress* (2007) 147 CA4th 1273, 55 CR3d 544 (movie portrayal of consultant as rebellious slacker not shown to have gone beyond parochial particulars). See §8.22 on anti-SLAPP motions in defamation cases. But see *Hall v Time Warner, Inc.* (2007) 153 CA4th 1337, 63 CR3d 798 (terms of Marlon Brando's will and living trust were issue of public interest subjecting invasion or privacy (intrusion and disclosing private facts) and elder abuse claims to anti-SLAPP motion).

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Source: Torts/California Tort Damages/9 Invasion of Privacy/ B. Disclosing Personal Information/ 1. Elements/§9.6 a. Common Law

B. Disclosing Personal Information

1. Elements

§9.6 a. Common Law

The plaintiff who seeks to recover damages from a defendant who has disclosed to the public personal information about the plaintiff ordinarily must plead and prove:

- The matter disclosed was purely private, *i.e.,* not available to the public, either generally or by way of public record. *Cox Broad. Corp. v Cohn* (1975) 420 US 469, 43 L Ed 2d 328, 95 S Ct 1029; *Forsher v Bugliosi* (1980) 26 C3d 792, 808, 163 CR 628; *Gill v Hearst Publ'g Co.* (1953) 40 C2d 224, 253 P2d 441.
- The disclosure was "to the public in general or to a large number of persons as distinguished from one individual or a few." *Porten v University of San Francisco* (1976) 64 CA3d 825, 828, 134 CR 839; see *Virgil v Time, Inc.* (9th Cir 1975) 527 F2d 1122, 1126.
- The matter disclosed was "offensive and objectionable to a reasonable [person] of ordinary sensibilities." *Forsher v Bugliosi* (1980) 26 C3d 792, 809, 163 CR 628.
- The disclosure was not of a matter of legitimate public concern (*i.e.*, it was not newsworthy). *Diaz v Oakland Tribune, Inc.* (1983) 139 CA3d 118, 188 CR 762; see *Virgil v Time, Inc.* (9th Cir 1975) 527 F2d 1122, 1129 (requirement met when disclosure complained of constituted "morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern").

NOTE: This "public disclosure" tort is described in Restatement (Second) of Torts §652D (1977) as follows: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."

The First Amendment (see §§8.33-8.41) does not, however, permit the imposition of invasion of privacy liability on a media defendant's publication of facts obtained from public official records of a criminal proceeding, even one concerning a felony conviction many years earlier. *Gates v Discovery Communication, Inc.* (2004) 34 C4th 679, 21 CR3d 663 (television documentary about person who, since serving prison term, had lived obscure, lawful life and become respected member of community). The *Gates* court overruled its own prior decision that an actionable privacy violation could occur through the reckless, offensive, injurious publication of true but not newsworthy information about the criminal past of a rehabilitated convict. See Justice Kennard's concurring opinion in *Shulman v Group W Prods.* (1998) 18 C4th 200, 246, 74 CR2d 843, citing *Cox Broad. Corp. v Cohn* (1975) 420 US 469, 496, 43 L Ed 2d 328, 350, 95 S Ct 1029, 1047, which said that "the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official records."

NOTE: In *Gates*, the court expressly overruled *Briscoe v Reader's Digest Ass'n* (1971) 4 C3d 529, 93 CR 866 (identification of plaintiff in article about long-past crimes). Of questionable precedentiary validity is *Melvin v Reid* (1931) 112 CA 285, 297 P 91 (use of plaintiff's name, after she had reformed, in connection with unsavory incidents in her earlier life). See also *Conklin v Sloss* (1978) 86 CA3d 241, 150 CR 121 (crime committed 20 years earlier); *Michaels v Internet Entertainment Group, Inc.* (CD Cal 1998) 5 F Supp 2d 823, 839 (newsworthiness privilege did not prevent celebrity couple from advancing right to privacy claim to bar distribution on Internet of videotape depicting them engaged in sex). See also the unpublished opinion in *Readylink Healthcare v Lynch* (9th Cir 2006) 2006 US App Lexis 17694 (nonmedia defendant, with a commercial interest in or a malicious motive, publishing facts about a plaintiff's past crimes).

Lack of newsworthiness is an essential element of a cause of action based on a publication's giving unwanted publicity to allegedly private aspects of a person's life. *Shulman v Group W Prods.* (1998) 18 C4th 200, 74 CR2d 843

(summary judgment for defendant proper because television broadcast regarding automobile accident in which plaintiffs (mother and son) were injured had subject matter of legitimate public concern). Thus, even if the material published is offensive, it is not actionable if it is newsworthy. *Kapellas v Kofman* (1969) 1 C3d 20, 35, 81 CR 360 (children of candidate for public office could not recover for disclosure of their conduct, recorded on police blotter); *Sipple v Chronicle Publ'g Co.* (1984) 154 CA3d 1040, 1046, 201 CR 665. See also *Taus v Loftus* (2007) 40 C4th 683, 715, 54 CR3d 775 (no liability for stating actual initials of "Jane Doe" during deposition given weeks after she had revealed her full name in her complaint in separate suit); *Beruan v French* (1976) 56 CA3d 825, 128 CR 869 (candidate for public office has no right of privacy as to truthful information that may be relevant to his or her qualifications for office); *Carlisle v Fawcett Publications, Inc.* (1962) 201 CA2d 733, 20 CR 405 (no cause of action in favor of person closely related to public figure).

In determining whether the private facts are covered by the privilege for reporting private but newsworthy information, the court must balance (1) the social value of the facts published, (2) the depth of the intrusion into ostensibly private affairs, and (3) the extent to which a party voluntarily acceded to a position of public notoriety. *Michaels v Internet Entertainment Group, Inc.* (CD Cal 1998) 5 F Supp 2d 823, 841.

TACTICS: A plaintiff who cannot establish the elements of a cause of action for public disclosure of private facts, as when there was no disclosure to the public in general or to a large number of persons, may still be able to state a cause of action under the privacy provision of Cal Const art I, §1. See §9.2.

Publishing a photograph taken in a public place does not ordinarily invade the privacy of the persons depicted (see *Gill v Hearst Publ'g Co.* (1953) 40 C2d 224, 253 P2d 441), but juxtaposing the photograph with text that reveals, or suggests, embarrassing information about the persons may invade their privacy. See *M.G. v Time Warner, Inc.* (2001) 89 CA4th 623, 631, 107 CR2d 504 (photo showing little league team accompanied by text about sexual molestation of minors). See also *Gill v Curtis Publ'g Co.* (1952) 38 C2d 273, 275, 239 P2d 630 (photo of pair spooning at ice cream parlor accompanied by text relating depicted conduct to "wrong kind" of love).

A crime victim whose confidential medical records are read into the trial record in a criminal case by the defendant's attorney may recover damages from the attorney for invasion of privacy. See *Susan S. v Israels* (1997) 55 CA4th 1290, 67 CR2d 42 (litigation privilege in CC §47(b)(2) did not defeat claim; see §9.8). But see *Mansell v Otto* (2003) 108 CA4th 265, 270, 133 CR2d 276 (litigation privilege inapplicable, but no privacy right violation when criminal action defense counsel read and disseminated complainant's medical records received under court-approved subpoena and release order).

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§9.7 b. Statutory: Medical Information; Federal Acts

The confidentiality of medical information is provided for in CC §§56-56.37 (Confidentiality of Medical Information Act). Civil Code §56.35 provides that, in addition to other remedies available at law, a patient whose medical information has been used or disclosed in violation of specified sections of the Act and who has sustained economic loss or personal injury may recover compensatory damages, punitive damages not to exceed $3000, attorney fees not to exceed $1000, and the costs of litigation. Civil Code §56.36 provides that, in addition to other remedies, an individual bringing an action against any person or entity who has negligently released confidential information or records may recover nominal damages of $1000 and/or actual damages sustained by the patient. In addition, §56.36 provides for administrative fines and civil penalties.

A dentist's report to a peace officer's superiors that the officer may be abusing prescription drugs falls within an exception to CMIA liability in CC §56.10(c)(14) for "information … specifically authorized by law." *Shaddox v Bertani* (2003) 110 CA4th 1406, 2 CR3d 808. A fertility clinic's disclosure medical records to a client's "ex-fiancé" and his attorney was protected by CC §56.10(c)(2), which permits (but does not require) a health care provider to furnish general information about a patient's reason for treatment. *Colleen M. v Fertility & Surgical Assocs. of Thousand Oaks* (2005) 132 CA4th 1466, 1473, 34 CR3d 439 (also, plaintiff had no reasonable expectation that records would not be revealed).

The Freedom of Information Act (5 USC §552(b)(7)(C)) does not require the revelation of information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *National Archives & Records Admin. v Favish* (2004) 541 US 157, 158 L Ed 2d 319, 327, 124 S Ct 1570 (family members' interest in preventing release of photographs relating to investigation of apparent suicide was personal privacy interest that could be overcome only if outweighed by public interest in disclosure as by evidence (not mere suspicion) of government investigatory impropriety).

Statutory damages may be recovered for the unauthorized disclosure of income tax return information. *Siddiqui v U.S.* (9th Cir 2004) 359 F3d 1200 (actionable disclosure about plaintiffs heard by 100 guests at retiree's "roast" was single disclosure, entitling each plaintiff to single $1000 statutory damages sum, not to 100 such sums).

Actual damage must be proved before a plaintiff can recover statutory damages for a violation of the federal Privacy Act of 1974. *Doe v Chao* (2004) 540 US 614, 157 L Ed 2d 1122, 124 S Ct 1204.

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§9.8 2. Defenses

A defendant can escape liability for disclosing private information about the plaintiff by convincing the court that the information published was not truly private, because, *e.g:*

- The matter disclosed was taken from plaintiff's own MySpace online journal (see *Moreno v Hanford Sentinal, Inc.* (2009) 172 CA4th 1125, 91 CR3d 858).
- It was well known to numerous people (see *Sipple v Chronicle Publ'g Co.* (1984) 154 CA3d 1040, 201 CR 665).
- It came from the public record (see *Cox Broad. Corp. v Cohn* (1975) 420 US 469, 43 L Ed 2d 328, 95 S Ct 1029 (see Note in §9.6)).
- It was newsworthy.

See *Virgil v Time, Inc.* (9th Cir 1975) 527 F2d 1122 (publicity, consent to publicize, newsworthiness). See also *Beruan v French* (1976) 56 CA3d 825, 828, 128 CR 869 ("charge of criminal conduct, no matter how remote, is relevant to a candidate's fitness for office").

Defendants sued for public disclosure privacy invasion may sometimes escape liability by showing that the publication was privileged under CC §47(b). See *Mansell v Otto* (2003) 108 CA4th 265, 270, 133 CR2d 276 (litigation privilege inapplicable, but no privacy right violation when criminal action defense counsel read and disseminated complainant's medical records received under court-approved subpoena and release order); *Wise v Thrifty Payless, Inc.* (2000) 83 CA4th 1296, 100 CR2d 437 (litigation privilege did not protect drug store that released to plaintiff's former husband, for his use in dissolution action, billing printouts showing plaintiff's medications and treatments).

Statutes requiring that specified public records not be concealed may provide a defense to a claimed privacy invasion. See *BRV, Inc. v Dunsmuir Joint Unified Sch. Dist.* (2006) 143 CA4th 742, 49 CR3d 519 (California Public Records Act (Govt C §§6250-6276.48) prevailed over agreement that record of investigation be kept private).

A defendant sued under a state statute that forbids disclosures of a particular kind may raise First Amendment defenses. See *Florida Star v B.J.F.* (1989) 491 US 524, 105 L Ed 2d 443, 109 S Ct 2603 (newspaper published, contrary to state statute, name of rape victim; statute not sufficiently narrowly tailored because it established liability per se and applied only to mass media; further, information had been lawfully obtained from public record).

An action for invasion of privacy in violation of CC §1798.53 (disclosure of nonpublic information obtained from government records) requires a showing of actual malice. *Anti-Defamation League of B'nai B'rith v Superior Court* (1998) 67 CA4th 1072, 79 CR2d 597. Further, a private medical provider cannot be liable for violating the Information Practices Act (CC §§1798-1798.75). *Jennifer M. v Redwood Women's Health Ctr.* (2001) 88 CA4th 81, 105 CR2d 544.

For private information posted on an Internet website, the 2-year statute of limitations on filing suit under the Privacy Act of 1974 (5 USC §552(a)) begins to run, under the "single publication rule" (see §9.3), on the date the material is first posted; the period is not extended by continuance on the site until later removed. *Oja v United States Army Corps of Engineers* (9th Cir 2006) 440 F3d 1122.

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Source: Torts/California Tort Damages/9 Invasion of Privacy/ C. Intruding on Solitude/ 1. Elements/§9.9 a. Common Law

C. Intruding on Solitude

1. Elements

§9.9 a. Common Law

A plaintiff may recover damages from a defendant who (1) intentionally intruded, physically or otherwise, on the plaintiff's solitude, seclusion, or private affairs or concerns (2) in a manner highly offensive to a reasonable person. *Shulman v Group W Prods.* (1998) 18 C4th 200, 231, 74 CR2d 843. See Restatement (Second) of Torts §652B (1977). See also *Wilkins v National Broad. Co.* (1999) 71 CA4th 1066, 1075, 84 CR2d 329 (plaintiff must establish intrusion into private place, conversation, or matter in manner highly offensive to reasonable person; TV network not liable to suspects for videotaping their meeting at public restaurant).

NOTE: Surreptitiously placing a hidden camera to record activity in a business office is an intrusion on the privacy of employees using that office—they had a reasonable expectation under widely held social norms that their employer would not do so without informing them—but they failed to show an intrusion that was "highly offensive and sufficiently serious" to be actionable, given evidence that the complaining employees themselves were never monitored or recorded. *Hernandez v Hillsides, Inc.* (2009) 47 C4th 272, 97 CR3d 274.

Reprinting, in a news story about mistreatment of Iraqi prisoners, photographs that the wife of a Navy SEAL had posted on her website was not an intrusion on her seclusion or that of the SEALs depicted; there is no reasonable expectation of privacy in Internet transmissions; and any intrusion was *de minimis* and not highly offensive to a reasonable person. *Four Navy SEALS & Jane Doe v Associated Press* (SD Cal 2005) 413 F Supp 2d 1136.

The intrusion may be a physical intrusion into the premises or personal effects of another. See, *e.g., Sheehan v San Francisco 49ers, Ltd.* (2009) 45 C4th 992, 89 CR2d 594 (without adequate justification, team policy of patdown searches of patrons entering stadium may be privacy invasion); *Shulman v Group W Prods.* (1998) 18 C4th 200, 74 CR2d 843 (although mother and son could not recover damages for intrusion based on mere presence of cameraman filming accident in which they were injured, they could state cause of action based on cameraman's presence in medical helicopter transporting plaintiffs to hospital, recording and amplifying conversations about mother's medical condition); *Sanchez-Scott v Alza Pharms.* (2001) 86 CA4th 365, 103 CR2d 410 (pharmaceutical salesperson present during doctor's physical examination of patient, without patient's consent, as part of "mentor program" between drug company and health care provider customers); *Miller v National Broad. Co.* (1986) 187 CA3d 1463, 232 CR 668 (camera crew accompanied paramedics into private home and filmed person's dying moments). See also *Friedman Prof. Mgmt. Co. v Norcal Mut. Ins. Co.* (2004) 120 CA4th 17, 15 CR3d 359 (claim for privacy and battery damages based on allegations that defendant doctor should not himself have been in operating room "at all"; see also §7.5).

Unreasonably intrusive investigation of a claim (for insurance policy benefits) may amount to an actionable invasion of privacy. See *Dishman v UNUM Life Ins. Co.* (9th Cir 2001) 269 F3d 974, 979 (state law invasion of privacy cause of action not preempted by federal Employee Retirement Income Security Act (ERISA)); *Noble v Sears, Roebuck & Co.* (1973) 33 CA3d 654, 109 CR 269 (attorney liable when his investigator gained admittance to plaintiff's hospital room and got information by deception).

An actionable intrusion into private matters may result from an investigator, researcher, or journalist assuming a false identity in order to gain personal information about an individual. See *Taus v Loftus* (2007) 40 C4th 683, 727, 54 CR3d 775 (liability of researchers who, seeking to debunk a previously published report based on case histories, falsely stated they were associated with a subject's therapist when interviewing family members; other bases for liability (including defamation and wrongful disclosure of private information) rejected). Similarly, actionable intrusion may be based on a defendant's gaining access to another's personal records or data. See, *e.g., White v Davis* (1975) 13 C3d 757, 120 CR 94 (covert police surveillance at university classes and organization meetings). See also *Pearson v Dodd* (DC Cir 1969) 410 F2d 701 (improper intrusion when confidential files removed from office by former employees with intent to show them to unauthorized outsiders).

An intrusion may involve surveillance, electronic or otherwise. *Bernhard v City of Ontario* (9th Cir 2008) 270 Fed Appx 518 (detective who, investigating theft of flashlight, installed video camera in police officers' locker room, where they showered, changed clothes, and used bathroom, violated their reasonable expectation of privacy and could not claim immunity); *Dietemann v Time, Inc.* (9th Cir 1971) 449 F2d 245 (clandestinely photographing plaintiff in his den and recording and transmitting conversation; First Amendment does not give newspersons immunity from torts or crimes they commit during course of newsgathering). Surreptitious videotaping in a business setting for broadcast as an exposé, when the recorded matter does not involve personal affairs, does not ordinarily give rise to invasion of privacy liability. See *Medical Lab. Mgmt. Consultants v American Broad. Cos. Inc.* (9th Cir 2002) 306 F3d 806, 814; *Trujillo v City of Ontario* (CD Cal 2006) 428 F Supp 2d 1094 (liability for secretly installing video camera to surveil police department men's locker room, ostensibly as part of investigation of allegedly stolen flashlight).

The intrusion form of invasion of privacy, unlike other forms of the tort, does not have as one of its elements the publication of any information obtained. "The tort is completed with the obtaining of the information by improperly intrusive means." *Pearson v Dodd* (DC Cir 1969) 410 F2d 701, 704. See *Dietemann v Time, Inc.* (9th Cir 1971) 449 F2d 245, 247 (publication not necessary element; technical trespass immaterial; proof of special damages not required).

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Source: Torts/California Tort Damages/9 Invasion of Privacy/§9.10 b. Statutory: Wiretapping and Eavesdropping

§9.10 b. Statutory: Wiretapping and Eavesdropping

Wiretapping or electronic eavesdropping that violates a statute can give rise to an invasion of privacy damages claim as well as to a claim for statutory relief. See Pen C §§630-637.9 (Invasion of Privacy Act). See *Lieberman v KCOP Television, Inc*. (2003) 110 CA4th 156, 161, 1 CR3d 536 (doctor whose conversations were secretly recorded presented sufficient evidence of violation to overcome anti-SLAPP motion (see §8.22); court warned that statutory damages for the surreptitious recording were not tantamount to damages resulting from later broadcast). See also *Marich v MGM/UA Telecommunications, Inc.* (2003) 113 CA4th 415, 7 CR3d 60 (television broadcast of video of police officers telephoning decedent's parents to tell him he died of drug overdose); *Clauson v Superior Court* (1998) 67 CA4th 1253, 79 CR2d 747 (employee whose employer installed eavesdropping device in his office and wiretapped his private office and telephone could seek both statutory penalties under Pen C §637.2 and punitive damages for common-law invasion of privacy, but, once favorable verdict returned, had to elect between the two remedies); *Warden v Kahn* (1979) 99 CA3d 805, 160 CR 471 (recording by participant to phone conversation; violation of Pen C §632); *Forest E. Olson, Inc. v Superior Court* (1976) 63 CA3d 188, 133 CR 573 (violation of Pen C §632); *Rogers v Ulrich* (1975) 52 CA3d 894, 125 CR 306 (dictum that scope of Pen C §632 broader than Pen C §631 in that it prohibits not only eavesdropping but also recording confidential communication by party without consent of all other parties to communication). See also *Ribas v Clark* (1985) 38 C3d 355, 212 CR 143 (Pen C §631(a) violation properly alleged when, without plaintiff's knowledge, defendant listened on extension phone to plaintiff's conversation with wife at wife's request); *Rattray v City of Nat'l City* (9th Cir 1994) 51 F3d 793 (city police officer, whose supervisor had ordered another officer secretly to record conversation with the object of acquiring evidence of sexual harassment, may maintain invasion of privacy action against city; supervisor's violation of Pen C §632 not excused by Pen C §633, because recording not made in course of criminal investigation).

NOTE: Damages lawsuits may also be based on violations of the federal wiretapping statute (18 USC §2511).

An employer that places a video camera behind a two-way mirror in a restroom used by employees (ostensibly to prevent drug use by truck drivers) violates Pen C §653n and is subject to civil liability. *Cramer v Consolidated Freightways, Inc.* (9th Cir 2001) 255 F3d 683 (state law cause of action not preempted by federal Labor Management Relations Act (LMRA)).

Secretly tape-recording face-to-face conversations with coemployees, including workplace supervisors, violates the Invasion of Privacy Act even if the person is doing the recording as an aid to his or her own memory with no intention of communicating the conversations to others; the Act is violated if either party to a conversation reasonably expects it to be private—*i.e.,* not overheard by either another person or a mechanical device. *Coulter v Bank of America* (1994) 28 CA4th 923, 33 CR2d 766 (employer and 11 coemployees awarded statutory damages (then $3000) for each of 44 violations). See also *Friddle v Epstein* (1993) 16 CA4th 1649, 21 CR2d 85 (real estate broker's surreptitious recording of telephone and face-to-face conversations violated Invasion of Privacy Act even though recording was never revealed to third person; plaintiff entitled to recover mandatory minimum award (then $3000) without regard to actual injury).

A business entity located in a state where it is legal to record telephone calls without warning the caller (or the person called) can be liable for damages resulting from such recording of calls from or to California callers, where recording without warning is illegal under Pen C §§630, 637.2, 632, but, apparently, only for warningless recording done after finality of the decision in *Kearney v Salomon Smith Barney, Inc.* (2006) 39 C4th 95, 45 CR3d 730 (damages not recoverable for previous violations of California law). Recording a telephone call without a participant's consent violates Pen C §632 only if the call includes a "confidential communication," defined as one for which the participant has an objectively reasonable expectation that it is not being overheard or recorded. *Flanagan v Flanagan* (2002) 27 C4th 766, 768, 117 CR2d 574 (rejecting view that conversation is confidential only if participant has expectation that content will not later be divulged to third person). Intercepting cellular and cordless phone calls is prohibited by Pen C §632.7, which appears to apply to all communications, confidential or not.

A plaintiff can state a cause of action for violation of his or her right of privacy by alleging that a reporter secretly recorded conversations. See *Sanders v American Broad. Cos.* (1999) 20 C4th 907, 85 CR2d 909 (reporter obtained

employment with "Psychic Marketing Group" and covertly videotaped conversations with coemployees). See also *Turnbull v American Broad. Cos.* (CD Cal 2004) 2004 US Dist Lexis 24351 (actors surreptitiously recorded during casting workshop had reasonable expectation that their actions and conversations would not be broadcast to ridicule them). Making a videotape recording in a public high school classroom, however, does not violate a teacher's right to privacy because a teacher must always expect public dissemination of classroom communications. See *Evens v Superior Court* (1999) 77 CA4th 320, 91 CR2d 497 (illegally recorded videotape of teacher's class could be used in disciplinary proceedings despite Ed C §51512 prohibiting unauthorized videotaping in classroom).

See Annos, 23 ALR6th 201 (2007) (expectation of privacy in text transmissions from cell phone, pager, or other wireless communications device), 92 ALR5th 15 (2001) (expectation of privacy in Internet communications).

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§9.11 c. Trespassing to Photograph or Record

A person is liable for physical invasion of privacy when he or she commits a trespass to physically invade another person's privacy with the intent to capture a visual image, sound recording, or other physical impression of the person engaging in a personal or familial activity, if the physical invasion occurs in a manner offensive to a reasonable person. CC §1708.8(a). Similarly, liability for constructive invasion of privacy attaches when a person attempts to capture, through the use of a visual or auditory enhancing device, a visual image, sound recording, or other physical impression of another person engaging in a personal or familial activity under circumstances in which that person has a reasonable expectation of privacy. CC §1708.8(b).

Damages for violating CC §1708.8 may be up to three times the amount of the resulting general and special damages, as well as punitive damages and disgorgement of commercial profits. CC §1708.8(d). An assault committed with intent to capture a visual image, a sound recording, or other physical impression has been subject to the damages and other provisions of CC §1708.8. CC §1708.8(c). The statute does not apply to law enforcement activities. CC §1708.8(g).

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§9.12 2. Defenses

A defendant can avoid liability for the intrusion form of privacy invasion by establishing that no improperly intrusive means were used. Thus, a publisher that merely received information acquired by a nonemployee could escape liability for intrusion even if the other person used improperly obtrusive means to obtain it; the claim would lie against the obtainer, not the publisher. See *Pearson v Dodd* (DC Cir 1969) 410 F2d 701; *Bilney v Evening Star Newspaper Co.* (Md App 1979) 406 A2d 652.

The mere publication of pictures of individuals, without more, "taken in a pose voluntarily assumed in a public place and … portraying nothing to shock the ordinary sense of decency or propriety" does not give rise to intrusion liability. *Gill v Hearst Publ'g Co.* (1953) 40 C2d 224, 231, 253 P2d 441.

The immunity provided to public entities by Govt C §821.6 for activity incidental to judicial and administrative proceedings may take precedence over privacy law. See *Richardson-Tunnell v School Ins. Program for Employees* (2007) 157 CA4th 1056, 69 CR3d 176, 72 CCC 1612 (administrator's hiree, defending workers' compensation claim, videotaped employee on disability leave at her wedding, reception, and honeymoon; immunity precluded suit under "anti-paparazzi" law).

The terms of an employment agreement may preclude an employee's attempt to preserve the privacy of matters recorded on a computer provided by the employer. See *TBG Ins. Servs. Corp. v Superior Court* (2002) 96 CA4th 443, 117 CR2d 155 (employer sued for wrongful termination entitled to retrieve contents of computer given to employee for use at home).

See Anno, 92 ALR5th 15 (2001) (expectation of privacy in Internet communication).

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D. Misappropriating Name or Likeness

1. Elements

§9.13 a. Common Law: Right of Publicity

A plaintiff may recover damages from a defendant who appropriated to his or her own use or benefit another's name or likeness. Restatement (Second) of Torts §652C (1977). This type of invasion of privacy, commonly called "misappropriation of name or likeness," is sometimes referred to as a violation of the "right of publicity." In California, the right of publicity is both a common-law right and a statutory right. *Gionfriddo v Major League Baseball* (2001) 94 CA4th 400, 415, 114 CR2d 307 (defendant's right to use photographs of retired ball players). The defendant's liability is usually based on the use of another's name or likeness for commercial purposes. See, *e.g., Motschenbacher v R J. Reynolds Tobacco Co.* (9th Cir 1974) 498 F2d 821; *Fairfield v American Photocopy Equip. Co.* (1955) 138 CA2d 82, 291 P2d 194.

A misappropriation claim may be based on commercial use of words or images connected with the plaintiff, even if the plaintiff's name or likeness are not used. See *Carson v Here's Johnny Portable Toilets, Inc.* (6th Cir 1983) 698 F2d 831. A misappropriation is actionable under either the common law or a statute (see §9.14) "regardless whether the purpose is commercial." *Kirby v Sega of Am., Inc.* (2006) 144 CA4th 47, 55, 50 CR3d 607.

The common-law right of publicity may be extinguished by the death of the person in whom the right arose. See *Lugosi v Universal Pictures* (1979) 25 C3d 813, 160 CR 323 (right not exercised during person's lifetime died with him). But see *Acme Circus Operating Co. v Kuperstock* (11th Cir 1983) 711 F2d 1538, 1544 ("where a right to publicity of a name has been exercised in conjunction with a specific product or business during a lifetime sufficiently to create a secondary meaning in that name and the right to use that name in conjunction with the same product or business has been validly assigned to another, the rights flowing therefrom survive the death of the assignor"). See also §§9.14-9.15 on statutes codifying a right of publicity.

Evidence of damages for unauthorized use of the plaintiff's likeness in an advertisement cannot include evidence of settlements paid in other cases in which the plaintiff's likeness was used. *O'Hearn v Hillcrest Gym & Fitness Ctr., Inc.* (2004) 115 CA4th 491, 9 CR3d 342 (bodybuilder's image used in ad; remand for retrial on damages).

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§9.14 b. Statutory: Living Persons

Damages may be recovered from a defendant who has violated CC §3344, which proscribes the knowing use, without his or her consent, of another's name, voice, signature, photograph, or likeness, "in any manner," including use on or in products, merchandise, or goods, or for advertising or selling products or services. See *Solano v Playgirl, Inc.* (9th Cir 2002) 292 F3d 1078, 1088 (actor depicted barechested on magazine cover with words suggesting he would be seen inside in sexually revealing poses could maintain action for CC §3344 violation; lower court's use of newsworthiness defense was premature; damages available include economic loss, defendant's profits from unauthorized use, statutory minimum, and punitive damages); *Waits v Frito-Lay, Inc.* (9th Cir 1992) 978 F2d 1093 ($375,000 compensatory and $2 million punitive to singer whose unique voice was imitated in radio commercial; California law not preempted by federal copyright law; attorney fee recoverable under 15 USC §1117 (Lanham Trade-Mark Act)). See also *Midler v Ford Motor Co.* (9th Cir 1988) 849 F2d 460 (defendant liable for using Bette Midler sound-alike in advertisements; deliberate imitation of widely known professional singer's voice was misappropriation under California law). But see *Laws v Sony Music Entertainment, Inc.* (9th Cir 2006) 448 F3d 1134 (licensed use of "sample" of singer's actual recording not actionable; copyright law preempted California misappropriation claim).

Conversely, depictions caricaturing celebrities, in which "significant creative elements" transform the depictions "into something more than mere celebrity likeness or imitation," enjoy First Amendment protection that trumps the right of publicity. *Winter v DC Comics* (2003) 30 C4th 881, 885, 134 CR2d 634 (no CC §3344 liability for drawings distorted for purposes of lampoon, parody, or comment). See *Comedy III Prods., Inc. v Gary Saderup, Inc.* (2001) 25 C4th 387, 106 CR2d 126 (liability when artist's reproduced drawing of Three Stooges on T-shirts and lithographs were not sufficiently transformative to receive First Amendment protection). See also *White v Samsung Elec., Inc.* (9th Cir 1992) 971 F2d 1395 (use, for advertising purposes, of robot that caricatured Vanna White did not violate CC §3344 because robot not a "likeness"; defendant could still be liable, however, for violating common-law right of privacy or trademark (15 USC §1125(a)).

NOTE: Civil Code §3344 was amended in 1984 to broaden its applicability beyond unauthorized use solely "for purposes of advertising products, merchandise, goods or services, or for purposes of solicitation of purchases of products." Cases applying the statute's pre-1984 wording to deny recovery for noncommercial misappropriations may thus be of limited precedential value. *KNB Enters. v Matthews* (2000) 78 CA4th 362, 92 CR2d 713. See, *e.g., Eastwood v Superior Court* (1983) 149 CA3d 409, 423, 198 CR 342 (works of fiction constitutionally protected in same manner as topical news stories); *Fleet v CBS, Inc.* (1996) 50 CA4th 1911, 58 CR2d 645; *Abdul-Jabbar v General Motors Corp.* (9th Cir 1996) 85 F3d 407. Note also that depiction of a short film clip within a movie could not be called a trademark entitled to protection under the Lanham Act. *Comedy III Prods., Inc. v New Line Cinema* (2000) 200 F3d 593, distinguishing *Waits v Frito-Lay, Inc., supra,* and *White v Samsung Elec., Inc., supra*.

Civil Code §3344 specifies certain restrictions on liability for misappropriating another's identity, and an alleged misappropriation may be protected by constitutional free speech concepts. See, *e.g.*, *Dora v Frontline Video, Inc.* (1993) 15 CA4th 536, 18 CR2d 790 (use of photographs, motion pictures, and audio recordings of self-described legendary figure in surfing in video documentary protected under CC §3344(d), which exempts use "in connection with any news, public affairs, or sports broadcast or account"; and public interest in subject matter of program gives constitutional protection from liability for common-law right to be free from misappropriation of name or likeness, in either of its branches: (1) the right of publicity (*i.e.,* the right to exploit commercially) and (2) the right to peace of mind (*i.e.,* freedom from injury to feelings)).

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§9.15 c. Statutory: Deceased Personalities

Damages may be recovered from a defendant who has violated CC §3344.1 (the Astaire Celebrity Image Protection Act), which proscribes the knowing use, without a statutorily specified person's consent, of a "deceased personality's" name, voice, signature, photograph, or likeness, "in any manner," including use on or in products, merchandise, or goods, or for advertising or selling products or services. See *Comedy III Prods., Inc. v Gary Saderup, Inc.* (2001) 25 C4th 387, 106 CR2d 126 (even under narrower predecessor to CC §3344.1, artist's selling reproduced drawing of Three Stooges on T-shirts and lithographs entitled Stooges' successors in interest to damages and attorney fee; depictions amounting to little more than appropriation of celebrities' economic value not protected by First Amendment).

Civil Code §3344.1 specifies certain restrictions on liability for misappropriating a deceased celebrity's identity. For example, no action may be brought under the statute after 70 years from the celebrity's death (CC §3344.1(g)), or if the depiction is in a fictional or nonfictional entertainment or a dramatic, literary, or musical work (CC §3344.1(a)(2)), or in connection with news, public affairs, or sports broadcast or account or a political campaign (CC §3344.1(j)).

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§9.16 2. Defenses

Showing that a person consented to the sued-on use of his or her name or likeness defeats the person's damages claim. See *Marder v Lopez* (9th Cir 2006) 450 F3d 445 (written release authorizing motion picture company to use dancer's description of details of her life as basis for film *Flashdance* sufficient to exonerate another company's use of *Flashdance*-like scenes in music video). See §§9.14-9.15.

The statute of limitations can provide a defense to causes of action for violation of the right of publicity, appropriation of likeness, and intentional infliction of emotional distress, asserted in a complaint filed 2 years after publication of plaintiffs' likeness. See *Christoff v Nestle USA, Inc.* (2009) 47 C4th 468, 97 CR3d 798 (single publication rule applies to suits for unauthorized commercial use of likeness; case remanded to determine whether defendant's repeated use of model's image in ads and other ways was single integrated publication); *Long v Walt Disney Co.* (2004) 116 CA4th 868, 10 CR3d 836 (computer-altered likenesses on nationally broadcast television program; single publication rule applied).

A defendant may also escape liability by convincing a court that the use of another's name or likeness was protected by the free speech and expression provisions of the First Amendment. See *Kirby v Sega of Am., Inc.* (2006) 144 CA4th 47, 57, 50 CR3d 607 (both state and federal constitutions protected makers of video game featuring female character drawn in anime style for liability to singer/dancer who had previously used similar clothing and movements; defendants entitled to attorney fees for prevailing); *Hoffman v Capital Cities/ABC, Inc.* (9th Cir 2001) 255 F3d 1180 (magazine publisher that used altered photograph of actor in fashion article not liable absent proof of actual (constitutional) malice by clear and convincing evidence). See also *Kournikova v General Media Communications, Inc.* (CD Cal 2003) 278 F Supp 2d 1111 (tennis celebrity failed to produce evidence the defendants acted with actual malice in conveying false impression that she endorsed magazine that depicted her on its cover). But see *Comedy III Prods., Inc. v Gary Saderup, Inc.* (2001) 25 C4th 387, 400, 106 CR2d 126 (First Amendment does not protect artist's selling reproduced drawing of Three Stooges on T-shirts and lithographs, amounting to little more than appropriation of celebrities' economic value). The First Amendment may also provide a defense against a claim that the cartoon depiction of a strip club in a video game infringed trademark and trade dress rights of an actual strip club. See *E.S.S. Entertainment 2000, Inc. v Rock Star Videos, Inc.* (9th Cir 2008) 547 F3d 1095 (drawings of "Pig Pen" in video game roughly imitated features and logo of Los Angeles's "Play Pen").

Free speech protections have been applied to allow the use of a plaintiff's name or likeness in truthful advertising that promotes the publication. See, *e.g., Cher v Forum Int'l, Ltd* (9th Cir 1982) 692 F2d 634 (magazine could use Cher's picture and refer to her truthfully in subscription advertising for purpose of indicating content (*i.e.,* that it contained an interview given by Cher)).

NOTE: The First Amendment is no bar to recovery, however, if the advertising falsely claims that a public figure endorses the news or other medium. See *Cher v Forum Int'l, Ltd, supra*; concurring opinion of Bird, CJ, in *Guglielmi v Spelling-Goldberg Prods.* (1979) 25 C3d 860, 160 CR 352. See also *Arrington v New York Times Co.* (1982) 449 NYS2d 941, 434 NE2d 1319. For a listing of other false endorsement cases, see *Cairns v Franklin Mint Co.* (CD Cal 2000) 107 F Supp 2d 1212, 1215, aff'd (9th Cir 2002) 292 F3d 1134 (Princess Diana memorabilia).

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III. DAMAGES AND RELIEF

§9.17 A. Mental Suffering, Emotional Distress, and Physical Consequences

A plaintiff who can prove the elements of an actionable invasion of privacy is entitled to damages for mental or emotional distress, whether or not coupled with or followed by physical manifestations of injury. *Miller v National Broad. Co.* (1986) 187 CA3d 1463, 1484, 232 CR 668 (damages recoverable for anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, and subsequent physical manifestations). See *Diaz v Oakland Tribune, Inc.* (1983) 139 CA3d 118, 188 CR 762 (extensive publicity, by causing greater emotional and mental distress, justifies larger damages); *Fairfield v American Photocopy Equip. Co.* (1955) 138 CA2d 82, 291 P2d 194.

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§9.18 B. Injury to Reputation

False-light privacy invasions may result in the same kinds of injury to reputation as does defamation. See generally *Fellows v National Enquirer, Inc.* (1986) 42 C3d 234, 247 n12, 228 CR 215 (false-light privacy invasion injures reputation; misappropriation of name or likeness injures proprietary interest; intrusion and public disclosure of private facts injure sensibilities and peace of mind). Arguably, misappropriation of name or likeness could also affect reputation or standing in the eyes of others.

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§9.19 C. Medical and Psychiatric Expenses; Other Damages

Special damages should be recoverable for privacy breaches that result in distress requiring medical or psychiatric treatment. See *Diaz v Oakland Tribune, Inc.* (1983) 139 CA3d 118, 188 CR 762. Similarly, damages should be recoverable for loss of earnings or employment, or of business opportunities.

A plaintiff who prevails on a cause of action for improper use of information properly obtained (see §9.2) may recover special and punitive damages, but the plaintiff's death before judgment precludes the estate, in a survival action (see chap 4), from recovering damages for emotional distress. *Urbaniak v Newton* (1991) 226 CA3d 1128, 1142, 277 CR 354.

NOTE: See §1.100 for discussion of *Urbaniak v Newton* (1993) 19 CA4th 1837, 24 CR2d 333, a later appeal, denying the examinee's estate the recovery of an attorney fee under the "private attorney general" statute.

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§9.20 D. Statutory Damages

Statutes that prohibit specified types of wiretapping, eavesdropping, and the publication of private information may also specify amounts recoverable by the person whose privacy has been invaded (or affected by such an invasion). Generally, these statutory damages are recoverable without the need to prove actual harm or loss. See, *e.g.*, Pen C §637.2, providing the greater of $5000 or three times any actual damages suffered for wiretapping or electronic eavesdropping of confidential communications. See §9.10.

Similarly, CC §3344 grants to the plaintiff in a misappropriation claim (see §9.14) the right to recover the greater of $750 or the actual damages suffered "as a result of the unauthorized use" of his or her name or likeness, together with any profits from the unauthorized use that are attributable to the use and are not taken into account in computing actual damages, plus attorney fees and costs. See *Miller v Collectors Universe, Inc.* (2008) 159 CA4th 988, 72 CR3d 194 (company's issuance of 14,060 form "certificates of authenticity" bearing plaintiff's name authorized statutory damages of $750, not 750 times 14,060). The remedies under CC §3344 are cumulative and are in addition to any others provided by law. CC §3344(g).

Damages for the willful and knowing release of confidential mental health information or records in violation of the Lanterman-Petris-Short Act are the greater of $10,000 or triple the actual damages. Welf & I C §5330(a). Damages for the *negligent* release of confidential information or records are both $1000 and actual damages, if any. Welf & I C §5330(b). Court fees and reasonable attorney fees must be awarded to a successful plaintiff under either of these subsections. Welf & I C §5330(d).

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§9.21 E. Punitive Damages

A plaintiff whose privacy was invaded may recover punitive damages only by meeting the requirements of CC §3294. See §14.5. See, *e.g., Diaz v Oakland Tribune, Inc.* (1983) 139 CA3d 118, 188 CR 762 (jury's awards of $250,000 compensatory damages and $525,000 punitive damages reversed for instructional error).

A plaintiff who prevails on a cause of action for improper use of information properly obtained (see §9.2) may recover special and punitive damages. *Urbaniak v Newton* (1991) 226 CA3d 1128, 1142, 277 CR 354.

An employee complaining of invasion of privacy based on his employer's installing eavesdropping devices in his office and wiretapping his private office and telephone could seek both statutory penalties under Pen C §637.2 and punitive damages for common-law invasion of privacy, but could not recover both. *Clauson v Superior Court* (1998) 67 CA4th 1253, 79 CR2d 747 (once favorable verdict returned, plaintiff required to choose between the two).

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F. Injunctive Relief

§9.22 1. Intrusion

Invasions of privacy that involve physical intrusion (see §§9.9-9.12) are more readily enjoined than are invasions involving speech. See *e.g., Galella v Onassis* (SD NY 1972) 353 F Supp 196, aff'd and modified (2d Cir 1973) 487 F2d 986 (plaintiffs obtained injunction against freelance photographer who regularly followed them; photographer's claimed First Amendment right to gather news, and public's right to be informed, rejected when harassment plaintiffs were suffering could not otherwise be prevented).

NOTE: When a privacy invasion is based on the content of a communication, the general constitutional prohibition against prior restraints prevents the entry of injunctions to restrain the invasion of privacy. See *Organization for a Better Austin v Keefe* (1971) 402 US 415, 29 L Ed 2d 1, 91 S Ct 1575; *Gilbert v National Enquirer, Inc.* (1996) 43 CA4th 1135, 51 CR2d 91 (actress failed to show grounds to enjoin publication of private information or for order to seal case record). But see *Frisby v Schultz* (1988) 487 US 474, 101 L Ed 2d 420, 108 S Ct 2495 (city ordinance prohibiting picketing in front of residences did not violate First Amendment).

Code of Civil Procedure §527.6 authorizes a victim of continuing harassment to seek both a temporary restraining order and an injunction against the guilty party. The prevailing party in an action brought under CCP §527.6 may be awarded court costs and attorney fees. CCP §527.6(i); *Krug v Maschmeier* (2009) 172 CA4th 796, 91 C3d 452 (attorney fee award discretionary with trial judge).

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§9.23 2. Misappropriation of Name or Likeness

Courts have occasionally been willing to grant injunctions to protect a person's property interests in his or her name or likeness. See *e.g., Ali v Playgirl, Inc.* (SD NY 1978) 447 F Supp 723 (injunction against defendant's use of objectionable portrait).

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IV. PROVING DAMAGES

A. Witnesses

§9.24 1. Plaintiff

Because the primary form of recoverable damages in an invasion of privacy suit is generally the plaintiff's mental suffering, the plaintiff is the most natural, and most crucial, witness. See *Fairfield v American Photocopy Equip. Co.* (1955) 138 CA2d 82, 291 P2d 194 (misappropriation of plaintiff's name). The plaintiff can testify to his or her efforts to keep certain matters private, the serious mental harm he or she has suffered as the result of the breach of his or her right of privacy, and any special damages he or she has incurred. See, *e.g., Diaz v Oakland Tribune, Inc.* (1983) 139 CA3d 118, 188 CR 762.

Concerning mental suffering, the plaintiff may testify about his or her feelings of anger, anguish, hurt, and depression and, at least to a limited extent, about others' statements in his or her presence. See *Fairfeld v American Photocopy Equip. Co., supra*. Although such testimony would be hearsay if submitted for its truth or to demonstrate that a third party believed the information, it is not hearsay when offered for the limited purpose of showing that the statement was made to illustrate its consequent impact on the plaintiff's mental feelings. See *Russell v Geis* (1967) 251 CA2d 560, 59 CR 569.

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§9.25 2. Plaintiff's Friends and Coworkers

A plaintiff's friends and coworkers can testify to their perception that the plaintiff was suffering distress. See generally *Diaz v Oakland Tribune, Inc.* (1983) 139 CA3d 118, 188 CR 762. They may have perceived the plaintiff's efforts to keep certain personal information private. They may also be able to describe statements of third parties in the plaintiff's presence, not for the truth of the statements or to demonstrate the speaker's belief in those words, but merely to show that the plaintiff heard the statements, to aid the jury in calculating the depth of the plaintiff's mental suffering. See generally *Russell v Geis* (1967) 251 CA2d 560, 571, 59 CR 569 (defamation case; on issue of humiliation and mental suffering, no error in permitting plaintiff to testify that "her daughter came home from school and said she was no longer permitted to play with children she had formerly played with, and that children told her her mother was a thief"); *Fairfield v American Photocopy Equip. Co.* (1955) 138 CA2d 82, 90, 291 P2d 194 (invasion of privacy case; error not to permit plaintiff to testify about what others said to him to show his mortification of feelings). But see *Turner v Hearst* (1896) 115 C 394, 399, 47 P 129 (defamation case; on issue of mental suffering, error to permit plaintiff to testify to what clients, reporters, and others said about publication). Finally, coworkers should be able to testify in support of a special damages claim relating to employment.

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§9.26 3. Expert Witnesses

Medical experts can be used to corroborate a plaintiff's mental suffering, the extent of emotional distress, and any resulting physical manifestations. See generally §1.78 and *Diaz v Oakland Tribune, Inc.* (1983) 139 CA3d 118, 188 CR 762.

Similarly, economic experts may testify to the plaintiff's economic loss when his or her employment has been damaged or destroyed as a consequence of the challenged publication. When the claim is based on misappropriation of the name or likeness for commercial purposes, expert testimony concerning the value of the plaintiff's name or likeness for that particular commercial misappropriation should be admissible, as well as testimony to prove the defendant's profits resulting from the misappropriation.

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Source: Torts/California Tort Damages/9 Invasion of Privacy/§9.27 B. Documents

§9.27 B. Documents

The same kinds of documents that can be introduced to show damages for bodily injury (see §§1.77-1.81) may also show the harm and loss resulting from an invasion of privacy.

Similarly, when the plaintiff can allege and prove some interference with his or her employment or other professional or occupational status, his or her records of employment, including income, evaluations, and the like, should be admissible if the proper evidentiary foundation is established.

A plaintiff may be entitled, under Welf & I C §827, to obtain juvenile court records and documents needed to pursue an invasion of privacy lawsuit. See *In re Gina S.* (2005) 133 CA4th 1074, 35 CR3d 277.

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§9.28 V. TAX CONSEQUENCES

A plaintiff need not declare, as taxable income, "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." IRC §104(a)(2). See Notes in §1.112 and §8.48 on the unconstitutionality of taxing damages that compensate a plaintiff for emotional distress or other forms of harm or loss that are unrelated to lost wages or earnings.

NOTE: On characterizing privacy as a purely personal right, see *Flynn v Higham* (1983) 149 CA3d 677, 683, 197 CR 145.

It may be that damages for misappropriation of name or likeness are also excludable from taxable income. See *Roemer v Commissioner* (9th Cir 1983) 716 F2d 693, 700 (defamation by false credit report injured plaintiff's business reputation; lump-sum jury award that did not distinguish between damages for injury to personal reputation and damages for injury to professional and business reputation not taxable). See generally §§8.48-8.50.

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10

Malicious Prosecution

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I. LIABILITY FACTORS

A. Nature of Cause of Action

§10.1 1. Purpose; Pleadings

"The tort of malicious prosecution lies to compensate an individual who is maliciously hailed into court and forced to defend against a fabricated cause of action." *Pace v Hillcrest Motor Co.* (1980) 101 CA3d 476, 478, 161 CR 662. To establish the cause of action, a plaintiff must plead and prove that a prior legal proceeding was:

- Commenced by or at the defendant's direction (see §§10.9-10.13);
- Instituted or maintained without probable cause (see §§10.9, 10.14-10.15);
- Initiated with malice (see §10.16);
- Pursued to legal termination in the plaintiff's favor (see §§10.17-10.20); and
- A cause of injury or loss (see §10.21).

Bertero v National Gen. Corp. (1974) 13 C3d 43, 50, 118 CR 184 (malicious prosecution of cross-complaint); *Bisno v Douglas Emmett Realty Fund 1988* (2009) 174 CA4th 1534, 1544, 95 CR3d 492 (malicious prosecution of unlawful detainer action). For further discussion of elements of this cause of action, see §§10.9-10.21.

The plaintiff's proof of malice and absence of probable cause need only apply to one, at least, of the "grounds for liability" asserted in the prior legal proceeding. *Crowley v Katleman* (1994) 8 C4th 666, 34 CR2d 386. See also discussion of "favorable termination" in §10.17.

NOTE: The elements that a plaintiff must prove to establish a malicious prosecution cause of action are listed, in terms that differ somewhat from those used by the courts, in CACI 1500 (prior criminal proceeding) and CACI 1501 (prior civil proceeding).

Malicious prosecution is a cause of action not favored by the law. *Babb v Superior Court* (1971) 3 C3d 841, 847, 92 CR 179 (rejecting medical malpractice suit defendant's attempt to seek, by cross-complaint, declaration that suit was being maliciously prosecuted).

Further, in contrast to malicious prosecution, malicious *defense* of a justified action has not been recognized as a basis for a malicious prosecution action, although it may support recovery under another tort theory. See *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 52, 118 CR 184. Further, there is no cause of action for malicious appeal by a defendant. See *Coleman v Gulf Ins. Group* (1986) 41 C3d 782, 794, 226 CR 90 (filing appeal "is not a separate proceeding and has no independent existence…; it is merely the continuation of an action"; defendant's appeal not separate action for affirmative relief, but rather merely continuation of attempt to repel plaintiff's attack).

Although courts have referred to malicious prosecution as a "disfavored cause of action" (see *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 872, 254 CR 336), that "convenient phrase" cannot be used to defeat a legitimate claim. *Zamos v Stroud* (2004) 32 C4th 958, 966, 12 CR3d 54 (noted in §§10.5, 10.9, 10.25).

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§10.2 2. Other Torts Compared

Abuse of process differs from malicious prosecution in that it involves the misuse of court process for an ulterior purpose, such as extortion. See chap 11.

A cause of action for false arrest or imprisonment is based on the illegal deprivation of a person's liberty, and actual deprivation must be shown. See chap 12.

There are circumstances in which a malicious prosecution cause of action against a public entity may be joined with a cause of action for violation of federal civil rights under 42 USC §1983. See *Newman v County of Orange* (9th Cir 2006) 457 F3d 991 (arrestee's malicious prosecution action against officer dismissed for failure to overcome presumption that prosecutor exercised independent judgment in choosing to file charges). See discussion in §12.33 of joining §1983 claims with actions for false arrest and imprisonment. Care must be taken that the damages recovered under the two causes of action are not overlapping. See *Gentile v County of Suffolk* (2d Cir 1991) 926 F2d 142, 153.

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§10.3 B. Persons Who May Recover

Malicious prosecution actions are "personal actions which do not give rise to a cause of action in any one other than the person directly aggrieved." *Coverstone v Davis* (1952) 38 C2d 315, 324, 239 P2d 876 (father of person allegedly maliciously prosecuted could not maintain action even though he claimed actual damage to his reputation due to son's arrest and prosecution). See *Pillsbury v Karmgard* (1994) 22 CA4th 743, 27 CR2d 491 (beneficiary of express trust held not to have standing to bring malicious prosecution suit when trustee declined to sue). The spouse of a maliciously prosecuted person may, however, sue for damages for loss of consortium. See chap 2.

Ordinarily, the person "directly aggrieved" was a defendant in the earlier maliciously prosecuted action. It appears that each of several such defendants may prosecute his or her own malicious prosecution action. See *City of Long Beach v Bozek* (1983) 33 C3d 727, 190 CR 918 (vacating and reiterating earlier decision in which court declined to rule that malicious prosecution was limited to individual plaintiffs).

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C. Persons Who May Be Liable

§10.4 1. Participants in Underlying Action

Persons whose participation in the underlying action is causally related to its initiation or instigation can be liable for malicious prosecution. See *Hardy v Vial* (1957) 48 C2d 577, 311 P2d 494 (fired college professor could maintain action against college personnel who neither made independent investigation of, nor verified, allegations against professor, when state personnel board found charges untrue and ordered reinstatement). See also *Sandoval v Southern Cal. Enters.* (1950) 98 CA2d 240, 248, 219 P2d 928 ("test is whether a defendant… was actively instrumental or was the proximate cause of maliciously putting the law in motion").

A complaining witness in a criminal prosecution, but not a mere percipient witness, may be liable for malicious prosecution. See *Lujan v Gordon* (1977) 70 CA3d 260, 138 CR 654. Furthermore, "a person who aids and abets a malicious prosecution after someone else has commenced it may be held liable." 70 CA3d at 263 (law firm members). But see *Cedars-Sinai Med. Ctr. v Superior Court* (1988) 206 CA3d 414, 253 CR 561 (private persons who merely identified voice on tape recording as plaintiff's in course of police investigation that led to criminal prosecution not liable).

Persons and entities acting in certain capacities may, in addition to asserting that they did not initiate the underlying proceeding, assert an immunity (see §10.7) or a privilege (see §10.25). See, *e.g., Johnson v Superior Court* (1994) 25 CA4th 1564, 31 CR2d 199 (expert medical consultants to professional regulatory board, when board is to determine whether charges should be filed), disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724 n4, 3 CR3d 623; *Hogen v Valley Hosp.* (1983) 147 CA3d 119, 195 CR 5 (claimant not liable; Board of Medical Quality Assurance, relying on independent investigation, initiated underlying proceeding).

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§10.5 2. Attorneys

An attorney's participation on a client's behalf in an underlying proceeding may subject the attorney to malicious prosecution liability if the attorney lacked a well-founded good faith belief in the merits of the client's action. See §10.15 on the probable cause standard for attorneys.

An attorney who continues to prosecute a lawsuit after learning that it was not supported by probable cause can be liable for malicious prosecution even though the underlying lawsuit was properly begun. *Zamos v Stroud* (2004) 32 C4th 958, 965, 12 CR3d 54 (malicious prosecution plaintiffs showed sufficient probability of prevailing to defeat anti-SLAPP motion (see §10.25). This *Zamos* ruling is applied retroactively. *Bergman v Drum* (2005) 129 CA4th 11, 23, 28 CR3d 112 (also noted in §10.25).

Civil Code §1714.10, which requires the plaintiff to obtain a court order before suing an attorney for civil conspiracy, provides no defense to an attorney sued for malicious prosecution. *Alden v Hindin* (2003) 110 CA4th 1502, 2 CR3d 845 (error to dismiss malicious prosecution count; conspiracy count was surplusage); *Westamco Inv. Co. v Lee* (1999) 69 CA4th 481, 81 CR2d 634 (allegations that the attorney conspired with client to prosecute underlying proceeding (1) were without probable cause and adequate investigation, and (2) would have been recognized as untenable by any reasonable attorney).

See §10.15 on the standard for establishing probable cause in malicious prosecution actions against attorneys.

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§10.6 3. Entities; Principals; Insurers

Corporations and other entities are subject to malicious prosecution liability. See *Kinsey v Wallace* (1868) 36 C 462, 478. See also *Iram Enters. v Veditz* (1981) 126 CA3d 603, 179 CR 1 (nonprofit corporation that commenced prior action, but not its individual "members," subject to malicious prosecution liability).

Similarly, a principal may be liable for a malicious prosecution action commenced by an agent either under normal principles of agency law or by ratifying the agent's act.

There are circumstances in which the insurer for a party in a lawsuit can be subject to malicious prosecution liability for pursuing a declaratory relief action, or other claim against the insured. See, *e.g., Camarena v Sequoia Ins. Co.* (1987) 190 CA3d 1089, 235 CR 820.

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§10.7 D. Immunity From Liability

Public entities and their officers are often immune from malicious prosecution actions. See Govt C §821.6, which provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." See *Blackburn v County of Los Angeles* (1974) 42 CA3d 175, 177, 116 CR 622; *Engel v McCloskey* (1979) 92 CA3d 870, 886, 155 CR 284 (committee of bar examiners).

Public policy considerations may persuade a court to immunize a person from malicious prosecution liability independent of any statute. See, *e.g., Rodas v Speigel* (2001) 87 CA4th 513, 520, 104 CR2d 439 (investigator whose report to insurer on condition of floor in house was submitted to contractor's licensing board, and who testified there, not liable to licensed contractor for malicious prosecution); *Stanwyck v Horne* (1983) 146 CA3d 450, 459, 194 CR 228 (person filing complaint about attorney with State Bar).

Litigants who use the small claims court procedure to seek redress are absolutely immune from malicious prosecution liability. See *Cooper v Pirelli Cable Corp.* (1984) 160 CA3d 294, 206 CR 581; *Black v Hepner* (1984) 156 CA3d 656, 202 CR 799.

The privilege afforded by CC §47(b) for statements made in connection with judicial proceedings may be invoked in defamation actions, but not in malicious prosecution actions. *Rothman v Jackson* (1996) 49 CA4th 1134, 1145, 57 CR2d 284. See *Albertson v Raboff* (1956) 46 C2d 375, 378, 295 P2d 405 (partially abrogated on other grounds by statutory amendment). This is true even when both claims arise out of an improperly instigated lawsuit. See *Steiner v Eikerling* (1986) 181 CA3d 639, 226 CR 694 (defendants who had previously caused forged will to be admitted for probate subject only to malicious prosecution liability). See also §§8.19, 10.11.

NOTE: A plaintiff may be able to maintain a federal civil rights action under 42 USC §1983, free of state-created immunities. See *Malley v Briggs* (1986) 475 US 335, 106 S Ct 1092, 89 L Ed 2d 271 (officer who procures arrest based on inadequate warrant may be liable for damages, notwithstanding his belief that allegations in warrant were true).

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§10.8 E. Insurance Coverage

The liability insurer of a person held liable for malicious prosecution damages may sometimes invoke Ins C §533, which permits an insurer to exempt itself from liability for an insured's willful act. See, *e.g., Downey Venture v LMI Ins. Co.* (1998) 66 CA4th 478, 78 CR2d 142 (insurer prohibited from indemnifying for malicious prosecution even when policy expressly provides such coverage; parties cannot contract for such coverage).

There may be situations, however, in which coverage is provided. See, *e.g., California Cas. Mgmt. Co. v Martocchio* (1992) 11 CA4th 1527, 15 CR2d 277 (insurer liable to indemnify insured for malicious prosecution damages nevertheless barred by Ins C §533 from paying monetary sanctions imposed by court on insured for bad faith conduct of insured's lawsuit). See also *Harbor Ins. Co. v Central Nat'l Ins. Co.* (1985) 165 CA3d 1029, 1034 n2, 211 CR 902 (Ins C §533 defense not raised in trial court or on appeal).

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F. Elements of Cause of Action

§10.9 1. Commencing or Continuing Prior Proceeding

A malicious prosecution action requires that the prior proceeding was actually commenced. Mere threats are insufficient. The commencement event for different kinds of underlying proceedings (*e.g.,* criminal, administrative, civil in personam, civil in rem) differs. Sections 10.10-10.12 discuss commencement points for several kinds of proceedings.

Continuing to prosecute a proceeding after learning that it was not supported by probable cause can be malicious prosecution even if the underlying proceeding was properly begun. *Zamos v Stroud* (2004) 32 C4th 958, 965, 12 CR3d 54 (attorney liability; see §10.5). Seeking an injunction against an employee under CCP §527.8 (Workplace Violence Safety Act) cannot be the basis for a malicious prosecution claim. *Robinzine v Vicory* (2006) 143 CA4th 1416, 50 CR3d 65 (sanctions under Act provided remedy for baseless and harassing allegations used to obtain injunction).

NOTE: A malicious prosecution defendant is entitled to dismissal of a suit based on proceedings initiated in an earlier bankruptcy proceeding; the federal bankruptcy laws provide sufficient remedies for misconduct in such proceedings and preempt state malicious prosecution suits based on them. *Saks v Parilla, Hubbard & Militzok* (1998) 67 CA4th 565, 79 CR2d 120. However, there appears to be an exception to the general rule of bankruptcy preemption for suits begun in state court that are not based on federal law or of a core bankruptcy character. See *Satten v Webb* (2002) 99 CA4th 365, 121 CR2d 234.

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Source: Torts/California Tort Damages/10 Malicious Prosecution/§10.10 a. Criminal Prosecution

§10.10 a. Criminal Prosecution

The procurement of the actual arrest of an individual is a sufficient step in the criminal process to signify that the underlying proceeding has begun. *Ray Wong v Earle C. Anthony, Inc.* (1926) 199 C 15, 247 P 894.

The rendering of an indictment or information is also sufficient to satisfy the commencement requirement. *Dreux v Domec* (1861) 18 C 83.

NOTE: An unsuccessful attempt to instigate a criminal prosecution does not support a malicious prosecution action. See *Ferraris v Levy* (1963) 223 CA2d 408, 36 CR 30. There appears, however, to be a gray area short of procuring an arrest in which the commencement of a criminal prosecution may be deemed to have begun. See 52 Am Jur 2d, *Malicious Prosecution*, §21 (1970). The Restatement position is that issuance of an arrest warrant is sufficient. Restatement (Second) of Torts §654(2)(a) (1977). See Anno, 81 ALR4th 1031 (1990) (effect of police having suppressed or failed to disclose or investigate exculpatory evidence).

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b. Civil Proceedings

§10.11 (1) Civil Actions; Ancillary Proceedings

For malicious prosecution purposes, the underlying civil action is deemed to have been commenced at least on service of the summons (and complaint). See *Eastin v Bank of Stockton* (1884) 66 C 123, 126, 4 P 1106; *Metzenbaum v Metzenbaum* (1953) 121 CA2d 64, 68, 262 P2d 596.

NOTE: For many purposes a civil action commences when the complaint is filed (CCP §350), but it is not clear that the mere filing of a complaint should provide a sufficient predicate for a malicious prosecution action. It could be argued that mere filing does not subject the defendant to the kinds of harm and loss a malicious prosecution action is designed to remedy. On the other hand, if the underlying action had been publicized, especially by the party that filed the underlying complaint, malicious prosecution damages might well be recoverable. See *Weaver v Superior* Court (1979) 95 CA3d 166, 156 CR 745 (malicious prosecution action upheld against summary judgment when underlying complaint had been filed but not served).

A malicious prosecution action also may be based on a proceeding ancillary to the underlying action, such as the filing and service of a cross-complaint. *Nicholson v Fazeli* (2003) 113 CA4th 1091, 6 CR3d 881 (malicious prosecution suit may be based on defendant's cross-complaint in marital dissolution proceeding; also noted in §10.17); *Minasian v Sapse* (1978) 80 CA3d 823, 145 CR 829 (counter-claim and cross-claim in original action). See also *Paramount Gen. Hosp. v Jay* (1989) 213 CA3d 360, 365 n2, 261 CR 723 (person sued as defendant in partnership dispute, but who agreed to be bound as plaintiff, can be liable).

Pursuit of an attachment in a lawsuit may give rise to malicious prosecution liability even if the complaint in that suit would not, by itself, have supported such damages. See Restatement (Second) of Torts §674, Comment f (1977). See generally, Anno, 70 ALR 3d 536 (1976) (proceedings for injunction or restraining order as basis of malicious prosecution action). But see *Merlet v Rizzo* (1998) 64 CA4th 53, 59, 75 CR2d 83 (malicious prosecution cannot be based on favorable termination of subsidiary part of ongoing litigation).

Filing a civil harassment petition under CCP §527.6 is not an underlying action that can be the basis of a malicious prosecution lawsuit. *Siam v Kilzilbash* (2005) 130 CA4th 1563, 31 CR3d 368 (no basis if order not obtained).

A postjudgment order to show cause re contempt and modification of visitation rights has been held to be a separate proceeding that could be the basis for malicious prosecution damages. See *Chauncey v Niems* (1986) 182 CA3d 967, 227 CR 718. But see *Lossing v Superior Court* (1989) 207 CA3d 635, 255 CR 18 (court "strongly disagreed" with *Chauncey v Niems* and held that action for malicious prosecution will not lie based on an unsuccessful attempt to have contempt adjudged during discovery proceedings in an ongoing action). See also *Bidna v Rosen* (1993) 19 CA4th 27, 23 CR2d 251 (malicious prosecution action not available to remedy conduct of other party in family law proceeding (here, dispute over child custody) no matter how egregious); *Green v Uccelli* (1989) 207 CA3d 1112, 255 CR 315 (withdrawal of order to show cause concerning contempt in dissolution action cannot form basis of malicious prosecution action).

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§10.12 (2) Administrative Proceedings

The initiation of an administrative proceeding, the result of which might be a firing or other invasion of a person's "legally protected interest," may be deemed the commencement of a proceeding for malicious prosecution purposes even before that initiation has led to a formal hearing, especially if the person has initiated proceedings to secure reinstatement of a position or license. See, *e.g., Hardy v Vial* (1957) 48 C2d 577, 311 P2d 494 (fired professor); *Axline v Saint John's Hosp. & Health Ctr.* (1998) 63 CA4th 907, 916, 74 CR2d 385 (doctor denied staff privileges by hospital's board of directors), disapproved on other grounds in *Hassan v Mercy Am. River Hosp.* (2003) 31 C4th 709, 724 n4, 3 CR3d 623.

Not all administrative proceedings provide a basis for a malicious prosecution action. See *Imig v Ferrar* (1977) 70 CA3d 48, 58, 138 CR 540 (no liability based on police department's initiation of internal investigation of citizen's complaint against officer, which did not lead to hearing before administrative tribunal with power to sanction officer); *Stolz v Wong Communications Ltd. Partnership* (1994) 25 CA4th 1811, 31 CR2d 229 (pursuit of application for radio station license, although it gives rise to adversarial "comparative hearing" before Federal Communications Commission, is not "action against another" on which malicious prosecution lawsuit may be based).

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§10.13 (3) Arbitration Proceedings

The submission of a lawsuit to binding contractual arbitration acts to remove that lawsuit, and its commencement and pursuit, as bases for a malicious prosecution claim. *Brennan v Tremco Inc.* (2001) 25 C4th 310, 317, 105 CR2d 790 ("termination by contractual arbitration is simply not the sort of favorable termination needed to support a malicious prosecution action"; trends disfavor creation or expansion of derivative tort remedies and favor allowing parties voluntarily to end disputes through private arbitration).

NOTE: The *Brennan* court distinguished but approved *Sagonowsky v More* (1998) 64 CA4th 122, 75 CR2d 118, in which the court ruled that a malicious prosecution claim could not be based on an arbitration pursued to resolve a dispute that had not been made the subject of a suit. *Brennan* disapproved, to the extent that it is inconsistent, *Rogers v Peinado* (2000) 85 CA4th 1, 101 CR2d 817, which held that a malicious prosecution suit could not be pursued against the party who entered into a private arbitration agreement, but could be pursued against that party's attorneys, who were not parties to the agreement. *Brennan*, 25 C4th at 317. *Brennan* would not appear to preclude a malicious prosecution suit against persons who initiate and pursue underlying lawsuits that go to statutorily mandatory judicial arbitration.

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Source: Torts/California Tort Damages/10 Malicious Prosecution/ 2. Lack of Probable Cause/§10.14 a. General Standard

2. Lack of Probable Cause

§10.14 a. General Standard

In the malicious prosecution suit, plaintiff must plead and prove that the proceeding sued on was instituted without probable cause with regard to at least one of the causes of action or counts alleged. *Crowley v Katleman* (1994) 8 C4th 666, 676, 34 CR2d 386; *Videotape Plus, Inc. v Lyons* (2001) 89 CA4th 156, 161, 107 CR2d 1 (in malicious prosecution suit, negligence count added in attempt to ensure insurance coverage lacked probable cause). See *Hindin v Rust* (2004) 118 CA4th 1247, 13 CR3d 668 (cause of action for malicious prosecution distinguished from forms of relief sought); *City-Wide Preferred Couriers, Inc. v Golden Eagle Ins. Corp.* (2003) 114 CA4th 906, 8 CR3d 199 (malicious prosecution claim can be maintained even if most, but not all, of amount claimed in underlying suit was without probable cause); *Sangster v Paetkau* (1998) 68 CA4th 151, 80 CR2d 66 (if court determines there was probable cause to institute prior action, malicious prosecution action fails even if prior suit was maliciously motivated). See also CACI 1503.

NOTE: *Crowley v Katleman* (1994) 8 C4th 666, 686, 34 CR2d 386, notes that the rule stated in *Freidberg v Cox* (1987) 197 CA3d 381, 242 CR 851, discussed in §10.17, that there must have been a *favorable termination* of the entire underlying suit does not, by analogy, require that all underlying causes of action have been asserted without *probable cause*.

Probable cause exists when a cause of action is, objectively speaking, legally tenable. *Videotape Plus, Inc. v Lyons, supra*. That is, whether there was probable cause for instituting the underlying proceeding is a question of law that turns on whether the underlying claim was legally tenable, as determined on an objective basis. *Estate of Tucker v Interscope Records, Inc.* (2008) 515 F3d 1019, 1031 (question is not whether defendant thought facts constituted probable cause but whether court thinks so; probable cause standard contrasted with that for malice; see §10.16).

If the knowledge and belief of the plaintiff in the original suit (the defendant in the malicious prosecution suit) supporting the underlying causes of action are undisputed, probable cause is a legal question for the trial judge; but, if such knowledge or belief are disputed, the jury must determine the facts before the judge decides whether those facts constitute probable cause. *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 881, 254 CR 336 (discussed in §10.15); *Videotape Plus, Inc. v Lyons, supra* (lack of probable cause is absence of honest and actual belief on instigator's part in the truth of facts there asserted in support of claim or contention).

Lack of probable cause can be established by proof that:

- The prior action was commenced despite the initiator's knowledge of the falsity of the claim; or
- A reasonable person would not have believed, based on the facts known to the initiator, that the prior action was legally tenable.

Bertero v National Gen. Corp. (1974) 13 C3d 43, 55, 118 CR 184. See *Sierra Club Found. v Graham* (1999) 72 CA4th 1135, 85 CR2d 726 (lack of probable cause can be shown by proof that defendant either (1) was not reasonable in bringing prior action, court's "objective call," or (2) commenced prior action knowing claims were false; probable cause is question of law, but if there is dispute concerning defendant's knowledge of facts, jury resolves threshold factual question and court determines whether defendant's knowledge constitutes absence of probable cause).

Probable cause has been defined as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true." See *Nicholson v Lucas* (1994) 21 CA4th 1657, 1665, 26 CR2d 778 (plaintiff never rebutted defendants' showing that their attempt, by administrative hearing, to deny him surgical privileges was based on probable cause; mere fact that review committee ultimately reversed denial of privileges does not establish, or raise presumption, that initial accusations, which followed expert review of patient records, lacked probable cause).

A person who asserts a charge or claim in an action or proceeding not believing it to be true cannot escape liability for commencing the earlier action "merely because a reasonable man might have believed it was meritorious." *Bertero*

v National Gen. Corp., supra. See *Jacques Interiors v Petrak* (1987) 188 CA3d 1363, 1370, 234 CR 44 (if defendant does not believe in facts, the fact that cautious person could have believed there was probable cause will not vindicate defendant); *Cowles v Carter* (1981) 115 CA3d 350, 171 CR 269 (defining probable cause).

The person who initiated the underlying proceeding cannot defend against malicious prosecution liability by showing facts acquired subsequent to the initiation of the proceeding. See *Hudson v Zumwalt* (1944) 64 CA2d 866, 872, 149 P2d 457. See also *Centers v Dollar Markets* (1950) 99 CA2d 534, 543, 222 P2d 136. See generally Restatement (Second) of Torts §674 (1977) ("one who takes an active part in the… continuation of civil proceedings against another" may be liable).

Resolution of the underlying proceeding in a way the favors the person who initiated it (as by a conviction or judgment) conclusively establishes that there was probable cause to initiate it. See *Williams v Taylor* (1982) 129 CA3d 745, 755, 181 CR 423. See also *Paiva v Nichols* (2008) 168 CA4th 1007, 85 CR3d 838 (that malicious prosecution defendant had obtained preliminary injunction in underlying case showed probable cause even though injunction not perfected by posting undertaking); *Wilson v Parker, Covert & Chidester* (2002) 28 C4th 811, 826, 123 CR2d 19 (ruling dismissing defendant's anti-SLAPP motion (see §10.25) in underlying suit conclusively showed that plaintiff in that suit had probable cause to pursue it); *White v Lieberman* (2002) 103 CA4th 210, 126 CR2d 608 (conclusive proof based on trial court judgment applies even if judgment reversed on appeal); *Vanzant v DaimlerChrysler Corp.* (2002) 96 CA4th 1283, 118 CR2d 48 (obtaining partial summary judgment in underlying case, even when reversed on appeal, conclusively proved probable cause), disapproved on other grounds in *Zamos v Stroud* (2004) 32 C4th 958, 973, 12 CR3d 54. On the other hand, the unfavorable resolution of the original proceeding (acquittal, dismissal, judgment for defendant) does not necessarily establish absence of probable cause. See *Ecker v Raging Waters Group, Inc.* (2001) 87 CA4th 1320, 105 CR2d 320 (probable cause to arrest person existed and defeated malicious prosecution claim even though person acquitted of criminal charges). Further, the fact that an indictment was returned makes a prima facie case for the existence of probable cause, subject, however, to rebuttal on the ground that the testimony on which the indictment was based was false or fraudulent. *Williams v Hartford Ins. Co.* (1983) 147 CA3d 893, 195 CR 448.

Denial of the original lawsuit defendant's summary judgment motion "normally" establishes that the plaintiff in that suit had probable cause to sue. See *Roberts v Sentry Life Ins.* (1999) 76 CA4th 375, 384, 90 CR2d 408 (rejecting, on basis of reasoning in *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 254 CR 336 (discussed in §10.15), contrary reasoning in pre-1989 cases). But see *Lucchesi v Giannini & Uniack* (1984) 158 CA3d 777, 787, 205 CR 62 (neither denial of motion for summary judgment nor denial of motion for nonsuit established that original action was instigated on probable cause).

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Source: Torts/California Tort Damages/10 Malicious Prosecution/§10.15 b. Standard for Attorneys

§10.15 b. Standard for Attorneys

For an attorney charged with malicious prosecution for initiating a proceeding on behalf of a client, probable cause is measured by an objective standard; the ultimate determination of whether the attorney had probable cause to institute an action (on the client's behalf) must be made by the trial court, not the jury. *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 876, 254 CR 336. Preliminary questions on what facts the attorney knew when the action was instituted, however, should be submitted to the jury. 47 C3d at 884. These preliminary factual questions are limited to the attorney's knowledge of facts, and at this preliminary stage the attorney's intent is irrelevant. 47 C3d at 881. Once any preliminary factual questions are decided, the trial court must determine the ultimate issue of probable cause. The court also held that:

- The adequacy of the attorney's legal research was also irrelevant to the issue of probable cause (47 C3d at 882);
- It is improper to admit expert legal testimony on the issue of probable cause (47 C3d at 884);
- The standard for determining probable cause is "whether any reasonable attorney would have thought the claim tenable" (47 C3d at 886);
- The attorney's subjective intent is relevant to the issue of malice (47 C3d at 881); and
- The extent of the attorney's investigation, while not relevant to probable cause, may be relevant to the issue of malice (47 C3d at 883).

See *Kreeger v Wanland* (2006) 141 CA4th 826, 46 CR3d 790 ("A" attorneys suing "B" attorneys for malicious prosecution likely to be able to prove that "B" attorneys—when they prosecuted malicious prosecution against "A" attorneys—lacked probable cause to believe that "A" attorneys lacked probable cause to pursue their client's personal injury claim against wife of "B" attorney for causing automobile collision); *Morrison v Rudolph* (2002) 103 CA4th 506, 126 CR2d 747 (attorney evaluating whether to initiate legal proceeding may generally rely on information provided by client; action is tenable, from legal standpoint, if supported by existing authority or reasonable extension of authority and from factual perspective if there is at least information reasonably warranting inference there is evidence sufficient to prevail), disapproved on other grounds in *Zamos v Stroud* (2004) 32 C4th 958, 973, 12 CR3d 54; *Fleishman v Superior Court* (*Salisbury*) (2002) 102 CA4th 350, 125 CR2d 383 (issuance of preliminary injunction in underlying action conclusively establishes attorney's probable cause); *Swat-Fame, Inc. v Goldstein* (2002) 101 CA4th 613, 124 CR2d 556 (attorneys reasonably relied on information supplied by client in filing underlying suit), disapproved on other grounds in *Zamos v Stroud* (2004) 32 C4th 958, 973, 12 CR3d 54; *Puryear v Golden Bear Ins. Co* (1998) 66 CA4th 1188, 78 CR2d 507 (test is whether reasonable attorney would have thought claim "objectively" tenable); *Mabie v Hyatt* (1998) 61 CA4th 581, 71 CR2d 657 (attorney must have reasonable belief in possibility of success in light of all legal and factual circumstances, and reasonable belief in validity of each asserted theory; probable cause is question of law to be determined by court); *Norton v Hines* (1975) 49 CA3d 917, 924, 123 CR 237 (malicious prosecution action lies if attorney prosecutes claim that reasonable lawyer would consider untenable, or unreasonably neglects to investigate facts and law).

NOTE: In *Sheldon Appel Co. v Albert & Oliker, supra,* the supreme court rejected the subjective test for probable cause set forth in *Tool Research & Eng'g Corp. v Henigson* (1975) 46 CA3d 675, 683, 120 CR 291, which had ruled that an attorney has probable cause to represent a client if, after "reasonable investigation and industrious search of legal authority," the attorney has an honest belief that the "client's claim is tenable in the forum in which it is to be tried." The supreme court also disapproved language in *Williams v Coombs* (1986) 179 CA3d 626, 639, 224 CR 865 (even when subjective standard for probable cause is shown—*i.e.,* that attorney honestly believed client's claim was tenable—lack of probable cause can be established by showing that objective standard is not satisfied —*i.e.,* that prudent attorney, after investigating facts and researching law as case circumstances reasonably warrant, would have deemed action untenable on theory advanced). 47 C3d at 883 n9. See CACI 1503.

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Source: Torts/California Tort Damages/10 Malicious Prosecution/§10.16 3. Malice

§10.16 3. Malice

Malice as a requisite for a malicious prosecution suit refers to the existence of an improper purpose in initiating the proceeding, and is not limited to hatred or ill will towards the defendant in the underlying action (the malicious prosecution suit plaintiff). See *Albertson v Raboff* (1956) 46 C2d 375, 383, 295 P2d 405 (partially abrogated on other grounds by statutory amendment), in which the court noted that improper purposes sufficient to establish malice exist in those proceedings in which:

- The person initiating them does not believe that his claim may be held valid;
- The proceedings are begun primarily because of hostility or ill will;
- The proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his or her property; or
- The proceedings are initiated for the purpose of forcing a settlement that has no relation to the merits of the claim.

The element of malice focuses on the malicious prosecution defendant's state of mind when instigating the underlying claim. *Estate of Tucker v Interscope Records, Inc.* (2008) 515 F3d 1019, 1031 (malice standard contrasted with that for probable cause; see §10.14).

Ill will or hostility towards an underlying action defendant sufficient to show malice may be established, *e.g.,* by showing that the primary purpose underlying the charge or claim against that defendant was the desire to vex, annoy, or harass, although the strong, aggressive assertion of legal rights does not constitute malice. See *United Prof. Planning, Inc. v Superior Court* (1970) 9 CA3d 377, 395, 88 CR 551 (original plaintiff's yelled statement over phone that he would "take him [defendant] for everything he was worth," and that he would "tie up the property" and force its sale, was merely assertion of plaintiff's legal rights and did not establish improper purpose).

NOTE: The fact that the malicious prosecution suit plaintiff lost his or her motion for sanctions in the underlying suit on the ground that "bad faith" was not established does not have the collateral estoppel effect of establishing that the malicious prosecution defendant acted without malice. *Wright v Ripley* (1998) 65 CA4th 1189, 77 CR2d 334 (issues resolved by routine sanction motion not entitled to preclusive effect in later malicious prosecution suit).

Generally, lack of probable cause (see §§10.14-10.15) in instigating the earlier charge or claim, insofar as it shows that the proceeding was not brought with a genuine belief as to its validity, also tends to show that it was brought for an improper purpose. See Restatement (Second) of Torts §669 (1977). Accordingly, a court or jury may, but need not, infer malice when lack of probable cause is established. See *Runo v Williams* (1912) 162 C 444, 450, 122 P 1082. Conversely, showing the existence of an improper purpose in instigating the earlier charge does not necessarily show lack of probable cause. Restatement §669A. That is, lack of probable cause may not be inferred from evidence of malice.

NOTE: Malicious prosecution damages may be recovered if there was malice in asserting one or more of the several causes of action pleaded in the underlying suit. *Crowley v Katleman* (1994) 8 C4th 666, 676, 34 CR2d 386 (rule stated in *Freidberg v Cox* (1987) 197 CA3d 381, 242 CR 851, discussed in §10.17, that there must have been *favorable termination* of entire underlying suit does not, by analogy, require that all underlying causes of action have been asserted maliciously).

When an attorney is sued for maliciously prosecuting a claim on behalf of the client, it is not necessary to establish that the attorney was personally motivated by spite or ill will toward the defendant. It is sufficient to show that the attorney knew the client's malice existed when the action was commenced. See *Munson v Linnick* (1967) 255 CA2d 589, 595, 63 CR 340, 344, disapproved on other grounds in *Babb v Superior Court* (1971) 3 C3d 841, 850, 92 CR 179. See §10.15 on an attorney's lack of probable cause.

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4. Favorable Termination of Prior Proceeding

§10.17 a. By Judgment or Decree

The plaintiff in a malicious prosecution suit must plead and prove that the prior action or proceeding terminated in his or her favor. *Casa Herrera, Inc. v Beydoun* (2004) 32 C4th 336, 341, 9 CR3d 97 (termination of breach of contract and fraud suit based on parol evidence rule satisfies favorable termination requirement; trial on merits not required; court lists forms of favorable termination, notes that technical or procedural terminations are not enough). See *Gibbs v Haight, Dickson, Brown & Bonesteel* (1986) 183 CA3d 716, 719, 228 CR 398 (determination deemed to occur when judgment entered). On the effect of an appeal, see §10.20. When the original proceeding has been adjudicated on the merits and a decree or judgment has been entered, the degree or judgment as a whole "is the criterion by which to determine who was the successful party." *Freidberg v Cox* (1987) 197 CA3d 381, 386, 242 CR 851. See CACI 1504.

Generally, a malicious prosecution suit plaintiff must show favorable termination of the entire original action, not just the favorable determination of one or more individual theories of recovery (whether called "causes of action" or "counts") relating to the violation of a single primary right. *Freidberg v Cox, supra*. See *Staffpro, Inc. v Elite Show Servs.* (2006) 136 CA4th 1392, 39 CR3d 682 (remedial order on one of two nonseverable causes of action not enough when other decided adversely to malicious prosecution plaintiff). On the other hand, a malicious prosecution lawsuit may be based on the favorable termination of a cause of action that is "severable" from causes of action in the underlying lawsuit on which there was not a favorable termination. See *Tabaz v Cal Fed Fin.* (1994) 27 CA4th 789, 33 CR2d 134 (claim or cause of action on which defendant in underlying lawsuit prevailed "spoke to a different injury" and was based on violation of different "primary right" from that asserted in claim on which plaintiff in underlying lawsuit prevailed). See also *Nicholson v Fazeli* (2003) 113 CA4th 1091, 6 CR3d 881 (family court denial of attorney fees and costs in underlying proceeding not unfavorable termination; also noted in §10.11); *Paramount Gen. Hosp. v Jay* (1989) 213 CA3d 360, 261 CR 723 (when underlying complaint includes severable causes of action, favorable determination of any severable claim provides sufficient basis for malicious prosecution suit).

A favorable termination does not necessarily require an adjudication by trial on the merits. See *Hurgren v Union Mut. Life Ins. Co.* (1904) 141 C 585, 75 P 168. When the original proceeding was a criminal prosecution, however, it must be shown that the former proceeding has legally terminated in such a manner as to indicate the innocence of the accused. *Jaffe v Stone* (1941) 18 C2d 146, 150, 114 P2d 335; *Hurgren v Union Mut. Life Ins. Co., supra.*

A favorable termination of an underlying lawsuit by summary judgment on the merits is not made less so by the settlement of a related action. See *Sierra Club Found. v Graham* (1999) 72 CA4th 1135, 85 CR2d 726 (two proceedings were separate, and had different procedural lives, parties, courts, and relief sought).

Termination of the underlying suit through the perjury or fraud of the malicious prosecution defendant can be shown in lieu of showing favorable termination for the malicious prosecution plaintiff. See *Cowles v Carter* (1981) 115 CA3d 350, 355, 171 CR 269.

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§10.18 b. By Dismissal

The dismissal of the underlying action for want of prosecution may signify a favorable termination of that action for the defendant in it. See *Minasian v Sapse* (1978) 80 CA3d 823, 827, 145 CR 829. Similarly, a dismissal for failure to comply with court rules may be a favorable termination (see *Lumpkin v Friedman* (1982) 131 CA3d 450, 182 CR 378) as may a dismissal entered as a discovery sanction for the underlying suit's plaintiff's refusal to be deposed (see *Ross v Kish* (2006) 145 CA4th 188, 51 CR3d 484 (refusal to be deposed construed as concession underlying claims lacked merit)). So may a dismissal based on the defense of privilege. See *Berman v RCA Auto Corp.* (1986) 177 CA3d 321, 222 CR 877. See also CACI 1503.

Not all involuntary dismissals of the original proceeding signify a favorable termination. See, *e.g., Drummond v Desmarais* (2009) 176 CA4th 439, 98 CR3d 183 (voluntary dismissal of underlying suit after appellate reversal of judgment not favorable termination on merits); *Hudis v Crawford* (2005) 125 CA4th 1586, 24 CR3d 50 (dismissal of underlying action because plaintiffs lacked standing to sue not deemed termination on the merits). If a criminal proceeding was dismissed "on technical grounds, for procedural reasons, or for any other reason not inconsistent with… guilt, it does not constitute a favorable termination." *Jaffe v Stone* (1941) 18 C2d 146, 150, 114 P2d 335. For example, in *Zeavin v Lee* (1982) 136 CA3d 766, 186 CR 545, a dismissal based on the client's refusal to cooperate with his attorney did not constitute a favorable termination so as to allow for a malicious prosecution action against the attorney, because it did not reflect on the innocence of the defendant in the earlier action or lack of merit of the claim.

A dismissal of the original civil proceeding based on the defense that the remedy was time barred is not ordinarily a favorable termination. See *Lackner v LaCroix* (1979) 25 C3d 747, 752 n3, 159 CR 693 (court suggesting, however, that malicious prosecution might lie against person who initiated underlying action knowing that it was subject to time bar defense). Further, a dismissal based on the defense of laches may not be a favorable termination. See *Asia Inv. Co. v Borowski* (1982) 133 CA3d 832, 184 CR 317.

Dismissal of a cross-complaint based on failure to comply with discovery requirements would not ordinarily be a favorable termination that would support a malicious prosecution action. See *Pattiz v Minye* (1998) 61 CA4th 822, 71 CR2d 802. See also *Jenkins v Pope* (1990) 217 CA3d 1292, 266 CR 557 (defendant could not cross-complain for malicious prosecution based on cause of action that had been dropped from amended complaint).

The *voluntary* dismissal of a civil action by its plaintiff can sometimes constitute a favorable termination for purposes of a later malicious prosecution action. In *MacDonald v Joslyn* (1969) 275 CA2d 282, 289, 79 CR 707, the court stated:

> A voluntary dismissal of a civil action or proceeding by the plaintiff… is not ordinarily considered a dismissal "on technical grounds".… Such a voluntary dismissal, though expressly made "without prejudice" is a favorable termination which will support an action for malicious prosecution.

See *Minasian v Sapse* (1978) 80 CA3d 823, 827, 145 CR 829 (rationale is natural assumption that, once meritorious action is commenced, it will not simply be abandoned).

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§10.19 c. By Settlement

A postjudgment settlement, in which the defendant in the underlying action gave up no portion of a judgment in his or her favor, constitutes a favorable termination on which a malicious prosecution suit can be based. See *Siebel v Mittlesteadt* (2007) 41 C4th 735, 62 CR3d 155 (settlement agreement expressly reserved defendant's right to sue for malicious prosecution).

Otherwise, the termination of the underlying lawsuit by settlement does not ordinarily constitute a termination favorable to a defendant in that action. See *Ferreira v Gray, Cary, Ware & Freidenrich* (2001) 87 CA4th 409, 104 CR2d 683; *Pender v Radin* (1994) 23 CA4th 1807, 29 CR2d 36 (termination not shown to be favorable even though malicious prosecution plaintiffs paid none of moneys that settled underlying lawsuit); *McCubbrey v Veninga* (9th Cir 1994) 39 F3d 1054 (malicious prosecution court correctly declined to look into parties' motives for settling and amounts paid). But see *Fuentes v Berry* (1995) 38 CA4th 1800, 45 CR2d 848, distinguishing *Pender* and holding that a triable issue of fact exists regarding a favorable termination of the underlying action. See also CACI 1503.

NOTE: A termination by settlement or consent is not ordinarily deemed a favorable termination because "the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant's guilt or innocence." See *Minasian v Sapse* (1978) 80 CA3d 823, 827 n4, 145 CR 829.

A party who claims that he settled the original suit on the basis of duress, because of financial or practical concerns, has not satisfied the favorable termination requirement. *Ludwig v Superior Court* (1995) 37 CA4th 8, 43 CR2d 350.

Settlement of the underlying proceeding by the defendant's insurer (under policy terms that permit the insurer to settle without the insured's consent) ordinarily precludes that defendant from pursuing a malicious prosecution suit against the prosecutors of that proceeding. See *Hurvitz v St. Paul Fire & Marine Ins. Co.* (2003) 109 CA4th 918, 135 CR2d 703 (insurer's settlement of underlying suit despite insured's objections precluded insured's claim against prosecutor of underlying proceeding but did thereby not create cause of action against insurer). See also *Villa v Cole* (1992) 4 CA4th 1327, 6 CR2d 644 (city settled suit by arrestee against city and individual police officers for waiver of costs; despite one officer's objection to settlement, officer's malicious prosecution suit against arrestee failed for lack of favorable termination of underlying proceeding).

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§10.20 d. Effect of Appeal

Generally, when an appeal from a judgment is pending, no favorable termination of the underlying action occurs until the appeal is resolved; filing a malicious prosecution complaint before that time is premature. See *Friedman v Stadum* (1985) 171 CA3d 775, 778, 217 CR 585.

For statute of limitations purposes, the underlying action is favorably terminated on entry of judgment in the trial court, at which time a cause of action for malicious prosecution accrues; the effect of an appeal is only to prevent prosecution of a malicious prosecution action while the appeal is pending. See *Gibbs v Haight, Dickson, Brown & Bonesteel* (1986) 183 CA3d 716, 719, 228 CR 398 (statute of limitations for malicious prosecution (see §10.22) runs from date of entry of judgment until notice of appeal is filed, and such period is included in calculating limitations period; statute is tolled while appeal actually pending, until appeal process is exhausted with denial of petition for hearing; malicious prosecution suit brought during pendency of appeal will be dismissed as premature). See also *Bellows v Aliquot Assocs., Inc.* (1994) 25 CA4th 426, 30 CR2d 723 (tolling of statute of limitations on malicious prosecution suit ends when clerk of appellate court enters issuance of remittitur in the appellate court's record).

An appellate reversal of a judgment gives rise to a potential malicious prosecution cause of action that first accrues on the date the appellate court issues its remittitur. *White v Lieberman* (2002) 103 CA4th 210, 126 CR2d 608.

When an appellate court decides a case on the merits, after the trial court decided it on statute of limitations or other technical grounds, the appellate decision satisfies the favorable termination requirement. See *Ray v First Fed. Bank* (1998) 61 CA4th 315, 71 CR2d 436.

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§10.21 5. Injury or Loss

The plaintiff in a malicious prosecution suit must plead and prove that the defendant's initiation or instigation and pursuit of the original action or proceeding caused the plaintiff harm or loss, as in any other tort suit. Damages are recoverable in a malicious prosecution suit as compensation for:

- The cost of defending the earlier action, including reasonable attorney fees;
- Injury to reputation;
- Impairment of social or business standing in the community; and
- Mental or emotional distress.

Bertero v National Gen. Corp. (1974) 13 C3d 43, 59, 118 CR 184.

Damages in malicious prosecution and defamation actions are similar; thus injury to reputation, humiliation, and emotional distress can be presumed, *e.g.,* from a charge that the person committed the crime of theft. See *Allard v Church of Scientology* (1976) 58 CA3d 439, 450, 129 CR 797 (when defamatory matter constitutes libel per se (see §8.2), general damages are presumed as matter of law). On general and presumed damages in defamation actions, see §§8.8-8.14.

NOTE: California does not follow the minority American rule that requires, as an element of the prima facie case of malicious prosecution, that special damages have been sustained. 52 Am Jur 2d, *Malicious Prosecution* §8 (1970). The fact that damages will be presumed does not obviate the need to plead special damages if they are sought.

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G. Defenses

§10.22 1. Statute of Limitations

Malicious prosecution actions are subject to the 2-year limitations period in CCP §335.1. *Stavropoulos v Superior Court (Stavropoulos)* (2006) 141 CA4th 190, 45 CR3d 705 (period begins to run on entry of judgment in underlying suit, is stayed if notice of appeal is filed, and recommences on conclusion of appellate process).

The cause of action accrues on the date that the proceedings in the prior action were dismissed or terminated in favor of the party bringing the malicious prosecution action. *Babb v Superior Court* (1971) 3 C3d 841, 846, 92 CR 179; *Feld v Western Land & Dev. Co.* (1992) 2 CA4th 1328, 1334, 4 CR2d 23 (cause of action accrues and begins to run on date judgment entered in underlying action; limitations period tolled on date notice of appeal in underlying action filed and begins to run again when remittitur of appeal filed); *Gibbs v Haight, Dickson, Brown & Bonesteel, supra* (cause of action accrues on entry of judgment; limitation period not tolled during time to appeal from judgment); *Soble v Kallman* (1976) 57 CA3d 719, 129 CR 373 (action accrues on date judgment entered, not on date time for filing notice of appeal expired). On tolling of statute of limitations during appeal and effect of appeal on malicious prosecution action, see §10.20.

For purposes of filing a malicious prosecution action, if no review is sought beyond the California Supreme Court, it is the issuance of the remittitur in the underlying action that exhausts the appellate process and recommences the running of the statute of limitations. *Rare Coin Galleries, Inc. v A-Mark Coin Co.* (1988) 202 CA3d 330, 338, 248 CR 341.

In an action ultimately decided by a federal appellate court, the statute of limitations for a malicious prosecution action runs from the issuance of the mandate by the federal appeals court. *Korody-Colyer Corp. v General Motors Corp.* (1989) 208 CA3d 1148, 256 CR 658.

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§10.23 2. Advice of Counsel

Reliance on the advice of counsel (public or private) is a defense for the plaintiff in the underlying action if that plaintiff sought counsel in good faith and made a full and complete disclosure of material facts to counsel before the action was initiated. *Sosinsky v Grant* (1992) 6 CA4th 1548, 1556, 8 CR2d 552; *Clary v Hale* (1959) 175 CA2d 880, 1 CR 91. See *State Farm Mut. Auto. Ins. Co. v Superior Court* (1991) 228 CA3d 721, 279 CR 116 (defense goes to negate probable cause element of cause of action). See also CACI 1505; Restatement (Second) of Torts §666 (1977).

The pleading or raising of this defense waives the attorney-client privilege. See generally Evid C §§912, 956-962. See also Evid C §996 (physician-patient privilege waived when patient tenders issue concerning patient's condition).

The advice of counsel defense fails if the initiator acts in bad faith or withholds from counsel facts he or she knew or should have known would defeat a cause of action otherwise appearing from the information supplied. *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 53, 118 CR 184. See *Palmer v Zaklama* (2003) 109 CA4th 1367, 1383, 1 CR3d 116 (burden is on malicious prosecution defendant to show that he or she acted in good faith, not merely to obtain cloak to protect against malicious prosecution suit, and did not withhold crucial facts from counsel); *Jackson v Beckham* (1963) 217 CA2d 264, 270, 31 CR 739 (party who seeks to use advice of counsel defense must show efforts to have learned all pertinent facts known by party's agents and to have disclosed them to counsel).

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§10.24 3. Presumption From Conviction or Judgment

Resolution of the underlying proceeding by the conviction of, or entry of judgment against, the defendant establishes a nearly conclusive presumption that the malicious prosecution suit defendant had probable cause to initiate the original proceeding. See *Babb v Superior Court* (1971) 3 C3d 841, 846, 92 CR 179 (civil suit); *Jaffe v Stone* (1941) 18 C2d 146, 150, 114 P2d 335 (criminal prosecution). The presumption may exist even if the conviction or judgment is reversed on appeal. See §10.20 (effect of appeal).

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§10.25 4. Privilege

When the original action was commenced or instigated by one who had a privilege to do so, that person is immune from a subsequent malicious prosecution action. See §10.7 on immunity.

For discussion of privilege as a defense, see §8.19.

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§10.25A 5. Anti-SLAPP Law

A malicious prosecution lawsuit can be dismissed under a special motion to strike under CCP §425.16 by a defendant who convinces a judge that the suit was brought "primarily to chill the [defendant's] valid exercise of the constitutional rights of free speech and petition for the redress of grievances," *i.e.,* that it is a "strategic lawsuit against public participation" (SLAPP). *Jarrow Formulas, Inc. v LaMarche* (2003) 31 C4th 728, 3 CR3d 636 (anti-SLAPP motion was held valid against suit for malicious prosecution of cross-complaint—which alleged slander of title and interference with economic advantage—in previous lawsuit arising out of protected activity); *Raining Data Corp. v Barrenechea* (2009) 175 CA4th 1363, 97 CR3d 196 (cross-complaint alleging malicious prosecution and other causes of action properly stricken; filing lawsuit alleging misappropriation of trade secrets protected activity); *Plumley v Mockett* (2008) 164 CA4th 1031, 79 CR3d 822 (denial of motion to strike reversed, appellate panel concluding that plaintiff failed to make prima facie case that defendants lacked probable cause in bringing underlying lawsuit). See *Paulus v Bob Lynch Ford, Inc.* (2006) 139 CA4th 659, 43 CR3d 148 (sustaining of anti-SLAPP motion entitled moving party to attorney fees and costs); *Marijanovic v Gray, York & Duffy* (2006) 137 CA4th 1262, 40 CR3d 867 (motion sustained for failure to demonstrate absence of probable cause for underlying cross-complaint); *Dickens v Provident Life & Acc. Ins. Co.* (2004) 117 CA4th 705, 11 CR3d 877 (anti-SLAPP statute applied to strike malicious prosecution claim based on prior termination of criminal prosecution; no showing that malicious prosecution defendants were instrumental in initiating underlying prosecution).

A malicious prosecution plaintiff can defeat an anti-SLAPP motion by presenting evidence that, if believed by the trier of fact, establishes a prima facie case that could result in judgment for the plaintiff; only a minimal showing of merit is required. See *Sycamore Ridge Apartments LLC v Nauman* (2007) 157 CA4th 1385, 1392 n1, 69 CR3d 561 (voluntary dismissal of underlying suit or failure to prosecute it deemed favorable termination). See also *Chavez v Mendoza* (2001) 94 CA4th 1083, 114 CR2d 825 (suit subject to special motion to strike under anti-SLAPP law, but plaintiff met burden of establishing probability of prevailing); *White v Lieberman* (2002) 103 CA4th 210, 126 CR2d 608 (attorney who obtains anti-SLAPP dismissal of malicious prosecution action entitled to attorney fees); *Mattel, Inc. v Luce, Forward, Hamilton & Scripps* (2002) 99 CA4th 1179, 121 CR2d 794 (sufficient evidence of probability of prevailing on malicious prosecution claim).

A plaintiff pursuing a malicious prosecution lawsuit defeats an anti-SLAPP motion to strike by presenting evidence that, if believed by the trier of fact, would be sufficient to support a judgment in plaintiff's favor. *Zamos v Stroud* (2004) 32 C4th 958, 965, 12 CR3d 54 (trial court to consider both parties' pleadings and evidentiary submissions, but not weigh credibility or comparative probative strength; court should deny motion except if, as matter of law, defendant's evidence defeats plaintiff's attempt to establish evidentiary support for claim). See *Bergman v Drum* (2005) 129 CA4th 11, 28 CR3d 112 (also noted in §10.5; holding that malicious prosecution plaintiff had established all prima facie elements needed to defeat an anti-SLAPP motion precluded, under law of case doctrine, summary judgment against plaintiff)*; HMS Capital, Inc. v Lawyers Title Co.* (2004) 118 CA4th 204, 12 CR3d 786 (favorable termination of underlying suit precluded anti-SLAPP dismissal); *Slaney v Ranger Ins. Co.* (2004) 115 CA4th 306, 8 CR3d 915 (earlier award against malicious prosecution defendant established probability of recovering in present suit); *Padres L.P. v Henderson* (2003) 114 CA4th 495, 519, 8 CR3d 584 (malicious prosecution defendant did not establish absolute privilege to bring underlying suits, but was entitled to have two of three malicious prosecution claims stricken for malicious prosecution plaintiffs' failure to show lack of probable cause).

On the effect of the dismissal of an anti-SLAPP motion in the underlying action as showing probable cause, see *Wilson v Parker, Covert & Chidester* (2002) 28 C4th 811, 821, 123 CR2d 19, in §10.14.

The anti-SLAPP motion to strike is often asserted against defamation suits. See §8.22.

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§10.25B 6. SLAPPback Claims

A malicious prosecution lawsuit brought against a person whose prior cause of action was dismissed under a special motion to strike under CCP §425.16 is known as a "SLAPPback" claim and is treated differently from an ordinary malicious prosecution claim. CCP §425.18. An anti-SLAPP motion (made under CCP §425.16) to strike a SLAPPback claim is not subject to specified subdivisions of CCP §425.16 but is subject to provisions in CCP §425.18 regarding time to file, hearing date, continuance for discovery, sanctions for frivolity or intent to delay, review by peremptory writ, illegality of the prior proceeding, and SLAPPbacks filed by public entities. An anti-SLAPP motion may be used to obtain the dismissal of a malicious prosecution (or abuse of process) lawsuit in which the malicious prosecution plaintiff had obtained the dismissal of an earlier lawsuit by means of an anti-SLAPP motion. See *Soukup v Law Offices of Herbert Hafif* (2006) 39 C4th 260, 46 CR3d 638 (CCP §425.18(h) made it clear that SLAPPback suits were subject to anti-SLAPP motions except when moving party's original cause of action was "illegal as a matter of law"; malicious prosecution plaintiff in present case, however, defeated anti-SLAPP motion by demonstrating probability of prevailing). For more on anti-SLAPP motions, see §§8.22, 11.8. See also *Hutton v Hafif* (2007) 150 CA4th 527, 59 CR3d 109 (dismissal of malicious prosecution suit upheld but attorney fee denied).

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§10.26 7. Equity

Equitable defenses such as "unclean hands" are available to defeat malicious prosecution causes of action. See, *e.g., Pond v Insurance Co. of N. Am.* (1984) 151 CA3d 280, 198 CR 517 (insurer cross-claimed against agent who had issued policy seeking to be indemnified for cost of settlement with insured; agent prevailed on cross-claim and sued insurer for malicious prosecution; during discovery, it was first revealed that agent had failed to disclose critical evidence in first suit that would have convinced insurer not to defend or settle it).

NOTE: The conclusion reached by the court in *Pond* may be questioned in the light of *Kendall-Jackson Winery, Ltd. v Superior Court* (1999) 76 CA4th 970, 90 CR2d 743 (unclean hands based on marketing misconduct cannot be used as legal or technical defense).

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II. RECOVERABLE DAMAGES

§10.27 A. Generally

Damages recoverable in a malicious prosecution suit include compensation for the costs and reasonable attorney fees incurred in defending the original action, mental or emotional distress, injury to reputation, and impairment of social and business standing in the community. *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 51, 118 CR 184. When a malicious prosecution defendant is liable, it is for harm and loss caused by every step regularly taken in the original prosecution of person now suing (or in the pursuit of the original proceeding). *Ray Wong v Earle C. Anthony, Inc*. (1926) 199 C 15, 247 P 894.

NOTE: For discussion of general and special damages in the context of a malicious prosecution action, see Restatement (Second) of Torts §§670-671 (1977).

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B. Litigation Costs and Attorney Fees

1. Incurred in Underlying Proceeding

a. Attorney Fees

§10.28 (1) Recovery for Reasonable Fees

The malicious compensation suit plaintiff may recover damages to compensate for attorney fees incurred in defending against the underlying proceeding. *Kennedy v Byrum* (1962) 201 CA2d 474, 482, 20 CR 98. The damages cannot exceed the amount of a reasonable fee. See *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 51, 118 CR 184; *Stevens v Chisholm* (1919) 179 C 557, 564, 178 P 128. See also *White v Lieberman* (2002) 103 CA4th 210, 126 CR2d 608 (attorney who obtains anti-SLAPP dismissal of malicious prosecution action entitled to attorney fees); *Peebler v Olds* (1945) 71 CA2d 382, 162 P2d 953.

The trier of fact in the malicious prosecution action determines what is a reasonable fee for representation in the underlying proceeding. See *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 62, 118 CR 184; *Stevens v Chisholm, supra*. See §1.99 on the recovery of attorney fees in insurance bad faith and other cases.

See Anno, 21 ALR3d 068 (1968) (attorney fees as damages in false imprisonment or arrest or malicious prosecution actions).

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§10.29 (2) Proving Amount and Reasonableness

Damages to compensate for attorney charges incurred in defending the underlying proceeding may be based on evidence of:

- The fee arrangement with counsel who provided representation in the underlying proceeding; ordinarily, damages to compensate for the defense of the underlying proceeding cannot exceed the amount provided for in the fee agreement;
- The dollar amount paid or charged for services actually rendered; and
- Expert opinion testimony on the reasonable value of the services actually rendered (see *Martino v Denevi* (1986) 182 CA3d 553, 558, 227 CR 354; see also *Brandt v Superior Court* (1985) 37 C3d 813, 819, 210 CR 211 (because fee issue is one of fact, expert legal testimony usually required; also noted in §1.99); such testimony may not be required, however, in a bench trial; see *Kennedy v Byrum* (1962) 201 CA2d 474, 482, 20 CR 98).

When the defendant in the malicious prosecution case objects to the amount of the attorney fees paid or incurred, reasonableness or unreasonableness of the fees may be shown by evidence of:

- The identity, professional standing, reputation, competence, and expertise of the person or persons who provided legal services; and
- The customary fees in the community given the experience of the attorney and the difficulty of the matter.

The award for fees should be near the "lodestar" amount, based of hours expended multiplied by a reasonable hourly rate. On lodestar calculations, see *Serrano v Unruh* (1982) 32 C3d 621, 625 n6, 186 CR 754.

TACTICS: Attorneys providing representation in proceedings against clients that appear to be without probable cause and motivated by malice should be especially careful to keep detailed time records that can serve as the basis for damages in a later malicious prosecution suit. Doing so enhances the attorney's credibility and may help to dispel a later charge that the fee charged was unreasonable. Of course, the failure to keep detailed records does not necessarily require damages for attorney fees to be reduced. See *Martino v Denevi* (1986) 182 CA3d 553, 559, 227 CR 354 (no bill or time records submitted to court, nor was there testimony in any but general terms of extent of services rendered; evidence of attorney's request for flat fee standing alone insufficient to substantiate fee sought; attorney's testimony "as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.")

In preparing the evidence to be submitted on the attorney fees issue, counsel should consider:

- *Necessity for services rendered.* It may be helpful to point out the extent to which the attorney fees were the result of the obstructive tactics of the person who initiated the underlying proceeding. The refusal of that person to cooperate, settle, and so on, will tend to confirm the need for the fees incurred.
- *Client conferences.* Counsel should be prepared to explain the need for the client conference time expended. Defense counsel, in contesting the amount of the fee sought, may attempt to show that the time spent was unnecessary.
- *Discrepancy between time sheets, billings, and fee paid.* Particularly when the fee has been paid, the fees charged by the attorney may have been reduced or discounted. An attorney has discretion in determining the fee. Any discrepancy between time sheets, billings, and payments received should be identified and reviewed, and counsel should be in a position to explain it to the jury.
- *Results achieved.* The attorney's time sheets are a road map of the client's experiences in the underlying action. To that extent, the time sheets may present a good opportunity to recount the trouble and expense the underlying action generated as well as to highlight its lack of merit by emphasizing the final favorable termination.

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§10.30 b. Other Litigation Costs

Damages are recoverable in a malicious prosecution suit to compensate for the reasonable litigation costs incurred in defending the original proceeding, to the extent of amounts not previously recovered (*e.g.,* by a cost bill) in that proceeding. See *Stevens v Chisholm* (1919) 179 C 557, 563, 178 P 128.

Not entirely clear, however, is whether malicious prosecution damages are recoverable for underlying litigation expenses beyond those enumerated by statute or rule in, *e.g.,* CCP §1033.5 (items of allowable costs) and Cal Rules of Ct 8.278 (costs on appeal).

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Source: Torts/California Tort Damages/10 Malicious Prosecution/§10.31 2. Costs, Fees, and Interest in Malicious Prosecution Action; CCP §998

§10.31 2. Costs, Fees, and Interest in Malicious Prosecution Action; CCP §998

Certain of the expenses of litigating the malicious prosecution action are recoverable through a cost bill, as in any other type of civil litigation. See *Kennedy v Byrum* (1962) 201 CA2d 474, 482, 20 CR 98 (court-appointed expert witness fee).

On the other hand, malicious prosecution actions are not excepted from the "American rule" that each party must pay its own attorney fees; hence, attorney fees expended in litigating the malicious prosecution action are not ordinarily recoverable by the winning party.

See §§1.94, 1.106A.

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§10.32 C. Loss of Social Standing; Creditworthiness

Damages are recoverable in a malicious prosecution suit for injury to or loss of social standing or creditworthiness caused by the underlying malicious instigation of a charge or claim. See *Babb v Superior Court* (1971) 3 C3d 841, 848 n4, 92 CR 179; *Ray Wong v Earle C. Anthony, Inc.* (1926) 199 C 15, 18, 247 P 894. See also *Von Brimer v Whirlpool Corp.* (9th Cir 1976) 536 F2d 838, 847 (applying California law). See §10.39 on apportioning damages.

Calculating damages for loss of creditworthiness is easiest when the initiation of a maliciously prosecuted proceeding caused the plaintiff to have paid a higher interest rate on a loan. Under such circumstances, the present value of the difference between the total amounts of the two loans shows detriment suffered by the plaintiff. In cases in which the person against whom the underlying charge or claim was pursued was then denied credit altogether, damages for emotional distress may more understandably compensate for the detriment suffered. See generally *Young v Bank of America* (1983) 141 CA3d 108, 113, 190 CR 122 (action for violation of Song-Beverly Credit Card Act of 1971 (CC §§1747-1748.9); $50,000 emotional distress award upheld based on plaintiff's humiliation after wrongfully being denied credit).

NOTE: Whatever the kind of damages sought, care must be given to establishing such liability facts as foreseeability, causation, and, for future detriment, reasonable certainty (as required by CC §3283).

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§10.33 D. Loss of Earnings or Business Profits

A malicious prosecution suit plaintiff may recover damages for economic loss resulting from the maliciously pursued charge or claim. *Davis v Local Union No. 11* (1971) 16 CA3d 686, 696, 94 CR 562 (plaintiff lost wages and profits by losing two jobs due to maliciously instituted litigation); *MacDonald v Joslyn* (1969) 275 CA2d 282, 293, 79 CR 707 (probate commissions and trustee's fees lost as result of maliciously instituted will contest). See Restatement (Second) of Torts §924 (1979) (damages recoverable for past or prospective loss or impairment of earning capacity).

An employed person can present evidence of his or her loss of income, as can the person's employer. The sole proprietor of a business can sometimes establish earning capacity impairment through evidence of a diminution in the business's profits resulting from the underlying maliciously prosecuted proceeding. But the damages recoverable for a self-employed plaintiff (or a partner in a business) are to compensate for the value to the business of services that he or she was prevented from rendering because of the maliciously prosecuted action. Damages are not recoverable, however, to the extent that the business's profits are based on the plaintiff's expected return on invested capital or on the work of employees or partners. See generally §§1.52-1.54 and Restatement §924, Comment c.

TACTICS: The malicious prosecution action defendant should be alert to the possibility of showing that a business's loss of profits overstates the value of services that the plaintiff would have actually rendered to the business.

Because it is loss of earning capacity for which the plaintiff is entitled to be compensated, damages for economic detriment can be recovered by a plaintiff who was not working at the time he or she was harmed by the original maliciously prosecuted proceeding. See §1.55. Impairment of future earning capacity is compensated for by damages based on the present value of earnings reasonably certain to be lost. See generally §§1.41-1.44 and Restatement §924, Comment d. There appear to be no reasons why damages concepts such as the collateral source rule (see §15.22) should not apply to malicious prosecution recoveries.

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§10.34 E. Mental and Emotional Distress

The malicious prosecution suit plaintiff may recover damages for mental and emotional distress that resulted from the maliciously instituted litigation. *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 51, 118 CR 184; *Carruth v Superior Court* (1978) 80 CA3d 215, 219, 145 CR 344. See generally §§1.73-1.75.

See §10.38 on emotional distress caused by arrest and imprisonment.

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§10.35 F. Injury to Reputation

The malicious prosecution suit plaintiff may recover damages for injury to his or her reputation resulting from the maliciously instituted litigation. *Allard v Church of Scientology* (1976) 58 CA3d 439, 450, 129 CR 797.

Being named as a defendant in a criminal or civil proceeding can be injurious to one's reputation. The fact that an arrest, criminal information, or lawsuit was accompanied by substantial publicity can increase the damage. Although reputation injury may be presumed, the amount of injury is not.

TACTICS: The plaintiff will want to present evidence showing his or her good reputation before the original proceeding was instituted, and diminished reputation thereafter. The defendant, of course, may seek evidence that the plaintiff's reputation was no better before the original proceeding than after, or that the plaintiff's reputation was harmed for a short period and in a minor way, if at all.

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§10.36 G. Bodily Injury

Damages may be recovered for the physical or bodily consequences (sometimes called "sequelae") of mental and emotional distress resulting, when it does, from malicious prosecution. See *Babb v Superior Court* (1971) 3 C3d 841, 848 n4, 92 CR 179. See generally §1.75.

See §10.38 on the recovery of damages for bodily injury suffered during an arrest or imprisonment.

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§10.37 H. Punitive Damages

Punitive damages can be recovered in a malicious prosecution action when malice, as defined in CC §3294, is established by clear and convincing evidence. See *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 65, 118 CR 184; *MacDonald v Joslyn* (1969) 275 CA2d 282, 293, 79 CR 707. See also *Babb v Superior Court* (1971) 3 C3d 841, 848 n4, 92 CR 179 (stating rule); *Davis v Local Union No. 11* (1971) 16 CA3d 686, 697, 94 CR 562.

See chap 14 for discussion of CC §3294, "malice," and "clear and convincing evidence."

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§10.38 I. Detriment Arising From Arrest or Imprisonment

Damages are recoverable in a malicious prosecution suit for the various forms of harm and loss that naturally result from any arrest or imprisonment consequent to the underlying proceeding. See *Ray Wong v Earle C. Anthony, Inc*. (1926) 199 C 15, 18, 247 P 894 (damages recoverable for loss of time, deprivation of liberty, injury to fame, reputation, character, mental suffering, general impairment of social and mercantile standing, injury to credit, and "all losses sustained to plaintiff's business as the direct and natural result of the proceedings complained of").

NOTE: Particular circumstances may dictate whether damages for bodily injury are recoverable from the malicious instigator of a proceeding that led to an arrest or imprisonment during which bodily injury was inflicted. See, *e.g., Heban v BFD, Inc.* (ND Ind 1985) 621 F Supp 669 (damages not recoverable in malicious prosecution action for physical injuries sustained by plaintiff due to jailer's abuse absent showing that defendant caused mistreatment of plaintiff while plaintiff was jailed or should have foreseen mistreatment by jailers).

The malicious prosecution suit plaintiff may thus seek to introduce evidence to prove that such forms of detriment as the following resulted from the defendant's malicious instigation of a prior proceeding:

- Mental anguish incident to an arrest, confinement, or commitment, including
- humiliation and embarrassment, fright and shock,
- anxiety and depression,
- fear of confinement and of indefinite confinement,
- physical injury resulting from mental distress (see §10.36),
- medical expenses, and
- pain and suffering resulting from physical injury;
- Physical injuries incident to an arrest, confinement, or commitment, including
- nature of injuries,
- medical expenses, and
- pain and suffering resulting from the physical injuries;
- Loss of liberty due to confinement;
- Injury to social standing and creditworthiness (see §10.32);
- Economic loss (see §10.33);
- Injury to reputation (see §10.35); and
- Punitive damages (see §10.37).

Arrest, confinement, or commitment may also raise particularized concerns that the plaintiff may be able to show, such as the fear of being confined with dangerous criminals or mentally ill patients. The plaintiff may reasonably fear attack by other inmates or patients, including exposure to sexually transmitted diseases due to nonconsensual sexual intercourse. In cases involving confinement to a mental institution, the plaintiff may fear ill treatment by the staff or injuries resulting from treatment.

TACTICS: Although some of the above items of damage and circumstances giving rise to them may be sufficiently understandable to the jury through the plaintiff's testimony, it is often desirable to buttress the plaintiff's testimony with that of inmates, guards, physicians, staff, and so on, who can illuminate for the jury the environment the plaintiff was placed in, or was threatened to be placed in, as a result of the maliciously instituted criminal action. Medical and psychiatric expert testimony may also be used to establish, or to rebut, the extent of the plaintiff's claimed injuries.

On proof of medical expenses, see §§1.34-1.40.

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§10.39 J. Apportioning Damages

A malicious prosecution suit plaintiff is entitled to recover damages even if the underlying proceeding was partly based on legitimate (nonactionable) charges or claims. See *Crowley v Katleman* (1994) 8 C4th 666, 34 CR2d 386 (plaintiff's proof of malice and absence of probable cause need only apply to one of "grounds for liability" asserted in prior proceeding). In such cases, the malicious prosecution suit defendant can assert that it should be liable only for detriment that flowed from the maliciously prosecuted aspects of the underlying proceeding—in effect, for an apportionment of damages.

The malicious prosecution suit defendant who seeks such an apportionment of damages has the burden of establishing the amount by which the plaintiff's claimed harm and loss was, or was not, caused by the maliciously prosecuted aspects of the underlying proceeding. See *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 60, 118 CR 184, (to obtain reduction, defendant had burden of proving what part of plaintiff's attorney fees in underlying suit related to legitimate claims). See also *Singleton v Perry* (1955) 45 C2d 489, 496, 289 P2d 794 (malicious prosecution suit plaintiff who shows that defendant maliciously joined unjustified charge with justified charge in original proceeding does not have additional burden of showing that plaintiff's damage is specifically attributable to malicious, not legitimate, prosecution; malicious prosecutor cannot escape liability by uniting groundless accusations with those for which there may be probable cause); *Mabie v Hyatt* (1998) 61 CA4th 581, 590, 71 CR2d 657 (malicious prosecution suit plaintiff need not prove that damage was specifically attributable to maliciously prosecuted claim and is not precluded from suing by inability to divide damages between claims that were maliciously prosecuted and those with merit).

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§10.40 K. Duty to Mitigate

It has been suggested that there is no duty to mitigate damages, at least for attorney fees and lost profits, in a malicious prosecution actions. See *Davis v Local Union No. 11* (1971) 16 CA3d 686, 696, 94 CR 562. Of course, only reasonable attorney fees can be recovered. See §10.28. And a person who fails to act to stem lost profits may well lose credibility with the jury.

Further, evidence to establish lost profits must not be uncertain or speculative. *Continental Car-Na-Var Corp. v Moseley* (1944) 24 C2d 104, 113, 148 P2d 9. Thus, any unreasonable conduct by the plaintiff tends to undermine the contention that the lost profits were real or were lost as a result of the maliciously prosecuted claim.

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§10.41 III. FUNCTIONS OF JUDGE AND JURY

The malicious prosecution suit plaintiff has the initial burden of proving, by a preponderance of the evidence, the elements of the cause of action listed and discussed in §§10.1 and 10.9-10.21. See generally Evid C §115.

According to Restatement (Second) of Torts §§673, 681B and comments, it is for the jury to determine:

- Whether the defendant believed that the charge or claim he instigated or continued was true (*Ball v Rawles* (1892) 93 C 222, 28 P 937);
- Whether the defendant was motivated by malice in instigating or continuing the proceedings; and
- The amount of the plaintiff's damages.

The jury may also be asked to make factual findings on the circumstances under which the defendant acted. Based on such findings, the trial judge would determine whether there was a favorable termination or probable cause. The judge would also determine

- Whether the alleged underlying proceeding had been commenced;
- Whether it had been terminated in the present plaintiff's favor;
- Whether there was probable cause for instigating or continuing it; and
- Proper elements in assessing damages.

Probable cause is a legal question for the trial judge when the knowledge and belief of the plaintiff in the original suit (the defendant in the malicious prosecution suit) supporting the underlying causes of action are undisputed; but if such knowledge or belief are disputed, the jury must determine the facts before the judge decides whether those facts constitute probable cause. *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 881, 254 CR 336; *Videotape Plus, Inc. v Lyons* (2001) 89 CA4th 156, 161, 107 CR2d 1 (both noted in §10.14). See *Tool Research & Eng'g Corp. v Henigson* (1975) 46 CA3d 675, 682, 120 CR 291, disapproved on other grounds in *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 883 n9, 254 CR 336 (see note in §10.15). See also CACI 1503.

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§10.42 IV. REPRESENTATION BY FORMER ATTORNEY

There can be drawbacks to having the attorney who represented the defendant in the underlying maliciously prosecuted action represent the person (as the plaintiff) in the malicious prosecution action. For example, if mental distress damages are sought in the malicious prosecution suit, the attorney could be a vital witness about the extent of such distress. Under Cal Rules of Prof Cond 5-210, an attorney should not represent a client before a jury that will hear the attorney's testimony unless the testimony relates to an uncontested matter or the nature and value of legal services, or the client has given an informed, written consent. Even an attorney who has obtained the client's consent may lack credibility with jurors.

Similar considerations apply if the attorney may be called on to testify about the amount and reasonableness of attorney fees and costs incurred in the underlying proceeding.

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§10.43 V. TAX CONSEQUENCES

Compensatory damages received by way of suit or settlement (whether in lump sum or by periodic payments) for personal physical injury or physical sickness are not taxable income. See IRC §104(a)(2). See Notes in §1.112 and §8.48 on the unconstitutionality of taxing damages that compensate a plaintiff for emotional distress or other forms of harm or loss that are unrelated to lost wages or earnings. See generally §§1.113-1.122, 8.49-8.50. Before the 1996 addition of the word "physical" to IRC §104(a)(2), many of the damages elements recovered in California malicious prosecution action had been held to come within the exclusion from taxable income. See *Von Brimer v Whirlpool Corp.* (9th Cir 1976) 536 F2d 838, 847 (applying California law).

Punitive damages that are recovered in a malicious prosecution suit appear, however, to be taxable. See §14.48.

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11

Abuse of Process

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I. INTRODUCTION

§11.1 A. Defining "Abuse of Process"

Basically, abuse of process is the use of a court's process to achieve a purpose for which the process was not designed; it is the misuse of the court's power and an act done in the court's name and under its authority "for the purpose of perpetrating an injustice." *Rusheen v Cohen* (2006) 37 C4th 1048, 39 CR3d 516; *Brown v Kennard* (2001) 94 CA4th 40, 44, 113 CR2d 891. For elements of cause of action, see §11.3.

A claim based on the bad faith filing of a bankruptcy petition, however, is preempted by federal law and will not be entertained by a state court. *Choy v Redland Ins. Co.* (2002) 103 CA4th 789, 127 CR2d 94. See note in §10.9 on malicious prosecution claims based on bankruptcy court action.

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§11.2 B. Distinguishing Malicious Prosecution

Abuse of process evolved from a need to expand the narrowly circumscribed tort of malicious prosecution; it is a separate tort that provides a remedy for individuals harmed by the wrongful use of the judicial process. See *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 104 n4, 101 CR 745; *Weisenburg v Molina* (1976) 58 CA3d 478, 489, 129 CR 813 (see this case in §11.10). See also *Estate of Tucker v Interscope Records, Inc.* (2008) 515 F3d 1019, 1037 (plaintiff succeeds in abuse of process suit by showing that defendant (1) contemplated ulterior motive in using judicial process and (2) committed willful act in using process; abuse can include adding to complaint made maliciously and without probable cause; see §§10.14, 10.16 on probable cause and malice in malicious prosecution actions).

An abuse of process cause of action seeks to impose liability on a person who misused or misapplied a properly issued process (see §11.4) to achieve a result for which the process is not designed; malicious prosecution imposes liability on persons who maliciously initiate or pursue baseless claims. *Weisenburg v Molina, supra.* Abuse of process, in contrast to malicious prosecution, does not require proof of the favorable termination of an underlying proceeding or proof that the tortfeasor acted without probable cause. See *Spellens v Spellens* (1957) 49 C2d 210, 232, 317 P2d 613.

The continued pursuit of meritless litigation for an improper collateral purpose, although actionable under malicious prosecution principles (see §10.9), is not separately actionable under an abuse of process theory. *Ramona Unified Sch. Dist. v Tsiknas* (2005) 135 CA4th 510, 520, 37 CR3d 381 (writ petition seeking to impede construction process by requiring additional environmental impact report and request private attorney general attorney fees no basis for abuse of process or barratry causes of action).

See chap 10 on malicious prosecution.

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II. ESTABLISHING LIABILITY

§11.3 A. Elements of Cause of Action

The abuse of process plaintiff must plead, and prove by a preponderance of the evidence, that the defendant, in a prior suit or proceeding, (1) acted with an ulterior purpose (or motive) and (2) committed "a wilful act in the use of the process not proper in the regular conduct of the proceedings." *Templeton Feed & Grain v Ralston Purina Co.* (1968) 69 C2d 461, 466, 72 CR 344; *Spellens v Spellens* (1957) 49 C2d 210, 232, 317 P2d 613. The litigant must establish that the defendant (1) contemplated an ulterior motive in using the process, and (2) committed a willful act in the use of the process not proper in the regular conduct of the proceedings. *Rusheen v Cohen* (2006) 37 C4th 1048, 1056, 39 CR3d 516; *Booker v Rountree* (2007) 155 CA4th 1366, 66 CR3d 733 (abuse of process cross- complaint). See *Brown v Kennard* (2001) 94 CA4th 40, 44, 113 CR2d 891 (abuse of process requires act outside purpose of process). See CACI 1520.

The plaintiff must also plead and prove by a preponderance of the evidence that he or she suffered loss or harm as a proximate result of the misuse of the legal process, and its nature and extent. See CC §3333.

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§11.4 1. Defining "Process"

"Process" is interpreted broadly to "encompass the entire range of procedures incident to litigation." *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 104 n4, 101 CR 745. Thus, an abuse of process may be based, in some circumstances, on the misuse of written interrogatories (see *Younger v Solomon* (1974) 38 CA3d 289, 296, 113 CR 113), notice of depositions (see *Thornton v Rhoden* (1966) 245 CA2d 80, 94, 53 CR 706), and requests for admissions (see *Twyford v Twyford* (1976) 63 CA3d 916, 923, 134 CR 145).

Improperly appealing from a lower court decision may be abuse of process under some circumstances. See *Tellefsen v Key Sys. Transit Lines* (1961) 198 CA2d 611, 613, 17 CR 919.

NOTE: A subtle distinction exists between the filing of a frivolous appeal and the use of the appeal process in an unauthorized manner. See *Coleman v Gulf Ins. Group* (1986) 41 C3d 782, 226 CR 90 (because no facts supported finding that process was used in unauthorized manner, abuse of process action was without merit; appropriate remedy was to seek sanctions under CCP §907).

Service of process can provide a basis for an abuse of process claim. See *Kappel v Bartlett* (1988) 200 CA3d 1457, 1465, 246 CR 815 (abuse of process cause of action could be based on allegations that defendant process server had executed false declaration that he had personally served summons and complaint in another action in which default judgment was entered; "ulterior purpose or motive" element could be inferred from willful abuse of process).

The mere filing or maintenance of a lawsuit, however, even if done with an improper purpose, is not an abuse of process absent a "wilful act in the use of the process not proper in the regular conduct of the proceedings." *Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 1168, 232 CR 567. But see debt collection cases discussed in §11.6.

Similarly, the improper recording of a notice of lis pendens provides no basis for an abuse of process claim because the recording is not accomplished under court authority either directly or by ancillary proceedings. *Woodcourt II Ltd v McDonald* Co. (1981) 119 CA3d 245, 251, 173 CR 836 (remedy is to have lis pendens expunged—see CCP §§405.30-405.39). See *Palmer v Zaklama* (2003) 109 CA4th 1367, 1381, 1 CR3d 116 (recordation of notice of lis pendens not valid basis for abuse of process cause of action).

NOTE: The tort of abuse of process requires misuse of a *judicial* process; pursuit of an application for a radio station license, although it gives rise to a "comparative [FCC] hearing" that is adversarial to a current license holder, is not an abuse of process. *Stolz v Wong Communications Ltd. Partnership* (1994) 25 CA4th 1811, 31 CR2d 229.

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§11.5 2. Ulterior Purpose; Improper Use

The abuse of process plaintiff must plead and prove the defendant's prior use of process for an ulterior purpose or motive, typically as a form of coercion to obtain a collateral advantage not properly involved in the proceeding itself. *Templeton Feed & Grain v Ralston Purina* Co. (1968) 69 C2d 461, 466, 72 CR 344. Merely showing vexation or harassment, however, does not satisfy the ulterior purpose element of the tort. *Ion Equip. Corp. v Nelson* (1980) 110 CA3d 868, 876, 168 CR 361.

In addition to ulterior purpose or motive, the plaintiff must plead and prove an improper use of process, *i.e.,* that it was used willfully for a purpose for which it was not designed. See *Friedman v Stadum* (1985) 171 CA3d 775, 217 CR 585 (ulterior purpose element of action satisfied but willful misuse element of action not satisfied).

NOTE: A simple way to distinguish the two elements is to view improper use as the misapplication of the legal means, and ulterior purpose or motive as the inequitable result that is sought.

Often, the existence of an ulterior purpose or motive can be inferred from the improper use of the legal process, although improper use cannot be inferred from ulterior purpose or motive. *Tellefsen v Key Sys. Transit Lines* (1961) 198 CA2d 611, 616, 17 CR 919; *Pimentel v Houk* (1951) 101 CA2d 884, 886, 226 P2d 739. Mere ill will against the adverse party does not, standing alone, serve to establish either ulterior purpose or improper use. *Kyne v Eustice* (1963) 215 CA2d 627, 633, 30 CR 391; *Pimentel v Houk, supra.*

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§11.6 B. Illustrative Situations

Abuse of process can occur in debt collection situations, when a creditor or debt-collection agency uses legal process in an unauthorized manner to coerce payment. For example, in *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 101 CR 745, a collection agency and its attorney were alleged to have knowingly and willfully filed statutorily inadequate complaints in improper counties for the ulterior purpose of impairing the individuals' ability to defend the suits and to coerce inequitable settlements. The court observed that "the judiciary itself has a strong interest in eliminating any systematic misuse of judicial machinery" (7 C3d at 107) and held that, if the allegations could be proved at trial, an injunction restraining the abuse of process would be appropriate (see §11.12). See also *Yu v Signet Bank/Virginia* (1999) 69 CA4th 1377, 1389, 82 CR2d 304 (creditor credit card issuer's suing debtor in another state could constitute "distant forum abuse" justifying abuse of process suit).

In *White Lighting Co. v Wolfson* (1968) 68 C2d 336, 347, 66 CR 697, 703, an abuse of process claim was held to be supported by allegations that a creditor had wrongfully obtained a writ of attachment and seized almost $20,000 of the alleged debtor's property to satisfy an $850 obligation; the excessive attachments were used as a form of extortion to force the debtor to forfeit his breach of contract claim against the creditor. See CCP §§490.010-490.060 on liability for wrongful attachment.

Conversely, allegations that during a debtor's examination the judgment creditor maliciously threatened to telephone each of the debtor's customers to ascertain the debtor's assets were held insufficient to support a claim for abuse of process. *Kyne v Eustice* (1963) 215 CA2d 627, 633, 30 CR 391 (allegations failed to establish misuse of legal process, because judgment creditor's conduct was within legitimate scope of debtor's examination; fact that judgment creditor may have acted with bad intentions did not alter result).

Abuse of process may occur in a variety of non-debtor-creditor settings. See, *e.g., Thornton v Rhoden* (1966) 245 CA2d 80, 95, 53 CR 706 (abuse of process could lie when deposition taken for sole purpose of obtaining publishing of defamatory remarks that news media might not have published absent privilege provided by CC §47(d)). See also *Younger v Solomon* (1974) 38 CA3d 289, 298, 113 CR 113 (alleged improper use of interrogatory to publish confidential information about professional misconduct complaint filed with State Bar for ulterior purpose of damaging attorney's reputation and professional standing).

On the use of abuse of process claims to combat wrongful eviction, see *Tranchina v Arcinas* (1947) 78 CA2d 522, 178 P2d 65.

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C. Defenses

§11.7 1. Statute of Limitations

Abuse of prosecution actions are subject to the 1-year statute of limitations prescribed by CCP §340. See *Thornton v Rhoden* (1966) 245 CA2d 80, 95, 53 CR 706; *McFaddin v H. S. Crocker Co.* (1963) 219 CA2d 585, 590, 33 CR 389 (abuse of process suit must be filed within 1 year after "the commission of the wrongful act").

NOTE: It could be argued that abuse of process suits are governed by the 2-year limitations period specified in CCP §335.1 for an "action… for injury to… an individual caused by the wrongful act or neglect of another." Abuse of process is not listed in the amended CCP §340(c) as one of the intentional torts (libel, slander, and false imprisonment) for which the 1-year limitations period remains in force. Abuse of process is not specified in CCP §335.1, but assault and battery are.

An abuse of process cause of action does not accrue until injury has occurred, even if that happens long after the wrongful act was committed. See *Kappel v Bartlett* (1988) 200 CA3d 1457, 1467, 246 CR 815 (abuse of process arising from false declaration of service of summons did not accrue until more than a year later, when execution on default judgment was made on plaintiff's property).

An abuse of process claim may accrue, however, before the underlying lawsuit is "terminated" for malicious prosecution purposes, even if the two causes of action are pleaded in one complaint; the abuse of process statute of limitations begins to run when the last act constituting an abuse of process occurs. See *McFaddin v H. S. Crocker Co., supra* (1-year statute of limitations barred recovery when provisional remedy in earlier action issued almost 3 years before abuse of process complaint was filed). See *Thornton v Rhoden, supra*.

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§11.8 2. Privilege

Under CC §47(b), a "publication" (or a communication) made in the course of a judicial proceeding is absolutely privileged. Accordingly, CC §47(b) would appear to preclude an abuse of process recovery that is based exclusively on a statement or publication taking place in the course of a judicial proceeding. See *Umansky v Urquhart* (1978) 84 CA3d 368, 372, 148 CR 547; *Thornton v Rhoden* (1966) 245 CA2d 80, 99, 53 CR 706. See, however, *Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 1167, 232 CR 567 (court observed it did not have to decide plaintiff's broad contention that CC §47(b) should not apply to these cases, having ruled plaintiff's alternative contention meritorious). The privilege is to be construed liberally. *Umansky v Urquhart* (1978) 84 CA3d 368, 372, 148 CR 547.

The CC §47(b) privilege also applies to noncommunicative conduct that is "necessarily related" to a cause of action based on a communicative act. *Rusheen v Cohen* (2006) 37 C4th 1048, 39 CR3d 516 (applying for writ of execution and act of levying on property both protected by privilege when abuse of process claim was based on communicative act of filing allegedly false declarations of service).

For CC §47(b)'s absolute privilege to bar an abuse of process claim, the publication in the prior proceeding must have satisfied all the following requirements:

- The publication occurred in the course of a judicial proceeding;
- It bore some connection or logical relationship to the action;
- It was made to achieve the objects of the litigation; and
- It involved the litigant or other authorized participant.

Profile Structures, Inc. v Long Beach Bldg. Material Co. (1986) 181 CA3d 437, 441, 226 CR 192.

Most disputes about the privilege conferred by CC §47(b) focus on the publication's connection to the object of litigation. The more the statement or publication is removed from a legitimate object of the litigation, the more reluctant is the court to bar the abuse of process claim. See *Younger v Solomon* (1974) 38 CA3d 289, 113 CR 113 (copy of complaint about attorney that had been filed with State Bar attached to written interrogatories).

A statement or publication made in a prior proceeding may be used as evidence of a defendant's ulterior purpose even when CC §47(b) would preclude use of a privileged publication as the basis of abuse of process liability. See *Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 1168, 232 CR 567 (CC §47(b) no bar to evidentiary use of publication made during course of judicial proceeding to show individual's state of mind (*i.e.,* intent)).

For more on the CC §47(b) privilege, see §8.19.

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§11.8A 3. Anti-SLAPP Law; SLAPPback Claims

The special motion authorized by CCP §425.16 to strike a complaint deemed to be a Strategic Lawsuit Against Public Participation (SLAPP) may be asserted against an abuse of process cross-complaint. *Booker v Rountree* (2007) 155 CA4th 1366, 66 CR3d 733 (abuse of process cross-complaint filed in a suit in which original plaintiff alleged he, as a wheelchair user, was denied equal access to restaurant; motion denied where cross-complainant showed probability of success on merits). See *Raining Data Corp. v Barrenechea* (2009) 175 CA4th 1363, 97 CR3d 196 (cross-complaint alleging malicious prosecution and other causes of action properly stricken; filing lawsuit alleging misappropriation of trade secrets protected activity).

An abuse of process (or malicious prosecution) lawsuit brought against a person whose prior cause of action was dismissed under a special motion to strike under CCP §425.16 is known as a "SLAPPback" claim. CCP §425.18. An anti-SLAPP motion made to strike a SLAPPback claim is not subject to specified subdivisions of CCP §425.16 but is subject to provisions in CCP §425.18 on time to file, hearing date, continuance for discovery, sanctions for frivolity or intent to delay, review by peremptory writ, illegality of the prior proceeding, and SLAPPbacks filed by public entities. See *Soukup v Law Offices of Herbert Hafif* (2006) 39 C4th 260, 46 CR3d 638 (CCP §425.18(h) made it clear that SLAPPback suits were subject to anti-SLAPP motions except when moving party's original cause of action was "illegal as a matter of law"). For more on anti-SLAPP motions, see §§8.22, 10.25A.

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III. DAMAGES AND OTHER RELIEF

§11.9 A. Compensatory Damages

The damages recoverable in a claim for abuse of process include, broadly, all "damage, loss or harm" resulting from the abuse of legal process. See generally CC §3333, applicable to most tort cases.

Abuse of process damages may thus include recovery for mental suffering (see *Spellens v Spellens* (1957) 49 C2d 210, 233, 317 P2d 613) and for loss of earnings, loss of profits, loss of the use and enjoyment of property seized, and injury to business property or reputation (see *White Lighting Co. v Wolfson* (1968) 68 C2d 336, 347, 66 CR 697). See also *Christensen v Younger* (1975) 47 CA3d 613, 618, 120 CR 923 (one who misuses legal process is liable for "pecuniary loss caused thereby").

NOTE: A corporation may pursue an abuse of process action, but cannot recover emotional distress damages. *Templeton Feed & Grain v Ralston Purina* Co. (1968) 69 C2d 461, 468, 72 CR 344.

An abuse of process plaintiff may be denied an award of attorney fees. See *Spellens v Spellens, supra*. But see *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 51, 118 CR 184 (in malicious prosecution action, reasonable attorney fees in defending earlier action are recoverable). See also §§10.27-10.31.

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B. Punitive Damages

§11.10 1. Proving Malice

Punitive damages are recoverable in an abuse of process case on the required proof of malice. See CC §3294; *Templeton Feed & Grain v Ralston Purina Co.* (1968) 69 C2d 461, 471, 72 CR 344. See also *Weisenburg v Molina* (1976) 58 CA3d 478, 490, 129 CR 813 (award of $625.40 in compensatory damages, and, against separate defendants, $25,000 and $3240.18 in punitive damages; questioned in *Mike Davidov Co. v Issod* (2000) 78 CA4th 597, 607 n5, 92 CR2d 897, which is noted in §14.38, on need for financial condition evidence as basis for punitive damages).

NOTE: The malice that must be proved to support punitive damages may differ in quality from any malice inferable from the plaintiff's proof of the defendant's earlier ulterior motive or improper use of process as a basis for establishing abuse of process liability for compensatory damages. See *Spellens v Spellens* (1957) 49 C2d 210, 232, 317 P2d 613; *Pimentel v Houk* (1951) 101 CA2d 884, 887, 226 P2d 739.

Malice for punitive damages purposes must be proved by clear and convincing evidence. CC §3294. See chap 14 on punitive damages generally.

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§11.11 2. Effect of Advice of Counsel

Proof that the abuse of process defendant fully disclosed all relevant facts to counsel and thereafter acted on counsel's advice may preclude a finding of the malice required to support a punitive damages recovery. See *Templeton Feed & Grain v Ralston Purina Co.* (1968) 69 C2d 461, 472 n7, 72 CR 344.

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§11.12 C. Injunction

An injunction restraining an abuse of process is sometimes an appropriate form of relief. See *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 103, 101 CR 745 (debt collection case (see §11.6); judiciary itself has strong interest in eliminating any systematic misuse of judicial machinery). See also *Czap v Credit Bureau* (1970) 7 CA3d 1, 7, 86 CR 417 (preliminary injunction to enjoin unlawful means of enforcing municipal court judgment).

Note that a request for injunctive relief requires that the complaint be verified, or that supporting declarations be filed. CCP §527.

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IV. PROCEDURAL CONSIDERATIONS

§11.13 A. Pleading

Claims for abuse of process may be initiated by a complaint or cross-complaint. See *White Lighting Co. v Wolfson* (1968) 68 C2d 336, 66 CR 697; *Younger v Solomon* (1974) 38 CA3d 289, 113 CR 113 (cross-complaint cases).

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§11.14 1. Joining Causes of Action

Additional forms of relief and damages may sometimes be obtained by pleading, in the same complaint, counts stating causes of action for abuse of process, malicious prosecution, false arrest and imprisonment, and intentional infliction of emotional distress. Of course, counsel must be aware of the differing elements for each cause of action and the statute of limitations applicable to each.

A business that consistently misuses legal process may be subject to injunctive relief under Bus & P C §17200 for unfair business practices. See Bus & P C §§17203-17204; *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 108, 101 CR 745 (decided under former section).

A creditor or debt collector may be subject to substantive provisions and remedies available under CCP §§490.010-490.060 or the Fair Debt Collection Practices Act (15 USC §§1692-1692(o)).

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§11.15 2. Joining Attorney as Defendant

Sometimes it is useful to add as a defendant the attorney or attorneys who assisted a party in carrying out the misuse of legal process. See *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 97 n1, 101 CR 745. An attorney who actively participated with a client in misusing the system to promote a client's wrongful objective might even be named as a coconspirator. See *Weisenburg v Molina* (1976) 58 CA3d 478, 489, 129 CR 813 (discussed in §11.10).

See Anno, 97 ALR3d 688 (1980) (attorney liability for abuse of process).

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B. Trial Strategy and Proof

§11.16 1. Proving Abuse

The abuse of process plaintiff's key to maximizing damages is to demonstrate, as clearly and conclusively as possible, the reprehensible manner in which the legal system was manipulated by the defendant to obtain an unjustified advantage over an adversary. The image to be conveyed to the jury is that the court process has been used not as a means to obtain justice but as an axe or sword to silence a critic, destroy a rival competitor, or extort payment of a disputed debt. In essence, the most convincing way to illustrate the mental suffering, anxiety, shame, or mortification of having to rectify the misuse of legal process is to present evidence of the defendant's egregious conduct.

Expert testimony may be used, even required, to explain that the complained-of use of process exceeded its authorized use. An expert can explain how the intended design and proper use of the legal process in issue differed from the use to which it was put by the defendant.

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§11.17 2. Proving Motive and Malice

Direct evidence of the defendant's ulterior motive or purpose in misusing the legal process is not typically available, but the trier of fact may infer motive from evidence that process was improperly used. See *Tellefsen v Key Sys. Transit Line*s (1961) 198 CA2d 611, 616, 17 CR 919 (noted in §11.5). Further, statements made by the defendant to third parties may provide circumstantial evidence of an ulterior motive or purpose.

Evidence that the defendant knew that the property seized by writ of attachment or similar procedure was necessary for the conduct of the plaintiff's business, or that the defendant specified what property should be seized, tends to show both an ulterior motive and malice.

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§11.18 3. Proving Damages

An abuse of process plaintiff can testify about his or her shock and outrage at having to resist an improper claim, as well as what it cost to do so. The plaintiff and other witnesses should seek to establish a causal link between the defendant's alleged misapplication of legal process and the harm suffered. Independent witnesses can explain how, in their dealings with the plaintiff, fear and apprehension over the loss of property or reputation was manifested.

Evidence of the sentimental or unique character of personal or real property wrongfully seized supports the extent of the plaintiff's mental anguish. The plaintiff—and, more effectively, other witnesses—can describe any aggravating circumstances surrounding seizure of property.

An argument for punitive damages may emphasize that their purpose is not only to punish the defendant for egregious behavior, but also to deter others from engaging in similar conduct.

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§11.19 V. TAX CONSEQUENCES

Compensatory damages received by way of suit or settlement (whether in a lump sum or by periodic payments) for personal physical injury or physical sickness are not taxable income. See IRC §104(a)(2). See Notes in §1.112 and §8.48 on the unconstitutionality of taxing damages that compensate a plaintiff for emotional distress or other forms of harm or loss that are unrelated to lost wages or earnings. See generally §§1.113, 8.49-8.50.

Punitive damages that are recovered in an abuse of process suit appear to be taxable as income. See §14.48.

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12

False Arrest and False Imprisonment

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I. LIABILITY FACTORS

§12.1 A. Defining the Tort

Every person has the right of protection from bodily restraint or harm, subject to qualifications and restrictions. CC §43. The tort of false imprisonment is "the unlawful violation of the personal liberty of another." *Asgari v City of Los Angeles* (1997) 15 C4th 744, 757, 63 CR2d 842; *Fermino v Fedco, Inc.* (1994) 7 C4th 701, 715, 30 CR2d 18 (quoting Pen C §236). See *City of Newport Beach v Sasse* (1970) 9 CA3d 803, 810, 88 CR 476 (Penal Code definition applies to both criminal and civil proceedings). See also *Wilson v Houston Funeral Home* (1996) 42 CA4th 1124, 1135, 50 CR2d 169 (tort is willful and wrongful interference with another's freedom of movement).

The violation of CC §52.1, relating to remedies for interference with civil rights, can be based on the arrest or imprisonment of a person without probable cause. See *Gillan v City of San Marino* (2007) 147 CA4th 1033, 1050, 55 CR3d 158 (police had reason to doubt high school girl's statements that coach had sexually molested her; officers not immune under Govt C §821.6; damages not recoverable for defamation or intentional infliction of emotional distress). An arrest without probable cause may also give rise to a tort cause of action under 42 USC §1983 for violation of the arrestee's civil rights. *Beck v City of Upland* (9th Cir 2008) 527 F3d 853 (causation element not negated by prosecutor's pre-arrest authorization of criminal charges; California immunity laws inapplicable).

In civil cases, the tort of false imprisonment is the intentional confinement of a person without consent and without lawful privilege for an appreciable length of time, however short. *City of Newport Beach v Sasse, supra* (citing Restatement (Second) of Torts §35 (1965)); *Hernandez Castro v City of Hanford* (ED Cal 2008) 546 F Supp 2d 822, 829 (officers' reasonable, albeit incorrect, belief that plaintiff was person named in warrant justified arrest and incarceration for 7 days). The cause of action lies when there has been an unlawful arrest followed by imprisonment or when an arrest is lawful but there is an unreasonable delay in releasing or in bringing the person before a magistrate. *City of Newport Beach v Sasse, supra* (citing *Dragna v White* (1955) 45 C2d 469, 289 P2d 428).

False arrest and false imprisonment are not separate torts; false arrest is but one way of committing a false imprisonment. *Asgari v City of Los Angeles* (1997) 15 C4th 744, 752 n3, 63 CR2d 842. See *Arpin v Santa Clara Valley Transp. Agency* (9th Cir 2001) 261 F3d 912 (false arrest and imprisonment allegations by transit passenger accused of trying to use expired identification card). Sometimes, however, because false arrest and false imprisonment are identified by the unlawfulness of the arrest or of the imprisonment, it is important to distinguish between an "arrest" and a "detention." See, *e.g., Dawkins v City of Los Angeles* (1978) 22 C3d 126, 133, 148 CR 857 (police held to different standards of care for detention than for arrest).

NOTE: Penal Code §834 defines arrest as "taking a person into custody, in a case and in the manner authorized by law."

A false imprisonment may be accomplished by fraud, deceit, or other forms of unreasonable duress as well as by an exercise or show of force. *Scofield v Critical Air Medicine, Inc.* (1996) 45 CA4th 990, 996, 52 CR2d 915 (air transport service deceived two minors into boarding its plane rather than plane chartered by father; not necessary that minors knew they were on wrong plane; $60,000 damages to each minor was for their "confinement" on wrong plane, not for being deceived; trial judge correctly deleted words about force from instruction).

For jury instructions on the elements of causes of action for false arrest or imprisonment in a variety of situations, and on affirmative defenses, see CACI 1400-1409.

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§12.2 B. Distinguishing Related Torts

The confinement necessary to constitute false imprisonment need not be the result of the harmful or offensive touching that is the gravamen of battery (see chap 7) if the victim felt compelled to acquiesce to confinement out of reasonable fear of harm or injury. See *People v Martinez* (1984) 150 CA3d 579, 599, 198 CR 565, disapproved on other grounds in *People v Hayes* (1990) 52 C3d 577, 628 n10, 276 CR 874.

False imprisonment is likewise distinguishable from assault, which requires that the tortfeasor create an apprehension of an immediate harmful or offensive touching; assault focuses on the apprehension, false imprisonment on the confinement. See 150 CA3d at 600.

False imprisonment—confinement without lawful process—is distinguishable from malicious prosecution, which is the misuse of legal process without probable cause and for an improper purpose (see §10.1). *Collins v City & County of San Francisco* (1975) 50 CA3d 671, 676, 123 CR 525.

NOTE: The distinction between false imprisonment and malicious prosecution is critical in cases involving public officers who are immune from civil liability for malicious prosecution within the scope of employment (Govt C §821.6), but not for false imprisonment (Govt C §820.4). See §12.11.

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§12.3 C. Permissible Claimants

It appears that only the person detained can recover damages for false imprisonment. See *Sea World Inc. v Superior Court* (1970) 13 CA3d 100, 106, 91 CR 336 (father of arrestee not permitted to maintain false imprisonment claim; action for false arrest is personal and does not give rise to cause of action in any person other than one directly aggrieved). See §10.3 on similar rule for malicious prosecution.

TACTICS: An attorney seeking to frame a cause of action for a person other than the one falsely imprisoned should analyze the facts under principles relating to loss of consortium (see chap 2), bystander liability under *Dillon v Legg* (1968) 68 C2d 728, 740, 69 CR 72 (see §§6.8-6.15), third party "direct victim" liability under *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 167 CR 831 (see §§6.24-6.29), or, if the defendant's conduct was especially egregious, intentional infliction of emotional distress (see §§6.16-6.23).

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Source: Torts/California Tort Damages/12 False Arrest and False Imprisonment/ D. Persons Liable/ 1. Police Officers, Private Persons, and Others/§12.4 a. For Arresting or Detaining

D. Persons Liable

1. Police Officers, Private Persons, and Others

§12.4 a. For Arresting or Detaining

A police officer can make an arrest under Pen C §836(a), without incurring civil liability, if:

- The officer has probable cause to believe that the person has committed a public offense in the officer's presence;
- The person has committed a felony, although not in the officer's presence; or
- The officer has probable cause to believe that the person has committed a felony, whether or not a felony in fact has been committed.

A police officer may also make an arrest based on probable cause to believe that a defined species of domestic assault and battery has occurred. See Pen C §836(d). Further, a police officer is not liable for "detaining" a person for questioning on the basis of a reasonable belief that the detention is necessary in the proper discharge of the officer's duties. *Dawkins v City of Los Angeles* (1978) 22 C3d 126, 133, 148 CR 857; *Gallegos v City of Los Angeles* (9th Cir 2002) 308 F3d 987 (detaining burglary suspect less than 1 hour before releasing him was within bounds of permissible investigatory stop). An off-duty police officer who arrests a person while working as a security guard, on the other hand, is held to the standard applicable to a private person (see below). *Cervantez v J. C. Penney Co.* (1979) 24 C3d 579, 587, 156 CR 198. See also §12.11 on immunities for arrest under a warrant and for receiving a person arrested by another. For jury instructions on a peace officer's affirmative defenses of probable cause to arrest and authority to detain, see CACI 1402, 1408.

An arrestee's later stipulation that there was probable cause for the arrest (apparently given to obtain dismissal of the criminal charges on which the arrest was based) immunizes the arresting officers from civil liability for false arrest and imprisonment. *Salazar v Upland Police Dep't* (2004) 116 CA4th 934, 11 CR3d 22.

A private person makes an arrest under Pen C §837, without incurring civil liability, if the person arrested:

- Has actually committed, or attempted to commit, a misdemeanor in the arresting person's presence;
- Has actually committed a felony; or
- Is believed by the arresting person, on reasonable cause, to have committed a felony that was actually committed.

An arrest by a private individual is lawful if made for a crime actually committed, even if that crime is not the one charged. See *Gomez v Garcia* (1980) 112 CA3d 392, 398, 169 CR 350 (arrest lawful though crime committed was trespassing, not disturbing peace as charged; arresting person need not be precisely familiar with Penal Code terminology). For jury instructions on a private citizen's affirmative defense of probable cause to arrest and common-law right to detain for investigation, see CACI 1404, 1409.

NOTE: A merchant arresting a person on suspicion of theft is held to a less strict standard than are private persons generally. See discussion of the merchant's defense in §12.12. A merchant making a citizen's arrest of persons claiming to be exercising their constitutional free speech right, when sued for false arrest, is not entitled to summary judgment absent a showing that the arrestees engaged in obstructive or intimidating conduct prohibited by Pen C §602.1. See *Hamburg v Wal-Mart Stores, Inc.* (2004) 116 CA4th 497, 10 CR3d 568 (also noted in §12.11).

The person inducing another to make a citizen's arrest can be liable as a coconspirator. *Kesmodel v Rand* (2004) 119 CA4th 1128, 15 CR3d 118 (mother encouraged adult son to sign citizen's arrest form; see also §12.14).

A false arrest claim made after a citizen's arrest is not subject to a SLAPP motion (see §8.22) under CCP §425.16. *Wang v Hartunian* (2003) 111 CA4th 744, 3 CR3d 909 (plaintiff's causes of action did not arise from protected activity).

Nor is a citizen's arrest a privileged communication under CC §47(b). See §12.14.

See Anno, 81 ALR4th 1031 (1990) (effect of claim that police suppressed or failed to disclose or investigate exculpatory evidence).

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§12.5 b. For Imprisoning

False imprisonment liability can be imposed on a person who does not release a prisoner the person knows or should know is entitled to be released. *Sullivan v County of Los Angeles* (1974) 12 C3d 710, 717, 117 CR 241 (county liability when sheriff failed to release plaintiff after all charges had been dismissed). See *Abbott v Cooper* (1933) 218 C 425, 429, 23 P2d 1027, 1028 (jailer liability for holding prisoner after he knew or should have known that arrest was illegal); *Shakespeare v City of Pasadena* (1964) 230 CA2d 375, 386, 40 CR 863 (city liability for acts of employees who held plaintiff after payment of bail); *Cousins v Lockyer* (9th Cir 2009) 568 F3d 1063 (convict imprisoned for 19 months after court of appeal held statute under which he was convicted unconstitutional; see also §12.11). But see *Hernandez Castro v City of Hanford* (ED Cal 2008) 546 F Supp 2d 822, 829 (plaintiff's evidence did not meet test for "knew or should have known": whether sheriff had actual knowledge during plaintiff's 7-day incarceration that imprisonment was unlawful or had notice that would have put reasonable man under duty to investigate its validity).

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§12.6 c. For Aiding Arrest or Imprisonment

False arrest and imprisonment liability can be imposed on anyone who authorizes, encourages, directs, or assists another in making an unlawful arrest, or who procures an unlawful arrest, or who otherwise participates in an unlawful arrest or imprisonment. *Ramsden v Western Union* (1977) 71 CA3d 873, 880, 138 CR 426 (plaintiff arrested on felony warrant allegedly based on false information supplied by defendant's employees). Conversely, liability is not imposed on a person who, in good faith, reports information to the police and leaves to the police the decision to arrest. *Ramsden v Western Union, supra.*

A person who knowingly gives false information to the police may be liable for false arrest if the information is of a character that could be expected to induce arrest and if the person furnished the information intending to induce the arrest. See *Du Lac v Perma Trans Prods., Inc.* (1980) 103 CA3d 937, 942, 163 CR 335, disapproved on other grounds in *Hagberg v California Fed. Bank FSB* (2005) 32 C4th 350, 375 n8, 7 CR3d 803. See also *Washington v Farlice* (1991) 1 CA4th 766, 2 CR2d 607 (liability of person who, in dispute over vehicle's ownership, falsely reported to police that it had been stolen, after rival claimant (or his permittee) stopped and detained by police).

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§12.7 2. Employers

False arrest and imprisonment liability can be imposed on the nongovernmental employer of the person who, acting within the scope of employment or agency, falsely arrests or imprisons another. *Ramsden v Western Union* (1977) 71 CA3d 873, 880, 138 CR 426. See §12.23 on the imposition of punitive damages on an employer that directs or ratifies a false arrest.

A public entity may likewise be liable for the acts of its employees, provided that the individual employee could be sued for the wrongful conduct. Govt C §815.2(a). Thus, a public employee and employer may be liable for injuries occurring in the course of making an arrest. See *Blankenhorn v City of Orange* (9th Cir 2007) 485 F3d 463, 477 (person arrested in shopping mall he had been enjoined from entering could pursue claims under state law and 42 USC §1983); *Inouye v County of Los Angeles* (1994) 30 CA4th 278, 35 CR2d 367 (public entity respondeat superior liability for injury caused by off-duty county safety police officer in course of making arrest).

A public entity must pay any judgment based on a claim against an employee if the complained-of act occurred within the scope of employment. Govt C §825. See §12.11 on public employee (hence, public entity) immunities from liability. See §12.23 on public entity (but not public employee) immunity from liability for punitive damages.

A public entity may be held primarily, not derivatively, liable for false imprisonment if the imprisonment is caused by breach of a mandatory duty. Govt C §815.6. See *Sullivan v County of Los Angeles* (1974) 12 C3d 710, 715, 117 CR 241 (breach of Pen C §1384 duty to release defendant in custody).

The United States is not liable, in a Federal Tort Claims Act (28 USC §§1346(b), 2674) suit, for a false arrest and imprisonment committed by foreign nationals acting at the behest of the federal Drug Enforcement Agency in Mexico. See *Sosa v Alvarez-Machain* (2004) 542 US 692, 159 L Ed 2d 718, 124 S Ct 2739 (reversing court of appeals; also rejecting individual's liability under Alien Tort Statute (28 USC §1350), which provides for tort suits for conduct that violates law of nations).

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§12.7A 3. Attorneys

A client convicted of a crime may recover damages—presumably including damages for emotional distress—on establishing that he or she was "actually innocent" of the crime as well as that the imprisonment resulted from the professional negligence of his or her attorney. See *Sangha v La Barera* (2006) 146 CA4th 79, 52 CR3d 640 (no actual innocence after admitting misdemeanor vandalism although attorney had advised pleading guilty to felony vandalism); *Wiley v County of San Diego* (1998) 19 C4th 532, 79 CR2d 672 (noting that most legal malpractice damages are "fungible" in sense that client is seeking money that was lost through attorney's negligence, whereas damages for criminal malpractice are harder to quantify); *Salisbury v County of Orange* (2005) 131 CA4th 756, 31 CR3d 831 (client entitled to jury trial on "actual innocence" element).

Actual innocence need not be proved when the convicted client's professional malpractice claim against an attorney concerns the return of seized property. See *Brooks v Shemaria* (2006) 144 CA4th 434, 50 CR3d 430.

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§12.8 E. Pleading

False imprisonment is sufficiently pleaded by allegations of an arrest without process, imprisonment, and damages. *Cervantez v J. C. Penney Co.* (1979) 24 C3d 579, 592, 156 CR 198 (allegation that plaintiff was arrested without warrant sufficient to raise issue that arrest was unlawful; defendant then had burden of establishing justification for arrest).

A plaintiff who alleges that an arrest by police was precipitated by false accusations made by a private person must allege not only that knowingly false statements were made to the police, but also that the accusations were of a type that could be expected to induce an arrest. *Du Lac v Perma Trans Prods., Inc.* (1980) 103 CA3d 937, 944, 163 CR 335, disapproved on other grounds in *Hagberg v California Fed. Bank FSB* (2005) 32 C4th 350, 375 n8, 7 CR3d 803.

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F. Defenses

§12.9 1. Statute of Limitations

An action for false imprisonment must be commenced within 1 year from the date of accrual. CCP §340(c).

The cause of action accrues on release from confinement. *Scannell v County of Riverside* (1984) 152 CA3d 596, 614, 199 CR 644 (release was accrual date, not later dismissal of criminal charges). The running of the limitations period may be tolled, however, from the date notice was given of criminal charges through their final disposition. *Schmidlin v City of Palo Alto* (2007) 157 CA4th 728, 69 CR3d 365 (2-to-1 decision).

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Source: Torts/California Tort Damages/12 False Arrest and False Imprisonment/§12.10 2. Government Claims Presentation

§12.10 2. Government Claims Presentation

A public entity may allege, as a defense, that the plaintiff failed to present a timely claim or otherwise failed to meet requirements of the Government Claims Act (Govt C §§810-996.6).

NOTE: Generally, a written claim must be presented to the entity within 6 months after accrual of the cause of action (Govt C §911.2), although there are exceptions and provisions for late claim relief. A civil complaint must then be filed within 6 months after notice of denial of the claim is mailed or delivered to the plaintiff or, if no written notice of denial is given, within 2 years following accrual of the cause of action. Govt C §945.6. For detailed discussion of these requirements, see California Government Tort Liability Practice, chaps 5-8 (4th ed Cal CEB 1999); California Tort Guide, chap 8 (3d ed Cal CEB 1996).

The arrested person may not bring a civil action against a peace officer or public entity while criminal charges against the person are pending in a court, during which period the statute of limitations is tolled. Govt C §945.3.

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Source: Torts/California Tort Damages/12 False Arrest and False Imprisonment/§12.11 3. Public Employee and Entity Immunities

§12.11 3. Public Employee and Entity Immunities

The "judicial immunity" that exonerates judges and other persons acting in a judicial capacity from liability for injury caused by the exercise of judicial functions does not protect such a person from liability for detriment caused by nonjudicial activities. *Regan v Price* (2005) 131 CA4th 1491, 33 CR3d 130 (attorney acting as discovery referee not immune from alleged false imprisonment of and battery on litigant at site of deposition).

Even when a federal law immunity for actions by a criminal prosecutor exonerates the state attorney general and others from liability under 42 USC §1983, a state law false imprisonment claim can be pursued to determine applicability of state law immunities. *Cousins v Lockyer* (9th Cir 2009) 568 F3d 1063 (convict imprisoned for 19 months after court of appeal held statute under which he was convicted unconstitutional).

Penal Code §847 enumerates several immunities for public officers participating in an arrest. For example, a peace officer, acting within the scope of the officer's authority, cannot be held civilly liable for false arrest or imprisonment if the officer had reasonable cause to believe that the arrest was lawful at the time it was made or if the arrest was made on a charge, based on reasonable cause, that the person to be arrested had committed a felony. See *O'Toole v Superior Court (San Diego Community College Dist.)* (2006) 140 CA4th 488, 510, 44 CR3d 531 (reasonable cause to arrest exists when facts known to officer would lead reasonable person to have strong suspicion of arrestee's guilt; officers knew that student carrying out activities opposing abortion did not have required permit). Nor can a peace officer be held liable for participating in an arrest on being summoned to aid another (Pen C §839), for arresting someone after being ordered to do so by a magistrate (Pen C §838), or for receiving an arrestee from another (Pen C §142(a)). See *Kinney v County of Contra Costa* (1970) 8 CA3d 761, 767, 87 CR 638; *Shakespeare v City of Pasadena* (1964) 230 CA2d 375, 382, 40 CR 863. See also *Hamburg v Wal-Mart Stores, Inc.* (2004) 116 CA4th 497, 10 CR3d 568 (peace officer who takes custody following citizen's arrest not required to determine whether arrest was justified).

Civil Code §43.55 immunizes from liability "any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant." See *Lopez v City of Oxnard* (1989) 207 CA3d 1, 254 CR 556 (police department that arrested plaintiff three times on warrant was immune despite failure to investigate municipal court "disposition sheet" stating that plaintiff was not suspect being sought); *Allison v County of Ventura* (1977) 68 CA3d 689, 703, 137 CR 542 (discussing when warrant is "regular on its face"); *Laible v Superior Court* (1984) 157 CA3d 44, 47, 203 CR 513. But see *Bell v State* (1998) 63 CA4th 919, 929, 74 CR2d 541 (ample evidence that officers' arrest of wrong person was unreasonable; Penal Code and other immunities inapplicable). For a jury instruction on a peace officer's affirmative defense under CC §43.55, see CACI 1406.

NOTE: The Government Claims Act (Govt C §§810-996.6) contains immunities and defenses generally available to public employees and entities. For discussion, see California Government Tort Liability Practice §§9.18-9.20 (4th ed Cal CEB 1999); California Tort Guide §8.2 (3d ed Cal CEB 1996). One statutory immunity expressly *not* available to bar false arrest and imprisonment liability is that provided by Govt C §821.6, which immunizes public employees from liability for malicious prosecution. *Asgari v City of Los Angeles* (1997) 15 C4th 744, 753, 63 CR2d 842; *Sullivan v County of Los Angeles* (1974) 12 C3d 710, 719, 117 CR 241. See Govt Tort Liability §§10.45-10.46, 11.6-11.11. Indeed, Govt C §820.4 expressly recognizes a cause of action against public employees for false arrest or imprisonment. *Randle v City & County of San Francisco* (1986) 186 CA3d 449, 456, 230 CR 901.

Government Code §845.8(a) immunizes the state and individual parole agents from potential liability for the mistaken arrest of a person different from one whose parole was subject to revocation, but the immunity did not protect parole agents who continued to hold him after they knew or should have known he was the wrong man. *Perez-Torres v State* (2007) 42 C4th 136, 64 CR3d 155 (keeping him in jail was ministerial action implementing basic policy decision, not discretionary decision for which Govt C §820.2 immunity could be asserted).

Like any other false arrest and imprisonment defendant, a public employee may assert defensively that the plaintiff has failed to prove an essential element of the cause of action. See *Jenkins v County of Orange* (1989) 212 CA3d 278,

260 CR 645 (because social worker who had taken custody of child based on erroneous claim of child abuse had promptly applied for court order that was later granted, imprisonment could not be found unlawful).

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§12.12 4. Merchants' Defense

Penal Code §490.5(f)(1) permits a merchant to detain an individual on probable cause to believe the person to be involved in theft. The statute also authorizes a merchant who arrests or detains a person to defend a claim of false arrest or imprisonment by proving that the merchant had probable cause to believe that the person had stolen or attempted to steal merchandise and that the merchant acted reasonably under all the circumstances. Pen C §490.5(f)(7). The statute cloaks the merchant with something similar to a peace officer's probable cause defense.

NOTE: Penal Code §490.5(f)(7) appears to supersede the holding in *Cervantez v J. C. Penney Co.* (1979) 24 C3d 579, 590, 156 CR 198, that the merchants' defense is limited to incidents of detention rather than formal arrest.

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§12.13 5. Amusement Park Defense

Penal Code §490.6(a) authorizes amusement park employees to detain a person for a reasonable time in a reasonable manner, and permits a merchant to detain an individual on probable cause to believe the person has violated lawful amusement park rules. See *Ecker v Raging Waters Group, Inc.* (2001) 87 CA4th 1320, 105 CR2d 320 (nonsuit on patron's false imprisonment and infliction of emotional distress claims reversible absent conclusive showing that park personnel had acted reasonably in confiscating patron's video camera, viewing tape without permission, and holding patron without explanation in physically uncomfortable surroundings for 3 hours).

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§12.14 6. Privilege: Reporting Potential Criminal Activity; Probable Cause

Civil Code §47(b) establishes a privilege, which bars all tort causes of action except a claim for malicious prosecution, for a "publication" made in specified instances, including an "official proceeding authorized by law." This privilege immunizes from liability for false imprisonment a citizen who reports potential criminal activity to the police. *Hagberg v California Fed. Bank* (2004) 32 C4th 350, 360, 7 CR3d 803 (bank not liable for calling police, who then detained person suspected of seeking to cash counterfeit check); *Mulder v Pilot Air Freight* (2004) 32 C4th 384, 7 CR3d 828 (privilege negates false arrest or imprisonment liability unless plaintiff can establish elements of malicious prosecution liability); *Hunsucker v Sunnyvale Hilton Inn* (1994) 23 CA4th 1498, 28 CR2d 722 (after maid told manager that guest's wife had gun, manager called police who, based on name similarity, mistakenly thought guest was felon and detained him for 30 minutes).

NOTE: The majority in *Hagberg v California Fed. Bank, supra,* declined to decide whether the CC §47(b) privilege bars recovery from a business that calls for police assistance on the basis of racial or ethnic prejudice in violation of the Unruh Civil Rights Act (CC §51). The court in *Devis v Bank of America* (1998) 65 CA4th 1002, 77 CR2d 238, in the course of holding a bank immune from liability for several alleged torts, suggested that CC §47 provided a defense only if the communication to the police was made in good faith. That suggestion was criticized in *Johnson v Symantec Corp.* (ND Cal 1999) 58 F Supp 2d 1107 (police reports are "official communications" entitled to absolute privilege; permitting good faith exception would make it qualified privilege). See also *Berioz v Wahl* (2000) 84 CA4th 485, 495 n6, 100 CR2d 905 (rejecting "qualified privilege" cases and citing as more authoritative *Williams v Taylor* (1982) 129 CA3d 745, 181 CR 423); *Sacramento Brewing Co. v Desmond, Miller & Desmond* (1999) 75 CA4th 1082, 89 CR2d 760 (adding that other cases disagree with good faith exception discussed in *Devis*).

Making a citizen's arrest is conduct, not a communication in an official proceeding; CC §47(b) does not immunize the person making or instigating the arrest from liability for false arrest. *Buchanan v Maxfield Enters., Inc.* (2005) 130 CA4th 418, 422, 29 CR3d 909 (store owner effected a citizen's arrest of customer by telling sheriff's deputies that he was doing so; this was not communicative conduct protected by the privilege; store and owner could be liable for ensuing detriment to customer when deputies handcuffed him, led him from store (accompanied by store manager), and "paraded" him before media assembled in parking lot because celebrities were in store); *Kesmodel v Rand* (2004) 119 CA4th 1128, 15 CR3d 118 (following citizen's arrest, police officer acted as "transporting and booking, rather than arresting," officer; see also §§12.4, 12.17).

A would-be airline passenger who falsely tells airport personnel or peace officers that she has a bomb in her luggage, even if the statement was not seriously made or understood, violates Pen C §148.1, providing probable cause for her arrest. *Levin v United Air Lines, Inc.* (2008) 158 CA4th 1002, 70 CR3d 535 (false arrest claim dismissed even though passenger not prosecuted).

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§12.15 7. Actions Taken at Request of Police Officer

A private person may defend a claim of unlawful citizen's arrest by showing that the arrest was made at the request or the direction of a police officer. *Peterson v Robison* (1954) 43 C2d 690, 697, 277 P2d 19.

NOTE: This defense can arise in a situation, as in *Peterson,* when the police are unable to make a misdemeanor arrest because the offense was not committed in their presence.

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§12.16 8. Workers' Compensation Exclusivity

Employers sometimes avoid damages liability to their own employees by invoking the workers' compensation exclusive remedy provisions of Lab C §§3600 and 3602. This immunity does not, however, protect an employer from false imprisonment liability if the employer's conduct (or that of the employer's security personnel) is such that the employer is deemed to have stepped outside its proper role and the resulting injury is beyond the scope of the workers' compensation bargain. *Fermino v Fedco, Inc.* (1994) 7 C4th 701, 30 CR2d 18 (during investigation of suspected theft, young female sales clerk held against her will in windowless, closed-door room, confronted by four men, subjected to profanities, falsely told that another employee and a customer would testify against her, told she could not leave room or call mother, and would be arrested and publicly charged with theft if she did not confess).

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II. DAMAGES

§12.17 A. Foreseeable Detriment

All damages that are the foreseeable result of a false arrest, including physical and mental suffering, are recoverable. *Gill v Epstein* (1965) 62 C2d 611, 616, 44 CR 45, disapproved on other grounds in *Manta Mgmt. Corp. v City of San Bernardino* (2008) 43 C4th 400, 412 n8, 75 CR3d 353 (plaintiff could recover for detriment resulting from newspaper publicity following filing of false arrest complaint because publicity was foreseeable result of arrest). See *Pool v City of Oakland* (1986) 42 C3d 1051, 232 CR 528 (damages recoverable for physical and emotional injury, based on evidence that plaintiff had never before been arrested, that he suffered indignity and humiliation in arrest, booking, fingerprinting, and strip and rectal searches, and that he continued to suffer high blood pressure and irregular heartbeats).

Economic, noneconomic, and punitive damages are recoverable by a victim of an unjustified citizen's arrest. *Kesmodel v Rand* (2004) 119 CA4th 1128, 15 CR3d 118 (victim was handcuffed by police, taken to station, booked, and jailed for 12 hours; damages awarded: $3500 economic, $27,000 noneconomic, and $2000 punitive).

As in malicious prosecution cases, the false arrest plaintiff should be entitled to recover damages for injury to credit and to social standing. See §10.32.

A false imprisonment cause of action may be pursued by a plaintiff who suffered merely nominal damage. *Scofield v Critical Air Medicine, Inc.* (1996) 45 CA4th 990, 1007, 52 CR2d 915 (court lists other forms of harm and loss for which damages are recoverable; see §§12.18-12.23).

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§12.18 1. Loss of Liberty

A falsely imprisoned plaintiff may seek monetary compensation for loss of liberty, arguing that damages can be awarded for the violation of a fundamental right. See *Scofield v Critical Air Medicine, Inc.* (1996) 45 CA4th 990, 1009, 52 CR2d 915 (damages recoverable for loss of time, inconvenience, damage to reputation, and other harm and loss).

TACTICS: The plaintiff's attorney might suggest to jurors that loss of liberty damages can be assessed on a per diem basis that takes into account evidence of the length and conditions of the unlawful confinement. Defense counsel can argue, inter alia, that any damages awarded for loss of liberty must not duplicate damages awarded for mental and emotional distress and suffering.

The difficulty of putting a dollar value on loss of liberty leads some plaintiffs' counsel to forego a loss of liberty argument in favor of emphasizing other, more easily quantifiable, aspects of damages.

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§12.19 2. Emotional Suffering

The false arrest and imprisonment plaintiff can testify about the nature, intensity, and duration of the distress suffered and the emotional impact of being arrested and held in custody, particularly if the plaintiff had never been arrested before. Factors that affect the degree of emotional suffering include the plaintiff's shock and fear at being (perhaps publicly) removed from familiar surroundings, handcuffed and placed in a patrol car, transported to jail, booked, fingerprinted, perhaps strip searched, and placed in a cell with other prisoners. See *Pool v City of Oakland* (1986) 42 C3d 1051, 232 CR 528 ($45,000 award); *Washington v Farlice* (1991) 1 CA4th 766, 770, 2 CR2d 607 ($10,000 award). See also dissenting opinion in *Dawkins v City of Los Angeles* (1978) 22 C3d 126, 148 CR 857 (describing humiliation experienced by falsely accused person); *Scofield v Critical Air Medicine, Inc.* (1996) 45 CA4th 990, 1009, 52 CR2d 915 (damages recoverable for emotional suffering and humiliation and other harm and loss).

TACTICS: Counsel should explore the possibility that a period of imprisonment, however short in duration, had lasting emotional effects that caused or may cause physical problems. In *Pool v City of Oakland supra,* for example, the plaintiff was permitted recovery on evidence that he suffered high blood pressure and an irregular heartbeat as a result of the arrest.

A defendant may use evidence of the plaintiff's previous arrests and incarcerations as a basis for arguing that the arrest sued on is unlikely to have caused significant distress.

Emotional effects may also accompany or follow any loss of reputation or of personal relationships resulting from a false arrest and confinement.

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§12.20 3. Physical Injury

Damages may be recovered for physical injury that results from false imprisonment. For example, a person may be injured during handcuffing or by a fellow prisoner. Government Code §844.6(a)(2), which immunizes public entities from liability for injuries to a prisoner, does not apply to a person falsely imprisoned. *Sullivan v County of Los Angeles* (1974) 12 C3d 710, 716, 117 CR 241. A person held in custody under a code section authorizing arrest for a penological objective, rather than in civil protective custody, is a "prisoner" for whose injury an entity can claim Govt C §844.6(a)(2) immunity even though the person, on release, is given a certificate describing the imprisonment as "detention." *Teter v City of Newport Beach* (2003) 30 C4th 446, 450, 133 CR2d 139 (person arrested for public intoxication in county with no available protective custody facility sued for injury received when beaten by another prisoner).

Public officers and entities can also be held liable for failing to take reasonable action to obtain medical treatment for a person in custody. Govt C §845.6.

See *Scofield v Critical Air Medicine, Inc.* (1996) 45 CA4th 990, 1009, 52 CR2d 915 (damages recoverable for physical discomfort, physical illness or injury to health, and other harm and loss). See chap 1 on general principles for measuring and recovering bodily injury damages.

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§12.21 4. Loss of Income

A person may recover damages for income lost during the period of confinement and for long-term economic loss if the loss was reasonably foreseeable and the damages are properly documented. For example, the plaintiff's professional reputation may be permanently diminished, particularly if the arrest took place at work or was highly publicized. This loss of reputation may lead to loss of business or promotion opportunities or to loss of clients. The psychological consequences of the experience could have a detrimental effect on the person's capacity to earn if diminished performance level rules out promotion or results in job loss. See *Scofield v Critical Air Medicine, Inc.* (1996) 45 CA4th 990, 1009, 52 CR2d 915 (damages recoverable for business interruption, damage to reputation, and other harm and loss).

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§12.22 5. Attorney Fees and Costs

The plaintiff suing for false arrest and imprisonment may be able to recover damages, as does the malicious prosecution plaintiff, for the costs (including attorney fees) of defending against or responding to the underlying arrest or imprisonment proceedings. See §§10.28-10.31.

NOTE: As in malicious prosecution cases, the costs of bringing and maintaining the false arrest and imprisonment suit appear not to be recoverable. Basing the suit on violation of the plaintiff's federal civil rights, however, appears to permit a recovery of attorney fees. See §12.33.

The award of attorney fees in a suit alleging false imprisonment, battery, and interference with constitutional rights in violation of CC §52.1 is not justified if the CC §52.1 cause of action cannot be sustained. *Jones v K-Mart Corp.* (1998) 17 C4th 329, 70 CR2d 844 (detention and search of suspected shoplifter by store employees).

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§12.23 B. Punitive Damages

Punitive damages may be recovered from individuals (in law enforcement or not) and from private employers. See CC §3294; *Scofield v Critical Air Medicine, Inc.* (1996) 45 CA4th 990, 1009, 52 CR2d 915; *Washington v Farlice* (1991) 1 CA4th 766, 774, 2 CR2d 607 (evidence that defendant falsely reported stolen vehicle to which she claimed ownership sufficiently established malice to support punitive damages award to owner and to person arrested while driving vehicle; $50,000 award remanded, however, for plaintiff's failure to introduce evidence of defendant's financial condition; see §14.38).

A private employer that knows of, directs, or ratifies an employee's wrongful conduct can be liable for punitive damages. CC §3294(b). See *Scannell v County of Riverside* (1984) 152 CA3d 596, 614, 199 CR 644.

A public entity cannot be required to pay punitive damages for its own, or its employee's, conduct. Govt C §818. The entity may, however, voluntarily pay punitive damages awarded against an employee, provided certain foundational facts are present. Govt C §825(b). See chap 14 on punitive damages.

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Source: Torts/California Tort Damages/12 False Arrest and False Imprisonment/§12.24 C. Determining Compensability Period

§12.24 C. Determining Compensability Period

False imprisonment damages are recoverable only for the period during which confinement was unlawful, essentially beginning with the false arrest and ending when lawful process begins. *Jackson v City of San Diego* (1981) 121 CA3d 579, 175 CR 395, disapproved on other grounds in *Asgari v City of Los Angeles* (1997) 15 C4th 744, 758 n10, 63 CR2d 842. Thus, following a lawful arrest, damages are recoverable only for detriment suffered during a period of unlawful incarceration after the person should have been released. *Dragna v White* (1955) 45 C2d 469, 473, 289 P2d 428, 431.

Events subsequent to an unlawful arrest can terminate the period for which damages can be awarded. See *Asgari v City of Los Angeles* (1997) 15 C4th 744, 63 CR2d 842 (plaintiff arrested, arraigned, imprisoned 7 months, then acquitted at trial; false arrest damages limited to harm suffered during period from arrest to arraignment; thereafter, arresting officer protected by Govt C §821.6 immunity from liability for malicious prosecution).

NOTE: There appear to remain situations in which, following an unlawful arrest, a subsequent arraignment may be viewed as a foreseeable result of that arrest, not as an independent intervening act that cuts off damages accruing from the unlawful arrest. See *Gill v Epstein* (1965) 62 C2d 611, 617, 44 CR 45, disapproved on other grounds in *Manta Mgmt. Corp. v City of San Bernardino* (2008) 43 C4th 400, 412 n8, 75 CR3d 353. But see *Jackson v City of San Diego* (1981) 121 CA3d 579, 589, 175 CR 395 (grand jury indictment could be sufficient independent act to break chain of causation; conduct that at first constituted false imprisonment became, after grand jury indictment, malicious prosecution, from which public officers are immune), disapproved on other grounds in *Asgari v City of Los Angeles* (1997) 15 C4th 744, 758 n10, 63 CR2d 842.

Despite rules setting the end of a period during which false imprisonment occurs, damages are recoverable for the harm caused by a false arrest or imprisonment that the plaintiff continued to experience after a period of unlawful detention ended. See *County of Los Angeles v Superior Court* (2000) 78 CA4th 212, 92 CR2d 668 (period of imprisonment, however short, may result in long-lasting physical and emotional effects; although false imprisonment ends at point malicious prosecution begins, *i.e.,* when person is arraigned, injuries attributable to that false imprisonment may continue after plaintiff is released from custody or indicted; *Asgari* did not intend to cut off compensation for continuing harm).

NOTE: It appears from *Asgari v City of Los Angeles, supra,* that injuries attributable solely to postarraignment incarceration should be excluded from evidence in a false arrest case, but that, in a related civil rights claim under 42 USC §1983, a plaintiff who shows that a prosecutor did not exercise independent judgment in filing a criminal complaint should be entitled to damages for all injuries arising from the false arrest, prearraignment false imprisonment, and postarraignment incarceration. On civil rights suits, see §12.33.

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III. PROVING DAMAGES

§12.25 A. Witnesses

Witnesses to the plaintiff's arrest or imprisonment, particularly if disinterested, can often establish and enhance damages by describing the treatment and appearance of the plaintiff during the arrest and subsequent confinement. Conversely, testimony demonstrating that the defendants acted carefully and respectfully tends to diminish damages. Sections 12.25-12.29 discuss common categories of witnesses in damage suits.

TACTICS: As always in tort cases, counsel should contact percipient witnesses as soon as possible after the events occurred to ensure that their perceptions and recollections are recorded while fresh.

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§12.26 1. Plaintiff

The plaintiff ordinarily testifies as both a percipient witness on the circumstances of the arrest or imprisonment and on facts showing that they were unlawful, on physical and mental suffering, and on other forms of harm and loss. The plaintiff's general appearance and attitude often determine the weight given to his or her testimony.

TACTICS: A plaintiff's attorney may wish to confine an unappealing plaintiff's testimony to hard facts concerning the arrest and imprisonment and economic loss, letting others describe the effect of the events on the plaintiff's mental and emotional state.

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Source: Torts/California Tort Damages/12 False Arrest and False Imprisonment/§12.27 2. Family Members

§12.27 2. Family Members

Family members or close friends may have witnessed both the actual events and their deleterious effect on the plaintiff. Members of the plaintiff's immediate family can be the best damages witnesses, unless they seem unduly biased or overly involved.

TACTICS: A person friendly or related to the plaintiff should be prepared to calmly articulate his or her perceptions of the effect the events have had on the plaintiff and to avoid exaggerated, emotional claims or hostile attacks on the defendants.

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Source: Torts/California Tort Damages/12 False Arrest and False Imprisonment/§12.28 3. Coworkers

§12.28 3. Coworkers

Employers, colleagues, coworkers, and clients can often supply strong evidence of items of consequential damage such as loss of business income and injury to reputation.

TACTICS: Counsel may opt not to bring in employers or coworkers who would testify about the extent to which the plaintiff's work has deteriorated since the experience when doing so would only compound the plaintiff's humiliation and further damage his or her reputation.

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§12.29 4. Experts

Medical doctors can testify about the plaintiff's physical injuries. Mental health professionals may be able to describe the plaintiff's lingering emotional distress and testify to any treatment or counseling in which they have participated with the plaintiff. Employment counselors or related professionals can testify to the long-term effects of imprisonment and its aftermath on the plaintiff's ability to earn a living.

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§12.30 B. Exhibits

Photographs showing physical injury (or lack of it) can bolster (or discredit) the plaintiff's claims. Even when the persons responsible for the arrest and imprisonment did not cause the physical injury, photographs of the plaintiff's condition can be useful. Similarly, photographs of the plaintiff on release from custody may support a cause of action for failure to furnish reasonably necessary medical care.

A photographic tour of the place of incarceration might convince the trier of fact of the relative ease or difficulty of the experience. With the indulgence of the trial judge, the jury might even be permitted to tour the facility where the plaintiff was held, if security and privacy objections can be avoided.

Torn or bloody clothing, damaged shoes, and broken articles of personal property should also be considered for their potential assistance in portraying the experience. In addition, any treatment in custody would have generated medical records that may be significant for what they do or do not contain.

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IV. ARGUMENT

§12.31 A. Plaintiff

The plaintiff's attorney may wish to suggest the monetary amount that would compensate the plaintiff for such items of detriment as, *e.g.,* having to spend a night in jail or having his or her emotional life and relationships disrupted. The attorney may also consider suggesting a lump sum based on a modest daily rate to compensate for lingering, perhaps lifelong, emotional injury.

Sometimes it can be useful to characterize the defendants as cold, cruel, and callous abusers of individuals and of the constitution, although overdoing this approach can alienate juries; a more productive approach would be balancing emotional appeal with emphasis on the law.

TACTICS: If there is no disputing that the plaintiff was arrested and imprisoned without a warrant, the defense bears the burden of proving justification for the plaintiff's arrest. See §12.8. Counsel can use this point to mingle liability and damages issues: "They have to justify what happened. They have to convince you, ladies and gentlemen. Can they justify the arrest? Can they justify the temperature in the cell that night? Can they justify the plaintiff's insomnia? Did they have reasonable probable cause to start the plaintiff down a road on which he was to lose his marriage, job, and peace of mind?"

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§12.32 B. Defendants

The defense approach to argument in a false imprisonment case usually asserts the reasonableness of the defendant's conduct under trying circumstances, *e.g.,* the defendant was "doing a job" and had to make a decision within a matter of seconds.

TACTICS: Defense counsel may note that, *e.g.,* the police officer did not have months before trial to think about the situation or have the benefit of 2 weeks of testimony "such as you have just heard" before deciding how to react. Some defense counsel are more aggressive: "It may not be nice, ladies and gentlemen, but all of this was the plaintiff's own fault; his conduct caused the arrest." Counsel might even argue that the plaintiff's conduct provoking or leading to his or her arrest entitles the defendant to a comparative fault reduction of damages. See §15.11.

The defense may point out the plaintiff's duty to mitigate damages. If, for example, the plaintiff resisted arrest, failed to assist in the booking process, declined to make a telephone call, or otherwise failed to get out of custody as soon as possible, a jury may be convinced that the plaintiff missed an opportunity to lessen or mitigate damages. *Pool v City of Oakland* (1986) 42 C3d 1051, 1066, 232 CR 528. See generally §15.23.

TACTICS: If the plaintiff is a sympathetic figure, the defense can emphasize the usefulness of the defendant's employment and the difficulty of doing it: "It may not be everybody's idea of a 'nice' or 'pleasant' job, but someone has to do it. Who are we to second-guess a police officer in circumstances we've never experienced? We believe you will agree that the defendant took his responsibilities seriously and that he acted reasonably in the course of this unfortunate incident involving the plaintiff."

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§12.33 V. FEDERAL CIVIL RIGHTS ACTIONS

A falsely arrested or imprisoned plaintiff may—as an alternative, or in addition, to pursuing a state law false arrest claim—state facts sufficient to plead a cause of action under 42 USC §1983 for violation of federally protected civil rights. See, *e.g.*, *Macias v County of Los Angeles* (2006) 144 CA4th 313, 50 CR3d 364 (under United States Constitution, Amendment IV, detention incident to search must be carried out in reasonable manner). See, for detailed discussion of these civil rights actions, California Government Tort Liability Practice, chap 13 (4th ed Cal CEB 1999).

Title 42 USC §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Civil Rights Attorney's Fees Awards Act (42 USC §1988) allows for the recovery of attorney fees by the prevailing party. The award of attorney fees can sometimes far exceed the plaintiff's other damages. See, *e.g., Riverside v Rivera* (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686 (attorney fees more than seven times greater than other damages). Conversely, the plaintiff might be placed at risk of paying the defendant's attorney fees if the court determines that the plaintiff's action was brought frivolously or in bad faith. See Govt Tort Liability §§13.50-13.55.

TACTICS: If plaintiff pursues both false imprisonment and federal civil rights causes of action, a special verdict form can be used to determine the jury's findings on each theory.

Pleading a federal civil rights cause of action in addition to one for false imprisonment gives the plaintiff the choice of filing in federal or state court. *Williams v Horvath* (1976) 16 C3d 834, 129 CR 453. If the plaintiff chooses the state forum, defense counsel can petition for removal to federal court under 28 USC §§1441(b), 1443. See Govt Tort Liability §§13.8-13.9. In a 42 USC §1983 claim pursued in a California court for the false arrest of a person who died of injuries sustained during an arrest, California limits on recoveries in survival actions (precluding pain and suffering damages) fulfill the requirements of the federal Act. See *Garcia v Superior Court* (1996) 42 CA4th 177, 49 CR2d 580.

A plaintiff who has been falsely arrested and imprisoned by public entity employees, and who has established in a state court suit the right to recover damages under 42 USC §1983, is entitled to the same damages in the state court as could have been recovered in federal court. *Valentin v Superior Court* (2000) 78 CA4th 212, 92 CR2d 668.

State statutory immunities do not apply to a 42 USC §1983 claim, although certain federal law immunities may. See *Williams v Horvath, supra*; Govt Tort Liability §§13.11, 13.39-13.49. See also *Tekle v U.S.* (9th Cir 2006) 511 F3d 839 (federal immunity did not protect narcotics officers alleged to have used excessive force in arresting and detaining unarmed 11-year-old; child could pursue Federal Tort Claims Act (28 USC §1346(b)) suit under cause of action created in *Bivens v Six Unknown Named Agents of the Fed. Bureau of Narcotics* (1971) 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999).

In addition to actions under 42 USC §1983, an arrested person may be able to base a damages claim on violation of a constitutional provision. See, *e.g., Galbraith v County of Santa Clara* (9th Cir 2002) 307 F3d 1119 (suit based on contention that coroner's falsification of autopsy report led to plaintiff's arrest for killing his wife).

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§12.34 VI. TAX CONSEQUENCES

Compensatory damages received by way of suit or settlement (whether in a lump sum or by periodic payments) for personal physical injury or physical sickness are not taxable income. See IRC §104(a)(2). See Notes in §1.112 and §8.48 on the unconstitutionality of taxing damages that compensate a plaintiff for emotional distress or other forms of harm or loss that are unrelated to lost wages or earnings. See generally §§1.113, 8.49-8.50.

Damages recovered on a claim that relates to a business may be taxable. IRC §61. See §13.25.

Punitive damages appear to be taxable as income. See §14.48.

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13

Vehicles and Other Personal Property

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I. INTRODUCTION

§13.1 A. Scope of Chapter

This chapter discusses the measure and proof of damages recoverable for injury to or destruction of (1) motor vehicles, (2) personal items (not freight) carried in vehicles, and (3) items worn or carried by persons in vehicles.

The chapter does not cover damages or other remedies available under such consumer protection laws as the Song-Beverly Consumer Warranty Act (CC §§1790-1795.7). See, *e.g., Bishop v Hyundai Motor Am.* (1996) 44 CA4th 750, 754, 52 CR2d 134 (emotional distress and loss of use damages not recoverable absent out-of-pocket expense or other monetary loss when fire due to manufacturing defect damaged newly purchased car beyond repair). See also *Moreno v Greenwood Auto Ctr.* (2001) 91 CA4th 201, 110 CR2d 177 (prejudgment interest on loss of use and other damages recoverable under Vehicle Leasing Act (CC §§2985.7-2992)).

NOTE: Counsel intending to settle only the personal injury claim of a vehicle owner, while preserving the right to pursue damages for damage to the vehicle or to other personal property, must take care that settlement documents specify that acceptance of money does not amount to accord and satisfaction on the property claims. See *Woolridge v J.F.L. Elec., Inc.* (2002) 96 CA4th Supp 52, 117 CR2d 771 (defendant's "partial payment" notation on check insufficient to permit further action on property damage claim).

Remedies and damages for injury to real property and items on real property are discussed in California Real Property Remedies and Damages, chap 11 (2d ed Cal CEB 2002). On other aspects of damages and remedies for damage to real and personal property, see generally California Attorney's Guide to Damages, chap 5 (2d ed Cal CEB 2004).

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§13.2 B. Statutory Basis for Recovery

Persons and entities are responsible for their willful and negligent acts. CC §1714. One who suffers "detriment" from another's unlawful act or omission is entitled to compensation in money, called "damages." CC §3281. Detriment is "loss or harm suffered in person or property." CC §3282. The measure of recoverable tort damages is "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." CC §3333.

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§13.3 C. Plaintiff's Duty to Mitigate

Although an injured party may recover all damages caused by the wrongful act of another, the plaintiff has a duty to attempt to exercise reasonable diligence and care to avoid loss and to minimize resulting damages. See §15.23. Damages recoverable may also be reduced if the injury was due in part to the plaintiff's own wrongful or negligent acts. See §§15.2-15.7 on comparative fault.

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§13.4 D. Payments From Independent Sources

As in tort actions for personal injuries, the defendant in an action for willful or negligent injury to personal property is precluded from offering into evidence, for the purpose of reducing the plaintiff's damages, proof that the plaintiff may have received payment for the loss from a source wholly independent from the defendant. *Anheuser-Busch, Inc. v Starley* (1946) 28 C2d 347, 349, 170 P2d 448. See §15.22 on the collateral source rule.

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§13.5 E. Burden of Proof

Generally, the plaintiff bears the burden of proving damages to a motor vehicle and other items of personal property. However, if more than one measure of damages may apply and the plaintiff has offered the higher measure, the defendant has the burden of proving that a lesser measure of damages exists and therefore should apply. *Konda v Frumpkin* (1928) 90 CA 384, 265 P 955; *Kincaid v Dunn* (1915) 26 CA 686, 148 P 235.

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II. MOTOR VEHICLES

§13.6 A. Damages Elements Summary

The measure of damages for tortiously caused damage to a motor vehicle (as for other personal property items) is determined by the following:

- Diminished value or restoration costs
- If destroyed, lost, or not reasonably repairable—the market value (see §13.7) or special value to the owner (see §13.8) immediately preceding the tort;
- If value is fully restorable—the lesser of the reasonable repair cost or diminution in value (see §§13.9-13.11);
- If value is partially restorable—reasonable repair costs plus the amount of diminished value (see §13.12).
- Loss of use (see §13.13).
- Lost prospective sale profit (see §13.14) or lost business profits (see §13.15).
- Out-of-pocket expenses (see §13.16).
- In limited situations, mental suffering and emotional distress (see §13.16).
- Punitive (exemplary) damages (see §13.16).
- Prejudgment and postjudgment interest (see §§1.94-1.98).

See *PG&E Co. v Mounteer* (1977) 66 CA3d 809, 812, 136 CR 280 (basic measure is difference between market value immediately before and immediately after injury to personal property or, if less, the reasonable cost of repair). See also *Itano v Colonial Yacht Anchorage* (1968) 267 CA2d 84, 90, 72 CR 823 (damages for "intermeddling" with personal property are for actual harm or loss suffered by reason of impairment or loss of use). See generally CACI 3903J, 3903K, 3903M.

NOTE: Tort damages for damage to a vehicle differ from amounts recoverable from insurers on contract causes of action. See *Ray v Farmers Ins. Exch.* (1988) 200 CA3d 1411, 246 CR 593 (policy promising to repair to "like kind and quality" required reimbursement only for cost of repair, not diminution of market value).

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Source: Torts/California Tort Damages/13 Vehicles and Other Personal Property/ B. Diminished Value; Cost of Restoring Value/ 1. Destroyed (or Lost) Vehicle/§13.7 a. Market Value

B. Diminished Value; Cost of Restoring Value

1. Destroyed (or Lost) Vehicle

§13.7 a. Market Value

Damages for the loss of a completely destroyed vehicle (or one otherwise no longer available for the plaintiff's use) can equal its market value at the time of, or immediately preceding, its destruction less any salvage value. See *Lane v Spurgeon* (1950) 100 CA2d 460, 463, 223 P2d 889; *Smith v Calley* (1930) 103 CA 735, 284 P 974. See also *Edrington v Stong* (1961) 194 CA2d 218, 224, 15 CR 34 (defendant entitled to show salvage value). See CACI 3903J, 3903K.

NOTE: The cost of replacing the lost or destroyed vehicle with a comparable vehicle appears not to be a proper measure of damages. See *Hand Elec., Inc. v Snowline Joint Unified Sch. Dist.* (1994) 21 CA4th 862, 26 CR2d 446 (replacement cost improper despite words "costs of repair or replacement" in definition of "economic damages" in CC §1431.2, which relates to allocation of economic damages among defendants under Proposition 51 and does not create new measure of damages). But see, for dictum suggesting that replacement cost sets the value of the total loss of a car, *Collin v American Empire Ins. Co.* (1994) 21 CA4th 787, 818, 26 CR2d 391.

The plaintiff owner, even if not qualified as an expert, may testify to the market value of his or her car, as may the owner's spouse. Evid C §§811, 813(a)(2). See *Newhart v Pierce* (1967) 254 CA2d 783, 62 CR 553. See also *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 114 CR 622.

NOTE: It appears that an owner's lay opinion about the value of a vehicle may be based on such factors as newspaper ads and publications like the Kelly Blue Book (online at kellybluebook.com), although the ads and books themselves could be excluded as hearsay. See Evid C §§814, 816. Testimony about a vehicle's market value might even be based on an insurer's statement of the value at which the vehicle is deemed "totaled," in the sense that estimated repair costs would exceed the insurer's view of market (or insured) value.

Receipts showing maintenance and upgrading expenditures may be used to establish that a particular vehicle had a market value greater than average for the make, year, and model. The plaintiff or other witnesses may testify to the amount of work the plaintiff put into its upkeep or upgrading.

TACTICS: The plaintiff's proof of predestruction value may be aided by "before" photographs that show the vehicle in good and saleable condition. Postdestruction ("after") photographs can show relative lack of value.

In some situations, the purchase price of the vehicle may be evidence of the vehicle's value before the damage. Evid C §815. Factors in determining the relevance of this type of evidence include the length of time between the purchase and the damage, and the mileage and repairs incurred between the date of purchase and the date of injury. See generally *Sanders v Austin* (1919) 180 C 664, 182 P 449; *Smith v Calley* (1930) 103 CA 735, 284 P 974; *Girard v Irvine* (1929) 97 CA 377, 275 P 840.

NOTE: If the particular vehicle model is viewed by aficionados as a "classic," its market value may be unexpectedly high. Specialized books dealing with classic cars can be considered by witnesses stating opinions on such a vehicle's value.

Postdestruction salvage value can be shown by the defendant, the plaintiff, or both through testimony from persons who deal in automobile salvage or parts.

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§13.8 b. Special Value; Unique Vehicle

Rarely can it be shown that a particular motor vehicle had no ascertainable market value before it was lost or destroyed. (Even an old car in poor condition might have a salvage value.) Nor have courts been receptive to claims that a particular vehicle had a sentimental or emotional value that exceeded for the owner what anyone else would have paid for it. See, however, §13.22 on damages for the loss or destruction of a unique book, painting, or photograph.

Nevertheless, damages for the loss or destruction of particular unique vehicles might well exceed the market value of typical vehicles of the same make, model, and year.

EXAMPLE: A 1949 Ford sedan used by Dwight D. Eisenhower while campaigning for the presidency (if such a car existed) would doubtless have a market value far exceeding that of other 1949 Fords. And its value to Eisenhower's great grandchild might well exceed its market value to an unrelated person.

In such cases, damages recoverable by the latest owner for destruction of such a vehicle might be based on evidence of the difficulty and cost of acquisition, or the vehicle's value to the particular owner as a museum attraction, symbol of power, or souvenir.

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§13.9 2. Fully Restorable Vehicle

Damages for tortiously caused damage to a vehicle that can be completely repaired and restored to its former condition are the lesser of (1) the reasonable cost of repair or (2) the diminution in its value (*i.e.,* the difference in market value immediately before and immediately after it was damaged). See *Pfingsten v Westenhaver* (1952) 39 C2d 12, 244 P2d 395. See also *Smith v Hill* (1965) 237 CA2d 374, 388, 47 CR 49.

NOTE**:** The plaintiff's proof of repair costs shifts to the defendant the burden of proving that diminution in value is less. See §13.5 on burden of proof. That is, a defendant can seek to limit damages by proving that (1) the claimed repair costs are unreasonable, (2) the predamage value of the vehicle was less than claimed repair costs, or (3) both.

The plaintiff need not actually repair the vehicle to recover the cost of repairs. *Kincaid v Dunn* (1915) 26 CA 686, 148 P 235.

TACTICS: When repair of a vehicle requires that damaged parts be replaced, the plaintiff may seek replacement by parts from original equipment manufacturers, rather than "after market" parts that can be shown to be inferior in structural integrity, corrosion or dent resistance, fit, durability, or finish and appearance. See *Lebrilla v Farmers Group, Inc.* (2004) 119 CA4th 1070, 16 CR3d 25 (request for class action certification for claims against insurer alleged to have authorized payment only for inferior parts).

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§13.10 a. Repair Costs

For a vehicle that has been repaired, the plaintiff can prove the reasonable cost of repair by testifying about such costs and offering, in support, repair bills paid or incurred. See *Laubscher v Blake* (1935) 7 CA2d 376, 383, 46 P2d 836, 839 (receipts can be sufficient to support damages for repair costs). Repair bills may be objected to as hearsay, however, and the plaintiff may need to call a qualified auto repair mechanic to testify about the reasonableness of repair costs. See *Menefee v Raisch Improvement Co.* (1926) 78 CA 785, 248 P 1031. Further, the plaintiff-owner may be held not to be a competent witness regarding the reasonable value of necessary repairs. See *LeBrun v Richards* (1930) 210 C 308, 319, 291 P 825 (real property damage).

For a vehicle that has not been repaired, the plaintiff can often establish the cost of repair through repair estimates. See *Smith v Hill* (1965) 237 CA2d 374, 388, 47 CR 49; *Kincaid v Dunn* (1915) 26 CA 686, 148 P 235 (evidence of repair cost—even though neither incurred nor paid for—may support damages award). If the defendant challenges such estimates, the plaintiff may need to offer expert testimony on probable repair costs. See *Smith v Hill, supra*.

TACTICS: The plaintiff's proof may be aided by photographs that show such extensive damage that claimed repair costs appear reasonable. "Before" photos showing the vehicle in good condition can provide a useful contrast. A defense argument that repair bills (or estimates) are unreasonably high, however, can be bolstered by postaccident photos in which damage to the vehicle appears slight.

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§13.11 b. Diminution in Value

A plaintiff or defendant can establish the amount by which the value of a vehicle has been diminished by a defendant's tortious conduct through evidence of its market value immediately before and after it was damaged. See §13.7 on proving value.

For damages purposes, diminution in value probably does not include the loss of value due to market conditions (*i.e.,* a general drop in vehicle prices) over the time required to effect repairs. See *Safeco Ins. Co. v J & D Painting* (1993) 17 CA4th 1199, 21 CR2d 903 (house damaged in fire).

TACTICS: It could be argued that ordinary depreciation in the vehicle's value over the time it takes to effect repairs (measured by evidence of depreciation of vehicles of the same type) should be viewed as a loss suffered by the owner for which damages are recoverable—especially if repair time is prolonged as when, *e.g.,* parts must be acquired from abroad.

On valuing special vehicles, see §13.8.

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§13.12 3. Partially Restorable Vehicle

For a vehicle that can be repaired but not restored to its former value, recoverable damages may include both the reasonable cost of necessary repairs and the amount by which the repaired vehicle is worth less than it was worth before being damaged. See *Merchant Shippers Ass'n v Kellogg Express & Draying Co.* (1946) 28 C2d 594, 600, 170 P2d 923; *Byrne v Western Pipe & Steel Co.* (1927) 81 CA 270, 253 P 776.

NOTE: Presumably, a damages recovery based on both cost of repair and diminution in value cannot exceed the value of the vehicle immediately before it was damaged. See §§13.7, 13.11.

The vehicle's owner can testify and present evidence about both the cost and reasonableness of repairs (see §13.10) and the diminution in value (see §13.11). People experienced in repairing vehicles, or in buying and selling them, may be qualified to give expert testimony. See *Conner v Dale* (1923) 63 CA 338, 342, 218 P 462.

The plaintiff can testify to residual functional or aesthetic problems with the vehicle after repairs have been made. A mechanic can testify to structural or mechanical weaknesses remaining after repairs.

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§13.13 C. Loss of Use

Damages for the loss of use of a damaged vehicle are based on the reasonable value of its use. *Story v Gateway Chevrolet Co.* (1965) 237 CA2d 705, 709, 47 CR 267. Further, loss of use damages are recoverable only for the period of time reasonably necessary to repair or replace the vehicle. *Reynolds v Bank of America* (1959) 53 C2d 49, 345 P2d 926 (loss of use damages recoverable whether property items completely destroyed or repairable); *Johnson v Central Aviation Corp.* (1951) 103 CA2d 102, 107, 229 P2d 114. See CACI 3903M. Loss of use damages are not recoverable, however, absent evidence that the vehicle would have been used between the date it was damaged and the date the owner was paid its replacement value. *Metz v Soares* (2006) 142 CA4th 1250, 48 CR3d 743 (evidence that owner had not used "classic car" negated loss-of-use claim despite claim that repair shop's negligence deprived him of opportunity to use it).

NOTE**:** An alternate measure, lost business profits, may be used if the vehicle was used commercially. See §13.15.

The reasonable value of the loss of a vehicle's use can be measured by its reasonable rental value. See *Valencia v Shell Oil Co.* (1944) 23 C2d 840, 843, 147 P2d 558. If substitute property has been rented, evidence of the cost of such rental may serve as evidence of the reasonable rental value of the property. See *Meyers v Bradford* (1921) 54 CA 157, 160, 201 P 471. See also *Lyle v Seller* (1924) 70 CA 300, 233 P 345 (taxi costs).

TACTICS: To prove loss-of-use values, the plaintiff can either present receipts of costs incurred in renting a substitute vehicle or testify to other transportation costs, such as bus, train, or taxi fares. Defendants can object to unreasonable expenses, such as renting a truck or van to replace a damaged sedan, or hiring a limousine for a trip to a grocery store.

The plaintiff need not actually rent a substitute vehicle to recover the costs for loss of use. *Meyers v Bradford, supra.* If no substitute vehicle is rented or no receipts are available, the plaintiff can use advertisements indicating car rental costs, or obtain written documentation of car rental costs from a company that rents vehicles to the public. If necessary, the plaintiff can have someone who works for a car rental agency testify as an expert witness regarding reasonable rental costs.

The mechanic who repaired the damaged vehicle can be used as an expert witness to testify that the length of time used to repair the vehicle was reasonable and necessary, given the nature and extent of damage. This testimony would be especially important if delays had occurred, *e.g.,* in obtaining hard-to-find parts.

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§13.14 D. Loss of Profits From Prospective Sale

Loss of profit from a planned sale of the damaged property can be recoverable as compensatory damages in addition to damages for loss of use. *Johnson v Central Aviation Corp.* (1951) 103 CA2d 102, 105, 229 P2d 114.

The plaintiff can testify to expected profits from a planned sale that fell through because of damage to, or destruction of, the vehicle. The plaintiff can also testify, *e.g.,* that he or she would have had the use of the car for a specified period of time between the date of damage and the date on which he or she would have been obligated to turn over the vehicle to the prospective buyer. A known prospective buyer can testify what the purchase price of the vehicle would have been had the vehicle not been damaged. Absent a known prospective buyer, the plaintiff might submit newspaper or other advertisements establishing the vehicle's expected sale price.

See Seabolt, Richard L., *Lost Profits Damages: From Expert Testimony Through Jury Instructions*, 16 Cal Lit 1, p 4 (Cal State Bar Litigation Section 2003).

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§13.15 E. Lost Business Profits

Damages reflecting the loss of net business profits because a particular vehicle was damaged are recoverable as an alternative to damages for loss of the vehicle's use (see §13.13). See *Tremeroli v Austin Trailer Equip. Co.* (1951) 102 CA2d 464, 481, 227 P2d 923 (if vehicle was used commercially, either measure of damages, but not both, can be used). Often, the plaintiff is able to prove lost business profits that exceed ordinary loss-of-use damages.

The plaintiff must establish a real, not a speculative loss; *i.e.,* he or she must prove what additional profit would have been gained had the vehicle remained in service, although the amount of the loss may be based on reasonable approximation or inference. See *Hanlon Drydock & Shipbldg. Co. v Southern Pac. Co.* (1928) 92 CA 230, 235, 268 P 385.

As with loss of use, recovery of damages for lost profits is limited to the period of time reasonably necessary to repair or replace the injured property. *Blake v E. Thompson Petroleum Repair Co.* (1985) 170 CA3d 823, 834, 216 CR 568. See *J'Aire Corp. v Gregory* (1979) 24 C3d 799, 157 CR 407.

NOTE: For more on the recovery of tort damages for lost profits, see, in addition to *J'Aire,* such cases as *Kids' Universe v In2Labs* (2002) 95 CA4th 870, 882, 116 CR2d 158 (water damage to business premises prevented launch of website; speculative evidence insufficient to provide basis for lost profits damages); *Ott v Alfa-Laval Agri., Inc.* (1995) 31 CA4th 1439, 37 CR2d 790 (dairy farm's loss from milking machine breakdown), and *Department of Water & Power v ABB Power T & D* (1995) 902 F Supp 1178 (economic loss damages sought on negligence and product liability theories; *Ott* analysis termed "problematic"). See also *McKay v State* (1992) 8 CA4th 937, 10 CR2d 771 (owner of property damaged by negligently set controlled-burn fire can recover loss-of-profits damages for interrupted business activity from public entity that set fire). See Anno, 89 ALR4th 11 (1991) (loss of profits from injury to property as damages element in product liability action).

The plaintiff's testimony can be used to prove lost business profits as can records comparing income and net profits over a reasonable time period preceding the loss with records for the time period after the loss while the vehicle was being repaired. An expert, such as a CPA, an economist, or some other business-profits specialist, may be able to identify future business losses, calculating their present value (see §1.108). See *Inyo Chem. Co. v City of Los Angeles* (1936) 5 C2d 525, 543, 55 P2d 850. For a business involving the sale and distribution of items on the market, comparative sales reports before and after the vehicle's disablement can be used both to establish past losses and to project future losses.

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§13.16 F. Out-of-Pocket Expenses

Certain out-of-pocket expenses are recoverable as compensatory damages for negligent injury to personal property. These expenses may include, *e.g.,* towing charges, the cost of a flagman at the scene of the accident, the amount paid for cargo loss, and salvage labor costs. *Tremeroli v Austin Trailer Equip.* Co. (1951) 102 CA2d 464, 480, 227 P2d 923.

The plaintiff can prove such out-of-pocket expenses by testifying to having incurred the expenses and providing receipts and cashed checks. Testimony may also be available from eyewitnesses concerning the expenditures or the services paid for.

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§13.17 G. Emotional Distress

Rare would be the situation in which damage to or loss of a vehicle would justify the recovery of damages for mental suffering or emotional distress. See *Lubner v City of Los Angeles* (1996) 45 CA4th 525, 53 CR2d 24 (art work; no recovery for emotional distress absent preexisting relationship or intentional tort). See generally §6.31 on the need to show invasion of personal, not economic, interest to justify recovery for negligently inflicted emotional distress. But see *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 921, 114 CR 622, 631 (mental distress damages for physical problems exacerbated by accident); *Deevy v Tassi* (1942) 21 C2d 109, 120, 130 P2d 389 (emotional distress following melee during repossession attempt); *Crisci v Security Ins.* Co. (1967) 66 C2d 425, 433, 58 CR 13 (emotional distress damages resulting from loss of real property).

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§13.18 H. Punitive Damages

Punitive (exemplary) damages may be recovered by the vehicle owner in addition to actual damages when, in the conduct that caused the damage, the defendant was guilty of oppression, fraud, or malice. CC §3294. See *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 921, 114 CR 622 (availability of punitive damages for callous disregard of plaintiff's property rights). See also *Rusheen v Drews* (2002) 99 CA4th 279, 120 CR2d 769 (damages recoverable for theft of automobile by fraud include punitive damages; defendant's no-contest plea to felony theft charge later reduced to misdemeanor was admissible as admission against interest).

The measure and proof of punitive damages is covered in chap 14.

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§13.19 III. OTHER ITEMS OF PERSONAL PROPERTY

Generally, the same principles that apply to the recovery of damages for harm to or loss of a vehicle also apply to damages recoverable for personal property harmed in vehicle accidents. Particular items are discussed in §§13.20-13.23.

That is, negligently caused damage to or destruction of property entitles the owner to damages measured by the diminution in market value, or for property that has no determinable market value, a rationally determined value, as distinct from sentimental value. See *Robinson v U.S.* (ED Cal 2001) 175 F Supp 2d 1215.

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§13.20 A. Jewelry

Damages recoverable for jewelry lost or destroyed are measured by its fair market value at the time of the loss. See §§13.7-13.12. Damages for repairable damage are measured by costs of repair and diminution in value, limited by predamage market value. See §§13.7-13.12.

Repair costs can be proved by receipts or the testimony of a jeweler. If the item of jewelry was lost or destroyed, the plaintiff can testify to its materials, size, shape, and purchase price. A receipt of purchase or the written report of an appraisal made prior to loss or destruction can also be used as evidence of the item's value. A receipt or report may also be used as part of the basis of an expert jeweler's testimony that, based on the fact that the particular item had not depreciated in value, its market value at the date of loss was its purchase price or appraised value.

On the use of a consignment memorandum in a conversion action as evidence of jewelry value and as a basis for calculating prejudgment interest, see *Irving Nelkin & Co. v South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 CA4th 692, 28 CR3d 815.

TACTICS: Often jewelry containing precious metals or stones appreciates in value with time. Therefore, a plaintiff may be successful in arguing and presenting evidence of replacement cost as the appropriate measure of damages, on the theory that the replacement cost shows the amount the item would have sold for (*i.e.,* its market value). For example, if a diamond ring is lost and its quality can be established by an expert familiar with the lost stone or by a previous appraisal, the plaintiff can testify to the size, shape, and setting of the stone, and a jeweler can testify to its present value or the cost of replacing it.

The owner can also testify about the item's personal significance, especially if the item of jewelry had been in the family for generations and had a sentimental value exceeding its monetary value. See §13.8.

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§13.21 B. Apparel

Clothing, unlike jewelry, usually depreciates with time and use; it often has a greatly diminished market value after use. To prove market value of a lost or destroyed garment, the plaintiff can testify about its purchase price and its age and condition immediately preceding the loss. In place of testimony regarding the purchase price, the plaintiff may present evidence of current sales prices for similar garments by use of advertisements or receipts for replacement items. Defendants can ask jurors to reduce their assessments of value to reflect probable wear, tear, and depreciation.

Garments damaged in vehicle accidents usually cannot be adequately repaired. When they are, however, repair costs can be shown by testimony, bills, and receipts.

TACTICS: If an accident involves serious personal injuries, most plaintiffs' attorneys do not claim loss of clothing (or anything but the most expensive jewelry) as damages. Evidence of such loss, though permissible, distracts the jury from the serious injuries, may appear to be overreaching, and may take undue time to prove.

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§13.22 C. Paintings, Books, and Papers

Easily replaced books and papers or art reproductions ordinarily have a value equal or close to replacement cost. Replacement cost can be shown with advertisements or price lists. For unique or rare items, the testimony of art or book experts may be needed to establish value.

The owner can state a lay opinion of the special personal value of a painting, book, or collection of papers that has no established market value. See *Willard v Valley Gas & Fuel Co.* (1915) 171 C 9, 14, 151 P 286, overruled on other grounds in *Showalter v Western Pac. R.R. Co.* (1940) 16 C2d 460, 465, 106 P2d 895. See also §13.8.

An owner who created a painting or writing that is later damaged can testify about the labor and materials used to create it. The cost of the materials used and the value of the labor can be established by presenting bills or testimony regarding current market prices or rates for similar materials and labor.

NOTE: Factors that may be considered in determining the value of property to its owner include the difficulty and expense incurred in acquiring the property, and the nature and character of its use to the owner. See *Zvolanek v Bodger Seeds, Ltd* (1935) 5 CA2d 106, 42 P2d 92 (value of crop of special variety of sweet peas).

Damages for art work lost or damaged through negligence does not include damages for harm to the artist's reputation or for related emotional distress. See *Lubner v City of Los Angeles* (1996) 45 CA4th 525, 53 CR2d 24 (art work subject to rule that recovery for emotional distress caused by injury to property requires preexisting relationship between parties or intentional tort). See also CC §987(a) (the California Art Preservation Act); the federal Visual Artists Rights Act of 1990 (no loss-of-reputation damages resulting from simple negligence).

If a damaged item can be repaired, costs of repairs can be proved with receipts, bills, canceled checks, or testimony of the plaintiff. An expert who repaired the item or who professionally repairs similar items can testify that the estimated amount for repairs is reasonable and does not exceed the predamage value of the item.

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§13.23 D. Mechanical or Electronic Equipment

Damage to or destruction of mechanical or electronic equipment, such as cameras, stereos, and computers, is provable in the same ways as is damage to or destruction of motor vehicles. Because of the nature of these items, damages for loss of use, lost business profits, loss of profits from a planned sale, and out-of-pocket expenses may also be recoverable. See §§13.6-13.16.

NOTE: The cost of replacing damaged electronic equipment with comparable equipment is not the correct measure of damages. See *Hand Elec., Inc. v Snowline Joint Unified Sch. Dist.* (1994) 21 CA4th 862, 26 CR2d 446 (even though cost of replacing electronic and mechanical equipment (damaged beyond repair while being carried in truck in vehicle accident) was much greater than market value at time it was damaged, market value is measure; words "costs of repair or replacement" in definition of "economic damages" in CC §1431.2, which relates to allocation of economic damages among defendants under Proposition 51 (see §15.8), does not create new measure of damages.)

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§13.24 E. Animals

Damages may be recoverable for tortiously caused injury to, or death of, an animal riding in a vehicle. See Anno, 61 ALR 5th 635 (1998) (damages for killing or injuring dog).

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§13.25 IV. TAX CONSEQUENCES

Damages received to compensate for damage to, or the loss of use of, personal property are includable in income for tax purposes only to the extent that the amount received exceeds the tax basis (cost plus adjustments) of the property. See *Raytheon Prod. Corp. v Commissioner* (1st Cir 1944) 144 F2d 110. Recoveries that do not exceed the tax basis are treated as nontaxable return of capital. *Pennroad Corp.* (1954) 21 TC 1087.

Absent proof that there was a sale or exchange of a capital asset (*i.e.,* certain types of property), payments for property damage in excess of the taxpayer's basis in the property are usually taxed as ordinary income, rather than as capital gain See, *e.g.,* Rev Rul 74-251, 1974-1 Cum Bull 234 (settlement of litigation involving value of right of company to select investment advisor is not sale or exchange).

Payments that represent a reimbursement for loss of past or future income are ordinary income when received. Rev Rul 73-161, 1973-1 Cum Bull 366; *Swastika Oil & Gas Co. v Commissioner of Internal Revenue* (6th Cir 1941) 123 F2d 382.

Punitive damages for injuries to a business (*e.g.,* for fraud) or to tangible property are ordinary income. *Commissioner v Glenshaw Glass Co.* (1955) 348 US 426, 99 L Ed 483, 75 S Ct 473.

The interest portion of a judgment, assessed in addition to damages to compensate the payee for delay in receiving payment of the damages, is considered ordinary income. IRC §61; *Ellis D. Wheeler* (1972) 58 TC 459.

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14

Punitive Damages

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I. LIABILITY FACTORS

§14.1 A. Nature; Purpose; Payment to State

Punitive damages are awarded "for the sake of example and by way of punishing the defendant." CC §3294(a). That is, punitive damages are imposed:

- To deter the defendant (and others similarly situated) from repeating conduct prohibited by CC §3294; and
- To punish the defendant for having committed the prohibited behavior.

Constitutional due process limitations (see §14.12) on the degree to which a punitive damages award can be used to deter misconduct are discussed in *Johnson v Ford Motor Co.* (2005) 35 C4th 1191, 1201, 29 CR3d 401 (sale of defective vehicle), and *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 1185, 29 CR3d 379 (punitive damages for breach of contract and fraud in building sale). See generally Smith, *Keep Your Punitive Damages Award*, 36 Forum 8, p 22 (Consumer Attorneys of Cal., Oct. 2006); Chandler, *Punitive Damages California-Style—In Light of* Simon *and* Johnson, 35 Forum 7, p 32 (Consumer Attorneys of Cal., Sept. 2005).

NOTE: "Exemplary damages" is another name for punitive damages.

Punitive damages are not determined by a fixed mathematical formula; the award is to be made by the trier of fact in its sound discretion, exercised without passion or prejudice. *Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co.* (1987) 189 CA3d 1072, 1097, 234 CR 835. See §14.10 on determining the amount needed to punish and deter.

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B. Requirements

1. Tortious Conduct

§14.2 a. Breach of Noncontractual Obligation

Punitive damages are available in an action "for the breach of an obligation not arising from contract." CC §3294(a). A plaintiff who proves no more than that the defendant breached a contract is not entitled to recover punitive damages. See *Myers Bldg. Indus. v Interface Technol., Inc.* (1993) 13 CA4th 949, 959, 17 CR2d 242 (cause of action for breach of contract alone, without underlying tort, cannot support punitive damages; finding that defendant had acted fraudulently was insufficient absent finding that fraud caused plaintiff's loss). See also *Harris v Atlantic Richfield Co.* (1993) 14 CA4th 70, 77, 17 CR2d 649 (no punitive damages no matter how willful or malicious was breach of commercial contract, unless defendant's conduct was also tort).

Further, mere breach of whatever implied covenant of good faith and fair dealing may be inherent in a commercial contract does not ordinarily provide a basis for punitive damages. See *CalFarm Ins. Co. v Krusiewicz* (2005) 131 CA4th 273, 31 CR3d 619 (liability based on promissory estoppel does not support punitive damages; because law unsettled, insurer's denial of coverage was objectively reasonable); *Harris v Atlantic Richfield Co.* (1993) 14 CA4th 70, 17 CR2d 649 (breach of franchise agreement); *Price v Wells Fargo Bank* (1989) 213 CA3d 465, 261 CR 735. See, however, §§14.24, 14.25 on breach of such implied covenants in employment and insurance contracts.

Allegations of intentional misrepresentation or fraud in the performance of a contract, however, can state an "independent action based in tort" for which punitive damages may be recovered. *Robinson Helicopter Co. v Dana Corp.* (2004) 34 C4th 979, 22 CR3d 352 (supplier provided false certificates of conformance with federal specifications for helicopter parts; tort action not barred by "economic loss," which bars product liability recoveries absent personal injury or damage to property other than product that was defective).

See Anno, 27 ALR4th 318 (1982) (reducing punitive damages for plaintiff's comparative fault).

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§14.3 b. Breach of Statutory Obligation

Statutes that proscribe discrimination and other abusive conduct often provide for the imposition of penalties on the defendant. Generally, each such statute will indicate whether the statutory penalty is an alternative, or an addition, to the recovery of punitive damages. Ordinarily, if the statute is silent on punitive damages, they may be recovered if the statute imposes a tort-type standard of care. *Commodore Home Sys., Inc. v Superior Court* (1982) 32 C3d 211, 221, 185 CR 270; *Monge v Superior Court* (1986) 176 CA3d 503, 509, 222 CR 64. Otherwise, the plaintiff is not entitled to recover both CC §3294 punitive damages and the prescribed penalty or remedy. See *Brewer v Premier Golf Props., LP* (2008) 168 CA4th 1243, 86 CR3d 225 (employer's minimum wage, rest-and-meal break violations under Labor Code do not support CC §3294 punitive damages, even if maliciously, oppressively, or fraudulently committed); *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v De Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 114 CR2d 708 (punitive damages not recoverable for violations of Mobilehome Residency Law (CC §§798-799.9), which specifically provided penalties, but could have been recovered had plaintiffs elected to pursue tort causes of action); *Troensegaard v Silvercrest Indus., Inc.* (1985) 175 CA3d 218, 228, 220 CR 712 (plaintiff who sought civil penalty under CC §1794 for personal injury to consumer thereby waived punitive damages for fraud).

Examples of statutory causes of action allowing punitive damages or civil penalties include:

- California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996). See §14.22.
- Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15675) specifically provides for recovery of punitive damages. Welf & I C §15657(c). Punitive damages claims for elder abuse, except those based on the negligent provision of medical services, are not subject to the procedural requirements of CCP §425.13. See §§14.29, 15.54; California Elder Law Litigation: An Advocate's Guide §§3.101-3.104 (Cal CEB 2003).
- Consumer Legal Remedies Act (CC §§1750-1782) provides for recovery of punitive damages for consumers damaged by unlawful acts enumerated in CC §1770. CC §1780(a)(4). It also provides civil penalties for consumers who are seniors or disabled persons. Note that consumers must comply with the notice prerequisites set forth in §1782 before commencement of an action.

NOTE: Both punitive damages and a prescribed civil penalty appear to be recoverable under CC §52(b) from a defendant who subjects another to violence or a threat of violence because of race or other specified characteristics (CC §51.7) or to sexual harassment (CC §51.9). *Los Angeles County Metro. Transp. Auth. v Superior Court (Lyons)* (2004) 123 CA4th 261, 20 CR3d 92 (also noted in §14.18).

Federal statutes that provide for damages include:

- Americans With Disabilities Act (ADA) (42 USC §12203(a)). A plaintiff may recover general and punitive damages for a willful violation of the antiretaliation provisions of the ADA. See *Ostrach v Regents of Univ. of Cal.* (ED Cal 1997) 957 F Supp 196.
- Federal Civil Rights Act (42 USC §1983). Proof that a plaintiff was harmed by a government official's violation of the plaintiff's civil rights can provide the basis for punitive damages, and state law requirements for punitive damages are not necessarily applicable. See California Government Tort Liability Practice §§13.49B-13.49D (4th ed Cal CEB 1999).
- Civil Rights Act of 1964, Title VII (42 USC §§2000e—2000e-17). To recover punitive damages in a Title VII sex discrimination case, the employee must show malice or reckless indifference on the part of the employer. No vicarious liability attaches when the conduct of managerial agents was contrary to the employer's policy and the employer attempted to comply with the law. *Kolstad v American Dental Ass'n* (1999) 527 US 526, 144 L Ed 2d 494, 119 S Ct 2118. See also *EEOC v Wal-Mart Stores Inc.* (9th Cir 1998) 156 F3d 989 (pregnancy bias based on discrimination and cover-up).

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§14.4 c. Intentional Tort

The facts that subject a defendant to liability for one of the traditional intentional torts often, but not necessarily, provide the clear and convincing evidence of malice, oppression, or fraud (see §§14.5-14.8) prerequisite to imposing liability for punitive damages. See §§7.19 (assault and battery), 8.11 (defamation), 9.21 (invasion of privacy), 10.37 (malicious prosecution), 11.10-11.11 (abuse of process), and 12.23 (false arrest or false imprisonment). Punitive damages may also be recovered for such intentional torts as intentional infliction of emotional distress. See §6.43.

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§14.5 2. Clear and Convincing Evidence of Punishable Conduct

A plaintiff who seeks to recover punitive damages must plead and prove, by "clear and convincing evidence" that the defendant has been guilty of "oppression, fraud, or malice." CC §3294(a). See §§14.6-14.8 on these forms of punishable conduct. The "clear and convincing" standard "requires a finding of high probability,… so clear as to leave no substantial doubt… sufficiently strong to command unhesitating assent of every reasonable mind." *Scott v Phoenix Schools, Inc.* (2009) 175 CA4th 702, 715, 96 CR3d 159. Absent such evidence, the court may instruct that punitive damages are not to be given. See CACI 3940, 3947. Proof by clear and convincing evidence means, according to jury instructions, persuading the trier of fact that it is highly probable that a fact is true (in contrast to persuasion that the fact is more likely than not to be true). See CACI 201. See *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1164, 74 CR2d 510 (use of BAJI 2.62 not reversible error).

See Anno, 58 ALR4th 878 (1987) (standard of proof for conduct underlying punitive damages).

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Source: Torts/California Tort Damages/14 Punitive Damages/§14.6 a. Malice

§14.6 a. Malice

Malice is (1) conduct that the defendant intends to cause injury or (2) despicable conduct carried on by the defendant with a willful and conscious disregard of the rights or safety of others. CC §3294(c)(1).

NOTE: CACI 3940 and 3947 define "despicable conduct" as conduct that is "so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people."

The plaintiff may show malice by (1) direct evidence of hatred or ill will or (2) indirect evidence supporting an inference of such ill will or of a conscious and deliberate disregard of the plaintiff's interests. *Taylor v Superior Court* (1979) 24 C3d 890, 894, 157 CR 693 (malice in fact must be shown; implied malice is not enough, although showing actual intent to harm is not required); *Angie M. v Superior Court* (1995) 37 CA4th 1217, 1227, 44 CR2d 197 (jury question whether malice and despicable disregard established by evidence that 48-year-old doctor had extended sexual relationship with minor to whom he allegedly supplied alcohol and drugs). It is the jury's prerogative to determine that a defendant acted without malice despite "abundant evidence that [he] acted with a conscious disregard for the safety of others." *Sumpter v Matteson* (2008) 158 CA4th 928, 70 CR3d 495 (no plaintiff entitled to punitive damages "as a matter of right," not even on "the clearest proof of malice in fact").

Conduct that is merely unreasonable, negligent, grossly negligent, or reckless does not rise to the level of the malice or evil motive that would justify punitive damages. See *G.D. Searle & Co. v Superior Court* (1975) 49 CA3d 22, 29, 122 CR 218. See also *Shade Foods, Inc. v Innovative Prods. Sales & Marketing, Inc.* (2000) 78 CA4th 847, 892, 93 CR2d 364 (insurer's failure to investigate claims or communicate with insured fell short of conduct that would qualify as despicable).

Malice may be shown by evidence of the defendant's intention to vex, harass, annoy, or injure and may be implied from the defendant's conduct evidencing a conscious disregard for the injured person's rights or safety. See *Silberg v California Life Ins. Co.* (1974) 11 C3d 452, 462, 113 CR 711.

A conscious disregard of the rights or safety of others means a conscious disregard of the probability that the actor's conduct will result in injury to others. See, *e.g., Taylor v Superior Court* (1979) 24 C3d 890, 895, 157 CR 693 (person who drinks alcohol to point of intoxication, knowing from outset he or she will later operate motor vehicle, exhibits conscious disregard for others' safety); *West v Johnson & Johnson Prods., Inc.* (1985) 174 CA3d 831, 867, 220 CR 437 (in strict liability action, defendant's inadequate testing of product established defendant's awareness of probable dangerous consequences, deliberate failure to avoid those consequences, and conscious disregard of users' safety); *Penner v Falk* (1984) 153 CA3d 858, 867, 200 CR 661 (landlord's knowledge for 2 years of conditions that created danger of criminal attacks on tenants); *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 808, 174 CR 348 (manufacturing and marketing defectively designed car; plaintiff who proves that defendant acted with conscious disregard of plaintiff's rights need not show that defendant intended to cause injury); *Nolin v National Convenience Stores, Inc.* (1979) 95 CA3d 279, 157 CR 32 (permitting slippery grease to accumulate around self-service gas pumps); *Seimon v Southern Pac. Transp. Co.* (1977) 67 CA3d 600, 607, 136 CR 787 (malice inferable from evidence that heavily traveled railroad crossing was particularly dangerous because of restricted view and absence of warning gates or signals).

Malice (and oppression) cannot generally be based on the defendant's "hardball" legal tactics in defending the lawsuit. See *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v De Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 918, 114 CR2d 708 (also discussed in §14.3).

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§14.7 b. Oppression

Oppression is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." CC §3294(c)(2). See *Dang v Cross* (9th Cir 2005) 422 F3d 800 (error not to instruct jury that it could award punitive damages if it found that defendant had acted in oppressive manner in denying civil rights).

Punitive damages can be based on a finding of oppression even absent a finding of malice. *Major v Western Home Ins. Co.* (2009) 169 CA4th 1197, 1225, 87 CR3d 556 (insurer bound by third party claims representative's oppressive behavior in failing to deal with homeowners' demands after fire destroyed their home; see §§6.39, 14.11, 14.24).

Oppression and malice, both of which are partly defined as a conscious disregard of the plaintiff's rights, are sometimes both found from the same facts and often discussed interchangeably, without differentiation. See, *e.g., Egan v Mutual of Omaha Ins. Co.* (1979) 24 C3d 809, 822, 169 CR 691 (defendant "acted maliciously, with an intent to oppress" by failing to investigate insured's claim properly, thereby breaking covenant of good faith and fair dealing inherent in insurance contract). See also *Tibbs v Great Am. Ins. Co.* (9th Cir 1985) 755 F2d 1370, 1375 (insurer guilty of oppression, fraud, and malice in refusing to defend policyholder). On insurer's liability for punitive damages, see §14.44.

NOTE: See §14.6 on "despicable" and "conscious disregard." It appears that the defendant's conscious disregard of the plaintiff's interests must have been "willful" to establish malice, but not oppression. Thus, there may be situations in which a defendant could be guilty of oppression without being guilty of malice. See, *e.g., Richardson v Employers Liability Assur. Corp.* (1972) 25 CA3d 232, 246, 102 CR 547, disapproved on other grounds in *Gruenberg v Aetna Ins. Co.* (1973) 9 C3d 566, 580 n10, 108 CR 480 (oppression seen in insurer's policy of paying uninsured motorist claim "only as a last resort"). See also *Rulon-Miller v International Bus. Machs. Corp.* (1984) 162 CA3d 241, 255, 208 CR 524, disapproved on other grounds in *Guz v Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 351, 100 CR2d 352.

Like malice, oppression may be inferred from the circumstances of a defendant's conduct. *Monge v Superior Court* (1986) 176 CA3d 503, 511, 222 CR 64.

A jury finding that there was clear and convincing evidence of oppression may be upheld on appeal if there is substantial evidence of oppressive conduct. See *Walker v Farmers Ins. Exch.* (2007) 153 CA4th 965, 63 CR3d 507 (insurer's "patently wrong" and reiterated denial of defense to sued policyholder amounted to oppression).

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§14.8 c. Fraud

Fraud, for punitive damages purposes, is an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant who intends thereby to deprive a person of property or legal rights or otherwise to cause injury. CC §3294(c)(3). Fraudulent statements include one made by a defendant who (1) knew it to be false, or (2) made it recklessly without knowing whether it was true or false. See CACI 1900. The fraud that establishes entitlement to punitive damages may also be proved by inferences from circumstances surrounding the transaction, the relationship, and the interests of the parties. *Miller v National Am. Life Ins. Co.* (1976) 54 CA3d 331, 338, 126 CR 731.

Punitive damages are not recoverable for false statements made merely carelessly rather than recklessly or intentionally. See *Palmer v Ted Stevens Honda, Inc.* (1987) 193 CA3d 530, 536, 238 CR 363 (constructive fraud alone not sufficient basis for punitive damages). See also *Delos v Farmers Group* (1979) 93 CA3d 642, 656, 155 CR 843.

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§14.9 3. Actual Damages

Punitive damages are recoverable "in addition to the actual damages." CC §3294(a). The statutory wording has given rise to a general rule that the plaintiff seeking punitive damages must plead and prove that he or she sustained detriment (*i.e.,* loss or harm) for which compensatory damages could be awarded. See, *e.g., Berkley v Dowds* (2007) 152 CA4th 518, 534, 61 CR3d 304 (personal representative's allegations that defendant intentionally subjected decedent to emotional distress alleges a wrong for which damages are not recoverable (see §4.15)); *Cheung v Daley* (1995) 35 CA4th 1673, 1677, 42 CR2d 164 (punitive damages must be accompanied by award of compensatory damages or its equivalent); *Jackson v Johnson* (1992) 5 CA4th 1350, 1358, 7 CR2d 482 (no punitive damages when complaint alleged only simple negligence and jury awarded no compensatory damages; but see dissent); *Gagnon v Continental Cas. Co.* (1989) 211 CA3d 1598, 1605, 260 CR 305 (no punitive damages absent proof that plaintiff suffered damage or injury). See also *Streetscenes v ITC Entertainment Group* (2002) 103 CA4th 233, 126 CR2d 754 (after compensatory damages award for lost profits reversed on appeal, case remanded for redetermination of punitive damages); *Fuhrman v California Satellite Sys.* (1986) 179 CA3d 408, 428, 225 CR 140, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638; *Kluge v O'Gara* (1964) 227 CA2d 207, 38 CR 607.

NOTE: "Damages" is defined in CC §3281 as "a compensation… in money" for detriment caused by unlawful conduct. Thus, the term "actual damages" in CC §3294(a) might best be read to mean detriment (defined in CC §3282 as loss or harm) for which compensatory damages could be recovered. On another point, earlier cases had held that the recovery of compensatory damages was not essential and that the requirement of "actual damages" was simply a requirement that tortious conduct be proved if punitive damages were to be assessed. See, *e.g., Wayte v Rollins Int'l, Inc.* (1985) 169 CA3d 1, 16, 215 CR 59 (punitive, but not compensatory, damages recovery by paraplegic son who lost future medical benefits when father's employment was wrongfully terminated); *Marriage of McNeill* (1984) 160 CA3d 548, 561, 206 CR 641 (restitution award satisfied actual damages requirement), disapproved on other grounds in *Marriage of Fabian* (1986) 41 C3d 440, 451 n13, 224 CR 333.

Actual damages sufficient to support an award of punitive damages can include noneconomic damages awarded to compensate a plaintiff for pain, suffering, and emotional distress. See *McNairy v C.K. Realty* (2007) 150 CA4th 1500, 59 CR3d 429 (uninhabitability of rental units could be basis for landlord liability for emotional distress damages and for punitive damages; also noted in §6.7); *Warren v Merrill* (2006) 143 CA4th 96, 116, 49 CR3d 122 (defendant defrauded plaintiff out of money, causing him to be evicted and to lose "all his worldly possessions"; also noted in §§1.70, 6.7).

See Anno, 40 ALR4th 11 (1985) (sufficiency of showing of actual damages to support award of punitive damages).

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Source: Torts/California Tort Damages/14 Punitive Damages/§14.10 a. Evidence Supporting Amount

§14.10 a. Evidence Supporting Amount

The plaintiff seeking punitive damages must present evidence from which a trier of fact can determine the amount to be awarded. The suitable amount depends on the defendant's financial worth and other factors because such damages are designed to deter the defendant and others from committing similar conduct (unlike compensatory damages, which are designed to compensate the plaintiff for detriment caused by the defendant's tortious conduct). See *College Hosp., Inc. v Superior Court (Crowell)* (1994) 8 C4th 704, 712, 34 CR2d 898.

The plaintiff may present evidence to show such matters as (1) the reprehensibility of the defendant's conduct, (2) the defendant's wealth or financial condition (to provide a basis for inferring the amount of punitive damages that would have a deterrent effect on the particular defendant), and (3) the extent of the plaintiff's injury, harm, and loss (to provide a basis for sufficient compensatory damages to have a reasonable relationship to the punitive damages sought). *Neal v Farmers Ins. Exch.* (1978) 21 C3d 910, 928, 148 CR 389 (noted in §14.1). See *Century Sur. Co. v Polisso* (2006) 139 CA4th 922, 43 CR3d 468 ($2 million punitive award not excessive given defendant's almost $57 million net worth, 3.2-to-1 ratio to compensatory damages, and conduct "moderately high" on reprehensibility scale); *Romo v Ford Motor Co.* (2003) 113 CA4th 738, 755, 6 CR3d 793 (defendant's conduct called highly reprehensible). See CACI 3940, 3947. See generally *EEOC v Farmer Bros. Co.* (9th Cir 1994) 31 F3d 891, 904 (under California law, courts should determine amount of punitive damages based on severity of defendant's misconduct, injury caused, and defendant's financial condition); *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1258, 1 CR2d 301 (noted in §14.11).

Punitive damages are intended to punish a defendant for the conduct that harmed the plaintiff, not for being an unsavory individual or business; thus, a court may limit or exclude evidence of conduct that is independent from the acts on which liability is premised. See *Phillip Morris USA v Williams* (2007) 549 US 346, 166 L Ed 2d 940, 127 S Ct 1057 (basing punitive damages on injury to others is unconstitutional (see §14.12), although harm to others can be considered in determining reprehensibility of defendant's conduct); *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) 538 US 408, 422, 155 L Ed 2d 585, 123 S Ct 1513 (noted below); *Merrick v Paul Revere Life Ins. Co.* (9th Cir 2007) 500 F3d 1007 (punitive damages for insurer's failure to pay disability claim reversed because of inadequate limiting instruction); *White v Ford Motor Co.* (9th Cir 2007) 500 F3d 963 (reversal and remand for "proper harm to nonparties" instruction). See also *Holdgrafer v Unocal Corp.* (2008) 160 CA4th 907, 73 CR3d 216 (plaintiff damaged by leak in underground oil pipeline; leaks on defendant's other pipelines could show reprehensibility, but not considered in assessing punitive damages); *Bullock v Phillip Morris USA, Inc.* (2008) 159 CA4th 655, 693, 71 CR3d 775 (defendant's proposed jury instruction on not awarding punitive damages for harm done to others not fatally defective for failing to mention that harm to others could be considered on question of reprehensibility; new trial limited to determining punitive damages amount).

Due process does not, however, prohibit the consideration of the defendant's wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff; recidivism remains pertinent to an assessment of culpability. *Johnson v Ford Motor Co.* (2005) 35 C4th 1191, 1204, 29 CR3d 401 (evidence that defendant had policy of concealing defects when selling used vehicles). Further, punitive damages can constitutionally be used "as a tool to protect the consuming public, not merely to punish a private wrong." 35 C4th at 1206. The scale and profitability of a defendant's course of wrongful conduct "is relevant to reprehensibility and hence to the size of the award warranted… to meet the state's interest in deterrence," although an award cannot be grossly excessive in relation to the harm done or threatened. 35 C4th at 1207. A punitive damages award that requires a defendant to disgorge profit obtained through wrongful conduct toward the plaintiff can be proper, although an unconstitutionally large award cannot be justified on the theory that it requires the defendant to disgorge aggregate profits from many other similar transactions. 35 C4th at 1208.

NOTE: The court of appeal, on remand from the California Supreme Court, having earlier reduced a $10 million punitive damages verdict to $53,435 (three times compensatory damages), revised its reduction to an award of $175,000 (just less than 10 times compensatory damages). See *Johnson v Ford Motor Co.* (2005) 135 CA4th 137, 37 CR3d 283.

In other situations, consideration may be given to "uncompensated or potential harm" that tortious conduct caused the plaintiff. *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 1167, 29 CR3d 379 (dictum; fraud in building sale). That is, there are situations in which evidence of a defendant's pattern and practice of malicious, oppressive, or fraudulent business conduct may be received. See *Hangarter v Provident Life & Acc. Ins. Co.* (9th Cir 2004) 373 F3d 998 (evidence of insurer's general corporate policy of denying first party disability claims).

State Farm Mut. Auto. Ins. Co. v Campbell (2003) 538 US 408, 155 L Ed 2d 585, 601, 123 S Ct 1513, 1522, pointed out that out-of-state conduct, with a nexus to the specific harm suffered by the plaintiff, can be probative on the deliberateness and culpability of the defendant's conduct. Nevertheless, some courts have declined to base punitive damages on fraudulent, oppressive, or malicious conduct that harmed persons outside the state, even when the size of the award compared to compensatory damages is not so large as to offend due process concepts. See also §14.21.

See §14.38 on proving defendant's financial condition.

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§14.11 b. Reasonable Relation to Actual Injury

In reviewing a punitive damages award, a court should consider:

- The degree of reprehensibility of the defendant's conduct;
- The disparity between the award and the actual or potential harm suffered by the plaintiff; and
- The difference between the awarded punitive damages and civil penalties authorized for the same conduct.

State Farm Mut. Auto. Ins. Co. v Campbell (2003) 538 US 408, 417, 155 L Ed 2d 585, 601, 123 S Ct 1513. See *Major v Western Home Ins. Co.* (2009) 169 CA4th 1197, 1216, 87 CR3d 556 ($31,359 in economic damages, $450,000 for emotional distress, and $189,000 in attorney fees justified $646,471 in punitive damages; see also §§6.39, 14.7, 14.24). *Johnson v Ford Motor Co.* (2005) 135 CA4th 137, 37 CR3d 283 ($10 million verdict reduced to $175,000, just under 10 times compensatory damages); *Boeken v Philip Morris, Inc.* (2005) 127 CA4th 1640, 1690, 26 CR3d 638 (reprehensibility and other factors applied; $5,539,127 compensatory damages; court of appeal reduced punitive damages to $50 million after trial judge had reduced jury award of $3 billion to $100 million); *Bardis v Oates* (2004) 119 CA4th 1, 18, 14 CR3d 89 (appellate court reviews de novo whether punitive damages are excessive under federal due process; $165,528 compensatory damages; punitive damages reduced from $7 million to $1.5 million; also noted in §14.11A). But see *Pavon v Swift Transp. Co.* (9th Cir 1999) 192 F3d 902, 909 (award is to be compared to compensatory damages, not merely to out-of-pocket losses; racial discrimination under 42 USC §1981; $1218 for economic, $250,000 for noneconomic, and $300,000 punitive; 6-to-5 ratio not unreasonable). See also *Mendez v County of San Bernardino* (9th Cir 2008) 540 F3d 1109 (single-digit ratio inappropriate when violation of civil rights causes little physical injury; after award of $2 in nominal damages to survivors of person shot by police, jury award of $250,000 in punitive damages reduced to $5000).

An appellate court may reduce a punitive damages award that is grossly disproportionate to the plaintiff's actual losses and to the culpability of the defendant's conduct. See *Jet Source Charter, Inc. v Doherty* (2007) 148 CA4th 1, 4, 55 CR3d 176 (amount of punitive damages should not exceed amount of compensatory damages when a single "not particularly vulnerable" plaintiff's loss was purely economic); *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1258, 1 CR2d 301. But a punitive damages award will be reversed as excessive only when the entire record viewed most favorably to the judgment indicates that the award was the result of passion and prejudice. See *Sierra Club Found. v Graham* (1999) 72 CA4th 1135, 85 CR2d 726 (not excessive are punitive damages no more than three times compensatory damages or about two percent of defendant's net worth; ratio may also reflect potential loss to plaintiffs if scheme worthy of punitive damages did not fully succeed); *Walker v Signal Cos.* (1978) 84 CA3d 982, 997, 149 CR 119.

The defendant is entitled, on request, to a jury instruction that punitive damages must bear a reasonable relation to the actual harm or injury. *Gagnon v Continental Cas. Co.* (1989) 211 CA3d 1598, 1605, 260 CR 305.

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§14.11A c. Ratio of Punitive to Compensatory Damages

California holdings have not set a ratio beyond which a punitive damages award will be deemed excessive. See *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 1188, 29 CR3d 379 (award 10 times economic damages approved after 340 times award rejected), which seems to reject the notion that *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) 538 US 408, 425, 155 L Ed 2d 585, 606, 123 S Ct 1513, established a presumption that punitive damages awards that exceed a single-digit ratio (*e.g.,* up to 9 to 1) "to a significant degree" are constitutionally questionable. See also *Bardis v Oates* (2004) 119 CA4th 1, 18, 14 CR3d 89 (nearly 10-to-1 ratio not deemed excessive; also noted in §14.11); *EEOC v Farmer Bros. Co.* (9th Cir 1994) 31 F3d 891, 903 (not necessary that punitive damages not exceed compensatory damages by 4-to-1 ratio). See also Justice Mosk's concurring opinion in *Lane v Hughes Aircraft Co.* (2000) 22 C4th 405, 417, 93 CR2d 60 (disagreeing with suggestion in Justice Brown's concurring opinion that punitive damages should not exceed three times compensatory damages).

Cases rejecting awards that exceeded a single digit ratio include: *BMW of N. Am., Inc. v Gore* (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589 (discussed in §14.12; award of 500 times actual harm was constitutionally excessive); *Planned Parenthood v American Coalition of Life Activists* (9th Cir 2005) 422 F3d 949, 963 (for highly reprehensible threats of injury or death, 9 to 1 ratio for all plaintiffs against all defendants deemed appropriate); *Bains LLC v ARCO Prods. Co.* (9th Cir 2005) 405 F3d 764 (despite evidence of highly reprehensible racial harassment, court rejected 100 to 1 ratio as excessive and suggested something between 6 to 1 and 9 to 1).

In a particular case decided under federal maritime law, the United States Supreme Court has decided that the amount of punitive damages should equal the amount of extensive compensatory damages. See *Exxon Shipping v Baker* (2008) ___ US ___, 171 L Ed 2d 570, 128 S Ct 2605 (punitive damages reduced to $507.5 million after Ninth Circuit had previously reduced award of $5 billion to $2.5 billion).

At least one court has concluded that in the "usual case," in which compensatory damages are neither exceptionally high nor low, and in which defendant's conduct is neither exceptionally extreme nor trivial, punitive damages should not exceed four times the amount of compensatory damages. *Textron Fin. Corp. v National Union Fire Ins. Co.* (2004) 118 CA4th 1061, 1083, 13 CR3d 586 ($165,414 compensatory damages; $360,000 punitive, reduced from $10 million jury award and earlier $1.7 million appellate reduction). See *Gober v Ralphs Grocery Co.* (2006) 137 CA4th 204, 40 CR3d 92 (appellate court imposed 6-to-1 ratio in sexual harassment case against employer; jury awards had created ratios ranging from 25-to-1 to 100-to-1).

See generally Levinson, *Punitive Damages: There is* No *Single Digit Ratio Rule*, 37 CAOC Forum 2, p 33 (Mar. 2007).

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§14.12 C. Constitutionality

If adequate procedural safeguards have been followed, the award of punitive damages does not, by itself, violate federal or state due process standards. See *Romo v Ford Motor Co.* (2003) 113 CA4th 738, 745, 6 CR3d 793 (given procedural safeguards in CC §3294, such as clear and convincing evidence requirement and objective criteria for determining entitlement amount, not unconstitutional to impose punitive damages on manufacturer of defectively designed car). But see *Johnson v Ford Motor Co.* (2005) 35 C4th 1191, 1205, 29 CR3d 401 (criticizing *Romo*). See also *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1256, 1 CR2d 301 (noted in §14.11).

Further, some challenges based on the federal constitution have failed. See, *e.g., Browning-Ferris Indus. v Kelco Disposal, Inc.* (1989) 492 US 257, 106 L Ed 2d 219, 109 S Ct 2909 (US Const amend VIII imposes no limitation on award of punitive damages between private litigants); *Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co.* (1987) 189 CA3d 1072, 1100, 234 CR 835 (punitive damages award did not violate defendant's rights under US Const amend VIII, which prohibits imposition of excessive criminal fines, or under due process clause of amend XIV). The award of punitive damages in a civil action against a person already convicted of a felony does not violate the Fifth Amendment (double jeopardy), the Eighth Amendment (excessive fines), or the Fourteenth Amendment (substantive due process). *Shore v Gurnett* (2004) 122 CA4th 166, 18 CR3d 583 (vehicular manslaughter).

On the other hand, basing a punitive damages award on punishing a defendant for harming persons who are not before the court (*e.g.,* victims whom the parties do not represent) is unconstitutional as a taking of "property" without due process of law. *Phillip Morris USA v Williams* (2007) 549 US 346, 166 L Ed 2d 940, 127 S Ct 1057 (death of heavy smoker). See also §§1.2, 2.7.

State statutes that extend the time limitations on specified causes of action in which punitive damages may be recovered are not unconstitutional as ex post facto laws. *Roman Catholic Bishop of Oakland v Superior Court* (2005) 128 CA4th 1155, 28 CR3d 355 (childhood sexual abuse); *21st Century Ins. Co. v Superior Court* (2005) 127 CA4th 1351, 26 CR3d 476 (insurance bad faith).

A grossly excessive punitive damages award, however, can violate notions of due process. See *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) 538 US 408, 417, 155 L Ed 2d 585, 601, 123 S Ct 1513, 1520 (discussed, with other cases, in §14.11). See also *BMW of N. Am., Inc. v Gore* (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589, in which a $2 million punitive damages award was deemed to violate Fourteenth Amendment due process requirements because:

- None of the aggravating factors associated with particularly reprehensible conduct was present;
- The award was 500 times the amount of the customer's actual harm as determined by the jury;
- There was no suggestion that the plaintiff or any other similarly situated person was threatened with any additional potential harm by the defendant's punishable conduct; and
- The sanction imposed on the defendant would have been substantially greater than other awards for similar malfeasance.

When determining whether a punitive damages award is constitutionally excessive, a court must conduct an independent review of the propriety of the amount under constitutional standards. *Cooper Indus., Inc. v Leatherman Tool Group, Inc.* (2001) 532 US 424, 149 L Ed 2d 674, 121 S Ct 1678 (appellate courts must review awards independently, applying "de novo" standard rather than less demanding "abuse-of-discretion" standard); *Leatherman Tool Group, Inc. v Cooper Indus., Inc.* (9th Cir 2002) 285 F3d 1146 (applying new standard requires reduction of $4.5 million to no more than $500,000). See Note in §14.11A.

See Imre, *Punitive Damages in the Aftermath of* Cooper: *Unanswered Questions*, 23 CEB Civ Litigation Rep 274 (Dec. 2001).

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II. PERSONS ENTITLED TO RECOVER

§14.13 A. Injured Individual

Civil Code §3294(a) authorizes "the plaintiff" to recover punitive damages when statutory requirements are met. Absent some other statutory authorization, a person other than the individual directly harmed by the defendant's punishable conduct may be denied punitive damages. See, *e.g., People v Superior Court (Jayhill Corp.)* (1973) 9 C3d 283, 287, 107 CR 192 (state attorney general could not recover punitive damages relating to false ads).

See Anno, 47 ALR6th 185 (2009) (principal's right to recover punitive damages for agent's or broker's breach of duty).

Punitive damages are not assignable. *Jackson v Rogers & Wells* (1989) 210 CA3d 336, 258 CR 454 (punitive damages are personal and cannot be assigned in context of legal malpractice and fraud allegations); *Murphy v Allstate Ins. Co.* (1976) 17 C3d 937, 942, 132 CR 424 (purely personal tort cause of action, as well as claim for punitive damages, was not assignable); *Certified Grocers of Cal., Ltd. v San Gabriel Valley Bank* (1983) 150 CA3d 281, 289 n3, 197 CR 710 (judgment debtor's claim for punitive damages was not assignable); *Dugar v Happy Tiger Records, Inc.* (1974) 41 CA3d 811, 819, 116 CR 412 (in absence of statute, punitive damages allowed only to immediate person injured).

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§14.14 B. Spouse or Family Member

A person entitled to recover emotional distress damages for the shock of witnessing the malicious injury of a spouse, child, parent, or sibling (see §§6.8-6.15) may also recover punitive damages. See §6.43. In other situations, only the person who was directly injured by punishable conduct may recover punitive damages.

Thus, a parent cannot ordinarily recover punitive damages from a defendant who has injured the parent's child, although the child (or a personal representative) could recover punitive damages for malicious injury to the child. See *Vander Lind v Superior Court* (1983) 146 CA3d 358, 365, 194 CR 209 (Pub Util C §2106 does not authorize award of punitive damages to deceased victim's parents; also noted in §§4.3, 4.11 on survival actions).

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§14.15 C. Personal Representative or Survivor

The personal representative of the estate of a decedent who could have recovered punitive damages before he or she died can pursue such damages on behalf of the decedent's estate or heirs. CCP §377.34. Relatively minor compensatory damages (*e.g.,* for damage to decedent's clothing and personal property as he or she was being killed) can be the springboard for substantial punitive damages. *Rufo v Simpson* (2001) 86 CA4th 573, 616, 103 CR2d 492 ($12.5 million each to estates of defendant's wife and a waiter); *Carr v Progressive Cas. Ins. Co.* (1984) 152 CA3d 881, 892, 199 CR 835; *Dunwoody v Trapnell* (1975) 47 CA3d 367, 120 CR 859. The personal representative must plead and prove that the punishable conduct occurred before the decedent's death. See CCP §377.34. See generally §4.10.

A decedent's survivors or heirs cannot recover punitive damages in a wrongful death action. CCP §377.60-377.62; *Stencel Aero Eng'g Corp. v Superior Court* (1976) 56 CA3d 978, 983, 128 CR 691. See generally §3.42.

Civil Code §3294(d) establishes an exception to the rule that the injured party must survive the fatal injury, which applies when the death resulted from a homicide for which the defendant was convicted of a felony. In such cases, punitive damages can be recovered either by survivors in a wrongful death action under CCP §377.60 or by a personal representative in a survival action under CCP §377.10-377.35, whether the decedent died instantly or survived the fatal injury, however briefly. See §§3.42, 4.10.

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§14.16 D. Public Entity

Despite immunity from liability for punitive damages (see §14.18), a public entity that brings an action against a private person can recover punitive damages in the same situations in which a private party could recover them for malice, oppression, or fraud directed against the entity. *City of Glendale v Superior Court* (2002) 95 CA4th 1266, 116 CR2d 16 (no equal protection violation); *City of Sanger v Superior Court* (1992) 8 CA4th 444, 10 CR2d 436.

Some statutes authorize public agencies, commissions, and other entities to recover punitive damages or civil penalties from persons whose punishable conduct was directed against a person the statute was intended to protect. For example, Govt C §12987 (in California's Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996)) authorizes the FEH Commission to award a civil penalty for an unlawful practice. See *Walnut Creek Manor v Fair Employment & Hous. Comm'n* (1991) 54 C3d 245, 267, 284 CR 718 (housing discrimination; FEH Commission could award one penalty, not 35, to racially mixed couple unlawfully denied apartment that was then offered to 35 other applicants).

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III. POTENTIAL DEFENDANTS' IMMUNITIES AND DEFENSES

§14.17 A. Estates and Survivors

A punitive damages claim is extinguished by the death, before judgment is entered, of the person whose conduct constituted the malice, oppression, or fraud necessary to support the recovery of such damages. CCP §377.42. See *Evans v Gibson* (1934) 220 C 476, 490, 31 P2d 389 (primary purpose of punishing tortfeasor cannot be served after his or her death). See generally §4.10 on recovering punitive damages in survival actions.

A judgment for punitive damages entered against a living defendant is enforceable even after that defendant's later death. See *Whelan v Rallo* (1997) 52 CA4th 989, 60 CR2d 876 (defendant died during unsuccessful appeal).

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B. Public Entities and Employees

§14.18 1. California

A California public entity can assert a statutory immunity to liability for punitive damages. Govt C §818; *McAllister v South Coast Air Quality Mgmt. Dist.* (1986) 183 CA3d 653, 228 CR 351. The employee of such entity, however, can be individually liable for punitive damages for conduct that meets the criteria in CC §3294. See *Runyon v Superior Court* (1986) 187 CA3d 878, 232 CR 101 (suit by public employees for wrongful employment practices, intentional infliction of emotional distress, and violation of federal civil rights). Further, the immunity that can be claimed by the entity does not apply to a plaintiff's claim of the civil penalty authorized by CC §52(b)(2) for a violation of Unruh Civil Rights Act provisions. *Los Angeles County Metro. Transp. Auth. v Superior Court (Lyons)* (2004) 123 CA4th 261, 20 CR3d 92 (allegations that entity was responsible for its employee's assault on bus passenger for presumed sexual orientation).

In some circumstances, a public entity other than the state can elect to pay punitive damages assessed against individual public employees. Govt C §825(b). For example, the entity might pay when the act giving rise to punitive damages occurred within the employee's or former employee's scope of employment and was performed in good faith with the apparent best interests of the entity in mind. See Govt C §§825(b), 825.2.

Damages that are "punitive in nature, but are not simply or solely punitive in that they fulfill legitimate and fully justified compensatory functions" are not punitive damages under Govt C §818 and may be recovered from a public entity. See *Kizer v County of San Mateo* (1991) 53 C3d 139, 145, 279 CR 318 (involving statutory civil penalties that also served compensatory function).

The State Compensation Insurance Fund is, by statute, not entitled to claim the Govt C §818 public entity immunity from liability for punitive damages. See *Courtesy Ambulance Serv. v Superior Court* (1992) 8 CA4th 1504, 11 CR2d 161 (employer insured by SCIF for workers' compensation sought compensatory and punitive damages on allegations that SCIF handled claims inefficiently, leading to excessive premiums).

Public utilities are subject to suit for punitive damages under limited circumstances. See Pub Util C §2106 (if court finds act or omission willful, it may award actual and punitive damages); *Vander Lind v Superior Court* (1983) 146 CA3d 358, 365, 194 CR 209 (only persons or their personal representatives who are themselves direct victims of utility's willful act or omission may recover punitive damages).

NOTE: The Volunteer Protection Act of 1997 (42 USC §§14501-14505) provides that volunteers of a nonprofit organization or government entity are protected from punitive damages unless the plaintiff shows by clear and convincing evidence that the harm was caused by willful or criminal misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed.

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§14.19 2. Federal

The Federal Tort Claims Act (FTCA) (28 USC §§2671-2680) prohibits punitive damages. 28 USC §2674. However, "punitive damages" is a legal term of art that has a widely accepted common-law meaning; it is not the equivalent of "damages awards that may have a punitive effect." *Molzof v U.S.* (1992) 502 US 301, 306, 116 L Ed 2d 731, 739, 112 S Ct 711.

NOTE: The FTCA does not, however, appear to bar a plaintiff from recovering damages for future medical expenses at a higher level than the government would provide free of cost (see §1.21) or for loss of enjoyment of life (see §1.86).

Statutes applicable to particular agencies also limit or forbid punitive damages. See, *e.g., Brewer v U.S.* (1994) 864 F Supp 741 (count for willful and wanton misconduct under Illinois law does not violate FTCA rule against punitive damages).

Punitive damages are not recoverable in private suits under §202 of the Americans with Disabilities Act (42 USC §12132) nor under §504 of the Rehabilitation Act of 1973 (29 USC §794(a)). *Barnes v Gorman* (2002) 536 US 181, 153 L Ed 2d 230, 239, 122 S Ct 2097 (also not awardable under Title VI of the Civil Rights Act of 1964 (42 USC §2000d)).

On the other hand, a federally chartered credit union is not immune from liability for punitive damages in a state court suit for employment discrimination. *McGee v Tucoemas Fed. Credit Union* (2007) 153 CA4th 1351, 63 CR3d 808.

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Source: Torts/California Tort Damages/14 Punitive Damages/ C. Employers/§14.20 1. Statutory Prerequisites

C. Employers

§14.20 1. Statutory Prerequisites

An employer from which punitive damages are sought because of the malicious, oppressive, or fraudulent acts of its employee can defeat such liability by showing the absence of a prerequisite stated in CC §3294(b). See *Hart v National Mortgage & Land Co.* (1987) 189 CA3d 1420, 1432, 235 CR 68. That is, under CC §3294(b), a plaintiff seeking to impose punitive damages liability on an employer for an employee's acts must plead and prove one of the following:

- The employer had advance knowledge of the employee's unfitness and employed him or her with a conscious disregard of the rights or safety of others;
- The employer authorized the employee's wrongful conduct;
- The employer ratified the employee's wrongful conduct; or
- The employer was itself "personally" guilty of malice, oppression, or fraud.

Failure to dismiss an employee after the commission of oppressive acts shows ratification of the acts if the employer knew or should have known of the employee's actions and failed to investigate. *Pusateri v E. F. Hutton & Co.* (1986) 180 CA3d 247, 253, 225 CR 526. See *Siva v General Tire & Rubber Co.* (1983) 146 CA3d 152, 159, 194 CR 51 (employer punitive damages liability based on ratification of employees' conscious disregard of others' safety when recapping heavy equipment tire).

NOTE: Cases before a 1980 amendment to CC §3294 provided that an employer could not be compelled to pay punitive damages unless it could be proved under the doctrine of respondeat superior that the tortious act was authorized or ratified. See, *e.g., Egan v Mutual of Omaha Ins. Co.* (1979) 24 C3d 809, 822, 169 CR 691 (employees' actions properly imputed to employer for purposes of assessing punitive damages).

See CACI 3943 and 3944 for jury instructions to be used when punitive damages may be imposed on an employer or principal for the acts of an employee or agent.

Maritime employers that willfully and wantonly disregard their maintenance and cure obligation to injured maritime employees are subject to punitive damages. *Atlantic Sounding, Co. v Townsend* (2009) ___ US ___, 174 L Ed 2d 382, 129 S Ct 2562 (recovery permitted under general maritime law was not altered by Jones Act (46 USC §§30104-30106)). See also *Baptiste v Superior Court* (1980) 106 CA3d 87, 164 CR 789 (punitive damages available to plaintiff who suffered hearing loss resulting from ship owner's informed decision to practice economy by not providing seamen with safe environment). See generally, on employers' liability under the Jones Act, California Workers' Compensation Practice §§1.73-1.75 (4th ed Cal CEB 2000); California Workers' Damages Practice §4.95 (2d ed Cal CEB 2001).

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§14.21 2. Corporation's Imputed Knowledge

An employer that is a corporation can defeat punitive damages liability by proving that no "officer, director, or managing agent" had the required "advance knowledge" (see §14.20) needed for punitive damages liability. CC §3294(b); *White v Ultramar, Inc.* (1999) 21 C4th 563, 572, 88 CR2d 19 (question of fact whether corporate employee was "managing agent" under statute). See *Kelly-Zurian v Wohl Shoe Co.* (1994) 22 CA4th 397, 27 CR2d 457 (employer not vicariously responsible for punitive damages absent ratification or act committed by officer, director or managing agent). Proof that the offending employee was a managing agent must be by clear and convincing evidence. *Barton v Alexander Hamilton Life Ins. Co. of Am.* (2003) 110 CA4th 1640, 1644, 3 CR3d 258 (plaintiff may have invited trial judge to so rule).

When an employee's injury-causing acts were done in his or her "personal capacity," the employing corporation is not liable. See *College Hosp., Inc. v Superior Court* (*Crowell*) (1994) 8 C4th 704, 723, 34 CR2d 898 (affidavits showed that alleged offending employee was acting in personal capacity and for personal benefit when exploiting plaintiff).

The knowledge of employees other than officers, directors, or managing agents is not imputed to a corporation for punitive damages purposes. See *Cruz v HomeBase* (2000) 83 CA4th 160, 167, 99 CR2d 435 (CC §3294(b) avoids punishing corporation for malice of low-level employees that does not reflect corporate "state of mind" or corporate leaders' intentions; loss-prevention supervisor in store was not managing agent). But see *Swinton v Potomac Corp.* (9th Cir 2001) 270 F3d 794, 810 (supervisor's failure to act to stop harassment imputed to employer for purposes of violation of federal law against racial harassment; see §14.22).

Managing agents are supervisory employees who have broad discretionary powers and who exercise substantial discretionary authority in the corporation. *White v Ultramar, Inc.* (1999) 21 C4th 563, 566, 88 CR2d 19 (mere ability to hire and fire employees does not necessarily make supervisory employee a managing agent under CC §3294(b)).

Of course, when a managing agent commits fraud, there is no need for a showing of authorization or ratification by the corporation. *Hartman v Shell Oil Co.* (1977) 68 CA3d 240, 248, 137 CR 244 (punitive damages imposed when fraud committed by agent acting in managerial capacity).

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3. Causes of Action

§14.22 a. Discrimination or Harassment

Punitive damages can be recovered by a person discriminated against or harassed by an employer or coemployee whose fraudulent, malicious, or oppressive conduct violates California's Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996). *Commodore Home Sys., Inc. v Superior Court* (1982) 32 C3d 211, 185 CR 270 (punitive damages recoverable under FEHA for job discrimination); *Dyna-Med, Inc. v Fair Employment & Hous. Comm'n* (1987) 43 C3d 1379, 241 CR 67 (courts may impose punitive damages); *Wysinger v Automobile Club of S. Cal.* (2007) 157 CA4th 413, 428, 69 CR3d 1 ($1 million punitive plus $280,000 compensatory not excessive for employer's "extreme indifference" to employee's rights, at "level which decent citizens should not have to tolerate" in failing to engage in interactive process to determine reasonable accommodation); *Weeks v Baker & McKenzie* (1998) 63 CA4th 1128, 1153, 74 CR2d 510 (employer's liability for employee's conduct; no need to show that employer itself was guilty of malice, oppression, or fraud). See *Fisher v San Pedro Peninsula Hosp.* (1989) 214 CA3d 590, 620, 262 CR 842 (punitive damages for sexual harassment but not for retaliation against coworker who reported it).

For more on punitive damages in employment discrimination cases, see Wrongful Employment Termination Practice §§9.4, 9.98, 12.22, 14.88 (2d ed Cal CEB 1997). See Anno, 81 ALR5th 367 (2000) (punitive damages under state employment discrimination law).

Punitive damages are also available for discrimination or harassment that violates federal law. *Kolstad v American Dental Ass'n* (1999) 527 US 526, 534, 144 L Ed 2d 494, 504, 119 S Ct 2118 (to be liable for punitive damages, employer must at least discriminate in face of perceived risk that its actions will violate federal law; employer's conduct need not be "egregious"); *Swinton v Potomac Corp.* (9th Cir 2001) 270 F3d 794, 810 (supervisor's failure to act to stop harassment imputed to employer).

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§14.23 b. Firing Contrary to Public Policy

An employee can recover punitive as well as compensatory damages from an employer that fired or discriminated against the employee in a way that violated a fundamental public policy. See *White v Ultramar, Inc.* (1999) 21 C4th 563, 577, 88 CR2d 19 (zone manager fired employee who testified on coemployee's behalf in employment benefits hearing). See also *Foley v Interactive Data Corp.* (1988) 47 C3d 654, 254 CR 211 (employer's liability to discharged employee for tortious breach of implied covenant of good faith and fair dealing in employment contract); *Tameny v Atlantic Richfield Co.* (1980) 27 C3d 167, 164 CR 839 (employer conditioned employment on employee participating in unlawful conduct).

A showing only that the firing violated public policy does not support punitive damages. The "clear and convincing" standard "requires a finding of high probability,… so clear as to leave no substantial doubt… sufficiently strong to command unhesitating assent of every reasonable mind." *Scott v Phoenix Schools, Inc.* (2009) 175 CA4th 702, 715, 96 CR3d 159 (merely showing firing in violation of public policy insufficient to show malice or oppression needed to support punitive damages; see also §14.5).

For more, see Wrongful Employment Termination Practice, chap 5 (2d ed Cal CEB 1997); California Workers' Damages Practice §§4.70-4.72 (2d ed Cal CEB 2001).

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D. Insurers: Causes of Action

§14.24 1. First Party Bad Faith

The insured can recover punitive damages from an insurer on evidence that the insurer maliciously, oppressively, or fraudulently engaged in conduct that injured the insured. See, *e.g., Egan v Mutual of Omaha Ins. Co.* (1979) 24 C3d 809, 822, 169 CR 691 (defendant "acted maliciously, with an intent to oppress" by failing to investigate insured's claim properly, thereby breaking covenant of good faith and fair dealing inherent in insurance contract); *Silberg v California Life Ins. Co.* (1974) 11 C3d 452, 462, 113 CR 711; *Major v Western Home Ins. Co.* (2009) 169 CA4th 1197, 87 CR3d 556 (homeowners' insurer's refusal to pay replacement cost after destruction by fire; claims representative's conduct found oppressive; see also §§6.39, 14.7, 14.11); *Diamond Woodworks, Inc. v Argonaut Ins. Co.* (2003) 109 CA4th 1020, 1054, 135 CR2d 736 (insurer denied workers' compensation liability; also noted in §14.11); *Notrica v State Comp. Ins. Fund* (1999) 70 CA4th 911, 83 CR2d 89 (workers' compensation insurer raised cost of insurance by improperly setting case reserves and otherwise engaging in improper claims-handling practices, thereby breaching implied covenant of good faith and fair dealing). See also *Tan Jay Int'l v Canadian Indem. Co.* (1988) 198 CA3d 695, 243 CR 907 (insurer practices violating Ins C §790.03(h)); *Hangarter v Provident Life & Acc. Ins. Co.* (9th Cir 2004) 373 F3d 998 (punitive damages based on insurer's general corporate policy of denying first party disability claims).

An insurer can, on the other hand, defend against its insured's claim that the insurer should pay punitive damages assessed against the insured, at least absent proof that the punitive damages assessment was proximately caused by the insurer's malicious, oppressive, or fraudulent refusal or failure to settle a claim against the insured. See *PPG Indus., Inc. v Transamerica Ins. Co.* (1999) 20 C4th 310, 316, 84 CR2d 455 (insurer's failure to settle underlying suit against insured was cause in fact, but not proximate (or legal) cause; policy reasons militate against allowing morally culpable wrongdoer, guilty of egregious misconduct, to shift punitive damages burden to insurer).

See §14.44 on the uninsurability of punitive damages.

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§14.25 2. Third Party Bad Faith

Neither compensatory nor punitive damages are available to a plaintiff under the theory that another person's insurer violated the unfair insurance practices provisions in Ins C §790.03(h). *Moradi-Shalal v Fireman's Fund Ins. Cos.* (1988) 46 C3d 287, 250 CR 116.

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§14.26 3. Uninsured Motorist

An insured cannot recover punitive damages from his or her own insurer under the uninsured motorist coverage of an automobile policy for the malice or recklessness of the uninsured motorist. *California State Auto. Ass'n Inter-Ins. Bureau v Carter* (1985) 164 CA3d 257, 210 CR 140 (punitive damages meant to punish tortfeasor who, if insured, would not have been covered for damages resulting from intentional acts (see §14.44); no provision for punitive damages under limited recovery of Ins C §11580.2).

See Anno, 54 ALR4th 1186 (1987) (punitive damages as within coverage of uninsured or underinsured motorist insurance).

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§14.27 E. Product Manufacturers or Suppliers

A plaintiff injured by a defective product can recover punitive damages from the identified manufacturer or supplier of the product by proving the defendant's malice (or oppression or fraud). *G.D. Searle & Co. v Superior Court* (1975) 49 CA3d 22, 26, 122 CR 218 (action for alleged adverse physical effects of oral contraceptive); *Romo v Ford Motor Co.* (2003) 113 CA4th 738, 744, 6 CR3d 793 (vehicle with roof that collapsed when it rolled over); *Hopkins v Dow Corning Corp.* (9th Cir 1994) 33 F3d 1116, 1127 (silicone gel breast implant maker continued selling them despite knowledge of possible hazards). See *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 398, 196 CR 117 (alleged conscious disregard of users' safety in design and marketing of intrauterine device). See also *Gawara v United States Brass Corp.* (1998) 63 CA4th 1341, 1362, 74 CR2d 663 (punitive damages not justified under circumstances; houses containing defective polybutylene plumbing systems).

Punitive damages are ordinarily not recoverable from product suppliers held liable under a "market share" liability theory. See *Magallanes v Superior Court* (1985) 167 CA3d 878, 213 CR 547 (manufacturers and distributors provided substantial share of drug that injured plaintiff in utero). On market share liability, see California Tort Guide §11.22 (3d ed Cal CEB 1996). This preclusion does not apply, however, to plaintiffs whose asbestos-related disease was caused by products supplied by a group of defendants. See *Stevens v Owens-Corning Fiberglas Corp.* (1996) 49 CA4th 1645, 57 CR2d 525; *Mullen v Armstrong World Indus., Inc.* (1988) 200 CA3d 250, 246 CR 32.

For more on product liability, see Tort Guide, chap 11. See also Annos, 108 ALR5th 343 (2003) (cigarette manufacturers' punitive damages liability), 39 ALR5th 763 (1996) (punitive damages for injury from transporting, handling, or storing hazardous substances), 55 ALR4th 166 (1987) (successor company's punitive damages liability for injury caused by predecessor's product).

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§14.28 F. Attorneys: Malpractice

An attorney sued for negligently losing a recovery of punitive damages in a lawsuit is not liable to compensate the client for such lost punitive damages. *Ferguson v Lieff, Cabraser, Heimann & Bernstein* (2003) 30 C4th 1037, 1046, 135 CR2d 46 (making negligent attorney liable for lost punitive damages would neither punish nor deter person whose conduct justified such damages); *Expansion Pointe Props. Ltd. Partnership v Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 CA4th 42, 61 CR3d 166. See *Piscitelli v Friedenberg* (2001) 87 CA4th 953, 981, 105 CR2d 88 (absent showing that attorney acted oppressively, maliciously, or fraudulently, attorney not liable for original defendant's punishable conduct).

See also Anno, 9 ALR6th 285 (2005) (punitive damages for attorney malpractice).

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§14.29 G. Health Care Providers: Medical Malpractice

A health care provider sued for medical negligence can escape liability for punitive damages if the plaintiff has failed to follow procedures prescribed by CCP §425.13. See §§15.53-15.55 and California Tort Guide §§9.26-9.28 (3d ed Cal CEB 1996).

Briefly, the plaintiff who wants to prove his or her entitlement to punitive damages must obtain a court order permitting punitive damages to be claimed in a complaint or amended complaint. The plaintiff's motion papers must establish a substantial probability on his or her CC §3294 claim. See *Vazquez de Mercado v Superior Court (McClung)* (2007) 148 CA4th 711, 55 CR3d 889 (veterinarian's alleged failure to advise prospective horse purchasers of its physical problem not, however, within definition of professional negligence; punitive damages not restricted). See Tort Guide §15.41.

See Anno, 35 ALR5th 145 (1996) (punitive damages for medical malpractice).

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§14.30 H. Religious Corporations

A religious corporation or "religious corporation sole" can escape liability for punitive damages if the plaintiff has failed to follow procedures prescribed by CCP §425.14. See *Little Co. of Mary Hosp. v Superior Court (Marin)* (2008) 162 CA4th 261, 75 CR3d 519 (section mandates earlier, rather than later, prima facie showing supporting allegations of recklessness, oppression, or fraud).

Briefly, the plaintiff who wants to prove his or her entitlement to punitive damages must obtain a court order permitting punitive damages to be claimed in a complaint or amended complaint. The plaintiff's motion papers must state sufficient evidence to establish that the plaintiff can meet the clear and convincing evidence requirements (see §§14.5-14.8) of CC §3294. See *Rowe v Superior Court* (1993) 15 CA4th 1711, 19 CR2d 625 (to obtain court's permission, plaintiff need only show sufficient evidence to permit claim to go to jury under clear and convincing standard; no need to actually prove to judge, by clear and convincing evidence, right to recover punitive damages).

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§14.31 I. Nonprofit Corporations' Officers and Directors

An officer or director of a nonprofit corporation who serves without compensation can escape liability for both compensatory and punitive damages if the plaintiff has failed to follow procedures prescribed by CCP §425.15.

Briefly, the plaintiff who wants to prove his or her entitlement to damages must obtain a court order permitting a complaint against the volunteer to be filed. The plaintiff's motion papers must state the facts on which liability would be based. Presumably, a plaintiff who wants to recover punitive damages would have to state facts showing that the plaintiff can meet the clear and convincing evidence requirements (see §§14.5-14.8) of CC §3294.

NOTE: See Note in §14.18 on the Volunteer Protection Act of 1997 (42 USC §§14501-14505), applicable to volunteers of a nonprofit organization or government entity.

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IV. PROCEDURES

A. Before Trial

§14.32 1. Pleading; Statement of Damages

A punitive damages claim is pleaded as part of one or more substantive causes of action; there is no separate cause of action for punitive damages. *Grieves v Superior Court* (1984) 157 CA3d 159, 163, 203 CR 556. The complaint should not state the dollar amount claimed as punitive damages. CC §3295(e).

When the plaintiff alleges facts stating a cause of action for an intentional wrong, a prayer for punitive damages may be supported by general allegations that the wrong was committed willfully or with a design to injury. *G.D. Searle & Co. v Superior Court* (1975) 49 CA3d 22, 29, 122 CR 218. On the other hand, allegations that the defendant acted willfully, wantonly, or recklessly do not, by themselves, charge malice, and are insufficient to support a claim for punitive damages when the alleged tort is not intentional or deliberate. *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 390, 196 CR 117 (plaintiff should have alleged, as part of negligence and strict liability counts, facts showing that specified acts were done with intent to cause injury or with conscious disregard of others' safety; pleading error forgiven, however, because parties tried case on theory that punitive damages were in issue).

Before a default can be taken, a plaintiff must serve a statement of damages on the defendant under CCP §425.11. If the plaintiff seeks punitive damages, §425.11 contains a form for reservation of right to seek punitive damages on default judgment and directs the manner and form of service. See discussion in California Civil Procedure Before Trial §§15.9-15.10 (4th ed Cal CEB 2004).

On special pleading procedures, see §§14.29 (medical malpractice), 14.30 (religious corporations), and 14.31 (nonprofit corporations).

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§14.33 2. Summary Judgment

Entitlement to punitive damages is a substantive question that is properly subject to a motion for summary adjudication under CCP §437c(f)(1). But summary adjudication is proper only if all factual disputes relating to the entire punitive damages claim can be adjudicated. When the claim for punitive damages is based on an interrelated set of facts, any one of which might support punitive damages, summary adjudication is not available to eliminate other facts relating to punitive damages. *Catalano v Superior Court* (2000) 82 CA4th 91, 97 CR2d 842.

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§14.34 3. Discovery

A plaintiff seeking pretrial discovery of information concerning the defendant's profits from the alleged wrongful conduct or his or her financial condition must first obtain a court order permitting such discovery, by means of a noticed motion, supported by affidavits or declarations. CC §3295(c). The plaintiff can subpoena documents and witnesses to be available at the trial, however, to establish profits or financial condition. The defendant may also be required to identify documents in his or her possession and the witnesses employed by or related to the defendant "who would be most competent to testify to those facts." CC §3295(c).

The court may permit such discovery after a hearing (if it deems a hearing is necessary), if it finds from the supporting and opposing affidavits presented that the plaintiff has established a substantial probability of success on the punitive damages claim. CC §3295(c). But before the court may grant an order allowing discovery of financial condition information, it must (1) weigh the evidence (relating to punitive damages liability) presented by both sides and (2) make a finding that it is "very likely the plaintiff will prevail" on the punitive damages claim. *Jabro v Superior Court* (2002) 95 CA4th 754, 115 CR2d 843 (court erred in ordering discovery of defendants' finances based solely on evidence from plaintiff that did no more than avoid summary judgment on punitive damages claim).

The court's finding and order cannot be considered a determination on the merits of the claim or any defense to it, and cannot be entered in evidence or referred to in trial. CC §3295(c). On the other hand, a judge's decision that the plaintiff has demonstrated a substantial probability that he or she will prevail on a punitive damages claim can serve as a ground, under CCP §170.6, for peremptory challenge to the judge. *Guardado v Superior Court (Mariposa Gardens)* (2008) 163 CA4th 91, 77 CR3d 149.

Similarly, in cases assigned to judicial arbitration, a court order must be obtained under CC §3295(c) before a party may compel production of financial condition evidence. CCP §1141.19.5.

See §14.37 on the defendant's right to bifurcation or a separate hearing before the introduction of evidence of profits or financial condition.

See Anno, 54 ALR4th 998 (1987) (discovery of defendant's sales, earnings, or profits on issue of punitive damages).

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§14.35 4. Arbitration

Arbitrators can award punitive damages absent a preclusion clause in the agreement to arbitrate. See *J. Alexander Sec., Inc. v Mendez* (1993) 17 CA4th 1083, 21 CR2d 826 (brokerage firm that drafted agreement under which disputes with customers were to be resolved could have, but did not, include punitive damages preclusion).

The fact that arbitration awards are subject to only limited appellate review does not mean that the inclusion of punitive damages in an arbitration award violates constitutional safeguards. *Rifkind & Sterling, Inc. v Rifkind* (1994) 28 CA4th 1282, 1289, 33 CR2d 828. See *Mastrobuono v Shearson Lehman Hutton, Inc.* (1995) 514 US 52, 131 L Ed 2d 76, 115 S Ct 1212 (arbitrators' punitive damage award not negated by clause that contract "shall be governed" by laws of state where punitive damages awards by arbitrators are invalid); *Barnes v Logan* (9th Cir 1997) 122 F3d 820 (arbitrator's award of punitive damages against stock broker).

NOTE: The fact that punitive damages are not precluded in an employment arbitration agreement could be invoked as one reason for upholding the validity of the agreement, namely that it provides the same relief as is available by lawsuit. Conversely, an employment arbitration agreement clause precluding or limiting the employee's recovery of punitive damages from the employer may render the agreement unconscionable and thus unenforceable. See *Circuit City Stores, Inc. v Adams* (9th Cir 2002) 279 F3d 889, 153 L Ed 2d 160 (writ denied) (agreement functions as thumb on employer's side of scale).

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B. During Trial

§14.36 1. Motion for Protective Order

A defendant may move, and show good cause, for an order requiring the plaintiff to produce prima facie evidence of the defendant's liability for punitive damages under CC §3294 before introducing evidence of the defendant's financial condition or of profits the defendant gained by virtue of the wrongful course of conduct. CC §3295(a).

NOTE: It appears that a protective order motion may be made either before or during trial, as may the application for bifurcation discussed in §14.37.

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§14.37 2. Application for Bifurcation

The court must order, on a defendant's application, that no evidence of the defendant's profits or financial condition be introduced until after the trier of fact has returned a verdict awarding "actual damages" (see §14.9) and finding that the defendant was guilty of malice, oppression, or fraud (see §§14.5-14.8). CC §3295(d).

The procedure to be followed at trial when a defendant applies for bifurcation is for the plaintiff to present evidence showing:

- Liability for compensatory damages;
- The amount of those damages; and
- That the defendant was guilty of fraud, oppression, or malice.

If the jury returns a verdict awarding compensatory damages and finds that the defendant is guilty of malice, oppression, or fraud under CC §3294, the same jury can be presented evidence of:

- Profits obtained from a defendant's wrongful conduct; and
- The defendant's financial condition.

TACTICS: Not all defendants think it advantageous to request bifurcation under CCP §3295(d). For example, an individual or corporate defendant with a low or negative net worth may not seek bifurcation on the theory that admission or poor financial status may engender sympathy for the defendant that leads the jury to find lower amounts for both compensatory and punitive damages. Similarly, a defendant who has lost money or received only nominal profits as a result of the allegedly wrongful conduct may want this evidence presented to the jury early and may therefore decline to request bifurcation.

Normally, the same jury both decides liability and sets amounts for compensatory and punitive damages. See *Rivera v Sassoon* (1995) 39 CA4th 1045, 1048, 46 CR2d 144 (possible error to try punitive damage issue to new jury). Absent objection by a party, however, it appears that the court may order that a separate trier of fact set the punitive damages amount. See *Medo v Superior Court* (1988) 205 CA3d 64, 251 CR 924 (defendant's attorney's silence when asked at pretrial hearing was deemed waiver of right to have same jury hear all issues).

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§14.38 3. Proving Defendant's Financial Condition

The wealthier the wrongdoing defendant, the larger the award of exemplary damages needs to be to accomplish the statutory objective. *Bertero v National Gen. Corp.* (1974) 13 C3d 43, 65, 118 CR 184.

NOTE: The constitutional soundness of basing punitive damages on defendant's wealth may be questioned after *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) 538 US 408, 426, 155 L Ed 2d 585, 607, 123 S Ct 1513, 1525.

A plaintiff ordinarily introduces evidence of the defendant's net worth as a measure for assessing punitive damages, but net worth is not the exclusive measure. *Adams v Murakami* (1991) 54 C3d 105, 116 n7, 284 CR 318 (single standard not always appropriate; net worth too easily subject to manipulation to be sole standard); *Rufo v Simpson* (2001) 86 CA4th 573, 620, 103 CR2d 492 (jurors could consider not only net worth at time of trial but also defendant's ability to earn future income by exploiting his name and likeness). But see *Kelly v Haag* (2006) 145 CA4th 910, 915, 52 CR3d 126 (meaningful evidence of defendant's financial condition is required; punitive damages cannot be based on defendant's out-of-court statements about what he owned); *Lara v Cadag* (1993) 13 CA4th 1061, 1064, 16 CR2d 811 (plaintiff must present evidence of defendant's actual net worth, or something akin to net worth; evidence of defendant's annual income is not enough). See also *Vallbona v Springer* (1996) 43 CA4th 1525, 1535, 51 CR2d 311 (punitive damages equaling about 25 percent of defendant couple's net worth was not excessive).

Evidence that a defendant has a negative net worth does not preclude a punitive damages award. See *Zaxis Wireless Communications Inc. v Motor Sound Corp.* (2001) 89 CA4th 577, 581, 107 CR2d 308 (question is not net worth but whether punitive damages amount exceeds defendant's ability to pay).

Punitive damages awarded against a person guilty of fraud in a business transaction can be based on evidence of the profitability of the defendant's misconduct. *Cummings Med. Corp. v Occupational Med. Corp.* (1992) 10 CA4th 1291, 1299, 13 CR2d 585 (judgment entered after party was defaulted for not complying with court's discovery orders; $1 million in punitive damages based on evidence that party's fraud would net more than that amount over 5 years).

TACTICS: When the court has bifurcated consideration of the defendant's financial condition under CC §3295(d), the plaintiff's attorney must be sure, before the jury is discharged, to request the opportunity to present financial condition evidence. See *City of El Monte v Superior Court (Bullen)* (1994) 29 CA4th 272, 34 CR2d 490 (court held jury could not be reconvened, leaving court with no basis to award punitive damages).

A defendant's failure to produce financial records under a court order obviates the need for the plaintiff to introduce evidence of the defendant's financial condition. See *Mike Davidov Co. v Issod* (2000) 78 CA4th 597, 92 CR2d 897 (defendant waived any right to complain of lack of evidence by failing to bring in financial records, despite being ordered to do so). The trial court may order the defendant to produce evidence of financial condition after determination of defendant's liability for punitive damages. Civil Code §3295(c) allows the trial court at any time to order discovery of financial condition even if the plaintiff had not previously (1) conducted pretrial financial discovery, (2) subpoenaed witnesses and documents for trial to establish the defendant's condition, or (3) moved to bifurcate under CC §3295.

Evidence of the wealth of a parent corporation is admissible if the parent and subsidiary can be considered the same entity. *Downey Sav. & Loan Ass'n v Ohio Cas. Ins. Co.* (1987) 189 CA3d 1072, 1100, 234 CR 835 (parent owned 100 percent of stock of subsidiary, occupied same office space, used same procedure manual, shared common employees, and prepared one set of consolidated financial statements). On the other hand, the parent company's annual report is insufficient to establish the financial condition of a subsidiary. See *Tomaselli v Transamerica Ins. Co.* (1994) 25 CA4th 1269, 31 CR2d 433 (insurance company).

NOTE: An error in permitting a plaintiff to introduce evidence of a parent company's net worth may be nonprejudicial under the circumstances. See *West v Johnson & Johnson Prods., Inc.* (1985) 174 CA3d 831, 870, 220 CR 437 (defendant introduced no evidence of its financial status and trial judge required reduction of $10 million punitive damages to $1 million and of $500,000 compensatory damages to $100,000 in recovery from tampon maker for toxic shock syndrome).

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§14.39 4. Jury Instructions; Special Verdict

See, for basic instructions on punitive damages, CACI 3940, 3947. See *Stevens v Owens-Corning Fiberglas Corp.* (1996) 49 CA4th 1645, 1661, 57 CR2d 525, which suggests that an additional instruction be given when punitive damages are sought against a defendant previously assessed punitive damages for the same conduct. See, for wording, "Directions for Use" accompanying CACI 3940 and 3947 and 49 CA4th 1663 n7.

TACTICS: Some attorneys think it useful to propose additional instructions tailored to facts of the particular case. See, *e.g.,* Wells, California Forms of Jury Instruction (1985).

Code of Civil Procedure §625 requires trial judges to instruct juries to separate punitive damages from compensatory damages in a written special verdict. The plaintiff's counsel should prepare and submit such a special verdict form at the time that the jury instructions are being submitted or settled.

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5. Argument

§14.40 a. By Plaintiff

If the defendant has obtained bifurcation under CC §3295(d) (see §14.37), the plaintiff makes two separate closing arguments. The plaintiff's first argument will focus on convincing the jury to award compensatory damages and to find the defendant guilty of malice, oppression, or fraud under CC §3294. If that argument is successful, the second argument will follow the introduction of financial condition evidence and will focus on convincing jurors that a punitive damages award of a particular amount, or above a stated level, will be needed to accomplish the purposes of punitive damages, namely to deter and to punish (see §14.1). Of course, if the financial condition issue was not bifurcated, the two legs of the argument will be made together in a single closing argument.

Plaintiffs' attorneys often chose to structure punitive damages arguments to follow the elements of CACI 3940 or 3947, or whatever instruction the court has indicated it will give. For each element that the instruction states must be proved, counsel can describe the evidence that supports it to convince jurors that each required element has been proved.

Closing argument is an effective time to remind jurors of their "promise," if one was elicited during jury voir dire, that they would not consider themselves limited to some preconceived mathematical formula or limit in awarding punitive damages (such as two or three times the actual damages).

TACTICS: Attorneys differ on whether to ask for a specific dollar amount of punitive damages in closing argument or merely to suggest a desired amount by using such terms as "substantial," "enough to deter and punish," and "send a message to the board room." Some attorneys believe they obtain better results by naming a dollar amount or minimum level, while others refer to such measures as "one week of net earnings," "2 percent of the defendant's net worth," or "one month of receipts realized by selling these defective products."

It is improper for plaintiff's counsel to say, during argument, that an individual's employer is authorized to pay any punitive damages assessed against the individual. *Larez v Holcomb* (9th Cir 1994) 16 F3d 1513, 1520.

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Source: Torts/California Tort Damages/14 Punitive Damages/§14.41 b. By Defendant

§14.41 b. By Defendant

Defense counsel, at the stage of arguing that the criteria for awarding punitive damages have not been met, often focus on convincing jurors that the plaintiff suffered no actual loss or harm and that the plaintiff's evidence fell short of being clear and convincing proof of the defendant's malice, oppression, or fraud. See §14.5. Defense counsel may also wish to focus on the term "despicable" (as it is defined in CACI 3940 and 3947, or on the elements of willfulness now required if the defendant has acted with conscious disregard of the rights of others). See CC §3294(c)(1). Emphasizing that punitive damages must not be awarded if any key element mentioned in the jury instructions has not been proved by sufficient evidence to meet the applicable standard, defense counsel may comment on the inadequacy of the evidence that relates to one or more of those elements.

At the stage of arguing about the amount that might be adequate as punitive damages, defense counsel may point out evidence that, *e.g.,* the defendant is a small company or an individual with a small or negative net worth. When the defendant's liability for actual damages is a close question, it can be effective to argue the lack of reprehensibility of the defendant's conduct (as do defense counsel in bad faith insurance suits when contractual liability under the insurance policy is not clear). Finally, counsel can argue that questionable or minimal compensatory damages justify little, if anything, in punitive damages, or that amounts suggested by plaintiff's counsel are unreasonable in light of actual detriment or the defendant's not too objectionable conduct.

See Annos, 39 ALR4th 1122 (1985) (evidence of defendant's rehabilitation or reformation as relevant on issue of punitive damages), 79 ALR3d 1138 (1977) (admissibility on defendant's behalf of evidence of lack of financial resources as mitigation of punitive damages).

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C. After Verdict

§14.42 1. Motion for New Trial or Remittitur

Defendants' motions for judgment notwithstanding the verdict or for a new trial provide trial judges an opportunity to reduce punitive damages awards they deem excessive by indicating that a new trial will be ordered unless the plaintiff agrees to accept a reduced punitive damages award. See, *e.g., West v Johnson & Johnson Prods., Inc.* (1985) 174 CA3d 831, 840, 220 CR 437 (trial judge required reduction of $10 million punitive damages to $1 million and of $500,000 compensatory damages to $100,000).

A new trial ordered because of excessive punitive damages (like an appellate reversal for excessiveness) can be limited to the issues of entitlement to and amount of punitive damages, with the original findings on liability for the underlying tort and compensatory damages left unchanged. See, *e.g., Torres v Automobile Club of S. Cal.* (1997) 15 C4th 771, 782, 63 CR2d 859; *Bullock v Phillip Morris USA, Inc.* (2008) 159 CA4th 655, 700, 71 CR3d 775 (court affirmed liability, and oppression, fraud, or malice findings and compensatory damages, remanded solely for determination of amount of punitive damages); *Barmas, Inc. v Superior Court* (2001) 92 CA4th 372, 377, 112 CR2d 71 (jury discharged after hanging on question of whether defendant was guilty of malice; trial judge properly limited retrial to malice and, if malice found, amount of punitive damages; decision by "same trier of fact" not required).

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§14.43 2. Assessing Interest on Punitive Damages

An award of punitive damages does not, by itself, provide a basis for prejudgment interest. See CC §3291; *Lakin v Watkins Assoc. Indus.* (1993) 6 C4th 644, 664, 25 CR2d 109.

Postjudgment interest on punitive damages is recoverable. CCP §685.010. Even when punitive damages are later reduced, under 28 USC §1961, postjudgment interest may run from the date of the original judgment. *Planned Parenthood v American Coalition of Life Activists* (9th Cir 2008) 518 F3d 1013. Prejudgment interest on a punitive damages award may run from the date of the original judgment, not merely from the date of a later judgment entered after remand from a higher court. See *Baker v Exxon Mobil Corp.* (9th Cir 2009) 568 F3d 1077. See also §1.94 (prejudgment interest after recovery of compensatory damages).

See Anno, 9 ALR5th 63 (1993) (prejudgment interest on punitive or multiple damages awards).

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§14.44 3. Collecting Punitive Damages Judgments; Insurance Coverage

A loss caused by the "willful act of the insured" is uninsurable. Ins C §533. Because the recovery of punitive damages requires a showing of oppression, fraud, or malice—conduct that is willful—a plaintiff cannot ordinarily require a liability insurer to pay punitive damages assessed against its insured. See *PPG Indus., Inc. v Transamerica Ins. Co.* (1999) 20 C4th 310, 317, 84 CR2d 455 (public policy prohibits indemnification for punitive damages; no punitive damages for insurer's negligent failure to settle underlying suit against insured that was guilty of egregious misconduct toward injured person); *Ohio Cas. Ins. Co. v Hubbard* (1984) 162 CA3d 939, 946, 208 CR 806 (against public policy to allow insurance for punitive damages).

Clauses in the insurance agreement (the policy) may also exclude coverage for willful or intentional conduct. See Anno, 16 ALR4th 11 (1982) (liability insurance coverage as extending to liability for punitive damages).

A "willful act" under Ins C §533 is something beyond the mere intentional doing of a negligent act. *J.C. Penney Cas. Ins. Co. v M.K.* (1991) 52 C3d 1009, 1021, 278 CR 64 (child molestation always harmful, wrongful, intentional, and "willful" as matter of law despite insured's testimony, supported by psychiatric evidence, that no harm to child was intended; Ins C §533 does not preclude coverage for negligent or reckless acts, but no sexual molestation of child is merely negligent or reckless).

A plaintiff who pleads and proves detriment resulting from both negligent and intentional conduct establishes the right to have damages for the negligently caused harm and loss paid by the defendant's liability insurer (which must defend the insured on all allegations). See *Horace Mann Ins. Co. v Barbara B.* (1993) 4 C4th 1076, 1084, 17 CR2d 210 (allegations that defendant both molested plaintiff and negligently subjected her to public embarrassment). Merely relabeling intentional misconduct as negligence, however, does not invoke the insurer's obligation to indemnify. See *Northland Ins. Co. v Briones* (2000) 81 CA4th 796, 809, 97 CR2d 127 (allegations of "negligent stalking," "negligent harassment," and "unintentional child molestation" not sufficient to require homeowner's insurer either to defend or to indemnify).

TACTICS: Courts do not condone attempts to "plead around" the exclusion of coverage for willful acts, but plaintiffs' attorneys may still broadly plead negligence however egregious the defendant's conduct. The contemplation that the defendant's insurer will not pay punitive damages, and the negative tax consequences of punitive damages recoveries (see §14.48) often provide an impetus to pretrial settlement.

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Source: Torts/California Tort Damages/14 Punitive Damages/§14.45 4. Giving Notice of Judgment Against Health Care Service Plan or Insurer

§14.45 4. Giving Notice of Judgment Against Health Care Service Plan or Insurer

To avoid sanctions under CC §3296, a plaintiff who has obtained entry of a punitive damages judgment against an insurer or health care service plan that is licensed under Health & S C §§1340-1399.76 must provide all of the following within 10 days to the Commissioner of Insurance or the Director of the Department of Managed Care, whichever regulates the insurer or health care service plan:

- A copy of the judgment;
- A brief recitation of the facts of the case; and
- Copies of the relevant pleadings, as determined by the plaintiff.

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§14.46 5. Avoiding Discharge in Bankruptcy

Provisions of particular statutes, such as 11 USC §523(a), may provide a plaintiff with a basis for preventing the defendant from avoiding punitive damages liability through discharge in bankruptcy. For example, under 11 USC §523(a)(6), punitive damages based on willful and malicious injury are nondischargeable. See *In re Bugna* (9th Cir 1994) 33 F3d 1054 (holding that 11 USC §523(a)(4) also barred discharge); *Florida v Ticor Title Ins. Co. (In re Florida)* (Bankr 9th Cir 1994) 164 BR 636 (such obligations as discovery sanctions, attorney fees, and collection costs ancillary to nondischargeable debt are also nondischargeable). See also *Cohen v de la Cruz* (1998) 523 US 213, 140 L Ed 2d 341, 118 S Ct 1212 (award of treble damages plus attorney fees and costs based on actual fraud not nondischargeable under 11 USC §523(a)(2)(A)).

Absent a specific statutory exception, punitive damages are dischargeable in bankruptcy. See *Giangrasso v Butler (In re Giangrasso)* (BAP 9th Cir 1992) 145 BR 319 (punitive damages did not meet nondischargeability criteria even though underlying compensatory damages did).

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V. TAX CONSEQUENCES

§14.47 A. Deductibility by Defendant

When a defendant business pays a judgment for actual damages or pays a settlement that does not differentiate between actual and punitive damages, the amount paid to satisfy the judgment or settlement is generally deductible by the defendant business as a business expense. See IRC §162; *U.S. v Gilmore* (1963) 372 US 39, 9 L Ed 2d 570, 83 S Ct 623; *Kopp's Co. v U.S.* (4th Cir 1980) 636 F2d 59.

The IRS has generally not contested a deduction for punitive damages when none of the illegal activities enumerated in IRC §62(c), (f)-(g) has occurred. See IRC §§162, 212; Rev Rul 80-211, 1980-2 Cum Bull 57. A deduction for punitive damages could possibly be denied because such a deduction either is not an ordinary or necessary business expense or would violate public policy.

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§14.48 B. Taxability to Plaintiff

Punitive damages received by a plaintiff are taxable as ordinary income. See IRC §104(a)(2), which, as amended effective August 21, 1996, limits nontaxability to "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness."

NOTE: Case law interpreting pre-1996 versions of IRC §104(a)(2) held that punitive damages are ordinarily taxable, even if received in a "tort-like" lawsuit, because punitive damages do not ordinarily have a compensatory purpose. They are not received "on account of personal injuries," but on account of the defendant's egregious conduct. *Hawkins v U.S.* (9th Cir 1994) 30 F3d 1077, 1080; *Commissioner v Schleier* (1995) 515 US 323, 132 L Ed 2d 294, 115 S Ct 2159.

Under IRC §62(a)(20), enacted October 22, 2004, a plaintiff's gross (taxable) income does not include attorney fees and court costs paid in connection with suits for unlawful discrimination (as defined in IRC §62(e), under 31 USC §3721-3733, or under 42 USC 1395y(b)(3)(A)). See §1.116.

In cases to which the 2004 statute does not apply, the portion of the punitive damages award retained by an attorney in accordance with a contingent fee agreement is included in the taxpayer's gross income. *Benci-Woodward v Commissioner* (9th Cir 2000) 219 F3d 941 (applying California law that attorney lien does not confer ownership interest nor grant attorney any right). Because legal expenses are not enumerated in 26 USC §67(b), they are classified as miscellaneous itemized deductions subject to 26 USC §56(b). See Note in §1.116 on retroactivity of the new statute.

TACTICS: In some cases, significant tax advantages can be obtained when settling cases in which punitive damages might be recoverable. A properly drafted and documented settlement agreement may forestall an IRS attempt to allocate a lump-sum settlement between nontaxable compensatory damages and taxable punitive damages. See Rev Rul 85-98, 1985-2 Cum Bull 51 (allocation on basis of prayer for relief in complaint). For discussion of allocation of taxable and nontaxable claims, see §8.50.

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Restrictions on Recovery

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§15.1 I. SCOPE OF CHAPTER

This chapter discusses legal rules and factual findings that act to reduce damages amounts otherwise recoverable.

Chapters 1-14 discuss the measure of damages—that is, the various items of loss, harm, and detriment for which damages may be recovered under tort causes of action.

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II. COMPARATIVE FAULT

A. Negligence

§15.2 1. Bodily Injury; Property Damage

A plaintiff's recovery of damages for bodily injury is reduced to the extent that negligence attributed to the plaintiff contributed to causing the bodily injury or injury to property for which the plaintiff seeks damages. *Li v Yellow Cab Co.* (1975) 13 C3d 804, 829, 119 CR 858 (in all actions for negligence resulting in injury to person or property, damages awarded shall be diminished in proportion to amount of negligence attributable to person recovering).

In applying the comparative fault doctrine adopted in *Li,* the trier of fact and the court must:

- Determine the total dollar amount that would compensate the person seeking recovery for all detriment to that person that was caused at least in part by a defendant's negligence or other fault;
- Determine the percentage, if any, of all the causative fault that is attributable to the person seeking to recover damages;
- Reduce the total dollar amount by that percentage; and
- Award no more than the balance as damages to the person recovering.

On further reductions that may be required when legal fault for the plaintiff's detriment has been attributed to two or more defendants, see §§15.8-15.18.

For discussion of the comparative negligence and assumption of risk defenses, see California Tort Guide §§1.38-1.45 (3d ed Cal CEB 1996).

Whether contributory negligence attributable to a parent acts to reduce a recovery of medical expense damages by a child, or vice versa, is discussed in §1.13.

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2. Wrongful Death

§15.3 a. Decedent's Fault

Damages recoverable by a decedent's survivors under CCP §377.60 are ordinarily reduced by the fault percentage attributed to the decedent, just as the decedent's damages would have been reduced, as noted in §15.2, had he or she survived. See *Horwich v Superior Court* (1999) 21 C4th 272, 285, 87 CR2d 222 ("comparative fault and equitable indemnification [principles] support an apportionment of liability among those responsible for the loss, including the decedent"; also noted in §15.27); *Buckley v Chadwick* (1955) 45 C2d 183, 201, 288 P2d 12, 289 P2d 242 (dissenting opinion) (decided before adoption of comparative fault doctrine; decedent's contributory fault barred recovery by heirs). See also *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 138 CR 705, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607; *Atkins v Strayhorn* (1990) 223 CA3d 1380, 1395, 273 CR 231 (noted in §15.43); *Lemos v Eichel* (1978) 83 CA3d 110, 147 CR 603. See CACI 407. See generally chap 3 and §3.18.

TACTICS: For noneconomic damages (usually the bulk of wrongful death damages), any fault percentage assigned by the trier of fact to the decedent automatically reduces the percentage of such damages each defendant is required to pay. See §15.11. If economic damages are substantial—and despite statements in the cases cited above, many of which could be viewed as dictum subject to reconsideration—plaintiffs could try to convince a court that, under *Li v Yellow Cab Co.* (1975) 13 C3d 804, 829, 119 CR 858, 875, the damages recoverable by a fault-free heir should not be reduced in proportion to fault attributed to the decedent, based on the statement in *Li* that damages are to be reduced in proportion to the fault attributable "to the person recovering." See concurring opinion in *Willis v Gordon* (1978) 20 C3d 629, 636, 143 CR 723. See dictum in *Lantis v Condon* (1979) 95 CA3d 152, 158, 157 CR 22 ("life expectancy of the *Buckley* decision today is questionable").

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§15.4 b. Survivors' Fault

The damages awarded for the loss suffered by *each* survivor entitled to wrongful death damages under CCP §377.60 should, under *Li v Yellow Cab Co.* (1975) 13 C3d 804, 829, 119 CR 858, be reduced in proportion to the fault percentage attributed by the trier of fact to that survivor. That is, the fault attributed to one of several survivors should reduce the part of the recovery representing that person's loss, but not the part of the recovery representing the other survivors' losses. See *Kasunich v Kraft* (1962) 201 CA2d 177, 185, 19 CR 872 (under pre-*Li* contributory fault rule, heir's contributory negligence barred rather than reduced damages awarded for that heir's claim).

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§15.5 B. Strict Product Liability

The damages recoverable by a person injured by a defective product are reduced to the extent that negligence attributed to the plaintiff contributed to causing the injury even when the defendant product manufacturer or supplier is liable under the theory of strict product liability. *Daly v General Motors Corp.* (1978) 20 C3d 725, 144 CR 380 (damages reducible for plaintiff's misuse of product or other contributory negligence). See *Safeway Stores, Inc. v Nest-Kart* (1978) 21 C3d 322, 146 CR 550 (apportionment between strictly liable defendant and negligent defendant). See also *Springmeyer v Ford Motor Co.* (1998) 60 CA4th 1541, 71 CR2d 190 (plaintiff injured by defective fan in truck engine; separate liability for noneconomic damages (see §15.15) allocated to strictly liable truck manufacturer and to negligent former owner who failed to replace fan in response to recall).

That is, the fault comparison described in §15.2 also applies in product liability cases, as do the limitations on noneconomic damages liability described in §§15.8-15.15.

For discussion of product liability, see California Tort Guide, chap 11 (3d ed Cal CEB 1996), particularly §§11.1-11.46 (strict product liability), 11.47-11.60 (negligence), and 11.61-11.72 (breach of warranty and misrepresentation).

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§15.6 C. Willful Misconduct

A plaintiff's contributory willful misconduct does not bar recovery of damages from a defendant charged with either negligence or willful misconduct; the trier of fact finds a comparative fault percentage for each party and the plaintiff's damages are reduced by the percentage assigned to the plaintiff. *Zavala v Regents of Univ. of Cal.* (1981) 125 CA3d 646, 651, 178 CR 185; *Southern Pac. Transp. Co. v State* (1981) 115 CA3d 116, 171 CR 187 (defendant/cross-complainant guilty of willful misconduct entitled to comparative indemnity from defendant/cross-defendant guilty only of negligence); *Plyler v Wheaton Van Lines* (9th Cir 1981) 640 F2d 1091.

See California Tort Guide §1.42 (3d ed Cal CEB 1996).

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.7 D. Intentional Misconduct

§15.7 D. Intentional Misconduct

Traditionally, the contributory negligence of a plaintiff has not barred recovery from a defendant whose conduct showed an intent to cause injury or a conscious disregard of the rights or safety of others. See BAJI 3.52 (plaintiff's contributory negligence does not reduce recovery from defendant who "intended to inflict harm upon the plaintiff").

There appear to be circumstances, however, in which damages are comparatively reduced by a plaintiff's negligence compared to a tortfeasor's intentional conduct. See *Weidenfeller v Star & Garter* (1991) 1 CA4th 1, 2 CR2d 14 (plaintiff's negligence—failing to use reasonable care to protect himself from assault—compared with both negligence of property owner—failing to provide adequate security for patrons—and intentional misconduct of third person who assaulted plaintiff on property); *Allen v Sundean* (1982) 137 CA3d 216, 226, 186 CR 863 (sound policy reasons exist for extending comparative fault principles to certain cases in which defendant's tortious conduct could be characterized as intentional). See also *Scott v County of Los Angeles* (1994) 27 CA4th 125, 153, 32 CR2d 643 (trial court's use of standard special verdict form, which called for fault apportionment based on "negligence," apparently misled jury into allocating only one percent to nondefendant whose intentional misconduct contributed to causing plaintiff's injury).

TACTICS: An attorney defending an assault and battery, defamation, invasion of privacy, malicious prosecution, abuse of process, or false arrest or imprisonment claim might consider whether conduct on the part of the plaintiff that does not amount to a complete defense to the claim might yet be cited to effect a proportional reduction of damages. For example, in an assault and battery lawsuit, jurors might well be permitted to assign a fault percentage to a plaintiff whose verbal and other conduct provoked a physical attack by the defendant, or to a resisting plaintiff who was injured by a police officer's use of unreasonable force in making an arrest. See *Munoz v Olin* (1979) 24 C3d 629, 156 CR 727, in which damages were reduced for fault attributed to a fleeing suspect who was shot by a police officer.

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III. PROPOSITION 51 (FAIR RESPONSIBILITY ACT OF 1986)

§15.8 A. Modified Joint and Several Liability

The Fair Responsibility Act of 1986 (Civil Code §§1431-1431.5) —commonly known as Proposition 51—supplements comparative fault principles (see §§15.2-15.7) to create a potential for further reductions in a plaintiff's damages recoveries when the fault of two or more tortfeasors combine to cause loss or harm. Basically, Proposition 51 modifies the former joint and several judgment rule under which a plaintiff could recover the full amount of a judgment from any one of the liable defendants without regard to the fault percentage assigned to that defendant. Under Proposition 51, the joint and several liability of multiple defendants applies only to "economic damages" (see §15.10); each defendant's liability for "non-economic" damages is limited to that defendant's proportional share of all the legal fault that contributed to causing the injury or detriment sued on, leaving the plaintiff unable to recover noneconomic damages attributable to tortfeasors (1) insolvent and uninsured, (2) statutorily immune from liability, (3) not sued or not located, or (4) dismissed after settlement for less than their proportional shares of such damages. On calculating Proposition 51 reductions in the damages recoverable by plaintiffs, see §§15.11-15.14.

In the now rare "action for personal injury, wrongful death, or property damage based on principles of comparative fault" to which Proposition 51 does not apply, a plaintiff can recover all damages from a "deep pockets" defendant and does not have his or her recovery diminished by the inability to collect damages from an uninsured and insolvent defendant.

NOTE: The joint and several judgment rule survived the 1975 adoption of comparative fault principles. See *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 146 CR 182. The plaintiff could recover all damages (reduced by any fault percentage assigned to the plaintiff) from any defendant to whom or which a fault percentage had been assigned. See CCP §875(g). A defendant who satisfied the plaintiff's judgment by paying more than that defendant's percentage of the damages could obtain reimbursement of that excess under principles of comparative (equitable) indemnity.

Under Proposition 51, a defendant (liable only for its proportional share of noneconomic damages) can seek comparative equitable indemnity only for a payment of more than its proportional share of economic damages. A defendant can seek such equitable indemnity by cross-complaining against other defendants. *Paragon Real Estate Group, Inc. v Hansen* (2009) 178 CA4th 177, ___ CR3d ___. See *Union Pac. Corp. v Wengert* (2000) 79 CA4th 1444, 95 CR2d 68. On comparative indemnity, see California Tort Guide §§1.52-1.58 (3d ed Cal CEB 1996). On the application of Proposition 51 to situations in which an original tortfeasor causes an injury that is made worse by negligent medical treatment, see Tort Guide §9.78.

Proposition 51 is not applicable to damages recoverable in legal malpractice suits, but its principles may be applied in determining the amount the plaintiff lost through the attorney's negligence. See *Ovando v County of Los Angeles* (2008) 159 CA4th 42, 71 CR3d 415 (when alleged malpractice resulted in plaintiff's wrongful criminal conviction, CC §1431.2 required allocation of fault percentages to rogue police officers notwithstanding their potential immunity under Govt C §821.6); *Brandon G. v Gray* (2003) 111 CA4th 29, 3 CR3d 330 (failure to pursue personal injury claim).

On ascertaining when a cause of action for injury by a dangerous substance, including asbestos, accrues for purposes of determining whether Proposition 51 is applicable to limit liability for noneconomic damages, see Tort Guide §1.59 and California Workers' Damages Practice §3.5 (2d ed Cal CEB 2001).

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.9 B. Roles of Trier of Fact and Trial Judge

§15.9 B. Roles of Trier of Fact and Trial Judge

Under CC §1431.2, it is the role of the trier of fact (*i.e.,* the jury) to:

- Determine the plaintiff's fault percentage, if any, compared with that of all persons whose legal fault contributed to causing the plaintiff's injury or loss (see §15.8);
- Determine the fault percentage of each tortfeasor (sued or not, immune or not);
- Find the amount of "economic damages" needed to compensate the plaintiff for economic detriment; and
- Find the separate amount of "noneconomic damages" needed to compensate the plaintiff for noneconomic detriment.

The trial judge then renders judgment, including:

- A joint and several award against all liable defendants for the full amount of economic damages (reduced, as discussed in §§15.11-15.14 for the plaintiff's fault and for certain prejudgment recoveries); and
- A several award against each liable defendant for noneconomic damages in direct proportion to that defendant's percentage of fault.

The trial judge ordinarily furnishes the jury a special verdict form that calls for fault percentage allocations to alleged tortfeasors and for separate findings of economic and noneconomic damages. For such special verdict forms, see CACI VF-402, VF-3700.

NOTE: At least in the first years after Proposition 51 took effect, a defendant that failed to ask for such a special verdict was deemed to have waived the right to limit its liability for noneconomic damages. See *Conrad v Ball Corp.* (1994) 24 CA4th 439, 29 CR2d 441 (defendant waived right to have damages reduced by amount of prior settlement).

The trier of fact can be asked to attribute fault percentages (based, of course, on admissible evidence) to persons who are statutorily immune from liability to the plaintiff and to persons otherwise not sued. *DaFonte v Up-Right, Inc.* (1992) 2 C4th 593, 603, 7 CR2d 238 (immune employer; comparison to be made with "universe of tortfeasors"); *Taylor v John Crane, Inc.* (2003) 113 CA4th 1063, 1066, 6 CR3d 695 (jury attributed 16-percent fault for plaintiff's asbestos-related injury to Navy, which, possibly immune, had not been sued). Fault percentages should similarly be assigned to persons who settled with the plaintiff and were not sued or were dismissed from the case. *Roslan v Permea, Inc.* (1993) 17 CA4th 110, 21 CR2d 66.

NOTE: A defendant whose answer is stricken from the record as a sanction for violating discovery orders loses the right to introduce evidence of the negligence of others. *Johnson v Pratt & Whitney Canada, Inc.* (1994) 28 CA4th 613, 626, 34 CR2d 26 (CC §1431.2 not to be used as shield against consequences of flagrant discovery dereliction).

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.10 C. Distinguishing Economic From Noneconomic Damages

§15.10 C. Distinguishing Economic From Noneconomic Damages

Civil Code §1431.2(b)(1) defines "economic damages" as "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities."

Civil Code §1431.2(b)(1) defines "non-economic damages" as "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation."

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D. Calculating Damages Reductions

§15.11 1. Fault of Plaintiff, Decedent, or Spouse

The first step in calculating the amount of a plaintiff's economic damages judgment for personal injury (awarded in a joint and several judgment against all defendants to whom a fault percentage was assigned) is to subtract from the full amount of such damages (as found by the trier of fact) a percentage equal to the fault percentage assigned by the trier of fact to the plaintiff. See *Espinoza v Machonga* (1992) 9 CA4th 268, 11 CR2d 498. Additional reductions may then be made if the plaintiff has received money through preverdict settlements (see §15.12) or as workers' compensation (see §15.14). Economic damages recovered for a wrongful death are reduced for contributory fault assigned to both the decedent and the survivor seeking such damages. See §§15.3-15.4.

Because noneconomic damages judgments are several, each defendant's liability being based on the fault percentage attributed to that defendant, no additional deduction need be made for the plaintiff's fault, or for fault attributed to a decedent or another survivor.

Similarly, loss of consortium damages (which are noneconomic by definition) already reflect fault percentages assigned to both spouses. See §2.17.

NOTE: A defendant can of course effectively reduce its liability for economic damages by convincing the trier of fact to assign fault percentages to the plaintiff, other defendants, the plaintiff's employer, and other persons not sued, immune from liability (like the plaintiff's employer), or dismissed from the suit under a settlement. See *DaFonte v Up-Right, Inc.* (1992) 2 C4th 593, 603, 7 CR2d 238 (fault comparison is to be made with "universe of tortfeasors," including immune employers); *Roslan v Permea, Inc.* (1993) 17 CA4th 110, 113, 21 CR2d 66 (alleged tortfeasors dismissed after settlement).

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.12 2. Preverdict Settlements

§15.12 2. Preverdict Settlements

When the plaintiff settles with some defendants and proceeds to verdict against others, the nonsettling defendants are entitled to a reduction of their damages liability by the dollar amount of the settlement (or settlements). CCP §877(a). The calculation of the reduction is done by the trial judge, not the jury, and the jury can be so instructed. See *Syverson v Heitman* (1985) 171 CA3d 106, 111, 214 CR 581; CACI 3926. See §15.21.

When Proposition 51 applies, a portion of prejudgment settlement proceeds is subtracted from the nonsettling defendants' liability for economic damages. This economic damages reduction is calculated, under CC §1431.2, by:

- Dividing economic damages by total damages (to obtain the percentage of all damages definable as economic);
- Multiplying the dollar amount of the settlement proceeds by the previously computed economic damages percentage (to obtain the "economic portion" of the settlement amount); and
- Subtracting the resulting dollar amount (the economic portion of the settlement) from the economic damages amount.

See *Espinoza v Machonga* (1992) 9 CA4th 268, 273, 11 CR2d 498. See also *McComber v Wells* (1999) 72 CA4th 512, 85 CR2d 376 (agreeing with *Espinoza*); *Hoch v Allied-Signal, Inc.* (1994) 24 CA4th 48, 29 CR2d 615 (same). Settlement proceeds reduce economic damages even when the trier of fact determines that no legal fault attributable to the settling defendants contributed to causing detriment to the plaintiff (*i.e.,* the settling defendants' fault percentages were zero). *Poire v C.L. Peck/Jones Bros. Constr. Corp.* (1995) 39 CA4th 1832, 1837, 46 CR2d 631. See *Bostick v Flex Equip. Co.* (2007) 147 CA4th 80, 54 CR3d 28 (full amount of settlement paid by zero-fault defendant deducted from damages judgment against remaining defendant).

Proposition 51 has been held not to permit preverdict settlement proceeds to reduce nonsettling defendants' several liabilities for noneconomic damages. See *Garcia v Duro-Dyne Corp.* (2007) 156 CA4th 92, 67 CR3d 100; *Ehret v Congoleum Corp.* (1999) 73 CA4th 1308, 1319, 87 CR2d 363. See also *Poire v C.L. Peck/Jones Bros. Constr. Corp.* (1995) 39 CA4th 1832, 1838, 46 CR2d 631. Thus, when the trier of fact finds only noneconomic damages, a defendant's liability for such damages is not reduced at all for prior settlements. See *Hoch v Allied-Signal, Inc.* (1994) 24 CA4th 48, 29 CR2d 615 (*Espinoza* reasoning permitted plaintiff who had received prior settlement to recover more than she would have recovered before adoption of Proposition 51).

Portions of a good faith settlement that settle a prospective wrongful death claim, or the injured person's spouse's loss of consortium claim, are not to be offset against a nonsettling defendant's liability, even for economic damages. *Jones v John Crane, Inc.* (2005) 132 CA4th 990, 35 CR3d 144 (allocations to death claim and consortium are determined from jury findings, not from terms of settlement agreements in which remaining defendants did not participate); *Hackett v John Crane, Inc.* (2002) 98 CA4th 1233, 120 CR2d 662 (court sets out formula for calculating offset); *Wilson v John Crane, Inc.* (2000) 81 CA4th 847, 97 CR2d 240 (court sets out slightly different formula). See also *Reed v Wilson* (1999) 73 CA4th 439, 86 CR2d 510 (no offset against litigation costs absent showing that settlement agreement intended to cover such costs).

NOTE: The settling parties' designation of parts of the settlement as being for economic damages or as noneconomic damages does not, however, supersede the calculation of the economic/ noneconomic ratio based on a trier of fact's findings. See *Greathouse v Amcord, Inc.* (1995) 35 CA4th 831, 41 CR2d 561.

There are circumstances in which a defendant can reduce its liability for both economic and noneconomic damages, in effect passing some of that liability to a settling defendant, by showing that the settlement was not made in good faith under CCP §§877-877.6. See *Long Beach Mem. Med. Ctr. v Superior Court* (2009) 172 CA4th 865, 873, 91 CR3d 494 (trial court abused discretion in finding physician's settlement was made in good faith when it allocated 98 percent of damages on other settling defendants); *TSI Seismic Tenant Space, Inc. v Superior Court (Geocon Inc.)* (2007) 149 CA4th 159, 56 CR3d 751 (proportionate share of liability, not just limitation clause in contract, must be considered). On determining the good faith of settlements, see California Civil Procedure Before Trial, chap 50 (4th ed Cal CEB 2004).

See Anno, 17 ALR6th 1 (2006) (effect of one party's settlement on contribution between joint tortfeasors).

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§15.13 3. Postverdict Settlements

When a plaintiff and one of several defendants reach a settlement after a verdict has been rendered (at least one that finds fault percentages and damages amounts), the proceeds of the settlement are to be applied first to reduce the settling defendant's liability for noneconomic damages (up to the amount of such liability), with any remainder reducing the settling defendant's liability for economic damages. *Torres v Xomox Corp.* (1996) 49 CA4th 1, 56 CR2d 455 (called "ceiling approach").

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.14 4. Workers' Compensation

§15.14 4. Workers' Compensation

The attorney for a plaintiff seeking personal injury (or wrongful death) damages must ascertain whether the plaintiff has received—or will be entitled to receive before judgment is rendered—any workers' compensation benefits furnished by the plaintiff's (or the decedent's) employer or employer's workers' compensation insurer. The cost of such benefits to the employer or insurer will, with rare exceptions, be applied to reduce the damages recoverable by the plaintiff through a lawsuit. If no employer fault contributed to causing the injury or death, the employer will be entitled to be reimbursed from the damages recovery before damages are paid to the plaintiff or plaintiff's attorney. To the extent that legal fault attributable to the employer bars such reimbursement, the defendants' liability is reduced. For extended discussion of these concepts, see California Workers' Damages Practice §§3.10-3.13 (2d ed Cal CEB 2001).

NOTE: In the now rare cases to which Proposition 51 does not apply, the plaintiff's total damages recovery is reduced by the dollar amount of the cost of furnished workers' compensation benefits. *Aceves v Regal Pale Brewing Co.* (1979) 24 C3d 502, 512, 156 CR 41, overruled on other grounds in *Privette v Superior Court* (1993) 5 C4th 689, 702 n4, 21 CR2d 72. References in the "subrogation" sections of the workers' compensation law to the payment of attorney fees do not alter the computation of reductions of a plaintiff's damages recovery whether or not the employer has sought reimbursement for benefits payments. See Workers' Damages §3.16.

When Proposition 51 applies in the case, a portion of the employer's workers' compensation cost is subtracted from the defendants' liability for economic damages in the same way that a portion of preverdict settlement proceeds are deducted (see §15.12). The economic damages reduction for workers' compensation is calculated, under CC §1431.2, by:

- Dividing economic damages by total damages (to obtain the percentage of all damages that are economic);
- Multiplying the dollar amount of the employer's workers' compensation payments by the previously computed economic damages percentage (to obtain the "economic portion" of the workers' compensation payments); and
- Subtracting the resulting dollar amount (the economic portion of the workers' compensation) from the economic damages amount.

See *Scalice v Performance Cleaning Sys.* (1996) 50 CA4th 221, 57 CR2d 711 (applying *Espinoza* calculation (see §15.12) to workers' compensation); *Torres v Xomox Corp.* (1996) 49 CA4th 1, 56 CR2d 455 (applying *Espinoza* calculation and rejecting other possible approaches). This *Torres/Scalice* approach appears to contemplate that each liable defendant would be required to pay its proportional share (based on the fault percentage attributed to it by the trier of fact) of noneconomic damages. For an example of a *Torres/Scalice* calculation, see Workers' Damages §3.12.

On workers' compensation in medical malpractice cases, see §15.49.

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E. Particular Situations

§15.15 1. Strict Product Liability

A defendant that was a link in the distributional chain (*e.g.,* manufacturer, distributor, retailer) for a defective product that caused an injury or death cannot ordinarily reduce its liability for noneconomic damages by asking that fault percentages be assigned to other links in the chain; all entities share a single fault percentage. See *e.g., Wimberly v Derby Cycle Corp.* (1997) 56 CA4th 618, 65 CR2d 532 (consumer injured by defective product may, under strict product liability, sue any business entity in chain of production and marketing; varying culpability among defendants in chain is for them to determine in later indemnity proceedings). For extended discussion, see California Tort Guide §§11.29-11.34 (3d ed Cal CEB 1996). On indemnity among suppliers, see Tort Guide §11.29. On interpreting an indemnity contract between a manufacturer and a retailer, see *Mel Clayton Ford v Ford Motor Co.* (2002) 104 CA4th 46, 127 CR2d 759.

NOTE: In "market-share" product liability actions, defendants are not jointly liable for damages, but are, at most, severally liable for their respective market-share percentages of the damages. *Brown v Superior Court* (1988) 44 C3d 1049, 245 CR 412 (pre-Proposition 51 principles applied). On market-share liability, see Tort Guide §11.22.

When multiple defective products cause the plaintiff's injury and the evidence provides a basis for allocating liability among them, however, each supplier (or supply chain) is liable only for its own proportional share (based on the fault percentage assigned to it by the trier of fact) of noneconomic damages. See *Arena v Owens-Corning Fiberglas Corp.* (1998) 63 CA4th 1178, 74 CR2d 580. See also *Wilson v John Crane, Inc.* (2000) 81 CA4th 847, 97 CR2d 240 (noneconomic damages liability allocated among various asbestos manufacturers).

Separate fault percentages are to be assigned—as a basis for restricting the liability of separate defendants for noneconomic damages—when one defendant is liable for strict product liability and another is liable for negligence. See *Springmeyer v Ford Motor Co.* (1998) 60 CA4th 1541, 71 CR2d 190 (plaintiff injured by defective fan in truck engine; separate liability for noneconomic damages imposed on strictly liable truck manufacturer and on negligent former owner who failed to replace fan in response to recall).

On ascertaining when a cause of action for injury by a dangerous substance, including asbestos, accrued for purposes of determining whether Proposition 51 applies to limit liability for noneconomic damages, see Tort Guide §1.59 and California Workers' Damages Practice §3.5 (2d ed Cal CEB 2001). On tobacco supplier liability generally, see Tort Guide §11.45 and Workers' Damages §3.19.

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§15.16 2. Premises Liability (Nondelegable Duty)

A landlord that hires someone to perform maintenance or repairs that are deemed the landlord's nondelegable duty cannot limit its liability for noneconomic damages by seeking the assignment of a separate fault percentage to the person hired. See *Koepnick v Kashiwa Fudosan Am., Inc.* (2009) 173 CA4th 32, 72 CR3d 453 (building owner's nondelegable duty to maintain elevator prevented damages reduction for fault allocated to maintenance company hired by owner); *Srithong v Total Inv. Co.* (1994) 23 CA4th 721, 28 CR2d 672 (single fault percentage assignable to landlord and hiree).

On a property owner's and landlord's nondelegable duties, see California Tort Guide §§10.13, 10.31 (3d ed Cal CEB 1996).

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§15.17 3. Employer's Respondeat Superior Liability

An employer or principal who is vicariously liable under the respondeat superior doctrine for injury caused by an employee or agent acting within the scope of his or her employment cannot limit its liability for noneconomic damages by seeking the assignment of a separate fault percentages to the employee or agent. *Miller v Stouffer* (1992) 9 CA4th 70, 11 CR2d 454.

When a fault allocation made by the trier of fact to an employer for its direct negligence cannot be sustained—the appellate court having concluded that the defendant was not a tortfeasor—the fault allocations among the plaintiff and other defendants must be recalculated. See *Munoz v City of Union City* (2007) 148 CA4th 173, 55 CR3d 393 (fault allocated between police officer and person injured at 91 percent to 9 percent; for later opinion, dealing with postjudgment interest, see *Munoz v City of Union City* (2009) 173 CA4th 199, 92 CR3d 527).

On respondeat liability generally, see California Tort Guide §§4.45-4.62 (3d ed Cal CEB 1996).

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§15.18 4. Vehicle Owners' and Entrusters' Liability

A vehicle owner liable under Veh C §17150 for injury caused by a permissive user of the vehicle cannot limit his or her liability for noneconomic damages by seeking the assignment of a separate fault percentage to the permissive user. *Galvis v Petito* (1993) 13 CA4th 551, 564, 16 CR2d 560; *Rashtian v BRAC-BH, Inc.* (1992) 9 CA4th 1847, 12 CR2d 411.

When, however, a jury assigns separate fault percentages to a young driver and to the owner of vehicle and a passenger for negligent entrustment, each defendant is severally liable for his or her percentage share of noneconomic damages. *Bayer-Bel v Litovsky* (2008) 159 CA4th 396, 71 CR3d 518.

On vehicle owner liability generally, see California Tort Guide §§4.28-4.40 (3d ed Cal CEB 1996).

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§15.18A 5. Misrepresentation

A Proposition 51 reduction of damages may be precluded when a defendant's intentional misrepresentation of the capabilities or safety of a product causes, along with other forms of legal fault, personal injury. See *Thomas v Duggins Constr. Co*. (2006) 139 CA4th 1105, 1113, 44 CR3d 66 (jury allocated 10 percent of causative fault for injury from collapse of scissors lift to misrepresentation by seller's employees; also discussed in §§1.95, 1.106A).

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§15.18B 6. Injury Aggravated by Medical Malpractice

To the extent that an injury can be divided according to causation into distinct parts—as when an original injury is aggravated by subsequent medical negligence—the tortfeasor responsible for the original injury is liable for all the noneconomic damages assessed for it, but is only severally liable for its percentage share of additional noneconomic damages assessed for the separate injury. See *Henry v Superior Court (Reinink)* (2008) 160 CA4th 440, 72 CR3d 808 (worker sued homeowners for injury caused by dangerous condition on their property; homeowners permitted to introduce evidence that worker's injury was aggravated by treating doctors).

NOTE: The court in *Henry* did not explain how jurors were to compare liability for maintaining a dangerous condition with liability for medical negligence. A different court might reason that the traditional rule that an original tortfeasor is responsible for additional injury resulting from treatment is not "a principle of comparative fault," and is thus not subject to a Proposition 51 apportionment.

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IV. PRIOR PAYMENTS

§15.19 A. By Defendant; Advances

A defendant is entitled to have the damages for which he or she is liable reduced by the amount of payments he or she made directly to the plaintiff (as an advance on damages) or to pay for the plaintiff's medical and other expenses. See *Dodds v Bucknum* (1963) 214 CA2d 206, 212, 29 CR 393.

TACTICS: Except when liability is admitted, the defendant may prefer to seek agreement that a stipulated amount, or one determined at a posttrial hearing, be deducted from the damages before judgment is entered, so that the payments are not interpreted by the jury as a concession of liability.

See Anno, 11 ALR3d 1115 (1967) (credit for prior disbursements under defendant's policy).

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§15.20 B. By Plaintiff's Insurer (Under Uninsured Motorist and Other Coverages)

A plaintiff who has obtained payments under the uninsured and underinsured motorist provisions of his or her own automobile insurance policy may not recover damages for the same detriment from the uninsured motorist. *Waite v Godfrey* (1980) 106 CA3d 760, 163 CR 881. See also *Criterion Ins. Co. v Welish* (1985) 167 CA3d 62, 212 CR 882, in which an insurer's liability under the "bodily injury" provision of a policy was reduced by a payment made under the uninsured motorist provision of the same policy.

Payments made by the plaintiff's insurer under medical payment or collision coverages are ordinarily deemed to be payments from a collateral source (see §15.22) that are not to be subtracted from damages owed by a tortfeasor other than the insurer.

NOTE: An insurer sued by its insured for improper or bad faith handling of a claim against the insured cannot ordinarily offset against bad faith damages any recovery received by the insured from a third party. See *Kardly v State Farm Mut. Auto. Ins. Co.* (1989) 207 CA3d 479, 255 CR 40 (rejecting any dicta to the contrary in *Waite v Godfrey, supra,* and noting that damages from insurer's failure to honor insured's policy are separate and distinct from personal injury damages recovered in other action). But see *Plut v Fireman's Fund Ins. Co.* (2000) 85 CA4th 98, 108, 102 CR2d 36 (collateral source rule not applicable to homeowner's breach of contract action; insurer entitled to set off amounts received by settlement from third party tortfeasor; *Kardly* distinguished on ground that emotional distress from insurer's bad faith unrelated to damages recoverable in that case from third party tortfeasor). For more, see California Liability Insurance Practice: Claims & Litigation, chaps 24-28 (Cal CEB 1991).

On the interaction between workers' compensation payments and uninsured motorist recoveries, see California Workers' Damages Practice §§3.59-3.60 (2d ed Cal CEB 2001).

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§15.21 C. By Alleged Tortfeasors (Prior Settlements)

Money (or value) received by a plaintiff before verdict or judgment, as good faith settlements from other "tortfeasors claimed to be liable for the same tort," in return for a release from liability, dismissal, or covenant not to sue or not to enforce judgment, reduces the damages recoverable from nonsettling defendants. CCP §877(a).

The methods for calculating judgments under Proposition 51 when there have been preverdict or postverdict settlements are discussed in §§15.12-15.13.

TACTICS: Counsel advising clients to settle with one or more, but not all, potential tortfeasors must take care that the terms of a settlement agreement or release do not act to discharge other potential defendants or to bar other potential claims against the settling party. See CCP §877(a); *San Diego Hospice v County of San Diego* (1995) 31 CA4th 1048, 37 CR2d 501 (release that included clause waiving CC §1542 provision that general release does not extend to unknown or unanticipated claims barred later claim despite plaintiff's arguments that release should be rescinded as given under economic duress and that release was unenforceable because of constructive fraud or fraudulent nondisclosure). But see *Neverkovec v Fredericks* (1999) 74 CA4th 337, 87 CR2d 856 (tortfeasor not exempted from liability as third party beneficiary of general release given to other tortfeasor). Counsel engaged in settling an injured person's damages claim must also be sure that the agreement does not inadvertently prevent the person from pursuing a workers' compensation claim. And, counsel assisting in settling a workers' compensation claim must be careful that the wording of the workers' compensation settlement does not inadvertently bar the pursuit of a damages lawsuit. On circumstances in which workers' compensation settlements may bar damages recoveries, see California Workers' Damages Practice §3.48 (2d ed Cal CEB 2001). Of course, not every release form signed by an unrepresented person prevents the pursuit of a damages claim. See *Kirby v Southern Cal. Edison Co.* (2000) 78 CA4th 840, 93 CR2d 223 (mother signed general release thinking $2500 from insurer was only to cover son's burial expenses).

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§15.22 D. By Collateral Sources

At trial, a plaintiff can, as a general rule, prevent a defendant from introducing evidence of, or commenting on, any payments made to the plaintiff or on his behalf by a "collateral source"—a source other than the defendant or defendant's insurer. See *Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 84 CR 173 (medical expense); *De Cruz v Reid* (1968) 69 C2d 217, 223, 70 CR 550 (workers' compensation); *Smock v State* (2006) 138 CA4th 883, 41 CR3d 857 (court properly excluded evidence of employer's payment of full salary and bonuses, allowing evidence of reduced hours of work and damages for lost earnings); *Arambula v Wells* (1999) 72 CA4th 1006, 85 CR2d 584 (error for trial court to instruct jury not to award damages for lost earnings when plaintiff's employer had gratuitously paid for time missed from work, even absent agreement for plaintiff to refund money). See also *PG&E v Superior Court* (1994) 28 CA4th 174, 33 CR2d 522 (rule discussed in case not involving personal injury or property damage).

NOTE: The collateral source rule cannot be invoked by one cotortfeasor seeking equitable indemnity from another; if a tortfeasor's insurer actually paid an injured person's judgment or settlement, except for a "deductible" paid by tortfeasor, the cotortfeasor's liability is limited to its fault-based percentage of the deductible amount. *Miller v Ellis* (2002) 103 CA4th 373, 381, 126 CR2d 667. Nor does the collateral source rule require the exclusion of evidence of both the regular pension payments and the disability retirement benefits to which the plaintiff is entitled because of the injury. See *Rotolo Chevrolet v Superior Court (Staudt)* (2003) 105 CA4th 242, 247, 129 CR2d 283.

A defendant who convinces the trial judge that the plaintiff's receipt of, *e.g.,* payments from two different sources for the same medical bill has given the plaintiff a motive to malinger or to obtain unnecessary treatment may be permitted to introduce evidence of those payments. The trial judge must, however, conclude that the probative value of the evidence in showing a motive to receive protracted treatment outweighs the inevitable prejudicial impact that such evidence is likely to have on the jury. See *Hrnjak v Graymar, Inc.* (1971) 4 C3d 725, 732, 94 CR 623 (trial court abused discretion by admitting collateral source evidence without weighing, under Evid C §352, probative value against prejudicial impact).

TACTICS: To keep evidence of collateral source payments from the jury, the plaintiff may, before opening, seek an in limine order based on Evid C §352 on the ground that the prejudicial nature of the evidence would outweigh its probative value. See *Hrnjak v Graymar, Inc., supra.*

When unusual circumstances warrant it, the jury in a lawsuit pursued under the Federal Employers' Liability Act (FELA) (45 USC §§51-60) can be instructed that the plaintiff does not have a right to workers' compensation benefits. *Lund v San Joaquin Valley R.R.* (2003) 31 C4th 1, 13, 1 CR3d 412.

The collateral source rule has limited or modified application in suits against public entities (see §15.35) or against health care providers (§§15.48-15.49).

NOTE: On what is known as the *Hanif/Nishihama* procedure (or doctrine or reduction), which may be viewed as a limitation on the collateral source rule, see §1.20.

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V. FAILURE TO MITIGATE DAMAGES

§15.23 A. Reduction for Failure to Mitigate; Avoidable Consequences Doctrine

A defendant may seek to reduce a plaintiff's claimed damages by proving that the plaintiff failed to use reasonable care after being injured to mitigate or minimize recoverable damages. *LeMons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 874, 148 CR 355. Failure to mitigate is a defense that is separate from comparative contributory fault (see §15.2). See discussion in California Tort Guide §1.46 (3d ed Cal CEB 1996). See CACI 3930 (defendant not responsible for harm plaintiff could have "avoided with reasonable efforts or expenditures").

Stated another way, under the "common law doctrine of avoidable consequences," one injured by another's tort is not entitled to recover damages for harm he or she could have avoided by the use of reasonable effort or expenditure after the tort was committed. *State Dep't of Health Servs. v Superior Court (McGinnis)* (2003) 31 C4th 1026, 1043, 6 CR3d 441 (victim of hostile environment sexual harassment could have avoided some of the harm she suffered, without undue risk, expense, or humiliation, by reporting incidents to employer; defendant entitled to show that employer took reasonable steps to prevent or correct workplace harassment, plaintiff unreasonably failed to follow employer-provided measures, and reasonable use would have prevented at least some of the harm plaintiff suffered).

The defendant who raises failure to mitigate as a defense must offer evidence showing the extent to which damages would have been reduced (or the injury have been less serious) if steps to mitigate had been taken. See *Pool v City of Oakland* (1986) 42 C3d 1051, 1066, 232 CR 528. The avoidable consequences doctrine (sometimes inaccurately characterized as a "duty" to mitigate damages) does not require an injured person to do the unreasonable or impracticable; the plaintiff is not required to make expenditures that he or she is financially unable to make. *Valencia v Shell Oil Co.* (1944) 23 C2d 840, 846, 147 P2d 558.

See Annos, 62 ALR5th 537 (1998) (nonuse of seatbelts as reducing damages), 41 ALR5th 771 (1996) (availability of free public special education to mitigate damages), 25 ALR5th 343 (1994) (smoking as basis for reducing damages), 24 ALR5th 174 (1994) (failure to lose weight as basis for reducing personal injury damages).

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§15.24 B. Need to Accept Surgery or Other Treatment

Generally, the duty to mitigate damages does not include a duty to submit to dangerous surgery, or a risky, painful, or anathematic course of treatment. See *Morris v Frudenfeld* (1982) 135 CA3d 23, 31, 185 CR 76, in which a mother who recovered "wrongful birth" damages (see §5.15) from a doctor after an unsuccessful sterilization procedure did not have damages reduced for failure to submit to an abortion or failure to place the resulting child for adoption. See also *Dodds v Stellar* (1946) 77 CA2d 411, 423, 175 P2d 607 (patient could opt for conservative treatment before amputation); *Karberg v Southern Pac. Co.* (1935) 10 CA2d 234, 252, 52 P2d 285 (no need to opt for possibly fatal surgery). But see *Neumann v Bishop* (1976) 59 CA3d 451, 490, 130 CR 786 (evidence that operation to correct unhealed fracture had high chance of success (70-80 percent) could be offered in support of motion for new trial unless plaintiff accepted reduction in damages).

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VI. DAMAGES LIMITATIONS IN PARTICULAR SITUATIONS

§15.25 A. Plaintiff Injured Committing or Fleeing From Felony

A plaintiff cannot recover personal injury damages from a negligent defendant if injured while committing or fleeing from the commission of a felony for which the plaintiff is later convicted. CC §3333.3.

Civil Code §3333.3 does not bar a plaintiff from recovering damages on causes of action based on intentional conduct. See *Jenkins v County of Los Angeles* (1999) 74 CA4th 524, 88 CR2d 149 (summary judgment improper given triable issue of material fact on whether plaintiff was in immediate flight from felony when injured).

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.26 B. Uninsured or Intoxicated Plaintiff Injured in Motor Vehicle

§15.26 B. Uninsured or Intoxicated Plaintiff Injured in Motor Vehicle

A plaintiff cannot recover damages for noneconomic losses (to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary detriment) arising out of the operation or use of a motor vehicle if the plaintiff:

- Was driving, and was later convicted of driving, under the influence of alcohol or drugs;
- Owned a vehicle that "was not insured as required by [the state's] financial responsibility laws"; or
- Was operating a vehicle involved in an accident and "can not establish his or her financial responsibility as required by the [state's] financial responsibility laws."

CC §3333.4. See *Quackenbush v Superior Court* (1997) 60 CA4th 454, 70 CR2d 271 (CC §3333.4 is constitutional, violating neither due process nor equal protection).

Persons not barred as uninsured owners from recovering noneconomic damages include the wife who was unaware that her husband had bought the vehicle in which they were riding when she was injured, thinking that it had been lent to the husband by his employer. *Ieremia v Hilmar Unified Sch. Dist.* (2008) 166 CA4th 324, 82 CR3d 658. See also *Savnik v Hall, supra* (girlfriend whose boyfriend had, without her knowledge, added her name to the registration).

NOTE: The fact that an uninsured driver's uninsured vehicle was parked when struck by another vehicle does not prevent CC §3333.4 provisions from precluding the recovery of noneconomic damages. See *Harris v Lammers* (2000) 84 CA4th 1072, 101 CR2d 361 (injury to owner of uninsured vehicle parked in drug store lot, handing items to her children when it was struck by another vehicle, was deemed to have arisen out of "use" of vehicle to transport children and supplies); *Cabral v Los Angeles County Metro. Transp. Auth.* (1998) 66 CA4th 907, 78 CR2d 385 (exiting parked vehicle included in "operation" and "use" for purposes of statute).

Civil Code §3333.4 does not preclude an uninsured owner or uninsured operator of a vehicle involved in a traffic accident from recovering punitive damages. *Nakamura v Superior Court* (2000) 83 CA4th 825, 100 CR2d 97.

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§15.27 1. Wrongful Death Claimant

Survivors of an uninsured motorist are not prohibited by CC §3333.4 from recovering noneconomic damages in a wrongful death action. *Horwich v Superior Court* (1999) 21 C4th 272, 87 CR2d 222 (as used in CC §3333.3, "injured person" who is barred from recovery is deceased uninsured drunk driver, not that person's survivors).

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§15.28 2. Person Suing Vehicle Supplier (Product Liability)

Civil Code §3333.4 does not bar an uninsured motorist from recovering noneconomic damages on establishing the defendant's strict product liability for making or supplying a vehicle with a defect that resulted in injury. See *Hodges v Superior Court* (1999) 21 C4th 109, 118, 86 CR2d 884 (court reasoned that state has "ongoing interest in deterring manufacturers from shipping dangerous and unsafe products into California and in fairly compensating persons injured by defective products," and declined to adopt "broad literal interpretation" of statute).

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§15.29 3. Insured Driver in Uninsured Vehicle

A driver who has automobile liability insurance who is injured while driving an otherwise uninsured vehicle is not prohibited by CC §3333.4 from recovering noneconomic damages. Similarly, a person injured while riding in his or her own uninsured vehicle is not barred if the driver was insured. See *Goodson v Perfect Fit Enters., Inc.* (1998) 67 CA4th 508, 79 CR2d 102 (spouse was riding in couple's uninsured van driven by daughter-in-law who was insured; vehicle deemed insured for purposes of statute if either owner or driver has insurance that covers driver).

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§15.30 4. Uninsured Driver in Employer's Vehicle

An uninsured motorist driving his or her employer's uninsured vehicle is not prohibited by CC §3333.4 from recovering noneconomic damages from another driver. See *Montes v Gibbens* (1999) 71 CA4th 982, 84 CR2d 324 (under state's financial responsibility laws, person driving in scope of employment needs to report accident to his or her employer who must report it to DMV and establish proof of financial responsibility; thus, court reasoned, injured employee is not within class of drivers who, under CC §3333.4(a)(3), "can not establish his or her financial responsibility as required by the financial responsibility laws").

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§15.31 5. Undocumented Alien Unable to Obtain Insurance

A motorist is considered uninsured, and thus prohibited by CC §3333.4 from recovering noneconomic damages, if the lack of insurance was due to the inability to obtain a driver's license because of undocumented status following expiration of a tourist visa. See *Honsickle v Superior Court* (1999) 69 CA4th 756, 82 CR2d 36 (uninsured illegal immigrant could not recover noneconomic damages despite her attempts to obtain liability coverage).

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§15.32 6. Person Suing for Injury Caused by Dangerous Condition of Property

Civil Code §3333.4 precludes an uninsured motorist from recovering noneconomic damages in a suit against a public entity alleging nuisance and dangerous condition of public property. See *Day v City of Fontana* (2001) 25 C4th 268, 105 CR2d 457.

Civil Code §3333.4 also precludes an uninsured motorist from recovering noneconomic damages in a suit against a private construction company that built and maintained control over the allegedly dangerous property. See *Allen v Sully-Miller Contracting Co.* (2002) 28 C4th 222, 120 CR2d 795 (unmarked raised "bus pad" on city street caught wheel of motorcycle; statute contains no "private entity" or "private property" exception.

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§15.33 C. Public Entity Defendant

Statutory restrictions noted in §§15.34-15.35 apply to damages recoveries from public entities. See California Government Tort Liability Practice §§8.59-8.67 (4th ed Cal CEB 1999).

An entity being sued as a health care provider for medical malpractice may invoke additional restrictions. See §§15.41-15.58.

NOTE: On immunities and damages restrictions that may be available to public utility defendants, see California Tort Guide §7.1 (3d ed Cal CEB 1996).

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§15.34 1. Periodic Payment of Judgment

Under Govt C §984(d), a public entity that is not insured may elect to pay damages in periodic payments if the judgment exceeds a statutory threshold ($725,000 increased by 5 percent each January 1 after 1996), after deduction for collateral source payments (see §15.22). The entity must pay 50 percent immediately and the balance over a period set by the court but not to exceed 10 years. Under Govt C §970.6, if the entity obtains a court order based on unreasonable hardship to the entity, the court may order a judgment of any amount to be paid in ten equal annual installments.

If the entity is held liable as a health care provider for professional negligence, it may obtain an order permitting periodic payment under CCP §667.7 as may any other medical malpractice defendant. See §15.50.

The entity must pay interest on the unpaid portions of a judgment at the 7-percent rate applicable to public entities. See California Government Tort Liability Practice §8.65 (4th ed Cal CEB 1999).

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.35 2. Reducing Judgment for Collateral Source Payments

§15.35 2. Reducing Judgment for Collateral Source Payments

Under Govt C §985(b), a public entity against which a verdict has been rendered can request a posttrial hearing at which to identify certain collateral source payments received by an injured plaintiff for loss and harm for which damages were awarded, with the amount of such payments to be deducted from the damages found by the trier of fact. See California Government Tort Liability Practice §8.59 (4th ed Cal CEB 1999).

At the entity's request, the plaintiff must produce a list of covered collateral source payments, and the provider of the payments must be notified of the hearing. Govt C §985(c). At the hearing, the court determines under Govt C §985(f) what portion of collateral source payments should:

- Be reimbursed to the provider from the judgment;
- Be deducted from the verdict; or
- Accrue to plaintiff's benefit.

Collateral source payments covered by this procedure include:

- Payments by prepaid health maintenance organizations or nonfederal publicly funded health service providers (Govt C §985(a)(1)(A));
- Payments from Medi-Cal, county health care, Aid to Families with Dependent Children, Victims of Crime, or nonfederal publicly funded sources of benefit with statutory lien rights (the court must order reimbursement to these sources) (Govt C §985(f)(1)); and
- Payments from private medical programs, health maintenance organizations, state disability, unemployment insurance, private disability insurance, or similar sources (Govt C §985(f)(2)).

Under Govt C §985(g), a court may deny reimbursement to a collateral source if the injured person would otherwise suffer "undue financial hardship." *Garcia v County of Sacramento* (2002) 103 CA4th 67, 126 CR2d 465 (quadriplegic received judgment against county for "far less than future medical costs"; court, at county's request denied reimbursement of Medi-Cal lien; see §16.10).

The collateral source rule does not prevent a public entity defendant from introducing evidence of payments made by the entity's insurer to plaintiff. See *Scott v County of Los Angeles* (1994) 27 CA4th 125, 32 CR2d 643, in which the court also discusses the Govt C §985 procedure.

At trial, the public entity may not introduce evidence of these payments (Govt C §985(b)), and the court must instruct the jury as follows (Govt C §985(j)):

> You shall award damages in an amount that fully compensates plaintiff for damages in accordance with instructions from the court. You shall not speculate or consider any other possible sources of benefit the plaintiff may have received. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.

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D. Parent's Liability for Minor's Conduct

§15.36 1. Negligent Driving

Vehicle Code §17707 provides that a person who signs and verifies a minor's driver's license application (usually the parent under Veh C §17701) is jointly and severally liable with the minor for damages from the minor's negligence or wrongful act or omission in driving a motor vehicle. See, for more detail, California Tort Guide §§4.41-4.43 (3d ed Cal CEB 1996).

Vehicle Code §17709 limits parents' liability to:

- $15,000 for injury or death of one person;
- $30,000 for injury or death of more than one person; and
- $5000 for property damage.

The same dollar limitation of damages applies to the parents' joint and several liability with the minor child for damages when the minor drives a motor vehicle with the parents' express or implied permission. Veh C §17708.

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§15.37 2. Willful Misconduct

When a minor's willful misconduct causes injury, death, or property damage, liability is imputed to the parent (or guardian) and the parent has joint and several liability with the child. CC §1714.1(a). The parents' maximum liability cannot exceed a statutory maximum, which is recomputed every 2 years, for each of the minor's torts. In the case of injury to a person, the damages are limited to medical, dental, and hospital expenses, not to exceed the statutory maximum. CC §1714.1(a). See *In re Michael S.* (2007) 147 CA4th 1443, 54 CR3d 92 (parent released from liability by victim's acceptance of insurance payment).

NOTE: The statutory maximum was $25,000 before January 1, 1997. This cap has been subject to cost of living adjustments every 2 years by the California Judicial Council, which publishes new caps as they are adopted. See CC §1714.1(c)-(d).

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§15.38 3. Defacing Property

Liability for a willful defacing of the property of another by a minor is imputed to the parent (or guardian). The parent is jointly and severally liable for all purposes for civil damages, including court costs and attorney fees. CC §1714.1(b). Thus, a parent may be jointly and severally liable with the minor for the minor's graffiti. See also Govt C §38772(a)-(b).

NOTE: The statutory maximum for the parent's liability was $25,000 before January 1, 1997. This cap has been subject to yearly cost of living adjustments every 2 years by the California Judicial Council, which publishes new caps as they are adopted. See CC §1714.1(c)-(d).

A city or county may make the abatement expense a lien against the parent's real property. Abatement includes expenses for court costs, attorney fees, costs of graffiti removal, costs of repair and replacement of defaced property, and the law enforcement cost of apprehending the minor. Govt C §38772(d)(1). The legislative body of a city or county may provide for the recovery from any other person (as well as a minor) who defaces property the costs of removing the graffiti or other inscribed material, the costs of repair and replacement of that property, court costs, attorney fees, and the law enforcement costs incurred in identifying and apprehending the minor or other person. Govt C §38772.

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§15.39 4. Discharging Firearm

Civil Code §1714.3 provides that a parent has civil liability for injury to another person or property caused by a minor's discharge of a firearm if the parent or guardian permitted the minor to have the firearm or left the firearm in a place accessible to the minor. Parents (or guardians) have joint and several liability with the minor.

The parents' maximum liability is $30,000 for injury to or death of one person or $60,000 to all persons as a result of one occurrence.

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§15.40 E. Federal Law Violations

It is beyond the scope of this book to cover restrictions on the recovery of damages applicable to violations of particular federal statutes. An example of such a restriction is found in the Rehabilitation Act of 1973 (29 USC §794(a)). See, *e.g., Lane v Pena* (1996) 518 US 187, 135 L Ed 2d 486, 116 S Ct 2092 (person discharged from U.S. Merchant Marine Academy for physical disability not entitled to monetary damages after government's sovereign immunity claim). See also *Ferguson v City of Phoenix* (9th Cir 1998) 157 F3d 668 (compensatory damages not available under Americans With Disabilities Act absent showing of discriminatory intent).

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§15.41 F. Medical Malpractice; MICRA

The Medical Injury Compensation Reform Act (MICRA), which took effect in 1975, imposes limitations on the amount of damages recoverable in lawsuits against health care providers for medical negligence. These MICRA restrictions have been held to be constitutional. See California Tort Guide §§9.80-9.84 (3d ed Cal CEB 1996).

NOTE: It is not within the scope of the following sections to discuss the varieties of conduct for which medical malpractice liability may be imposed on health care providers such as doctors, hospitals, dentists, and other professionals and entities. Similarly, this chapter does not attempt to cover defenses and immunities that totally preclude or circumscribe the recovery of any damages from a health care provider for certain acts (*e.g.,* conduct within good Samaritan statutes, immunity for providing immunizations). For such coverage, see Tort Guide, chap 9.

Sections 15.42-15.58 discuss ways in which MICRA modifies or restricts the recovery of damages awarded by a trier of fact for bodily injury or emotional distress resulting from medical malpractice. The MICRA restrictions discussed in these sections, however, generally may not be invoked by health care service plans and managed care entities. See CC §3428(c).

MICRA restrictions on the liability of a "health care provider" rendering "professional services"—including procedural restrictions on claims for punitive damages and limitations provisions—protect emergency medical technicians and their negligence in operating an ambulance. *Canister v Emergency Ambulance Serv.* (2008) 160 CA4th 388, 72 CR3d 792. MICRA provisions also cover an unlicensed social worker, registered with the Board of Behavioral Sciences and working toward licensure, when sued by survivors of a suicide whose release from a facility she authorized. *Prince v Sutter Health Cent.* (2008) 161 CA4th 971, 74 CR3d 750. In addition, MICRA covers veterinarians sued for professional negligence. See *Vazquez de Mercado v Superior Court (McClung)* (2007) 148 CA4th 711, 55 CR3d 889 (but restrictions not applicable because veterinarian's alleged failure to advise prospective horse purchasers of horse's physical problem not within MICRA definition of professional negligence). See Tort Guide §3.34A.

See Anno, 26 ALR5th 245 (1995) (statutory restrictions on medical malpractice damages).

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§15.42 1. Ceiling on Noneconomic Damages

Civil Code §3333.2 provides that an injured plaintiff suing a health care provider for professional negligence is limited to a maximum of $250,000 in damages for noneconomic losses such as pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage. This ceiling on noneconomic damages does not violate constitutional concepts of due process or equal protection of the law. *Fein v Permanente Med. Group* (1985) 38 C3d 137, 211 CR 368. See *Hoffman v U.S.* (9th Cir 1985) 767 F2d 1431 (limitation applies to federal tort claims that arise in California and do not offend U.S. Constitution). See also *Baker v Sadick* (1984) 162 CA3d 618, 626, 208 CR 676 (damages reduced to $250,000 plus additional sums for future medical expense, plaintiff's attorney fee, and $300,000 as punitive damages; $250,000 ceiling does not restrict punitive damages).

To obtain a limit on noneconomic damages, the defendant must ask the court to segregate, or to ask the jury to segregate, noneconomic from economic damages. *Moore v Preventive Medicine Med. Group, Inc.* (1986) 178 CA3d 728, 746, 223 CR 859. See *Semsch v Henry Mayo Newhall Mem. Hosp.* (1985) 171 CA3d 162, 169, 216 CR 913 (jury should be given special interrogatory to distinguish economic from noneconomic damages); *Pressler v Irvine Drugs, Inc.* (1985) 169 CA3d 1244, 1248, 215 CR 807 (although special interrogatory should have been submitted with original verdict, reduction could be based on interrogatory submitted after gross verdict received). See also *Taylor v U.S.* (9th Cir 1987) 821 F2d 1428 (when damages were clearly noneconomic, defendant does not waive right to invoke $250,000 limit by waiting until after verdict to ask for its application).

NOTE: Since 1986, because principles of comparative fault apply to medical malpractice liability, if legal fault attributable to more than one tortfeasor caused the plaintiff's injury or death, damages are ordinarily segregated into economic and noneconomic portions under CC §1431.2 (Proposition 51) without the need for an independent CC §3333.2 request for segregation. See §§15.8-15.10.

Under Proposition 51, a judgment for noneconomic damages is calculated by determining the amount of such damages for which each responsible defendant is liable before the MICRA cap is applied. *Francies v Kapla* (2005) 127 CA4th 1381, 1387, 26 CR3d 501 ($425,000 noneconomic damages finding reduced to $283,333—to reflect defendant's two-thirds fault percentage—then capped at $250,000). If there are multiple health care provider defendants, the total of noneconomic damages "owed" by all cannot exceed $250,000; the fault percentage attributed by the trier of fact to each liable defendant determines the portion of $250,000 that will be part of the separate noneconomic damages judgment rendered against each. *Mayes v Bryan* (2006) 139 CA4th 1075, 1099, 44 CR3d 14 (court properly reduced noneconomic verdict to $250,000 before applying each defendant's fault percentage); *Gilman v Beverly Cal. Corp.* (1991) 231 CA3d 121, 129, 283 CR 17. On application of the $250,000 ceiling in a case in which Proposition 51 was not applicable, see *McAdory v Rogers* (1989) 215 CA3d 1273, 264 CR 71.

TACTICS: If substantial noneconomic damages will be unrecoverable because of the ceiling, plaintiff's counsel may wish to emphasize economic damages, which are not limited, and call economists as experts who can give detailed evidence about all available aspects of economic loss. A plaintiff's attempt to negate the ceiling by foregoing any claim for noneconomic damages and his spouse's claim for loss of consortium damages (see §15.43) and asking that $500,000 of a pretrial settlement be deemed to be for such damages and thus not credited against the remaining damages was rejected in *Deocampo v Ahn* (2002) 101 CA4th 758, 772, 125 CR2d 79 (see also §§15.50, 15.57).

See Anno, 80 ALR3d 583 (1977) (validity and construction of state statutory provisions relating to limitations on amount of recovery in medical malpractice claim).

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§15.43 a. Loss of Consortium Damages

The spouse of an injured patient can recover loss of consortium damages up to $250,000 in addition to the patient's own recovery of personal injury damages; that is, two separate $250,000 caps are applied, one to the patient's noneconomic damages and the other to the spouse's loss of consortium damages. *Atkins v Strayhorn* (1990) 223 CA3d 1380, 273 CR 231. See also *Taylor v U.S.* (9th Cir 1987) 821 F2d 1428. The courts have reasoned that an action for loss of consortium is an entirely separate action, one that may be pursued in a lawsuit different from the injured spouse's suit. See "Tactics" in §15.42.

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§15.44 b. Wrongful Death Damages

In wrongful death actions pursued by more than one of the decedent's eligible survivors, the $250,000 limit on noneconomic damages imposed by CC §3333.2(b) is applied to all claimants in the aggregate, not to each one individually. *Yates v Pollock* (1987) 194 CA3d 195, 200, 239 CR 383.

However, the $250,000 cap on the heirs' aggregate recovery of noneconomic damages resulting from a wrongful death is not reduced or limited by any survival action damages recovered by the decedent or the decedent's spouse for predeath loss and harm. See *Schwarder v U.S.* (9th Cir 1992) 974 F2d 1118, 1125, also noted in §15.45.

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§15.45 c. Survival Action Damages

In a survival action to recover on behalf of a decedent's estate damages for loss and harm suffered by the decedent before his or her death, the $250,000 limit on noneconomic damages imposed by CC §3333.2(b) is applied to such damages separately from the $250,000 ceiling imposed on the decedent's survivor's wrongful death damages. See *Schwarder v U.S.* (9th Cir 1992) 974 F2d 1118, 1125. See also *Hernandez v California Hosp. Med. Ctr.* (2000) 78 CA4th 498, 93 CR2d 97 (error for trial court to grant summary judgment in favor of medical malpractice defendant on assertions that plaintiff, surviving son of elderly man, could not establish damages because decedent's bills were paid by Medicare and Medi-Cal; Medicare and Medi-Cal payments established fact of damages). See §§15.48-15.49 on MICRA's effect of collateral source payments.

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§15.46 d. Causes of Action Exempt From Ceiling: Battery; Elder Abuse; EMTALA

The noneconomic damages ceiling imposed by CC §3333.2(b) is applicable only to "professional negligence" by a "health care provider." Thus, MICRA damage limits do not apply to a health care provider's liability for common-law battery—something more than a "technical battery"—as when a surgeon performs a procedure different from one to which the patient consented. *Perry v Shaw* (2001) 88 CA4th 658, 106 CR2d 70 (surgeon's conduct was both battery and negligence, but injury from both was same; no ceiling on noneconomic damages; ceiling could apply to situations in which plaintiff's consent to procedure given absent disclosure of potential complications). See generally California Tort Guide §9.16 (3d ed Cal CEB 1996).

NOTE: The exemption of battery from MICRA limits might well apply by analogy to a health care provider's liability for sexual contact with or harassment of a patient, breach of a guaranty or warranty of a favorable result, fraud, intentionally inflicting emotional distress, and invading a patient's privacy rights. See generally Tort Guide §§9.17-9.20A.

Specific provisions of the Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600-15675) provide relief beyond what MICRA would authorize. For example, Welf & I C §15657 permits a plaintiff who demonstrates by clear and convincing evidence that the defendant is guilty of something more than negligence—*i.e.,* of reckless, oppressive, fraudulent, or malicious conduct—is entitled to attorney fees and, in a wrongful death suit, to damages for the decedent's pain and suffering. See *Delaney v Baker* (1999) 20 C4th 23, 82 CR2d 610. Otherwise, Welf & I C §15657.2 provides that damages based on a health care provider's alleged professional negligence are governed by the laws that specifically apply to such causes of action. See *Smith v Ben Bennett, Inc.* (2005) 133 CA4th 1507, 1514, 35 CR3d 612 (inapplicability of MICRA to aspects of elder abuse actions). See generally Tort Guide §9.55.

A federal district court has ruled that a lawsuit alleging "disparate screening" brought under the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 USC §1395dd) against a hospital and a doctor is not subject to the MICRA damages cap. See *Romar v Fresno Community Hosp. & Med. Ctr.* (2008) 583 F Supp 2d 1179. But see *Barris v County of Los Angeles* (1999) 20 C4th 101, 83 CR2d 145 (MICRA caps apply to "patient dumping").

See Balisok, *Damages: The Importance of Distinguishing Elder Abuse from Actions for Professional Negligence*, 21 California Litigation 3, p 25 (State Bar Litigation Section 2008); Chafetz, *Why Plaintiffs Prefer Pleading Elder Abuse to Medical Malpractice*, 36 CAOC Forum 1, p 9 (Jan./Feb. 2006).

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§15.47 e. Causes of Action Subject to Ceiling

The noneconomic damages ceiling imposed by CC §3333.2(b) is applicable to a variety of causes of action that might, at first blush, seem to be outside the scope of "professional negligence" by a "health care provider." The following are among such situations to which the ceiling is applied.

- **Injury caused by hospital personnel.** A variety of injuries occurring in a hospital setting have been held to constitute medical malpractice and thus to fall within the MICRA limitations. See, *e.g., Murillo v Good Samaritan Hosp.* (1979) 99 CA3d 50, 160 CR 33, disapproved on other grounds in *Flowers v Torrance Mem. Hosp. Med. Ctr.* (1994) 8 C4th 992, 1002 n6, 35 CR2d 695 (failure to raise bed rails resulting in fall); *Bellamy v Appellate Dep't* (1996) 50 CA4th 797, 57 CR2d 894 (fall from x-ray table); *Taylor v U.S.* (9th Cir 1987) 821 F2d 1428 (patient became disconnected from ventilator, resulting in brain damage). See generally California Tort Guide §§9.55-9.61 (3d ed Cal CEB 1996).
- **Taking or supplying blood.** A blood bank is a "health dispensary" within the meaning of Health & S C §1200 and thus may invoke MICRA limitations. *Coe v Superior Court* (1990) 220 CA3d 48, 269 CR 368. See generally Tort Guide §9.54.
- **Conducting hospital medical staff competence review.** MICRA damage limits apply to a suit alleging that injury or death resulted from a hospital's failure to use reasonable care in conducting a review to determine the entitlement to hospital staff privileges of a surgeon whose negligence harmed or killed a patient. See *Bell v Sharp Cabrillo Hosp.* (1989) 212 CA3d 1034, 260 CR 886 (*Elam* action—named after *Elam v College Park Hosp.* (1982) 132 CA3d 332, 183 CR 156—based on rendering of professional services within meaning of CC §3333.2). See generally Tort Guide §9.57.

A health care provider may invoke the $250,000 limit on noneconomic damages provided by CC §3333.2 to limit the provider's liability to pay comparative partial equitable indemnity to other tortfeasors. *Western Steamship Lines v San Pedro Peninsula Hosp.* (1994) 8 C4th 100, 32 CR2d 263.

See §15.46 for contrary holdings on the applicability of the MICRA ceiling on noneconomic damages in cases brought under the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 USC §1395dd). See also Tort Guide §9.81.

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2. Collateral Source Evidence

§15.48 a. Defendant's Right to Introduce

A health care provider sued for professional negligence may introduce evidence of payments received by the plaintiff from collateral sources—evidence that otherwise would be excluded by the collateral source rule (see §15.22). CC §3333.1(a). Thus, the defendant may introduce evidence of such benefit payments as social security; state or federal disability or worker's compensation; health, sickness, or income-disability insurance; and other enumerated sources. If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of the amounts paid or contributed to obtain such benefits. CC §3333.1(a). The defendant may not, however, introduce evidence that the disability insurance benefits the plaintiff is receiving are not taxable as income. *Cox v Superior Court (Shields)* (2002) 98 CA4th 670, 120 CR2d 45 (such evidence would be likely to invite improper jury speculation and guesswork).

The statute is silent on how the jury is to use such evidence, but the California Supreme Court has concluded that "the Legislature apparently assumed that in most cases the jury would set plaintiff's damages at a lower level because of its awareness of plaintiff's 'net' collateral source benefits." *Fein v Permanente Med. Group* (1985) 38 C3d 137, 164, 211 CR 368 (holding that CC §3333.1 is constitutional). Such jury action is not mandatory, however. See *Brown v Stewart* (1982) 129 CA3d 331, 336 n2, 181 CR 112 ("Presumably, under the statute at issue, a kind and generous jury could include any collateral benefits in its award, and even in a medical malpractice action, the plaintiff could recover what has been characterized by some as a windfall").

Although drafts of §3333.1 required the trier of fact to deduct collateral source benefits, the final version of §3333.1 simply allows a defendant that so elects to introduce evidence of benefits. Thus, in *Hernandez v California Hosp. Med. Ctr.* (2000) 78 CA4th 498, 93 CR2d 97, the court noted that §3333.1 does not preclude evidence of benefits, but allows the trier of fact to decide how to apply the evidence in calculating damages.

TACTICS: Some plaintiffs' counsel elect not to introduce evidence of medical bills on the theory that the defense will simply counter that the bills have been paid. However, large bills may be evidence of the extent of the plaintiff's injuries or the type of care required. In addition, the defendant may be unprepared to meet the burden of proving that the bills were paid by insurance. Even if such evidence is adduced, the plaintiff may offer evidence of the cost of medical insurance. There appears to be no limit on the plaintiff's proof of the cost of insurance over a number of years.

See Annos, 77 ALR3d 366 (1977) (collateral source rule: receipt of public relief or gratuity as affecting recovery in personal injury action); 77 ALR3d 415 (1977) (collateral source rule; injured person's hospitalization or medical insurance as affecting damages recoverable).

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.49 b. Reimbursement Rights of Benefits Furnishers

§15.49 b. Reimbursement Rights of Benefits Furnishers

Civil Code §3333.1(b) provides that the source of any of the collateral benefits introduced under CC §3333.1(a) is barred from obtaining reimbursement from the plaintiff, or, as the plaintiff's subrogee, from the third party tortfeasor. See *Barme v Wood* (1984) 37 C3d 174, 207 CR 816 (provisions are constitutional).

The furnisher of workers' compensation benefits, for example, is denied its usual right to be reimbursed from an injured employee's personal injury recovery. See *Miller v Sciaroni* (1985) 172 CA3d 306, 218 CR 219; California Workers' Damages Practice §§3.56, 7.4 (2d ed Cal CEB 2001). The employer or insurer's right to credit for the employee's recovery from a third party is also reduced. See *Graham v WCAB* (1989) 210 CA3d 499, 258 CR 376; Workers' Damages §8.6.

Civil Code §3333.1 does not, however, abrogate Medi-Cal liens. See *Brown v Stewart* (1982) 129 CA3d 331, 181 CR 112. Further, when the right to be reimbursed is guaranteed by federal law (*e.g.,* Medicare payments under 42 USC §2651), federal supremacy principles take precedence over the provisions of CC §3333.1. See *Barme v Wood* (1984) 37 C3d 174, 180 n6, 207 CR 816; *Hernandez v California Hosp. Med. Ctr.* (2000) 78 CA4th 498, 93 CR2d 97 (noted in §§15.45, 15.48); *Brown v Stewart, supra*.

There is some authority for arguing that CC §3333.1 does not abrogate claims for reimbursement by self-funded ERISA health plans. See, *e.g., Electro-Mechanical Corp. v Ogan* (6th Cir 1993) 9 F3d 445. Generally, the plan must have a clear subrogation clause, must be set up under ERISA, and must be self-funded by the employer.

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§15.50 3. Periodic Payment of Future Damages

Under CCP §667.7, future damages in medical malpractice actions that equal or exceed $50,000 may, on timely request of any party, be ordered wholly or partly paid in periodic installments. See *American Bank & Trust Co. v Community Hosp.* (1984) 36 C3d 359, 204 CR 671 (provision is constitutional). See also Anno, 41 ALR4th 275 (1985) (validity of statute providing for periodic payment of future damages in medical malpractice action). Section 667.7 is intended to provide for an injured person's (and his or her dependents') needs for the length of time monetary compensation is necessary, by preventing early dissipation of an award; thus settlement money received before judgment is credited to reduce amounts awarded for past damages and for prejudgment interest before being applied to reduce periodic payments for future damages. *Deocampo v Ahn* (2002) 101 CA4th 758, 771, 125 CR2d 79 (see also §§15.43, 15.57).

Ordinarily, the defendant requests a special verdict that segregates the portion of the award that is intended to compensate for future damages. See *American Bank & Trust Co. v Community Hosp., supra.* See also *Salgado v County of Los Angeles* (1998) 19 C4th 629, 639, 80 CR2d 46 (discussed in §15.51). The request for periodic payment of future damages must be timely, *i.e.,* made at least before the entry of a lump-sum judgment. *Craven v Crout* (1985) 163 CA3d 779, 209 CR 649. A request that future damages be paid periodically may be made in an answer to a complaint. *Gorman v Leftwich* (1990) 218 CA3d 141, 266 CR 671.

TACTICS: Because the request for periodic payment may affect the evidence to be presented at trial, it should be made early. Defense counsel often request periodic payments in the answer, in trial briefs, or in motions in limine. If the desirability of periodic payment becomes apparent later, a request can be made before the case is submitted to the jury or on receipt of the verdict.

"Future damages" are defined in §667.7 to include damages for future "medical treatment, care or custody," earnings loss, loss of bodily function, and pain and suffering. The trier of fact determines the amount of future damages. After the jury returns its verdict, the court conducts postverdict hearings to determine the recipient, amount, and timing of installments.

A public entity that is held liable as a health care provider for professional negligence may obtain an order permitting periodic payment of future damages under CCP §667.7 or of all damages under Govt C §970.6 or §984(d). See §15.32.

Damages awarded to a plaintiff for a reduction in life expectancy ("lost years" damages; see §1.90) are not subject to periodic payment under CCP §667. See *Hurlbut v Sonora Community Hosp.* (1989) 207 CA3d 388, 254 CR 840 (otherwise, damages not paid by time of plaintiff's early death would be lost). Accordingly, the jury should be asked to segregate lost years damages in the special verdict.

When a judgment requiring periodic payments is entered, the "amount of the judgment" for purposes of calculating the amount of the undertaking the defendant must post to stay payment during an appeal is, under CCP §917.1, the lump sum present value of the judgment. *E.S.S. Entertainment 2000, Inc. v Rock Star Videos, Inc.* (9th Cir 2008) 547 F3d 1095.

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§15.51 a. Calculating Payment Schedule

Periodic payments must be scheduled to pay the gross amount of the future damages finding, not reduced to present value, to the plaintiff who lives throughout the payment period. See *Salgado v County of Los Angeles* (1998) 19 C4th 629, 639, 80 CR2d 46 (improper to structure payment schedule on present value; doing so would work double discount by reducing future damages to present value, then delaying payment); *Hrimnak v Watkins* (1995) 38 CA4th 964, 974, 45 CR2d 514 (periodic payments must be based on gross amount of future damages; trial court erred by periodicizing present value of future economic damages and awarding interest at legal rate on future economic damages). Thus, when periodic payment of future damages is requested, counsel should submit a special verdict form that asks the jury to state separately the gross amount of future damages, not reduced to present value, although the jury may also be asked to separately find the present value of such damages. See §1.108 on the need to reduce future damages to present value when periodic payment is not ordered.

The trial judge has considerable discretion to fashion a periodic payment schedule, consistent, of course, with the evidence. *Holt v Regents of Univ. of Cal.* (1999) 73 CA4th 871, 877, 86 CR2d 752 (defendant entitled to fund payments by purchasing annuity, but plaintiff need not execute satisfaction of judgment until entire amount paid). The trial judge may structure a payment schedule reflecting, for example, a jury finding that future expenses are likely to be greater in early years than in later years. *Salgado v County of Los Angeles, supra*.

TACTICS: Parties often stipulate to the use of an annuity to pay future payments and to immediate entry of a satisfaction of judgment, plaintiffs being eager to have payments begin immediately, and defendants and their insurers to have the extent of their liability finalized.

The statutory ceiling on noneconomic damages in medical malpractice cases (CC §3333.2; see §15.42) caps the amount the defendant needs to pay during the course of the period but is not a starting point for a reduction to present value. See *Salgado v County of Los Angeles* (1998) 19 C4th 629, 645, 80 CR2d 46 (improper for trial judge to require defendant to furnish annuity that was to pay only present value of statutory amount).

Periodic payment schedules are modifiable. If the injured person dies before receiving all of the payments, any party in interest may petition the court that entered the original judgment for a modification, terminating future payments except for those portions attributable to lost future earnings, which shall be made payable to those persons to whom the injured party owed a duty of support before death. CCP §667.7(c). See *Deocampo v Ahn* (2002) 101 CA4th 758, 772, 125 CR2d 79 (future earnings exception supports requiring pretrial settlement to be credited against past earnings; see §15.50).

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§15.52 b. Interest on Future Damages

A defendant who obtains a ruling under CCP §667.7 that the future economic damages portion of a judgment can be paid in installments is not required to pay interest from the date of judgment on the amounts to be paid in the future. See *Hrimnak v Watkins* (1995) 38 CA4th 964, 45 CR2d 514 (trial court erred by awarding interest at legal rate on future economic damages); *Schiernbeck v Haight* (1992) 7 CA4th 869, 881, 9 CR2d 716.

TACTICS: Because of the way in which the statutory ceiling is applied to periodic payments of noneconomic damages (see §15.51) and the possibility that interest may be payable on noneconomic damages payable in the future (see *Schiernbeck v Haight* (1992) 7 CA4th 869, 880, 9 CR2d 716), defense counsel, particularly in wrongful death cases, often forego the right to request a periodic payment order.

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4. Punitive Damages

§15.53 a. Procedural Prerequisites

The plaintiff who seeks punitive damages from a health care provider for professional negligence must not include punitive damages allegations or requests in a complaint but must move for leave of court to file an amended complaint, supported by declarations. CCP §425.13(a). The court is not to grant such leave to amend except after finding, based on supporting and opposing declarations, that the plaintiff has established a "substantial probability" of prevailing on the punitive damages claim under CC §3294 (discussed in chap 14).

The motion must be filed within 2 years of the original pleading or not less than 9 months before the case is first set for trial, whichever is earlier. CCP §425.13(a). But an amended complaint may be filed less than 9 months before the trial date if it is shown that it could not have been filed earlier. *Goodstein v Superior Court* (1996) 42 CA4th 1635, 50 CR2d 459; *Looney v Superior Court* (1993) 16 CA4th 521, 20 CR2d 182. But see *Freedman v Superior Court (Charbonneau)* (2008) 166 CA4th 198, 82 CR3d 563 (plaintiff failed to meet two prongs of five-part *Goodstein* test for authority to file less than 9 months before trial).

A defendant's failure until trial to object to the plaintiff's noncompliance with CCP §425.13 may constitute a waiver of the section's protections. See *Vallbona v Springer* (1996) 43 CA4th 1525, 51 CR2d 311 (absent demurrer or motion to strike, motion in limine came too late).

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§15.54 b. Causes of Action Affected

Not exempted from the procedural requirements of CCP §425.13 are causes of action for the type of battery that occurs when a doctor performs a procedure or surgery without having obtained the patient's informed consent, inasmuch as the injury is "directly related to the professional services provided by a health care provider acting in its capacity as such." *Central Pathology Servs. Med. Clinic v Superior Court* (1992) 3 C4th 181, 186, 10 CR2d 208 (requirements apply even to causes of action for fraud and for intentional infliction of emotional distress). For discussion of battery for lack of informed consent, see California Tort Guide §9.16 (3d ed Cal CEB 1996). See also *Williams v Superior Court* (1994) 30 CA4th 318, 36 CR2d 112 (CCP §425.13 requirements applied in suit by independent contractor injured while drawing blood from patient at rehabilitation clinic alleging clinic's failure to warn that patient had violent tendencies); *Davis v Superior Court* (1994) 27 CA4th 623, 627, 33 CR2d 6 (compliance with CCP §425.13 required despite allegation that doctor's conduct amounted to criminal scheme to defraud).

Not ordinarily subject to CCP §425.13 requirements, however, are lawsuits against the owners of nursing homes and similar entities under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15675). *Covenant Care, Inc. v Superior Court (Inclan)* (2004) 32 C4th 771, 781, 11 CR3d 222 (malicious elder abuse, even failing to provide medical care, is not "professional negligence"; health care providers were sued under EADACPA as custodians and caregivers, not as health care providers); *Country Villa Claremont Healthcare Ctr., Inc. v Superior Court (Rodriguez)* (2004) 120 CA4th 426, 429, 15 CR3d 315 (CCP §425.13 inapplicable where "gravamen of the claims is elder abuse subject to heightened civil remedies" under EADACPA).

NOTE: In *Covenant Care,* the Supreme Court disapproved, to the extent it is inconsistent, *Community Care & Rehabilitation Ctr. v Superior Court* (2000) 79 CA4th 787, 94 CR2d 343, which held that wrongful death plaintiffs alleging elder abuse by a convalescent center were required to comply with the procedural requirements of CCP §425.13 for an injury directly related to professional services furnished by the health care provider. 32 C4th at 791 n12. *Central Pathology Servs. Med. Clinic v Superior Court* (1992) 3 C4th 181, 191, 10 CR2d 208, suggests that causes of action for sexual battery or defamation are not subject to the requirements of CCP §425.13. But see *Cooper v Superior Court* (1997) 56 CA4th 744, 65 CR2d 674 (punitive damages claim for alleged sexual battery during gynecological procedure required compliance with CCP §425.13 inasmuch as touching of genitalia was "directly related" to medical services being provided); *United W. Med. Ctrs. v Superior Court* (1996) 42 CA4th 500, 504, 49 CR2d 682 (compliance with CCP §425.13 required in suit against hospital for failing to protect patient against sexual assault by hospital employee).

A plaintiff who alleged that he was injured, and suffered emotional distress because a health maintenance organization (HMO) and a "utilization review service" denied that the prosthetic device he sought was "medically necessary" is required to conform to CCP §425.13 requirements. See *Palmer v Superior Court (Sharp Rees-Stealey Med. Group, Inc.)* (2002) 103 CA4th 953, 127 CR2d 252 (patient sought newly available "ultra light" leg prostheses to better accommodate his active lifestyle; defendants contended that older model was adequate and that patient's activity claims were contrary to assertions about his condition under which he was receiving disability insurance payments).

A plaintiff must comply with CCP §425.13 when seeking punitive damages from sperm bank and the doctors and others who perform genetic screening of sperm donors. *Johnson v Superior Court (Cal. Cryobank, Inc.)* (2002) 101 CA4th 869, 124 CR2d 650 (suit by and behalf of child conceived with sperm from donor with history of kidney disease; see §§5.5-5.6). Similarly, compliance with CCP §425.13 is required when punitive damages are sought in a suit against a tissue bank. *Cryolife, Inc. v Superior Court (Minvielle)* (2003) 110 CA4th 1145, 1158, 2 CR3d 396.

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§15.55 c. Proving Substantial Probability

The requirement in CCP §425.13(a) that the plaintiff establish that there is "a substantial probability that the plaintiff will prevail on the claim" under CC §3294(a) does not contemplate a "mini-trial" or the presentation of evidence on the basis of which the trial court judge weighs whether it is more likely than not that a jury would award punitive damages to the plaintiff; instead, the judge should permit the plaintiff to pursue a punitive damages claim if the plaintiff states and "substantiates" (*i.e.,* supports with competent, admissible evidence) a legally sufficient claim; but the judge should deny the plaintiff's motion if the supporting and opposing affidavits negate, or fail to reveal, the actual existence of a triable punitive damages claim. *College Hosp., Inc. v Superior Court (Crowell)* (1994) 8 C4th 704, 34 CR2d 898 (affidavits failed to show that hospital acted maliciously or was responsible under CC §3294(b) for acts of its employee). See §§14.5-14.6 on the need for clear and convincing evidence of oppression, fraud, or malice.

The plaintiff's burden of establishing that there is a substantial probability of prevailing on the punitive damages claim at trial must be met by showing, by affidavit (or declaration under penalty of perjury), that there exists clear and convincing evidence that the defendant was guilty of fraud, oppression, or malice, as is required by CC §3294(a). *Looney v Superior Court* (1993) 16 CA4th 521, 537, 20 CR2d 182. In evaluating the plaintiff's showing, the trial judge does not weigh the evidence, make credibility determinations, or draw inferences, but merely determines, as a legal issue, whether there is sufficient evidence to establish a prima facie case for punitive damages, having in mind the "clear and convincing" standard. See *Aquino v Superior Court* (1993) 21 CA4th 847, 26 CR2d 477 (plaintiff's showing insufficient).

TACTICS: Code of Civil Procedure §3295(c) provides that no pretrial discovery of evidence of the defendant's financial condition or profits may be pursued without a court order. Presumably, although no case has yet stated this, if a court grants the plaintiff's motion to allow the pleading of punitive damages, a second hearing would not be required for leave to conduct such discovery.

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5. Plaintiff's Attorney Fees

§15.56 a. Statutory Limits

Business and Professions Code §6146(a) restricts the contingency fee that may be received by the plaintiff's attorney in a medical malpractice action to:

- 40 percent of the first $50,000 recovered;
- 33 1/3 percent of the next $50,000 recovered;
- 25 percent of the next $500,000 recovered;
- 15 percent of any amount by which the recovery exceeds $600,000.

The limitations apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind. Bus & P C §6146(a).

This provision is constitutional. *Roa v Lodi Med. Group, Inc.* (1985) 37 C3d 920, 211 CR 77. See also *Waters v Bourhis* (1985) 40 C3d 424, 220 CR 666 (application of restrictions in action based on both negligence and intentional tort theories).

An attorney cannot circumvent the Bus & P C §6146(a) cap by retaining other attorneys and categorizing their fees as costs; the total fee must be based on the statutory percentages. See *Ojeda v Sharp Cabrillo Hosp.* (1992) 8 CA4th 1, 10 CR2d 230.

In a wrongful death action for medical malpractice brought by more than one heir, the percentage limitations on the plaintiffs' attorney's contingent fee are applied against the judgment as a whole, not against the separate share of each heir. *Yates v Law Offices of Samuel Shore* (1991) 229 CA3d 583, 280 CR 316 (application against individual shares would have nearly doubled attorney fee; maximum allowable fee also held to cover attorney's handing of appeal).

The Bus & P C §6146 cap on attorney fees does not apply when the recovery is based on certain forms of intentional conduct. See *Waters v Bourhis, supra*.

See Anno, 12 ALR4th 23 (1982) (validity of statutory limitations on contingent fees in medical malpractice cases).

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Source: Torts/California Tort Damages/15 Restrictions on Recovery/§15.57 b. Fees From Periodic Payments

§15.57 b. Fees From Periodic Payments

Attorney fees may be awarded out of any lump sum awarded the plaintiff or out of periodic payments. When a plaintiff whose future damages are to be paid periodically also recovers a judgment that includes sums to paid immediately, the attorney fee can be paid from sums received immediately to the extent they are adequate. See *Deocampo v Ahn* (2002) 101 CA4th 758, 774, 125 CR2d 79 (judgment that provided for immediate payment of prejudgment interest, costs, and the first two periodic payments adequate to pay attorney; also §§15.43, 15.50).

TACTICS: Many plaintiffs' counsel specify in the fee agreement that, in the event of a recovery by annuity or by periodic payments, the attorney fees will be paid out of the initial lump sum, ensuring that the attorney is fully compensated even if the plaintiff's death terminates later periodic payments.

If periodic payments are awarded to the plaintiff under CCP §667.7, the court must place a total value on these payments based on the projected life expectancy of the plaintiff, and include this amount in computing the total award from which attorney fees are calculated. *Schneider v Kaiser Found. Hosps.* (1989) 215 CA3d 1311, 264 CR 227 (error to simply add up future payments and base fee on that sum), disapproved on other grounds in *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 27, 10 CR2d 183. See *Padilla v Greater El Monte Community Hosp.* (2005) 129 CA4th 667, 28 CR3d 636 (almost 2 years after verdict, when injured person's conservator challenged attorney fee calculation, was too late for attorney to obtain recalculation of present value based on table different from table used by jury).

Plaintiff's counsel should be prepared to present expert testimony about the value of any annuity used to finance periodic payments and on the present cash value of such payments. See discussions in *Hrimnak v Watkins* (1995) 38 CA4th 964, 45 CR2d 514, and *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 40 CA4th 1433, 48 CR2d 301. This is because the cost of an annuity may be less than the present value of future damages, depending on the discount value assigned by the insurance company, the plaintiff's life expectancy, or other factors. See *Holt v Regents of Univ. of Cal.* (1999) 73 CA4th 871, 884, 86 CR2d 752 (no abuse of discretion for trial court to calculate attorney fees on basis of present value of future damages).

Once a judgment for future damages in periodic payments under CCP §667.7 is made, the trial court has no jurisdiction to amend a judgment to have the defendant pay the attorney fees and offset the fees against periodic payments. *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 40 CA4th 1433, 1443, 48 CR2d 301. Thus, plaintiff's counsel should seek to have a stay of entry of judgment until the manner of payment of attorney fees is determined.

No interest is allowed on attorney fees paid out of periodic payments because the periodic payments are already based on present cash value. 40 CA4th at 1454 n15.

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§15.58 6. Expert Witness Fees

The major expense in prosecuting and defending medical malpractice cases is the cost of expert witnesses. Although certain expert witness fees are recoverable as costs, fees for experts retained by a plaintiff to meet the burden of proof in a medical malpractice case have been held to be not "ordered by the court" and thus not a proper element of a cost bill. See *Sanchez v Bay Shores Med. Group* (1999) 75 CA4th 946, 89 CR2d 634.

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16

Reimbursement Claims and Liens

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I. INTRODUCTION

§16.1 A. Scope of Chapter

Personal injury, wrongful death, and property damage recoveries are subject to a variety of reimbursement claims made by persons and entities that provided medical and other services to the injured person. Sometimes a claimant is deemed to have a statutory right to indemnity that may be asserted as a lien on the plaintiff's settlement or judgment recovery. Such liens are payable to the claimants before money paid by a defendant is paid the plaintiff or plaintiff's attorney. In other instances, the claimant is subrogated to the recovery rights of either the entity that furnished the services or the person entitled to recover damages.

This chapter discusses common reimbursement claims and provides statutory and case law sources for each.

NOTE: This book does not discuss attorney fee liens. Nor does it discuss reimbursement claims asserted by employers or insurers that have furnished workers' compensation to the plaintiff, or will do so before judgment is rendered. Such damages reductions, under Lab C §§3852-3864, are discussed in detail in California Workers' Damages Practice, chaps 3, 7-8 (2d ed Cal CEB 2001). Also not discussed are state reimbursement claims, asserted as subrogation rights or liens, under crime victim indemnification laws. See Govt C §§13950-13969.7. Except as noted in §16.9, "ERISA" liens are not covered. See generally, de Camara, *Status of ERISA Liens After McDowell*, 35 Forum 7, p 14 (Sept. 2005).

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B. General Considerations

§16.2 1. Identifying Potential Claims

An attorney can benefit from trying to identify all the reimbursement claims or liens that could be asserted against the plaintiff's recovery, before agreeing to represent the plaintiff. Reduction of the potential recovery to reimburse legitimate claimants may leave too few recoverable dollars to justify undertaking the representation, at least for the particular attorney. That is, amounts payable to reimburse such claimants may leave too little to provide an adequate fee to the attorney, or a reasonable recovery to the client if, *e.g.,* the trier of fact attributes a high contributory fault percentage to the plaintiff or to tortfeasors that are immune from liability (such as the injured person's employer), or the defendants that are held liable have little insurance and few unprotected assets.

Identifying potential reimbursement claims can begin with asking the client to identify the sources of any medical treatment, wage replacement, and other services related to the injury or of payments for such services. The attorney can then ascertain whether the payor has a contractual or statutory claim against the client's damages recovery.

See generally Ehlers, *The Common Elements of Medical Reimbursement Liens*, 35 Forum 7, p 7 (Sept. 2005).

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§16.3 2. Attorney's Duties to Client and to Lien Claimant

The injured person's attorney should be alert to resist untenable or questionable reimbursement claims. Arguably, the attorney has a duty to maximize the client's actual recovery (not just the awarded damages) even if doing so may mean additional work to resist the questionable claim and a danger of alienating the claimant, thus impairing cooperation on future cases.

The attorney may also have a duty—not based on an attorney-client relationship but on statute or even general negligence principles—to notify legitimate reimbursement claimants of impending or agreed-on settlements or judgments. An attorney who knows or should know of a legitimate reimbursement claim can be held personally liable for acts or omissions that defeat or diminish the claimant's recovery. See *Bonta v Friedman* (2001) 91 CA4th 819, 111 CR2d 194 (state entitled to amend complaint to seek reimbursement from attorney who distributed medical malpractice settlement recovery; case noted in §16.10); *Kaiser Found. Health Plan, Inc. v Aguiluz* (1996) 47 CA4th 302, 54 CR2d 665 (attorney with notice of client's obligation to reimburse health care provider from proceeds of settlement or judgment is liable for disbursing such proceeds in knowing disregard of provider's claim), disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 775 n6, 98 CR2d 1; *Miller v Rau* (1963) 216 CA2d 68, 76, 30 CR 612 (attorney distributes contested funds to client at own risk). See also *Board of Admin. v Glover* (1983) 34 C3d 906, 917, 196 CR 330 (attorney's failure to give workers' compensation reimbursement claimant statutorily required notice). See generally California Workers' Damages Practice §7.59 (2d ed Cal CEB 2001).

NOTE: Attorneys often hold settlement money in a trust account until determination of the legitimacy and amounts of reimbursement claims. Defense attorneys can be expected to insert in the release from liability a clause requiring the plaintiff to hold the defendant harmless against all related reimbursement claims and liens. In addition, attorneys are faced with the question of whether portions of recoveries must be "set aside" in trust accounts to satisfy reimbursement claims for services provided in the future under federal health care statutes. Judge Richard L. Gilbert's discussion of the question, *Medicare "Set-Aside" Requirements in Third Party Liability Cases,* is available at www.rgilbertadr.com.

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§16.4 3. Compromising the Claim

At the early stages of litigation, it may become apparent to the plaintiff's attorney that the dollars actually recoverable from tortfeasors will be inadequate both to pay the full amount of legitimate reimbursement claims and to give a reasonable recovery to the plaintiff (and hence to the plaintiff's attorney). The attorney may seek the agreement of the claimants to "compromise," *i.e.,* to accept less than the full amount of their claims.

The claimant's agreement to compromise its claim is sometimes more easily obtained before a settlement has been agreed on or a judgment rendered, *i.e.,* when there is doubt whether an insured or solvent defendant will be held liable, and thus whether the claimant will recover anything.

TACTICS: The plaintiff's attorney seeking the claimant's agreement to reduce its claim might point out that, absent such a compromise, the plaintiff will simply dismiss his or her suit (perhaps in return for a waiver of costs) as not worth pursuing, leaving the reimbursement claimant with no recovery or with the less desirable option of proceeding itself against the alleged tortfeasors without much voluntary help from the plaintiff. The plaintiff's attorney might also note that a court contemplating a recovery too small to both fully reimburse the claimant and adequately compensate the injured person may apply concepts of fairness and equity as reasons to reduce the claimant's recovery. See *Sapiano v Williamsburg Nat'l Ins. Co.* (1994) 28 CA4th 533, 536, 33 CR2d 659.

A provider disinclined to reduce its claim for practical or equitable reasons might nevertheless be persuaded to reduce the claim by the amount of a reasonable fee for the plaintiff's attorney's efforts in effecting the recovery on which the reimbursement claim is to be imposed. See §16.5.

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Source: Torts/California Tort Damages/16 Reimbursement Claims and Liens/§16.5 4. Attorney Fees

§16.5 4. Attorney Fees

The written contingency fee agreement presented by the attorney to the client can (and should) indicate whether the fee is to be a percentage of (1) all monies recovered from the defendants, or (2) the remainder after established reimbursement claims have been paid. See Bus & P C §6147(a)(2) (agreement to contain "statement as to how disbursements … incurred in connection with the … settlement of the claim will affect the contingency fee and the client's recovery").

Some attorneys' agreements specify that the fee will be based on the total recovery from alleged tortfeasors without regard to the payment of legitimate reimbursement claims.

EXAMPLE: The agreement provides for a fee of 40 percent of amounts paid to satisfy the plaintiff's claim. A medical care provider asserts a reimbursement claim for $30,000. The settlement is for $100,000 and specifies that the plaintiff will hold the defendant harmless against reimbursement claims and liens. From the $100,000 settlement proceeds, the attorney pays $30,000 to the provider, retains $40,000 as his or her fee, and pays the $30,000 balance to the client.

No statute or rule appears to forbid an agreement under which the attorney's fee exceeds the client's net recovery, although an attorney should not enter into an agreement for an "unconscionable fee." See Cal Rules of Prof Cond 4-200.

Other attorney fee agreements specify that the attorney fee will be based on the remainder after payment of legitimate reimbursement claims.

EXAMPLE: The agreement provides that specified reimbursement claims will first be paid from any recovery and a fee of 40 percent will be deducted from the remainder. A medical care (or workers' compensation) provider asserts a reimbursement claim for $30,000. The settlement is for $100,000 and specifies that the plaintiff will hold the defendant harmless against reimbursement claims and liens. The attorney sets aside $30,000 to the provider, retains a fee of $28,000 (40 percent of $70,000), and pays the $42,000 balance to the injured person.

The attorney for an injured plaintiff is sometimes entitled to recover a fee from both the client and the reimbursement claimant. See *Lee v State Farm Mut. Auto. Ins. Co.* (1976) 57 CA3d 458, 129 CR 271 (reimbursed insurer required to pay pro rata share of plaintiff's attorney fee). The rationale in these cases is that because the attorney's efforts produced the fund from which the claimant is reimbursed, the attorney deserves a fee from the share payable to the claimant. See, however, *Lovett v Carrasco* (1998) 63 CA4th 48, 56, 73 CR2d 496 (court may not reduce amount of lien by apportioning attorney fees under common fund doctrine; doctrine does not apply to personal injury medical lienholders because plaintiff and lienholders have debtor-creditor relationship, not common interest in settlement proceeds). See generally §§1.99-1.101.

The reimbursement claimant, to save the expense of having its own counsel participate in the lawsuit against alleged tortfeasors, may agree in advance to the reduction of its ultimate reimbursement recovery as a fee for the plaintiff's attorney. This amount may be based on the same percentage as that specified in the plaintiff's agreement with the attorney, although it need not be.

EXAMPLE: The attorney-plaintiff agreement provides that specified reimbursement claims will first be paid from any recovery and a fee of 40 percent will be deducted from the remainder. A medical care (or workers' compensation) provider asserts a reimbursement claim for $30,000. The attorney, with the client's consent, agrees with the provider that its reimbursement recovery will be reduced by 40 percent for the attorney's efforts in effecting recovery for the provider's contingency fee. The settlement is for $100,000 and specifies that the plaintiff will hold the defendant harmless against reimbursement claims and liens. The attorney pays $18,000 to the provider, retaining $12,000 (40 percent of $30,000) as a fee, retains a fee of $28,000 (40 percent of $70,000) from the remainder, and pays the $42,000 balance to the injured person.

Any statute that is the basis for a reimbursement claim may specify whether the claimant's recovery may be reduced

by a fee for the injured person's attorney and how the amount is to be determined. See *e.g.,* §16.10. The recovery of attorney fees in connection with an employer's or insurer's reimbursement for workers' compensation furnished to an injured person, for example, is governed by statutes that have been the subject of extensive judicial interpretation. See California Workers' Damages Practice §§3.16-3.18, 7.22-7.25 (2d ed Cal CEB 2001). Thus, when reimbursement is sought for an employer's workers' compensation payments, the "active participation" of the reimbursement claimant's attorney in pursuing the case against the alleged tortfeasors may preclude any reduction of the claimant's recovery to compensate the injured person's attorney.

NOTE: The availability of a fee based on recovery for a reimbursement claimant should not diminish the attorney's care to resist an unsupportable reimbursement claim. Other attorney fee questions, including recovery of a fee under the "private attorney general" theory, are covered in California Attorney Fee Awards (2d ed Cal CEB 1994).

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II. CLAIMS BASED ON CONTRACT PROVISIONS

A. By Plaintiff's Automobile Insurer

§16.6 1. Medical Payments

Automobile insurance policies frequently contain provisions permitting the insurer that paid for a policyholder's medical treatment (under "medical pay" coverage) to be subrogated to the policyholder's rights against a third party tortfeasor. Such provisions are generally enforceable. See *Lee v State Farm Mut. Auto. Ins. Co.* (1976) 57 CA3d 458, 129 CR 271 (reimbursed insurer required to pay pro rata share of plaintiff's attorney's fee); *West v State Farm Mut. Auto. Ins. Co.* (1973) 30 CA3d 562, 106 CR 486 (subrogation clause in automobile insurance policy was valid). Further, a passenger in an insured automobile who receives payments for medical treatment is subject, as a third party beneficiary of the insurance contract, to the insurer's claims for reimbursement from the passenger's damages recovery from another driver who was legally responsible for the passenger's injury. *Mercury Cas. Co. v Maloney* (2003) 113 CA4th 799, 802, 6 CR3d 647.

NOTE: Other insurance policies that may contain contractual reimbursement provisions include those for homeowners, disability, dismemberment, life, and health and accident. Not all insurers pursue the reimbursement rights granted them by their policies. Nevertheless, negative consequences may flow from ignoring policy provisions that require the policyholder to notify the insurer of claims and lawsuits against third parties. For discussion of whether the method by which an insurer seeks reimbursement from a policyholder for medical payments may constitute an unfair business practice, see *Progressive W. Ins. Co. v Superior Court (Preciado)* (2005) 135 CA4th 263, 37 CR3d 434.

Under the made-whole and common-fund rules, the insurer's reimbursement is reduced by the prorata share of attorney fees that the insured spent in obtaining a recovery from a third-party tortfeasor. *21st Century Ins. Co. v Superior Court (Quintana)* (2009) 47 C4th 511, 98 CR3d 516 (insurer's $1000 reimbursement reduced by $400 prorata share of attorney fees).

The plaintiff's attorney, having no contractual relationship with the plaintiff's insurer, is not obligated to distribute a part of the client's damages recovery to the insurer that made medical payments; the insured, not his or her attorney, is bound by the reimbursement provisions of the policy. *Farmers Ins. Exch. v Smith* (1999) 71 CA4th 660, 664, 83 CR2d 911 (insurer cannot "press-gang" insured's personal injury attorney into service as collection agent); *Farmers Ins. Exch. v Zerin* (1997) 53 CA4th 445, 61 CR2d 707. See, however, §16.3.

See Anno, 19 ALR3d 1054 (1968) (automobile insurer's subrogation rights under medical payment provisions).

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§16.7 2. Property Damage Payments

Automobile insurance policies that require the insurer to pay the insured for damage to the insured's vehicle may require that the insurer be reimbursed for such payments from any recovery the insured receives for damage to the vehicle. Such provisions are generally enforceable. The insurer cannot enforce its subrogation right to obtain reimbursement, however, until the insured has been compensated for the full market value of a destroyed vehicle. See *Sapiano v Williamsburg Nat'l Ins. Co.* (1994) 28 CA4th 533, 33 CR2d 659 (general rule: insurer entitled to subrogation only after insured's debt fully discharged).

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§16.8 B. By Treating Doctor or Hospital

Medical professionals and entities often obtain, perhaps as a condition of providing services, the patient's agreement that the doctor or entity may enforce a lien on any money recovered by the patient from anyone held legally liable for causing the treated injury. See *Sperber v Robinson* (1994) 26 CA4th 736, 31 CR2d 659 (nonenforceability of lien form signed by patient's attorney, not by patient; doctor's pursuit of equitable lien against patient's subsequent attorney); *Wujcik v Wujcik* (1994) 21 CA4th 1790, 27 CR2d 102 (doctors' and attorney's liens to be paid from arbitration award in order of their creation, and thus take precedence over later-created judgment lien).

TACTICS: Attorneys should advise their clients not to sign such forms, but to bring them to counsel for review. The attorney should look for unduly onerous provisions such as those relating to the payment of interest or to the reimbursement of the provider before proceeds are otherwise distributed.

Even absent such a reimbursement agreement, a physician may attempt to condition cooperation with the patient's attorney, even the uncompelled furnishing of the patient's medical records, on the patient's and the attorney's agreements that money recovered from alleged tortfeasors will be used first to pay the doctor's charges. The doctor can be compelled by subpoena, however, to furnish the patient's medical records. See *Person v Farmers Ins. Group* (1997) 52 CA4th 813, 61 CR2d 30 (medical treatment provider cannot condition release of patient's records on being given lien against patient's potential damages recovery). See also Evid C §1158 (provider's obligation to furnish records before suit filed when given patient's written authorization).

TACTICS: Agreeing to reimburse a provider can often, however, (1) avoid the inconvenience of pursuing procedures to enforce discovery, (2) help to ensure that the plaintiff will receive optimal medical treatment, and (3) otherwise increase the prospects of full cooperation from the provider.

Some doctors have voluntarily foregone the recovery of the full fee charged if persuaded that the injured person has —perhaps because of the perceived uncertainty of imposing liability on a solvent defendant—considered it prudent to settle the lawsuit for considerably less than was warranted by the harm and loss suffered.

A trial judge's conclusion that a provider has "run up" medical costs by overtreating is not, by itself, and absent a contrary statutory provision, an adequate basis for the judge to order reduction of a private medical lien. See *Lovett v Carrasco* (1998) 63 CA4th 48, 57, 73 CR2d 496 (also discussed in §16.5). See also *Nager v Allstate Ins. Co.* (2000) 83 CA4th 284, 99 CR2d 348 (automobile insurer does not necessarily act in bad faith by declining to pay, under medical payment coverage, portions of provider's charges that are not both reasonable and necessary).

NOTE: Similar to a medical provider's lien is a lien asserted by a person in the business of "factoring medical accounts" who obtains an injured person's agreement to a lien on his or her recovery for medical bills that the factor obtains from medical providers in return for discounted payments. See *Gilman v Dalby* (2009) 176 CA4th 606, 98 CR3d 231 (factor's lien was subordinate to attorneys' asserted lien for litigation costs if evidence established latter's existence and validity).

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§16.9 C. By Health Care Plan

Damages recovered by a plaintiff whose treatment was furnished under his or her employer's group health plan may be subject to the plan's reimbursement claim or lien. See *Samura v Kaiser Found. Health Plan, Inc.* (1993) 17 CA4th 1284, 1296, 22 CR2d 20 (Kaiser reimbursement provision generally valid, but enforceability limited if contract is unconscionable); *Block v California Physicians' Serv.* (1966) 244 CA2d 266, 53 CR 51 (Blue Shield claim was valid). See *Providence Health Plan v McDowell* (9th Cir 2004) 361 F3d 1243 (health plan's contractual reimbursement claim not preempted by Employee Retirement Income Security Act (ERISA) (29 USC §§1001-1461)). See also *Carpenters Health & Welfare Trust v Vonderharr* (9th Cir 2004) 385 F3d 1168 (ERISA preemption of claim for reimbursement of medical benefits from personal injury recovery). The right of a provider to obtain reimbursement for the cost of medical care furnished under an ERISA plan was upheld in *Sereboff v Mid Atl. Med. Servs.* (2006) 547 US 356, 164 L Ed 2d 612, 126 S Ct 1869 (plaintiff's $750,000 settlement in California vehicle accident suit subject to provider's almost $75,000 claim).

The right to reimbursement may depend, however, on the injured person having been made aware, before the treatment was provided, of a clearly stated reimbursement provision to which the person actually or constructively agreed. See discussion in *Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 11, 84 CR 173.

TACTICS: The plaintiff's attorney should ask to see the documents on which a provider's reimbursement claim is based. It may be that the terms of any agreement, or that any notice of them, were ambiguous or indirect. The attorney could argue that the agreement was one of adhesion to be strictly construed against the insurer and that the plaintiff and his employer had, after all, already paid for the services for which the insurer now wants to be reimbursed.

Medical care providers can provide the plaintiff's attorney with an itemized list of the services provided with a specification of the "reasonable charge" for each such service. The health care plan or insurer, however, may have actually paid the doctors and hospitals that performed examinations, tests, and treatments less than the indicated charges. Presumably, an insurer should be reimbursed no more than the actual amount of its expenditures.

Restrictions on the reimbursement recoveries of providers of services under specified health care plans are detailed in CC §3040.

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III. CLAIMS BASED ON STATE STATUTES

§16.10 A. Medi-Cal

When an injured person has received medical and hospital services provided or paid for under the California Medical Assistance Act (Medi-Cal) (Welf & I C §§14000-14668), the state has a statutory right to be reimbursed from any money received for the injury from alleged tortfeasors. Welf & I C §§14124.70-14124.89. See *Kizer v Hirata* (1993) 20 CA4th 841, 844, 25 CR2d 19 (Medi-Cal lien may be asserted against settlement proceeds; no need for finding or admission of alleged tortfeasor's fault).

The state's reimbursement right may be asserted against a variety of personal injury recoveries. See *Bonta v Friedman* (2001) 91 CA4th 819, 111 CR2d 194 (state entitled to seek reimbursement from attorney who distributed medical malpractice settlement recovery relating to treatment of birth defects; no defense to reimbursement claim that treatment was for condition, birth defects, not injury). See also *Kizer v Hanna* (1989) 48 C3d 1, 255 CR 412 (DHS recovery from beneficiary's estate); *Kain v California Dep't of Health Servs.* (2001) 91 CA4th 325, 109 CR2d 891 (DHS entitled to reimbursement from award under National Vaccine Injury Compensation Program; 42 USC §§300aa-1—300aa-23); *California State Auto. Ass'n Inter-Ins. Bureau v Jackson* (1973) 9 C3d 859, 109 CR 297 (reimbursement from uninsured motorist recovery); *Riddell v State* (1996) 50 CA4th 1607, 58 CR2d 555 (DHS lien against proceeds of settlement paid by tortfeasor, another state agency).

A Medi-Cal lien does not, however, apply to a wrongful death recovery, inasmuch as no part of that recovery can have compensated for medical services provided the decedent. *Fitch v Select Prods. Co.* (2005) 36 C4th 812, 31 CR3d 591.

The state commonly asserts this reimbursement right by filing a notice of claim or notice of lien in a pending lawsuit, although the Medi-Cal reimbursement statute also empowers the state to intervene in a lawsuit or to file an independent suit against the alleged tortfeasor, and the absence of a lawsuit does not insulate the tortfeasor or the injured person from the state's claim. See *Kizer v Ortiz* (1990) 219 CA3d 1055, 268 CR 666 (3-year limitations period on state filing suit begins to run on receipt of notice that injured person has received settlement or judgment).

The state's right to be reimbursed attaches to "that portion of the settlement, judgment, or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary." Welf & I C §14124.76(a). On determining what portion of a settlement represents medical expense, see *Bolanos v Superior Court (Department of Health Servs.)* (2008) 169 CA4th 744, 87 CR3d 174. See also *Lima v Vouis* (2009) 174 CA4th 242, 94 CR3d 183 (Medicaid lien extinguishable to extent it exceeds amount of settlement trial judge determines is allocable to past medical expense).

Federal law preempts Welf & I C §§14124.74, 14124.791 so that the lien recovery cannot exceed the cost-sharing charges otherwise allowed under state law. *Olszewski v Scripps Health* (2003) 30 C4th 798, 135 CR2d 1 (further, litigation privilege precludes patient from pursuing action against provider for violation of Unfair Competition Law (Bus & P C §§17200-17210)). See *Espericueta v Shewry* (2008) 164 CA4th 615, 79 CR3d 517 (approval of minor's compromise had determined amount of settlement subject to DHS lien, so claim did not violate federal law restrictions).

The plaintiff's attorney can ask the doctor or hospital that actually provided medical services to the injured person for an itemized list of such services, with specifications of the providers' customary charges for them, to use as evidence of the reasonable value of the medical care required by the plaintiff. The amounts paid by the state, under its contract with the provider, may be less than their reasonable value, and the state's reimbursement recovery should be restricted to the amount it paid. See *Palumbo v Myers* (1983) 149 CA3d 1020, 197 CR 214 (provider who accepted Medi-Cal payment for services provided cannot assert claim against personal injury recovery for difference between payment and provider's "usual and customary fee" for such services). See §§1.20, 16.15.

In medical malpractice cases, the state is not precluded by CC §3333.1 (see §15.49) from asserting its right to Medi-Cal reimbursement.

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§16.11 1. Duty to Notify DHS

The attorney (or personal representative) for an injured person who received Medi-Cal-provided services must notify the director of the California Department of Health Services (DHS), as well as "insurance carriers … having liability for the beneficiary's claim," within 30 days of filing a lawsuit (Welf & I C §14124.73) and before distributing any payment received as a settlement or award or in satisfaction of a judgment, giving the director a reasonable opportunity to perfect and satisfy a lien. Welf & I C §§14124.76, 14124.79.

NOTE: An attorney whose failure to give a required notice frustrates the director's reimbursement right could be held personally liable for the state's loss. See §16.3. The prudent attorney who is unsure whether all the client's treatment came from non-Medi-Cal sources would do well to ask the DHS if it has a record of having furnished medical benefits to the client. The attorney is not necessarily protected by the client's failure to tell the attorney that he or she received Medi-Cal treatment or a notice or warning from the DHS.

The attorney's notifications to the DHS need not be in a particular form, but should state:

- Injured person's name (or minor's parents' names) and Medi-Cal identification number;
- Date of injury;
- Names and addresses of known treatment providers and dates of their services;
- Lawsuit (or workers' compensation claim) number, court, parties, and attorneys (can be supplied by attaching copy of complaint or application); and
- Policy numbers of any private health coverage or health care plans.

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§16.12 2. Attorney Fees and Costs

The state's reimbursement for the reasonable value of benefits it provided is to be reduced by (1) 25 percent, as its "reasonable share" of attorney fees paid by the injured person, and (2) a proportional share of litigation costs. Welf & I C §14124.72(d). These provisions reduce the amount of the injured person's liability to the state and do not otherwise affect the amount of the fee to which the attorney is entitled from the client's recovery. See generally §16.5 on attorney fees. See also *Neil D. Reid, Inc. v State Dep't of Health Care Servs.* (1976) 55 CA3d 418, 127 CR 685 (attorney fee apportionment before adoption of 25-percent statute).

The attorney should furnish the state an itemized list of litigation costs that are to be shared. The amount of the reduction of the state's reimbursement recovery for costs is calculated by multiplying the costs by the ratio of the full amount of the reasonable value of benefits provided to the full amount of the damages recovery. Welf & I C §14124.72(d).

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§16.13 3. Compromising the Claim

Medi-Cal reimbursement is not to exceed one half of the amount payable to the injured person after deduction of attorney fees, litigation costs, and other medical expenses relating to the injury not covered by insurance for which the plaintiff is personally responsible. Welf & I C §14124.78. See *McMillian v Stroud* (2008) 166 CA4th 692, 83 CR3d 261 (person seeking reduction of lien has burden of showing that DHS's calculation exceeded legal limit). The DHS director has discretion to further reduce the state's reimbursement recovery as necessary to avoid undue hardship to the injured person. Welf & I C §§14124.71(b), 14124.72(b). The DHS, however, is not obligated to conduct a hearing to determine whether satisfying its lien would cause undue hardship. *Wright v Department of Benefit Payments* (1979) 90 CA3d 446, 153 CR 474. See *Brown v Stewart* (1982) 129 CA3d 331, 181 CR 112.

To obtain a discretionary reduction, the attorney should submit medical reports and other documents tending to establish undue hardship. Courts and administration tribunals lack authority to order such further reductions of Medi-Cal reimbursement. For more on compromising reimbursement claims, see §16.4.

The trial judge may, under Govt C §985(f), reduce the amount of a Medi-Cal lien, although such a reduction may not be made if the lien is on proceeds of a settlement paid by another department of state government. *Riddell v State* (1996) 50 CA4th 1607, 58 CR2d 555. Under Govt C §985(g), a court may deny a Medi-Cal lien if the injured person would otherwise suffer "undue financial hardship." *Garcia v County of Sacramento* (2002) 103 CA4th 67, 126 CR2d 465 (quadriplegic received judgment against county for "far less than future medical costs"; court, at county's request denied reimbursement of Medi-Cal lien; see §15.35).

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§16.14 B. County Services to Indigents and Children

A county that furnishes hospital, medical, surgical, or dental care to a tortiously injured person has (1) the right to sue the tortfeasor for the reasonable value of such services, and (2) a "first lien" on any judgment recovered by the injured person. Govt C §23004.1(b). The lien is not imposed on money received by settlement. *Newton v Clemons* (2003) 110 CA4th 1, 8, 1 CR3d 90 (inability to impose lien under Govt C §23004.1 no impediment to lien under other statute; see §16.15); *Mares v Baughman* (2001) 92 CA4th 672, 677, 112 CR2d 264 (statute says "judgment"; settlement not "functionally the equivalent" of judgment).

NOTE: Defense attorneys may wish to temper settlement offers to reflect the defendant's remaining direct liability to the county. Plaintiff's counsel may, in order to obtain a higher settlement, agree to conduct the defense against a potential county claim and hold part of the settlement in trust to pay the county's claim, knowing that not all counties pursue their reimbursement claims, often because the county lacks personnel to do so. Plaintiff's attorneys thus may agree to hold the defendant harmless against lien claims, but may decline to agree to a settlement that imposes a broad obligation to indemnify the defendant.

The county has discretion to reduce its reimbursement claim and may have a "recovery program." See Govt C §§23004.2, 23004.4. The county's lien on a judgment is not, however, automatically subject to reduction to pay a portion of the injured person's litigation expense or attorney fee. *City & County of San Francisco v Sweet* (1995) 12 C4th 105, 124, 48 CR2d 42 (common fund doctrine not applicable; injured person has debt to county; county entitled to recover full amount of value of services without reduction for attorney fees); *Lindsey v County of Los Angeles* (1980) 109 CA3d 933, 936, 167 CR 527 (patient liable to county as debtor). See *Tapia v Pohlmann* (1998) 68 CA4th 1126, 81 CR2d 1 (medical services furnished under county's Children's Medical Services Program (Health & S C §123982); county's claim not subject to reduction; claim analogous to Govt C §23004.1(b), not to Medi-Cal reimbursement under Welf & I C §14124.78).

TACTICS: Plaintiff's attorney should not forego trying to persuade a county to compromise its claim. Some counties readily agree to do so, although others do not. Some counties still have in place "pre-*Sweet*" recovery programs that allow reductions for litigation costs and attorney fees. In addition, the attorney may raise such factors as the plaintiff's disinclination to pursue the damages lawsuit further if reimbursing the county in full would effect too great a reduction in the plaintiff's recovery or would impose a hardship. See §16.13. Counsel can point out that, under the county's contract with the provider, the county has actually paid far less for the services than the value the provider ascribed to them in the particular case. See §§1.20, 16.10. The county might even be willing to "trade" a waiver of its reimbursement right for the plaintiff's agreement not to pursue a potential cause of action against the county.

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Source: Torts/California Tort Damages/16 Reimbursement Claims and Liens/§16.15 C. Hospital Lien Act

§16.15 C. Hospital Lien Act

The person or entity that maintains a hospital that furnishes emergency or ongoing medical or other services to a tortiously injured person may enforce a reimbursement lien against the injured person's damages recovery, to the extent of reasonable and necessary charges. See CC §3045.1. (Excluded from recovery under the Hospital Lien Act (HLA) (CC §§3045.1-3045.6) are claims based on injuries that arise out of and in the course of employment (covered by Lab C §§3201-6208) and claims and causes of action against a common carrier (CC §3045.6).) Asserting a reimbursement claim under CC §3045.1 does not violate California's Unfair Competition Law (Bus & P C §§17200-17210). *Swanson v St. Johns Reg'l Med. Ctr.* (2002) 97 CA4th 245, 118 CR2d 325, disapproved on other grounds in *Parnell v Adventist Health Sys./W.* (2005) 35 C4th 595, 609, 26 CR3d 569.

The hospital's lien does not have priority over other liens that were created before it was. *County of San Bernardino v Calderon* (2007) 148 CA4th 1103, 56 CR3d 333 (although hospital's services to accident victim began on July 14, his attorney's lien, created on July 18, had priority over hospital lien, notice of which was given to third party tortfeasor on November 13).

A hospital that has accepted payment from a patient or a health insurer as payment in full under its contracts with the insurer cannot assert a lien under the HLA on the patient's personal injury recovery for the difference between the payments it received and its usual, or reasonable and necessary, charges for the same services. *Parnell v Adventist Health Sys./W.* (2005) 35 C4th 595, 598, 26 CR3d 569 (contract between hospital and health plan provided for reduced payments by patient and scheduled payments by the plan; when those payments had been made, no further debt remained on which lien could be based).

NOTE: According to dictum in *Parnell*, hospitals remain free to include provisions in contracts with insurers that would entitle them to recover, and to impose an HLA lien for, the difference between a negotiated rate and the hospital's usual and customary charges for the services actually provided. See 35 C4th at 611 (including n15). See generally Derby, *Following the Ripple Effect of Parnell v. Adventist Health System/West*, 35 Forum 7, p 20 (Sept. 2005).

The hospital's lien may be imposed on damages recovered by settlement, compromise, or judgment. CC §3045.2. The hospital establishes its right to the lien by delivering or mailing a notice with specified contents to each alleged tortfeasor and tortfeasor's insurer before damages have been paid to the injured person (or to his or her attorney or representative). CC §3045.3 (mailing to be registered with return receipt requested).

NOTE: Hospitals frequently assign their reimbursement claims to health maintenance organizations, which then assign them to collection businesses. These businesses learn that lawsuits have been filed by the treated patients when attorneys obtain the patient's medical records or notify the Department of Health Services of the tort claim. Multiple liens enforceable under different state statutes are to be satisfied in the following order: Medi-Cal (Welf & Inst C §14124.74); county hospital (Govt C §23004.1); and emergency care (CC §3045.1). 63 Ops Cal Atty Gen 808 (1980).

An alleged tortfeasor or insurer that has received notice of the hospital's claim is liable to the hospital for as much of its lien as can be satisfied out of 50 percent of the money due to the injured person under a settlement, compromise, or final judgment. CC §3045.4. See *Mercy Hosp. & Med. Ctr. v Farmers Ins. Group* (1997) 15 C4th 213, 61 CR2d 638 (hospital with $49,198 claim entitled to 50 percent of insurer's $15,000 policy limit paid to injured person, not to $15,000; 50 percent cap not raised by fact that insurer paid plaintiff despite knowing of hospital's claim). The amount of the hospital's lien is limited; a patient's agreement to reimburse from the proceeds of any litigation may create a contractual right that the hospital could seek to enforce, but such an agreement does not entitle the hospital to a lien on the patient's recovery. *Newton v Clemons* (2003) 110 CA4th 1, 9, 1 CR3d 90 (also noted in §16.14).

The hospital has 1 year after a payment to the injured person to sue the person or entity that made the payment despite having been notified of the hospital's claim. CC §3045.5.

The fact that a hospital has filed a lien under CC §3045.1, requiring an injured person's attorney to, in effect, perform

legal services on behalf of the hospital, does not entitle the attorney, after the underlying lawsuit is lost, to recover a quantum meruit fee from the hospital. *Day v Alta Bates Med. Ctr.* (2002) 98 CA4th 243, 119 CR2d 606.

The HLA does not entitle a hospital (or its assignee) to a lien against money paid an injured person under the underinsured motorist provisions of the person's own automobile policy. *Weston Reid, LLC v American Ins. Group, Inc.* (2009) 174 CA4th 940, 94 CR3d 748 (HLA liens assertable only against recoveries from alleged tortfeasors).

See de Camara, *Preventing the Tortfeasor from Purchasing and Profiting from the Plaintiff's Hospital Lien*, 37 CAOC Forum 7, p 10 (Sept. 2007). See Anno, 16 ALR 5th 262 (1993) (construing statutes giving hospitals liens against recoveries from tortfeasors).

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IV. CLAIMS BASED ON FEDERAL STATUTES

§16.16 A. Medicare

When an injured person covered by a group health plan or insurance administered under the Medicare program receives medical care paid for by Medicare and recovers damages from an alleged tortfeasor, Medicare (through the secretary of the Health and Human Services (HHS) department) is entitled to reimbursement by the injured person (the beneficiary) for its outlays. 42 USC §1395y(b)(2)(B)(i-v). Medicare is entitled to full recovery of its payments even if the beneficiary has settled the tort claim for less than recoverable personal injury damages (*i.e.,* has entered into a discounted settlement). See *Zinman v Shalala* (9th Cir 1995) 67 F3d 841 (full recovery not precluded by fact that Medicare claim is based on right to be subrogated to beneficiary's right to damages; provision permitting apportionment of claim against discounted settlement of formulaic workers' compensation benefits does not require apportionment of claim against settlement for disputable personal injury damages). See also 42 CFR §411.24(c); *Zinman v Shalala* (ND Cal 1993) 835 F Supp 1163, 1166.

The Medicare recovery is reduced by its proportional share of the beneficiary's tort case litigation expense and attorney fee. See 42 CFR §411.37. See also 42 CFR §411.24 (Medicare recovery not to exceed amount of settlement or judgment reduced by costs and attorney fee). Further, the beneficiary may apply for a full or partial hardship waiver of the Medicare claim. See 42 USC §1395gg.

NOTE: As a reimbursement right created by federal statute, Medicare reimbursement is not limited by such state laws as CC §3333.1 (see §§15.48-15.49, 16.10). Bases for opposing Medicare reimbursement claims are noted in *California-Pacific Utils. Co. v U.S.* (1971) 194 Ct Cl 703.

In a case involving an insurer's reimbursement claim for medical care furnished under the Federal Employees Health Benefits Act of 1959 (5 USC §§8901-8914), the United States Supreme Court ruled that the state court in which an injured federal worker had initiated a tort lawsuit was the proper forum to determine the insurer's contract-derived claim. *Empire Healthchoice Assur., Inc. v McVeigh* (2006) 547 US 677, 165 L Ed 2d 131, 126 S Ct 2121. A state's reimbursement for medical care furnished under a Medicaid program is limited by the amount awarded in a personal injury case for medical expense even if the cost of the care furnished exceeded the amount of medical expense damages; the difference is not made up out of other forms of damages. *Arkansas Dep't of Health & Human Servs. v Ahlborn* (2006) 547 US 268, 164 L Ed 2d 459, 126 S Ct 1752.

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§16.17 B. Medical Care Recovery Act: Injured Service Personnel

Under the Medical Care Recovery Act (42 USC §§2651-2653), the United States is entitled to be reimbursed for medical services furnished to an injured member of the military from that person's personal injury damages recovery. The United States has the right to (1) sue the alleged tortfeasor directly, (2) intervene or join in the injured person's lawsuit, or (3) otherwise enforce its subrogation rights. 42 USC §2651(a).

The government customarily reduces its claim to provide for the injured person's litigation costs and attorney fee obligation and, in cases of undue hardship—*e.g.,* a low policy limits settlement for a serious injury—may waive its claim substantially or entirely. 42 USC §2652(b).

TACTICS: Defense attorneys sometimes object to the introduction of evidence of the government's medical expense absent a document showing that the plaintiff's attorney also represents the government on its reimbursement claim.

See Anno, 7 ALR Fed 289 (1969) (liability under Medical Care Recovery Act).

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Appendix

Damages Checklists

Damages Checklist: Bodily Injury (Chapter 1)

Medical Expense (§§1.20-1.40)

- Physicians, surgeons, other practitioners (§1.23)
- Hospitals, clinics, other care facilities (§1.24)
- Nurses, attendants (§1.25)
- Physical and occupational therapists (§1.26)
- Psychotherapists (§1.27)
- Rehabilitation and retraining counselors (§1.28)
- X-rays; laboratory and diagnostic tests and procedures (§1.29)
- Drugs, medications (§1.30)
- Prostheses, other aids to function (§1.31)
- Modification of vehicles and dwellings (§1.32)
- Travel expense (§1.33)

Impaired Earning Capacity (§§1.41-1.65)

- Value of time lost from employment (§§1.45-1.46, 1.53-1.54, 1.56-1.58)
- Lost wages, tips, overtime pay (§§1.45-1.48)
- Lost benefits (§§1.49-1.50)
- Lost or delayed promotions and opportunities (§1.51)

Services (§§1.66-1.69)

- Family's loss of injured person's services (§§1.66-1.68)
- Need for personal care (§1.69)

Pain, Suffering, and Emotional Distress (§§1.70-1.81)

Other Elements (§§1.82-1.106)

- Alternative general damages (§§1.82-1.91)
- Impaired enjoyment of life (§1.86)
- Punitive damages (§1.92)
- Interest (§§1.94-1.98)
- Attorney fees (§§1.99-1.106)

Damages Checklist: Loss of Consortium (Chapter 2)

Recoverable (§2.6)

- Loss of love, companionship, affection, society, solace, and comfort
- Diminished sexual relations
- Diminished conjugal fellowship
- Interruption of future plans and planning

- Loss of moral support
- Diminished physical assistance in cooking, maintaining the home
- Need to provide additional care to injured person

Not Recoverable (§2.7)

- Damages claimed by injured person (including for inability to provide financial support and services to family)
- Reasonable value of necessary nursing and attendant services provided to injured person (if claimed separately)
- Grief, distress, humiliation, embarrassment over injured person's scars or disability

Damages Checklist: Wrongful Death (Chapter 3)

Recoverable (§§3.21-3.37)

- Financial support, contributions (§§3.21-3.25)
- Services (§§3.26-3.28)
- Society, comfort, care, protection, companionship, consortium (§§3.29-3.33)
- Training, advice (§3.34)
- Funeral and burial expense (§3.35)
- Prospective gifts (§3.36)

Not Recoverable. (§§3.38-3.42)

- Detriment suffered by decedent (§3.38)
- Decedent's medical expenses (§3.39)
- Survivor's grief, sorrow, anguish, mental suffering (§3.40)
- Decedent's prospective savings (§3.41)
- Expectancy of inheritance (§3.41)
- Punitive damages (§3.42)

Damages Checklist: Survival of Actions (Chapter 4)

Recoverable

- Loss and harm between date of injury and date of death (§§4.1-4.3)
- Medical expense (§4.11)
- Lost earnings (§4.12)
- Family's loss of decedent's services (§4.13)
- Personal care of decedent (§4.14)
- Punitive damages (§4.10)

Not Recoverable

- Pain, suffering, disfigurement, emotional distress (§4.15)
- Prospective profits and postdeath earnings (§4.16)
- Alternative general damages (*e.g.,* damages for disability, impaired enjoyment of life, susceptibility to future injury, shortened life expectancy) (§4.16)

Damages Checklist: Wrongful Life and Birth (Chapter 5)

Impaired Child (§§5.1-5.12)

- Extraordinary expenses (§§5.4, 5.11)

- Medical treatment throughout expected life
- Custodial and nursing care
- Prostheses and equipment
- Special education, training, and therapy
- Modification of dwelling and vehicles
- Services provided by parents and other family members
- Impaired earning capacity (§5.5)
- Pain, suffering, emotional distress (§5.6)
- Shortened life expectancy (§5.7)
- Punitive damages (§5.8)

Parents of Impaired Child

- Items listed above, if not recovered by child
- Emotional distress from having, and having to care for, an impaired child (§5.12)

Parents of Unwanted Child (§§5.13-5.16)

- Cost of negligently performed genetic counseling, sterilization, or abortion
- Bodily injury to mother from pregnancy and delivery, including cost of prenatal and delivery care
- Loss of income
- Pain, suffering, emotional distress
- Cost of raising child to majority (less child's expected earnings)
- Emotional distress from interference with parents' planned life (offset by joys and benefits provided by child)
- Loss of mother's services to family
- Father's loss of consortium

Damages Checklist: Emotional Distress (Chapter 6)

Liability Situations

- Physical impact (§6.3)
- Physical Injury or disorder (§6.4)
- Fear for own safety (§6.5)
- Fear of future illness (§6.6)
- Nuisance (§6.7)
- Perception of injury to loved one (§§6.8-6.15)
- Intentional infliction of emotional distress (§§6.16-6.23)
- Negligent infliction of emotional distress (§§6.24-6.39)

Damages (§§6.40-6.43)

- Serious or severe distress
- Fright, apprehension, fear, terror
- Anxiety, worry, ordeal
- Humiliation, embarrassment, indignity, mortification
- Horror, grief (but not grief, sorrow, or anger over fact that a loved one was injured or killed)
- Physical manifestations and consequences (*e.g.,* insomnia, nervousness, malaise); medical, psychiatric,

and related expenses
- Impaired earning capacity
- Loss of services
- Punitive (§6.43)

Damages Checklist: Assault and Battery (Chapter 7)

- Emotional distress (§§7.10, 7.15-7.18)
- Apprehension, fear, fright
- Anxiety, worry
- Shock
- Humiliation, embarrassment, indignity
- Physical consequences
- Medical, psychiatric, and related expenses (§7.12)
- Lost earnings, impaired earning capacity (§7.13)
- Services: loss and expense (§7.10)
- Pain and suffering (§7.10)
- Punitive damages (§7.19)

Damages Checklist: Defamation (Chapter 8)

Recoverable (§§8.8-8.17)

- Nominal damages (token judgment, no compensable loss) (§8.10)
- Presumed general damages (if defamatory words are actionable per se) (§8.8)
- Special damages (§8.9)
- Detriment to property, business, trade, profession, occupation
- Money expended as a result of libel
- General damages (§8.8)
- Injury to reputation
- Emotional distress (shame, mortification, hurt feelings)
- Punitive damages (§§8.11-8.12)
- Other relief
- Injunctive (§8.15)
- Declaratory (§8.16)
- Removal from office (§8.17)

Not Recoverable

- Prospective loss of employment or of reputation (§8.9)
- Others' emotional distress (§8.8)
- Loss of an election (§8.17)

Damages Checklist: Invasion of Privacy (Chapter 9)

- Mental suffering and emotional distress (§9.17)
- Embarrassment, humiliation, shame
- Anxiety

- Anguish, feelings of powerlessness
- Depression
- Physical consequences
- Injured reputation (§9.18)
- Medical and psychiatric expense (§9.19)
- Loss of earnings, employment, business opportunities
- Loss of income or profit
- Other identifiable losses
- Statutory damages (§9.20)
- For wiretapping, electronic eavesdropping
- For misappropriation of name, likeness
- Attorney fees and costs
- Punitive damages (§9.21)
- Injunctive relief (§§9.22-9.23)

Damages Checklist: Malicious Prosecution (Chapter 10)

Recoverable (§§10.27-10.38)

- Expense of defending earlier action or proceeding
- Attorney fees (§§10.28-10.29)
- Litigation costs (§10.30)
- Injury to social standing (§10.32)
- Injury to credit rating or worthiness (§10.32)
- Loss of earnings, impairment of earning capacity (§10.33)
- Other economic detriment (§10.33)
- Mental suffering and emotional distress (§10.34)
- Physical consequences
- Medical and related expense
- Injury to reputation (§10.35)
- Detriment from arrest and imprisonment (§10.36)
- Loss of time, deprivation of liberty
- Injury to fame, reputation, character
- Fear of confinement
- Bodily injury
- Pain and suffering
- Other loss and harm (see above)
- Punitive damages (§10.37)

Not Recoverable

- Attorney fees in prosecuting malicious prosecution lawsuit (§10.31)

Damages Checklist: Abuse of Process (Chapter 11)

Recoverable

- Compensatory (§11.9)
- Mental suffering, emotional distress
- Loss of earnings
- Loss of profits
- Loss of use and enjoyment of seized property
- Injury to business
- Injury to reputation
- Other pecuniary loss
- Punitive damages (§§11.10-11.11)
- Injunction (§11.12)

Damages Checklist: False Arrest and False Imprisonment (Chapter 12)

Recoverable (§§12.17-12.24)

- Mental suffering and emotional distress (§12.19)
- Humiliation from publicity
- Shock and fear from removal from familiar surroundings
- Indignity from arrest, booking, fingerprinting, search (especially strip and body cavity)
- Physical consequences (*e.g.,* increased pulse or blood pressure)
- Loss of liberty (§12.18)
- Bodily injury (§12.20)
- Loss of income (§12.21)
- Attorney fees and costs (§12.22)
- Other loss and harm (§12.17)
- Punitive damages (§12.23)

Damages Checklist: Vehicles and Other Personal Property (Chapter 13)

Vehicle

- Diminution in value (§§13.7-13.12)
- If destroyed or if cost of repair would exceed value (§§13.7-13.8)
- Market value or special value to owner
- If value restorable by repair (§§13.9-13.11)
- Lesser of reasonable cost of repair or diminution in market value (§13.10)
- If value not restorable by repair
- Reasonable cost of repair plus diminution in value (§13.12)
- Loss of use (§13.13)
- Loss of profit on prospective sale (§13.14)
- Loss of business income (§13.15)
- Other out-of-pocket expense (e.g., towing) (§13.16)
- Emotional distress (§13.17)
- Punitive damages (§13.18)

Jewelry, Apparel, Paintings, Books, Electronic Equipment (§§13.19-13.24)

- Diminution in value (see above)
- Loss of use
- Other pecuniary loss (see above)
- Emotional distress

Damages Checklist: Punitive Damages (Chapter 14)

Standard of Proof (§§14.2-14.12)

- Clear and convincing evidence (§14.5)

Punishable Conduct

- Malice (§14.6)
- Conduct intended to cause injury
- Despicable conduct carried on with willful and conscious disregard of others' rights or safety
- Oppression (§14.7)
- Despicable conduct that subjects a person to cruel or unjust hardship in conscious disregard of person's rights
- Fraud (§14.8)
- Intentional misrepresentation, deceit, or concealment of material fact known to defendant with intention of causing injury

Factors in Determining Amount

- Need to split Aug. 16, 2004-July 1, 2006 recoveries with state (§14.1)
- Reprehensibility of defendant's conduct (§14.10)
- Defendant's financial condition (§§14.10, 14.38)
- Extent of plaintiff's injury, harm, or loss (§14.10)
- Reasonable relation to plaintiff's harm or loss (§14.11)
- Statutory penalties for similar conduct (§14.11)
- Actual injury; amount of compensatory damages (§14.11)
- Constitutionally permissible ratio (§14.11A)

Checklist : Restrictions on Recovery (Chapter 15)

- Fault of person recovering
- Negligence (§§15.2-15.4)
- Strict product liability (§15.5)
- Willful misconduct (§15.6)
- Intentional misconduct (§15.7)
- Fault of decedent (in wrongful death case) (§15.3)
- Several (not joint) liability for noneconomic damages (§§15.8-15.18)
- Payments by defendant (§15.19)
- Payments (settlement) by other tortfeasors (§15.21)
- Other payments
- Workers' compensation (whether or not recoverable by employer)
- Uninsured motorist (§15.20)
- Damages avoidable by mitigation (§§15.23-15.24)

- Discounting of future damages to present value (§1.108)
- Other
- Uninsured or intoxicated driver (§§15.26-15.32)
- Public entity defendant (§§15.33-15.35)
- Parent (§§15.36-15.39)
- Fleeing felon (§15.25)
- Federal law violation (§15.40)
- Health care provider defendant (MICRA) (§§15.41-15.58)
- Noneconomic damages ceiling
- Collateral source payment (§§15.48-15.49)
- Periodic payment of future damages (§§15.50-15.52)
- Punitive damages (§§15.53-15.55)
- Plaintiffs' attorney fees (§§15.56-15.57)
- Expert witness fees (§15.58)

Checklist : Reimbursement Claims and Liens (Chapter 16)

- Automobile insurer
- Medical payments (§16.6)
- Property damage payments (§16.7)
- Treating doctor or hospital (§16.8)
- Health care plan (§16.9)
- Medi-Cal (§§16.10-16.13)
- County services to indigents and children (§16.14)
- Hospital Lien Act (§16.15)
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- Medical Care Recovery Act (service personnel) (§16.17)

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